The Supreme Court of South Carolina

In the Matter of Julia Ann Gold, Respondent.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 16, 1983, Julia Ann Gold was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated March 11, 2004, Ms. Gold submitted her resignation from the South Carolina Bar. We accept Ms. Gold's resignation.

Ms. Gold shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, she shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Ms. Gold shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Julia Ann Gold shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

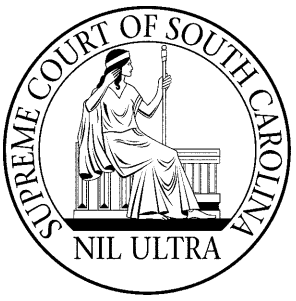
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 21, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

April 26, 2004

ADVANCE SHEET NO. 16

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2004-UP-266-The State v. Herbert T. Frazier
(Clarendon, Judge Thomas W. Cooper, Jr.)

2004-UP-267-The State v. Edward N. Dawson
(Charleston, Judge A. Victor Rawl)

2004-UP-268-The State v. Dominique Gallman
(Chester, Judge Paul E. Short, Jr.)

2004-UP-269-Charles Ellis Cutshaw v. Joyce Sinclair Cutshaw
(Chester, Judge Brooks P. Goldsmith)

2004-UP-270-Alan D. Anderson et al. v. Hank and Linda Buonforte
(Sumter, Special Referee W. C. Coffey, Jr.)

2004-UP-271-Hilton Head Resort Four Seasons Centre Horizontal Property Regime Council of Co-Owners, Inc. v. Martin Bergman and Hilton Head Realty Group
(Beaufort, Judge Daniel E. Martin, Sr.)

2004-UP-272-The State v. Deryl Norton
(Horry, Judge Steven H. John)

2004-UP-273-The State v. Julius Munn
(Charleston, Judge A. Victor Rawl)

2004-UP-274-Robert Hoisington v. Douglas W. MacNeille, Keri A. Jordan, Ruth & MacNeille, P.A., William A. Ruth, and Michael G.Olivetti
(Beaufort, Judge L. Henry McKellar)

2004-UP-275-The State v. Kent McDowell
(Spartanburg, Judge Edward W. Miller)

2004-UP-276-Josephine Washington and Annie Brown v. Kimberly Eve Miller
(Charleston, Judge A. Victor Rawl)

2004-UP-277-Edward D. Sloan, Jr., individually, and as a citizen, resident, taxpayer and registered elector of Greenville County v. Greenville County, a political subdivision of the State of South Carolina et al.
(Greenville, Judge John C. Few)

PETITIONS FOR REHEARING

3714-State v. Burgess	Denied 4/22/04
3741-Ellie, Inc. v. Miccichi	Denied 4/22/04
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Denied 4/22/04
3747-RIM Associates v. Blackwell	Pending
3748-Ellis v. Davidson	Pending
3749-Goldston v. State Farm	Denied 4/22/04
3750-Martin v. Companion Health	Denied 4/22/04
3751-State v. Barnett	Denied 4/22/04
3753-Deloitte & Touche, LLP v. Unisys Corp.	Denied 4/22/04
3755-Hatfield v. Van Epps	Denied 4/22/04
3757-All Saints v. Protestant Episcopal Church	Denied 4/23/04
3758-Walsh v. Woods	Denied 4/22/04
3759-QZO, Inc. v. Moyer	Denied 4/22/04
3762-Jeter v. SCDOT	Pending
3763-Fuller v. Blanchard	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Denied 4/22/04
3766-Craig v. Craig	Pending
3767-Hunt v. S.C. Forestry Comm'n	Pending
3770-Hinds v. Elms	Pending

3772-State v. Douglas	Pending
3773-State v. Richardson	Pending
3774-Marlboro Park v. SCDHEC	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-481-Branch v. Island Sub-Division	Pending
2003-UP-736-State v. Ward	Denied 4/22/04
2004-UP-024-State v. Foster	Denied 4/22/04
2004-UP-086-State v. Rice	Denied 4/22/04
2004-UP-098-Smoak v. McCullough	Denied 4/22/04
2004-UP-102-State v. Boan	Denied 4/22/04
2004-UP-110-Page v. Page	Denied 4/22/04
2004-UP-111-Phillips v. Cassidy	Denied 4/22/04
2004-UP-114-State v. Bailey	Pending
2004-UP-117-State v. Simpson	Pending
2004-UP-119-Williams v. Pioneer Machine	Denied 4/22/04
2004-UP-120-State v. Harris	Pending
2004-UP-122-State v. Aiken	Denied 4/22/04
2004-UP-125-State v. Chronister	Denied 4/22/04
2004-UP-131-Ford v. Georgetown County	Denied 4/22/04
2004-UP-134-Herridge v. Herridge (Ginsberg)	Denied 4/22/04
2004-UP-135-Phillips v. Brown	Moot-Case settled

2004-UP-137-State v. Drayton	Denied 4/22/04
2004-UP-138-State v. Ceasar	Denied 4/22/04
2004-UP-142-State v. Morman	Denied 4/22/04
2004-UP-146-State v. Gainey	Denied 4/22/04
2004-UP-147-KCI Management v. Post	Denied 4/22/04
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Denied 4/22/04
2004-UP-151-State v. Baskin	Denied 4/22/04
2004-UP-153-Walters v. Walters	Denied 4/22/04
2004-UP-186-State v. Randolph	Pending
2004-UP-200-Krenn v. State Farm	Pending
2004-UP-211-State v. Anderson	Pending
2004-UP-216-Arthurs v. Brown	Pending
2004-UP-221-Grate v. Bone	Pending
2004-UP-229-State v. Scott	Pending
2004-UP-236-State v. Skanes	Pending
2004-UP-237-In the interest of B., Justin	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3596-Collins Ent. v. Coats & Coats et al.	Pending
3602-State v. Al-Amin	Pending
3607-State v. Parris	Pending

3610-Wooten v. Wooten	Pending
3623-Fields v. Regional Medical Center	Pending
3635-State v. Davis	Pending
3639-Fender v. Heirs at Law of Smashum	Pending
3640-State v. Adams	Pending
3642-Hartley v. John Wesley United	Pending
3643-Eaddy v. Smurfit-Stone	Pending
3645-Hancock v. Wal-Mart Stores	Pending
3646-O'Neal v. Intermedical Hospital	Pending
3647-State v. Tufts	Pending
3650-Cole v. SCE&G	Pending
3652-Flateau v. Harrelson et al.	Pending
3653-State v. Baum	Pending
3654-Miles v. Miles	Pending
3655-Daves v. Cleary	Pending
3656-State v. Gill	Pending
3658-Swindler v. Swindler	Pending
3661-Neely v. Thomasson	Pending
3663-State v. Rudd	Pending
3667-Overcash v. SCE&G	Pending
3669-Pittman v. Lowther	Pending

3671-White v. MUSC et al.	Pending
3674-Auto-Owners v. Horne et al.	Pending
3676-Avant v. Willowglen Academy	Pending
3677-The Housing Authority v. Cornerstone	Pending
3678-Coon v. Coon	Pending
3679-The Vestry v. Orkin Exterminating	Pending
3680-Townsend v. Townsend	Pending
3681-Yates v. Yates	Pending
3683-Cox v. BellSouth	Pending
3685-Wooten v. Wooten	Pending
3686-Slack v. James	Pending
3690-State v. Bryant	Pending
3691-Perry v. Heirs of Charles Gadsden	Pending
3693-Evening Post v. City of N. Charleston	Pending
3703-Sims v. Hall	Pending
3706-Thornton v. Trident Medical	Pending
3707-Williamsburg Rural v. Williamsburg Cty.	Pending
3708-State v. Blalock	Pending
3709-Kirkman v. First Union	Pending
3710-Barnes v. Cohen Dry Wall	Pending
3711-G & P Trucking v. Parks Auto Sales	Pending

3712-United Services Auto Ass'n v. Litchfield	Pending
3716-Smith v. Doe	Pending
3718-McDowell v. Travelers Property	Pending
3719-Schmidt v. Courtney (Kemper Sports)	Pending
3720-Quigley et al. v. Rider et al.	Pending
3721-State v. Abdullah	Pending
3722-Hinton v. SCDPPPS	Pending
3728-State v. Rayfield	Pending
3729-Vogt v. Murraywood Swim	Pending
3733-Smith v. Rucker	Pending
3737-West et al. v. Newberry Electric	Pending
3739-Trivelas v. SCDOT	Pending
3742-State v. McCluney	Pending
3743-Kennedy v. Griffin	Pending
2003-UP-009-Belcher v. Davis	Pending
2003-UP-060-State v. Goins	Pending
2003-UP-111-State v. Long	Pending
2003-UP-112-Northlake Homes Inc. v. Continental Ins.	Pending
2003-UP-135-State v. Frierson	Pending
2003-UP-143-State v. Patterson	Pending
2003-UP-144-State v. Morris	Pending

2003-UP-205-State v. Bohannan	Pending
2003-UP-244-State v. Tyronne Edward Fowler	Pending
2003-UP-277-Jordan v. Holt	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-324-McIntire v. Cola. HCA Trident	Pending
2003-UP-336-Tripp v. Price et al.	Pending
2003-UP-353-State v. Holman	Pending
2003-UP-358-McShaw v. Turner	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-396-Coaxum v. Washington et al.	Pending
2003-UP-397-BB&T v. Chewing	Pending
2003-UP-409-State v. Legette	Pending
2003-UP-416-Sloan v. SCDOT	Pending
2003-UP-420-Bates v. Fender	Pending
2003-UP-444-State v. Roberts	Pending
2003-UP-453-Waye v. Three Rivers Apt.	Pending
2003-UP-458-InMed Diagnostic v. MedQuest	Pending
2003-UP-459-State v. Nellis	Pending
2003-UP-462-State v. Green	Pending
2003-UP-467-SCDSS v. Averette	Pending
2003-UP-468-Jones v. Providence Hospital	Pending

2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-473-Seaside Dev. Corp. v. Chisholm	Pending
2003-UP-475-In the matter of Newsome	Pending
2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-489-Willis v. City of Aiken	Pending
2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-503-Shell v. Richland County	Pending
2003-UP-515-State v. Glenn	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending
2003-UP-533-Buist v. Huggins et al.	Pending
2003-UP-535-Sauer v. Wright	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending

2003-UP-588-State v. Brooks	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending
2003-UP-638-Dawsey v. New South Inc.	Pending
2003-UP-640-State v. Brown #1	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-662-Zimmerman v. Marsh	Pending
2003-UP-672-Addy v. Attorney General	Pending
2003-UP-678-SCDSS v. Jones	Pending
2003-UP-688-Johnston v. SCDLLR	Pending
2003-UP-689-Burrows v. Poston's Auto Service	Pending
2003-UP-703-Beaufort County v. Town of Port Royal	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-706-Brown v. Taylor	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-715-Antia-Obong v. Tivener	Pending
2003-UP-718-Sellers v. C.D. Walters	Pending
2003-UP-719-SCDSS v. Holden	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Pending

2003-UP-735-Svetlik Construction v. Zimmerman	Pending
2003-UP-751-Samuel v. Brown	Pending
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending
2003-UP-757-State v. Johnson	Pending
2003-UP-758-Ward v. Ward	Pending
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Pending
2004-UP-001-Shuman v. Charleston Lincoln Mercury	Pending
2004-UP-011-Baird Pacific West v. Blue Water	Pending
2004-UP-012-Meredith v. Stoudemayer et al.	Pending
2004-UP-019-Real Estate Unlimited v. Rainbow Living	Pending
2004-UP-029-City of Myrtle Beach v. SCDOT	Pending
2004-UP-038-State v. Toney	Pending
2004-UP-050-Lindsey v. Spartan Roofing	Pending
2004-UP-055-Spartanburg Cty. v. Lancaster	Pending
2004-UP-061-SCDHEC v. Paris Mt.(Hiller)	Pending

PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Martin McIntosh, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Marlboro County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 25808
Heard January 7, 2004 - Filed April 19, 2004

REVERSED

Assistant Appellate Defender Robert M. Dudek of the South Carolina Office of Appellate Defense, of Columbia, and John M. Ervin, III, of Darlington, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of

Columbia; and Solicitor Jay E. Hodge, Jr., of Darlington, for Respondent.

JUSTICE BURNETT: Martin McIntosh (Petitioner) was convicted of murder, kidnapping, first degree criminal sexual conduct, and criminal conspiracy in a joint trial with five co-defendants.[1] The Court of Appeals' unpublished opinion affirmed Petitioner's convictions for murder, kidnapping, and criminal conspiracy and reversed the criminal sexual conduct conviction because there was no evidence Petitioner sexually assaulted Darlene Patterson (Victim), or acted in concert with others to sexually assault her. State v. McIntosh, Op. No. 2001-UP-479 (S.C. Ct. App. filed November 8, 2001).

We granted the petition for a writ of certiorari to review the Court of Appeals' conclusion the prosecutor did not commit a Doyle[2] violation by questioning Petitioner about the fact he did not present his alibi defense to police after he was arrested and read his Miranda[3] rights. We reverse and remand for a new trial.

FACTS

The body of Victim, 36, was found on November 24, 1994, partially submerged in a pond near Burnt Factory Road in rural

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[1] The six defendants jointly tried under the "hand of one, hand of all" theory were Petitioner, Alfonzo Staton, Leroy Staton, Ricky Stuckey, Jeffrey Walls, and Robert Graham. All faced the same four charges as Petitioner except Robert Graham, who was charged with everything except murder.

[2] Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

[3] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Marlboro County. Victim had been missing since November 12, 1994. Her ankles and hands had been bound with gray duct tape; the tape also had been wrapped tightly around her face and head.

The medical examiner testified Victim likely died of asphyxiation due to the tape around her face and head. Victim probably was dead before her body was placed in the pond, although the examiner could not rule out death by drowning. Further, the death likely occurred between November 12 and 20, 1994, and probably closer to November 12. The autopsy revealed no physical evidence that Victim had been sexually assaulted before her death, although the fact Victim was a mature woman and the body had partially decomposed made it more difficult to obtain such evidence if any existed.

Investigators examined items recovered from an abandoned house, where Victim had been held, and from the pond, including Victim's pocketbook, eyeglasses, an earring, and duct tape samples. However, investigators were unable to identify any physical or trace evidence (fingerprints, samples of hair, blood, semen, or the like) linking Petitioner or any other person to Victim's kidnapping and death. The State's case against Petitioner and other co-defendants consisted primarily of the testimony from co-defendants, Danny Davis and Bobby Ransom.

Davis and Ransom testified they observed Victim tied up and lying on a couch or bed during a cookout and party at two co-defendants' mobile home. Both accompanied several co-defendants on a trip to move Victim from the mobile home to an abandoned house. Ransom testified he was smoking marijuana and drinking creek liquor (a type of "white lightning" or moonshine) when several co-defendants arrived at his house the next night and asked him to join them on a trip back to the abandoned house. When he saw his visitors approaching, Ransom drank the remaining half of a pint of creek liquor he had been drinking so they would not ask him for any.

Davis and Ransom testified Petitioner and another co-defendant were waiting when they arrived at an abandoned house where Victim

had been left the previous night. Several unidentified co-defendants carried Victim, still bound by tape, to the car and put her in the back seat beside Ransom. Ransom testified he began "freaking out" when the "liquor hit [him]" and he begged them to stop Victim from "crying all over [him]," although she really was not. The eight co-defendants – including Davis, Ransom, and Petitioner – rode in a single car to a bridge, where unidentified co-defendants placed Victim's body in the pond.

Davis and Ransom were cross-examined at length about their extensive history of alcohol and substance abuse. Davis testified he suffered brain damage from a traumatic head injury 10 years earlier, as well as anxiety, sleeplessness, and depression. He was a victim of child abuse and had extensively abused alcohol and illegal drugs for years. He testified he drank heavily every day during November 1994. His alcohol use caused him to forget events and confuse things. During his two-year incarceration preceding the trial, Davis testified he saw nonexistent shadows, heard "a lot of [nonexistent] voices," and talked with imaginary friends. He was taking anti-psychotic and anti-depressant medications during his incarceration and the trial.

Ransom testified he had been paralyzed from the chest down since 1983. In November 1994, he had been on a drinking binge for some three years and eight or nine months. He often blacked out and suffered from memory loss. He had been hospitalized at psychiatric facilities three times before 1996 for abuse of alcohol and numerous drugs, including Valium, Xanax, sleeping pills, amphetamines, powder cocaine, crack cocaine, acid, marijuana, and "huffing" gasoline. He drank two quarts to a gallon of alcohol each week, including creek liquor.

Davis and Ransom testified on cross-examination they were good friends who grew up together. Davis often visited the reclusive Ransom at his house in 1994, and they saw one another frequently during a four-month period after the crime until their arrest. Police in March 1995 brought Ransom from another jail to see Davis in jail so Ransom could "confront" Davis about the crimes. The two confessed

to police the same afternoon at the same location, and, for the first time, Ransom implicated Petitioner.

At his guilty plea prior to Petitioner's trial, Davis stated, "a lot of this stuff I can't quite remember, but my co-defendant [Ransom] has – he's told me everything." While insisting he was trying to tell the truth at petitioner's trial, Davis testified he had changed his story "a lot of times," although not every time he talked to police during fifteen to twenty interviews. He "told [police] what they wanted to hear." In fact, he testified he no longer had an independent recollection of even being at the bridge that night, but based his trial testimony on some other source.

Petitioner, then 29, denied any involvement in the crimes, testifying he was in New York when they occurred. Petitioner testified that in 1994 he lived in Brooklyn, New York, where he was raised. Since his childhood, he often traveled to Marlboro County, where his father was raised, to visit family and friends.

Petitioner testified he stayed in Marlboro County, in September 1994, for a week or two with a friend, Butch Moore and then returned to New York. On November 2, 1994, he left New York with two friends and traveled to Marlboro County, again staying with Butch Moore. He returned to New York on November 7, 1994. To establish these dates, Petitioner entered into evidence a rental car receipt.[4] He also testified he attended his godfather's birthday party in New York on November 9, 1994. Petitioner tried to subpoena Moore to the trial, but the sheriff's office was unable to locate him.

Petitioner testified he again returned to Marlboro County by bus on the morning of November 23, 1994. He stayed several days with a cousin, but also visited the home and automobile repair shop of Joe Stuckey on Thanksgiving Day. In December 1994, Petitioner moved into the mobile home with co-defendants Ricky Stuckey and Robert

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[4] A friend rented the car with a credit card and Petitioner repaid him in cash. The rental agreement listed Petitioner as the driver.

Graham. He testified he had been to that mobile home – where Victim had been seen during the cookout and party – only once. Petitioner worked some at Joe Stuckey's shop and heard that Victim's body had been found, but testified he did not hear anyone say they were involved in the crimes.

In January 1995, while he was working at the shop, police examined Petitioner's identification but did not question him. In February 1995, Petitioner received a subpoena to appear before a federal grand jury investigating Victim's murder. Petitioner testified he returned to New York later that month. In April 1995, Petitioner returned to Columbia to testify before the grand jury. He was told he was not on the grand jury witness list and would not be called. Petitioner asked the secretary to call Marlboro County authorities because he had heard they had warrants for him. He was transported to Marlboro County, where he was arrested for murder and read his Miranda rights.

During direct examination, Petitioner testified as follows:

> Q. And they read you your rights at that time?
> A. Yes, sir.
> Q. Told you you were under arrest?
> A. Yes, sir.
> Q. Did they ask you to make a statement?
> A. Yes, sir.
> Q. And what did you tell them?
> A. I didn't want to make a statement about something I didn't know about.
> Q. And at that point, you were arrested?
> A. Yes, sir.

The following testimony occurred during cross-examination of Petitioner:

> Q. Well, let's talk some more about your story here. Now, the truth is the first time that you have told anybody in law

enforcement this story about your being in New York is today, isn't it?
A. Yes, sir.
Q. You ain't – for two-and-a-half years, you ain't never told this story.

Petitioner raised a Doyle objection, arguing the prosecutor was not allowed to question Petitioner about his post-arrest, post-Miranda silence or his failure to tell police he was in New York when the crimes occurred. He argued such questions violate his right to remain silent. The prosecutor contended Petitioner was in Marlboro County when the crimes occurred. Because Petitioner was asserting he was not in the county, the State was entitled to show that he never told police that at any time. The trial judge overruled Petitioner's objection.

The cross-examination continued:

Q. Let's go back to where we stopped. What I was asking was the police talked to you, did they not?
A. That's according to when you're talking about.
Q. Well, let's talk about when you came to Columbia. You told your lawyer that you came down to Columbia?
A. Yes, sir.
Q. And the police wanted to talk to you?
A. Yes, sir.
Q. And you talked to them, agreed to talk to them, did you not?
A. Yes, sir.
Q. And you told them at that point in time, yeah, I don't know anything about this thing. I was in New York.
A. No, I never mentioned where I was. I just told them I didn't know what they were talking about and they asked me did I want to make a statement. I told them no. Then they asked – they kept asking me to make statements. I told them I wanted to speak to a lawyer.
Q. And when you told them you wanted to speak to a lawyer, they stopped, didn't they?

A. No, they continued to ask me questions.
Q. Well, did you tell them anything?
A. No.
Q. So that's my point. They stopped you at some point because you're here and you didn't tell them anything. Right?
A. Even after they talked to me – the same day I came to Marlboro County up from Columbia, that's the same day they appointed me a lawyer. They took me to Charlie Usher I believe his name is.
Q. Uh-huh.
A. And appointed a lawyer. But they still came to question me.

Following Petitioner's testimony, the judge instructed the jury:

> [t]here is some testimony in this record regarding this individual of an alleged statement that he makes. In this connection, I tell you that a defendant has the absolute right to make a statement. If he elects to remain absolutely silent, that is his absolute constitutional right, and his silence may not be used against him. A defendant if he elects to make a statement may stop at any time and thereafter elect to remain silent. And if, should that occur, that silence cannot and must not be used against him in any way whatsoever. The fact that he elects initially or later, that fact cannot be used against any defendant and this defendant whatsoever.

In closing arguments, neither Petitioner nor the State mentioned Petitioner's testimony about what he did or did not tell police after his arrest. Petitioner was found guilty on all counts.[5] He was sentenced to

[5] The jury found all co-defendants guilty on all counts, except Alfonzo Staton was found not guilty of first-degree CSC and Robert Graham (not charged with murder) was found not guilty of kidnapping or CSC.

life in prison for murder, thirty years consecutive for first-degree criminal sexual conduct, five years concurrent for criminal conspiracy.[6]

On appeal, Petitioner contended the State's cross-examination on his post-arrest, post-Miranda silence was a violation of due process pursuant to Doyle. The Court of Appeals held no Doyle violation occurred because Petitioner emphasized his cooperation with authorities in his direct examination, opening the door to the State's cross-examination. The Court of Appeals further concluded any error was harmless because it was cured by the trial court's charge following the solicitor's cross-examination.

ISSUE

> Did the Court of Appeals err in holding Petitioner, during direct examination, presented the defense he had cooperated with police, thus opening the door to otherwise impermissible cross-examination on his post-arrest, post-Miranda silence?

DISCUSSION

Petitioner contends the Court of Appeals erred in holding he "opened the door" to a Doyle violation. Petitioner argues he did not assert he cooperated with police, but only explained his travels between South Carolina and New York and his contacts with police in anticipation the prosecutor would argue he was fleeing from the crimes. Furthermore, Petitioner asserts the error was not harmless and was not cured by the judge's instruction immediately following the solicitor's cross-examination.

The United States Supreme Court has held the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor seeks to impeach a defendant's exculpatory story, told for

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[6] No sentence was imposed for kidnapping pursuant to S.C. Code Ann. § 16-3-910 (1976).

the first time at the trial, by cross-examining him about his post-arrest silence after receiving the Miranda warnings. Doyle, 426 U.S. at 619, 96 S.Ct. at 2245, 49 L.Ed.2d at 98.

In Doyle, the state prosecutor presented evidence a police informant sold marijuana to defendants. The defendants testified they had been framed by the informant because they were not the sellers, but had intended to buy marijuana from the informant. Both were arrested within minutes of the alleged crime, were advised of their Miranda rights, and chose not to make any substantive post-arrest statements. During cross-examination at separate trials, the prosecutor questioned the defendants why they did not promptly assert their innocence after their arrest by telling police their exculpatory story. Doyle, 426 U.S. at 611-614, 96 S.Ct. at 2243-2244, 49 L.Ed.2d at 94-96.

In finding a due process violation, the Court rejected the State's arguments such cross-examination was necessary to show a defendant may have concocted a false, exculpatory story after his arrest.

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. Moreover, while it is true the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle, 426 U.S. at 617-618, 96 S.Ct. at 2244-2245, 49 L.Ed.2d at 97-98 (citation omitted).

In limited exceptions to the general rule, the State may cross-examine a defendant about his post-arrest, post-Miranda silence when he offers an exculpatory story at trial and claims he told police the same

version upon arrest. Doyle, 426 U.S. at 619 n.11, 96 S.Ct. at 2245 n.11, 49 L.Ed.2d at 98 n.11. Similarly, Doyle does not bar cross-examination into prior inconsistent statements made by a defendant who voluntarily speaks after he has received the Miranda warnings. Anderson v. Charles, 447 U.S. 404, 408, 100 S.Ct. 2180, 2182, 65 L.Ed.2d 222, 226 (1980); State v. Kimsey, 320 S.C. 344, 465 S.E.2d 128 (Ct. App. 1995).

The State may point out a defendant's silence prior to arrest, or his silence after arrest but prior to the giving of the Miranda warnings, in order to impeach the defendant's testimony at trial. Due process is not violated because "[s]uch silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty." Brecht v. Abrahamson, 507 U.S. 619, 628, 113 S.Ct. 1710, 1716, 123 L.Ed.2d 353, 366 (1993); Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).

The Doyle rule, as well as other principles prohibiting the prosecutor from using or commenting on a defendant's exercise of his constitutional rights, is "rooted in due process and the belief that justice is best served when a trial is fundamentally fair." Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000). "The obvious purpose is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions. Such an inference is constitutionally impermissible because the burden at all times remains upon the State to prove beyond a reasonable doubt every element of a crime with which the accused is charged." Id.

This case presents a clear Doyle violation. Petitioner voluntarily returned to South Carolina, as required by a federal subpoena, then voluntarily surrendered to Marlboro County authorities who had warrants for his arrest. He was arrested and read his Miranda rights. He chose not to speak to police, other than to deny knowledge of the crimes and ask for a lawyer.

At trial, the solicitor questioned Petitioner at length about his failure to present his alibi defense to police after he was arrested and given the Miranda warnings. The solicitor's questions were intended to focus the jury's attention on Petitioner's post-arrest silence as substantive evidence of his guilt, a prohibited tactic. See State v. Smith, 290 S.C. 393, 394-95, 350 S.E.2d 923, 924 (1986) (finding Doyle violation where solicitor asked psychiatrist if he knew defendant had refused to make a statement to police; granting new trial as it was not harmless error). The constitutionally impermissible inference the jury may have drawn from testimony about his post-arrest silence is Petitioner was guilty simply because he remained silent. See Edmond, 341 S.C. 340, 534 S.E.2d 628 (granting new trial to applicant in post-conviction relief action where testimony and prosecutor's closing improperly referred to defendant's exercise of right to remain silent and right to counsel); see also State v. Reid, 324 S.C. 74, 476 S.E.2d 695 (1996) (finding Doyle violation when officer, after arresting defendant and advising him of his Miranda rights, was asked whether defendant inquired about the condition of his passengers after an accident; granting new trial as it was not harmless error), overruled on other grounds by State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002); State v. Myers, 301 S.C. 251, 258-259, 391 S.E.2d 551, 555 (1990) (finding an unpreserved Doyle violation but strongly cautioning solicitors against violating the prohibition by commenting on defendant's exercise of constitutional rights); State v. Holliday, 333 S.C. 332, 340, 509 S.E.2d 280, 284 (Ct. App. 1998) (noting that solicitors have been repeatedly warned by appellate courts against violation of Doyle prohibition; and granting new trial as violation was not harmless error); State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (Ct. App. 1991) (finding Doyle violation where solicitor cross-examined defendant on failure to tell police his exculpatory story; and granting new trial as violation was not harmless error).

The State contends Petitioner opened the door to any Doyle violation by trying to convince the jury he had fully cooperated with police. Therefore, the prosecutor properly was allowed to cross-

examine Petitioner to show he had not cooperated with police, but in fact had remained silent.[7]

The State correctly explains other courts have held a defendant may open the door to cross-examination for impeachment purposes by testifying or creating the impression through his defense presentation he has cooperated with police when, in fact, he has not. Such cross-examination is permissible, as the Supreme Court recognized in Doyle by noting a prosecutor may challenge a defendant's contention he told his exculpatory story to police when he actually did not. Doyle, 426 U.S. at 619 n.11, 96 S.Ct. at 2245 n.11, 49 L.Ed.2d at 98 n.11. See e.g., Kibbe v. Dubois, 269 F.3d 26, 34-35 (1st Cir. 2001) (explaining Doyle is not violated when defendant opens the door to cross-examination on post-arrest silence by testifying on direct he told police what had happened and lawyer stated the same in opening and closing); United States v. Reveles, 190 F.3d 678, 684-685 (5th Cir. 1999) (finding no Doyle violation because "[w]hen a defendant attempts to convince a jury that he was of a cooperative spirit, Doyle does not tie the hands of prosecutors who attempt to rebut this presentation by pointing to a lack of cooperation"); Earnest v. Dorsey, 87 F.3d 1123, 1135 (10th Cir. 1996) (finding no Doyle violation because "prohibition against reference to post-arrest silence does not allow the defendant to freely and falsely create the impression that he has cooperated with police when, in fact, he has not"); United States ex rel. Saulsbury v. Greer, 702 F.2d 651 (7th Cir. 1983) (finding no Doyle violation where defendant opened the door to cross-examination on post-arrest silence by testifying on direct he did not make a statement to the sheriff because it could be used against him and, since he was on parole, he did not think the sheriff would believe him); Wentz v. State, 766

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[7] The State also argues the Court should find Petitioner's argument unpreserved because his lawyer did not object after the first allegedly improper question. Petitioner's lawyer objected after the prosecutor's second question. The State's argument is without merit. See State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (Ct. App. 1991) (finding Doyle objection was sufficiently contemporaneous where defendant's lawyer objected after second improper question).

N.E.2d 351, 362 (Ind. 2002) (finding no Doyle violation because defendant opened the door to cross-examination on post-arrest silence by testifying on redirect he had answered all the police's questions).

In the State's view, Petitioner claimed he cooperated with police and thus opened the door to an otherwise improper line of questioning by (1) testifying on direct examination he voluntarily returned to South Carolina and he did not give a statement to police upon his arrest; (2) inferring to the jury he had told his alibi story to authorities by testifying he was staying with Butch Moore when the crimes occurred, but the sheriff had not been able to serve a subpoena on Moore shortly before or during the trial;[8] (3) inferring to the jury he really wanted to speak to police but they did not want to talk to him, as they only once asked for his identification and later served a federal subpoena on him; and (4) testifying on cross-examination before the challenged inquiry "if I knew anything about any of this, I would have been talking to the police. I would have talked to the people in Columbia a long time ago."

We conclude Petitioner did not open the door to any Doyle violation. Petitioner did not, explicitly or implicitly, assert he cooperated with police. The focus of Petitioner's defense, as revealed by his actions before his arrest and at his arrest, as well as his trial testimony, was he was not present when the crimes occurred, knew nothing about the crimes or who was involved, and so had nothing to tell police.

In an analogous case, a defendant made no post-arrest statement to police and asserted an alibi defense for the first time at trial in an armed robbery case in which "[t]here was no dispute that the crimes charged had been committed by someone." State v. Garcia, 887 P.2d

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[8] Petitioner testified he left South Carolina on November 7, 1994, to return to New York, and returned to South Carolina on November 23, 1994. Victim apparently was kidnapped on November 12, 1994, and murdered a day or two later. Thus, Petitioner testified he was in New York – not staying with Moore – when the crimes occurred.

767 (N.M. Ct. App. 1994). The prosecutor questioned the defendant why he did not mention his alibi defense to a police detective in the hour he spent traveling with the detective after his arrest.

The New Mexico court concluded the prosecutor's questions violated due process, reasoning a defendant who chooses to remain silent about his alibi defense until trial does not open the door to this line of questioning. "[T]here is nothing to impeach until the defense has come forward with an explanation. By the State's reasoning, offering an explanation [for the first time at trial] would always open the door for the impeachment." Endorsing the State's door-opening argument in such a case is not appropriate because it "would completely undercut Doyle." Garcia, 887 P.2d at 772.

We further conclude the trial error in this case was not harmless; nor was it cured by the judge's instruction. When a Doyle violation occurs, the conviction still may be upheld when a review of the entire record establishes beyond a reasonable doubt the error was harmless. "To be harmless, the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming." State v. Pickens, 320 S.C. 528, 530-531, 466 S.E.2d 364, 366 (1996). "An instruction to disregard incompetent evidence is usually deemed to have cured the error unless on the facts of the particular case it is probable that, notwithstanding the instruction, the accused was prejudiced." State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986).

In this case, the prosecutor questioned Petitioner thoroughly about his post-arrest, post-Miranda silence, asking him no less than ten questions aimed at showing Petitioner never presented his alibi defense to police. The solicitor tied Petitioner's silence directly to his alibi defense, asking him, for example, "[n]ow, the truth is the first time that you have told anybody in law enforcement this story about your being

in New York is today, isn't it?" and "[y]ou ain't – for two-and-a-half years, you ain't never told this story."

Petitioner's story was not totally implausible. He had traveled between South Carolina and New York since he was a child. He had documentary proof (the rental car receipt) he had left South Carolina before the crimes occurred. His irregular arrivals and departures, along with the fact he moved into the co-defendants' mobile home after the crimes occurred and lived there for some two months, may have caused the State's two key witnesses to be unable to accurately recall whether they saw him at the crime scene or just living at the mobile home in following weeks.

Finally, the evidence against Petitioner was not overwhelming. No physical or trace evidence was introduced linking Petitioner to the crimes. The case against Petitioner consisted primarily of the testimony of two witnesses, Davis and Ransom. Both testified about their extensive history of alcohol and substance abuse, as well as their memory lapses, before and during the period the crimes occurred. Both Davis and Ransom were interviewed by police numerous times and faced the death penalty until they began cooperating. The testimony of these key witnesses cannot be deemed overwhelming, particularly when viewed in light of the likely impact the State's improper questioning had on jurors' perception of Petitioner's credibility. See State v. Smith, 309 S.C. 442, 447, 424 S.E.2d 496, 499 (1992) (admission of testimony about prior drug use which likely destroyed defendant's credibility, in a case where witness credibility was crucial to jury's determination of who and what to believe, could not be deemed harmless error); State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) ("[e]rror which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense").

CONCLUSION

We reverse the Court of Appeals concluding (1) the prosecutor's questions violated Petitioner's right to due process as established in

Doyle; (2) Petitioner did not in his testimony or the presentation of his defense attempt to create the impression that he had cooperated with police, and therefore did not open the door to a Doyle violation; and (3) the violation under these facts and circumstances was not harmless error and was not cured by the judge's cautionary instruction. We reverse Petitioner's convictions and remand for a new trial.

REVERSED.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice Thomas L. Hughston, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Duncan Proctor, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Dorchester County
Charles W. Whetstone, Jr., Circuit Court Judge

Opinion No. 25809
Heard December 4, 2003 - Filed April 19, 2004

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General Deborah R. J. Shupe, all of Columbia, and Walter M. Bailey, Jr., of Summerville, for Petitioner.

Chief Attorney Daniel T. Stacey, of Columbia, and Christopher W. Adams, of Atlanta, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review a Court of Appeals' decision remanding respondent's appeal to the circuit court with instructions to hold a hearing and determine whether information not disclosed by the State was material to the defense. State v. Proctor, 347 S.C. 587, 556 S.E.2d 418 (Ct. App. 2001). Because we hold there is no reasonable possibility that, had the information sought been disclosed, the result of respondent's trial would have been different, we reverse the Court of Appeals.[1]

FACTS

Respondent was convicted of first degree criminal sexual conduct, assault with intent to kill, and possession of a firearm during the commission of a violent crime. These convictions arise out of a housebreaking and subsequent assault of the victim ("J").

The State proposed to admit DNA test results linking respondent to semen recovered from J. The DNA evidence had been processed at the South Carolina Law Enforcement Division (SLED) lab. Respondent sought to discover SLED's internal DNA proficiency test results in order to explore the possibility of challenging the accuracy of the lab's assessments.[2] SLED conducts both 'blind' and 'open' tests; the lab analyst is aware of the test in the 'open' situation but not in the 'blind.'

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[1] We granted certiorari to review a Court of Appeals' decision granting respondent this same relief with regard to his convictions in Charleston County. State v. Proctor, 348 S.C. 322, 559 S.E.2d 318 (Ct. App. 2001). In an opinion filed today, we reverse that decision as well. State v. Procter, Op. No. 25810 (S.C. Sup. Ct. filed April 19, 2004).

[2] Proficiency tests determine how accurately an analyst applies validated technology; their purpose is to determine what difficulties a particular examiner may encounter when applying specific methods. Edward J. Imwinkelried, DNA Typing: Emerging or Neglected Issues, 76 Wash. L. Rev. 413, 459 (2001).

In response to respondent's request for the proficiency test information, SLED produced an affidavit from SLED Lt. Ira Jeffcoat that outlined the general test procedures, and stated that the SLED examiners have never made an incorrect 'match' in any proficiency test. At a pretrial hearing,[3] the trial judge denied respondent's discovery request, finding respondent failed to show how the proficiency testing information sought would be relevant and material.

ISSUE

Did the Court of Appeals err in remanding this matter to the trial court?

ANALYSIS

As we understand respondent's argument, he seeks the proficiency test results not to attack the methodology used or results obtained in his particular case, but as the predicate for his expert to derive the SLED DNA lab's 'lab error rate.' In turn, respondent's expert would use that rate to evaluate the accuracy of SLED's probability estimates. Further, if SLED's proficiency test results were not perfect, as represented by Lt. Jeffcoat, then they could potentially be used as impeachment evidence.

Respondent contends he is entitled to another hearing to determine whether the proficiency test results are material under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963),[4] and/or Rule 5(a)(1)(D),

[3] The pretrial hearing combined respondent's requests made in this case with his requests made in the Charleston County case. A single order was issued addressing both requests. Accordingly, our analysis here mirrors that in our Charleston opinion.

[4] "[T]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment…." Brady, 373 U.S. at 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed. 2d 215, 218.

SCRCrimP.[5] The materiality test is the same under Brady and under the rule. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998), *aff'd*, 337 S.C. 617, 524 S.E.2d 837 (1999). Evidence is material under Brady if there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996). Impeachment evidence, as well as evidence that is relevant to guilt or punishment, can be material. Id.

The Court of Appeals found "the undisclosed proficiency test results could very well be material to [respondent's] case for impeachment and important for cross-examination purposes" and remanded so that a circuit court judge could reconsider whether to order disclosure of the test results. While we agree that respondent's original pretrial hearing was flawed, we find no error warranting a remand.

Where a defendant makes a threshold showing that the evidence he seeks is material within the meaning of Brady and Rule 5, the trial judge should conduct a hearing. State v. Bryant, 307 S.C. 458, 415 S.E.2d 806 (1992). Here, respondent made that showing. He presented evidence that defense experts examining proficiency tests from other labs have found errors that demonstrated flaws in the test lab's methodology. Further, he presented evidence that no DNA lab has a "zero error rate" on DNA proficiency exams. Having met this threshold requirement, the trial judge should have examined the material *in camera*.[6] The trial judge's reliance on Lt. Jeffcoat's affidavit

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[5] "[U]pon request…the prosecution shall permit the defendant to inspect and copy any results or reports of…scientific tests or experiments…which are material to preparation of the defense…." Rule 5(a)(1)(D), SCRCrimP.

[6] At oral argument, the State contended that the raw material respondent sought would be meaningless to the trial judge unless he hired his own expert to assist him. We assume that, in addition to the raw data, the materials would include a summary of the results that would not require expert interpretation. Further, the State acknowledged at respondent's pretrial hearing that it had, in fact, given this type of information to a circuit court judge in another case. We are not prepared to say that the State can arbitrate whether scientific information is too sophisticated for the average trial judge. Further, Lt. Jeffcoat referred to the proficiency testing several times in his

in lieu of conducting his own *in camera* examination was error. State v. Bryant, *supra* (error for trial judge to rely on State's witness's representation of contents rather than personally inspect materials).

Although we conclude that respondent made an adequate threshold showing entitling him to a full Bryant hearing, we find that error does not require remand:

> For Brady purposes, in determining the materiality of nondisclosed evidence, an appellate court must consider the evidence in the context of the entire record. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2393, 49 L.Ed. 2d 342 (1976). However, the court should not consider the sufficiency of the evidence. The court's function is to determine whether the appellant's right to a fair trial has been impaired. State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987); State v. Goodson, 276 S.C. 243, 277 S.E.2d 602 (1981).
> State v. Taylor, 333 S.C. 159, 177, 508 S.E.2d 870, 879 (1998).

For purposes of determining whether respondent was denied a fair trial, we will assume that the undisclosed proficiency tests would have revealed that the SLED DNA lab did not, in fact, have a perfect record. We proceed to consider not just the evidence against respondent at trial, but the context in which the DNA evidence was presented.

J positively identified respondent as her assailant. She testified that the assault lasted approximately twenty minutes, and that during that period she had many opportunities to observe him. In a criminal sexual conduct case, the victim's degree of attention is presumably acute. State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1981). Pubic

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testimony establishing the *bona fides* of the SLED DNA lab. So long as the State relies upon these results to bolster the lab's credibility, it should not be surprised that defense counsel will seek to look behind its representations.

hairs consistent with respondent's were recovered from the scene, and blood evidence showed the rapist was a Group B secretor. Respondent is a Group B secretor, a trait shared by 9% of whites and 16% of African-Americans.[7] Finally, J identified a gun recovered when respondent was arrested as being similar to the one used by her attacker.

Lt. Jeffcoat testified that the SLED lab DNA analysts participated in proficiency tests in order to meet certain lab accreditation requirements. When he began to testify to the results of those proficiency tests, respondent's objection was sustained. In this case, the jury never heard evidence that the SLED lab had a perfect record on those tests, and thus respondent was not denied an opportunity to impeach Lt. Jeffcoat. Lt. Jeffcoat testified that the comparison of the DNA samples with a sample from respondent resulted in an "unprecedented" match of six out of seven probes. Respondent acknowledges that nothing in the proficiency test results would have permitted him to question these results.

Finally, Lt. Jeffcoat was permitted to testify that the probabilities of an individual unrelated to respondent having the same DNA profile as that found in the semen sample was "1 in 45 billion Caucasians, and 1 in 3.7 billion blacks." Had the proficiency test results been provided, respondent's experts could have determined a 'lab error rate,' and in turn would have testified[8] to probabilities lower than those testified to by Lt. Jeffcoat.

We find that the nondisclosure of proficiency test results was not material. The other evidence was formidable: the test results could only have reduced the probabilities. Even if the 'lab error rate' resulted in a 90% reduction of Lt. Jeffcoat's probabilities, those numbers would

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[7] Respondent is of mixed Caucasian and African heritage.

[8] There appears to be a disagreement among experts as to the validity or usefulness of a lab error rate. We will assume for purposes of our decision today that this evidence would be admitted, but express no final judgment as to this type of evidence's admissibility.

still be staggering: 1 in 450 million Caucasians and 1 in 37 million African-Americans. Further, Lt. Jeffcoat acknowledged during his testimony that errors are made in every lab, and that those errors affect the validity of the probability determination.

Respondent was not denied a fair trial because the SLED lab proficiency test results were not disclosed to him. State v. Taylor, *supra*. We therefore reverse the decision of the Court of Appeals remanding this matter for further proceedings.

REVERSED.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Duncan Proctor, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Charles W. Whetstone, Jr., Circuit Court Judge

Opinion No. 25810
Heard December 4, 2003 - Filed April 19, 2004

REVERSED

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Chief Attorney Daniel T. Stacey, of the Office of Appellate Defense, of Columbia, and Christopher W. Adams, of Atlanta, for Respondent.

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FACTS

Respondent was convicted of one count of burglary and four counts of first degree criminal sexual conduct arising out of an unlawful entry into the victim's **(**G's) home and sexual assaults perpetrated upon her in that home.

The State proposed to introduce DNA test results linking respondent to semen recovered from G. The DNA evidence had been processed at the South Carolina Law Enforcement Division (SLED) lab. Respondent sought to discover SLED's internal DNA proficiency test results in order to explore the possibility of challenging the accuracy of the lab's assessments.[2] SLED conducts both 'blind' and 'open' tests; the lab analyst is aware of the test in the 'open' situation but not in the 'blind.'

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In response to respondent's request for the proficiency test information, SLED produced an affidavit from SLED Lt. Ira Jeffcoat that outlined the general test procedures, and stated that the SLED examiners have never made an incorrect 'match' in any proficiency test. At a pretrial hearing,[3] the trial judge denied respondent's discovery request, finding respondent failed to show how the proficiency testing information sought would be relevant and material.

ISSUE

Did the Court of Appeals err in remanding this matter to the trial court?

ANALYSIS

As we understand respondent's argument, he seeks the proficiency test results not to attack the methodology used or results obtained in his particular case, but as the predicate for his expert to derive the SLED DNA lab's 'lab error rate.' In turn, respondent's expert would use that rate to evaluate the accuracy of SLED's probability estimates. In this case, for example, Lt. Jeffcoat's written report states that the probability of an individual unrelated to the donor matching the DNA obtained from semen evidence was "approximately 1 in 10,000 CAUCASIANS and 1 in 3,700 BLACKS."[4] Further, if SLED's proficiency test results were not perfect, as represented by Lt. Jeffcoat, then they could potentially be used as impeachment evidence.

Respondent contends he is entitled to another hearing to determine whether the proficiency test results are material under Brady v. Maryland,

[3] The pretrial hearing combined respondent's requests made in this case with his requests made in the Dorchester County case. A single order was issued addressing both requests. Accordingly, our analysis here mirrors that in our Dorchester opinion.

[4] Respondent is of mixed Caucasian and African heritage.

373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963),[5] and/or Rule 5(a)(1)(D), SCRCrimP.[6] The materiality test is the same under Brady and under the rule. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998), *aff'd*, 337 S.C. 617, 524 S.E.2d 837 (1999). Evidence is material under Brady if there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996). Impeachment evidence, as well as evidence that is relevant to guilt or punishment, can be material. Id.

The Court of Appeals found "the undisclosed proficiency test results could very well be material to [respondent's] case for impeachment and important for cross-examination purposes" and remanded so that a circuit court judge could reconsider whether to order disclosure of the test results. While we agree that respondent's original pretrial hearing was flawed, we find no error warranting a remand.

Where a defendant makes a threshold showing that the evidence he seeks is material within the meaning of Brady and Rule 5, the trial judge should conduct a hearing. State v. Bryant, 307 S.C. 458, 415 S.E.2d 806 (1992). Here, respondent made that showing. He presented evidence that defense experts examining proficiency tests from other labs have found errors that demonstrated flaws in the test lab's methodology. Further, he presented evidence that no DNA lab has a "zero error rate" on DNA proficiency exams. Having met this threshold requirement, the trial judge should have examined the material *in camera*.[7] The trial judge's reliance on Lt. Jeffcoat's affidavit

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[5] "[T]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment…." Brady, 373 U.S. 83, 87, 83 S.Ct.1194, 1196-1197, 10 L.Ed. 2d 215, 218 .

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[7] At oral argument, the State contended that the raw material respondent sought would be meaningless to the trial judge unless he hired his own expert to assist him. We assume that, in addition to the raw data, the materials would include a summary of the results that would not require expert

in lieu of conducting his own *in camera* examination was error. State v. Bryant, *supra* (error for trial judge to rely on State's witness's representation of contents rather than personally inspect materials).

Although we conclude that respondent made an adequate threshold showing entitling him to a full Bryant hearing, we find that error does not require remand:

> For Brady purposes, in determining the materiality of nondisclosed evidence, an appellate court must consider the evidence in the context of the entire record. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976). However, the court should not consider the sufficiency of the evidence. The court's function is to determine whether the appellant's right to a fair trial has been impaired. State v. Osborne, 291 S.C. 265, 353 S.E.2d 276 (1987); State v. Goodson, 276 S.C. 243, 277 S.E.2d 602 (1981).
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For purposes of determining whether respondent was denied a fair trial, we will assume that the undisclosed proficiency tests would have revealed that the SLED DNA lab did not, in fact, have a perfect record. We proceed to consider not just the evidence against respondent at trial, but the context in which the DNA evidence was presented.

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interpretation. Further, the State acknowledged at respondent's pretrial hearing that it had, in fact, given this type of information to a circuit court judge in another case. We are not prepared to say that the State can arbitrate whether scientific information is too sophisticated for the average trial judge. Further, Lt. Jeffcoat referred to the proficiency testing several times in his testimony establishing the *bona fides* of the SLED DNA lab. So long as the State relies upon these results to bolster the lab's credibility, it should not be surprised that defense counsel will seek to look behind its representations.

While G was unable to make a positive identification, her description of her attacker's physical attributes (height, build, hair color, hair texture) match respondent's. Further, hair evidence recovered from the scene was consistent with respondent's, and blood evidence showed the rapist was a Group B secretor, as is respondent. This trait is shared by 9% of whites and 16% of African-Americans. Finally, fingerprints identified as respondent's were found on a window screen at the victim's house at the point of entry, and on a tube of K-Y jelly handled by her attacker. The non-DNA evidence pointing to respondent as the perpetrator of these offenses was substantial.

At trial, Lt. Jeffcoat testified that the SLED DNA lab used proficiency testing to ensure its analysts were accurate. He was permitted to testify, over respondent's objection, "In every occasion where we have been provided proficiency tests, we've always called the correct match." Assuming that the proficiency test results would have shown this statement to be untrue, Lt. Jeffcoat could have been impeached by those results. While the lieutenant went on to testify that in this particular case, the lab had been able to match four of five probes from samples recovered from the scene to samples given by respondent, the witness did not testify to the probabilities of such a match occurring in a random population sample. Accordingly, to the extent that respondent sought the proficiency test results in order to calculate the 'lab error rate' and then use that rate to discount the probability match, he cannot demonstrate prejudice from the denial of that information since no 'match' evidence was presented to the jury.

CONCLUSION

Respondent made the threshold showing entitling him to a Bryant hearing and an *in camera* inspection by the trial judge of the proficiency test results. We assume those results would have reflected adversely on the SLED DNA lab's performance, and that Lt. Jeffcoat could have been impeached on his statement that the lab was always correct. We hold, however, that respondent has not demonstrated that he was denied a fair trial. State v. Taylor, *supra*. We therefore reverse

the decision of the Court of Appeals remanding the matter for further proceedings.

REVERSED.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Shirley Ann Madison, Appellant,

v.

American Home Products Corporation and Aiken Drug Co., Defendants,
Of Whom Aiken Drug Co. is Respondent.

Appeal From Aiken County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 25811
Heard March 17, 2004 - Filed April 19, 2004

AFFIRMED

Charles L. Henshaw, Jr., of Furr, Henshaw & Ohanesian, of Columbia, for Appellant.

David E. Dukes, Clarence Davis, and John D. Martin, all of Nelson, Mullins, Riley and Scarborough, of Columbia, for Respondent.

JUSTICE WALLER: This is a strict liability case. The issue on appeal is whether a pharmacy may be held strictly liable for the distribution of a prescription drug which was filled in accordance with a physician's

orders. The circuit court granted summary judgment to Respondent, Aiken Drug Company (Aiken). We affirm.

FACTS

Shirley Madison, a physician, began taking the drug Effexor on September 25, 1998, which was prescribed for chronic depression. She took it as prescribed through September 29, 1998, at which time she assaulted her seven-year-old son and attempted suicide at her home in Aiken County.

Thereafter, she instituted this suit against American Home Products Corporation (AHP), the company which formulated and marketed Effexor, and Aiken, the pharmacy which filled the prescription. She alleged causes of action in negligence (against AHP only), strict liability, and breach of warranty. Aiken filed a Rule 12(b)(6), SCRCP, motion to dismiss, contending Madison had failed to state a claim upon which relief could be granted against it. The trial court agreed and dismissed the strict liability and breach of warranty claims against Aiken.

ISSUE

Did the circuit court err in granting Aiken's motion to dismiss the strict liability cause of action? [1]

DISCUSSION

Initially, Madison claims that since the issue is novel, it should not have been decided on a Rule 12(b)(6) motion to dismiss. We disagree.

As a general rule, important questions of novel impression should not be decided on a motion to dismiss. Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss. Unysis Corp. v. South Carolina

[1] Madison does not contest dismissal of the breach of warranty action.

Budget and Control Bd. Div. of Gen. Servs., 346 S.C. 158, 551 S.E.2d 263 (2001). We find development of the record unnecessary as the present case presents the purely legal issue of whether a pharmacy may be held strictly liable for properly filling a prescription drug in accordance with a physician's orders. Cf. Unysis Corp., supra (constitutional challenges to Procurement Code proceeding properly resolved on Rule 12(b)(6) motion where there were no factual issues in need of further development); In re Breast Implant Product Liability Litigation, 331 S.C. 540, 554, 503 S.E.2d 445, 451, n. 2 (1998) (certiorari granted to review denial of defendant's motion to dismiss claim of strict liability of physician for use of breast implant devices). Accordingly, we find no error in the trial court's resolution of the issue pursuant to a Rule 12(b)(6) motion. Further, under the facts of this case, we hold the trial court properly dismissed Madison's strict liability claim.

South Carolina's strict liability statute, S.C. Code Ann. § 15-73-10 (1976) (the Defective Products Act), provides, in pertinent part:

> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if
>
> (a) The seller is engaged in the business of selling such a product, and
>
> (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) shall apply although
>
> (a) The seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

Madison asserts that since a pharmacy "sells" prescription drugs, and § 15-73-10 does not specifically exempt them as sellers, they are strictly liable for the sale of prescription drugs. We disagree.

In In re Breast Implant Product Liability Litigation, supra, we addressed the liability of health care providers for the use of medical devices, such as breast implants. We found the determinative issue in the case was whether a health care provider, such as a hospital or a doctor, is a "seller" within the meaning of § 15-73-10. We rejected the plaintiffs' claim that, because § 15-73-10 did not specifically exempt "health care providers," they were strictly liable as "sellers." After recognizing that § 15-73-10 applies only to products and not to services, we found health care providers who perform breast implant procedures, offer services rather than products stating:

> Although the breast implant procedure requires the use of a product, the implant, the health care provider is fundamentally and predominantly offering a service. The provider must have medical knowledge and skill to conduct the procedure. He must advise the patient of the medical consequences and must recommend to the patient the preferable type of procedure. The product may not be purchased independently of the service. One does not "buy" a breast implant procedure in the same way as one would buy a product, such as a lawnmower. At its heart, the breast implant procedure is a service and not a product.

331 S.C. at 547, 503 S.E.2d at 448-449. The In re Breast Plant Litigation Court went on to survey a number of jurisdictions which hold health care professionals and institutions are providers of services, rather than sellers of products, for purposes of strict liability, because the provision of medical services is qualitatively different from the sale of products. We find this analysis applies with equal force to services of a pharmacist in properly filling a prescription in accordance with a physician's instructions.

Other jurisdictions have reached similar conclusions. In Murphy v. E.R. Squibb & Sons, Inc., 710 P.2d 247 (Cal. 1985), the California Supreme Court affirmed the grant of judgment on the pleadings to a pharmacy which had sold the drug DES to the plaintiff's mother; the court held a pharmacy may not be held strictly liable for dispensing a prescription drug. The court addressed only the duties of a pharmacist as they relate to filling prescription drugs on the order of a physician, and only when the pharmacist has used due care in compounding and labeling the drug. The court engaged in a lengthy discussion of the distinctions and similarities between pharmacists and ordinary retailers, noting that "[a] key factor is that the pharmacist who fills a prescription is in a different position from the ordinary retailer because he cannot offer a prescription for sale except by order of the doctor." 710 P.2d at 251. While noting that a "sale" does, in fact, occur in the case of prescription drugs, the court nonetheless concluded pharmacies are immune from strict liability, stating:

> If pharmacies were held strictly liable for the drugs they dispense, some of them, to avoid liability, might restrict availability by refusing to dispense drugs which pose even a potentially remote risk of harm, although such medications may be essential to the health or even the survival of patients. Furthermore, in order to assure that a pharmacy receives the maximum protection in the event of suit for defects in a drug, the pharmacist may select the more expensive product made by an established manufacturer when he has a choice of several brands of the same drug.

Id. at 253. We find the present case analogous to Murphy.[2]

Here S.C. Code Ann. § 40-43-10 (the South Carolina Pharmacy Practice Act), specifically states that "[t]he practice of pharmacy shall center around the provision of pharmacy care **services** and assisting the patient to achieve optimal therapeutic outcomes." Similarly, S.C. Code Ann. § 40-43-

[2] The Murphy court was persuaded by the fact that the California Legislature had provided pharmacies are a "dynamic patient oriented health **service.**" 710 P.2d at 252. (emphasis supplied).

30(23) defines "health care provider" to include a pharmacist who provides health care services within the pharmacist's scope of practice pursuant to state law and regulation." Given our holding in In re Breast Implant Product Liability Litigation that "health care providers" are engaged in a service, we find the same analysis applies here to relieve pharmacists of strict liability.

Consistent with this approach, most courts addressing the issue have declined to extend strict liability to pharmacies. As the Utah Supreme Court recently stated:

> [S]trict liability for manufacturers exists in large part as a deterrent and a method of allocating the risk of loss among those best equipped to deal with it. Compounding pharmacies provide a unique and valuable service in our health care system, one which we have no reason to deter at this point. Nor do we believe that pharmacies are in a good position to insure against, or take steps to reduce the risk of, harm done by the drugs used in their compounded products through additional warnings. So long as the pharmacy is acting within the rules and regulations set forth by the state and federal governments for the practice of pharmacy, providing compounded drug products to patients after receipt of a physician's prescription, and confining themselves to the traditional scope of pharmaceutical care, we need not shift the pharmacy into the category of drug manufacturer for the purpose of strict products liability.

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 79 P.3d 922, 932 (Utah 2003). See also In re New York County Diet Drug Litig., 262 A.D.2d 132, 133, 691 N.Y.S.2d 501, 502 (1st Dept. 1999) (where no allegation pharmacist failed to fill prescriptions precisely as directed, no basis to hold pharmacists liable under theories of negligence, breach of warranty or strict liability); Kohl v. Am. Home Prods. Corp., 78 F.Supp.2d 885 (W.D. Ark 1999)(holding pharmacists immune from strict liability).

In addition to the theory that filling a prescription is more of a service than a sale, courts have found no basis to impose strict liability on

pharmacists because "negligence theories provide adequate consumer protection; strict liability is inconsistent with the learned intermediary doctrine, which places the duty to warn on the prescribing physicians, and not pharmacists; the imposition of such duties would force pharmacists to refuse to stock necessary drugs because of risks involved, refuse to use less expensive generic drugs, or second guess the judgment of prescribing physicians; and that permitting strict liability would run counter to a specific exception [comment k] in the commentary to the restatement provision [Restatement (Second) of Torts, § 402(A)]."[3] David J. Marchitelli, Liability of Pharmacist Who Accurately Fills Prescription for Harm Resulting to User, 44 A.L.R. 5th 393, 419, § 2(a)(1996).

CONCLUSION

We hold that because the pharmacy is providing a service, rather than selling a product, it may not be held strictly liable for properly filling a prescription in accordance with a physician's orders. Accordingly, the circuit court's grant of summary judgment to Aiken is affirmed.

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

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[3] Pursuant to comment *k* of § 402(A) of the Restatement (Second) of Torts, a seller of an "unavoidably unsafe" product is not held strictly liable. Comment *k* states, in part, "a product which is incapable of being made safe for its intended and ordinary use, is not considered either defective or unreasonably dangerous, if the product is properly prepared, and accompanied by proper directions and warning." Comment *k* specifically states, "It is . . . true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, . . . but such experience as there is justifies the use and marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products. . . is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product. . ." Here, in light of our holding that a pharmacist is not strictly liable for properly filling a prescription drug in accordance with a physician's orders, we need not determine whether Effexor would be considered an "unavoidably unsafe" product, so as to relieve all sellers of strict liability.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Peoples Federal Savings and Loan Association of South Carolina, Appellant/Respondent,

v.

Resources Planning Corporation, Litchfield Plantation Company, Inc., Litchfield Plantation Association, Inc., and Louise P. Parsons a/k/a Louise Price Parsons, Respondents/Appellants,

And

Lee R. Minton, Doris N. Beal, Joseph R. Bunn, II, Angela R. Bunn, Jeane M. Chapman, Jacqueline R. Coble, James Davies, Carol F. Davies, Cora N. Davis, Trustee, Thomas L. Davy, Jr., Jeanita S. Davy, Kevin W. Dickey, Christopher S. Dickey, William Talley Elliott, Jr., Emma T. Fairey, William F. Fairey, Hugh M. Farr, Ella Ray Farr, Anne C. Forrester, Donald Gregg, Elizabeth L. Gregg, James H. Herbert, Elizabeth T. Herbert, Robert L. Jones, Trustee of Robert O. Jones

Retirement Trust, Robert D. Klemme, M. Virginia Klemme, Kathleen W. Lipscomb, Virginia W. Mackey, Winifred C. Moore, Ruby G. McManus, Adelaide S. Nichols, James E. Scott, II, Business Assets Trust, Jane Martin Smith, and James Harrison Whitner, IV, Trustee, Respondents.

Appeal From Georgetown County
Don S. Rushing, Special Referee

Opinion No. 25812
Heard October 22, 2003 - Filed April 26, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Michael W. Battle and Victoria T. Vaught, of Battle & Vaught, P.A., of Conway, and Douglas M. Muller of Moore & Van Allen, P.L.L.C., of Charleston, for appellant-respondent.

Howell V. Bellamy, Jr., and Douglas M. Zayicek, of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., of Myrtle Beach, for Respondents-Appellants Resources Planning Corporation, Litchfield Plantation Company, Inc., and Louise P. Parsons a/k/a Louise Price Parsons.

Robert W. Dibble, Jr., and Robert L. Widener, of McNair Law Firm, P.A., of Columbia, for Respondent-Appellant Litchfield Plantation

Association, Inc., and for Respondents Lee R. Minton, Doris N. Beal, Joseph R. Bunn, II, Angela R. Bunn, Jeane M. Chapman, Jacqueline R. Coble, James Davies, Carol F. Davies, Cora N. Davis, Trustee, Thomas L. Davy, Jr., Jeanita S. Davy, Kevin W. Dickey, Christopher S. Dickey, William Talley Elliott, Jr., Emma T. Fairey, William F. Fairey, Hugh M. Farr, Ella Ray Farr, Anne C. Forrester, Donald Gregg, Elizabeth L. Gregg, James H. Herbert, Elizabeth T. Herbert, Robert L. Jones, Trustee of Robert O. Jones Retirement Trust, Robert D. Klemme, M. Virginia Klemme, Kathleen W. Lipscomb, Virginia W. Mackey, Winifred C. Moore, Ruby G. McManus, Adelaide S. Nichols, James E. Scott, II, Business Assets Trust, Jane Martin Smith, and James Harrison Whitner, IV, Trustee.

PER CURIAM: Appellant/Respondent Peoples Federal Savings and Loan Association of South Carolina (Peoples) filed this action seeking a declaration of its rights and interests as the successful bidder at the foreclosure sale of 30 acres of undeveloped property located within Litchfield Plantation. In addition, it alleged the defendants, Respondents/Appellants Resources Planning Corporation (RPC), Litchfield Plantation Company, Inc. (LPC), and Litchfield Plantation Association (LPA), conspired to injure the marketability of the purchased property through improper assessments and initiation fees. Peoples sought actual and punitive damages. The defendants filed various counterclaims.

After a merits hearing, the Special Referee determined Peoples acquired the foreclosed property subject to the same rights and limitations (including the payment of assessment fees) as any other purchaser of undeveloped Plantation property, but that RPC, LPC, and LPA had conspired to injure Peoples by destroying the marketability of its property and depreciating the value of its property through improper means. The referee awarded Peoples actual and punitive damages as a result of the conspiracy and awarded RPC, LPC, and LPA contract damages. The referee set off the monetary awards, leaving a net award to Peoples of $161,816 actual damages on its conspiracy claim against RPC, LPC, and LPA, and $441,050 in

punitive damages against RPC and LPC. The parties have filed cross-appeals. We affirm in part and reverse in part.

BACKGROUND

LPC was formed in the 1960s for the purpose of developing 600-acre Litchfield Plantation as a private residential development in Pawley's Island. In 1971, LPC recorded a Declaration of Restrictive Covenants to facilitate the development of Phase I of the project. The Covenants reserved to LPC significant rights as the developer, including rights to approve certain uses in the Plantation and exclusion from payment of any assessments by a property owners' association. The Plantation and the property to which the Covenants were applicable were described on a recorded plat which was incorporated by reference into the Covenants.

The Covenants mandate the formation of LPA which serves as the property owners' association for the Plantation. Each purchaser of property within Phase I is an automatic member of LPA. The Covenants require LPA to operate and maintain the common elements and impose upon LPA the duty to levy and collect assessments against certain property owners within Phase I to defray the cost. The Covenants specify: "[e]ach purchaser of any lot . . . within Phase I, shall, by acceptance of a deed or other conveyance, be deemed to agree to pay [LPA] an annual assessment or charge to be fixed, established and collected from time to time as hereinafter provided." The only property exempt from assessments are properties owned or leased by LPC, LPA, and all property owned by their affiliates, subsidiaries, and paid employees.

The Covenants contain a specific provision making the Covenants and LPA's by-laws binding upon all owners within Phase I. In addition, the Covenants contain a provision making duly adopted amendments to the Covenants binding upon future owners of property subject to the amendment.

In June 1971, LPC recorded master deeds for two condominium regimes in the Plantation. The sale of residential lots followed. Each deed to a condominium and to a residential lot was made subject to the Covenants. The purchasers became members of the LPA and became obligated to pay assessments levied by the LPA.

In the mid-1970s, LPC suffered severe financial hardship and underwent statutory reorganization. RPC became the "financial advisor" to LPC; RPC entered into a management contract with LPA. Donald Parsons is CEO of RPC; his children own all the stock in RPC. LPC's stock is held almost entirely by Parsons' wife, Louise Parsons. Donald Parsons serves on the board of directors for RPC, LPC, and LPA. Allan Kidston is an employee of RPC, a board member of LPA, and president of RPC, LPC, and LPA.

Prior to 1985, RPC acquired property in Phase I of the Plantation. Thereafter, Peoples loaned RPC $1,000,000. The loan was secured by personal guaranties, a mortgage from RPC on real estate within Phase I, and an accomodation mortgage from LPC on real estate within Phase I. In 1986, RPC negotiated a $400,000 loan from Peoples. The loan was secured by personal guaranties and an accommodation mortgage from LPC on real estate within Phase I.

In 1984, the independent homeowners (those not affiliated with RPC or LPC), filed suit against LPC and LPA. A 1988 Settlement Agreement provided for various changes in and additions to the Covenants, including a ten year limitation on RPC's and LPC's voting control over LPA. Significantly, the agreement required RPC and LPC to designate at the time of sale the numbers of units within any area of undeveloped property in Phase I which was sold for development. The 1988 Agreement provided the developer (specifically defined as RPC, LPC, and their successors and assigns) would pay a "developers' assessment" of 20% of LPA's budget for ten years at the end of which the developers would make a final designation of total density on their undeveloped property and begin paying monthly assessments. During the ten year period, RPC and LPC were entitled to repayment if LPA had a budget surplus.

Between 1989 and 1995, Peoples extended both loans on several occasions, however, Peoples' loans to RPC ultimately went into default and Peoples instituted an action to foreclose both mortgages. Peoples waived deficiency judgment on each loan. The Master-in-Equity entered an Amended Master's Report and an Amended Order of Sale pursuant to which he sold the real estate covered by the mortgages, approximately 30 undeveloped acres, at public sale on January 5, 1998. Peoples was the successful bidder; it purchased the property for $1,337,000. The master executed and delivered his deed to Peoples and the sale was confirmed by order on January 12, 1998. RPC, LPC, LPA, Donald Parsons, and Kidston appealed the master's order of foreclosure. The Court of Appeals affirmed. Peoples Fed. Sav. & Loan Assoc. of S.C. v. Resources Planning Corp., Op. No. 99-UP-118 (Ct. App. 1999).

At or about the time of the foreclosure sale, RPC/LPC hired a commercial real estate appraiser to conduct a financial analysis of the property acquired by Peoples. The appraiser's report was generated based on 1) RPC/LPC's stated authority to control the development of the 30 acres and 2) monthly assessments on 120 units and an $1800 per unit initiation fee. The report details the expected annual costs which would be incurred by Peoples "until all legal questions have been resolved."

Sometime after the foreclosure sale, RPC and LPC designated a minimum of 120 assessable units and a maximum of 140 assessable units on the property acquired by Peoples. LPC notified LPA of the designation. On May 12, 1998, the LPA board, including Donald Parsons and Kidston, unanimously resolved to establish an initiation fee of $1800 per unit for all new members, retroactive to January 1, 1998. They further resolved to assess Peoples monthly assessments pro rata from January 6, 1998, on 120 units at the rate of $148.50 per unit. The following day, LPA informed Peoples of the $302,000 in charges.[1] Peoples claimed the assessments and initiation fees

[1] Kidston delivered the letter to Peoples at a conference during which the parties discussed settling the appeal of the foreclosure action and a lender liability suit instituted by RPC, LPC, Donald Parsons, and Kidston against Peoples after the foreclosure.

were unenforceable and refused to remit payment.[2] Peoples instituted this litigation late in 1998. By the time of trial, Peoples had not sold or developed any part of the property.

In December 1998, RPC, LPC, and most of the other property owners, excluding Peoples, executed an agreement modifying the 1988 Agreement. The modification extended the 1998 deadline for ending developer control of LPA for three years or until the end of litigation with Peoples. While the extension was in effect, RPC and LPC were entitled to repayment of their loans to LPA if LPA generated a budget surplus.[3]

One month before trial, LPA issued a statement to Peoples requesting payment of $4,012,928 representing monthly homeowner's assessments, initiation fees of $216,000, late charges, and interest. Two weeks later, LPA issued a revised statement, deleting the initiation fees and late charges thereon. The revised statement reflected assessments and late charges of $2,254,628. Five days prior to trial in May 2000, a second revised statement reduced the assessments and late charges to $614,256.

Since 1985, LPC has not sold any new lots or condominiums, but it has exercised the right of first refusal provided in the 1971 Covenants to reacquire many of the lots and condominiums previously sold. By the time of trial in the current case (May 2000), LPC had sold 53 condominium or single family residential lots even though the Plantation had the capacity to develop 800 units. Less than thirty of the sold properties were purchased by individuals not affiliated with RPC, LPC, or Louise Parsons.

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[2] Peoples was the only property owner subject to this initiation fee.

[3]At some point, LPA owed LPC nearly $2,000,000 for funding budget deficits. In turn, LPC owed RPC $100 million in mortgage debt.

In his final order, the referee concluded, as a purchaser of 30 acres of undeveloped property in Phase I of the Plantation, Peoples was subject to assessments imposed by LPA pursuant to the 1988 Amendments. The referee concluded, however, the 120-unit designation was untimely, improper, or illegal. Accordingly, the referee imposed a 2-unit designation on each of the 30 acres purchased by Peoples based on the minimum designation established by the 1988 Amendments.

ISSUES

I. Did the referee err by finding evidence of a conspiracy?

II. Did the referee impose improper awards of actual and punitive damages?

III. Did the referee err by denying LPA's Rule 12(b)(6), SCRCP, motion to dismiss?

IV. Did the referee err by ruling on the validity of the right of first refusal provision in the Covenants?

V. Did the referee err by determining Peoples did not become a co-developer with RPC/LPC when it acquired the Plantation property at the foreclosure sale?

I. Evidence of Conspiracy

RPC, LPC, and Louise P. Parsons assert the referee erred by finding the existence of a conspiracy. More specifically, they claim because LPC was contractually required to designate a number of units under the terms of the 1988 Amendments to the Covenants, there is no evidence the defendants intended to harm Peoples. We disagree.

A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff and thereby causing special damage. Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996).

Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances. Island Car Wash, Inc. v. Norris, 292 S.C. 595, 3538 S.E.2d 150 (Ct. App. 1987). "Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence. . . ." Id. at 601, S.E.2d at 153. An action for civil conspiracy is an action at law; the trial judge's findings will be upheld on appeal unless they are without evidentiary support. Gynecology Clinic v. Cloer, 334 S.C. 555, 514 S.E.2d 592 (1999).

In relevant part, the 1988 Amendments provide:

> Sale of Undeveloped Parcel: In the event the Developer sells an undeveloped parcel of land for purposes of development (an "Undeveloped Parcel") to a party not related to the Developer (the "Unrelated Builder") for development into Units, the Developer shall designate a maximum and a minimum number of Units to be available and of votes to be assigned to that particular Undeveloped Parcel at the time of sale. In no event shall the number of assessments to be paid by the Unrelated Builder be less than two times the number of acres of buildable high ground acres in the Undeveloped Parcel.

We disagree with RPC/LPC's premise that LPC was contractually obligated to designate a number of units under the terms of the 1988 Amendments. Instead, the 1988 Amendments specifically required RPC/LPC to designate the number of assessable units on undeveloped property "at the time of sale." The 1988 Amendments did not authorize RPC/LPC to designate a number of units for assessment purposes four months after the sale of undeveloped property.

In any event, the referee found the following facts constituted direct and/or circumstantial evidence of RPC and LPC's intent and motive to harm Peoples by imposing the 120 unit designation: 1) RPC and LPC unsuccessfully defended the foreclosure suit; 2) RPC and LPC were unable to post bond to stay the foreclosure sale; 3) at the time of the foreclosure, RPC hired a real estate appraiser who detailed Peoples' expected losses over a several year period using the proposed unit designation and initiation fee if

Peoples refused to submit to RPC/LPC's control; 4) RPC and LPC proposed a density designation, but concealed the designation from Peoples for more than four months after the foreclosure sale; 5) the designation created an opportunity for RPC and LPC to buy the distressed property back from Peoples for a fraction of its original cost; 6) RPC and LPC stood to directly benefit from the 120-unit assessment as the two were required to make up LPA's budgetary shortfall; and 7) RPC/LPC notified Peoples of the $302,000 charge during a settlement conference concerning two other pending actions between Peoples and RPC/LPC. The record is replete with evidence establishing RPC/LPC's motive and intent to injure Peoples. Accordingly, the Court is required to affirm the referee's findings of fact. Id.

II. Damages

A. Actual Damages

The referee awarded Peoples damages based on his determination the "claimed assessments depreciated the present value of Peoples' property and created a reasonable probability of litigation which destroyed its marketability." The referee awarded Peoples $749,767 in actual damages based on two categories of damages: 1) $454,959 representing the diminution in present value of the property and 2) $294,808 representing Peoples' holding costs for the 30 acres during the period of the conspiracy.

In a conspiracy action, what is required is proof of the fact of damages, not certainty of amount. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942). "The elements which go to make up such damages must depend on the nature of the act and the injury." Id. S.C. at 174, S.E.2d at 726 internal citation omitted.

1. Diminution in Value

LPA contends the referee erred by awarding actual damages based on the diminution in market value of Peoples' property. Relying on Yadkin Brick Co., Inc. v. Materials Recovery Co., 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000), and opinions from Texas and Ohio, LPA asserts

damages for the temporary, non-physical injury to property is limited to the loss of rental value during the time of the temporary injury. We disagree.

In Yadkin Brick Co., Inc. v. Materials Recovery Co., id., the Court of Appeals held diminution in market value is an appropriate measure of damages where there is injury of a permanent nature to real property. Where the injury is temporary, the landowner can recover the depreciation in the rental or usable value of the property caused by the injury.

Yadkin Brick, id., concerns the appropriate measure of damages where there is physical injury to real property. Here, Peoples suffered economic injury. Accordingly, Yadkin Brick is inapplicable.

Seelbach v. Clubb, 7 S.W.3d 749 (1999 Ct. App. Tex.), and Hall v. Robbins, 790 S.W.2d 417 (1990 Ct. App. Tex.), involved the temporary loss of use of land due to blocked access to the property. In both cases, the Texas Court of Appeals held the rental value of the land was an appropriate measure of damages under the circumstances. The Texas courts noted the lease value or rental value of the land was not the only appropriate measure of damages which can be awarded for the temporary loss of use of land. Relying on the earlier Texas decision, in Henderson v. Spring Run Allotment, 651 N.E.2d 489, 497 (Ohio App. 1994), the Ohio court held lost profits were the appropriate measure of damage "under [the] circumstances" where plaintiffs discharged untreated sewage prevented defendant from selling the residential lots.

The referee did not abuse his discretion by fashioning damages on the diminution in value of Peoples' property during the pendency of the assessments, initiation fees, and ensuing litigation. The referee's damage award recognizes the temporary loss in value of Peoples' 30 acres as a result of the retroactive imposition of 120 units worth of assessments and initiation fees months after its purchase of the property. The referee's award attempts to restore Peoples to the "benefit of the bargain" at the time of its purchase in January 1998. Considering the nature of the conspiracy and its resulting injury to Peoples, the referee's attempt to base the actual damage award on Peoples' special injury is appropriate. Charles v. Texas Co., supra. This result is in accord with the Texas and Ohio cases referenced by LPA which

state the appropriate measure of damages should be determined by the circumstances.

2. Martin Letter

LPA contends the referee erred by using the "Martin Letter" to extrapolate the diminution in value of Peoples' property because 1) the letter was inadmissible as a part of settlement negotiations and 2) it did not address diminution in value. We disagree.

Over LPA's objection, the referee admitted the June 4, 1998 letter prepared by certified appraiser Robert S. Martin. As stated in the letter, RPC hired Martin to prepare a financial analysis of Peoples' property as of January 1, 1996, and for the next three years. The report is an appraisal of the value of Peoples' investment considering assessments and initiation fees for 120 units and RPC's right to control and veto the construction on the property. It is undisputed the Martin report was requested by RPC to assist it in settlement negotiations with Peoples during the appeal of the foreclosure action and lender liability suit.

Rule 408, SCRE, provides that evidence of offers or acceptances of settlement "is not admissible to prove liability for or invalidity of the claim or its amount."

While the Martin letter provides an estimate of value of Peoples' property, the Martin letter was not evidence of an offer of settlement. Instead, the report was produced to assist RPC in its own evaluation of settlement of the foreclosure and lender liability suits. It did not constitute evidence of an offer of settlement.

Moreover, the referee adopted the model, not the actual data, used by Martin to determine the value of Peoples' property. Using Martin's model, the referee projected the value of Peoples' property based on assessments and initiation fees of 120 and 60 units. From these results, the referee extrapolated the diminution in value of Peoples' property. The admission of the letter was not an abuse of discretion. Gamble v. Int'l Paper

Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996) (admission or exclusion of evidence within sound discretion of trial court and, absent clear abuse, will not be disturbed on appeal).

3. Cost of Carry/Holding Costs

LPA argues the referee erred by awarding Peoples holding costs. Alternatively, it asserts the referee allowed Peoples a double recovery because the costs of carry were included in the discount rate.

Holding costs are expenses such as insurance or taxes associated with "carrying" property over a period of time. Peoples Fed. Sav. and Loan Ass'n v. Myrtle Beach Retirement Group, Inc., 302 S.C. 223, 394 S.E.2d 849 (Ct. App. 1990). We conclude holding costs are appropriate. The referee did not abuse his discretion by awarding these costs to Peoples. Gynecology Clinic v. Cloer, supra.

Nevertheless, the award appears to provide Peoples with double recovery of its holding costs. As noted above, in order to determine Peoples' actual damages, the referee adopted the model provided in the June 4, 1998 report of RPC's appraiser. The appraiser's report includes the carrying costs associated with Peoples' retaining the 30 acres (i.e., the 120 unit monthly assessment, the per unit initiation fee, property taxes, and insurance) while the parties debated permissible development of the property. The model applies a 12% discount rate, representing the market return expected by a residential real estate developer, to determine the present value of Peoples' property. Since the model already includes Peoples' holding costs, permitting Peoples to earn an additional 6.3% cost of money for its costs of carry, the referee permitted a double recovery.

B. Punitive Damages

LPA argues it was subject to RPC and LPC's control (by voting control, the Covenants, and 1988 Amendments), and therefore, there was no evidence it acted willfully. Accordingly, LPA asserts the award of punitive damages must be reversed. We disagree.

There is clear and convincing evidence LPA acted willfully in imposing the 120 unit assessments and initiation fee on Peoples.[4] Although governed by the 1971 Covenants and 1988 Assessments and subject to the voting control of LPC, LPA, a non-profit corporation, was not authorized to act improperly, much less illegally, as found by the referee. LPA was not entitled to assess the 120 unit fee even though so instructed by LPC. Furthermore, LPA, on its own initiative, imposed the retroactive initiation fee. LPA's imposition of the 120 lot assessment and initiation fees constitutes clear and convincing evidence which supports a punitive damages award.

III. Rule 12(b)(6), SCRCP

LPA argues the referee erred by denying its Rule 12(b)(6), SCRCP, motion to dismiss Peoples' complaint for failure to state a cause of action for conspiracy. LPA asserts Peoples' conspiracy claim is simply a restatement of its breach of fiduciary duty claim and fails to allege any special damages resulting from the conspiracy. We disagree.

A plaintiff cannot recover damages for a particular act or wrong and likewise recover on a conspiracy to do the act or wrong. See Todd v. South Carolina Farm Bureau Mut. Ins. Co., 276 S.C. 284, 278 S.E.2d 607 (1981), rev'd on other grds. 287 S.C. 190, 336 S.E.2d 472 (1985); Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989); See F. Hubbard and R. Felix, The South Carolina Law of Torts 2d ed. (1997) (authors suggest Todd v. South Carolina Farm Bureau Mut. Ins. Co., supra, limited to proposition that plaintiff can only recover damages once and must elect remedy).

The damages alleged in Peoples' breach of fiduciary duty and conspiracy claims are similar. However, since the referee directed the verdict

[4] The plaintiff has the burden of proving punitive damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135 (Supp. 2002).

in favor of LPA on Peoples' breach of fiduciary duty claim, LPA is not twice subject to payment for damages for the same act. There is no error.

IV. Rule against Perpetuities

RPC, LPC, and Louise P. Parsons argue the referee erred by ruling the right of first refusal in the 1971 Covenants[5] was void and unenforceable as violative of the rule against perpetuities (RAP).[6] They assert there is no justiciable controversy surrounding the right of first refusal provision because Peoples has not received a bona fide offer to purchase its property. We agree.

"A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy." Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct.App.1998). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial

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[5] The Covenants provide:

> Prior to acceptance of any offer for the purchase of any property (including improvements, if any) the owner thereof shall first offer said property for sale to the Corporation for the same price at which the higher bona fide offer has been made for such property, and the said Corporation shall have thirty (30) days within which to exercise its option to purchase said property at such price; should the Corporation fail or refuse, within thirty (30) days after receipt of written notice of the price and terms of the offer, to exercise its option to purchase said property, then the owner thereof shall have the right to sell said property subject, however, to all covenants, restrictions and limitations contained therein.

[6] RAP provides: "A non-vested property interest is invalid unless: (1) when the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual then alive . . . ." S.C. Code Ann. § 27-6-20 (1991).

determination, as distinguished from a contingent, hypothetical or abstract dispute." Pee Dee Elec. Coop. Inc., v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). A declaratory judgment action must involve an actual, justiciable controversy. Southern Bank & Trust Co. v. Harrison Sales Co., 285 S.C. 50, 328 S.E.2d 66 (1985).

In Webb v. Reames, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997), the Court of Appeals held a case or controversy regarding the validity of a pre-emptive right does not accrue until the right has been asserted. We concur with this ruling. Absent a pending sale or offer for sale, or purchase or offer to purchase, or the presence of a third party challenging right of first refusal, there is no justiciable controversy. See Parker v. Weed, 713 P.2d 535 (Mont. 1986).

Because Peoples does not have a pending offer for the purchase of its property, there is currently no justiciable controversy concerning the validity of the preemptive right provision in the Covenants. Accordingly, the referee erred by ruling on the enforceability of the right of first refusal provision. But see Webb v. Reames, supra (where preemptive right might not vest within a life in being at the time of creation of right or until later than 21 years thereafter, interest violates RAP and is, therefore, void); see also Estate of Johnson v. Carr, 691 S.W.2d 161 (Ark. 1985) (where preemptive right is of unlimited duration, the provision is considered void as violative of RAP); Atchison v. City of Englewood, 463 P.2d 297 (Colo. 1969) (same); Peele v. Wilson County Bd. of Ed., 289 S.E.2d 890 (N.C. App. 1982) (same).

V. Acquisition of Developers' Rights

Peoples asserts the referee erred by ruling it did not acquire RPC's and LPC's developers' rights through succession. Peoples relies principally upon Bd. of Managers of Medinah on the Lake Homeowners Ass'n v. Bank of Ravenswood, 692 N.E.2d 402 (Ill. App. 1998), as support for its assertion that, by acquiring the undeveloped property through foreclosure, it became the developer as a successor to RPC or LPC.

"'[S]uccessor' is a term of art.' It may mean . . . succeeding to a place, or a right, or an interest or a power, official, or otherwise. . . The word

'successor' has a twofold meaning: It may be used in the sense of one entitled to succeed as well as in the sense of one who has in fact succeeded." Battery Homeowners Ass'n v. Lincoln Financial Resources, Inc., 309 S.C. 247, 250, 422 S.E.2d 93, 95 (1992) (internal citations omitted) (holding where declaratory covenants permitted named homeowners association "and it successors" to charge regime fee, newly-established property owners' association was properly considered successor entitled to charge regime fee).

In Bank of Ravenswood, id., A.P. Ross Enterprises (A.P. Ross), as beneficiary of a trust, proposed to develop a residential community with a certain number of units on each of three lots. A fourth lot was set aside for the community's common area. Heritage Bank held title to the lots as trustee and recorded restrictive covenants. The declaration defined "developer" as A.P. Ross "and its successors and assigns" and the "declarant" as Heritage Bank as trustee "and its successors and assigns."

To fund the development, Heritage Bank as trustee executed and delivered a note to Exchange Bank. A.P. Ross guaranteed the note and signed a collateral agreement assigning 100% beneficial interest in the Heritage Bank trust to Exchange Bank upon default. After developing one lot, Heritage Bank and A.P. Ross became insolvent and the property was purchased by Exchange Bank through a foreclosure proceeding. Ultimately, another purchaser, Ravenswood Bank, acquired the three undeveloped lots and held title as trustee.

The homeowners association filed suit against Ravenswood Bank to recover a portion of the operating expenses for maintenance of the common areas. Ravenswood Bank filed a third party complaint against the established condominium. The trial judge ruled Ravenswood Bank was not the declarant or the developer and, therefore, had no right to develop or erect any structure on the property.

The Illinois Appellate Court held a purchaser of real property through a foreclosure sale can develop property as a successor of a declarant. While noting developers' rights are generally personal in nature, the Illinois Appellate Court held the powers reserved by a developer "and its successors

and assigns" in restrictive covenants can, in appropriate circumstances, be exercised by the developer's successors. In making its decision, the court expressed concern that commercial lenders may limit the extension of credit or increase its costs if precluded from acquiring developers' rights upon default.

We find Bank of Ravenswood persuasive and conclude several factors presented by this case convince us that Peoples should be deemed a successor/co-developer of RPC/LPC. First, we recognize that in both the Covenants and 1988 Amendments, RPC and LPC specifically contemplated the possibility of successorship. See Covenants definition of LPC includes "its successors;" 1988 Amendments define "developer" as LPC, RPC "and their respective successors." Second, we note Peoples could not have reasonably anticipated the imposition of an extraordinarily large assessment, much less an initiation fee, four months after its purchase of the Plantation property through the foreclosure sale. Third, as demonstrated by RPC, LPC, and LPA's actions towards Peoples, we perceive a deep-seated animosity between the parties which may affect Peoples' ability to develop or otherwise dispose of its Plantation property. Fourth, like the Bank of Ravenswood court, we are concerned that commercial lenders may hesitate to provide loans at beneficial rates if they are precluded from acquiring developers' rights when the defaulting party acts less than honestly. Accordingly, under the unusual circumstances presented, we find Peoples acquired the position of co-developer through its purchase of the thirty acres at the foreclosure proceeding.[7]

CONCLUSION

In conclusion, the referee's order is affirmed in part and reversed in part and this matter is hereby remanded to the referee to modify the damages award to reflect the rulings in this opinion. Finally, we note that as

[7] Because Peoples is a co-developer with RPC/LPC, and, therefore, entitled to the developer's exemption from the homeowners' assessment, RPC/LPC and LPA are not entitled to costs and attorneys' fees incurred by their efforts to enforce payment of the homeowners' assessment.

co-developers, RPC/LPC and Peoples are required to abide by the 1971 Covenants, as amended. As co-developers, the parties must "develop and improve in accordance with an harmonious plan for the design and relative location [of single-family dwellings and/or condominium apartments], so as to create a community to be known as 'Litchfield Plantation' providing the greatest possible degree of beauty and amenity for all the property owners and inhabitants thereof."

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Henry Matthews, Petitioner,

v.

State of South Carolina, Respondent.

On Writ of Certiorari

Appeal from Charleston County
Edward B. Cottingham, Trial judge
A. Victor Rawl, Post-Conviction Judge

Opinion No. 25813
Submitted December 4, 2003 - Filed April 26, 2004

REVERSED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Henry Matthews (petitioner) asserts that the post-conviction relief (PCR) judge erred in dismissing his application for

PCR. We hold that the PCR judge erred in finding petitioner's trial counsel rendered effective assistance.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner pled guilty to armed robbery, attempted armed robbery, carjacking, and accessory after the fact to murder. He agreed to a thirty-year sentence for armed robbery, concurrent twenty-year sentences for attempted armed robbery, a concurrent twenty-year sentence for carjacking, and a concurrent fifteen-year sentence for accessory after the fact to murder. Petitioner did not appeal the decision.

Petitioner filed a PCR application, and the PCR judge denied relief but ordered the Department of Corrections to treat petitioner as though he had pled guilty but mentally ill (GBMI) pursuant to S.C. Code Ann. § 17-24-70 (Supp. 2002). Petitioner submits the following question for review:

> Did the PCR judge err in finding petitioner's trial counsel effective even though counsel failed to request a competency hearing to determine whether petitioner was competent to stand trial?

LAW/ANALYSIS

Petitioner asserts his trial counsel was ineffective in failing to raise the issue of his fitness to stand trial. He contends that the PCR judge erred in denying PCR relief and, at the same time, ruling that petitioner should be treated as having pled GBMI. We find that petitioner's trial counsel was ineffective in failing to make a motion for a *Blair*[1] hearing given the evidence of petitioner's incompetency.

Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea. *Jeter v. State*, 308 S.C. 230, 232, 417 S.E.2d 594, 595-596 (1992) (citations omitted).

[1] *State v. Blair*, 275 S.C. 529, 243 S.E.2d 536 (1981).

In a PCR action, the petitioner must prove by a preponderance of the evidence that he was incompetent when he entered his guilty plea. *Id.* at 232, 417 S.E.2d at 596; Rule 71.1(e), SCRCP.

In order to find that petitioner's trial counsel was ineffective for refusing to request a *Blair* hearing on petitioner's competency to stand trial, petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 55, 80 L. Ed. 2d 674 (1984); *Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992).

In *Jeter*, this Court proclaimed that in proving *Strickland* prejudice within the context of counsel's failure to fully investigate the petitioner's mental capacity, "the [petitioner] need only show a 'reasonable probability' that he was either insane at the time [the crime was committed] or incompetent at the time of the plea." *Jeter*, 308 S.C. at 233, 417 S.E.2d at 596.

During the PCR hearing, petitioner's mother testified that petitioner had learning disabilities, took special education classes, and was "slower than other children."[2] In addition, petitioner's mother testified that petitioner was in a near-fatal auto accident one year before the crimes were committed.[3] As a result of the accident, petitioner had surgery on his neck and his head, as well as a tracheotomy to keep him breathing.

Dr. John Cusack (Cusack), a psychiatrist, testified about his five evaluations of petitioner prior to the PCR hearing. He testified that petitioner's pre-accident condition was "at best below the realm of average and possibly mild retardation." Petitioner's auto accident caused him to

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[2] At the trial stage, petitioner's trial counsel informed the court that petitioner has an I.Q. of 60, which registers as "mildly retarded."

[3] Petitioner's mother testified that she told petitioner's trial counsel about the accident, but trial counsel testified that he was unaware of the auto accident.

suffer from anoxia, which causes cerebral damage resulting from the lack of oxygen. Cusack described petitioner's post-accident mental condition as "someone with severe frontal lobe brain damage, which are the cognitive areas" and concluded that petitioner was incompetent and could not participate in his own defense.

In describing petitioner's mental condition, Cusack referred to petitioner's quick, nonsensical responses to questions. When Cusack asked petitioner where he was, he gave the quick, basic response of "here." When asked if he was in a prison, cafeteria, or zoo, petitioner responded, "zoo." When asked what his name was, petitioner responded, "me."

Through the testimony of Cusack mentioned above, petitioner clearly established by a preponderance of the evidence that he was incompetent at the time he entered his guilty plea. Consequently, petitioner's trial counsel was deficient for failing to request a *Blair* hearing so that the court could examine petitioner's fitness to stand trial.

We find that trial counsel's failure to request a *Blair* hearing prejudiced petitioner under the *Jeter* standard because there was, at minimum, a "reasonable probability" that petitioner was incompetent at the time of his guilty plea.

Therefore, the PCR judge erred in finding that petitioner's trial counsel rendered effective assistance.

CONCLUSION

Since petitioner's trial counsel rendered ineffective assistance in failing to explore petitioner's incompetence, petitioner's guilty plea is vacated, and petitioner is granted a new trial.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

STATE OF SOUTH CAROLINA
In The Court of Appeals

Home Port Rentals, Inc., Appellant,

v.

Roger Moore, Respondent.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 3779
Heard December 10, 2003 – Filed April 19, 2004

AFFIRMED

M. Dawes Cooke, Jr., and Phillip S. Ferderigos, both of Charleston, for Appellant.

Thomas W. Bunch, II, and L. Jefferson Davis, IV, both of Columbia, for Respondent.

KITTREDGE, J.: Home Port Rentals, Inc. brought this declaratory judgment action in July 2000 against Roger Moore, seeking to determine the enforceability of a March 20, 1989 judgment. The circuit court granted Moore's motion for summary judgment, finding the judgment was more than ten years old and no longer enforceable. We affirm and hold that the ten-year enforcement period for execution on judgments as provided in

S.C. Code Ann. § 15-39-30 (Supp. 2003), once commenced, is absolute and not subject to tolling. Such a judgment is "utterly extinguished" ten years from the date of its entry.

FACTS

Home Port obtained a judgment against Moore on March 20, 1989, in the United States District Court of South Carolina. During portions of the ten-year period following entry of the March 20, 1989 judgment, Home Port undertook efforts to locate Moore. These sporadic efforts were unsuccessful until Moore was located in Bossier City, Louisiana, in January of 1999. Home Port then filed an action on March 17, 1999 to register the judgment in the United States District Court for the Western District of Louisiana. Home Port filed the present declaratory action in the circuit court on July 14, 2000, seeking a determination of its ability to enforce the judgment in South Carolina after the expiration of the ten-year statutory enforcement period. Moore answered, asserting the judgment was no longer valid as the ten-year enforcement period had expired.

The parties filed cross-motions for summary judgment, claiming the only issue for the court to decide was whether the ten-year enforcement period was tolled while Moore was absent from South Carolina. The circuit court granted Moore's motion for summary judgment, finding the ten-year time for enforcement was absolute and not tolled during the period of Moore's absence from South Carolina.

LAW/ANALYSIS

Home Port asserts the circuit court erred in granting summary judgment to Moore. Home Port argues that while S.C. Code Ann. § 15-39-30 places a ten-year statute of limitations on the execution of a judgment, S.C. Code Ann. § 15-3-30 (Supp. 2003) should operate to toll the expiration of the enforcement period. We disagree and find summary judgment was warranted as the judgment was extinguished ten years from March 20, 1989, the date of its entry.

We begin our analysis with the March 20, 1989 judgment that Home Port obtained against Moore in the United States District Court for the District of South Carolina. South Carolina has adopted the Uniform Enforcement of Foreign Judgments Act (UEFJA), which is codified at S.C. Code Ann. § 15-35-900 et seq. (1976). Pursuant to section 15-35-910(1), a "'[f]oreign [j]udgment' means a judgment, decree, or order of a court of the United States . . . which is entitled to full faith and credit . . . ." The 1989 federal court judgment is a "foreign judgment." UEFJA is consistent with the federal statute governing enforcement of judgments rendered in federal courts. 28 U.S.C.A. § 1962 provides in part:

> Every judgment rendered by a district court within a State shall be a lien on the property located in such State *in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time.*

(emphasis added).

Federal law thus incorporates the law of the applicable State in determining the effective date of the judgment lien, as well as its expiration. In this regard, Home Port acknowledges that a "judgment creditor . . . [has] ten years from entry of a 'foreign judgment' of a United States District Court of South Carolina to enroll such judgment in a South Carolina county . . . . Thus, the judgment in question is in practical effect a South Carolina judgment, even though it is, paradoxically, a 'foreign judgment' under UEFJA." In essence, as mandated by federal law, the judgment rendered in the United States District Court for the District of South Carolina on March 20, 1989 became a South Carolina judgment for enforcement purposes on the same date. We must therefore resort to South Carolina law, section 15-39-30 of the South Carolina Code (Supp. 2003), to determine the extent, if any, of Home Port's continuing right to execute on this judgment in South Carolina.[1]

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[1] The judgment has been registered in the United States District Court for the Western District of Louisiana. Moore unsuccessfully challenged the entry and enforceability of the judgment in that court, including an appeal to the United States

"A judgment represents a judicial declaration that a judgment debtor is personally indebted to a judgment creditor for a sum of money." Wells v. Sutton, 299 S.C. 19, 22, 382 S.E.2d 14, 16 (Ct. App. 1989) (citing Ducker v. Standard Supply Co., Inc., 280 S.C. 157, 311 S.E.2d 728 (1984)). Pursuant to section 15-39-30:

> Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions.

The South Carolina Supreme Court has concluded that a judgment is "utterly extinguish[ed] . . . after the expiration of ten years from the date of entry." Hardee v. Lynch, 212 S.C. 6, 17, 46 S.E.2d 179, 183 (1948); see also Garrison v. Owens, 258 S.C. 442, 446-47, 189 S.E.2d 31, 33 (1972) (stating that "[a] judgment lien is purely statutory[;] its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by the statute, if such time expires before the action is tried.").

In Wells, 299 S.C. at 22, 382 S.E.2d at 16, this court stated:

Court of Appeals for the Fifth Circuit. Home Port Rentals, Inc. v. The Int'l Yachting Group, Inc., 252 F.3d 399 (5th Cir. 2001). For purposes of the case before us, we note the parties' position in the Louisiana litigation. Specifically, Home Port filed the enforcement action in the United States District Court for the Western District of Louisiana on March 17, 1999, "three days shy of the [judgment's] tenth anniversary." Id. at 402. The federal appeals court recognized that on March 17, 1999, the judgment was still "live" under South Carolina law. Id. at 403. This finding is consistent with the applicability of section 15-39-30 to the judgment rendered in the federal district court in South Carolina. Our application of the ten-year enforcement period in section 15-39-30 to this foreign judgment reflects the interplay between UEFJA, 28 U.S.C.A. § 1962 and applicable State law.

> Executions may be issued within ten years from the date of the original entry of the judgment. "The execution is [the] only process to enforce the judgment, and it cannot have active energy unless the underlying judgment has a lien." The South Carolina Supreme Court has indicated a judgment is utterly extinguished after the expiration of ten years from the date of entry.

(citations omitted). In its conclusion, this court held:

> [T]his court emphasizes it does not condone efforts by judgment debtors to secrete assets to avoid payment of judgments . . . . The reason for our holding is simply our recognition of the public policy of this State as expressed in the statutes to limit the life of judgments to ten years. A judgment creditor should recognize this policy and proceed expeditiously to conclude his efforts to collect his judgment within the ten year period.

Id.

Home Port contends the enforcement period should be tolled at some undefined point prior to its expiration while Moore was absent from South Carolina. According to Home Port, section 15-3-30 provides for tolling here. Specifically, section 15-3-30 provides as follows:

> If when a cause of action shall accrue against any person he shall be out of the State, such action may be commenced within the terms in this chapter respectively limited after the return of such person into this State. And if, after such cause of action shall have accrued, such person shall depart from and reside out of this State or remain continuously absent therefrom for the space of one year or more, the time

> of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

Home Port cites Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 512 S.E.2d 123 (Ct. App. 1999), arguing it establishes that the ten-year enforcement period may be interrupted and tolled if a party can demonstrate that the judgment debtor was out of the state and unavailable. We reject Home Port's reading of Commercial Credit. Commercial Credit obtained a default judgment in Illinois on May 27, 1986 and subsequently brought an action in South Carolina to domesticate the foreign judgment. The judgment was enrolled in the Book of Abstracts for Newberry County on February 21, 1989. The dispute in Commercial Credit focused on determining the commencement date of the enforcement period in South Carolina in accordance with section 15-39-30. In the trial court, the special referee found the commencement of the South Carolina enforcement period related back to the date of entry of the judgment in Illinois, a position which this court rejected:

> Our state courts have held that a judgment is extinguished ten years from the date of entry. The institution of an action to domesticate a foreign judgment specifically contemplates that a South Carolina judgment will be issued by a South Carolina court. At that point, pursuant to section 15-35-810, this South Carolina judgment may then be abstracted and indexed so as to constitute a lien upon the debtor's real property for a period of ten years. It logically follows that section 15-39-30 also deals with the date of original entry of the South Carolina judgment which may then be executed upon for a period of ten years. In the context of this case, the Illinois judgment was transmuted into a South Carolina judgment when it was domesticated and the judgment duly enrolled on February 21, 1989. Thus, both the ten year lien period on real estate, and the

> ten year period for enforcement of the judgment began on that date.

Id. at 181-82, 512 S.E.2d at 126. (citations and footnote omitted).

Here, pursuant to the mandate of 28 U.S.C.A. § 1962, the commencement of the ten-year enforcement period in South Carolina is indisputably March 20, 1989. Moreover, contrary to Home Port's assertion, Commercial Credit does not hold that the enforcement period under section 15-39-30 may be tolled after it begins. Indeed, Commercial Credit recognizes "the policy of this state to limit the life of a judgment to ten years" and further asserts the ten-year "enforcement period cannot be tolled." Id. at 185, 183, 512 S.E.2d at 128, 127. [2]

Home Port additionally cites a number of cases which allow the tolling of a statute of limitations under a variety of circumstances involving the application of the discovery rule[3] to a potential cause of action, but none applies the discovery rule to delay or interrupt the running of the ten-year enforcement period in section 15-39-30 after entry of the judgment in South Carolina. The public policy in favor of extinguishment as set forth in Wells is much stronger than a policy allowing the tolling of the enforcement period once it commences. The burden lies with the judgment creditor to know the policy of South Carolina and to ensure collection on the judgment. Wells,

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[2] Commercial Credit was decided prior to South Carolina's adoption of UEFJA. UEFJA, however, does not alter the court's analysis or result in Commercial Credit. Since Home Port's underlying foreign judgment originated in a federal district court in South Carolina, 28 U.S.C.A. § 1962 requires a finding that the South Carolina enforcement period began on March 20, 1989, the date the federal court judgment was rendered in South Carolina. As Home Port candidly acknowledges, its federal court judgment "is in practical effect a South Carolina judgment."[3] Under the discovery rule, "the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct." True v. Monteith, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997).

299 S.C. at 22, 382 S.E.2d at 16. The application of the discovery rule to "causes of action" prejudgment simply does not have the same efficacy postjudgment after the section 15-39-30 statutory enforcement period has commenced.[4]

CONCLUSION

We find, as many courts of this State before us, that a judgment is "utterly extinguished" ten years from the date of its entry and the ten-year enforcement period cannot be tolled. See, e.g., Garrison, 258 S.C. at 446-47, 189 S.E.2d at 33. Such a holding honors the clear legislative intent in section 15-39-30 precluding "any renewal" beyond the ten-year period of "active energy." Accordingly, since Home Port's judgment was extinguished in South Carolina on March 20, 1999, the judgment of the circuit court is

AFFIRMED.

HEARN, C.J., and HOWARD, J. concur.

[4] Home Port submitted an affidavit detailing various attempts to locate Moore. Close scrutiny of this affidavit reveals that Home Port made little or no effort to locate Moore from 1993 through 1998. In light of our holding that tolling is not available to extend the ten-year enforcement period, we need not determine the nature of Home Port's diligence throughout the ten-year period.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas E. Pope, as Solicitor,
Sixteenth Judicial Circuit, Appellant,

v.

Willie Edward Gordon, Jr., and Twenty-Five Thousand Three Hundred Forty-One and 09/100's (25,341.09) Dollars in U.S. Currency; One 1984 GMC Pickup Truck; Two Motorola Cellular Phones (Serial Numbers; SUF1857M and SUG1049B230L012QT16WF1); and One Hundred Twenty-Eight & no/100s (128.00) Dollars in U.S. Currency, Respondent.

Appeal From York County
John Buford Grier, Special Circuit Court Judge

Opinion No. 3780
Submitted March 11, 2004 – Filed April 19, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Kristie Hannah Jordan, of York, for Appellant.

Leland Bland Greeley, of Rock Hill, for Respondent.

CURETON, A.J.: The State brought this civil forfeiture action pursuant to section 44-53-520(a) of the South Carolina Code of Laws.[1] The

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[1] This statute provides in pertinent part:

> (a) The following are subject to forfeiture:
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> . . .
>
> (4) All property, both real and personal, which in any manner is knowingly used to facilitate production, manufacturing, distribution, sale, importation, exportation, or trafficking in various controlled substances as defined in this article;
>
> . . .
>
> (6) all conveyances including . . . motor vehicles . . . which are used or intended for use unlawfully to conceal, contain, or transport or facilitate the unlawful concealment, possession, containment, . . . or transportation of controlled substances . . . except as otherwise provided, must be forfeited to the State. No motor vehicle may be forfeited to the State under this item unless it is used, intended for use, or in any manner facilitates a violation of Section 44-53-370(a), involving at least . . . more than ten grains of crack . . ..
>
> (7) all property including, but not limited to, monies . . . or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, and all proceeds including, but not limited to, monies, and real and personal property traceable to any exchange;
>
> (8) all monies seized in close proximity to forfeitable controlled substances . . . or in close proximity to forfeitable

State appeals the circuit court's order returning property to Willie Edward Gordon, Jr. ("Gordon"). We affirm in part, reverse in part, and remand.[2]

FACTS

This forfeiture action arose from the arrest of Gordon in September of 1996 for trafficking in crack cocaine. At the time of his arrest, Gordon was the owner of Gordon's Car Cleaning Service, an unincorporated business whose principal venture was the cleaning and detailing of automobiles for car dealerships and individuals.

Precipitating Gordon's 1996 arrest was an investigation by agents with the Rock Hill Police Department ("Department"). In the early part of 1994, agents received information from confidential informants that Gordon was involved in selling crack cocaine. Acting on its suspicions, the Department conducted a controlled buy of illegal drugs from Gordon on January 27, 1994. As a result, the Department obtained a search warrant on February 3, 1994, for Gordon's home and recovered crack cocaine and marijuana. While

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> records of the . . . distribution of controlled substances and all monies seized at the time of arrest or search involving violation of this article. If the person from whom the monies were taken can establish to the satisfaction of a court of competent jurisdiction that the monies seized are not products of illegal acts, the monies must be returned pursuant to court order.

S.C. Code Ann. § 44-53-520 (a) (2002 & Supp. 2003). Although we note this case arose in 1996, we cite to the most current version of the statute. Subsection (a)(6) of section 44-53-520 was amended effective May 20, 2002. The change, however, does not affect the merits of this appeal.

[2] This case was originally argued before a panel of this Court consisting of Judge Goolsby, Judge Connor, and Judge Anderson. Due to the untimely passing of Judge Connor, Judge Cureton was substituted as a member of the panel. Rather than re-argue the case, the parties agreed to submit the case to the new panel based on the record and their briefs.

conducting an additional search on February 12, 1994, officers recovered crack cocaine in a well house near Gordon's residence. Gordon pleaded guilty to possession of marijuana for the incident that occurred on February 3, 1994.

In September of 1996, the Department began another investigation of Gordon following the arrest of a low-level crack dealer who identified Gordon as her supplier. She also identified another dealer, Tommy Rhinehart ("Rhinehart"). On September 23, 1996, Rhinehart agreed to cooperate with the Department after agents executed a search warrant at his residence during which they recovered two bags of crack cocaine, each containing approximately 10 grams, and a pill bottle containing 1.8 grams. Rhinehart informed the agents that Gordon had given him the drugs just prior to the search. According to Rhinehart, he retrieved the drugs from the door of Gordon's pickup truck where Gordon indicated he had hidden them.

The next day, Rhinehart met with Gordon to discuss future transactions. During the course of the conversation, Rhinehart told Gordon that he had "flushed" the crack cocaine during the Department's search of his residence. On September 26, 1996, Gordon and his nephew, Spencer, gave Rhinehart another bag of crack cocaine. Spencer stayed with Rhinehart while he sold some of the crack cocaine. On September 27, 1996, Rhinehart met with agents and turned over the proceeds from the sale and the remaining crack cocaine. At that time, the agents gave Rhinehart $500 in marked money to pay Gordon for the crack cocaine that he had "fronted" him. In a recorded conversation, Rhinehart set up another transaction with Gordon. Gordon indicated that he needed to contact Spencer. Rhinehart was then instructed to meet Spencer at Gordon's car wash. At the car wash, Spencer gave Rhinehart two bags of crack cocaine, weighing 9.4 grams and 9.8 grams respectively, and collected $500 for a previous transaction. Rhinehart then left, met with the agents, and turned over the crack cocaine.

On September 30, 1996, Rhinehart paged Gordon to arrange a meeting time so that he could pay for the two additional bags of crack cocaine. The agents gave Rhinehart $1,000 in marked money and equipped him with a surveillance wire. Rhinehart met with Spencer at a designated location. He then gave Spencer the money received from the sale of the crack cocaine that

was purchased earlier from Gordon. Spencer left and told Rhinehart he would return with more crack cocaine. Spencer met Gordon, who was driving the pickup truck, at the car wash. Spencer left the car wash, drove to NationsBank, and made a deposit. Shortly thereafter, agents arrested Spencer and searched him. The agents found a bank deposit receipt for account number 790167308, the business account for Gordon's car wash. The balance of the account was $22,209.85, which included the deposit.

During the same time period, Gordon was arrested while driving his pickup truck. He was found to be in possession of two cellular phones as well as $1,584 in cash, $880 of which was law enforcement funds given to Spencer earlier by Rhinehart. Pursuant to this arrest, the State seized the following property: the NationsBank operating account of Gordon's car wash business, $22,209.85 plus $726.24 from the payroll account; the $1,584 in cash; the pickup truck; and two cellular phones.

The forfeiture action also included seizures of cash in the amount of $821 and $128. On September 29, 1996, agents seized $821 in cash from Gordon when he was arrested on unrelated warrants during the search of another person's residence. On October 5, 1996, Gordon was arrested for obstruction of justice. While Rhinehart was wearing a surveillance wire, Gordon offered him $5,000 to leave town and not testify against him. At the time of the arrest, the agents seized $128 in cash from Gordon.

Ultimately, Gordon was convicted of trafficking in crack cocaine and sentenced to thirty years imprisonment and payment of a $50,000 fine.

The State filed a civil action seeking to confirm the seizure and forfeiture of Gordon's property. During the hearing, the State offered Officers Chuck Grant and Rodney Pickel of the Rock Hill Police Department, as well as Rhinehart, as witnesses to the above-outlined investigation. The State also presented several witnesses who testified regarding Gordon's finances. In addition to this testimony, the State presented Gordon's voluminous NationsBank records into evidence.

Christine Rogers, an employee of a property management company, testified she became acquainted with Gordon in 1995 or 1996 when she rented him an apartment in Rock Hill. In 1996, Gordon entered into a commercial lease agreement for the purchase of property. The terms of the agreement required Gordon to provide a $6,000 down payment and then a $750 monthly lease payment. According to Rogers, Gordon paid cash for monthly rent for his apartment as well as the $6,000 down payment.

John Comer, a South Carolina Department of Revenue employee, testified the Department had no tax records for Gordon individually or for the car wash during the years of 1995 or 1996. Margaret Parsons, an accountant, began assisting Gordon with his finances beginning in May or June 1996. Based on her review of Gordon's finances, Parsons believed Gordon's expenses exceeded his business income and that the balance of the expenses was paid for in cash.

The circuit court ordered all of the seized property, with the exception of the $128 in cash, returned to Gordon. The court reasoned the State had failed to meet its "burden of initially showing probable cause of a nexus with illegal drug activity of all the property sought to be forfeited." The court excluded the $128, finding it was "marked money" that was seized during Gordon's first arrest.

The State filed a motion for reconsideration. After a hearing, the court denied this motion. The State appeals.

STANDARD OF REVIEW

"An action for forfeiture of property is a civil action at law." City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck (VIN # JM2UF1132N0294812), 330 S.C. 371, 373, 498 S.E.2d 894, 895 (Ct. App. 1998). In a non-jury action at law, the trial judge's findings of fact have the same force and effect as a jury verdict unless he or she committed some error of law leading to an erroneous conclusion or unless the evidence is reasonably susceptible of the opposite conclusion only. Hiott v. Guar. Nat'l Ins. Co., 329 S.C. 522, 528-29, 496 S.E.2d 417, 421 (Ct. App. 1997); see

Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) ("In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings.").

DISCUSSION

I.

A.

The State argues the circuit court erred in returning the seized money to Gordon. Specifically, the State contends the court committed an error of law by requiring the State to "directly trace the seized money to a specific drug transaction." The State believes, in light of the totality of the circumstances, it met its burden to establish probable cause that the NationsBank accounts were used in furtherance of Gordon's drug trafficking.[3]

Based on our review of the court's order, we believe the court properly considered the requirements of the forfeiture statute. In its order, the court found "for moneys taken, the State must present evidence that the money is traceable to an exchange involving controlled substances. The State presented no evidence whatsoever that the moneys in the account were from drug transactions." This holding is precisely what section 44-53-520(a)(7) requires for a forfeiture of monies.

Section 44-53-520(a)(7) provides:

> all property including, but not limited to, monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange

[3] With respect to this issue, we note the State's brief is primarily devoted to an argument concerning the NationsBank accounts. As such, our analysis is confined to this particular item of property. To the extent the State appears to challenge the return of the cash seized from Gordon's person, we will discuss that issue separately. Additionally, it does not appear the State is appealing the two cellular phones given they were of negligible value.

> for a controlled substance, and all proceeds including, but not limited to, monies, and real and personal property **traceable to any [illegal drug] exchange**.

S.C. Code Ann. § 44-53-520(a)(7) (2002) (emphasis added). In order to analyze this case, we are faced with determining the exactness required to prove whether the bank accounts are "traceable to any exchange." Thus, we must employ the rules of statutory construction.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." City of Sumter Police Dep't, 330 S.C. at 375, 498 S.E.2d at 896. If a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

An action for forfeiture is a civil in rem action at law that is, by its nature, a penal action that must be strictly construed. See Ducworth v. Neely, 319 S.C. 158, 162, 459 S.E.2d 896, 899 (Ct. App. 1995) (strictly construing the term "knowledge" to mean "actual knowledge"). Furthermore, "in rem forfeiture statutes must be interpreted in light of the evil sought to be remedied and in a manner that is consistent with the statute's purpose." Id. at 163, 459 S.E.2d at 899. Accordingly, we must apply a strict definition of the disputed text of the statute which best fulfills the law's purpose to remedy a particular evil.

"The purpose of a forfeiture hearing is to confirm that the state had probable cause to seize the property forfeited." Medlock v. One 1985 Jeep Cherokee VIN 1JCWB782FT129001, 322 S.C. 127, 131, 470 S.E.2d 373, 376 (1996). The State has the "initial burden of demonstrating 'probable cause for the belief that a substantial connection exists between the property

to be forfeited and the criminal activity defined by statute.'" United States v. Thomas, 913 F.2d 1111, 1114 (4th Cir. 1990)(quoting Boas v. Smith, 786 F.2d 605, 609 (4th Cir. 1986)). "If probable cause is shown, the burden then shifts to the owner to prove that he or she 'was not a consenting party to, or privy to, or did not have knowledge of, the use of the property which made it subject to seizure and forfeiture.'" Medlock, 322 S.C. at 131, 470 S.E.2d at 376 (quoting S.C. Code Ann. § 44-53-586(b)(1) (Supp. 1994)). "Section 44-53-586(b) specifically places the burden of proof on the property owner to show innocent ownership by a preponderance of the evidence, showing legislative intent to place the burden of proving innocence on the property owner." Id.

"'Probable cause' for the purpose of forfeiture proceedings is the same standard used in search and seizure cases." Thomas, 913 F.2d at 1114. A determination of probable cause requires the magistrate to analyze the totality of the circumstances, which means his task is to "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." State v. Weston, 329 S.C. 287, 290-91, 494 S.E.2d 801, 802-03 (1997) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)); State v. Martin, 347 S.C. 522, 527, 556 S.E.2d 706, 709 (Ct. App. 2001) ("A 'totality of the circumstances' test is applicable in determining whether sufficient probable cause exists to issue a search warrant.").

Because our research reveals no South Carolina case that is directly on point, we agree with the State that federal law is instructive in deciding this case. In other forfeiture cases, our Supreme Court and this Court have consistently turned to the guidance of the federal courts, particularly decisions of the Fourth Circuit. See, e.g., Medlock, 322 S.C. at 132, 470 S.E.2d at 377 (adopting "excessive fine test" set forth by Fourth Circuit Court of Appeals in United States v. Chandler, 36 F.3d 358 (4th Cir. 1994), cert. denied, 514 U.S. 1082 (1995)); Condon v. One 1985 BMW, 4 Door, VIN # WBAAE6403F0704170, 312 S.C. 431, 432, 440 S.E.2d 895, 896 (Ct. App. 1994)(applying Fourth Circuit cases to determine whether seized vehicle

facilitated the unlawful transportation of controlled substances under sections 44-53-520(a)(4), (a)(6)).

We are persuaded to consider United States v. Thomas, 913 F.2d 1111 (4th Cir. 1990), a case where the Fourth Circuit Court of Appeals interpreted a federal statute that is similar to our state forfeiture statute.[4] The defendant in Thomas became the subject of a federal government drug investigation. In the course of the investigation, the officers conducted undercover drug buys at the defendant's business in Georgetown, South Carolina. Government officers also discovered Thomas had significant cash expenditures and had "unusual travel habits," which included numerous one-way airline tickets from Charleston, South Carolina to Miami, Florida. Ultimately, the investigation was concluded when the Immigration and Naturalization Service arrested Thomas for being an illegal alien. Subsequently, the federal government seized certain real and personal property that belonged to Thomas. After a forfeiture hearing, the district court ordered the return of the property to Thomas, finding the government had not shown probable cause for its belief that there was a substantial connection between the property to be forfeited and the illegal drug-related activities.

On appeal, the Fourth Circuit Court of Appeals reversed the district court, holding the totality of the facts demonstrated probable cause. Id. at 1117. The Court believed the district court took "too stringent a view of the legal standard involved in establishing probable cause and too dismissive a

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[4] The federal statute, 21 U.S.C.A. § 881(a)(6) (1999 & Supp. 2003), provides in relevant part:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . .
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance . . ., [and] all proceeds traceable to such an exchange . . ..

view of its own factual findings." Id. at 1115. The Court characterized the district court's analysis as "[p]arsing evidence in isolation for a fatal flaw" which would defeat a finding of probable cause. In reaching this conclusion, the Court noted that "'[c]ircumstantial evidence of drug transactions is sufficient to support the establishment of probable cause in a forfeiture proceeding,' without showing a 'direct connection between the property subject to seizure and the illegal activity that renders the items forfeitable.'" Id. at 1117 (quoting United States v. Edwards, 885 F.2d 377, 390 (7th Cir. 1989) and United States v. $93,685.61 in United States Currency, 730 F.2d 571, 572 (9th Cir. 1984))(citations omitted). As the factual basis for its decision, the Court emphasized that Thomas: had a criminal record involving drug activity; possessed unusually large amounts of cash; made significant cash expenditures which vastly exceeded his legitimate income; engaged in drug transactions at his business; and had unusual travel patterns. Additionally, informants stated that Thomas had used the proceeds of illegal drug dealing to purchase the properties sought to be forfeited.

With these principles in mind, we turn to the instant case. Although we disagree with the State's assessment that Thomas is dispositive based on a comparison of the facts of the two cases, we believe Thomas is instructive as to the "method of evidentiary assessment" regarding the establishment of probable cause for forfeiture. Id. at 1117. Here, the court properly weighed the evidence. It considered the totality of the circumstances and did not require the State to trace the money seized from the bank accounts to a particular drug transaction. In light of our standard of review, we cannot say the court's holding that the State failed to establish probable cause regarding the bank accounts is without support in the record or that the evidence is "reasonably susceptible of the opposite conclusion only." Hiott, 329 S.C. at 529, 496 S.E.2d at 421.

Even though there is evidence that Gordon was involved in illegal drug transactions and had significant cash expenditures, this evidence did not rise above "mere suspicion" that the bank proceeds were subject to forfeiture. See United States v. All Right, Title and Interest in Real Property and Appurtenances Thereto Known as 785 St. Nicholas Ave. and 789 St. Nicholas Ave., 983 F.2d 396, 403 (2d Cir. 1993) ("To establish probable

cause neither the real property nor bank proceeds need to be linked to any one particular transaction, but the government must establish 'reasonable grounds'--that is to say, rising above 'mere suspicion'--that the property is subject to forfeiture.")(citations omitted). There was extensive documentary evidence that the bank accounts contained legitimate business income as evidenced by checks from Rock Hill car dealerships. It is also unclear whether the deposit ticket the State seized was evidence that Spencer deposited "drug money" or money from Gordon's car wash. Furthermore, the State failed to show the withdrawals from the bank accounts were used to pay for items in cash as opposed to Gordon paying for these items directly from money gained from the sale of drugs. Finally, the testimony of Gordon's accountant did not establish that Gordon was "washing" large amounts of undocumented money through the bank accounts. Therefore, we agree with the circuit court that the State failed to establish probable cause that the money in the bank accounts contained proceeds traceable to illegal drug transactions. Accordingly, we affirm the court's decision with respect to the NationsBank accounts.

B.

Broadly construing the State's argument, it appears the State is appealing the entire $25,341.09 amount that was seized, which included the NationsBank accounts as well as two cash amounts seized from Gordon's person. These amounts include the $821 seized from Gordon on September 29, 1996, when he was arrested on unrelated warrants. The second amount was seized from Gordon the following day when he was arrested while driving his pickup truck. At the time of the arrest, Gordon was found to be in possession of $1,584 in cash, $880 of which was law enforcement funds used in the undercover drug transactions.

The State, however, did not address this specific argument in its brief. Although the State discusses the "monies seized" from Gordon, its entire argument is devoted to the bank accounts. Therefore, we find this issue not

properly preserved for our review.[5] See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating issues not argued in the brief are deemed abandoned and will not be considered on appeal).

Because, however, Gordon admits in his brief that there was an amount of "marked cash" seized from Gordon, we hold the State is entitled to the $880 of law enforcement funds. See S.C. Code Ann. § 44-53-582 (2002) ("All monies used by law enforcement officers or agents, in the line of duty, to purchase controlled substances during a criminal investigation must be returned to the State or local agency or unit of government furnishing the monies upon a determination by the court that the monies were used by law enforcement officers or agents, in the line of duty, to purchase controlled substances during a criminal investigation.").[6]

II.

The State asserts the circuit court incorrectly incorporated the excessive fines test into the probable cause determination.

In Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001, 322 S.C. 127, 132, 470 S.E.2d 373, 377 (1996), our Supreme Court discussed the application of the Excessive Fines Clause[7] to civil forfeiture cases. In Medlock, the Court adopted the Fourth Circuit Court of Appeals' three-part

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[5] Although we note the court's order contains several factual errors concerning at what point in the investigation the cash was seized from Gordon's person, this does not affect our analysis.

[6] Additionally, even if properly preserved, we find the evidence supports the court's decision to return the $821 to Gordon. Because this money was seized from Gordon when he was arrested on warrants unrelated to the undercover investigation, it should not have been the subject of forfeiture.

[7] In Medlock, the Appellant argued the forfeiture of her Jeep constituted an excessive fine in violation of the Eighth Amendment of the United States Constitution and Article I, § 15 of the South Carolina Constitution. Medlock, 322 S.C. at 132, 470 S.E.2d at 377.

instrumentality test. "Under this test, a court must examine (1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder." Id. at 132, 470 S.E.2d at 377.

We agree with the State that the circuit court incorrectly referenced the excessive fines test. Although not specifically delineated as such in its order, the test was clearly a part of the court's analysis as shown by the listing of the three parts of the test. This constituted error. Because the court did not confirm the forfeiture of the NationsBank accounts, the excessive fines test was inapplicable. See Austin v. United States, 509 U.S. 602, 622 (1993) (holding forfeiture is subject to the Excessive Fines Clause if the forfeiture can be viewed as punitive).

The court's error in applying the test, however, does not negate its ruling. As previously discussed, the court properly considered the requirements of the forfeiture statute and the State's burden to establish probable cause for the forfeiture. In light of our decision affirming the court's ultimate holding that the State failed to carry its burden to confirm the forfeiture, we find the error was harmless. Cf. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (finding an error is harmless if it could not reasonably have affected the result of the trial); Wells v. Halyard, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000) ("An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict.").

III.

The State argues the circuit court erred in finding Gordon's pickup truck had not been used to facilitate the distribution or sale of crack cocaine.

Specifically, the State contends the truck was properly seized pursuant to section 44-53-520(a)(4) or 44-53-520(a)(6). See Condon, 312 S.C. at 432, 440 S.E.2d at 896 ("Property facilitates the sale of a controlled substance and becomes thereby subject to forfeiture under section 44-53-520(a)(4) or

section 44-53-520(a)(6), when, like under the Federal Civil Forfeiture Statute, 21 U.S.C. § 881(a)(4), there is a substantial connection between the property seized and the underlying drug related activity.").

In its order, the court denied the forfeiture of the pickup truck based on two grounds. First, the court found the State failed to establish probable cause given the evidence showed that the truck only served as "a location from where drugs were taken." Secondly, the court concluded "[t]he State presented no evidence as to the amount of crack cocaine involved."

We find the court erred on both points. On the first point, the court erred as matter of law. Based on the language of section 44-53-520(a)(6), the fact that the truck was used to conceal or contain the crack cocaine was sufficient to support forfeiture of the vehicle. See S.C. Code Ann. § 44-53-520(a)(6) (Supp. 2003) ("all conveyances including . . . motor vehicles . . . which are used or intended for use unlawfully to conceal, contain, or transport or facilitate the unlawful concealment, possession, containment, . . . or transportation of controlled substances . . . except as otherwise provided, must be forfeited to the State").

As to the second point, the State did offer evidence as to whether the amount of the crack cocaine that was concealed or contained within the truck exceeded the requisite statutory weight. Rhinehart testified that on September 23, 1996, the Department's agents executed a search warrant at his residence during which they recovered two bags of crack cocaine, each containing approximately 10 grams, and a pill bottle containing 1.8 grams. Rhinehart informed the agents that Gordon had given him the drugs just prior to the search. According to Rhinehart, he retrieved the drugs from the door of Gordon's pickup truck where Gordon indicated he had hidden them. See S.C. Code Ann. § 44-53-520(a)(6) (Supp. 2003) ("No motor vehicle may be forfeited to the State under this item unless it is used, intended for use, or in any manner facilitates a violation of Section 44-53-370(a), involving at least . . . more than ten grains of crack . . .").

Because our standard of review in forfeiture cases only permits this Court to reverse on errors of law, we may not make findings of fact. Thus,

we reverse on this issue and remand for the circuit court to reconsider the forfeiture of the pickup truck consistent with the findings of this opinion. If the court confirms the forfeiture, it must then determine whether the forfeiture constituted an excessive fine. See Medlock, 322 S.C. at 132, 470 S.E.2d at 377 (outlining three-part test to determine whether a forfeiture constitutes an excessive fine).

CONCLUSION

Based on the foregoing, we affirm the court's decision to return to Gordon the NationsBank accounts and a portion of the cash amounts. We reverse the court's decision regarding the pickup truck and remand for further proceedings consistent with this opinion. Finally, we order the return of $880 in law enforcement funds to the State.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GOOLSBY and ANDERSON, JJ., concur.