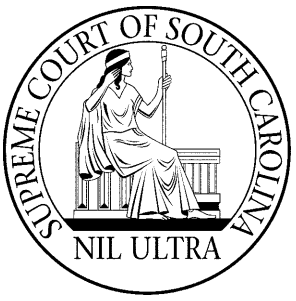

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

May 3, 2004

ADVANCE SHEET NO. 17

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Lee Nance, Petitioner,

v.

R. Dodge Frederick, Director,
South Carolina Department of
Corrections, Respondent.

ON WRIT OF CERTIORARI

Appeal from Florence County
John H. Waller, Jr., Trial Judge
Thomas J. Ervin, Post-Conviction Judge

Opinion No. 25814
Heard February 5, 2003 - Filed April 26, 2004

REVERSED

Teresa L. Norris, Maura McNally, William Norman Nettles, and South Carolina Office of Appellate Defense, all of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney

General William Edgar Salter, III, and Assistant Attorney General S. Creighton Waters, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Robert Lee Nance (Petitioner), sentenced to death for murder, appeals from the post-conviction relief (PCR) court's denial of his application for PCR. We hold that the manner in which Petitioner's trial counsel investigated, planned, and conducted his defense constitutes a classic example of a complete breakdown in the adversarial process. Therefore, we grant Petitioner a new trial.

FACTUAL / PROCEDURAL BACKGROUND

The victims, Robert and Violet Fraley, were attacked at home where they lived alone.[1] On the night of the intrusion, Mr. Fraley testified that he and his wife went to bed around 9:30 or 10:00 p.m. Mr. Fraley awoke to the sound of someone knocking on the front door of the house. Mr. Fraley testified that he saw a man standing on the porch, and that the man asked him if he could come in to use the phone because his truck had broken down. Mr. Fraley told him he could use the phone outside in his shop. When the man said he did not have a light to see his way to the shed, Mr. Fraley left the door to get him a flashlight. Mr. Fraley testified that when he unlatched the door to hand over the light, the man forced the door open and immediately began stabbing him with a screwdriver.

At some point, Mrs. Fraley entered the room and tried to help Mr. Fraley as he tried unsuccessfully to get away from the intruder. Mr. Fraley was bleeding profusely and his wife was trying to wipe up blood while the intruder was demanding money and the keys to their car. Mrs. Fraley retrieved both of their wallets and their keys and gave approximately $194 in cash and the keys to the intruder. Mr. Fraley testified that he pleaded with the intruder not to kill him and his wife, but that the intruder replied that he

[1] Mr. and Mrs. Fraley were 78 and 73 years old respectively at the time of the attack.

was going to kill both of them. The intruder then raped and killed Mrs. Fraley. Miraculously, Mr. Fraley survived the attack but was hospitalized for thirteen days.

Petitioner was arrested in the early morning hours following the attack after he was pulled over driving the Fraleys' Cadillac. There was blood on his clothes that was later determined to be Mrs. Fraley's. The car also contained a bank envelope that was taken from the Fraleys' home during the attack. Two people were in the car with Petitioner when he was stopped. One person fled the scene and was never apprehended. The other person, Erskine Green, testified at Petitioner's trial that he did not know Petitioner and that Petitioner had picked him and the other man up on the side of the road.

Petitioner was convicted of murder, criminal sexual conduct (CSC) in the first degree, first-degree burglary, assault and battery with intent to kill (ABIK), and armed robbery. He was sentenced to death on the murder charge. He was also sentenced to life for burglary, thirty years for CSC, twenty years for ABIK, and twenty-five years for armed robbery. His convictions and sentences were affirmed on direct appeal. *State v. Nance,* 320 S.C. 501, 466 S.E.2d 349 (1996). Subsequently, Petitioner filed a PCR application. The PCR court denied relief, and Petitioner asks this Court for relief on both the guilt and sentencing phases of his trial.

Petitioner has submitted many issues for review, challenging many of his counsel's actions and lack of actions during trial, but, in our view, the essential issue in this case is as follows:

> Did the PCR judge err in finding that Petitioner's Sixth and Fourteenth Amendment rights to counsel were not violated because defense counsel failed to sufficiently investigate, prepare and present the case?

LAW/ANALYSIS

Petitioner claims that the PCR judge erred in finding that his defense counsel were not ineffective for failing to prepare and present the case as required under the Sixth Amendment. We agree.

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 2555, 45 L. Ed. 2d 593 (1975).

The Sixth Amendment guarantees that every criminal defendant shall receive "Assistance of Counsel" in establishing his defense. U.S. Const. amend. VI. On May 14, 1984, the United States Supreme Court handed down two opinions holding that the Sixth Amendment requires that the criminal defendant receive *effective* assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In *Cronic*, the Court characterized the protection that the Sixth Amendment affords the defendant:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors -- the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."

466 U.S. at 656-657, 104 S. Ct. at 2045-2046 (citations omitted).

In *Strickland*, the Court set forth a two-part test for evaluating the effectiveness of the criminal defendant's attorney. To receive a new trial on the grounds of ineffectiveness of counsel, the petitioner must prove (1) that his counsel's representation was deficient, and (2) that there is a reasonable probability that counsel's deficient conduct prejudiced the outcome of petitioner's trial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

The Court stated in *Cronic* that there are three circumstances in which the defendant's representation is so inadequate that the second element of the *Strickland* test, the prejudice element, can be presumed. *Cronic*, 466 U.S. at 658-659, 104 S. Ct. at 2039.

The first scenario in which prejudice is presumed is when there is a "complete denial of counsel," which occurs when a trial is rendered unfair because the defendant is denied assistance of counsel during a "critical stage" of his trial. *Id*.

In the second scenario, prejudice is presumed if "counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing." When there has been no meaningful adversarial testing, then "the adversary process itself [is] presumptively unreliable." *Id*. In *Bell v. Cone*, the U.S. Supreme Court explained further that "the attorney's failure [to test the prosecutor's case] must be complete" for this standard to be met. 535 U.S. 685, 697, 122 S. Ct. 1843, 1851, 152 L. Ed. 2d 914 (2002).

Third, prejudice is presumed when circumstances dictate that no attorney could render effective assistance of counsel. *Cronic,* 466 U.S. at 659-662, 104 S. Ct. at 2047-2048.[2]

We now apply the *Cronic* analysis to the case at hand.

TRIAL PRESENTATION

Following Petitioner's arrest, defense counsel was appointed as Petitioner's lead counsel. At the time he was appointed, defense counsel had either recently suffered from or was then suffering from pneumonia, gout, ulcers, diabetes, alcoholism, and congestive heart failure. During the trial he was taking various prescription medications, including Valium, Lopressor,

[2] The Fourth Circuit has held that the presumption of prejudice as defined by *Cronic* only applies in extraordinary circumstances. *Young v. Catoe*, 205 F.3d 750 (4th Cir. 2000). Otherwise, when prejudice is not presumed, the *Strickland* standard applies. *Id.*

Isocet, and Tenormin. At the PCR hearing, Petitioner's experts testified that the side effects of those medications included impaired memory, lack of sleep, and sedation. Defense counsel's testimony at the PCR hearing indicated that he remembered very little from the trial that took place 5 years before the PCR hearing.

An attorney, who had only been practicing law for eighteen months, was appointed as co-counsel. Co-counsel testified at the PCR hearing that Petitioner's mother was the only family member who was interviewed prior to trial; that he did not recall that anyone investigated Petitioner's background; and that no one had requested Petitioner's records from the Department of Corrections.

The psychologist who planned to offer expert testimony concerning Petitioner's mental health, Dr. Dewitt (Dewitt), asked defense counsel for Petitioner's medical records, social history, statements from family members, and statements from the Department of Corrections staff but never received them. He received Petitioner's hospital records a few hours before trial.

GUILT PHASE

When introducing himself in his opening statement to the jury, co-counsel said, "I did not ask [to represent the Petitioner], I was simply appointed. [defense counsel], as the public defender, did not ask for this case either. He was just appointed to represent Mr. Nance." In addition, defense counsel presented only three witnesses to testify on behalf of Petitioner's defense: a corrections officer, an unqualified expert, and Petitioner's sister.

Defense counsel's first witness, a Florence County detention center officer, testified that while in prison, Petitioner threw urine at a female corrections officer.[3] On cross-examination, the officer testified that this

[3] At the PCR hearing, Petitioner's PCR counsel presented testimony that the reason why Petitioner threw urine at the female office was because she reminded him of his aunt.

episode was Petitioner's only incident of misbehavior during the seven-month period that Petitioner was under his watch.

The defense's second witness, Dewitt, testified about Petitioner's mental health. Based on only two meetings with the Petitioner, Dewitt opined that Petitioner more closely resembled a criminal who was guilty but mentally ill. Defense counsel was not successful in qualifying Dewitt as an expert.

The defense rested after Dewitt's testimony. The trial judge then granted defense counsel's request to reopen his presentation so that Petitioner's sister could testify. Defense counsel failed to prepare the sister's testimony but asked that she testify about Petitioner's childhood. The sister testified that Petitioner was an abnormal child: pretending to be an undertaker, he buried one of his brothers; pulled a gun on their father; stabbed himself with a broken bottle; and killed their pets.

In sum, the testimony that defense counsel presented in Petitioner's guilt phase defense consisted of testimony of a corrections officer concerning the only incident of misconduct that Petitioner committed while incarcerated; an opinion by an uninformed psychiatrist who was not qualified as an expert; and unprepared testimony of Petitioner's sister about Petitioner's oddities as a child.

SENTENCING PHASE

Defense counsel's mitigation presentation during the sentencing phase of the trial lasted seven minutes. Counsel began by waiving the opening statement and then incorporated the meager amount of defense testimony elicited during the guilt phase.

Defense counsel then presented the testimony of a corrections officer of the Florence Detention Center, who testified that Petitioner was taking two prescription medications, Cogentin and Haldol, and that Petitioner had taken

Haldol that morning.[4] Counsel presented no further testimony, to which the trial judge responded by asking, "Are you ready to go to the jury?" Counsel responded, "We incorporate what we feel, Your Honor -- the doctor and the other testimony by the sister would be repetitious." The judge then replied, "Do you need any time to collect your thoughts? This is rather quick."[5] Co-counsel gave the closing argument, refusing to plead for Petitioner's life and referring to Petitioner as a "sick" man who did "sick things."

We find that this trial presentation, in its entirety, represents a classic *Cronic* ineffectiveness case, falling under the second *Cronic* scenario because there was a total breakdown in the adversarial process during both the guilt phase and penalty phase of Petitioner's trial. For the reasons set forth below, we presume Petitioner was prejudiced, and accordingly, grant him a new trial.

First, Petitioner was disadvantaged from the outset because lead defense counsel was in ill health and on heavy medication, and co-counsel had only practiced law for eighteen months.

Second, in aid of its claim that Petitioner was mentally ill, the defense had wanted Petitioner to appear in the courtroom in his natural demeanor,

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[4] The trial judge forbade Petitioner from taking any antipsychotic drugs during trial. Haldol is a very strong antipsychotic drug used in the treatment of acute schizophrenia and acute psychosis, controlling a patient's tendency towards aggression and agitation.
http://www.psyweb.com/Drughtm/halope.html

[5] This is an example of the trial judge's commendable attempt to insure that defense counsel was effectively representing his client. Unfortunately, the trial judge's ability to hold defense counsel to his constitutional obligation to effectively represent his client was greatly limited by (1) the desultory manner in which defense counsel tried this case and (2) the fact that at the time this case was tried, South Carolina common law provided little guidance as to what constituted an attorney's complete failure to provide effective representation. We hope that this opinion provides some clarity as to what does *not* constitute effective representation.

unaffected by the administration of psychotropic drugs. The defense was successful in getting the trial judge to order such. Nevertheless, defense counsel failed to inform the jail personnel of the trial judge's order that Petitioner be taken off the anti-psychotic drug, Haldol. Consequently, Petitioner remained in a drug-influenced demeanor during the entire trial, and the jury never observed his natural demeanor.

Third, the trial had just begun when co-counsel communicated to the jury that neither he nor defense counsel wanted to be there.

Fourth, while defense counsel may have been pursuing a defense of guilty but mentally ill (GBMI),[6] he failed to qualify his own expert. Further, by eliciting the unprepared testimony of Petitioner's sister only *after* defense psychologist Dewitt testified, defense counsel failed to give his unqualified expert, at minimum, the opportunity to inform the jury of how the sister's testimony of Petitioner's mental irregularities as a child could lead to a conclusion that Petitioner was mentally ill at the time of the murder.

Fifth, defense counsel presented no adaptability evidence at the sentencing hearing. In fact, by merely incorporating the testimony elicited from the guilt phase, defense counsel gave the impression that Petitioner had not adapted to confinement, because the only evidence that had been presented concerning his confinement was the urine-throwing incident.

During the PCR hearing, Petitioner presented testimony to show that the urine-throwing incident was the only instance of bad behavior during confinement. In fact, Petitioner was selected as the Manning Correctional Institution's inmate of the year and was nominated for the Department of Corrections' inmate of the year. He also sang in the prison choir and participated in other Christian activities. A jail administrator and prison

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[6] Dewitt testified that Petitioner's mental incapacity did not rise to the level of the *M'Naughten* standard for insanity but did opine that he met the standard for GBMI. Despite evidence of Petitioner's mental incapacity, defense counsel failed to raise the issue of whether Petitioner was competent to stand trial.

minister testified that Petitioner was a model inmate. Defense counsel could have easily discovered this adaptability evidence prior to trial but failed to do so.[7]

Sixth, defense counsel presented no mitigating social history evidence to explain the Petitioner's odd childhood behavior to which his sister referred to during the guilt phase. Defense counsel failed to reveal that Petitioner was beaten throughout his childhood; his father was an alcoholic who fought with many family members; he was treated with alcohol as a child in lieu of over-the-counter medication; and he grew up in a family of extreme poverty and physical deprivation.

Seventh, defense counsel's seven-minute mitigation presentation failed to provide the jury with *any* insight concerning Petitioner's mental illness. At the PCR hearing, Petitioner introduced evidence that he has a family history of schizophrenia, he has a history of hearing voices in his head, and he has suffered neurological damage.

Finally, during the closing argument, co-counsel failed to plead for Petitioner's life and referred to him as a "sick" man.

We hold that this trial presentation amounts to a classic *Cronic* ineffectiveness case, as defense counsel completely failed to test the prosecution's case. If anything, defense counsel's actions, and inactions, reinforced the prosecution's argument that the Petitioner should be convicted and sentenced to death.

We decline to recognize this consistently inept form of lawyer conduct as acceptable in this state, nor will we employ a prejudice analysis, for "[defense] counsel's ineffectiveness [was] so pervasive as to render a

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[7] The United States Supreme Court has recently recognized that defense counsel must conduct a reasonable investigation "to discover *all reasonably available* mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, __, 123 S. Ct. 2527, 2537, 156 L. Ed. 2d 471 (2003) (citation omitted).

particularized prejudice inquiry unnecessary." *Frett v. State*, 298 S.C. 54, 56, 378 S.E.2d 249, 251 (1988).

CONCLUSION

We find that defense counsel's conduct, investigation, preparation and presentation of Petitioner's defense during the guilt phase and sentencing phase of Petitioner's trial provided no meaningful adversarial challenge to the prosecution's case.

We apply the *Cronic* "meaningful adversarial challenge" analysis to this case because we find that this trial represents the classic example of a judicial process that lost "its character as a confrontation between adversaries." *Cronic,* 466 U.S. at 656-657, 104 S. Ct. at 2045-2046. Thus, Petitioner's constitutional right to effective assistance of counsel has been violated.

Accordingly, we **REVERSE** Petitioner's convictions and sentences and **REMAND** the case for a new trial.

MOORE, BURNETT, PLEICONES, JJ., and Acting Justice James R. Barber, III, concur.

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules of Civil Procedure

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O R D E R

By Order dated January 29, 2004, certain amendments to the South Carolina Rules of Civil Procedure were submitted to the General Assembly pursuant to Art. V, § 4A of the South Carolina Constitution. Ninety or more days having passed since the submission to the General Assembly without rejection, the amendments are effective immediately.

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 27, 2004

AMENDMENTS TO THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE

(1) Rule 3 is amended to read as follows:

RULE 3
COMMENCEMENT OF ACTION

(a) Commencement of civil action. A civil action is commenced when the summons and complaint are filed with the clerk of court if:

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or

(2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

(b) Filing In Forma Pauperis. A plaintiff who desires to file an action *in forma pauperis* shall file in the court a motion for leave to proceed *in forma pauperis*, together with the complaint proposed to be filed and an affidavit showing the plaintiff's inability to pay the fee required to file the action. If the motion is granted, the plaintiff may proceed without further application and file the complaint in the court without payment of filing fees.

(2) The following note is added to the end of Rule 3:

Note to 2004 Amendment:

This amendment rewrote subsection (a), deleted subsection (b), and renumbered subsection (c) as subsection (b). These changes are intended to reflect the legislative intent expressed in § 15-3-20 as amended by 2002 S.C. Act No. 281, § 1.

(3) Rule 63 is amended to read:

RULE 63
DISABILITY OF A JUDGE

If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned. The successor judge may proceed upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge shall, at the request of a party, recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may also provide for the recall of any witnesses.

(4) The following note is added to the end of Rule 63:

Note to 2004 Amendment:

The 2004 Amendment rewrote this Rule to provide a clear procedure when a judge who has heard some or all of a case is unable to proceed. The language is similar to Rule 63 of the Federal Rules of Civil Procedure.

(5) Rule 71.1(f) is re-lettered 71.1(g) and new Rule 71.1(f) shall read as follows:

(f) Filing and Service of Order. The post-conviction relief judge shall submit the signed final order or judgment to the clerk for filing and the clerk of court shall provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRCP.

(6) The following note is added to the end of Rule 71.1:

Note to 2004 Amendment:

The 2004 Amendment clarifies the process for filing and notification of parties of filed orders in post-conviction relief actions.

(7) The following two sentences are added to the end of Rule 77(d):

In addition to the above, in post-conviction relief actions, the post-conviction relief judge shall submit the signed order or judgment to the clerk of court for filing and the clerk shall promptly provide notice of the entry of judgment and serve a copy of the signed order to the parties. Pursuant to Rule 5(b) service shall be made solely on the attorney when the applicant is represented by counsel and, where an applicant is proceeding *pro se*, service shall be made upon the applicant at the last known address provided to the clerk by the applicant.

(8) The following note is added to the end of Rule 77:

Note to 2004 Amendment:

The 2004 amendment clarified the process for clerks of court providing notice of entry of judgment and copies of the final signed order to the parties. It made clear that service is to be made on the attorney of a represented applicant and only on applicants when they are proceeding *pro se*.

The Supreme Court of South Carolina

In the Matter of Phillip Wayne Hudson, Respondent.

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR. Respondent consents to the interim suspension.

IT IS ORDERED that the petition is granted and respondent is placed on interim suspension until further order of this Court. Respondent is directed to deliver all books, records, funds, property, and documents related to his office to the Chief Municipal Judge for the City of Myrtle Beach.

s/Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

April 26, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

All Saints Parish, Waccamaw, a South Carolina non-profit corporation, a/k/a The Episcopal Church of All Saints and a/k/a The Vestry and Church Wardens of the Episcopal Church of All Saints Parish, and Martha M. Lachicotte, Frances Ward Cromwell, and Alberta Lachicotte Quattlebaum, Individually and as Representatives of the Inhabitants of the Waccamaw Neck Region in Georgetown County, and Evelyn LaBruce, Individually and as descendant of George Pawley, Plaintiffs,

Of Whom All Saints Parish, Waccamaw, a South Carolina non-profit corporation, a/k/a The Episcopal Church of All Saints and a/k/a The Vestry and Church Wardens of the Episcopal Church of All Saints Parish are Respondents,

v.

The Protestant Episcopal Church in the Diocese of South Carolina, The Episcopal Church a/k/a The Protestant Episcopal Church in the United States of America, Mark Sanford, in his official capacity as the Governor of South Carolina, State of South Carolina and John Doe and Jane Doe as descendants to George Pawley and William Poole, Defendants,

Of Whom The Protestant Episcopal Church in the Diocese of South Carolina, The Episcopal Church a/k/a The Protestant Episcopal Church in the United States of America are Appellants

and

Mark Sanford, in his official capacity as the Governor of the State of South Carolina, State of South Carolina and John Doe and Jane Doe as descendants to George Pawley and William Poole are Respondents.

Appeal From Georgetown County
John L. Breeden, Jr., Circuit Court Judge

Opinion No.3757
Heard September 10, 2004 – Filed March 8, 2004
Withdrawn, Substituted and Refiled April 23, 2004

VACATED IN PART, REVERSED IN PART and REMANDED

Benj. Allston Moore, Jr., Julius H. Hines and Coming B. Gibbs, Jr., all of Charleston, for Appellants.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney Treva Ashworth, Senior Assistant Attorney General C. Havird Jones, Jr., all of Columbia; Fred B. Newby and Henrietta U. Golding, both of Myrtle Beach, for Respondents.

HOWARD, J.: This is a suit involving All Saints Parish, Waccamaw ("the Parish"), the Protestant Episcopal Church in the Diocese of South Carolina ("the Diocese"), the Protestant Episcopal Church in the United States of America ("the National Church"), and the descendants of the trustees ("the Does") to determine who owns real and personal property located on Pawley's Island, South Carolina.

In 1745, a trust was created for the "Inhabitants On Waccamaw Neck for the Use of a Chapple or Church for divine worship of the Church of England established by Law." The trust was not recorded until 1767, the same year the Parish was recognized by the colonial government. During the next 100 years, the Parish became affiliated with the Diocese and the National Church.

In September 2000, after an ecclesiastical dispute arose between the Parish, the Diocese, and the National Church, the Bishop of the Diocese filed a notice with the Register of Deeds in Georgetown County, stating the Diocese and the National Church held an interest in the property by means of church canons. The Parish filed suit to have the statement removed from the deed book and to have the circuit court declare the Parish to be the sole owner of all real and personal property.

Because of the existence of the trust deed, the circuit court appointed a guardian *ad litem* to represent any interest the Does might have in the property. The Does moved for partial summary judgment, alleging they owned legal title to the real property. Based on the Parish's affiliation with the Diocese and the National Church, the Diocese and the National Church claimed an interest in the property by means of the Statute of Uses, adverse possession, laches, and staleness. The circuit court ruled for the Does on the motion for summary judgment, finding the Does held legal title to the real property. The Diocese and the National Church appeal. We vacate in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

The property at issue in this case is located in Georgetown County, in an area known as the Waccamaw Neck region. In 1745, Percival Pawley and his wife conveyed the property[1] to two trustees, George Pawley and William Poole, "in Trust For The Inhabitants On Waccamaw Neck for the Use of a Chapple or Church for divine worship of the Church of England established by Law."

[1] The Pawleys received the property from John Hutchinson's widow in 1731. John Hutchinson received the property in 1711 as a land grant from the Lords Proprietors. See Coburg Dairy v. Lesser, 318 S.C. 510, 512 n.1, 458 S.E.2d 547, 548 n.1 (1995) ("From 1672 until 1730, grants of land were made by the Lords Proprietors who were granted enormous tracts of land in America by Charles II, King of England. The Lords Proprietors owned all of Carolina and acted in the stead of the sovereign in making land grants.").

In 1767, the General Assembly passed an act creating the Parish in the "Waccamaw Neck" region and appointing seven men to serve as commissioners for the Parish.[2] See Act No. 961 of May 23, 1767, 4 Stat. 266. That same year, the 1745 trust deed was recorded in Charleston County.

Although the charter was renewed on several occasions,[3] in 1902 the Parish became concerned that its charter had "probably long since expired," vesting its property with the Diocese.[4] To remedy this situation, the Chancellor of the Diocese suggested the Parish apply to the South Carolina Secretary of State for a corporate charter and request a quitclaim deed from the Diocese. Later that same year, the Parish received its certificate of incorporation from the Secretary of State. In 1903, the trustees of the Diocese executed a quitclaim deed that relinquished title of the property to the Parish.

Subsequent to the recording of this deed, the Parish leased parts of the property for uses not authorized by the trust and mortgaged the

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[2] In 1770, the Royal Privy Council disallowed the Parish's colonial charter. However, in 1778, the Parish was recognized by the government of the newly formed state of South Carolina. See Act No. 1071 of Mar. 16, 1778, 4 Stat. 407; S.C. Const. of 1778, arts. XII-XIII.

[3] In 1839, the original Parish charter was "revived" for a fourteen-year term. See Act No. 2788 of December 21, 1839, 11 Stat. 70. The charter was renewed for an unspecified term in 1852. See Act No. 4081 of December 16, 1852, 12 Stat. 137.

[4] According to an 1880 statute, title to "all property belonging to any of the corporations or churches or dormant parishes formerly connected with the [Episcopal Church for the South Carolina Diocese], but which have now ceased to have active operation . . . or whose charters of incorporation may have expired" vested in the Diocese. See Act No. 222 of Feb. 20, 1880, 17 Stat. 257.

property.[5]

In September 2000, after an ecclesiastical dispute arose involving the Parish, the Diocese, and the National Church, the Bishop of the Diocese issued a notice setting forth the canons of the Diocese and the National Church that limit the alienation and encumbrance of church property. This notice was recorded in the public records of Georgetown County.

In response to the recording of this notice, the Parish filed a complaint in October 2000, seeking a removal of the notice from the deed book and a declaration that it owned the real and personal property located on Pawley's Island. The Diocese and the National Church answered and counterclaimed, alleging the property was owned by the Parish subject to the canons of the Diocese and the National Church.

The Parish requested the court appoint a guardian *ad litem* to represent the interests of John and Jane Doe, the representatives of the descendants to the original trustees of the 1745 trust.

After the circuit court appointed a guardian *ad litem* to represent the Does, the Does petitioned for partial summary judgment on the issue of the ownership of the real property, arguing they were the sole owners of the real property. Thereafter, the Parish aligned itself with the Does' position.[6]

At the hearing, the Diocese and the National Church defended

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[5] The Diocese authorized these mortgages.

[6] The Parish also filed a motion for summary judgment asking the circuit court to declare "the subject property [was] governed by the 1745 Trust Deed, and as a matter of law [the Diocese] and [the National Church] have no right to assert any interest in the said property." The circuit court declined to rule on the Parish's motion because of its disposition on the Does' motion.

against the Does' claim,[7] maintaining the position that the Parish owned the real property and they owned an interest in any property owned by the Parish.

After hearing extensive argument on the Does' motion for summary judgment, the circuit court concluded the language contained in the 1745 trust deed was clear and unambiguous and therefore refused to consider parol evidence to explain the terms in the trust deed. The circuit court granted the Does' motion for partial summary judgment, ruling "the 1745 Deed created an active valid and binding charitable trust and legal title to the Subject Property is held by the common law heirs of George Pawley represented by John Doe and Jane Doe, and the equitable title is held by the inhabitants of the Waccamaw Neck as the Trust beneficiaries." In making its ruling, the circuit court determined: 1) the Diocese and the National Church did not have standing to assert Statute of Uses, adverse possession, laches, and staleness; 2) the Statute of Uses did not execute the trust; 3) the trust did not fail when the Church of England ceased to be recognized in the United States; 4) the Parish did not acquire the property by adverse possession; 5) the Does' claim was not barred by laches; 6) the Does' claim was not barred by staleness; 7) the Diocese and the National Church were "at best, incidental beneficiaries" to the trust; and 8) the court did not have subject matter jurisdiction to determine the ownership of the personal property. The Diocese and the National Church appeal.

ISSUES PRESENTED

1. Did the circuit court err by holding the Diocese and the National Church did not have standing to assert Statute of Uses, adverse possession, laches, and staleness?

2. Did the circuit court err by ruling on summary judgment that the Statute of Uses did not execute the trust?

[7] Neither the Diocese nor the National Church filed a cross-motion for summary judgment.

3. Did the circuit court err by ruling on summary judgment that the trust did not fail when the Church of England ceased to be recognized in the United States?

4. Did the circuit court err by granting summary judgment to the Does on the claim of adverse possession?

5. Did the circuit court err by granting summary judgment to the Does on the claim of laches?

6. Did the circuit court err by granting summary judgment to the Does on the claim of staleness?

7. Did the circuit court lack subject matter jurisdiction to declare the Diocese and the National Church to be incidental beneficiaries of the trust?

8. Did the circuit court err by declaring it did not have subject matter jurisdiction to determine the ownership of the personal property?

LAW/ANALYSIS

I. Standing

The Diocese and the National Church argue the circuit court erred by holding they did not have standing to assert Statute of Uses, adverse possession, laches, and staleness. We agree.

A party must have a personal stake or interest in the subject matter of the lawsuit to have standing. Anchor Point v. Shoals Sewer, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992) (holding a party has standing to sue if the party has "a real, material, or substantial interest in the subject matter of the action, as opposed to . . . only a nominal or technical interest in the action"); Duke Power v. South Carolina Pub. Serv. Comm'n, 284 S.C. 81, 96, 326 S.E.2d 395, 404 (1985) ("[T]o have standing to present a case before the courts of this State, a party

must have a personal stake in the subject matter of the lawsuit."); see Town of Sullivan's Island v. Felger, 318 S.C. 340, 346, 457 S.E.2d 626, 629 (Ct. App. 1995) (holding the town has standing in a declaratory action to determine whether Felger owns fee simple title to the property, even though the town does not have a direct interest in ownership of the property).

The present lawsuit began as an action with the Parish as plaintiff and the Diocese and the National Church as co-defendants. The Parish initiated the lawsuit after the Bishop of the Diocese filed a notice in the County of Georgetown Deed Book, claiming the Diocese and National Church hold an interest in any property owned by the Parish based on the canons of the Diocese and the National Church.[8] In its complaint,

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[8] The quoted language from the canons of the Diocese read, in part, "[a]ll real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for the Episcopal Church and the Protestant Episcopal Church in the Diocese of South Carolina." The quoted language from the canons of the National Church was nearly identical. Although the Parish claims it is not bound by these canons, the Parish does not deny it has been affiliated with the National Church since as early as 1820 and with the Diocese since at least 1903. We note the interpretation of the canons is an ecclesiastical dispute and beyond the jurisdiction of the civil court. See Fire Baptized Holiness Church of God of Americas v. Greater Fuller Tabernacle Fire Baptized Holiness Church, 323 S.C. 418, 421-23, 475 S.E.2d 767, 769-70 (Ct. App. 1996) ("The trial court . . . found that the issue of whether the 1975 deed comported with Church discipline so as to effectively transfer the subject property to the National Church was ecclesiastical in nature, and therefore beyond the jurisdiction of the civil court . . . . [In affirming the trial court's decision, this Court stated], [t]he interpretation of the Discipline, and what it mandates, is a matter for the ecclesiastical tribunal of the National Church, not the civil court."); see also Seldon v. Singletary, 284 S.C. 148, 149-50, 326 S.E.2d 147, 148-49 (1985) (holding a local congregation that is part of a hierarchical church is under the government and control of the religious organization); Morris Street Baptist Church v. Dart, 67 S.C.

the Parish requested the circuit court declare it to be the sole owner of the property.

Because the Parish requested it be declared the sole owner of the property and did not simply ask the circuit court to determine the claims between the Parish, the Diocese, and the National Church, the circuit court heard arguments for the appointment of representatives for anyone having an interest in the property. The circuit court appointed the Does to represent the claim of the descendants of the trustees to the 1745 trust.

After being appointed, the Does moved for partial summary judgment, claiming they alone held legal title to the real property. The Parish supported this motion. Unless the Diocese and the National Church are able to assert the Parish owns the real property, their claim to an interest in the property will be lost based solely on the Parish's decision not to pursue the issue. Thus, the Diocese and National Church have a stake in any lawsuit that could affect the Parish's interest in the property.

Therefore, the circuit court erred by ruling the Diocese and the National Church did not have standing to assert Statute of Uses, adverse possession, laches, and staleness. Consequently, we reverse.

II. Summary Judgment

Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

338, 343, 45 S.E. 753, 754 (1903) ("Episcopalians subject themselves, in church affairs, to the authority of synods and councils.").

"In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). "If triable issues exist, those issues must go to the jury." Rothrock v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 367 (1991).

"An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, South Carolina Rules of Civil Procedure." Lanham v. Blue Cross & Blue Shield of South Carolina, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

A. Statute of Uses

The Diocese and the National Church argue the circuit court erred by ruling on summary judgment that the Statute of Uses did not execute the trust. We agree.

In a trust where the trustee is instructed to use the property for the benefit of another, the Statute of Uses executes to vest legal title with the beneficiary, if the beneficiary is capable of taking legal title and the trustee has no active duties. Restatement (Second) of Trusts § 67 (1959); see id. at cmt. b ("When the Statute of Uses executes a use or trust not only is the interest of the beneficiary made legal but the interest of the person who otherwise would hold subject to the use or trust is extinguished. The Statute thus has a double effect in turning the equitable interest of one person into a legal interest and extinguishing the legal interest of the other."); Johnson v. Thornton, 264 S.C. 252, 257, 214 S.E.2d 124, 127 (1975) ("In a passive trust the legal and equitable titles are merged in the beneficiaries and the beneficial use is converted into legal ownership, but as to an active trust the title remains in the trustee for the purpose of the trust."); see also Young v. McNeill, 78 S.C. 143, 153, 59 S.E. 986, 989 (1907) (holding the Statute of Uses will not execute the trust if the beneficiary of the trust is not capable of taking legal title); Bowen v. Humphreys, 24 S.C. 452, 455 (1886)

(holding the Statute of Uses will not execute the trust "as long as there is anything remaining for the trustee to do which renders it necessary that he should retain the legal title in order fully to perform the duties imposed upon him by the trust").

The Does argued the Statute of Uses did not execute the trust. According to the Does, the plain language of the trust deed established the beneficiary was not capable of taking legal title, and the trustee had active duties.

The circuit court agreed with the Does, ruling the term "inhabitants on Waccamaw Neck" referred to the people living in the geographic region and ruling the language in the deed imposed an affirmative duty upon the trustees to assure "continued use of the property for a chapel or church and to ensure that divine worship [was] maintained."[9]

Because of these rulings, the circuit court refused to consider parol evidence regarding the issues of whether the beneficiary was

[9] In finding the settlor's intent was to ensure the property was used for divine worship, the circuit court ignored the words "Church of England established by Law." Because this language revealed the settlor's intent to use the property to house a chapel for a specific denomination of the Christian faith, we hold the circuit court erred in this ruling. See First Carolina Joint Stock Land Bank v. Deschamps, 171 S.C. 466, 480, 172 S.E. 622, 627 (1933) ("In view of the . . . provisions of the trust deed and of the decisions cited, ... [t]his construction gives full effect to the intention as expressed in every part of the deed."); Town of Pawlet v. Clark, 13 U.S. 292, 324 (1815) (holding the interpretation of a grant must "give full effect to all the words" in the document); see also Combe v. Brazier, 2 S.C. Eq. 431, 446-47, 2 Des. Eq. 431, 446-47 (1806) (holding that because there are "slight shades of difference between the different sects of protestant Christians," a trust deed which provided for a Methodist minister to preach at a church failed when the minister became an Episcopal priest).

capable of taking legal title and whether the trustee lacked affirmative duties.

"The primary consideration in construing a trust is to discern the settlor's intent." Bowles v. Bradley, 319 S.C. 377, 380, 461 S.E.2d 811, 813 (1995). When the beneficiary "is described in terms applicable . . . to more than one person or thing, [parol] evidence is admissible to prove which of the persons or things so described was intended."[10] Cuningham v. Cuningham, 20 S.C. 317, 330 (1883) (quoting James Wigram & John O'Hara, A Treatise on Extrinsic Evidence in Aid of the Interpretation of Wills 142 (1872)); see Bowles, 319 S.C. at 380, 461 S.E.2d at 813 ("[W]hen there is no defect on the face of a document but an uncertainty appears upon attempting to effectuate the document, then the document contains a latent ambiguity and parol evidence is admissible to determine the settlor's intent."). Furthermore, the evidence must be considered in light of the law as it existed at the time. See id. (holding it was proper to review the case law applicable to the time when the settlor wrote his trust deed to determine "issue" had only one legal interpretation at the time, meaning no latent ambiguity existed).

In adopting the Does' argument, the circuit court ignored the argument of the Diocese and the National Church that "Inhabitants on Waccamaw Neck" referred to the Parish. According to the Diocese and the National Church, the settlor intended to deed the property to the Parish but could not do so directly until such time as the church was

[10] The law relating to discerning the drafter's intent is identical for wills and trusts. See Deschamps, 171 S.C. at 480, 172 S.E. at 627 (holding courts are authorized to ascertain a maker's intent in the construction of wills and trust deeds); South Carolina Nat'l Bank v. Bonds, 260 S.C. 327, 331-32, 195 S.E.2d 835, 837 (1973) ("In construing the terms used by the Testator in his will, the paramount consideration of this Court is to ascertain and effectuate the intent of the Testator."); Bowles, 319 S.C. at 380, 461 S.E.2d at 813 ("The primary consideration in construing a trust is to discern the settlor's intent.").

officially recognized by the government. Based on this argument, the Statute of Uses executed the trust once the Parish was officially established, meaning the trustees had no continuing duties.[11]

To advance their point, the Diocese and the National Church offered parol evidence, statutes, cases, and constitutions to demonstrate that in colonial times churches could not be recognized by the government until they owned property, and they could not own property until they had been officially recognized. See Pawlet, 13 U.S. at 330 (holding "no parish church . . . could have a legal existence until consecration and consecration was expressly inhibited unless upon a suitable endowment of land"). As such, a colonial practice arose in which a settlor placed property in trust for a congregation until such time as the government recognized the church. See id. at 331 ("[I]t would form an exception to the generality of the rule, that to make a grant valid there must be a person *in esse* capable of taking it. And under such circumstances until a parson should be legally inducted to such new church, the fee of its lands would remain in abeyance."). The Diocese and the National Church argued this practice was followed by the settlor as evidenced by the fact that the trust was not recorded until the year the Parish was recognized by the government, approximately twenty years after the trust was created.

Because uncertainty arose when attempting to effectuate the trust deed, we hold "inhabitants on Waccamaw Neck" was a latent ambiguity, and it was error for the circuit court to refuse to consider parol evidence, statutes, cases, and constitutions in determining whether the beneficiary was capable of taking legal title and whether

[11] Because the Royal Privy Council disallowed the 1767 Act creating the Parish in 1770, the Diocese and the National Church raise the possibility that the property may have escheated to the government three years after vesting with the Parish. Because we remand this case in full, we need not further address this issue.

the trustees lacked affirmative duties.[12] See Bowles, 319 S.C. at 380, 461 S.E.2d at 813 ("[W]hen there is no defect on the face of a document but an uncertainty appears upon attempting to effectuate the document, then the document contains a latent ambiguity and parol evidence is admissible to determine the settlor's intent.").

When the parol evidence is considered, there is at least a genuine issue of material fact as to the meaning of "inhabitants on Waccamaw Neck." Therefore, the circuit court erred by ruling on summary judgment that the Statute of Uses did not execute the trust. See George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

B. Failure of the Trust[13]

The Diocese and the National Church argue the circuit court erred by ruling on summary judgment that the trust did not fail when

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[12] The circuit court relied on Beckham v. Short, 298 S.C. 348, 349-50, 380 S.E.2d 826, 827 (1989), to support the proposition that parol evidence is inadmissible to vary the terms of a deed in the absence of fraud, mistake, or other grounds for reformation or rescission. Because the Diocese and the National Church sought to introduce the parol evidence to explain the term, not to vary it, we hold the circuit court erred in its reliance on Beckham. See Shelley v. Shelley, 244 S.C. 598, 606, 137 S.E.2d 851, 855 (1964) ("'[E]vidence is admissible which merely intends to explain and apply what the testator has written.'" (quoting McCall v. McCall, 25 S.C. Eq. 447, 456, 4 Rich. Eq. 447, 456 (1852))).

[13] The Does and the National Church assert this argument only if, upon remand, the Statute of Uses is determined not to execute the trust in a subsequent circuit court proceeding. If the Statute of Uses executed the trust in 1767, the possibility that the trust failed in the 1770s as a result of the disestablishment of the Church of England in the United States is irrelevant.

the Church of England ceased to be recognized in the United States.[14] We agree.

"Charitable trusts are entitled to peculiar favor; the courts will construe them to give them effect, if possible, and to carry out the general intention of the donor." Colin McK. Grant Home v. Medlock, 292 S.C. 466, 470, 349 S.E.2d 655, 657 (Ct. App. 1986).

"Although a court has considerable discretion to adapt a trust to changed circumstances, this flexibility is not unlimited." Id. at 471, 349 S.E.2d at 658; see Bonds, 260 S.C. at 337, 195 S.E.2d at 840 ("[T]here is no question that where conditions have substantially changed, the Court is allowed considerable discretion [in trying to effectuate the intent of the testator]."); Furman Univ. v. McLeod, 238 S.C. 475, 490, 120 S.E.2d 865, 872 (1961) ("[T]he Court of Equity has the power upon a proper showing, to permit a deviation from the strict terms of a trust if necessary or advisable to carry out the purposes thereof.").

A court is authorized to deviate from the terms of a trust to carry out the settlor's intent but is prohibited from applying the trust property to a different charitable purpose from that designated by the terms of the trust. Bonds, 260 S.C. at 337-41, 195 S.E.2d at 840-42; see id. at 341-42, 195 S.E.2d at 842-43 ("[T]he Testator's primary purpose was to create a perpetual memorial . . . by aiding deserving high school graduates in pursuit of their education . . . . With the many changes which have taken place since the Testator's death . . . it is obvious that if the terms of the trust were literally complied with and the beneficiaries limited to the graduates of 'Greenville City High

[14] As part of its ruling, the circuit court concluded the trust did not fail when the Church of England ceased to be recognized as the official church in the United States. The Diocese and the National Church argued against this ruling, alleging the trust failed once the Church of England was no longer "established by law" as required by the language of the trust. The Diocese and the National Church make this argument in connection with their assertion that the Parish holds the property by adverse possession.

Schools,' the Testator's main purpose would be defeated rather than effectuated."); McLeod, 238 S.C. at 489, 120 S.E.2d at 871-73 (holding the circuit court was authorized to deviate from the strict terms of the trust because the intent of the testator was to benefit the school); Pringle v. Dorsey, 3 S.C. 502, 507-09 (1872) (holding the trust was for the benefit of a particular church that was subsequently destroyed by fire, and no departure from the trust was authorized because no evidence suggested the testator indicated any organization other than the particular church was to benefit from the trust); Attorney Gen. v. Jolly, 21 S.C. Eq. 379, 394-96, 2 Strob. Eq. 379, 394-96 (1848) (holding the income of a trust could not be diverted from a particular congregation to the national church, when the testator specifically requested the money be given to the congregation).

We find Bonds instructive on this point. In Bonds, a Greenville County resident created a trust whose income was "to be used for assistance of deserving students of Greenville City High Schools in completing their education." Bonds, 260 S.C. at 330, 195 S.E.2d at 836. When the document was written in 1941, two Greenville City High Schools existed. By the time the trust became effective in 1971, one of these high schools had been destroyed by fire and students were bused throughout the consolidated Greenville County school system to achieve racial integration. As a result, students who would have been eligible for trust proceeds in 1941 did not qualify in 1971 and vice versa. Id. at 330-36, 195 S.E.2d at 836-39. In determining whether the trust failed, our supreme court stated that because "a change in conditions which the Testator could not have reasonably anticipated" occurred, the application of the trust language to the "factual situation [as it existed in 1971] result[ed] in certain latent ambiguities and uncertainties." Id. at 336, 332, 195 S.E.2d at 839, 838. Thus, our supreme court concluded it was proper to admit parol evidence to determine if the intent of the testator could be carried out with a deviation from the literal words of the trust or if the change of circumstances meant that the purpose of the trust had been frustrated. Id. at 331-342, 195 S.E.2d at 837-43.

Similarly, in the present case, the trust required the property be used to house a chapel for worship of the "Church of England established by Law." When the settlor wrote this term in 1745, there was no ambiguity as to the meaning of the term. The term referred to the state church of England which was recognized by the ruling authorities of the American colonies. However, after the formation of the United States, both the national constitution and state constitution disallowed the establishment of a state-sponsored church. See U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."); S.C. Const. art. I, § 2 ("The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.").

Thus, a latent ambiguity arose once the Church of England ceased to be recognized in the United States. Therefore, the circuit court erred by refusing to consider parol evidence concerning the legal successor of the Church of England in the United States. See Bonds, 260 S.C. at 332, 195 S.E.2d at 838 (holding "the application of [the trust] language to the current factual situation result[ed] in certain latent ambiguities and uncertainties"); cf. Pawlet, 13 U.S. at 323-36 (holding the court should consider common law, statutes, and historical material in determining whether a charter grant of "one share for a glebe[15] for the church of England as by law established" was either void or devolved to the state after the American Revolution).

When the parol evidence is considered, there is at least a genuine issue of material fact as to whether the trust failed when the "Church of England established by law" ceased to exist in the United States. Thus, the circuit court erred by granting summary judgment to the Does on this issue. See George, 345 S.C. at 452, 548 S.E.2d at 874 ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

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[15] A glebe is the "[l]and possessed as part of the endowment or revenue of a church or ecclesiastical benefice." Black's Law Dictionary 698 (7th ed. 1999).

C. Adverse Possession

i. Evidence of Adverse Possession

The Diocese and the National Church argue the circuit court erred by granting summary judgment to the Does on the claim of adverse possession because ample evidence was presented that the Parish had adversely possessed the property in excess of forty years. We agree.

"To constitute adverse possession, the possession must be continuous, hostile, open, actual, notorious and exclusive for . . . [the required] statutory period." Davis v. Monteith, 286 S.C. 176, 180, 345 S.E.2d 724, 726 (1986).

Where the party claims the property under color of title, the statutory period is forty years. S.C. Code Ann. § 15-3-380 (1977) ("No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period."); see Black's Law Dictionary 260 (7th ed. 1999) (stating color of title is "a written instrument or other evidence that appears to give title, but does not do so").

In 1903, the Diocese presented the Parish with a quitclaim deed to the property. At least from 1903 to the filing of the lawsuit in 2000, the Parish continually possessed the property at issue in this case.[16]

[16] The Parish began possession of the property once it was chartered in 1767. There is some dispute as to whether the Parish existed continuously from 1767 to 1903. Because our analysis on adverse

During this period, the Parish built structures on the property, improved the property, and sold burial plots from the property. Additionally, the Parish mortgaged the property on four separate occasions from 1959 to 1993. On each occasion, the Parish represented to the lender that it held fee simple title to the property.[17] See Miller v. Leaird, 307 S.C. 56, 62, 413 S.E.2d 841, 844 (1992) (holding evidence of adverse possession included mortgage payments paid on the property, taxes paid on the property, and boundary lines marked on the disputed property); see also First Baptist Church of Woodruff v. Turner, 248 S.C. 71, 81, 149 S.E.2d 45, 49 (1966) ("'The giving of a deed or mortgage by one in possession of land is ordinarily evidence of assertion of title.'" (quoting Carr v. Mouzon, 86 S.C. 461, 467, 68 S.E. 661, 663 (1910))).

Thus, the Diocese and the National Church presented ample evidence that the possession by the Parish was continuous, hostile, open, actual, notorious, and exclusive from at least 1903 to 2000, a period of nearly 100 years. See Presbyterian Church of James Island v. Pendarvis, 227 S.C. 50, 57, 86 S.E.2d 740, 743 (1955) (holding evidence of adverse possession included the church's dealings with the property as if it owned the property in fee simple for a period of more than half a century, and the fact that the church's title had not been questioned for approximately fifty years). Viewing the evidence in the light most favorable to the Diocese and the National Church, there is at least a genuine issue of material fact as to whether the Parish had adversely possessed the property for at least forty years. Therefore, the circuit court erred by granting summary judgment in favor of the Does on this issue. See George, 345 S.C. at 452, 548 S.E.2d at 874 ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

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possession is not affected by the events of this time period, we decline to comment on this issue.

[17] On each occasion, the Parish obtained permission from the Diocese, as required by the canons of the Diocese and the National Church.

ii. Requirement of Hostile Possession

The Diocese and the National Church argue the circuit court erred by ruling on summary judgment that the Parish was not in hostile possession of the property. We agree.

Hostile possession is "possession asserted against the claims of all others." Black's Law Dictionary 1184 (7th ed. 1999).

An adverse possession claim fails if the claimant's possession is not hostile. Perry v. Heirs at Law and Distributees of Gadsden, 316 S.C. 224, 225, 449 S.E.2d 250, 251 (1994).

In the present case, the circuit court cited Cook v. Eller, 298 S.C. 395, 397, 380 S.E.2d 853, 854 (Ct. App. 1989), for the proposition that possession cannot be hostile if based on a mistaken belief of ownership.

Our supreme court stated the rule that "possession under a mistaken belief that property is one's own and with no intent to claim against the property's true owner cannot constitute hostile possession . . . is applicable only to cases involving boundary disputes between adjoining landowners." Perry, 316 S.C. at 226, 449 S.E.2d at 251; see Pendarvis, 227 S.C. at 57-58, 86 S.E.2d at 743 (holding a party's possession was adverse even when "due to the long lapse of time all parties, including the congregation and the ministers, had simply forgotten the trust").

Because the dispute in this case concerns the entire piece of property and is not merely a boundary dispute, the circuit court erred by applying Cook.[18]

[18] Although the Parish admits it was not aware of the trust until 1986, the deed was properly recorded in 1767 and remained on record from that time. Thus, the Parish had constructive notice of the trust. Pendarvis, 227 S.C. at 57-58, 86 S.E.2d at 743 (holding the parties had constructive notice of the 1713 trust because it was recorded in the office of the Register of Deeds in 1732).

As an additional ground for finding the Parish's possession was not hostile, the circuit court cited Frady v. Invester, 118 S.C. 195, 205, 110 S.E. 135, 138 (1921), for the proposition that one who enters property based on permissive use may not fulfill the hostility requirement of adverse possession.[19]

Although our supreme court noted a party cannot adversely possess property used with the permission of the owner, it stated a party may adversely possess such property upon a clear disclaimer of the owner's title. Monteith, 289 S.C. at 180, 345 S.E.2d at 726; see Young v. Nix, 286 S.C. 134, 136, 332 S.E.2d 773, 774 (Ct. App. 1985) ("Where one enters land under permission from the title holder, the possession can never ripen into an adverse title unless a clear and positive disclaimer of the title under which entry was made is brought home to the other party.").

The actions of the Parish from at least 1903 to 2000, including leasing the property for uses not permitted by the trust and mortgaging the property, could not have been based on the permission of the trustees because no additional trustees were appointed after the death of the last trustee in 1774. Further, none of the four mortgages taken out by the Parish made reference to any ownership interest related to the 1745 trust.[20] Thus, the circuit court erred in applying Frady to these facts.

Viewing the evidence in the light most favorable to the Diocese and the National Church, there is at least a genuine issue of material fact as to whether the Parish fulfilled the hostility requirement for

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[19] Even Frady does not preclude a party whose possession began under permissive use from adversely possessing the property, so long as the party "either surrendered the possession or gave notice of an adverse possession." Id.

[20] See footnote 17, supra.

adverse possession. Thus, the circuit court erred by granting summary judgment to the Does on this issue. See George, 345 S.C. at 452, 548 S.E.2d at 874 ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

iii. Repudiation of the Trust by a Beneficiary or a Trustee[21]

The Diocese and the National Church argue the circuit court erred by ruling on summary judgment that the Parish had not repudiated the trust. We agree.

In a claim for adverse possession "where one's possession was begun in privity with or in subservience to the title of another," adverse possession cannot begin until the trust is openly repudiated by "a clear, positive, and continued disclaimer of the title . . . [and the adverse claim is] brought home to the other party." Bradley v. Calhoun, 125 S.C. 70, 82, 117 S.E. 811, 815 (1923); cf. Ham v. Flowers, 214 S.C. 212, 218-19, 51 S.E.2d 753, 756 (1949) (holding when a party took possession of property to protect his interest as a mortgagee, that party entered "the premises in the quasi character of trustee for the mortgagor and [could] not hold adversely to [mortgagor's] rights until he distinctly disavows and repudiates his mortgagee relationship and notice thereof is brought home to the mortgagor").

Repudiation "need not be in specific words but may consist of conduct inconsistent with the existence of the trust." Pendarvis, 227 S.C. at 57-58, 86 S.E.2d at 743-44 (holding the party's leasing the property and using the property in a manner not consistent with the trust was "tantamount to a repudiation of the trust").

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[21] The Diocese and National Church assert this argument only if the Parish is determined to be the beneficiary of the trust during a subsequent circuit court proceeding or the Parish is determined to be the trustee of the trust in a subsequent probate court proceeding. See S.C. Code Ann. § 62-7-201(a)(1) (Supp. 2002) (stating the probate court has exclusive jurisdiction to appoint trustees).

Although the factual situations in Calhoun, Ham, and Pendarvis involved trustees adversely possessing against the trust, "[t]he same requirements logically apply to the possession by a beneficiary." See Reasor v. Peoples Fin. Servs., 579 S.E.2d 742, 744 (Ga. 2003) (holding a trustee or a beneficiary may adversely possess against the trust by denying the trust and possessing in a continuous, hostile, open, actual, notorious, and exclusive manner); see also Lewis v. Hawkins, 90 U.S. 119, 126 (1874) (holding a beneficiary can adversely possess against the trust if a distinct denial of the trust or a possession inconsistent with it is clearly shown).

In 1947, the Parish leased portions of the property for uses not authorized by the trust. This act constituted evidence of repudiation. See Pendarvis, 227 S.C. at 57-58, 86 S.E.2d at 743-44.

From 1959 to 1993, the Parish mortgaged the property at least four times, each time listing itself as the owner of the property.[22] Because neither the language of the trust nor an order of the probate court authorized such action, mortgaging the property was additional evidence of repudiation. See 27 S.C. Jur. Mortgages § 12(i) (1996) ("A trustee may not mortgage trust property unless the trust agreement specifically authorizes such action without court approval."); see also Chapman v. Williams, 112 S.C. 402, 405-06, 100 S.E. 360, 361 (1919) ("This court does not say that under no circumstances will it allow trustees to put a mortgage on trust property, but three things must appear: (a) the necessity for the mortgage must be absolute; (b) the trustees must consent to the mortgage; and (c) the trustees must have the power to make the mortgage.").

Viewing the evidence in the light most favorable to the Diocese and the National Church, there is at least a genuine issue of material fact as to whether the Parish repudiated the trust. Thus, the circuit court erred by granting summary judgment to the Does on this issue. See George, 345 S.C. at 452, 548 S.E.2d at 874 ("The purpose of

[22] See footnote 17, supra.

summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

D. Laches

The Diocese and the National Church argue the circuit court erred by granting summary judgment to the Does on the claim of laches. We agree.

Laches is an equitable doctrine, which "arises upon the failure to assert a known right." Ex parte Stokes, 256 S.C. 260, 267, 182 S.E.2d 306, 309 (1971); see Byars v. Cherokee County, 237 S.C. 548, 559, 118 S.E.2d 324, 330 (1961) ("Laches is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done, or neglecting or omitting to do what in law should have been done for an unreasonable and unexplained length of time and in circumstances which afforded opportunity for diligence.").

To prove laches, a party must establish: "(1) delay, (2) unreasonable delay, [and] (3) prejudice." Hallums v. Hallums, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988); see Arceneaux v. Arrington, 284 S.C. 500, 503, 327 S.E.2d 357, 358 (Ct. App. 1985) ("Whether . . . [a claim] is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party.").

In addition, "the circumstances must . . . [be] such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts." Byars, 237 S.C. at 559, 118 S.E.2d at 330; see Pendarvis, 227 S.C. at 58, 86 S.E.2d at 744 (holding a party seeking to enforce a trust "may become barred by laches if he fails to proceed with reasonable diligence").

Assuming the trust still exists, no assertion of rights has been made on behalf of the trust in approximately 200 years. During this

200-year period, the Parish leased the property for uses not mentioned in the trust and mortgaged it on at least four different occasions.[23]

In the mortgages dated 1979, 1988, and 1993, the Parish covenanted it was "lawfully seised" of the property it was mortgaging. According to Black's Law Dictionary, "seise" means to hold in fee simple. Black's Law Dictionary 1362 (7th ed. 1999). Thus, for approximately fifteen years, the Parish was specifically claiming to a third party that it held the property in fee simple.[24] During this fifteen-year time period, the Does did not challenge the Parish's claim of ownership, even though a default on the mortgage could have resulted in foreclosure.

Prejudice is arguably shown because to allow the Does to assert ownership of the property after such a delay could cause the outstanding balances on the mortgages to come due immediately. See Arceneaux, 284 S.C. at 503, 327 S.E.2d at 358 (holding a claim is barred by laches if the delay prejudices the other party).

Viewing the evidence in the light most favorable to the Diocese and the National Church, there is at least a genuine issue of material fact as to whether the Does' claims are barred by laches. Thus, the circuit court erred by granting summary judgment in favor of the Does on the issue of laches. See George, 345 S.C. at 452, 548 S.E.2d at 874 ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

E. Staleness

The Diocese and the National Church argue the circuit court erred by granting summary judgment to the Does on the claim of staleness. We agree.

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[23] This lawsuit was commenced in 2000. The Parish mortgaged the property for a fifth time in 2001.

[24] See footnote 17, supra.

A stale demand is "'one that has for a long time remained unasserted; one that is first asserted after an unexplained delay of such great length as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and to do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that it has been abandoned or satisfied.'" Pendarvis, 227 S.C. at 59, 86 S.E.2d at 744 (quoting Bell v. Mackey, 191 S.C. 105, 123, 3 S.E.2d 816, 824 (1939)).

We find Pendarvis instructive on this issue. In Pendarvis, a trust was established in 1713. Pendarvis, 227 S.C. at 53, 86 S.E.2d at 741. The deed was recorded in the Register of Deeds Office for Charleston County within twenty years of the creation of the trust. Id. at 56, 86 S.E.2d at 742. However, the existence of the trust was forgotten for the next 200 years. Id. During this time period, the church treated the property as its own. Id. at 52-56, 86 S.E.2d at 741-43. Because no successor trustees were appointed after the original trustees died, no one representing the trust asserted ownership of the property pursuant to the terms of the trust during this 200-year period. Id. at 54, 86 S.E.2d at 742. When the church decided to subdivide the property in 1945, the trust was rediscovered and a suit was commenced to clear title to the property. Id. at 56, 86 S.E.2d at 742. In explaining numerous reasons not to enforce the trust, our supreme court reviewed these facts and then stated a court "should not now undertake to enforce this ancient trust." Id. at 57, 86 S.E.2d at 743.

Similarly, in the present case, a trust established in 1745 was recorded in the Register of Deeds Office for Charleston County approximately twenty years after the trust's creation. The trust was then forgotten for the next 200 years, during which time the Parish treated the property as its own. No successor trustees were appointed after the original trustees died, and thus, no one representing the trust asserted any ownership rights to the property during this 200-year period. The trust was rediscovered in 1986 and still no claim was made by the descendants of the trustees for another twenty years. It was not until the Diocese gave notice to the Register of Deeds Office for

Georgetown County that both the Diocese and the National Church held an interest in the property that a lawsuit was filed in which the Does eventually asserted a claim to the property.

Viewing the evidence in the light most favorable to the Diocese and the National Church, there is at least a genuine issue of material fact as whether the Does' claims were stale.[25] See id. at 59, 86 S.E.2d at 744. Thus, the circuit court erred by granting summary judgment in favor of the Does on the staleness claim. See George, 345 S.C. at 452, 548 S.E.2d at 874 ("The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.").

III. Subject Matter Jurisdiction

Standard of Review

"Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998); see Eaddy v. Eaddy, 283 S.C. 582, 584, 324 S.E.2d 70, 72 (1984) ("[S]ubject matter jurisdiction . . . may be raised at any stage of the proceeding.").

[25] The dispute between the parties concerning the term "inhabitants on Waccamaw Neck" in the present case exemplifies why it is "difficult or impossible for the court to ascertain the truth of the matters in controversy and to do justice between the parties." Pendarvis, 227 S.C. at 59, 86 S.E.2d at 744. The Parish claims this term should be read according to its plain meaning. The Diocese and the National Church contend the term had a special meaning in colonial times and referred to the political unit that would exist once a parish was established. In attempting to ascertain the intent of the settlor, we note the extreme difficulty in determining which of these meanings would have been more prevalent in colonial times.

A. Ascertaining Beneficiaries

The Diocese and the National Church argue the circuit court lacked subject matter jurisdiction to declare the Diocese and the National Church to be incidental beneficiaries of the trust. To the extent the circuit court order does this, we agree and vacate.

The probate court has exclusive jurisdiction to "ascertain beneficiaries." S.C. Code Ann. § 62-7-201(a)(3) (Supp. 2002). A beneficiary "includ[es] a person who has any present or future interest, vested or contingent . . . and, as it relates to a charitable trust, includes any person entitled to enforce the trust." S.C. Code Ann. § 62-1-201(2) (1987).

The circuit court found the Diocese and the National Church were "at best, incidental beneficiaries" to the trust. To the extent that the circuit court's statement was a finding that the Diocese and the National Church were incidental beneficiaries, we vacate.

B. Personal Property

The Diocese and the National Church argue the circuit court erred by declaring it did not have subject matter jurisdiction to determine the ownership of the personal property. We agree.

"[T]he probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts." S.C. Code Ann. § 62-7-201 (Supp. 2002).

In its complaint, the Parish sought a declaration that it owned the personal property located on the real property. The Diocese and the National Church counterclaimed for a declaration that all personal property located on the real property was owned by the Parish, subject to an interest held by both the Diocese and the National Church.

After the circuit court determined the holders of both legal and equitable title to the real property, the circuit court stated it had "no

further jurisdiction regarding this case." In the Rule 59(e), South Carolina Rules of Civil Procedure, motions to alter or amend the judgment, the Diocese and the National Church noted the issue of personal property had not been resolved. The circuit court did not address this issue in its order denying the motion.

The language of the trust deed refers only to real property.[26] Thus, because the personal property is not subject to the trust, the probate court cannot have exclusive jurisdiction over the personal property. Accordingly, we remand this issue to the circuit court.

CONCLUSION

Based on the foregoing, the circuit court's order is

VACATED IN PART, REVERSED IN PART and REMANDED.

STILWELL and KITTREDGE, JJ., concur.

[26] In their brief, the Does concede the personal property is not subject to the trust.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nationwide Mutual Insurance Company, Appellant,

v.

Julius Prioleau and Paula Prioleau, Respondents.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 3781
Submitted March 8, 2004 – Filed April 26, 2004

REVERSED

Robert C. Brown, of Columbia, for Appellant.

Arthur Aiken and Howard Hammer, of Columbia, for Respondents.

HUFF, J.: Nationwide Mutual Insurance Company brought this declaratory judgment action to determine whether Paula Prioleau was entitled to underinsured motorist (UIM) coverage under her automobile insurance policy purchased from Nationwide. The trial court found no meaningful offer of UIM coverage had been made to Paula, and she

was therefore entitled to have her policy reformed to include UIM coverage up to the limits of the policy. Nationwide appeals. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

On April 25, 1997, Julius Prioleau applied for automobile insurance with Nationwide. The application was completed in the names of "Julius and Paula Prioleau," but only Julius went to the insurance agency to apply for the insurance, and only Julius signed as an applicant. At the same time that Julius signed the application, he was presented with an "Offer of Optional Additional Uninsured and Underinsured Automobile Insurance Coverages" form. This form described the available UIM coverage and requested that Julius either accept or reject the additional coverage. Julius alone signed the form, rejecting the UIM coverage. The policy issued by Nationwide, however, listed both "Julius and Paula Prioleau" as the named insureds.

On February 3, 1998, Paula Prioleau was involved in an automobile accident while driving one of the vehicles covered by the Prioleaus' policy with Nationwide. Paula sustained bodily injuries as a result of the accident and made a claim against the at-fault driver's insurance carrier. The at-fault driver's insurance carrier paid Paula the liability policy limits. Paula then asserted an underinsured motorist claim against Nationwide.

At trial, the parties presented the deposition testimony of both Paula and Julius, as well as the in-court testimony of Paula. In his deposition, Julius testified that normally he and his wife handled the acquisition of insurance together, and he could not remember why Paula did not accompany him when he obtained the policy from Nationwide. Paula testified by way of deposition that she did not have anything to do with the acquisition of the Nationwide insurance policy, and although she knew they had to obtain insurance, she did not know her husband was going to get it that day. She could not remember whether it was she or her husband who handled getting their insurance in the two years between the time they returned from Germany in 1995

until Julius acquired the Nationwide policy in 1997. In her testimony before the trial court, Paula stated that Julius did not have authority from her to act as her agent in connection with the application of insurance with Nationwide. She admitted, however, that she knew her husband was "going to get some insurance," and she did not object to him going and getting the insurance, "because [she] didn't know when he was going."

Nationwide argued the rejection of UIM coverage form signed by Julius Prioleau was a valid rejection under South Carolina law, and it was not required to also obtain the signature of Paula rejecting UIM coverage, as Julius was the named insured and the only applicant for the policy. Alternatively, Nationwide claimed that the form was sufficient because Julius was acting as the agent for his wife when he obtained the insurance policy. The trial court rejected both claims and ordered the Prioleaus' policy be reformed to include underinsured motorist coverage up to the liability limits of the policy.

Nationwide appeals, arguing the trial court erred in ruling a valid and effective offer of UIM coverage had not been made when (1) such an offer had been made to and rejected by Julius Prioleau as the named insured and applicant for the policy and (2) such an offer had been made to and rejected by Julius Prioleau as the agent for his wife, Paula Prioleau. Because we find Julius necessarily acted as the agent for Paula, we reverse the trial court.

STANDARD OF REVIEW

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. Antley v. Nobel Ins. Co., 350 S.C. 621, 625, 567 S.E.2d 872, 874 (Ct. App. 2002). As the underlying issue in the present case involves determination of coverage under an insurance policy, the action is at law. State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 237, 530 S.E.2d 896, 898 (Ct. App. 2000). In an action at law, tried without a jury, the trial judge's factual findings will not be disturbed on appeal unless a review of the record reveals there is no evidence which reasonably supports the

judge's findings. Id. "'When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts.' In such cases, the appellate court is not required to defer to the trial court's legal conclusions." Allstate Ins. Co. v. Estate of Hancock, 345 S.C. 81, 84, 545 S.E.2d 845, 846 (Ct. App. 2001) (quoting WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000)).

LAW/ANALYSIS

In addressing the agency issue, the trial court found the facts of the case did not support Nationwide's position that an agency relationship existed between Paula and Julius. In support of this finding, the court noted the uncontradicted testimony of Paula that "she was not aware of her husband's intention to sign the offer form and that she did not give her husband authority to act on her behalf, in any way, in matters having to do with automobile insurance." We find the trial judge erred as a matter of law in finding the facts did not support the existence of an agency relationship between Paula and Julius.

It is well-settled that the relationship of agency between a husband and wife is governed by the same rules which apply to other agencies, and no presumption arises from the mere fact of the marital relationship that one spouse is acting as agent for the other. Bankers Trust of South Carolina v. Bruce, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984). However, the relationship of agency need not depend upon express appointment and acceptance thereof. Rather, an agency relationship may be, and frequently is, implied or inferred from the words and conduct of the parties and the circumstances of the particular case. Id.

> The law creates the relationship of principal and agent if the parties, in the conduct of their affairs, actually place themselves in such position as requires the relationship to be inferred by the courts, and if, from the facts and circumstances of the particular case, it appears that there was at least an implied intention to create it, the relation

> may be held to exist, notwithstanding a denial by the alleged principal, and whether or not the parties understood it to be an agency.

Crystal Ice Co. of Columbia v. First Colonial Corp., 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979).

In her testimony, Paula admitted she knew she and Julius had to obtain insurance and that she knew her husband was "going to get some insurance," even though she did not know when he was going to get it or that he was getting it that particular day. While she stated her husband did not "have authority from [her] to act as [her] agent in connection with [the] application" for insurance with Nationwide, this testimony is nothing more than a denial of any **express** authority given by Paula to Julius. The law is clear, however, that the relationship of agency need not depend upon express appointment and acceptance thereof, but may be, and frequently is, implied by the words and conduct of the parties and the circumstances of the particular case. Indeed, the law creates the relationship of principal and agent where the parties, in the conduct of their affairs, actually place themselves in such position as requires the relationship to be inferred by the courts. Crystal Ice Co. of Columbia Corp., 273 S.C. at 309, 257 S.E.2d at 497.

Here, Paula and Julius, by their conduct, placed themselves in such a position as required an agency relationship to be inferred by the courts, and the only reasonable conclusion from the facts of this case is that an implied agency existed between Paula and Julius. Otherwise, Paula is repudiating the very contract under which she seeks reformation. As noted by the Appellate Court of Illinois in a similar case, it would be inconsistent to allow a spouse under such facts to argue that

> (1) she was covered by the policy procured exclusively by her husband but admittedly for her benefit; (2) she was entitled to recover from [the insurance company] under the terms of the policy; but (3) with respect to one aspect of the policy, her husband acted without her authority and his

> decision cannot bind her. To allow such an argument would permit [the wife] to accept the benefit of the bargain her husband made on her behalf but not the burden.

Messerly v. State Farm Mut. Auto. Ins. Co., 662 N.E.2d 148, 151 (Ill. 1996).

CONCLUSION

While the evidence supports a finding that no **express** agency relationship existed between Paula and her husband, the facts clearly demonstrate an **implied** agency existed between the parties for the purpose of acquiring the automobile insurance policy in question. By making a claim under the policy, Paula has essentially placed herself in such a position that the court must infer an agency relationship. Otherwise, no policy would exist under which Paula could claim UIM coverage. Accordingly, the record reveals there is no evidence which reasonably supports the trial court's finding of the non-existence of an agency relationship between Paula and her husband.[1] The judgment of the trial court is therefore

REVERSED.
STILWELL, J. and CURETON, A.J. concur.

[1]It should be noted that the matter at issue here is the existence of an agency relationship, not the scope. Here, we are not dealing with a situation where one person gives another only limited authority to act as an agent in obtaining specific types and levels of coverage. Accordingly, this opinion does not imply blanket authority when a spouse is authorized to act in some matter on behalf of the other, and it does not address the issue of whether an agent's authority has been exceeded.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Video Gaming Consultants, Inc., Respondent,

v.

South Carolina Department of Revenue, Appellant.

Appeal From Horry County
J. Stanton Cross, Jr., Special Circuit Court Judge

Opinion No. 3782
Heard February 11, 2004 – Filed April 26, 2004

REVERSED

Carol I. McMahan, Nicholas P. Sipe, Harry T. Cooper, Jr., of Columbia; for Appellant.

H. Buck Cutts, of Surfside Beach; for Respondent.

HUFF, J.: After prevailing in underlying litigation against the South Carolina Department of Revenue (Department), Video Gaming Consultants, Inc. (Video Gaming) asked that it be awarded attorney's fees pursuant to S.C.

Code Ann. § 15-77-300 (Supp. 2003). The circuit court awarded $25,286.00 in attorney's fees. The Department appeals. We reverse.

FACTS

Video Gaming operated a video gaming business in Garden City. On July 27, 1995, the Department issued Video Gaming a citation for violation of S.C. Code Ann. § 12-21-2804(b) (Supp. 1999)[1] for advertising video games on its premises. Video Gaming had displayed a large sign stating "STOP HERE TRY OUR POKER VIDEO GAMES" and two signs stating "JACKPOT VIDEO GAMES."

Video Gaming appealed the citation to the Administrative Law Judge (ALJ) Division, contending that the State's prohibition against advertising violated the protection of free speech afforded by the First Amendment and the relevant statute should be declared void and unconstitutional. The ALJ upheld the citation. The Honorable J. Stanton Cross, Jr., sitting as Special Circuit Court Judge, affirmed the ALJ decision. The South Carolina Supreme Court reversed finding the statute was an unconstitutional restriction on commercial speech. Video Gaming Consultants v. S.C. Dept. of Revenue, 342 S.C. 34, 535 S.E.2d 642 (2000).

After the supreme court issued its opinion, Video Gaming filed a petition for attorney's fees pursuant to S.C. Code Ann. § 15-77-300 (Supp. 2003). The case was heard by Judge Cross. He awarded Video Gaming $27,453.00 in fees. In an amended order, Judge Cross reduced the amount by $6,499.00 to correct a billing error and also added $3,404.00 for fees incurred between May 2001 through September 2001 for a total award of $25,286.00 in attorney's fees. This appeal followed.

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[1] This section provided, "No person who maintains a place or premises for the operation of machines licensed under Section 12-21-2720(A)(3) may advertise in any manner for the playing of the machines." It was repealed by Act No. 125, Part I, § 8, eff. July 1, 2000, 1999 S.C. Acts 1325.

STANDARD OF REVIEW

On appeal, the trial court's decision regarding an award of attorney's fees under S.C. Code Ann. § 15-77-300 (Supp. 2003) will not be disturbed absent an abuse of discretion. Heath v. County of Aiken, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001).

LAW/ANALYSIS

The Department argues the trial court erred in awarding attorney's fees to Video Gaming. We agree.

The prevailing party to a civil action may recover attorney's fees against a state agency only if "the agency acted without substantial justification in pressing its claim against the party" and there are no "special circumstances that would make the award of attorney's fees unjust." S.C. Code Ann. § 15-77-300 (Supp. 2003). Our supreme court held "substantial justification" does not mean "'justified to a high degree,' but rather 'justified in substance or in the main'-- that is, justified to a degree that could satisfy a reasonable person." Heath v. County of Aiken, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988), which was applying the federal Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A) (Supp. 2003)[2]). In deciding whether a state agency acted with substantial justification, the courts look to the agency's position in litigating the case to determine "whether it is one which has a reasonable basis in law and fact." McDowell v. S.C. Dep't of Soc. Servs., 304 S.C. 539,

[2] The EAJA provides that "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (Supp. 2003).

542, 405 S.E.2d 830, 832 (1991). An agency's loss on the merits does not create a presumption that its position was not substantially justified. Kiareldeen v. Ashcroft, 273 F.3d 542, 554 (3rd Cir. 2001); see Pierce, 487 U.S. at 569 (noting the government could take a position that is substantially justified, yet lose).

In awarding attorney's fees to Video Gaming, Judge Cross stated the following:

> In further response to [the Department's] Motion to Reconsider, I point out that [the Department] acted without substantial justification when it continued to vigorously prosecute this case after the United States Supreme Court handed down its decision in the 44 Liquormart case[3] in the summer 1996. This decision was handed down before the Administrative Law Judge decision was issued and substantially undercut the legal analysis and argument of the state relative to both the Reyelt[4] and Posadas[5] decisions.

The court then explained that the Department had failed to meet its affirmative duty to "disclose to the ALJ Division Court and to this Court the impact and legal effect of 44 Liquormart."

We find no evidence the Department acted without substantial justification in continuing its action against Video Gaming after the United States Supreme Court's decision in 44 Liquormart. Rule 3.3(a)(3) of the Rules of Professional Conduct, Rule 407, SCACR, requires lawyers to disclose to the tribunal "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . " As the comment to this section notes, "[a] lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities."

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[3] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).
[4] Reyelt et al. v. S.C. Tax Comm'n, C/A No. 6-93-1491-3 (D.S.C. 1993).
[5] Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986).

Our review of the record reveals no indication of the Department being less than forthcoming with regard to the Court's decision in 44 Liquormart. The Department did not fail to disclose the case to the tribunals in the underlying litigation. The parties argued extensively about the proper interpretation of 44 Liquormart during the ALJ hearing. The circuit court likewise engaged in a substantial discussion of the case's impact in its order affirming the ALJ decision. We find no point at which the Department maintained a position that can be viewed as disingenuous.

Furthermore, the Department was in no position to determine that 44 Liquormart had rendered Section 12-21-2804 unconstitutional. All statutes are presumed constitutional. Davis v. County of Greenville, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996). As an administrative agency, the Department "must follow the law as written until its constitutionality is judicially determined; an agency has no authority to pass on the constitutionality of a statute." Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm., 335 S.C. 230, 241, 516 S.E.2d 655, 660-61 (1999). By continuing its action against Video Gaming, the Department was merely enforcing Section 12-21-2804 as it was obligated to do until a proper court determined the statute to be unconstitutional. Thus, we find the Department had a reasonable basis in law and fact for continuing its action against Video Gaming.

Accordingly, we hold the trial court abused its discretion in determining the Department acted without substantial justification in the underlying litigation. The trial court's award of attorney's fees pursuant to Section 15-77-300 is

REVERSED

STILWELL,J. and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ernest Dwight Perry, Appellant.

Appeal From Newberry County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 3783
Submitted December 8, 2003 – Filed April 26, 2004

AFFIRMED

Senior Assistant Appellate Defender Wanda P. Hagler, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General W. Rutledge Martin, all of Columbia; and Solicitor William Townes Jones, of Greenwood, for Respondent.

CURETON, A.J.: A jury convicted Ernest Dwight Perry of trafficking in marijuana, manufacturing marijuana, manufacturing marijuana on the lands of another, and resisting arrest. The trial judge sentenced Perry to

concurrent sentences of twenty-five years for trafficking in marijuana, five years for manufacturing marijuana, five years for entry on another's land for the purpose of cultivating marijuana, and a consecutive sentence of one year for resisting arrest. Additionally, he was ordered to pay a fine of $25,000 for trafficking in marijuana. Perry appeals, arguing the trial judge erred: (1) in failing to direct a verdict as to the charges of trafficking in marijuana and manufacturing marijuana; (2) in denying his motion to require the State to elect to prosecute either manufacturing marijuana or entry on another's land for the purpose of cultivating marijuana; and (3) in denying his motion to quash the indictment charging him with assault on a police officer while resisting arrest. We affirm.

FACTS

On July 21, 2000, the Newberry County Sheriff's Office conducted an eradication flight over different areas of the county in an attempt to locate marijuana. During this flight, Investigator Wesley Boland spotted eight to ten plots of what appeared to be marijuana growing near Prosperity. He also saw hoses running through the woods to each of the plots. The hoses ran from a pump house behind Perry's residence. Officers with the Newberry County Sheriff's Department and the Newberry Police Department approached the house and found Perry at the pump house. Based on their investigation, the officers arrested Perry. As Officer Lawson was attempting to get Perry into the police car, Perry became belligerent and kicked Lawson in the right shin.

Subsequently, the officers obtained a search warrant and executed it on Perry's house and property. The water hoses from the pump house led to fourteen different plots on the adjacent property. Officer Robert Dennis testified he recovered several bags of marijuana from inside the house. Wayne Nichols owned the property where all the plants were growing. However, he testified he knew nothing about the marijuana and had not given Perry permission to grow marijuana on his property. While conducting the search of the property, the officers pulled up 456 marijuana plants. During the search, the officers inventoried, tagged, and processed the plants for

future testing. Shortly thereafter, the officers transported the plants to a secure location.

At trial, Investigator Max Pickelsimer was qualified as an expert to analyze marijuana. He testified that he received 456 stalks of marijuana and analyzed thirty-four of the stalks. He explained the stalks were wet when they were bundled together and, as a result, they became stuck together as they dried. In attempting to separate them, he was able to get thirty-four plants that were strong enough to analyze, and that all thirty-four plants tested positive for marijuana.

Perry did not testify at trial. The jury convicted him of trafficking in marijuana, manufacturing marijuana, manufacturing marijuana on the lands of another, and resisting arrest. Perry appeals.

DISCUSSION

I. Directed Verdict

Perry contends the trial judge erred in denying his motion for a directed verdict on the charges of trafficking in marijuana and manufacturing marijuana. We disagree.

On appeal from the denial of a directed verdict in a criminal case, this Court must view the evidence in the light most favorable to the State. State v. Al-Amin, 353 S.C. 405, 411, 578 S.E.2d 32, 35 (Ct. App. 2003); State v. Morgan, 352 S.C. 359, 364, 574 S.E.2d 203, 205 (Ct. App. 2002). When ruling on a motion for a directed verdict, the trial judge is concerned with the existence or nonexistence of evidence, not its weight. State v. Wilds, 355 S.C. 269, 274, 584 S.E.2d 138, 140 (Ct. App. 2003). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Harris, 351 S.C. 643, 653, 572 S.E.2d 267, 273 (2002). On the other hand, if the State fails to produce evidence of the offense charged, a defendant is entitled to a directed verdict. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001); State v. Padgett, 354

S.C. 268, 271, 580 S.E.2d 159, 161 (Ct. App. 2003), cert. denied (Sept. 24, 2003).

A. Trafficking in Marijuana

Perry argues he was entitled to a directed verdict on the charge of trafficking in marijuana because the State failed to present evidence that he was in actual or constructive possession of 100 to 1000 marijuana plants, the quantity element of the offense. Specifically, he claims the State failed to establish this element of the offense given it only tested thirty-four of the seized plants.

A person is guilty of trafficking in marijuana if he is in actual or constructive possession of 100 to 1000 marijuana plants. S.C. Code Ann. § 44-53-370(e)(1)(b) (2002)[1]; see State v. Muhammed, 338 S.C. 22, 27, 524 S.E.2d 637, 639 (Ct. App. 1999) ("Possession requires more than mere presence. The State must show the defendant had dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it.").

Viewed in the light most favorable to the State, we find there was evidence that reasonably tended to prove Perry's guilt as to the charge of trafficking in marijuana. Investigator Salazar testified that 456 marijuana plants were seized from property that was adjacent to Perry's residence. The hoses on the plots originated from a pump house behind Perry's residence. Police Chief Swindler testified he recognized all the plants as marijuana based on the appearance and the smell of the plants. Investigator Pickelsimer testified all the plants appeared to be of the same type and that the sample thirty-four plants all tested positive for marijuana. Based on this evidence, it could be fairly and logically deduced that Perry was in actual or constructive possession of 100 to 1000 marijuana plants. See State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000) (stating in reviewing the refusal to grant a directed verdict in a criminal case, the evidence is viewed in the light

[1] We note section 44-53-370 was amended effective May 20, 2002. This amendment, however, does not affect the merits of this case.

most favorable to the State to determine whether there is any direct or substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which guilt may be fairly and logically deduced).

Our decision is supported by the holdings of several state and federal courts. For example, the Kentucky Court of Appeals upheld a conviction for trafficking in marijuana when the State presented evidence that only six of the ninety-eight plants that had been seized were tested and found to be positive for marijuana. Taylor v. Commonwealth, 984 S.W.2d 482, 484-85 (Ky. Ct. App. 1998). Because the weight or amount of the marijuana was an element of the trafficking offense with which he was charged, Taylor argued that each plant used to determine the total weight should have been tested. The Court rejected this argument, finding there was no evidence that the ninety-two plants that were not tested were different from the six plants that were tested. Id. (relying on and discussing state and federal cases which held that the prosecution is not required to test samples from all individual portions of a controlled substance when the charged offense relates to a certain amount of a controlled substance).

Similarly, the Fourth Circuit Court of Appeals has held that the prosecution need not produce the results of any testing to survive a directed verdict motion for growing marijuana. United States v. Fry, 787 F.2d 903, 906 (4th Cir.), cert. denied, 479 U.S. 861 (1986). In Fry, the defendant was convicted of growing and conspiring to grow and distribute marijuana. As one of his issues on appeal, Fry argued that the evidence was insufficient to convict because law enforcement destroyed all the plants they seized before performing chemical analysis. The Court affirmed Fry's convictions, holding testimony from two of Fry's co-conspirators and a law enforcement officer established the plants were marijuana plants. The Court ruled that "[s]uch lay testimony is sufficient to support a jury finding that the plants were marijuana plants." Id. at 906.

Based on the foregoing, the trial judge properly denied Perry's motion for a directed verdict as to the charge of trafficking in marijuana.

B. Manufacturing Marijuana

Perry next argues the trial judge erred in declining to direct a verdict on the charge of manufacturing marijuana. Because the marijuana was not grown on his property, he contends there was insufficient proof of guilt on this charge.

Section 44-53-370 of the South Carolina Code makes it unlawful to "manufacture, distribute, dispense, deliver, . . . a controlled substance or a controlled substance analogue." S.C. Code Ann. § 44-53-370(a)(1) (2002). As a threshold matter, the plain language of the statute does not require the manufacturing of marijuana to be on one's own property. See State v. Baucom, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible."); State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002) ("The legislature's intent should be ascertained primarily from the plain language of the statute."). As such, the fact that someone else owns the property is irrelevant in proving the elements of the offense of manufacturing marijuana.

With this in mind, we turn to the issue concerning the sufficiency of the evidence. Viewed in the light most favorable to the State, we find the judge properly submitted to the jury the charge of manufacturing marijuana. Investigator Wesley Boland testified he was engaged in an eradication flight over Newberry County on July 21, 2000, when he observed marijuana growing in a field. He also observed water hoses leading to a pump house behind Perry's house. Law enforcement executed a search warrant on Perry's property and found water hoses leading from Perry's pump house to fourteen different plots that had marijuana plants growing. This evidence reasonably tended to prove Perry's guilt. Thus, the trial judge properly denied Perry's motion for a directed verdict.

II. Motion to Require the State to Elect

Perry asserts the trial judge erred in denying his motion to require the State to elect to prosecute either the offense of manufacturing marijuana or

the offense of manufacturing marijuana on the land of another.[2] We disagree.[3]

At the close of the State's case, defense counsel moved for the State to elect between the two manufacturing offenses. Because the evidence only showed that the marijuana had been grown on Wayne Nichols's property, and not Perry's, counsel contended the jury could not find Perry "guilty of both under the circumstances in this case." The trial judge denied the motion. Based on the statutory language of the two offenses, the judge found the "Legislature intended for this to be a separate offense if you go onto the lands of another to do that."

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[2] Perry repeatedly refers to this offense as "manufacturing marijuana on the land of another." However, the actual offense charged is, "Entry on another's land for purpose of cultivating marijuana." S.C. Code Ann. § 16-11-617 (2003). Our Supreme Court has recognized the distinction between "cultivating" and "manufacturing." State v. Walker, 349 S.C. 49, 52 n.2, 562 S.E.2d 313, 314 n.2 (2002) (stating "[e]vidence sufficient to sustain a conviction for manufacturing marijuana may not always be sufficient to sustain a conviction for cultivating marijuana on the lands of another, even where there is no dispute the property belonged to someone other than the defendant"). Perry has never asserted any argument regarding this distinction.

[3] Although it is not determinative of the outcome of this issue, we note the trial judge sentenced Perry to concurrent terms of five years imprisonment on these charges, which, in turn, were to be served concurrently with the twenty-five-year sentence Perry received for trafficking in marijuana. As such, we are not required to review this issue. See State v. Ervin, 333 S.C. 351, 359, 510 S.E.2d 220, 225 (Ct. App. 1998) (recognizing appellate court has discretion to review issues concerning convictions which involve concurrent sentences).

A.

"[A] motion to elect is addressed to the sound discretion of the court." City of Greenville v. Chapman, 210 S.C. 157, 159, 41 S.E.2d 865, 866 (1947). In Chapman, our Supreme Court stated:

> The rule in this state is that distinct offenses--felonies or misdemeanors--may be charged in separate counts of the same indictment, whether growing out of the same transaction or not. If the several offense[s] charged do not grow out of the same transaction, then the proper practice is to require the prosecuting officer to elect upon which count he will proceed. But, when several offenses charged grow out of the same transaction, then the prosecuting officer is not required to elect, and the court instructs the jury to pass upon the several counts separately, and write their verdict accordingly.

Id. at 160, 41 S.E.2d at 866 (quoting State v. Lee, 147 S.C. 480, 483, 145 S.E.285, 286 (1928)). In interpreting Chapman, this Court found that offenses may be joined in the same indictment and tried together "where they (1) 'aris[e] out of a single chain of circumstances,' (2) 'are proved by the same evidence,' (3) 'are of the same general nature,' and (4) no 'real right of the defendant has been jeopardized.'" State v. Tate, 286 S.C. 462, 464, 334 S.E.2d 289, 290 (Ct. App. 1985) (quoting Chapman, 210 S.C. at 160, 41 S.E.2d at 867).

In the instant case, all of the charged offenses arose out of a single transaction and met the requirements outlined in Tate. Thus, the trial judge did not abuse his discretion when he denied Perry's motion to require the State to elect to prosecute either the offense of manufacturing marijuana or the offense of entering the land of another for the purpose of cultivating marijuana. See Walker, 349 S.C. at 52, 562 S.E.2d at 314 (indicating defendant may be indicted and tried for trafficking marijuana, manufacturing marijuana, and cultivating marijuana on the land of another); see also State v. Hall, 280 S.C. 74, 77, 310 S.E.2d 429, 431 (1983) (holding distinct criminal offenses may arise from a single act).

B.

In a related argument, Perry claims the denial of this motion resulted in a double jeopardy violation. He asserts, "a single manufacturing/cultivating offense applied to the case as opposed to the allegation that two manufacturing/cultivating offenses occurred."

Initially, we question whether this issue is preserved for our review. Based on the arguments presented at trial, we can discern no specific argument concerning a violation of double jeopardy. As such, we need not address this issue. See Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001, 322 S.C. 127, 132, 470 S.E.2d 373, 376 (1996) (holding double jeopardy issue must be raised to the trial court to be preserved for appellate review); see also Humbert v. State, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001) (stating issues not raised and ruled upon in the trial court will not be considered on appeal). However, to the extent counsel's argument can be construed as relating to double jeopardy, we address the merits of the issue.

Section 44-53-370(a)(1) provides that it is unlawful for a person "to manufacture . . . a controlled substance." S.C. Code Ann. § 44-53-370(a)(1) (2002). Pursuant to section 16-11-617, "[i]t is unlawful for a person to enter on the land of another for the purpose of cultivating or attempting to cultivate marijuana. The provisions of this section are cumulative to other provisions of law." S.C. Code Ann. § 16-11-617 (2003) (emphasis added).

The United States Constitution and the South Carolina Constitution protect against double jeopardy. The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .." U.S. Const. amend. V. The South Carolina Constitution states: "No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . .." S.C. Const. art. I, § 12.

"The Double Jeopardy clause protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for

the same offense after conviction; and (3) multiple punishments for the same offense." State v. Nelson, 336 S.C. 186, 195, 519 S.E.2d 786, 790 (1999). Our Supreme Court has reaffirmed that Blockburger v. United States, 284 U.S. 299 (1932), is "the only remaining test for determining a double jeopardy violation, in both multiple punishment and successive prosecution cases." State v. Easler, 327 S.C. 121, 132, 489 S.E.2d 617, 623 (1997).

"In Blockburger v. United States, the United States Supreme Court held where the same act or transaction constitutes a violation of two distinct statutory provisions, 'the test to determine whether these are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.'" Stevenson v. State, 335 S.C. 193, 198, 516 S.E.2d 434, 436-37 (1999) (quoting Blockburger, 284 U.S. at 304). However, "a court may conclude there is no double jeopardy violation even if the same elements test is met where the legislature clearly intends multiple punishments for a single act." State v. Price, 333 S.C. 267, 270 n.4, 510 S.E.2d 215, 217 n.4 (1998).

Because the offense of cultivating or attempting to cultivate marijuana on the land of another requires proof of an element that is not present in the charge of manufacturing marijuana, there exists no double jeopardy violation. Furthermore, based on the plain language of section 16-11-617, the General Assembly clearly intended for this offense to be cumulative to other provisions of the law. Therefore, it did not violate Perry's protection against double jeopardy to be convicted of both offenses. Cf. State v. Brown, 319 S.C. 400, 408, 461 S.E.2d 828, 831 (Ct. App. 1995) (emphasizing that "there is no [double jeopardy] prohibition against the contemporaneous prosecution by the State for both possession with intent to distribute and distribution of crack cocaine and the related school charges where . . . they arise out of the same conduct").

III. Motion to Quash the Indictment for Resisting Arrest

Perry contends the trial court erred in denying his motion to quash the indictment charging him with assault on a police officer while resisting

arrest. Because the date of the offense as stated in the indictment was incorrect, Perry argues the indictment was defective and, as result, the court was without subject matter jurisdiction. We disagree.

At trial, defense counsel moved to "quash"[4] the indictment after Officer Lawson testified to the physical altercation with Perry. Counsel argued the two-count indictment alleged the incidents occurred on July 24, 2000, but all the testimony indicated the incidents happened on July 21, 2000. The trial judge denied the motion, but stated he would reconsider the motion at the close of the State's case.

After the State rested its case, Perry renewed his motion, arguing he was in jail on July 24, and "the State has failed to prove the [sic] sufficient evidence with respect to that particular indictment."[5] The State relied on the language in the indictment, " . . . did in Newberry County, state aforesaid, on or about the 24th day of July, 2000, willfully and unlawfully resist an arrest . . .." Additionally, the State argued the indictment was sufficient to put Perry on notice of the charges against him and it had met the burden on each element of the charge. The trial judge again denied the motion on the ground that it was a typographical error. The judge reasoned, "I think everyone has been on the same page since day one that it was alleged that at the time he was arrested it is no question that it was on the 21st."

A circuit court has subject matter jurisdiction over a criminal offense if: (1) there has been an indictment that sufficiently states the offense; (2) there has been a waiver of indictment; or (3) the charge is a lesser-included offense of the crime charged in the indictment. Carter v. State, 329 S.C. 355,

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[4] Counsel never specifically made a motion to quash the indictment but simply stated the dates in the indictment were incorrect based on the testimony.

[5] The language used by defense counsel in renewing his motion at the close of the State's case indicates that he was actually moving for a directed verdict on this charge. On appeal, Perry only raises an argument regarding the validity of the indictment and not the sufficiency of the evidence.

362, 495 S.E.2d 773, 777 (1998). "An indictment passes legal muster if it 'charges the crime substantially in the language of the . . . statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood . . ..'" State v. Reddick, 348 S.C. 631, 635, 560 S.E.2d 441, 443 (Ct. App. 2002) (quoting S.C. Code Ann. § 17-19-20(1985)); see S.C. Code Ann. § 17-19-20 (2003) ("Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.").

The indictment for the charge of resisting arrest provided:

> That ERNEST DWIGHT PERRY, did in Newberry County, state aforesaid, on or about the 24th day of July, 2000, wilfully and unlawfully resist an arrest being made by one whom the said defendant knew or reasonably should have known was a law enforcement officer, to wit: Officer Curtis Lawson, in violation of section 16-9-320 of the South Carolina Code of Laws, 1976, as amended[.]

The text of this indictment charges the crime of resisting arrest in substantially the same language as section 16-9-320(1). S.C. Code Ann. § 16-9-320(A) (2003) ("It is unlawful for a person knowingly and wilfully to oppose or resist a law enforcement officer in serving, executing, or attempting to serve or execute a legal writ or process or to resist an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not."). As such, there is no jurisdictional defect given Perry was apprised of the offense with which he was being charged.

CONCLUSION

Accordingly, Perry's convictions and sentences are

AFFIRMED.

HOWARD and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Earl Miller, Appellant.

Appeal From Cherokee County
Gary E. Clary, Circuit Court Judge

Opinion No. 3784
Heard March 10, 2004 – Filed April 26, 2004

REVERSED AND REMANDED

William G. Rhoden, of Gaffney, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

HUFF, J.: A Cherokee County grand jury indicted Robert Earl Miller for unlawful possession of a handgun, failure to stop for a police

vehicle, and armed robbery. Following a jury trial, Appellant was convicted of all three charges. During trial, Appellant asked for and was denied a suppression hearing concerning the show-up identification of his alleged co-participant. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

On or about 4:00 p.m. on the afternoon of October 5, 2001, a black male robbed the Alltel Communications store located on Floyd Baker Boulevard in Gaffney, South Carolina. The perpetrator entered the store with his back to the store's two female employees. As the man turned to face the employees, he pulled a black mask over his face, brandished a black handgun, and ordered the employees to fill a bag with money.

The two employees began filling the bag with money from one of the store's cash registers, when the man ordered one of the women to open the second cash register. However, the employees could not find the keys to the second register. While in the back looking for the keys, the man forced one of the women to open the store's safe. After finding the safe empty, the man told one of the women to keep looking for the keys to the register. Realizing they would not be able to open the second register, the man took both women into the back of the store and made them lie down on the floor. The employees lay on the floor as instructed until they heard the front door buzzer. Assuming the robber had left the store, the employees went to the front of the store, locked the door, and called 911.

The robbery lasted approximately ten minutes and resulted in a little over four hundred dollars being stolen. When police arrived on the scene, the employees described the robber as a black male who wore a blue shirt and dark pants. Sometime later, an individual was brought back to the store, and both women positively identified this person as the robber. One of the women testified, although the man never removed the mask during the robbery, they were able to see the side of his face as he pulled the mask down. Both women testified they

never saw a car in the parking lot, but they heard a car door and assumed it was a customer coming in when the robber entered the store.

On October 5, 2001, shortly after starting his 4:00 shift, Trooper Johnnie Godfrey with the South Carolina Highway Patrol was traveling on Floyd Baker Boulevard near the Alltel store when a vehicle came from his right and cut him off. At this point, Trooper Godfrey testified that he turned on his blue lights and attempted to pull over the car for the purpose of issuing a warning for improper lane change and failing to yield the right-of-way. The car pulled into a parking lot, but failed to stop, instead exiting on another street and heading up the interstate toward Blacksburg. A pursuit ensued involving several officers, including the Highway Patrol and the Blacksburg City Police Department.

The pursued car left Gaffney and headed up I-85 toward North Carolina, sideswiping a car and turning off the interstate. A bystander testified that she observed the chase and as the car approached her, she saw someone toss a gun from the passenger side window. Officer Christy Poole of the Gaffney City Police Department searched the area where the gun was allegedly thrown and retrieved a black handgun.

The chase ended after the pursued car attempted to make a right hand turn and ran off the road and into a field. The two occupants then jumped from the car as it was still rolling, and fled. The driver of the vehicle was quickly apprehended and identified as appellant, Robert Miller.

Miller was placed in the back seat of Sergeant Mark Gooch's patrol car. Miller remained in the car for a period of fifteen to twenty minutes, while detectives and the crime scene unit responded to the scene. Sergeant Gooch testified that while en route to the detention center, Miller commented "I heard someone say something about a robbery. I don't know anything about a robbery. I wasn't even near an Alltel store." Miller also questioned what the crime scene officers were doing at the vehicle, and when the sergeant told him they were recovering evidence and asked Miller if he was worried about them finding his fingerprints on the guns, he stated, "my man had a gun."

After hesitating, Miller then said, "if you will get a detective to talk to me, I'll tell them what they need to know." Officer Gooch stated that, while Miller was seated in his car, he did not mention a robbery or any charges against him to Miller. He admitted, however, that his police radio was on while Miller was seated in the car, and he did discuss these matters with other officers outside of the car, about fifteen feet behind the patrol vehicle.

Once he was transported to the local detention center, a datamaster test was administered. Trooper Godfrey testified he smelled an odor of alcohol on appellant and suspected appellant had been using marijuana. Based on the datamaster test, the trooper asked Miller to submit to a urine test and Miller refused. Trooper Godfrey charged Appellant with driving under the influence and Miller subsequently pled guilty to the charge.

The passenger from the vehicle was apprehended after he was found hiding in an outbuilding approximately two hundred yards from where the car was abandoned. This individual, identified as Tavo Glenn, was wearing a blue shirt and dark pants when apprehended. Mr. Glenn had several items in his possession when he was arrested including a little over four hundred dollars, a pair of latex gloves, and eight to ten rounds of .380 caliber pistol ammunition. A search of the automobile produced a .380 caliber silver handgun, found under the passenger seat.

Shortly after Glenn's apprehension, Captain Skinner of the Gaffney Police Department arrived on the scene and instructed one of his officers to take Glenn back to the Alltel store to be identified. When Glenn arrived at the Alltel store, the officers took him out of the patrol car and placed him in front of the vehicle, twenty to twenty-five feet from the front door of the store. Glenn was handcuffed and was the only civilian in the area, standing among police officers. The two employees positively identified Glenn as the perpetrator of the robbery. Thereafter, both Glenn and Miller were charged with armed robbery.

Appellant took the stand and admitted that he was the driver of the vehicle and that he intentionally failed to stop when he saw the police cars' blue lights. He claimed he did not see the lights while on Floyd Baker Boulevard, but noticed them after he cut through a parking lot, and thought he was being pulled for cutting through the lot to avoid a red light. Miller claimed that he rode with Glenn to Gaffney so that Glenn could get some marijuana. The two were riding around smoking and drinking and made some stops along the way for Glenn to sell some of the drugs. They also stopped for Miller to go to the bathroom, at which point he took over driving since Glenn's license had been suspended. Miller stated that he failed to stop for the blue lights because he was on parole and he knew there was a gun in the car, as well as significant amounts of illegal drugs. At some point during the chase, Miller saw Glenn throw something out the window. He knew that Glenn was getting rid of the drugs, but he did not know if Glenn threw a gun out the window. Miller denied that he robbed anyone. He stated he did not know anything about the Alltel robbery until after he was put in the police car. While sitting in the car, he was listening to the police radio, and "heard them keep bringing up something about armed robbery." He stated he must have heard them specifically mention Alltel.

Prior to trial, defense counsel moved for a suppression hearing pursuant to State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000), based on the unduly suggestive show-up identification of Tavo Glenn. Recognizing Glenn was not on trial in this case and had already been convicted in the matter, defense counsel nonetheless argued Miller was entitled to such a hearing as this was a "hand of one, hand of all case" and the identification of Glenn was a critical part of the State's case against Miller. The defense asserted the court needed to make a determination of the reliability of the evidence prior to the matter going before the jury.

The trial court pointed out that it had held such a hearing in Glenn's trial and, although it acknowledged that courts generally disfavor one person show-ups, the court had found the necessary requirements of the law met and admitted the identification in Glenn's

trial. Because Glenn had already been tried and convicted, the court held that his identification was not an issue in Miller's case. Defense counsel countered the State elected to try Glenn and Miller separately, and as a result, Miller was not present during the proceedings in Glenn's trial dealing with the identification issue. He therefore never had the opportunity to cross-examine the witnesses. Finding no case law to give guidance on the matter, the court determined Miller was not entitled to an in camera hearing regarding the identification of Glenn as the perpetrator.

LAW/ANALYSIS

Appellant argues the trial court erred by failing to conduct a suppression hearing related to the show-up identification of his alleged co-participant, Tavo Glenn. We agree.

South Carolina courts have consistently held that when identification of a defendant is at issue, "the general rule is that a trial court must hold an in camera hearing when the State offers a witness whose testimony identifies the defendant as the person who committed the crime, and the defendant challenges the in-court identification as being tainted by a previous, illegal identification or confrontation." State v. Ramsey, 345 S.C. 607, 613, 550 S.E.2d 294, 297 (2001) (citing State v. Cash, 257 S.C. 249, 185 S.E.2d 525 (1971)). In State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992), our Supreme Court noted the court had adopted a per se rule requiring the trial court to hold an in camera hearing in such situations. Simmons, 308 S.C. at 82-83, 417 S.E.2d at 93.

This court has also recently addressed the issue of a defendant's right to an in camera hearing concerning the admissibility of identification of the accused. In State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002), this court recognized the per se rule adopted by our courts. Cheatham, 349 S.C. at 117-118, 561 S.E.2d at 627. There, the defendant moved for a hearing outside the presence of the jury regarding his identification pursuant to Neil v. Biggers, 409

U.S. 188, 93 S. Ct. 375 (1972), State v. Washington, 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996), and Rule 104(c), SCRE. The trial judge denied this request. Cheatham, 349 S.C. at 112-13, 561 S.E.2d at 624-25. This court found Rule 104(c), SCRE, "unambiguously mandates hearings on the admissibility of out of court identifications of the accused shall in all cases be held outside the presence of the jury." Rule 104(c) provides as follows:

> **Hearing of Jury. Hearings on** the admissibility of confessions or statements by an accused, and **pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury.** Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

Rule 104(c), SCRE (emphasis added).

In Cheatham, we pointed out that the in camera hearing required by Rule 104(c) allowed for a more vigorous cross-examination that might otherwise be curtailed if such an examination were conducted in the presence of the jury, thereby requiring the defendant to risk alienating himself from the jurors. Cheatham, 349 S.C. at 117, 561 S.E.2d at 627. Based on Rule 104(c) and prior case law, this court reaffirmed the rule requiring an in camera hearing when a defendant challenges the in-court identification of defendant as being tainted by a previous illegal identification. Cheatham, 349 S.C. at 117-18, 561 S.E.2d at 626-27.

Although the procedures to be followed when a defendant challenges an in-court identification of himself on the basis that it has been tainted by a prior illegal or suggestive identification are clearly established, South Carolina courts have yet to address whether the same procedures are to be followed when, as here, the defendant seeks to challenge the identification of an alleged co-participant. The State contends Miller has no standing to challenge the line-up identification of another because constitutional rights are personal rights. Miller

asserts, under the facts of this case, due process requires that he be allowed to challenge the identification process. He contends he was never identified as a participant in the robbery and his only connection to the robbery is that he was apprehended with Glenn. He further argues the issue is the reliability of the evidence.

While there are no South Carolina cases directly on point, other jurisdictions have examined the issue of whether a defendant has standing to challenge the identification of an alleged co-participant. In People v. Bisogni, 483 P.2d 780 (Cal. 1971), the defendant sought to challenge the show-up identification of one of his alleged co-participants in a robbery. The defendant introduced alibi evidence that he and his alleged co-participant were somewhere else on the night of the crime. Id. at 782. Therefore, if this co-participant were proven to be one of the perpetrators, it would effectively destroy the defendant's alibi.

The California Supreme Court noted the reason for excluding unfairly conducted show-up identification evidence is that such evidence is unreliable as a matter of law and may result in the conviction of innocent persons. As pointed out by that court, such evidence is equally unreliable whether it involves the identity of the defendant, or the identity of a co-participant. Based on the circumstances of that case, the court held that "whenever the identity of a confederate is essential to prove the defendant's participation in a crime and when, as here, such evidence effectively destroys the defense offered by the defendant, he has standing to challenge the fairness of the identification procedures of the alleged co-participant." Id. at 783.

Similarly, in the more recent case of State v. Clausell, 580 A.2d 221 (N.J. 1990), the Supreme Court of New Jersey considered the issue of a challenge to the identification of a co-defendant. In Clausell, as in Bisogni, defendant presented the alibi defense that neither he nor his co-defendant were at the scene of the crime. Id. at 234. Finding that the defendant did have standing to challenge the identification of his co-defendant, the court held that "[a]lthough a litigant generally may assert only his or her constitutional rights, when the party raising

the claim is not simply an interloper and the proceeding serves the public interest, standing will be found." Id. (citations omitted). Noting that any evidence that placed the co-defendant at the scene of the crime bolstered the State's case against the defendant, the court held "[b]ecause defendant has a substantial personal stake in the admissibility of the identification evidence, . . . [defendant] has standing to challenge the trial court's ruling on that question." Id.

A similar situation presents itself under the facts of the current case. As Miller points out, he was never identified by the victims of the robbery and the only thing linking him to the robbery of the Alltel store is the fact that he was apprehended in the company of Tavo Glenn, who in turn, was identified as the person who perpetrated the robbery. Neither of the eyewitnesses saw the car the robber may have used, much less whether there was another person involved who may have been the driver of that car. As in Clausell and Bisogni, the success or failure of Miller's defense – that he knew nothing about the robbery – turns largely on the identification of Tavo Glenn as the perpetrator of the crime.

The State argues that Miller does not have standing to challenge the identification procedure used in regard to Glenn because such rights are constitutional rights, personal to Glenn. We disagree. While a defendant challenging the admissibility of evidence obtained in violation of constitutional rights must often show he is challenging the evidence based on a personal violation of his rights by the manner in which the evidence was obtained, a person requesting a hearing as to identification evidence is challenging the evidence based on the reliability of that evidence. For example, it is generally recognized that one does not have standing to challenge the admission of evidence obtained based on the violation of another's constitutional rights. Thus, where one does not have an expectation of privacy, he may not challenge the admission of evidence based on the violation of another's right to privacy. See State v. McKnight, 291 S.C. 110, 115, 352 S.E.2d 471, 473 (1987) (defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate he has a legitimate expectation of privacy in connection with the searched premises in order to have

standing to challenge the search). The concern under the current set of facts is not whether one's personal constitutional rights were violated in obtaining the evidence, but whether the evidence obtained is unreliable, such that failure to suppress the evidence violates one's due process rights. Accordingly, we find Miller has standing to challenge the reliability of the identification of Glenn.

The State contends, however, that even if there was error in the identification procedure, such error was harmless as the evidence of Miller's guilt was overwhelming, and was sufficient to conclusively establish his guilt beyond a reasonable doubt. Again, we disagree.

Whether an error is harmless depends on the circumstances of the particular case. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). Error is harmless when it could not reasonably have affected the result of the trial. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Here, assuming the identification evidence was improperly admitted, we cannot conclude it could not have reasonably affected the result of Miller's trial. Miller was never identified as a participant in the robbery of the Alltel store. Indeed, no direct evidence was presented that the robbery was accomplished by anyone other than a lone gunman. While we acknowledge that there is circumstantial evidence of Miller's participation in the crime by way of Miller's apprehension with Glenn and the circumstances surrounding that apprehension, it cannot be said that, without the identification of Glenn, Miller's guilt was conclusively proven by competent evidence such that no other rational conclusion could be reached. Accordingly, we find any error in the admission of the identification evidence was not harmless.

In light of the critical nature of the identification of Glenn to the State's case against Miller, we find, under the facts of this particular case, the interests of justice required a preliminary hearing be conducted outside the hearing of the jury on the pretrial identification of Glenn,[1] and the trial court erred in refusing to hold such a hearing. It does not follow, however, that Miller is entitled to a new trial. Rather, we remand this case to the trial court for the purpose of conducting an in camera hearing to determine whether the identification of Glenn was so tainted as to require its suppression at trial. Should such a finding be made, Miller will then be entitled to a new trial. See State v. Simmons, 308 S.C. 80, 83, 417 S.E.2d 92, 93-94 (1992) (proper remedy where court erroneously refuses to hold suppression hearing on identification is remand for such a hearing).

REVERSED AND REMANDED.

STILWELL, J. and CURETON, A.J., concur.

[1]As previously noted, Rule 104(c), SCRE provides that hearings on pretrial identifications of an accused shall be conducted out of the hearing of the jury, and "[h]earings on other preliminary matters shall be so conducted when the interests of justice require . . . ."