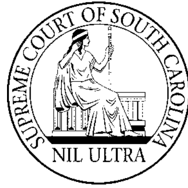

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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N O T I C E

IN THE MATTER OF ROBERT LEE NEWTON, JR., PETITIONER

On November 8, 2004, Petitioner was definitely suspended from the practice of law for one year, retroactive to September 25, 2003. In the Matter of Newton, 361 S.C. 404, 605 S.E.2d 538 (2004). He has now filed a petition to be reinstated.

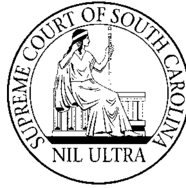
Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than March 7, 2005.

Columbia, South Carolina

January 6, 2005



The Supreme Court of South Carolina

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FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF ARTHUR T. MEEDER, PETITIONER

On October 30, 1995, Petitioner was definitely suspended from the practice of law for eleven months. In the Matter of Meeder, 320 S.C. 82, 463 S.E.2d 312 (1995). Thereafter, Petitioner was disbarred on August 4, 1997. In the Matter of Meeder, 327 S.C. 169, 488 S.E.2d 875. He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

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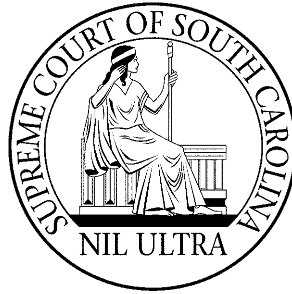

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 2

January 10, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Progressive Casualty Insurance Company, Plaintiff,

v.

Louis Leachman, Defendant.

CERTIFIED QUESTIONS

Opinion No. 25919
Heard September 22, 2004 – Filed January 10, 2005

QUESTIONS ANSWERED

J.R. Murphy and Adam J. Neil, both of Murphy & Grantland, of Columbia, for plaintiff.

James B. Richardson, Jr., of Richardson & Birdsong, of Columbia; and Jay T. Gouldon, of Stoney, Gouldon & Roddey, of Charleston, for defendant.

Darra W. Cothran and Edward M. Woodward, both of Woodward, Cothran & Herndon, of Columbia; and Richard Hodyl, Jr., Thomas J. Pontikis, and Michael J. Borree, all of Williams, Montgomery & John, of Chicago, for amicus curiae Property Casualty Insurers Association of America.

CHIEF JUSTICE TOAL: The Honorable David C. Norton of the United States District Court, District of South Carolina, certified questions to this Court asking whether an insurer made a meaningful offer of under insured motorist coverage ("UIM").

FACTUAL / PROCEDURAL BACKGROUND

In April 2001, Louis Leachman ("Leachman") purchased an automobile insurance policy from Progressive Casualty Insurance Company ("Progressive"). Leachman purchased a $300,000 combined single limits liability policy. Leachman selected UIM coverage by marking a line designated $100,000 / $300,000 / $50,000 on the offer form. He also signed the form at the bottom, noting that the UIM coverage was lower than his liability coverage ($300,000). After Leachman signed an acknowledgement of his selection, Progressive issued Leachman the policy.

Available amounts of UIM coverage were described on the first page of Progressive's form.

> Available limits of UM and/or UIM are (for "each person" / "each accident" / "property damage each accident"):
>
> $15,000/$30,000/$10,000
> $15,000/$30,000/$15,000
> $25,000/$50,000/$10,000
> $25,000/$50,000/$15,000
> $25,000/$50,000/$25,000
> $50,000/$100,000/$25,000
> $50,000/$100,000/$50,000
> $100,000/$300,000/$50,000
> $250,000/$500,000/$100,000
> $100,000 Combined Single Limit (each accident)
> $300,000 Combined Single Limit (each accident)
> $500,000 Combined Single Limit (each accident)

The form also explained that increased coverage was available:

> For a modest increase in premium, the higher limits of UM and/or UIM are available up to the limits of your bodily injury

Liability Coverage. Our representative can quote premium prices for you.

The form also had a page for insureds to select the amount of coverage they desired. Leachman selected the following:

__$15,000/$30,000/$10,000- premium = $8.00
__$15,000/$30,000/$15,000- premium = $8.00
__$25,000/$50,000/$10,000- premium = $9.00
__$25,000/$50,000/$15,000- premium = $9.00
__$25,000/$50,000/$25,000- premium = $9.00
__$50,000/$100,000/$25,000 - premium = $11.00
__$50,000/$100,000/$50,000 - premium = $11.00
_x_$100,000/$300,000/$50,000 - premium = $13.00[1]
__$250,000/$500,000/$100,000
__$100,000 Combined Single Limit (each accident) - premium = $12.00
__$300,000 Combined Single Limit (each accident) - premium = $15.00
__$500,000 Combined Single Limit (each accident)

Finally, the form allowed the insureds to acknowledge that they had selected or rejected UIM coverage. Leachman marked the following:

x_I have been offered and I have rejected the option to purchase Underinsured Motorist Coverage in the amount equal to my limits of Liability Coverage. Instead, as shown above, I either: (1) elect lower limits of Underinsured Motorist Coverage or (2) reject the option to purchase any Undersinsured Motorist Coverage.

In June 2002, while taking a walk, Leachman was hit by a car and was seriously injured. Leachman claimed that the damages from the accident exceeded the driver's automobile liability coverage limit, which was $15,000. Leachman made a claim for UIM coverage, and Progressive tendered $100,000. Leachman also sought additional coverage up to the amount of his liability coverage ($300,000).

[1] The "x" indicates the amount of coverage selected by Leachman.

Progressive filed a declaratory judgment action in the United States District Court, District of South Carolina asking the Court, to determine the amount of UIM coverage provided under the policy. The Honorable David C. Norton of the United States District Court, District of South Carolina, has certified the following questions to this Court:

I. In attempting to make an insured a "meaningful offer" of UIM coverage, is it sufficient for an insurer to offer all of the options of UIM coverage that the insurer is authorized to sell, up to the limits of the insured's liability policy, or must an insurer provide a blank line, or some equivalent, that allows the insured to select any increment of UIM coverage up to the insured's liability limits?

II. Does the form used in this case constitute a meaningful offer?

LAW / ANALYSIS

We will address the second certified question first.

Leachman argues Progressive failed to make a meaningful offer of UIM coverage, and the policy should be reformed to include UIM coverage equal to the amount of liability coverage of $300,000. We disagree.

The insurer bears the burden of establishing that it made a meaningful offer. *Butler v. Unisun Ins. Co.*, 323 S.C. 402, 405, 475 S.E.2d 758, 759 (1996). A noncomplying offer has the legal effect of no offer at all. *Hanover Ins. Co. v. Horace Mann Ins. Co.*, 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990). "If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of liability insurance carried by the insured." *Butler*, 323 S.C. at 405, 475 S.E.2d at 760.

In general, for an insurer to make a meaningful offer of UIM coverage, (1) the insurer's notification process must be commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the

insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium. *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987).

In response to *Wannamaker*, the legislature passed a statute establishing the requirements for forms used in making offers of optional insurance coverage such as UIM. The statute directs the insurer to include the following in its offer:

> (1) a brief, concise explanation of the coverage;
> (2) a list of available limits and the range of premiums for the limits;
> (3) space for the insured to mark whether the insured chooses to accept or reject the coverage, and a space to select the limits of coverage desired;
> (4) a space for the insured to sign the form, acknowledging that the optional coverage has been offered; and
> (5) the mailing address and telephone number of the Department, so that the insured may contact it with any questions that the insurance agent is unable to answer.

S.C. Code Ann. § 38-77-350(A) (2003).

An insurer enjoys a presumption that it made a meaningful offer if it executes a form that complies with this statute. S.C. Code Ann. § 38-77-350(B) (2003); *Antley v. Nobel Ins. Co.*, 350 S.C. 621, 632, 567 S.E.2d 872, 878 (Ct. App. 2002). If the form does not comply with the statute, the insurer may not benefit from the protections of the statute. *Osborne v. Allstate Ins. Co.*, 319 S.C. 479, 486, 462 S.E.2d 291, 295 (Ct. App. 1995). Furthermore, a form does not necessarily constitute a meaningful offer simply because it was approved by the Department of Insurance. *Butler*, 323 S.C. at 408-409, 475 S.E.2d at 761.

This Court recently addressed the issue of whether an insurer made a meaningful offer of UIM to an insured. *Bower v. Nat'l Gen. Ins. Co.,* 351 S.C. 112, 569 S.E.2d 313 (2002). In *Bower*, this Court held that when the

insurer failed to inform the insured that UIM coverage was available *in any amount up to the insured's liability coverage*, a meaningful offer was not made. *Id.* at 119, 569 S.E.2d at 316 (citing *Garris v. Cincinnati Ins. Co.*, 280 S.C. 149, 311 S.E.2d 723 (1984)) (emphasis added). The form at issue in *Bower* listed four choices for UIM coverage amounts. Three of the choices included coverage up to the limits of the insured's liability coverage.[2] Other amounts of coverage were not available on the form. The form did, however, provide a blank line, which allowed the insured to write in any amount of coverage the insured desired. Bower rejected UIM coverage altogether. This Court held the form did not constitute a meaningful offer, and therefore had the legal effect of being no offer at all. *Id.* As a result, the insurance policy was reformed to include UIM up to the liability limits. *Id*.

In another case, the court of appeals held that no meaningful offer was made when the insurer listed only three choices for UIM coverage. *Wilkes v. Freeman*, 334 S.C. 206, 512 S.E.2d 530 (Ct. App. 1999). *Wilkes* also involved an insured who rejected UIM coverage altogether. After suffering injuries, the insured wanted UIM coverage up to the amount of his policy limits, arguing he did not receive a meaningful offer. The court held that no meaningful offer was made, and the policy was reformed to include coverage for the insured in the amount of liability coverage. *Id*.

The facts in the present case are distinguishable from *Bower* and *Wilkes*. Unlike the insureds in *Bower* and *Wilkes*, the insured in the present case purchased UIM coverage. Moreover, Progressive's form, titled "UIM selection form," allowed Leachman to choose from eleven different amounts of UIM coverage up to the amount of liability coverage, including $300,000.[3] Because this offer gave the insured the opportunity to make an intelligent and informed decision on whether to purchase UIM coverage, we hold that Progressive made a meaningful offer.

---

[2] The fourth choice exceeded Bower's liability limits, and therefore he was not permitted to select it.

[3] The form also had two other options: a twelfth level of coverage, which was above the insureds liability limits, and an option to select no UIM whatsoever.

There are also policy reasons for finding that Progressive made a meaningful offer. The goal, as set forth in *Wannamaker*, is to provide an insured with adequate information to make an intelligent decision on whether to accept or reject UIM coverage. 291 S.C. at 521, 354 S.E.2d at 556. In addition, a meaningful offer allows an applicant to purchase UIM insurance in any amount up to the limits of liability at an additional premium. *Bower*, 351 S.C. at 117, 569 S.E.2d at 315. To conclude that Progressive did not make a meaningful offer in this case would lead to an absurd result. If this Court applies the rationale of *Bower* and *Wilkes*, Progressive would be required to pay an amount that Leachman specifically rejected. To compel coverage would overstep the purpose behind mandating a meaningful offer.

In addition, these public policies behind mandating a meaningful offer would be underminded if the insurer were forced to provide full coverage when it failed to offer *every conceivable combination* of coverage up to an insured's liability limits. *See Wilkes*, 334 S.C. at 211-212, 512 S.E.2d at 533 (insurer is not required to offer every possible coverage limit combination and merely listing several available options without providing a clear description that the applicant may request other limits is not a meaningful offer). In other words, the policy behind requiring a meaningful offer is promoted without creating a rule that places such an unfair burden on insurers.

As to the first certified question, we hold that it is sufficient for an insurer to offer all of the coverage amounts the insurer is authorized to sell by the Department of Insurance,[4] without providing a blank line for insureds to write in any amount of coverage up to the policy limit.

The controlling statute does not require insurers to provide a blank line. *See* S.C. Code Ann. § 38-77-350(A) (requiring insurers to provide a list of available limits, a space for the insured to mark whether the insured chooses to accept or reject the coverage, and a space to select the limits of coverage

[4] South Carolina statutory law provides that "no insurer may make or issue a policy except in accordance with its filings with the Department as to approved premium amounts." S.C. Code Ann. § 38-73-920 (2003).

desired). Moreover, a blank line maybe helpful but it is not necessary. *Bower*, 351 S.C. at 121-122, 569 S.E.2d at 317-318 (Toal, C.J., dissenting). Further, an offer is not necessarily meaningful when a blank space is provided for the insured to write in the desired amount of coverage. *Id*. at 119, 569 S.E.2d at 316. If the legislature had intended for insurers to provide a blank line allowing insureds to choose any amount of coverage, the blank-line mandate would have been included in the statute.

Therefore, we hold that when an insurer offers all amounts of coverage authorized by the Department of Insurance, insurers have provided insureds with the opportunity to make an intelligent decision as to whether to accept or reject UIM coverage.

CONCLUSION

The holding in *Bower* should not be extended to require the insurer to offer every possible numerical combination of coverage for UIM. Instead, the goal is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs. Accordingly, the Court finds that Progressive made a meaningful offer, and therefore the second question is answered in the affirmative. As to the first question, it is sufficient, in making a meaningful offer, for an insurer to offer an insured all of the coverage amounts that the insurer is authorized to sell by the Department of Insurance.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jonathan Kyle Binney, Appellant.

Appeal from Cherokee County
J. Derham Cole, Circuit Court Judge

Opinion No. 25920
Heard September 21, 2004 – Filed January 10, 2005

AFFIRMED

Acting Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Harold W. Gowdy, III, of Spartanburg, for Respondent.

CHIEF JUSTICE TOAL: In November 2002, Appellant Jonathan Kyle Binney (Binney) was convicted of murder and first-degree burglary and sentenced to death by a Cherokee County jury. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In early June 2000, Cherokee County police received a call that a local resident, upon returning home from work, was surprised and shot by a man who was hiding inside her house. When police went to the victim's residence to investigate, they found a suicide note Binney wrote and signed. Binney was later found in the crawl space of his Spartanburg County residence.

Before Binney was arrested and was read his *Miranda* rights, Binney turned to Cherokee County Sheriff's Deputy Steve Reynolds and said, "she's dead isn't she?" Reynolds replied, "who?" And Binney responded, "the woman I shot."

During Binney's detainment and eventual arrest, Binney's wife was talking on a cordless phone to Bill Bannister (Bannister), Binney's attorney in another matter.[1] Captain Mike Fowlkes (Fowlkes) with the Cherokee County Sheriff's Department testified that while Binney's wife was on the phone, she repeatedly told Binney not to say anything to the officers. Eventually, while still at the residence, SLED agent DeWitt "Spike" McCraw (McCraw) spoke with Bannister and assumed that Bannister would continue to represent Binney in the present matter.[2]

After hearing of Binney's arrest, Don Thompson (Thompson), Public Defender for Cherokee County, went to the jail to talk to Binney. Binney told Thompson that he wanted the death penalty, and Thompson told Binney

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[1] Bannister was representing Binney in a pending case where Binney was charged with criminal sexual conduct with a minor (CSC).

[2] Later, Bannister declined to represent Binney, and Don Thompson, public defender for Cherokee County, was appointed; however, Thompson did not represent Binney at trial. Instead, Binney hired Trent N. Pruett and Sam "Mitch" Slade, Jr., both of the Pruett Law Firm in Gaffney, SC, as his trial counsel.

not to talk to the police. Thompson met with Binney again a few days later, and Binney was still determined to get the death penalty.[3]

At trial, Thompson testified that almost everyday during the first week of Binney's incarceration, either agent McCraw or the solicitor's office asked for permission to interrogate Binney. Thompson testified that he repeatedly refused their requests and told them that they could not talk to Binney.

On Friday, June 14, 2000, approximately a week after Binney's arrest, Thompson visited Binney and later testified that "it was hard to talk to him about anything," and that Binney mostly wanted to talk about the death penalty. On that same day, McCraw called Thompson and asked if he could send Binney a message asking Binney to submit to an interrogation without the presence of an attorney. Thompson told McCraw that he could not.

Also on June 14, McCraw contacted Travis Alexander (Alexander), a jailer who worked at the prison where Binney was incarcerated. McCraw told Alexander to find Binney and let him know that if he wanted to talk then he had to make a written request to talk with a detective without the presence of an attorney.[4] Within hours of contacting Alexander, McCraw received a handwritten note from Binney, which included a request to see a detective, without the presence of an attorney.

On that same day, McCraw and Fowlkes picked Binney up and brought him to the Sheriff's Office. Before questioning began, Binney was advised of his rights, and he signed a pre-interrogation waiver form. In addition, at trial, he testified that he did not have any trouble understanding what the

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[3] Binney was put on suicide watch for the first several days that he was incarcerated.

[4] McCraw denies that he told Alexander to tell Binney that he would have to specify in writing that he did not want an attorney present; however, Binney testified that he included this specification in his request at Alexander's instruction.

officers told him about his right to an attorney. McCraw and Fowlkes testified that during the interrogation, Binney appeared coherent, indicated that he understood the nature of the interrogation, and was never promised anything or coerced in anyway. Eventually, Binney wrote and signed a five-page statement confessing to the murder.[5] At no time during Binney's arrest, incarceration, or questioning did Binney ask to have his attorney present.

During his confession, Binney told police what took place during the commission of the murder. He explained that before he was tried for the CSC charge, Bannister, Binney's lawyer at the time, told him that, if convicted, he would be sentenced to ten years, at the very least. The potential for substantial, future jail time made Binney very anxious. He went to a local shopping center and found a friend who sold him a handgun. He then went to the victim's house and hid just off the property line and watched the house and looked for activity. Binney never met the victim before the day of the murder. He stayed in the surrounding woods overnight thinking about whether he should just go into the house "to commit suicide or rape someone, or to just shoot all of them and kill [himself]."

The next morning, he waited until the victim and her husband left the house and then entered the house through an unlocked window. He cut all the phone lines in the house and put kitchen knives and other possible weapons out of reach. Late that afternoon, the victim came home and found Binney in her bathroom. The victim startled Binney because he did not hear her enter the house. Binney fired the gun in her direction and then chased her out of the house. Once outside, he shot in her direction again to "keep her scared and running" and then ran in the opposite direction into the woods. He ran home and hid under his house, where he was later found by police.

In his June 14 statement, Binney requested that he be given the death penalty: "the crime I committed definitely warrants it." In addition, he stated that he was not promised anything or coerced in any way. In addition, Binney wrote "I waive my right to an attorney." After Binney wrote and

[5] This is the June 14 statement that Binney argues was improperly admitted.

signed his June 14 statement, he took McCraw and Fowlkes to the woods next to the victim's house where he hid his moped and the murder weapon.

On Monday, June 17, three days after Binney sent his first written request, Binney sent McCraw another request to meet. Again, McCraw read Binney his rights and had him sign another waiver. Mike Prodan (Prodan), head of the Behavioral Science Unit at SLED, also attended the June 17 interrogation, because McCraw requested the assistance of someone with experience in investigating crimes involving sexual motives.

Meanwhile, on that same day, Thompson received a message that Binney met with police and signed a statement the previous Friday, June 14. Thompson eventually found Binney at the Sheriff's Office. McCraw and Prodan testified that Thompson "burst in" to the interrogation room and told Binney to quit talking. When Binney turned to McCraw and asked him what to do, McCraw responded, "*he* works for *you*." (Emphasis added.) Binney told Thompson to leave so that he could continue talking to the officers.

At the suppression hearing, McCraw testified that Thompson never told him not to talk to Binney. The judge found that Binney never invoked his Fifth Amendment right to an attorney. Moreover, the judge found that Binney knowingly and intelligently waived his Fifth Amendment right to an attorney and that McCraw's communication to Binney inviting him to request a meeting was not an "interrogation."

Binney raises the following issue on appeal:

> Did the trial judge err in admitting into evidence Binney's June 14 statement because it was taken in violation of Binney's Fifth Amendment right to have an attorney present during a custodial interrogation?

LAW/ANALYSIS

Binney argues that the trial judge erred in admitting the June 14 statement in which he confessed to murder because the statement was

procured in violation of his Fifth Amendment right to have an attorney present during a custodial interrogation. We disagree.

The State has the burden to show by the preponderance of the evidence that a defendant has voluntarily waived his right to counsel. *State v. Franklin*, 299 S.C. 133, 137, 382 S.E.2d 911, 913 (1989). Police must inform criminal suspects of their right to have an attorney present during a custodial interrogation before the interrogation commences. *Miranda v. Arizona*, 384 U.S. 436, 473-474 (1966). The Court went on to say that "[o]nce warnings have been given, the subsequent procedure is clear…[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* In addition, police are restricted from initiating contact with a suspect when that contact is the "functional equivalent" of an interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The "functional equivalent" of an interrogation is

> any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from a suspect.

Id.

In *Edwards v. Arizona*, the United States Supreme Court elaborated on one's right to have an attorney present during a custodial police interrogation. 451 U.S. 477 (1981). In that case, the police reinitiated an interrogation and eventually elicited a confession sometime after the defendant requested an attorney and interrogation had ceased. The Supreme Court of Arizona upheld the conviction, holding that the defendant's confession was voluntarily given. The United States Supreme Court reversed, holding "waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege." *Id.* at 483.

To invoke a Fifth Amendment right to counsel, one must give "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the

police." *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991); *see also State v. Kennedy*, 333 S.C. 426, 430, 510 S.E.2d 714, 715 (1998) (holding that an unequivocal invocation of the Fifth Amendment right to counsel must be presented in a manner that a reasonable police officer, under similar circumstances, would understand the statement to be a request for the presence of an attorney).

Nevertheless, this Court has held that

> [a] valid waiver of the right to counsel will not be presumed simply from the silence of the accused after *Miranda* warnings are given. The record must show an accused was offered counsel but intelligently and knowingly rejected the offer.

State v. McCray, 332 S.C. 536, 546, 506 S.E.2d 301, 306 (1998).

In addition, a criminal suspect's rights are not violated when the suspect, not the police, "initiates further communication, exchanges, or conversations with the police." *State v. Howard*, 296 S.C. 481, 489, 374 S.E.2d 284, 288 (1988) (citing *Edwards*, 451 U.S. at 485). Finally, this Court has held that, after it has been determined that the waiver was valid, the analysis is over:

> [o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

State v. Drayton, 293 S.C. 417, 426, 361 S.E.2d 329, 334-335 (1987) (citing *Moran v. Burbine*, 475 U.S. 412 (1986)).

In the present case, we find that the following facts support the conclusion that Binney's Fifth Amendment rights were not violated and that his June 14 statement was admissible:

(1) There is no evidence that Binney ever asked for an attorney at any point during his arrest, incarceration, or questioning.

(2) Binney has an adequate level of intelligence, and he has been arrested and read his rights before.

(3) In his written request, Binney stated that he did not want an attorney present during the meeting with detectives.

(4) Before Binney provided police with a statement, he was again read his rights and he signed a waiver of rights.

In addition, McCraw's message to Binney instructing him to write a written request to meet was not the initiation of an "interrogation," because it would not reasonably elicit an incriminating response. Instead, McCraw's message was simply an invitation for Binney to initiate contact. Moreover, Binney's request to meet with a detective and his later confession both were made out of his own free will, without coercion or deception. In fact, the record indicates that Binney was motivated to talk with police to get off of suicide watch. Finally, nothing in the record suggests that Binney was not fully informed of his rights, did not understand his rights, or that the confession was not the product of his own free will.

SENTENCE REVIEW

The Court must conduct a proportionality review of Binney's death sentence based on the record. S.C. Code Ann. § 16-3-25(A) (2003). In conducting the review, the Court considers similar cases in which the death penalty has been upheld. *See* S.C. Code Ann. § 16-3-25(E) (2003).

We find Binney's death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the evidence supports the trial judge's findings of aggravation. *See* S.C. Code Ann. § 16-3-25(C) (2003). In addition, Binney's sentence, in relation to the sentences this Court has upheld in similar cases, was not excessive or disproportionate to his crime. *See State v. Tench*, 353 S.C. 531, 59 S.E.2d 314 (2003); *State v. Weik*, 356

S.C. 76, 507 S.E.2d 683 (2002), *cert denied*, 539 U.S. 930 (2003); *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000).

CONCLUSION

For the foregoing reasons, we affirm Binney's conviction and sentence and hold that the trial judge did not err in admitting the June 14 statement into evidence.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Arthur Elbert Jordan, Jr., both Individually and as a Member of Winner's Circle South, L.L.C., Respondent,

v.

Lawrence Byerly Holt, Jr., and Gordon Wayne Livingston, both Individually and as Members of Winner's Circle South, L.L.C.; and David Livingston, Third Party Plaintiffs, Petitioners,

v.

Brian Arthur Jordan, Third Party Defendant, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Alison Renee Lee, Circuit Court Judge

Opinion No. 25921
Heard December 2, 2004 – Filed January 10, 2005

REVERSED

Henrietta U. Golding, of McNair Law Firm, of Myrtle Beach, for Petitioners.

James B. Richardson, Jr., of Richardson & Birdsong, of Columbia, and Richard M. Lovelace, Jr., of Conway, for Respondents.

JUSTICE BURNETT: We granted Dr. Lawrence Byerly Holt, Jr., Gordon Wayne Livingston, and David Livingston's (Petitioners') petition for certiorari to review the Court of Appeals' opinion in Jordan v. Holt, Op. No. 2003-UP-277 (S.C. Ct. App. filed April 16, 2003) reversing the trial court's award of punitive damages against Dr. Arthur Elbert Jordan, Jr. and his son, Brian Jordan (Respondents). We reverse.

FACTUAL/PROCEDURAL BACKGROUND

In 1995, Dr. Jordan approached Dr. Holt and proposed they invest in a racing theme restaurant in Myrtle Beach, South Carolina. On September 11, 1995, the parties entered into a written agreement (Agreement) to form a limited liability company (LLC) known as Winner's Circle South. The initial members of the LLC were Dr. Jordan, Brian Jordan, Wayne Livingston, and Dr. Holt. The parties also executed an "Agreement to Lease" and a "Memorandum" setting forth the estimated construction cost for the project. Although the parties filed Articles of Organization on September 29, 1995, they never executed an operating agreement. The parties later agreed to operate in accordance with applicable South Carolina statutory law. Pursuant to the Agreement, Dr. Jordan held a 55 percent ownership interest, Brian Jordan a 10 percent interest, Dr. Holt a 25 percent interest, and Wayne Livingston a 10 percent interest.

Winner's Circle restaurant opened in November 1995 with Brian Jordan acting as general manager. In January 1996, Wayne Livingston transferred one-half of his interest to his son, David Livingston. Wayne Livingston's transfer of interest to his son created a voting majority among

Wayne Livingston, David Livingston, and Dr. Holt. See S.C. Code Ann. § 33-44-404(a) (Supp. 2003).

Dissension among the members developed when it became clear the venture was undercapitalized and constantly in need of additional operating capital. In June 1996, the relationship between the parties was irreparably damaged when Holt, Wayne Livingston, and David Livingston entered the restaurant to speak with Dr. Jordan. A verbal confrontation ensued between Brian Jordan's mother, who was helping with food preparation, and Wayne Livingston. The Jordans continued to operate the restaurant after the incident using personal and LLC funds. In 1997, the Jordans added 15 poker machines to the restaurant and began operating a business known as Competitive Marketing, which leased the additional machines from a third-party company.

The restaurant closed in July 1997. Dr. Jordan brought this action seeking dissolution of the LLC and an accounting. He also alleged causes of action for breach of fiduciary duty, civil conspiracy, breach of written and oral contracts, and slander per se. Holt and Wayne Livingston filed counterclaims and a third party complaint against Brian Jordan. In addition to seeking dissolution of the LLC, they alleged causes of action for breach of fiduciary duty, misappropriation of assets, breach of contract, breach of the duties of good faith and fair dealing, fraud, negligent misrepresentation, and gross negligence.

Following a bench trial, the circuit court dissolved the LLC and awarded it a judgment of about $763,000 against Dr. Jordan and a judgment of $19,945 against Brian Jordan. Petitioners were awarded the difference between the amount of their initial contributions to the LLC and the amount each receives upon dissolution of the LLC. In addition, the circuit court awarded Petitioners punitive damages on their breach of fiduciary duty claim.

Respondents appealed only the punitive damages award. The Court of Appeals reversed the award, holding the facts and circumstances of the case did not warrant an award of punitive damages.

ISSUE

Did the Court of Appeals err in reversing the trial court's punitive damages award on Petitioner's breach of fiduciary duty claim by applying the wrong standard of appellate review?

DISCUSSION

Petitioners argue the Court of Appeals erred in using an equitable standard of review in determining punitive damages were not warranted and that, using the legal standard of review, the evidence supported an award of punitive damages. We agree.

In its opinion, the Court of Appeals noted the case presented two separate and distinct questions: (1) whether an action for dissolution of an LLC is equitable or legal; and (2) whether an action for breach of fiduciary duty, made in conjunction with an action for dissolution, is a legal claim for purposes of determining the remedies available. However, the court concluded it was unnecessary to address these questions because the facts and circumstances of the case did not warrant punitive damages. Jordan v. Holt, supra.

The Court of Appeals improperly found facts in accordance with its own view of the evidence. The Court of Appeals improperly blended Petitioners' breach of fiduciary duty and dissolution actions and reviewed the case under an equitable standard of review, despite its contention it need not determine the appropriate standard of review. The proper analysis is to view the actions separately for the purpose of determining the appropriate standard of review. See Corley v. Ott, 326 S.C. 89, 92, 485 S.E.2d 97, 99 (1997) (legal and equitable actions, when maintained in one suit, each retain their own identity for purposes of the applicable standard of review on appeal); Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996). A corporate dissolution is an action in equity. Ward v. Ward Farms, Inc.. 283 S.C. 568, 324 S.E.2d 63 (1984). In an action in equity tried without a reference, the appellate court may find facts in accordance with its own view

of the preponderance of the evidence. Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). On the other hand, a claim of breach of fiduciary duty is an action at law and the trial judge's findings will be upheld unless without evidentiary support. Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996). The trial court based its punitive damages award on Petitioners' cause of action for breach of fiduciary duty, not on the dissolution claim. Therefore, the case is one at law and the trial judge's findings will be upheld on appeal unless the findings are without evidentiary support.

The Court of Appeals improperly assessed the facts of this case based on its own view of the evidence instead of determining whether the trial court's findings lacked evidentiary support. The Court of Appeals determined, after its review of the evidence, Respondents' actions were not willful or wanton, but resulted from sloppy business practices which rendered neither party more culpable than the other. In concluding neither party was more culpable than the other, the Court of Appeals injected its own view of the facts thereby exceeding its scope of review.

We conclude the trial judge's award of punitive damages is supported by evidence in the record. The trial judge found the egregious conduct on the part of Dr. Jordan and Brian Jordan, including ignoring requests for financial information and meetings, using LLC monies for payment of personal debts and obligations, self-dealing, especially regarding the video poker machines, and selling or transferring LLC property without the knowledge and consent of the LLC and then pocketing the monies. The judge ruled the wrongdoing on the part of Dr. Jordan and Brian Jordan justified the award of punitive damages against each of them.

Testimony in the record supports the view of the evidence taken by the trial judge. Respondent failed to provide LLC members financial information regarding the operating expenditures of Winner's Circle. The record indicates Petitioners requested complete financial disclosure from Respondents. Wayne Livingston testified that after May 1996, Respondent refused to provide any information about the LLC to him. Dr. Holt testified that by June 1996, Respondent had excluded Petitioners from participating in

the operations of the LLC and that on June 25, 1996, Brian Jordan demanded Petitioners leave the restaurant.

There is also evidence in the record Respondents used LLC monies for their own benefit. Dr. Jordan opened a Wachovia operating account for the LLC and deposited monies belonging to the LLC. Even though the funds belonged to the LLC, Respondent used the account to pay his personal interest obligations to Wachovia and BB&T.

Petitioners testified that after Dr. Jordan excluded them from management of the restaurant, Respondents installed additional video poker machines in the restaurant. The increase in machines occurred at the same time Respondents decided to operate a business know as Competition Marketing. The business operated video machines at the restaurant, but never paid rent to the LLC, nor did the LLC receive any share of profits from Competition Marketing. Petitioners also testified that Respondents misappropriated assets. When the restaurant closed in July 1997, Respondents failed to prepare a detailed inventory of the LLC property and disposed of the racing memorabilia, the satellite system, and approximately 25 to 30 televisions. Items in the gift shop were sold and the funds generated kept by Brian Jordan as partial payment for back wages.

Based on this evidence, the Court of Appeals ignored the directive that it must affirm the trial court's finding of punitive damages if any evidence reasonably supports the judge's factual findings. An award of punitive damages is left almost entirely to the discretion of the jury and trial judge. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942). The rationale for vesting discretion in the trial court was expressed in Lucht v. Youngblood, 266 S.C. 127, 138, 221 S.E.2d 854, 860 (1976):

> The fact [the trial judge] heard the evidence and was more familiar than we with the evidentiary atmosphere at trial gives [the trial judge], we think, a better informed view than we have. This is particularly true when the elements of damage are intangibles and the appraisal depends somewhat on the observation of the [witnesses] and evaluation of their testimony.

Finally, we conclude the trial court also conducted a post-trial review of the punitive damages award using the factors outlined by this Court in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) and properly set forth its findings on the record. In Gamble, the Court explained the trial court should consider: (1) the defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood that the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) other factors deemed appropriate. Id. The trial court found particularly reprehensible Respondents' ouster of Petitioners from the management of the business and Respondents' constant failure to respond to Petitioners' requests for meetings and financial information. The trial court again noted Respondents' misappropriation of the LLC's assets and use of money for their own personal benefit. The trial court's findings are supported by evidence in the record. Therefore, the Court of Appeals erred in reversing the punitive damages award.

For the foregoing reasons, we reverse the Court of Appeals' decision and reinstate the trial judge's ruling.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Henry D. McMaster, as Attorney General of South Carolina, Appellant,

v.

The South Carolina Retirement System, Adolph Joseph Klein, Jr., James Michael Hicks, Johnny M. Martin, Ellison Lawson, Jr., Troy Phillips, and Edward Thomas Lewis, Jr.,

Of whom

Edward Thomas Lewis, Jr. is Respondent.

Henry D. McMaster, as Attorney General of South Carolina, Appellant,

v.

The South Carolina Retirement System, Adolph Joseph Klein, Jr., James Michael Hicks, Johnny M. Martin, Ellison Lawson, Jr., Troy Phillips, and Edward Thomas Lewis, Jr.,

Of whom

Adolph Joseph Klein, Jr. is Respondent.

Henry D. McMaster, as Attorney General of South Carolina, Appellant,

v.

The South Carolina Retirement System, Adolph Joseph Klein, Jr., James Michael Hicks, Johnny M. Martin, Ellison Lawson, Jr., Troy Phillips, and Edward Thomas Lewis, Jr.,

Of whom

Johnny M. Martin is Respondent.

Appeal from Richland County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 25922
Heard October 6, 2004 – Filed January 10, 2005

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Chief, State Grand Jury Sherri A. Lydon, and Assistant Deputy Attorney Robert E. Bogan, all of Columbia, for appellant.

Kristi F. Curtis, of Bryan, Bahnmuller, Goldman & McElveen, LLP, of Sumter, for respondents Lewis and Martin.

John S. Nichols, of Bluestein & Nichols, LLC, of Columbia, for respondent Klein.

JUSTICE MOORE: We consolidated these three appeals to consider the retroactive application of a lien on retirement benefits pursuant to S.C. Code Ann. § 8-1-115 (Supp. 2003) which applies to public officials convicted of embezzling public funds. The trial court found the amount of the lien was limited to the amount of restitution previously ordered at criminal sentencing. The Attorney General appeals. We reverse.

FACTS

Respondents Klein, Lewis, and Martin were each indicted by the state grand jury on charges stemming from the embezzlement of funds from Sumter County School District #17 over a ten-year period. Each respondent pled guilty or was convicted between 1999 and 2000, and each was ordered to pay restitution.[1]

Subsequently, on April 10, 2001, the legislature enacted § 8-1-115 which "created a general lien upon any public retirement or pension plan not

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[1]Respondent Klein pled guilty on June 1, 1999, to conspiracy to commit embezzlement and ten counts of embezzlement. As part of his sentence, he was ordered to pay restitution in the amount of $180,000. Respondent Lewis pled guilty on May 15, 2000, to criminal conspiracy, misconduct in office, and receiving stolen goods. As part of his sentence, he was ordered to pay restitution in the amount of $45,000. Respondent Martin was convicted on July 20, 2000, of criminal conspiracy, misconduct in office, and receiving stolen goods. As part of his sentence, he was ordered to pay restitution in the amount of $50,000.

governed by ERISA of any public officer, public employee, or any other person who is convicted of an offense involving embezzlement or misappropriation of public funds. . . ." In addition, the legislature provided that this lien was to apply retroactively as well as prospectively. 2001 S.C. Act No. 16, § 6.

The Attorney General then commenced these actions against respondents seeking to enforce liens pursuant to § 8-1-115. In each case, the Attorney General sought a lien in an amount exceeding the amount of restitution previously ordered. The trial court held the lien created by § 8-1-115 is a criminal sanction intended to secure the payment of restitution; the amount of the lien is limited to the outstanding amount of restitution ordered as a part of sentencing; and the lien cannot be foreclosed until the defendant has defaulted on his restitution payments.

ISSUE

Is the amount of the lien limited to the amount of restitution ordered as part of criminal sentencing?

DISCUSSION

1. Statutory construction

Section 8-1-115 provides in pertinent part:

> (A) There is hereby created a general lien upon any public retirement or pension plan not governed by ERISA of any public officer, public employee, or any other person who is convicted of an offense involving embezzlement or misappropriation of public funds or public property to the private use of himself or any other person, to the extent of the total loss, damage, and expense to the State, or to a county or municipality, or to any agency or political subdivision of the State, or to any state, county or municipal agency, any college or university, or to any school, special or public service

district within the State, that is authorized by law to perform a governmental function or provide a governmental service.

(B)(1) The presiding judge before whom any public officer, employee, or any other person is convicted of an offense described in subsection (A) must send to the Attorney General and the appropriate retirement or pension plan system a notice of the lien showing the name of the person convicted whose retirement or pension plan is subject to the lien created by subsection (A) and the date of the conviction, which is the date upon which the lien attaches. The presiding judge must set the lien at the time of conviction and the presiding judge's notice of lien must state the amount of the lien.

(2)(a) Within ten days of the date of conviction, the convicted person's spouse or representative of the convicted person's minor children may file a petition with the presiding judge requesting the judge to dissolve the lien, in whole or in part, in favor of the spouse or minor children because the spouse or minor children would suffer extreme financial hardship if the lien were to attach. . . . .

(C) In addition to any other sentence imposed upon a person convicted of an offense described in subsection (A) and taking into account the petition process set forth in subsection (B), the presiding judge may require full restitution of all public funds embezzled or misappropriated and full payment for the conversion, use, and value of public property appropriated to private use and may provide for an indeterminate sentence of incarceration or probation, or both, until restitution in full has been made.

(D) The Attorney General is charged with an affirmative duty to recover public funds and property embezzled or converted to private use, or the value thereof, and he or his designee may bring an action to enforce the lien created by this section at any time up to the death of a person whose

retirement or pension plan is subject to the lien created by subsection (A).

(E) The Attorney General or his designee shall file a satisfaction and discharge of the lien created by this section after restitution has been made by payment of the amount of the lien in full or after the death of the person whose retirement or pension plan is subject to the lien created by subsection (A). If the beneficiary of the person whose retirement or pension plan is subject to the lien created by subsection (A) was, himself, convicted of the same offense involving the embezzlement or misappropriation of public funds or public property for which the lien was created, the lien must continue until restitution has been made or until the death of the beneficiary.

(F) The lien created by this section and the action to enforce the lien are cumulative and in addition to all other remedies provided by law.

(emphasis added). The legislation enacting this section further provides:

This act is intended to create remedies to more efficiently recover restitution due to state and local governmental entities in cases involving embezzlement or misappropriation of public funds or public property to the private use of a public officer or employee, or any other person. As such, it is remedial legislation intended to be retroactive as well as prospective in its application, so as to attach the general lien created by Section 8-1-115(A) to any public retirement or pension plan not governed by ERISA of any public officer, public employee, or any other person who has been convicted of an offense described in Section 8-1-115(A). In cases where a living person was convicted of an offense described in Section 8-1-115(A) before the effective date of this act, the lien attaches to their public retirement or pension plan not governed by ERISA immediately upon approval of this act by

> the Governor. In cases concluded before the effective date of this act the <u>Attorney General</u> or his designee <u>may send the notice of lien</u> required by Section 8-1-115(B) to the appropriate retirement or pension plan system instead of the presiding judge.

(emphasis added). 2001 S.C. Act No. 16, § 6.

Under a plain reading of the statute, subsection (A) creates a lien for the total amount of the loss to the government entity. In cases concluded after the statute's effective date, the lien attaches under subsection (B) at the time of conviction and the presiding judge must send a notice of lien to the Attorney General and the retirement system stating the amount. If the case was concluded <u>before</u> the statute's enactment and the defendant is still living, the lien is deemed to have attached April 10, 2001, the effective date of the statute. The Attorney General, instead of the presiding judge, then sends the notice of lien to the retirement system.

Under subsection (C), the trial judge may order, in addition to any other sentence, "full restitution . . . <u>and</u> full payment . . . <u>and</u> . . . an indeterminate sentence of incarceration or probation, or both, until restitution in full has been made."

Subsection (D) authorizes the Attorney General to bring an action to enforce the lien at any time before the defendant's death. The lien is discharged "after restitution has been made by payment of the amount of the lien in full."[2]

Act No. 16 expressly provides that the statute is "intended to create remedies to more efficiently recover restitution due to state and local governmental entities." It is "remedial legislation" that applies retroactively "so as to attach the general lien created by Section 8-1-115(A)." Notably, subsection (C), which provides for restitution enforceable by incarceration, is not retroactive.

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[2]If the defendant dies before the lien is enforced, the lien is discharged unless the beneficiary was himself convicted of the same offense.

The legislature clearly expressed its intent that the statute, at least the provisions regarding a lien, be construed as "remedial."[3] Subsection (D) charges the Attorney General with "an affirmative duty" to recover funds, including "bringing an action to enforce the lien created by subsection (A)." A lien is a well-established civil remedy -- it attaches to property and imposes no personal liability. *See* W.M. Kirkland, Inc. v. Providence Washington Ins. Co., 264 S.C. 573, 216 S.E. 2d 518 (1975); Williams v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 246 S.C. 396, 143 S.E.2d 797 (1965); Sexton v. Harleysville Mut. Cas. Co., 242 S.C. 182, 130 S.E.2d 475 (1963) (distinguishing imposition of lien and personal liability); *see also* Black's Law Dictionary (8th ed. 2004) (defining a lien as a legal right or interest that a creditor has in another's property). The trial court's conclusion that the language of subsection (A) on its face creates a lien as "part of the defendant's criminal sentence" is therefore incorrect.

Further, a reading of the statute as a whole does not support the trial court's conclusion that the legislature intended the lien simply to secure the criminal sanction of restitution. Contrary to the trial court's analysis, there is nothing in the statute limiting the lien to the amount of restitution ordered. Subsection (A) expressly states that the lien is for the total amount of loss to the government entity. The only provision limiting the amount of the lien is subsection (B)(2) which allows a reduction for familial hardship.

Subsection (E) expressly provides for satisfaction of the lien "after restitution has been made by payment of the amount of the lien in full." The trial court incorrectly read subsection (E) to impose a limit on the amount of the lien.[4]

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[3]A statute may be in part remedial and in part penal. Francis v. Mauldin, 215 S.C. 374, 55 S.E.2d 337 (1949). Subsection (C), which imposes restitution enforceable by incarceration, is penal and is not retroactive.

[4]The word "restitution" is used in two different contexts in this statute. In subsection (C), "restitution" is a criminal penalty enforceable by

In sum, a plain reading of the statute indicates the legislature's intent that the lien imposed under subsection (A) is a civil sanction and not a criminal penalty, and the amount of the lien is not limited to the amount of restitution.

2. Double jeopardy and ex post facto

The trial court concluded that to allow a lien in an amount greater than the amount of restitution subsequent to the criminal conviction would violate double jeopardy and ex post facto provisions of the federal constitution. We disagree.

The Double Jeopardy Clause prohibits a subsequent criminal punishment for the same offense. This provision does not apply to a subsequent civil sanction. United States v. Ursery, 518 U.S. 267, 273 (1996); In re: Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001). Whether a particular punishment is criminal or civil is initially a matter of statutory construction. Hudson v. United States, 522 U.S. 93, 99 (1997); State v. Price, 333 S.C. 267, 510 S.E.2d 215 (1998). The court must first ascertain whether the legislature intended to establish a civil sanction. Seling v. Young, 531 U.S. 250 (2001). The legislature's manifest intent will be rejected only where the challenging party provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention. *Id.*

The same analysis applies to determine if a subsequent punishment violates the Ex Post Facto Clause. If the subsequent punishment is civil only, it does not violate either constitutional protection. *Id.; see also* In re: Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002) (statute must be criminal or penal in purpose or nature to offend ex post facto laws); Callahan v. Callahan, 36 S.C. 454, 15 S.E. 727 (1892) (ex post facto laws relate to criminal and penal proceedings, which impose punishment and

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incarceration; however, the word is also used in the more general sense of "restoration" or "compensation" as in subsection (E).

forfeiture, and not to civil proceedings which affect private rights retrospectively).

As discussed above, the language of the statute indicates the lien is a civil sanction. We will not reject the legislature's manifest intent to impose a civil sanction unless there is the "clearest proof" that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention. Seling v. Young, *supra.* Under this second prong, if the sanction is actually a criminal punishment, double jeopardy and ex post facto provisions apply.

The United States Supreme Court addressed the issue of a subsequent sanction in Ursery v. United States, 518 U.S. 267 (1996), and adhered to precedent holding that civil forfeitures are not punitive for double jeopardy purposes. *See* United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); Various Items of Personal Property v. United States, 282 U.S. 577 (1931). The Court reiterated in Ursery several points pertinent to this prong of the double jeopardy analysis: civil forfeitures are *in rem* proceedings and, as such, are distinguishable from fines which are *in personam*; actions *in rem* have traditionally been viewed as civil proceedings; and civil forfeitures serve important nonpunitive goals. These same factors apply to the case at hand and support the conclusion that the lien created by § 8-1-115(A) is a civil sanction not subject to double jeopardy or ex post facto prohibitions.

First, it is well-settled that a proceeding to enforce a statutory lien is *in rem* and not *in personam*. *See* Beatty v. Wittemkamp, 171 S.C. 326, 172 S.E. 122 (1933); Tolbert v. Buick Car, 142 S.C. 362, 140 S.E. 693 (1927).[5] Liens, like civil forfeitures, are traditionally civil remedies. *See, e.g.,* S.C. Code Ann. §§ 5-7-300 (tax lien); 5-27-340 (assessment lien); 6-21-330 (bondholders lien); 12-49-10 (tax lien); 15-19-240 (attachment lien); 15-35-810 (judgment lien). The fact that the lien is tied to criminal activity does not render the statute punitive. Ursery, 518 U.S. at 267. Finally, as with civil

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[5]Although the trial judge who sentences the defendant sends the notice of lien, the lien is enforced by an action brought by the Attorney General. § 8-1-115(D).

forfeitures, the lien here serves an important nonpunitive goal: the recovery of public funds.

We find the United States Supreme Court's decision in Ursery dispositive here and conclude there is not the "clearest proof" that the legislature intended to impose a criminal sanction contrary to the statute's expressed intent. Accordingly, neither the Double Jeopardy Clause nor the Ex Post Facto Clause prohibits the subsequent imposition of a lien for the total amount of the loss.

REVERSED.

TOAL, C.J., WALLER and BURNETT, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent and would affirm the trial judge's holding that the amount of the lien created by S.C. Code Ann. § 8-1-115 is limited to the amount of restitution ordered at the defendant's prior criminal sentencing.

The General Assembly created this new remedy as an additional means to collect restitution in a criminal matter involving embezzlement or misappropriation of public funds or public property. 2001 Act No. 16, § 6. In situations where the criminal case is already concluded, the Legislature provided only for the giving notice of the lien by the Attorney General or his designee. Id. The Act contains no provisions for relitigating the amount of restitution in such a case, and I would not imply one.

In my opinion, nothing in the text of the statute itself supports the conclusion that the amount of restitution can be increased. I read subsection (A) to limit the amount of the lien to that part of the restitution award attributable to the governmental entity's loss, thus providing for situations where the restitution award includes repayment attributable to other losses. Since a restitution award may be only partially subject to the lien, subsection (B) requires the judge to specify the amount subject to this remedy. Further, subsection (C) simply gives the trial judge discretion to set the restitution at less than the full amount due. Finally, section (F) merely makes explicit the judicial system's authority to enforce restitution through traditional means, such as a probation revocation proceeding, and provides that such a revocation proceeding does not preclude an action to enforce the lien.

I do not believe the lien statute permits the Attorney General to seek an increase in the restitution awarded in a case where, as in these cases**,** the criminal proceedings were concluded prior to the statute's effective date. I would affirm.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

David F. Sullivan, Appellant.

Appeal From Spartanburg County
John C. Few, Circuit Court Judge

Opinion No. 25923
Heard December 2, 2004 – Filed January 10, 2005

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and Harold W. Gowdy, III, of Spartanburg, for Respondent.

JUSTICE PLEICONES: Appellant was convicted of criminal domestic violence of a high and aggravate nature (CDVHAN) and sentenced to ten years imprisonment. We certified the case for review under Rule 204(b), SCACR. We affirm.

FACTS

Appellant was indicted for CDVHAN. The aggravating circumstances alleged were infliction of serious bodily injury, difference in gender, great disparity in the ages or physical conditions of the parties, and purposeful infliction of shame and disgrace.

Prior to *voir dire*, Appellant moved the circuit court to strike "purposeful infliction of shame and disgrace," claiming the phrase was unconstitutionally vague in that it failed to provide notice of the particular conduct to be avoided in order to stay within the bounds of the law. The court denied the motion.

The case went to trial, and Appellant was convicted. Before sentencing, Appellant moved for a new trial, again claiming vagueness. The court denied this motion as well.

On appeal, Appellant claims he is entitled to a new trial because there is a reasonable doubt that he would have been convicted of CDVHAN[1] had the jury not been charged as to "purposeful infliction of shame and disgrace." In support of his vagueness claim, Appellant asserts "shame" and "disgrace" lack clear meaning. In addition, Appellant asserts there is no standard by which to determine the existence of a purposeful infliction.

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[1] On appeal Appellant does not deny that criminal domestic violence occurred.

ISSUE

Whether "purposeful infliction of shame and disgrace" is unconstitutionally vague.

ANALYSIS

A person is guilty of CDVHAN if he or she commits criminal domestic violence[2] and "the elements of assault and battery of a high and aggravated nature [ABHAN] are present." S.C. Code Ann. § 16-25-65 (2003).[3] ABHAN is "an unlawful act of violent injury" accompanied by a circumstance of aggravation. State v. Primus, 349 S.C. 576, 580, 564 S.E.2d 103, 105 (2002). Circumstances of aggravation include: use of a deadly weapon; intent to commit a felony; infliction of serious bodily injury; great disparity in the ages or physical conditions of the parties; difference in gender; purposeful infliction of shame and disgrace; taking indecent liberties or familiarities with a female; and resistance to lawful authority. Primus, 349 S.C. at 580-81, 564 S.E.2d at 105-06.

Regarding vagueness, the due-process[4] standard is whether the statute "either forbids or requires the doing of an act in terms so vague that men of

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[2] Criminal domestic violence is "caus[ing] physical harm or injury to a person's own household member" or "offer[ing] or attempt[ing] to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril." S.C. Code Ann. § 16-25-20(A) (2003 and Supp. 2003). The legislature's 2003 amendments to section 16-25-20 did not redefine criminal domestic violence. See 2003 Act No. 92, § 3 (effective January 1, 2004).

[3] In 2003 the legislature substantially amended section 16-25-65, redefining CDVHAN. 2003 Act No. 92, § 3 (effective January 1, 2004); see also S.C. Code Ann. § 16-25-65(A) (Supp. 2003). The version in effect from 1994 through 2003 applies to this case. See S.C. Code Ann. § 16-25-65(A) (2003).

[4] U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3.

common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, 328 (1926); see also State v. Michau, 355 S.C. 73, 75-78, 583 S.E.2d 756, 758-59 (2003) (applying the principle).

We disagree with Appellant that the CDVHAN statute violates due process. "Shame" and "disgrace" are common terms, so a person of common intelligence need not guess at the meanings. Likewise, a person of common intelligence understands what "purposeful infliction" means. Consequently, "purposeful infliction of shame and disgrace" does not offend due process. Appellant's conviction is

AFFIRMED.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Efia Nwangaza, Respondent.

Opinion No. 25924
Submitted December 6, 2004 – Filed January 10, 2005

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, Susan M. Johnston, Deputy Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, all of Columbia, for the Office of Disciplinary Counsel.

Stephen John Henry, of Greenville, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to either an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

On or about December 14, 1999, complainant signed a contingency fee agreement retaining respondent to represent her in a claim for damages sustained in an automobile accident (the Personal Injury Matter).

Complainant also hired respondent to represent her in a child support matter (the Domestic Matter). No written fee agreement regarding the Domestic Matter was signed. Respondent represents there was an oral agreement that her fee in the Domestic Matter would be paid from the proceeds of the Personal Injury Matter. Complainant disputes the existence of an oral agreement.

Complainant paid respondent $100 for the cost of filing and service in the Domestic Matter. Respondent's attorney's fees in the Domestic Matter were to be calculated at $125 per hour. Respondent submitted an affidavit of attorney's fees and costs totaling $2,100 in the Domestic Matter.

In July 2000, the family court awarded complainant $300 in temporary attorney's fees to be paid by the defendant at a rate of $100 per month. The court stated the remaining claim for attorney's fees and costs would be addressed at the subsequent paternity hearing. The defendant submitted to a paternity test in August 2000. The test established a 99% probability that he was the father of complainant's child.

The insurance company agreed to pay $6,250 to settle the Personal Injury Matter. The insurance company issued a check payable to complainant and respondent in the amount of $6,250.

On or about October 5, 2000, complainant went to respondent's office for settlement disbursement. Respondent presented complainant with a letter outlining the disbursement of the proceeds of the Personal Injury Matter. The disbursement sheet stated: " . . . attorney's fees for your on-going child support case are also due from these proceeds. As the Defendant . . . was ordered to pay $300 of the $2,100 for which you were invoiced on July 19, 2000, the balance due is $1800. While I am prepared to compromise this amount, it must be paid today."

When respondent presented complainant with the disbursement sheet, a dispute arose. Complainant refused to sign the disbursement sheet or the settlement check and terminated respondent.

As a result of her termination, respondent did not request a paternity hearing. Respondent did not pursue the balance of her fees and costs from the defendant in the Domestic Matter as permitted by the family court's order.

On October 6, 2000, respondent negotiated the settlement check without complainant's consent or endorsement by depositing it into her trust account. Respondent issued a check in the amount of $1,339 to complainant's medical provider. Respondent withdrew her contingency fees in the amount of $2,083.33. Respondent failed to maintain the balance of $2,827.66 in her trust account until the dispute over the fees in the Domestic Matter was resolved.

On or about December 13, 2000, respondent filed a lawsuit against complainant in magistrate's court claiming $1,800 in attorney's fees for the Domestic Matter, plus $305 in costs and fees, for a total of $2,105. On August 15, 2003, respondent paid complainant the disputed portion of the fee plus 9% interest in the Domestic Matter.

LAW

Respondent admits that by her misconduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2 (lawyer shall abide by client's decisions concerning the objectives of representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.5 (when lawyer has not regularly represented client, fee shall be communicated to client, preferably in writing); Rule 1.15 (lawyer shall hold client property in her possession separate from lawyer's own property); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of the client); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to

the administration of justice). Respondent acknowledges that her misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute), and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate oath of office).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for her misconduct.

PUBLIC REPRIMAND.

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

The Supreme Court of South Carolina

In re: Amendments to Rule 412, SCACR,
Interest on Lawyer Trust Accounts (IOLTA)

O R D E R

The South Carolina Bar Foundation has proposed amending Rule 412, SCACR, the rule regarding Interest on Lawyer Trust Accounts (IOLTA), to convert the IOLTA program to a mandatory program so as to enhance revenues to fund critical initiatives that support the justice system,[1] to ensure that the rule complies with the United States Supreme Court's holding in Brown v. Legal Foundation of Washington, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003), including providing guidance to attorneys on how to determine "nominal and short-term deposits" and delineating procedures for issuance of refunds when client funds should have been placed in non-IOLTA accounts for the benefit of the client, and to

[1] These initiatives are related to the three program goals established by the South Carolina Bar Foundation: (1) providing civil legal aid to the poor; (2) offering law-related education; and (3) supporting programs to improve the administration of justice in South Carolina.

incorporate service fee policies to ensure ongoing compliance by financial institutions. The proposed amendments are approved.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 412, SCACR, to reflect the changes set forth above. These amendments shall be effective March 1, 2005. A copy of the amended rule is attached.

IT IS SO ORDERED.

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

January 6, 2005

RULE 412
INTEREST ON LAWYER TRUST ACCOUNTS (IOLTA)

(a) Definitions. As used herein, the term:

(1) "Nominal or short-term" describes funds of a client or third person that, pursuant to section (d) below, the lawyer has determined cannot provide a positive net return to the client or third person;

(2) "Foundation" means the South Carolina Bar Foundation, Inc.;

(3) "IOLTA account" means an interest bearing trust account benefiting the South Carolina Bar Foundation established in a participating institution for the deposit of nominal or short-term funds of clients or third persons;

(4) "Participating Institution" means any bank, credit union or savings and loan association authorized by federal or state laws to do business in South Carolina and insured by the Federal Deposit Insurance Corporation or any successor insurance corporation(s) established by federal or state law.

(b) Attorney Participation.

(1) All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of the South Carolina Bar practicing law from an office or other business location within the state of South Carolina shall be deposited into one or more IOLTA accounts, except as provided in Rule 1.15 of Rule 407, South Carolina Appellate Court Rules, with respect to funds maintained other than in a bank account and as provided in section (i) below.

(2) A law firm of which the lawyer is a member may maintain the account on behalf of any or all lawyers in the firm.

(c) Depository Procedures.

(1) The IOLTA account shall be established with a participating institution. Funds deposited in each IOLTA account shall be subject to withdrawal upon request and without delay, subject only to any notice period which the institution is required or permitted to reserve by law or regulation and as provided in Rule 1.15 regarding safekeeping of client property.

(2) The rate of interest payable on any interest bearing trust account shall not be less than the rate paid by the depository institution on comparable accounts to its non-IOLTA customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility requirements, if any. Higher rates offered by the institution to customers whose deposits exceed certain or quantity minima may be obtained by a lawyer or law firm on some or all of the deposited funds so long as there is no additional impairment of the right to withdraw or transfer principal. Reasonable service charges or fees may be assessed, as provided in section (h) below, only against the interest or dividends generated and not against the principal.

(d) Determination of Nominal or Short-Term Funds.

(1) The lawyer shall exercise good faith judgment in determining upon receipt whether the funds of a client or third person are nominal or short-term. Client funds shall be deposited in a lawyer's or law firm's IOLTA account unless the funds can otherwise earn income for the client in excess of the costs incurred to secure such income.

In the exercise of this good faith judgment and determining whether a client's funds can earn income in excess of costs and thus provide a positive net return to the client, the lawyer or law firm shall consider the following factors:

(A) the amount of funds to be deposited;

(B) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(C) the rates of interest or yield at financial institutions where the funds are to be deposited;

(D) the cost of establishing and administering non-IOLTA accounts for the client's benefit, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;

(E) the capability of financial institutions to calculate and pay income to individual clients; and

(F) any other circumstances that affect the ability of the client's funds to earn a net return for the client.

The lawyer or law firm shall review its IOLTA account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client.

(2) The determination of whether a client's or third person's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with ethical impropriety based on the exercise of such good faith judgment.

(3) Notification to the client is not required nor shall the client have the power to elect whether nominal or short-term funds shall be placed in the IOLTA account.

(4) The provisions of section (c) shall not relieve a lawyer or law

firm from an obligation imposed by Rule 1.15 of the Rules of Professional Conduct with respect to safekeeping of client property.

(e) IOLTA Refund Procedures.

The Foundation will issue refunds when interest has been remitted in error when, pursuant to subsection (d), the funds should have been placed in a non-IOLTA account for the benefit of the client. The Foundation shall establish procedures for the processing of refund requests.

(f) Notice to Foundation.

Lawyers or law firms shall advise the Foundation, at Post Office Box 608, Columbia, SC 29202-0608 or by facsimile at (803) 779-6126, of the establishment and closing of an IOLTA account for funds covered by this rule. Such notice shall include: the name of the institution where the IOLTA account is established; the IOLTA account number as assigned by the institution; the institution address; and the name and South Carolina Bar attorney number of the lawyer, or of each member of the South Carolina Bar in a law firm, practicing from an office or other business location within the state of South Carolina that has established the IOLTA account.

(g) Certification.

Each member shall certify annually on the member's license fee statement submitted pursuant to Rule 410, South Carolina Appellate Court Rules, that the member is in compliance with the provisions of this rule or, pursuant to section (i) below, has been approved by the Foundation as exempt from the provisions of this rule.

(h) Remittance and Reporting Instructions.

A lawyer or law firm depositing client funds in an IOLTA account shall direct the depository institution to:

(1) calculate and remit interest or dividends, net of reasonable service charges or fees, on the average monthly balance in the account or as otherwise computed in accordance with the institution's standard accounting practice, monthly to the Foundation, which shall be the sole beneficial owner of the interest or dividends generated by the accounts;

(2) transmit monthly to the Foundation a report, listing by account the name of the lawyer or law firm for whom each remittance is made, the lawyer's or law firm's IOLTA account number as assigned by the institution, the rate of interest applied, the average account balance for the reporting period or the other amount from which interest or dividends are determined, the amount of each remittance, and the amount of any service charges or fees assessed during the remittance period, and the net amount of interest remitted for the period;

(3) transmit at least quarterly to the depositing lawyer or law firm, a report or statement containing the information required in subsection (2) above.

In the event that a financial institution does not waive service charges or fees on IOLTA accounts, reasonable customary account maintenance fees may be assessed. Fees for wire transfer, insufficient funds, bad checks, stop payment, account reconciliation, negative collected balances and check printing are not considered customary account maintenance charges and may not be assessed against an IOLTA account. Such non-routine fees must be brought to the attention of the lawyer or law firm, who in turn may absorb these specific costs or pass along those fees to the client(s) being served by the transaction (in accordance with attorney/client agreements).

Negative interest earnings resulting from service charges which exceed interest earned are prohibited on IOLTA accounts. Service charges may only be imposed to the extent of interest earned on an

individual account.

Participating institutions shall forward the remittance report to the Foundation within 45 days of the end of the reporting period.

(i) Exempt Accounts.

The Foundation will establish procedures for a lawyer or law firm to maintain an interest-free trust account for client and third-person funds that are nominal or short-term when these nominal or short-term funds cannot reasonably be expected to produce or have not produced an interest income net of reasonable participating institution service charges or fees.

(j) Program Administration.

The Foundation shall, in accordance with its charter and by-laws, receive, administer, invest, disburse and separately account for all funds remitted to it through this program.

The Supreme Court of South Carolina

RE: Amendment to Rule 404, SCACR

ORDER

In In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. 304, 422 S.E.2d 123 (1992), this Court left it to the administrative agencies to determine under what conditions they would allow attorneys licensed in other states to appear before them. This result was consistent with our rule at the time that left it up to each court to determine if a *pro hac vice* admission would be allowed.

Since that time, this Court has amended Rule 404, SCACR, to place limits on *pro hac vice* admissions and to establish a uniform procedure for seeking *pro hac vice* admissions to include a standardized application form. Under the current procedure, a copy of the application is provided to this Court, and this allows this Court to monitor the extent and circumstances in which *pro hac vice* admissions are being sought so it can determine if further regulation is necessary. Additionally, the current rule requires the attorney seeking *pro hac vice* to associate a South Carolina lawyer, to agree

to be bound by the South Carolina Rules of Professional Conduct and to be subject to the disciplinary authority of this Court for any unethical conduct.

We see no reason why the same requirements and restrictions should not be placed on attorneys seeking to be admitted *pro hac vice* in a contested case before the South Carolina Administrative Law Court or a South Carolina agency. Accordingly, Rule 404, SCACR, is amended as shown in the attached. This amended rule shall become effective March 1, 2005.

IT IS SO ORDERED.

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

January 6, 2005

RULE 404
ADMISSION PRO HAC VICE

(a) Admission; Tribunal Defined. Upon written application, an attorney who is not admitted to practice law in South Carolina and who is admitted and authorized to practice law in the highest court of another state or the District of Columbia may appear *pro hac vice* in any action or proceeding before a ~~court~~ tribunal of this state if an attorney admitted to practice law in South Carolina is associated as attorney of record. For the purpose of this rule, a “tribunal” includes any court of this state, and the South Carolina Administrative Law Court and any South Carolina agency authorized to hear and determine contested cases as defined under S.C. Code Ann. § 1-23-310.

(b) Prohibitions on Admission. An attorney may not appear *pro hac vice* if the attorney is a resident of South Carolina, is regularly employed in South Carolina, or is regularly engaged in the practice of law or in substantial business or professional activities in South Carolina, unless the attorney has filed an application for admission under Rule 402, SCACR.

(c) Application for Admission. An attorney desiring to appear *pro hac vice* shall file with the ~~court~~ tribunal in which the matter is pending, prior to making an appearance, an Application for Admission *Pro Hac Vice* which contains the following information:

(1) the applicant's residence and office addresses;

(2) the state and federal courts to which the applicant has been admitted to practice and the dates of admission;

(3) whether the applicant is a member in good standing in those courts, and a certificate of good standing of the Bar of the highest court of the state or the District of Columbia where the applicant regularly practices law;

(4) whether the applicant is currently suspended or disbarred in any court, and if so, a description of the circumstances under which the suspension or disbarment occurred;

(5) whether the applicant has been formally notified of any complaints pending before a disciplinary agency in any other jurisdiction and, if so, provide a detailed description of the nature and status of any pending disciplinary complaints;

(6) an identification of all law firms with which the applicant is associated and a description of all the applicant's pending *pro hac vice* appearances in South Carolina to include the name and address of the tribunal;

(7) the names of each case or proceeding in South Carolina in which the applicant has filed an application to appear as counsel *pro hac vice*, the name and address of the tribunal, the date of each application, and whether it was granted;

(8) the name, address, and telephone number of the active member(s) of the South Carolina Bar who is (are) the attorney(s) of record; and

(9) an affirmation that the applicant will comply with the applicable statutes, law and procedural rules of the State of South Carolina; be familiar with and comply with the South Carolina Rules of Professional Conduct; and submit to the jurisdiction of the South Carolina courts and the South Carolina disciplinary process.

The ~~court~~ tribunal in its discretion may order a hearing on the application and shall enter an order granting or refusing the application. If the application is refused, the ~~court~~ tribunal shall state its reasons.

(d) Fee; Record of Appearances. Each time an application under this rule is made, the attorney seeking to appear *pro hac vice* shall provide a copy of the application to the South Carolina Supreme Court Office of Bar Admissions accompanied by a $100 fee. Upon receipt of the application, the Clerk of the South Carolina Supreme Court shall certify to the ~~court~~ tribunal in which a *pro hac vice* appearance has been requested that the fee has been received. The Office of Bar Admissions

shall maintain a record of all *pro hac vice* applications as a public record.

(e) Conduct of Attorney Appearing *Pro Hac Vice*. An attorney appearing *pro hac vice* is subject to the jurisdiction of the South Carolina courts with respect to South Carolina law governing the conduct of attorneys to the same extent as an attorney admitted to practice law in this state. The attorney shall comply with the South Carolina Rules of Professional Conduct and is subject to the disciplinary jurisdiction of the Supreme Court of South Carolina. The ~~court~~ tribunal in which an attorney is appearing *pro hac vice* or the Supreme Court of South Carolina may, for violations of South Carolina law, the South Carolina Rules of Professional Conduct, or orders of the ~~court~~ tribunal, withdraw its permission for an attorney to appear *pro hac vice*.

(f) Responsibilities of Attorney of Record. The South Carolina attorney of record shall at all times be prepared to go forward with the case; sign all papers subsequently filed; and attend all subsequent proceedings in the ~~action~~ matter, unless the ~~court~~ tribunal specifically excuses the South Carolina attorney of record from attendance.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,	Respondent,
v.	
Thurman O'Neil Smith, Jr.,	Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 3916
Heard November 10, 2004 – Filed January 10, 2004

REVERSED

Edward T. Hinson, Jr., of Charlotte, and Leland Bland Greeley, of Rock Hill, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General David Spencer, all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

STILWELL, J.: Thurman O'Neil Smith, Jr. was tried for murder and convicted of voluntary manslaughter. He appeals, arguing the evidence did not support either the verdict of voluntary manslaughter or its submission as a verdict option. We reverse.

BACKGROUND

On June 10, 2002, Smith's 16-year-old daughter told her mother her paternal grandmother's husband, Tommy Moss, molested her when she was approximately 8 years old. She said the molestation happened at her grandmother's home while her grandmother was sleeping. Although she did not tell her parents at the time, she never spent the night at her grandmother's home again.

Around 7:00 a.m. the next day, Smith's wife relayed the allegation to Smith. Although shaken by the news, Smith went to work until about 3:15 p.m., when he left one work site and stopped by another to give a price estimate. Smith arrived at home between 4:00 and 4:20 p.m. While there, he had a beer and talked for about 45 minutes to his wife and daughter about the alleged molestation. They discussed seeking counseling for Smith's daughter, which spurred Smith to call his therapist to arrange an appointment. They also discussed whether law enforcement could be involved and about exposing what Moss had done. Smith then showered, talked to the therapist, and retrieved a gun from his dresser. He left the house, with his wife and daughter unaware he had the gun and under the impression he was going to a lake he frequented.

Instead, Smith drove to the home of a friend, and without mentioning the molestation allegation, discussed target practice. During the discussion, he asked his friend's son or the son's friend to go buy some shells for him, which he did. Smith left and stopped at a local bar and grill around 5:30 p.m. He talked with another friend, Tommy Edwards, and drank part of a beer. The two walked outside and continued to talk. Smith told Edwards about the

alleged molestation of his daughter and the earlier abduction and death of another daughter many years before.

After Edwards left, Smith loaded the gun with six bullets and started driving to the home of his mother and stepfather. Along the way, Smith stopped and removed the bullets, but he put two back in the gun. He arrived at the Mosses' home about twenty minutes later.

Smith's mother, Loretta, saw a truck she did not recognize[1] arrive in her driveway. When Smith stepped out of his truck, Loretta then recognized her son. Smith was yelling, asking Loretta something to the effect of "Where is that son of a bitch you're married to?" He screamed out the accusations against Moss, and Loretta responded Smith was wrong and his daughter was a "lying slut." Loretta testified Smith said, "I've come down here to kill you" to Moss. At this point, Moss was outside at his doorway. Smith was waving the gun, and Loretta was asking him to put the gun away. Moss possibly raised his hand and made contact with Smith's arm, and the gun fired. Moss was shot and he fell blocking the door, requiring Loretta to enter the house from the back to call for emergency assistance. Moss died.

DISCUSSION

Smith argues the trial court erred in charging the jury on the law of voluntary manslaughter and allowing the jury's voluntary manslaughter guilty verdict to stand. We agree.

The trial court must determine the law to be charged based on the evidence at trial. State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d. 110, 112 (2003). When the record contains no evidence to support it, a voluntary manslaughter jury charge should not be given. See State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-69 (2000).

In considering a new trial motion based on insufficiency of the evidence, the trial court is concerned with the existence of evidence rather

[1] Smith and his mother had been estranged for nearly three years.

than its weight. See State v. Pauling, 264 S.C. 275, 278, 214 S.E.2d 326, 327 (1975). The weight of the evidence is a question for the jury. Id. Where there is any evidence supporting the jury's verdict, the court commits no error in denying the motion. Id.

> Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation. Both heat of passion and sufficient legal provocation must be present at the time of the killing. The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence.

State v. Cooley, 342 S.C. at 67, 536 S.E.2d at 668 (internal citations omitted). Even if sufficient legal provocation has aroused a defendant's passion, "if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter." State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001).

Assuming without deciding sufficient legal provocation existed in this case, the evidence clearly does not establish Smith acted in the sudden heat of passion. Smith heard the allegation early in the morning, went to work, talked to his family and called to make his daughter an appointment with a therapist, went to a friend's house to talk, dropped by a bar where he talked with another friend, and finally arrived at Moss's home in the evening. This was certainly a long enough period to render Smith capable of cool reflection. Also, during this time he retrieved his gun, had someone buy him ammunition, loaded the gun, unloaded it, and reloaded it. Although there was testimony he was upset, this evidence suggests he in fact coolly reflected on the situation. Because demonstration of sudden heat of passion is required to establish voluntary manslaughter, the evidence supports neither the voluntary manslaughter verdict option nor the verdict itself.

REVERSED.[2]

SHORT, J., concurs.

ANDERSON, J., dissents and concurs in a separate opinion.

I **VOTE** to **REVERSE** and **REMAND** for a new trial on involuntary manslaughter. In my judgment, a reversal is proper in regard to the charge of voluntary manslaughter, but the case must be remanded for the purpose of a new trial on involuntary manslaughter.

I am convinced that a retrial of the defendant on the charge of involuntary manslaughter is proper. In State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000), our supreme court edified:

> Furthermore, based on the testimony presented at Defendant's trial, the result of our holding here is that without any evidence of legal provocation Defendant cannot be retried on the charge of voluntary manslaughter. Thus, retrial will be limited to the charge of involuntary manslaughter.

Id. at 69, 536 S.E.2d at 669.

Applying Cooley, a reversal encapsulates a retrial on involuntary manslaughter.

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[2] The majority thoroughly agrees with the dissent that State v. Cooley would allow Smith to be tried on a charge of involuntary manslaughter. Even though this court does not specifically remand for that purpose, that option remains open should the solicitor in his discretion determine the facts of the case warrant it.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,	Respondent,
v.	
John Gleason Hubner,	Appellant.

Appeal From Richland County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 3917
Submitted October 1, 2004 – Filed January 10, 2005

REVERSED AND REMANDED

Carol Annette McCurry of West Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General David A. Spencer, all of Columbia; and Solicitor Warren Blair Giese, of Columbia, for Respondent.

HUFF, J.: In this criminal case, John Gleason Hubner appeals following his conviction for six counts of lewd act upon a child. Hubner asserts the trial judge erred in (1) admitting evidence of a prior bad act under the common scheme or plan exception to the rule which generally disallows prior bad act evidence, (2) admitting the conviction itself resulting from that prior bad act, and (3) denying Hubner's motion for continuance. We reverse and remand[1] for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

The victim in this case met John Hubner in the summer of 1996. At that time, victim was twelve years old, was between sixth and seventh grade, and was about to start in her church's junior high youth group. Hubner was an active member of the church, where he volunteered with the youth group and taught Sunday school. Victim's first impression of Hubner was that he was nice, and she specifically appreciated the manner in which he would listen and talk to her. Victim testified she was able to talk to Hubner about problems in her relationship with her mother, and Hubner would tell her that victim was right and her mother had problems.

Victim would often arrive at church early on Sunday mornings because her parents served as greeters in the church. When victim would get there, Hubner would regularly be waiting for her at a downstairs door, where he would immediately hug victim and engage her in conversation. Victim testified to a progression of a more sexual relationship from August 1996 through March 1997. Victim first recalled a major incident that occurred in a Sunday school room after she injured her leg playing softball. Hubner massaged her knee by reaching down into her pants to her knee and massaging her leg all the way back up to the top.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

Victim next testified to an incident that occurred during a discussion she had with Hubner about the changes her body was undergoing as a result of puberty and the effect it had on her softball playing abilities. During this conversation behind a closed door in victim's Sunday school room, victim testified Hubner hugged her from behind, pulled his arms out and reached across her breasts. He then moved his arms toward her hips, turned her toward him, lifted her shirt and stared at her in her bra. He then squeezed her breasts before putting her shirt back down and telling her everything was fine. Hubner also hugged victim tightly, pushing his crotch close to her. At this time, victim felt their relationship was changing.

Victim testified about another incident occurring prior to Christmas in 1996 when they were alone in the game room in her church's youth area on a Wednesday night. There, Hubner showed her how to dance by putting victim's feet on top of his and holding her. Hubner reached into her back pockets and squeezed her "butt." He then took his hands out of the pockets, placed them into her pants, and continued to squeeze her "butt" while they danced. He proceeded to lift her onto a foosball table and fondle her between her vagina and rectum. At this point, victim still liked Hubner because he listened to her, and he often told her that he loved her.

Victim related another incident occurring November 15, 1996, when the youth group had a lock-in and went to Frankie's Fun Park. It was a cold evening and victim had left her jacket on the bus. Hubner asked her if she was cold and, although she told him she was not, he unzipped his jacket, put her inside the jacket with him, and zipped it back up. Suddenly, victim realized Hubner had an erection. He looked at her, hushed her, and told her he loved her.

On another occasion, victim related how, on a Sunday morning in the Sunday school room, they were alone with the door shut and talking about her problems with her mother. Hubner again told victim that she was right, and that her parents had problems. He stated that her parents were "Sunday morning Christians" and they did not have the relationship with God like he had and that he wanted victim to have.

He told victim if she trusted God, everything would be okay. Hubner asked her to unbutton his shirt and touch his chest, which she did. Then, he guided her hand to touch his penis through his clothes. She repeatedly pinched his penis and he had an erection. Hubner's eyes rolled back into his head and then he suddenly stopped victim, telling her it was time for Sunday school. Thereafter, victim thought Hubner was mad at her because he did not speak to her the next several times he saw her. The next time they talked, Hubner told victim he loved her, that God had given them "this really special relationship" and that he was happy God had put her in his life. He told victim she needed to remember their relationship was private and secret, and that's the way God wanted it to be. On another occasion, Hubner sat victim down on his knee while in the church sanctuary and read I Corinthians 13, a bible passage on love, to her and told her that was how he loved victim.

Next, victim related a story occurring in the church annex as she played hide and seek with friends. She was standing alone in a room when Hubner walked up behind her, picked her up around her breast area, and guided her behind a door. He began to massage her shoulders and neck and then proceeded to massage down her leg and then the inside of her leg, getting close to her groin. Victim broke away and ran to her friends.

Victim testified their relationship changed again around March 7, 1997, when she participated in a church event called Disciple Now. There, discussions about sexual relationships led victim to realize her relationship with Hubner was not normal, and afterwards, she began to either avoid being alone with Hubner or asked her friends to pull her away if they saw her with him. Sometime after Disciple Now, victim testified Hubner presented her with a bracelet as a birthday gift, though she refused the gift. After she rejected the gift and began to avoid Hubner, he became more forceful with victim. Victim complained to some adults that Hubner made her feel uncomfortable and she did not want to be around him, but she did not disclose to them the wrongful touchings.

After the Disciple Now weekend in March, the next incident occurred when victim was thirteen years old, in July 1997. She and Hubner both attended a church camp. Victim related a time where she thought Hubner had accidentally touched her vagina when his fingers slipped in her bathing suit while Hubner was throwing victim and her friends in a swimming pool. However, at the same camp, victim testified to an event that upset her greatly. Victim testified she was talking to a group of people when Hubner called her over. Victim kept a row of chairs between them, but Hubner reached out to hug her anyway. Victim crossed her arms over her chest and leaned back. Hubner then grabbed victim around her face, pulled her toward him, and kissed her. Victim stated she felt that had she not turned her face, he would have kissed her on her lips. Victim was shocked at this. She stated she became very upset and was scared and shaking. She then told the two female leaders for her group about the kiss.

Later, around August of 1997, victim rode over to the Hubner home with her sister, who was friends with Hubner's youngest daughter. He asked victim to accompany him to show her his new motorcycle. While in the garage, Hubner picked victim up, placed her on the bike, and sat on it behind her. He then put his hands down her shorts, over her panties, and fondled her vagina.

Victim still did not tell anyone what had occurred with Hubner after the motorcycle incident. She testified she did not say anything because she thought Hubner loved her. She also stated she was afraid Hubner would kill her because he told her their "relationship was secret and it was God's, and God punishes people when they don't obey him."

Victim was able to avoid Hubner during the fall and winter of 1997 and 1998. Thereafter, victim began complaining to the church youth pastor about Hubner's unwanted attention. Victim told the pastor Hubner needed to be removed from the youth group, telling the pastor she was frightened of Hubner, that he hugged her too much, told her he loved her unconditionally, told her that her body was beautiful, and always wanted to be alone with her. While she did not detail any illegal behavior on Hubner's part, victim did, at the pastor's request,

write a letter in the summer of 1998 explaining some of the aspects of their relationship and the reasons she felt uncomfortable around Hubner. As a result of that letter, Hubner was asked to step down from his position in the youth ministry department.

Thereafter, when victim was fifteen and sitting alone outside the sanctuary during a Christmas pageant practice, Hubner sat down beside her, placed his arm around her shoulder and rested his hand on the side of her breast. During this incident, victim reported he told her he still loved her and they had a special relationship that was very secret.

Eventually, victim opened up to her youth pastor and detailed some of the more explicit incidences that had occurred with Hubner. These allegations came to the attention of law enforcement, and Hubner was subsequently charged with six counts of committing a lewd act upon a child. After jury selection, the State requested it be allowed to introduce evidence of prior criminal actions by Hubner against another child which occurred in Maine in 1981 and 1982. The State argued there were numerous similarities between the two cases and the evidence should be admitted in order to demonstrate the existence of a common scheme or plan. The defense countered the allegations in the two cases were not that similar, but were merely general to this type of case. Further, the defense asserted, given the dissimilarities between the two cases and the fact that the prior case was almost twenty years old, the evidence should be excluded. The trial court held an in camera hearing on the matter, which included taking the testimony of Hubner's prior victim, Rachel,[2] regarding the incidents of abuse she suffered at the hands of Hubner.

Rachel, who was thirty-two at the time of the trial, voluntarily traveled from her home in Arizona to South Carolina to testify against Hubner. She testified at the end of the summer of 1981, when she was eleven but about to turn twelve, her family moved to a new house in Waterville, Maine. Hubner lived three to four houses away and became

[2] The prior victim's name has been changed in this opinion to protect her identity.

acquainted with Rachel's parents. Thereafter, Rachel began to watch television with Hubner and became his friend. She would help him shovel his driveway and baby-sat his children at his house.

Rachel thought Hubner was nice to her. Hubner began to give Rachel short hugs. At some point, however, these hugs became a kind where Hubner would touch her body in the wrong way. He also began to kiss Rachel on the neck, and cheek, and would French kiss her. This contact occurred at his house while Rachel was baby-sitting. There came a time when Hubner began to fondle Rachel's breasts and bottom through her clothing and would tell Rachel she had a nice body. On one occasion, Hubner came up from behind Rachel, grabbed her chest, and "rub[bed] certain body parts." In another incident, Hubner removed Rachel's shirt, but not her bra, and just stared at her.

Hubner also would put his hands in her front and back pockets and would massage her vagina and her buttocks through her clothes. This progressed until he would also touch her vaginal area under her clothes. Hubner would also come up behind her while he had an erection and rub himself against her. On other occasions, she touched his crotch both with and without his clothes on. This behavior progressed to him masturbating in front of Rachel and having sexual intercourse with her. Hubner also gave her alcohol. Rachel testified Hubner would tell her she was pretty, she had a beautiful body, and that he loved her. He threatened to kill her if she ever told anyone.

On cross-examination, Rachel admitted giving a statement to police indicating the hugging started in December, 1981. The statement showed it was also during December that he was hugging her from behind and, by the next Saturday, put his hands in her shirt and played with her breasts. Rachel therefore agreed that within a week of the hugging in December, Hubner was touching her breasts. The statement further showed that "by the next Saturday, [Hubner] started making passes at [her] by pointing at [her] and then him and then upstairs," so that he was almost immediately propositioning her for sex. Thus, Hubner was propositioning her within two weeks of the first hug. Rachel also admitted these sexual encounters involved other people.

She testified one of her friend's, Michelle, was with her on one occasion where Hubner exposed his penis and masturbated in front of them. She also testified to an occasion when another man came over to Hubner's house and this man had intercourse with Rachel. Rachel's statement also indicated that around Christmas, Hubner was at Rachel's home and he put her on her bed and touched her near her breasts. Another time at Rachel's home, Hubner slapped her and tried to kiss her. Sometime after the hugging started, Hubner attempted to take Rachel's pants off while they were watching television. Rachel also indicated in her statement that Hubner offered to pay her for fellatio and to masturbate him. Rachel reported the matter in early February 1982. She agreed that all of these incidences took place over roughly a two-month period.

During the hearing, Hubner took the stand and admitted pleading guilty to one count of unlawful sexual contact against Rachel, but denied he committed any of the acts Rachel claimed he committed. After hearing the testimony and arguments, the trial judge noted that the progression of the seriousness of the acts over a period of time was different between the two cases and there were "a number of acts that were very dissimilar." Nonetheless, the judge found the similar acts were probative, and their probative value outweighed their prejudicial effect. He thus determined it was proper to admit the portions of Rachel's testimony regarding the similar acts, but the State was not allowed to go into dissimilar acts. The case proceeded to trial, and Rachel's testimony regarding the hugging, kissing and inappropriate touching was allowed into evidence over Hubner's objection. Thereafter, Hubner was found guilty on all charges and was sentenced to three consecutive twelve-year terms, two concurrent twelve-year terms, and one fifteen-year term, which was suspended with five years of probation.

STANDARD OF REVIEW

Ordinarily, determinations concerning the admissibility of evidence are treated as involving questions of fact. State v. Tutton, 354

S.C. 319, 326, 580 S.E.2d 186, 190 (Ct. App. 2003). However, the determination of whether the facts surrounding an assault sufficiently evidence a common scheme or plan is a question of law. Id. at 326-27, 580 S.E.2d at 190.

LAW/ANALYSIS

Generally, evidence of prior crimes or bad acts is inadmissible to prove the specific crime charged; however, an exception exists for evidence tending to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or (5) the identity of the person charged with the present crime. See State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923); Rule 404(b), SCRE. For the common scheme or plan exception to apply, a close degree of similarity or connection between the prior bad act and the crime charged is necessary. State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). The connection between the prior bad act and the charged crime must be more than just a similarity, as a common scheme or plan concerns more than just the commission of similar crimes; some connection between the crimes is necessary. Id. Under the common scheme or plan exception, there must be a close degree of similarity or connection between the prior bad act and the crime charged which enhances the probative value of the evidence so as to outweigh its prejudicial effect. State v. Hough, 325 S.C. 88, 95, 480 S.E.2d 77, 80 (1997).

Further, common scheme or plan evidence in criminal sexual conduct cases will be admitted on a generalized basis only where there is a pattern of continuous illicit conduct. Tutton, 354 S.C. at 328, 580 S.E.2d at 191. The conduct need not be continuous, however, to fall within the common scheme or plan exception. Id. at 330, 580 S.E.2d at 192. Rather, the determination of the admissibility of a prior bad act that does not include continuous conduct rests solely on whether the requisite degree of similarity between the separate acts is present. Id.

In arguing to the trial judge that Rachel's testimony should be admitted, the solicitor asserted our appellate courts have been "extremely liberal in the acceptance and the admissibility of Lyle-type testimony in child sexual assault cases." However, there is no case law to support that position. Indeed, this court noted in Tutton, that prior case law did not "lower the bar for admissibility under Lyle simply because sexual crimes are involved." Id. at 328, 580 S.E.2d at 191.

In Tutton, we found Lyle evidence of a previous attack against one of the same child victims to be inadmissible. Tutton was accused of improperly fondling two sisters who were visiting his live-in girlfriend's daughter. It was alleged that on the first night the children slept on the floor near Tutton's bed and he fondled one of them by touching her "butt", rubbing her private parts, and using his fingers to penetrate her vagina. Tutton, 354 S.C. at 323, 580 S.E.2d at 188. The second night, Tutton slept on a couch and the girls again slept nearby on the floor. Id. Another sister testified Tutton fondled her "butt" and touched her private parts before she could move over and out of Tutton's reach. Id. At trial, the State was allowed to introduce evidence from one of these girls that Tutton had previously assaulted her some four to five years prior to the trial. Id. at 324, 580 S.E.2d at 189. The girl testified Tutton forced her to lie on her back, take off her panties, and Tutton then performed oral sex on her and forced her to perform oral sex on him. Id. Additionally, she testified he threatened to tell her parents she was misbehaving if she told anyone of the incident. Id.

Recognizing that there were some similarities between the prior alleged assault and the charged offenses, this court, in Tutton, nonetheless found the separate offenses were dissimilar in significant ways. Id. at 331-32, 580 S.E.2d at 193. There we stated:

> For purposes of analyzing evidence of prior misconduct under the common scheme or plan exception, we believe it is crucial to distinguish similarities that merely link the two crimes from those similarities that tend to paint the broader, more relevant picture. Where, for example, the similarities

> are used to prove only the defendant's intent, very little is required because the charged act in such cases is assumed done. 2 Wigmore, § 304. However, 'where the very act is the object of proof, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common plan as their explanation involves so much higher a grade of similarity as to constitute a substantially new and distinct test.' Id. 'The added element, then, must be, not merely a similarity in the results, but such a concurrence of common features that the various acts are normally to be explained as caused by a general plan of which they are the individual manifestations.' Id. (emphasis in original).

Id. at 331, 580 S.E.2d at 192-93. Noting that the balancing of similarities is a difficult task in cases dealing with the admission of common scheme or plan evidence, we found the similarities in the case were insufficient to support the inference that Tutton employed a common scheme or plan to commit the assaults alleged by the victims. Id. at 333, 580 S.E.2d at 194.

In the case at hand, the acts were against two different victims and occurred some fourteen years apart. Thus, the testimony cannot be admitted on a generalized basis as a pattern of continuous illicit conduct under the common scheme or plan exception. Rather, the admissibility of Rachel's testimony rests solely on whether the requisite degree of similarity between the separate acts is present. As noted, this similarity must not merely be a similarity in the results. Rather, there must be such a concurrence of common features that the various acts are normally to be explained as caused by a general plan of which they are the individual manifestations.

The trial judge here recognized the numerous dissimilarities in the two cases. He nonetheless allowed into evidence prior bad acts against Rachel, attempting to limit the impact of these dissimilarities by restricting the examination of Rachel to testimony concerning only similar acts. The evidence was thus presented in a vacuum to the jury.

However, this does not diminish the fact that an overwhelming number of significant dissimilarities were present between the prior bad act and the case at hand. While the similarities may "link the two crimes," the question is whether they "paint the broader, more relevant picture" of a common scheme or plan of which they are the individual manifestations. Tutton, 354 S.C. at 331, 580 S.E.2d at 192-93. Thus, the trial judge failed to balance the similarities and dissimilarities in making a determination as to whether Rachel's testimony concerning the prior bad acts was admissible at all.

In the instant case, we find there are insufficient similarities between the conduct with Rachel and the conduct with victim to support admission of the evidence of Hubner's prior abuse of Rachel. First, while the prior acts with Rachel did include a few general similarities to the case at hand that may "link the two crimes," including the hugging and inappropriate touchings of twelve-year-old girls, there were numerous dissimilarities between the acts. The kissing with Rachel included kissing her on her neck and cheek and French kissing her, while with victim it was one kiss on her cheek, which victim believed was meant for her lips. The acts with Rachel further included intercourse, fellatio, masturbation, and multiple partners. The conduct with Rachel included an almost immediate progression from innocuous hugs to inappropriate touching and beyond, such that it is hard to segregate the less egregious acts from the more egregious. Victim, on the other hand, alleged a slow progression in the development of a sexual based relationship where she was hugged, fondled, and ultimately persuaded to touch Hubner. The degree in and progression of behavior experienced by Rachel and victim is markedly different. Second, Hubner threatened to kill Rachel, whereas he told victim that God had given them a special, secret relationship. Thus, Hubner used victim's religious habits and beliefs to take advantage of the opportunities to commit these sexual acts and to keep her from telling anyone of them, whereas he used money, employment and physical threats to do the same to Rachel. Third, Hubner also committed sexual acts with another girl in the presence of Rachel, whereas there is no testimony he also committed such acts with any of victim's friends or that anyone else was present with victim during any

of the abuse she experienced. Likewise, Rachel indicated Hubner brought in another man to join in the sexual acts with Rachel, while no such thing occurred with victim. Additionally, all abuse against Rachel took place at Hubner's house or Rachel's house, whereas the alleged abuse against victim, with the exception of one incident at Hubner's home, took place in public places such as the church, an amusement park, and church camp and all of these incidences were affiliated with church activities. Further, while Hubner often talked to Rachel about sex and gave her alcohol, victim alleges Hubner talked to her about God, religion, and her family problems. Victim did not indicate any instances where Hubner gave her any alcohol. Finally, the State focuses on the position of authority Hubner had over victim as a church deacon and leader within the youth group. He held no such special position of authority over Rachel, however, to whom he was simply a neighbor and person who employed her as a babysitter. Thus, the incidences with Rachel and victim occurred "under different circumstances, at different times, in different places, and in different ways." State v. Berry, 332 S.C. 214, 219, 503 S.E.2d 770, 773 (Ct. App. 1998).

We are especially mindful of the exhortation in Lyle that "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt and the evidence should be rejected." Lyle, 125 S.C. at 417, 118 S.E. at 807. As previously noted, a close degree of similarity or connection between the prior bad act and the crime charged, which enhances the probative value of the evidence so as to outweigh its prejudicial effect, is required for the evidence to be admissible under the common scheme or plan exception. In the context of sexual assault cases, "[t]he rationale for this rule is that the overwhelming result of admitting unconnected sexual relationships is to establish an accused's character or propensity to engage in the alleged sexual conduct as a basis for inferring that he committed the charged crime." State v. Rivers, 273 S.C. 75, 78, 254 S.E.2d 299, 300 (1979). Here, there simply is not such a close degree of similarity or connection between the prior bad act and the crimes charged as would enhance the probative value so as to outweigh its

prejudicial effect. Because we do not clearly perceive the required connection between these two cases, we hold the trial judge erred in admitting Rachel's testimony.

In addition to finding Rachel's testimony was admitted in error, we find the admission was not harmless. In determining whether the improper introduction of evidence is harmless, the appellate court must review the other evidence admitted at trial in order to determine whether the defendant's guilt was conclusively established by competent evidence such that no other rational consideration could be reached by the jury. Tutton, 354 S.C. at 334, 580 S.E.2d at 194. While the State presented some evidence that corroborated Hubner's opportunity to commit the acts in question and victim's reaction to Hubner, there was no testimony by anyone that witnessed a clear instance of Hubner's commission of a lewd act on victim. Hubner vehemently denied victim's accusations, and the case effectively came down to a challenge of credibility between Hubner and victim. Therefore, we cannot say that without Rachel's testimony the evidence was so overwhelming that a guilty verdict was the only rational conclusion.[3]

For the foregoing reasons, we reverse Hubner's convictions and remand for a new trial.

REVERSED AND REMANDED.

HEARN, C.J., and KITTREDGE, J., concur.

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[3] Because we find the trial judge erred in admitting the prior bad act evidence, we need not address other issues raised by Hubner. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its disposition of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Nathaniel Mitchell, Appellant.

Appeal From Richland County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3918
Heard December 7, 2004 – Filed January 10, 2005

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Warren Blair Giese, of Columbia, for Respondent.

ANDERSON, J.: Nathaniel Mitchell (Mitchell) was found guilty of homicide by child abuse. Mitchell argues the circuit court should have charged involuntary manslaughter as a lesser included offense. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Nathaniel and Sonya Mitchell were acting as foster parents for Hodari, Nautica, and Passion Gardner. While under the Mitchells' care, Passion, who was approximately two years and three months of age, died from severe head injuries. Mitchell was indicted and tried for homicide by child abuse under S.C. Code Ann. § 16-3-85.

At trial, numerous physicians testified for the State that Passion's injuries were not only consistent with, but a result of shaken baby syndrome. They further opined that trauma of that type and severity could not have been inflicted accidentally.

Passion arrived at the hospital alive, but in critical condition. Dr. Hubbird was called to assist the effort to resuscitate Passion. At trial, he described her condition:

> A. . . . [Her] eyes were widely dilated . . . . I saw hemorrhages, areas of bleeding into the retina on both eyes. . . .
>
> . . . .
>
> . . . [T]he main thing that I was noticing, I came into the E.R., the child was in the emergency department in a bed intubated, not moving, and the pupils were widely dilated so neurologically I already knew the child was quite devastated.
>
> . . . .

Q. Did the C.T. scan in fact confirm that the child had—when you say neurological, do you mean brain damage?

A. Brain damage, yes.

Q. And what did the C.T. scan show?

A. . . . It showed what we call a subdural hematoma, meaning there's a collection of blood. . . .

. . . It showed the subdural hematoma and it showed swelling of the brain itself.

. . . [T]here was so much swelling on the right side that the brain was pushed over against the left, there was some midline shift. Midline shift is very dangerous. Any swelling of the brain is dangerous, but midline shift in particular means that there's massive, massive swelling and that causes massive damage.

Dr. Hubbird then asseverated as to the likely cause of Passion's injuries:

A. My examination, with the subdural hematoma, with the retinal hemorrhages, and the abnormal neurological findings is the evidence of big time swelling and neurological deficit, that indicated child abuse. That's what causes it, that's what it is.

. . . .

A. This is—those three things together virtually is diagnostic, meaning it tells us what it is. They used to call it—and a lot of people still call it shaken baby syndrome.

Q. And when you say shaken baby syndrome, what type of trauma is inflicted on this child to cause these injuries?

A. Shaken baby syndrome is violent whiplash type shaking of an infant or small toddler. It has to be very violent. The human brain is meant to take a nice—you know, if you fall you might be a little dazed. We are meant to take a quick trauma to the brain, if it's just a one time deal, I mean, you wake up like that, and it doesn't usually cause a big problem.

But back and forth, sustained shaking and violent shaking, the brain is not meant to take that and it causes bleeding, retinal hemorrhages, and all that then causes the swelling of the brain.

Q. And Doctor, in your expert opinion—and you mentioned could a fall, say from even like a countertop or a bed or even from several feet, could that cause these types of injuries?

A. No. The only trauma that I know of, and I've never seen this, but from what's reported, that can cause anything even similar is a big time automobile accident, either head-on or side impact where the child is ejected from the car. And I guess it's a potential from a several story fall, but then you'd see associated other injuries as well.

. . . .

Q. Could a child cause these types of injuries, say a three year old?

A. No ma'am. A three year old wouldn't have the strength. Generally in head injuries, it's—a serious injury is caused by serious forces. Violent forces cause big injuries.

. . . .

> Q. What about just—If I, as a grown person, were picking the child up in the air and its head goes back, could that cause these types of injuries? Could this be accidental in any way?
>
> A. No this was not accidental.
>
> Q. So taking a child and lifting it in the air or slightly shaking it wouldn't cause this?
>
> A. No, this would be violent, violent shaking. . . .

Dr. Linda Christmann was qualified as an expert and explained the force necessary to sustain the injuries to Passion:

> Q. . . . Doctor, the hemorrhages that you saw, could they have even been caused by falling down say a flight of stairs?
>
> A. No they could not.
>
> . . . .
>
> Q. Doctor, in your opinion, could this have been an accidental shaking?
>
> A. No.

Another expert, Dr. Close, corroborated the opinions of Drs. Hubbird and Christmann:

> Q. And, Doctor, how would you characterize the type of shaking and/or trauma that would be necessary to inflict this on a two year old, three month child?
>
> A. That would be brutal. I've seen children fall. Kids come to the hospital after falling out of shopping carts and things like that. You don't see bleeds from that kind of trauma.

> You see this bleed from bad car wrecks. You see it—when I was a resident, when a child that had fallen out of a window—a third floor window. It's significant trauma.

One physician testified for the defense that his examination of the child was inconclusive. He further stated the rebleeding of an existing head injury could have caused the death.

At trial, Mitchell averred that he discovered Passion and her brother, Hodari, playing in the toilet. He stopped them, spanked both with his belt, cleaned them up, and let them leave to play while he cleaned up the bathroom. Thereafter, Hodari directed Mitchell's attention to Passion, who was facedown in the hallway. The jury did not credit Nathaniel Mitchell's testimony and found him guilty. He was sentenced to twenty-five years imprisonment.

LAW/ANALYSIS

I. Involuntary Manslaughter Is Not a Lesser Included Offense

The circuit court declined to charge the jury on involuntary manslaughter. The court found (1) involuntary manslaughter is not a lesser included offense of the specific, statutorily defined crime of homicide by child abuse, and (2) the facts did not support involuntary manslaughter. The question of whether involuntary manslaughter is a lesser included offense of homicide by child abuse is a novel issue of law in South Carolina.

A. Elements Test

"The test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense." State v. Elliott, 346 S.C. 603, 606, 552 S.E.2d 727, 728 (2001); accord Murdock v. State, 308 S.C. 143, 144, 417 S.E.2d 543, 544 (1992). "If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." Hope v. State, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997).

One commentator on South Carolina courts has written that in recent years our courts have "tended to parse the elements of offenses quite closely, often finding two offenses contain separate elements and therefore that one offense is not contained within the other." William Shepard McAninch & W. Gaston Fairey, The Criminal Law of South Carolina 51 (4th ed. 2002). An example is Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997). In Hope, the court determined entering without breaking is not a lesser included offense of first degree burglary. The supreme court explained that first degree burglary is defined in part as entering a dwelling without consent, whereas the alleged lesser included offense involves entering without breaking. Id. at 81-82, 492 S.E.2d at 78-79.

In Stevenson v. State, 335 S.C. 193, 516 S.E.2d 434 (1999), the court determined resisting arrest is not a lesser included offense of assault and battery of a high and aggravated nature: "ABHAN requires proof of circumstances of aggravation which is not required for resisting arrest. Resisting arrest requires proof that the person assaulted is a law enforcement officer which is not an element of ABHAN." Id. at 200, 516 S.E.2d at 438. The Stevenson court addressed lesser included offenses to ascertain whether the double jeopardy clause was violated by convicting the defendant on charges of ABHAN and resisting arrest. Id. at 198-200, 516 S.E.2d at 436-439. The court did this by relying on the "same elements" test created in Blockburger v. United States, 284 U.S. 299, 304 (1932). In this way, the elements test used to determine lesser included offenses apparently is an artifact of double jeopardy jurisprudence.

S.C. Code Ann. § 16-3-85 (2003) provides:

(A) A person is guilty of homicide by child abuse if the person:

> (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life.

Involuntary manslaughter is defined as: "(1) the unintentional killing of another without malice, but while engaged in an unlawful activity **not**

naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Reese, 359 S.C. 260, 597 S.E.2d 169 (Ct. App. 2004) (emphasis added) (citing State v. Tyler, 348 S.C. 526, 529, 560 S.E.2d 888, 889 (2002); State v. Chatman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999)).

Homicide by child abuse requires child abuse or neglect; therefore, Mitchell is compelled to argue that he would fit within the first prong of involuntary manslaughter, involving an unlawful activity, rather than the second, involving a lawful activity. Obligatorily, Mitchell is forced to show that engaging in an unlawful activity not naturally tending to cause death or great bodily harm is a lesser element of homicide by child abuse. Here, Mitchell fails.

The crime of homicide by child abuse only applies in cases where the decedent is under the age of eleven whereas the application of involuntary manslaughter is not affected by the age of the decedent. Moreover, homicide by child abuse involves child abuse or neglect; in contrariety, involuntary manslaughter exists based on a larger number of factual predicates. Indeed, Mitchell concedes in his brief that "**obviously involuntary manslaughter could not be a lesser-included offense under the elements test[.]**" (Emphasis added). Apodictically, homicide by child abuse does not include all the elements of involuntary manslaughter. The elements test is not met. See also State v. Elliot, 346 S.C. 603, 611, 552 S.E.2d 727, 731 (2001) (Pleicones, J., dissenting) (observing that the legislature has created several statutory forms of homicide, including homicide by child abuse, which "are not lesser included offenses of **common law** murder charge because they cannot meet the 'elements test' applied when the greater-lesser question involves a common law/statutory combination.") (emphasis in original).

Our arbitrament that involuntary manslaughter is not a lesser included offense of homicide by child abuse is not exclusively an application of the strict elements test. The decision to create the crime of homicide by child abuse displays the legislature's intent to define and target a specific societal problem. See generally People v. Payne, 282 N.W.2d 456 (Mich. App. 1979) (refusing to find "assault with intent to do great bodily harm less than

murder" a lesser included offense of criminal sexual conduct because sexual assault is a particularly heinous form of assault and the prohibition of these crimes serves different societal interests). Legislatively, the entirely new crime of homicide by child abuse was created instead of opting to enhance the punishment for involuntary manslaughter. In fact, a purpose given for enactment of the statute was the "creat[ion of] the felony criminal offense" of homicide by child abuse. 1992 S.C. Acts 412.

B. Historical Antecedent Test/Elliot

The utilitarian efficacy of the elements test has been limited by our supreme court. In State v. Elliott, 346 S.C. 603, 552 S.E.2d 727 (2001), the court deviated from the strict elements test and determined that assault and battery of a high and aggravated nature (ABHAN) is a lesser included offense of assault with intent to commit criminal sexual conduct (ACSC). In this academic and erudite endeavor titled "an anomaly in the law," our supreme court retrocedes from the elements test:

> To the extent that the elements of ABHAN and ACSC do not meet the elements test, we recognize this situation presents an anomaly in the law, akin to manslaughter and murder. The common law does not always fit into the neat categories we might prefer. Nevertheless, we find compelling reasons not to abandon our longstanding inclusion of ABHAN as a lesser included offense of attempted sexual battery crimes.
>
> . . . . **We recognize this holding deviates from the strict elements test, yet decline to overrule our many cases leading to this result. Despite the existence of a few anomalies, we reiterate our commitment to the elements test. We will continue to consider offenses on a case-by-case basis, beginning with the elements test**.

Elliot, 346 S.C. at 607-08, 552 S.E.2d at 729-30 (emphasis added). The court rooted its decision in the historical fact that ABHAN was a lesser included charge of the precedent crime of assault with intent to ravish. Id. at 606-07, 552 S.E.2d at 729.

Subsequently, in State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002), our supreme court declined an invitation to deviate from the elements test on the question of whether reckless homicide was a lesser included offense of murder. Although the court had previously stated—in dictum—that reckless homicide was a lesser included offense of murder, the Watson court held: "Despite the . . . dictum in State v. Reid, [324 S.C. 74, 476 S.E.2d 695 (1996)], this Court has never held that reckless homicide is a lesser included offense of murder. We decline to do so. We instead adhere to the result dictated by the elements test for lesser included offenses . . . ." Id. at 377, 563 S.E.2d at 338.

In the case sub judice, there is no historical antecedent that suggests involuntary manslaughter is a lesser included offense of homicide by child abuse. Homicide by child abuse is a crime of relatively recent legislatorial vintage, the statute having been promulgated in 1992. See 1992 S.C. Acts 412. In departing from the elements test, the Elliot court recounted that it had "consistently incorporated ABHAN into the CSC framework as a lesser included offense of ACSC" and cited a number of cases in which it had done so. Elliot at 607, 552 S.E.2d at 729. Contrastively, our courts have never held or suggested that involuntary manslaughter is a lesser included offense of homicide by child abuse.

Furthermore, Elliot involved the lesser crime of ABHAN as it relates to ACSC. The predecessor crime to ACSC was assault with intent to ravish. The Elliot court cited State v. Stewart, 283 S.C. 104, 109, 320 S.E.2d 447, 450-51 (1984), which explicates: "The statutes dealing with rape and assault with intent to ravish were repealed by Act. No. 157 of the 1977 Acts and Joint Resolutions of the General Assembly. In the same act, the crime of criminal sexual conduct was established." Elliot, 346 S.C. at 607, 552 S.E.2d at 729. Here, there is no predecessor crime to homicide by child abuse. No statutes were repealed in its promulgation; it takes its place amid the laws and jurisprudence of this State on a tabula rasa. Because there is no predecessor crime which homicide by child abuse supersedes, there is no longstanding tradition from which to justify a departure from the elements test.

Finally, State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002) states that "in the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death." Therefore, the homicide by child abuse statute requires a type of activity similar to a deliberate act leading to death whereas involuntary manslaughter treats situations where an unlawful act leads to death when death would not normally have been expected.

The quiddity of Mitchell's argument focuses on the fact that the standard for homicide by child abuse is "extreme indifference to human life" whereas the standard for involuntary manslaughter is "reckless disregard for the safety of others." Mitchell contends the involuntary manslaughter standard has traditionally been treated as a lesser included offense and an alternative where the jury does not find "malice" or "extreme indifference to human life." However, this argument withers when exposed to the light of Jarrell's definition of extreme indifference. Mitchell fails the Elliot historical antecedent test.

C. Other Jurisdictions

This case involves a novel issue of law. Concomitantly, we look to other jurisdictions for edification, enlightenment, and guidance. California's involuntary manslaughter statute parallels South Carolina's division between lawful and unlawful activity except that our unlawful activity element requires the activity not naturally tend to cause death or great bodily harm. Additionally, California's unlawful activity element requires the activity not be a felony. See Cal. Penal Code § 192(b) (West) (defining involuntary manslaughter as "the unlawful killing of a human being without malice . . . in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection . . .").

Cal. Penal Code § 273ab reads:

> Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great

> bodily injury, resulting in the child's death, shall be punished by imprisonment in state prison for 25 years to life . . . .

In Orlina v. Superior Court, 86 Cal. Rptr. 2d 384, 386 (Cal. Ct. App. 1999), the court concluded involuntary manslaughter is not a lesser included, but a lesser related, offense of that state's crime of "assault on a child under eight years of age resulting in death." The Orlina court held: "[T]he elements of involuntary manslaughter are not necessarily encompassed within the elements of section 273ab. Involuntary manslaughter is a lesser related rather than a lesser included offense of the charged crime." Orlina at 386. While this decision's persuasive authority is limited by some dissimilarity in South Carolina's and California's definitions of the related crimes, we find the decision supports our determination.

Similarly, New York law buttresses our conclusion. The pertinent New York statute provides:

> A person is guilty of murder in the second degree when:
>
> . . . .
>
> 4. Under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person . . . .

N.Y. Penal § 125.25 (McKinney). New York defines manslaughter in the second degree as "recklessly caus[ing] the death of another person." N.Y. Penal § 125.15 (McKinney). In People v. Robinson, the New York Appellate Division held:

> [M]anslaughter in the second degree is not a lesser included offense of murder in the second degree under Penal Law § 125.25(4). Creating a grave risk of serious physical injury is an element of Penal Law § 125.25(4) but is not an element of manslaughter in the second degree, and thus it is possible to

> commit the greater crime without also committing the lesser (see, People v. Glover, 57 N.Y.2d 61, 64, 453 N.Y.S.2d 660, 439 N.E.2d 376).

Robinson, 723 N.Y.S.2d 277, 277-78 (N.Y. App. Div. 2000).

We find the trial judge correctly concluded, as a matter of law, that Mitchell was not entitled to an instruction on involuntary manslaughter as a lesser included offense of homicide by child abuse. Mitchell fails both the elements test and the Elliot historical antecedent test. Consequently, the circuit court did not commit error.

II. Involuntary Manslaughter Is Unsupported Factually

The circuit court found the evidence did not support a charge of involuntary manslaughter. A charge on a lesser included offense is only required when the evidence warrants such an instruction. State v. Coleman, 342 S.C. 172, 175, 536 S.E.2d 387, 389 (Ct. App. 2000) (citing Hopper v. Evans, 456 U.S. 605, 611 (1982)). The circuit court does not err in refusing to charge a lesser included offense "unless there is testimony tending to show that the defendant is only guilty of [the lesser included offense]." State v. Hollman, 245 S.C. 362, 364, 140 S.E.2d 597, 598 (1965). "[A]n instruction on a lesser included offense is proper only when the charged greater offense requires that the jury find a disputed factual element which is not a requisite for conviction of the lesser included offense." State v. Cude, 265 S.C. 313, 316, 218 S.E.2d 240, 242 (1975) (citation omitted).

In this case, Mitchell essentially argued he had no contact with Passion, except for a prior spanking, and he simply found her unconscious on the floor. These facts do not support an application of the charge of involuntary manslaughter.

CONCLUSION

We hold that involuntary manslaughter is **NOT** a lesser included offense of homicide by child abuse based on the elements test. We rule that involuntary manslaughter is not a lesser included offense of homicide by

child abuse under the Elliot antecedent test. Additionally, we conclude that this factual record does not support involuntary manslaughter as a lesser included offense of homicide by child abuse.

AFFIRMED.

STILWELL and SHORT, JJ., concur.