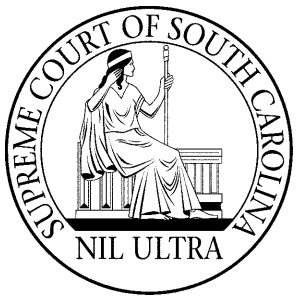

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

June 30, 2003

ADVANCE SHEET NO. 25

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Terry Ted Lindsey, Appellant.

Appeal From Spartanburg County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 25669
Heard April 22, 2003 - Filed June 30, 2003

AFFIRMED IN PART; REVERSED IN PART

Senior Assistant Appellate Defender Wanda H. Haile, of Columbia, for Appellant.

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

JUSTICE WALLER: Terry Ted Lindsey was convicted of first degree criminal sexual conduct (CSC) and sentenced to life imprisonment without parole pursuant to the Two-Strikes Law, S.C. Code Ann. § 17-25-

45(C)(1) (Supp. 2002). We affirm his conviction, but reverse and remand for resentencing.

FACTS

Lindsey was indicted for committing first-degree criminal sexual conduct on his seventeen year old step-daughter. According to the Victim, Lindsey was driving her to her cousin's house when he took a detour, locked the car doors, then forced himself on her, raping her. The trial judge submitted the charges of first and third degree CSC to the jury. The jury convicted Lindsey of first-degree CSC. Based upon his 1976 guilty plea to rape, Lindsey was sentenced to life imprisonment without parole (LWOP) under the Two-Strikes law.

ISSUES

1. Did the trial court err in sentencing Lindsey to life without parole pursuant to S.C. Code Ann. § 17-25-45(A)(1), where the triggering offense of rape is not enumerated as a "most serious offense" in S.C. Code Ann § 17-25-45(C)(1)?

2. Was there any evidence of "aggravated force," such that the trial judge properly denied Lindsey's motion for a directed verdict on the charge of first degree CSC?

1. MOST SERIOUS OFFENSE

Lindsey contends his 1976 rape conviction is not enumerated as a "most serious" offense under S.C. Code Ann. § 17-25-45 (C)(1), such that he was improperly sentenced to LWOP. We agree.

Under § 17-25-45(A), a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more prior convictions for a "most serious" offense. Subsection (C) defines "most serious" offenses and includes first and second degree CSC, criminal sexual conduct with minors, and assault with intent to commit

criminal sexual conduct, first and second degree. However, "rape" is not listed as a "most serious" offense. The question we must resolve is whether Lindsey's 1976 rape conviction necessarily fell into the category of a first or second degree CSC, so as to be considered a "most serious" offense.

In State v. Washington, 338 S.C. 392, 526 S.E.2d 709 (2000), we were faced with the issue of whether the defendant's prior convictions for common law burglary and housebreaking could be used to enhance his sentence to life without parole, where the prior offenses were not listed in section 17-25-45 as "most serious" or "serious" offenses. There, we found Washington's 1982 common law burglary offense contained all the elements of first-degree burglary, as enunciated in S.C. Code Ann. § 16-11-311(a)(3), such that it was a "most serious offense," for which Washington could be sentenced as a recidivist. Here, then, the question is whether Lindsey's 1976 rape conviction **necessarily** contains all the elements of the "most serious" CSC offenses specified in § 17-25-45(C)(CSC first-degree, CSC second-degree, or criminal sexual conduct with a minor[1]). We find that it does not.

In State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971), this Court held that "ravish or rape, the words being synonymous, is defined as the carnal knowledge of a woman by **force** and **against her consent**. . . . In order to constitute the crime of rape these must be some degree of penetration of the female genital organ by the male genital organ, but any penetration, however slight, is all that is necessary." (internal citation omitted). Notably, rape was not defined in Tuckness as including an element of aggravated force.

Under S.C. Code Ann. § 16-3-652(1)(1985), first degree CSC requires (1) a sexual battery and (2) **aggravated force** or forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or "any other similar offense or act." State v. McFadden, 342 S.C. 629, 539 S.E.2d 387

[1] It is patent that rape does not encompass all the elements of CSC with a minor, as there is no requirement the sexual battery occur with a minor. Accord State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987) (second degree criminal sexual conduct with a minor is not a lesser-included offense of second degree criminal sexual conduct because it contains the additional requirement the victim be a minor).

(2000). Second degree CSC requires the use of **aggravated coercion** to accomplish sexual battery. S.C. Code Ann. § 16-3-653 (1985). Third degree CSC (which is not listed as a "most serious offense" in § 17-25-45(C)) occurs where the actor engages in sexual battery with the victim and one or more of the following circumstances are proven: a) the actor uses **force** or coercion to accomplish the sexual battery **in the absence of aggravating** circumstances or b) the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.

Here, there is no evidence in the record concerning Lindsey's 1976 rape conviction. The only indication concerning that conviction is a form indictment, which gives no details of the facts or circumstances concerning the rape. Accordingly, the 1976 rape may have fallen into the category of third degree CSC, involving a sexual battery using force or coercion, but without aggravating circumstances. Since third degree CSC is not a "most serious offense" for which a life sentence may be imposed pursuant to § 17-25-45, we find Lindsey's 1976 rape conviction, absent evidence it involved aggravated force or coercion, insufficient to warrant application of the recidivist statute. Accordingly, the LWOP sentence is reversed and the matter remanded for resentencing.

2. DIRECTED VERDICT/AGGRAVATED FORCE

At the close of the state's evidence, Lindsey moved for a directed verdict on the charge of first degree CSC, contending there was no evidence of "aggravated force" sufficient to submit the charge to the jury. The trial judge denied the motion. We affirm.

On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). In ruling on a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight. Id. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Burdette, 335 S.C. 34, 46, 515

S.E.2d 525, 531 (1999). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000).

As noted in Issue 1, above, pursuant to S.C. Code Ann. § 16-3-652(1)(a), a person is guilty of criminal sexual conduct in the first degree "if the actor engages in sexual battery with the victim and . . . the actor uses aggravated force to accomplish sexual battery."[2] Unlike first degree CSC, third degree CSC requires only that the actor engage in a sexual battery with the victim and "the actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances." Under S.C. Code Ann. § 16-3-651(c), "aggravated force means that the actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon."[3]

In State v. Green, 327 S.C. 581, 491 S.E.2d 263 (Ct. App. 1997), the Court of Appeals addressed the degree of force requisite to a conviction for first degree CSC. The Court of Appeals rejected the state's contention that the aggravated force requirement for first-degree CSC is satisfied if **any** of the ABHAN's "circumstances of aggravation" are present.[4] It held that "under section 16-3-652(1)(a), a sexual battery constitutes first-degree CSC only if it was accomplished through the use of force **and** the force constitutes

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[2] Under § 16-3-652(1)(b), it is also CSC first degree if the victim of the sexual battery is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act. Under the circumstances of this case, the state could have relied upon this section to establish first degree CSC, in light of the victim's testimony that she was forcibly confined in the vehicle. However, the state did not rely on this section in the indictment, and the language of subsection (b) was not charged to the jury.

[3] Aggravated coercion is defined in subsection (b) as "the actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person."

[4] These circumstances are the infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in sexes, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. In State v. Primus, 349 S.C. 576, 564 S.E.2d 103, n. 4 (2002), this Court recognized that ABHAN may occur even without any real use of force toward the victim.

aggravated force." 327 S.C. at 586, 491 S.E.2d at 265 (emphasis in original). The Green court found no evidence Green used **any** force on the victim, such that he should have been granted a directed verdict on the charge of first degree CSC.

Unlike Green, here there is evidence that after confining his victim in the automobile, Lindsey grabbed her hands, got on top of her and was holding her down with his body and hands. The victim testified that he would not get off of her, and that she was kicking, pushing, fighting and hitting to get him off of her. We find this evidence sufficient to create a jury issue as to whether Lindsey used aggravated force in attacking the victim. Accord State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990)(upholding attempted first degree CSC conviction on evidence defendant grabbed victim, forced her into the woods and ripped her clothes off in an effort to commit a sexual battery); State v. Fulp, 310 S.C. 278, 423 S.E.2d 149 (Ct.App.1992) (evidence supported a verdict of second degree assault with intent to commit criminal sexual conduct, even though the defendant did not verbally threaten the victim, where, after pulling her from the balcony railing over which she was trying to escape, the defendant grabbed her breasts with both hands and began fumbling with the clothing that covered her stomach; thus, the defendant's actions supported an inference that he threatened to use high and aggravated force on the victim to commit a sexual battery). Accordingly, we find the charge of first degree CSC was properly submitted to the jury.

CONCLUSION

We affirm the denial of Lindsey's motion for a directed verdict as the evidence presented by the state was sufficient to submit the charge of first degree CSC to the jury. However, we find Lindsey's 1976 rape conviction was improperly used to enhance his sentence for the current crime to LWOP. Accordingly, the matter is remanded for resentencing.

AFFIRMED in part, REVERSED in part, and REMANDED.

MOORE, BURNETT and PLEICONES, JJ., concur. TOAL, C.J., concurring in part in a separate opinion in which MOORE, WALLER and BURNETT, JJ., concur.

Chief Justice Toal, concurring in part: I agree with the majority's analysis on the directed verdict issue, and concur with the result reached by the majority on the LWOP issue. However, I write separately to illuminate the inconsistency of this result in hopes that the General Assembly might remedy it.

As noted by the majority, the record in this case does not include any details of Lindsey's 1976 rape conviction to instruct us in classifying the rape as either first or second degree CSC (enumerated in § 17-25-45 as most serious offenses). In *State v. Washington,* 338 S.C. 392, 526 S.E.2d 709 (2000), this Court held that a prior conviction for common law burglary constituted a "most serious offense" because "it contained the same legal elements as burglary, first degree that section 17-25-45(C)(1) declares a 'most serious offense.'" As discussed by the majority, neither first nor second degree CSC contain exactly the ***same legal elements*** as rape.[1] *Washington,* 338 S.C. at 397, 526 S.E.2d at 711 (emphasis added). Under *Washington*, rape then cannot qualify as a most serious offense for purposes of § 17-25-45.

The irony of this result is that rape was arguably a *more* severe offense than either first or second degree CSC, both of which make a defendant eligible for an LWOP sentence. Rape required actual penetration of the female genital organ by the male genital organ without consent and with force;[2] first and second degree CSC requires only *sexual battery* (which is defined as intercourse or "any intrusion, however slight of any part of a person's body or of any object into the genital or anal openings of another person's body,") and some degree of force as defined by statute.[3] First and Second degree CSC encompass more conduct than rape, and include penetration by any object. In addition, second degree CSC only requires

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[1] Lindsey was convicted of rape in 1976, and the General Assembly amended the Code to provide for different levels of criminal sexual conduct in 1977. Prior to 1977, S.C. Code Ann. § 16-71 (1962) codified common law rape.

[2] S.C. Code Ann. § 16-71 (1962); *State v. Tuckness*, 257 S.C. 295, 185 S.E.2d 607 (1971).

[3] S.C. Code Ann. § 16-3-652 and –653 (Rev. 2003).

aggravated coercion – defined as a threat to use force – while rape required that actual force be used. S.C. Code Ann. § 16-71; *Tuckness*. Because rape was arguably a more serious crime than either first or second degree CSC, and certainly more serious than third degree CSC, it is only logical that those with prior rape convictions should be eligible for LWOP sentences under § 17-25-45. However, where the terms of the statute are clear, the court must apply those terms according to their literal meaning. *City of Columbia v. American Civil Liberties Union of S.C., Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996).

Section 17-25-45 does not name rape as a most serious offense, and rape does not contain the same elements as any of the enumerated offenses. Therefore, I agree that Lindsey's LWOP sentence must be reversed under *Washington*, but write in hopes that the General Assembly will correct the discrepancy this creates in the Two Strikes Law.

MOORE, WALLER and BURNETT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: Charlie Condon, Attorney General for the State of South Carolina, Appellant,

In Re: C. Bruce Littlejohn, on behalf of himself and all others similarly situated, Respondent,

v.

State of South Carolina, the South Carolina Department of Revenue, Wal-Mart Stores, Inc., CVS Pharmacy, Inc., KMART Corporation, Eckerd Corporation, d/b/a Eckerd Drugs and all others similarly situated, S. C. Hyatt Corporation, and all others similarly situated, Piggly Wiggly Retail Stores, Inc., Piggly Wiggly #2, Inc., Piggly Wiggly #75, Inc., Harris Teeter, Inc., Winn-Dixie Raleigh, Inc., and all others similarly situated, Respondents.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 25670
Heard April 2, 2003 - Filed June 30, 2003

DISMISSED

Deputy Attorney General Treva G. Ashworth, Assistant Deputy Attorney General Robert D. Cook, Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia; for Appellant

A. Camden Lewis and Ariail E. King, both of Lewis, Babcock & Hawkins, of Columbia; and Richard A. Harpootlian, of Columbia, for Respondent C. Bruce Littlejohn. Ronald W. Urban, of South Carolina Department of Revenue, of Columbia, for Respondents State of South Carolina and South Carolina Department of Revenue. Burnet R. Maybank, III, of Nexsen, Pruet, Jacobs & Pollard, of Columbia; and Paul A. Dominick, of Nexsen, Pruet, Jacobs, Pollard & Robinson, of Charleston, for Respondent Wal-Mart Stores, Inc. Bernie W. Ellis, of McNair Law Firm, of Greenville, for Respondent CVS Pharmacy, Inc. Erik P. Doerring, of McNair Law Firm, of Columbia, for Respondents KMART Corporation and S. C. Hyatt Corporation. B. Rush Smith, III, of Nelson, Mullins, Riley & Scarborough, of Columbia; and John C. von Lehe, Jr., of Nelson, Mullins, Riley & Scarborough, of Charleston, for Respondents Eckerd Corporation d/b/a Eckerd Drugs and Winn-Dixie, Raleigh, Inc. Marvin D. Infinger, of Haynsworth Sinkler Boyd, of Charleston, for Respondents Piggly Wiggly Retail Stores and Piggly Wiggly #2, Inc. Charles H. Williams, of Williams & Williams, of Orangeburg, for Respondent Piggly Wiggly #75, Inc. William H. Morrison, of Moore & Van Allen, of Charleston, for Respondent Harris Teeter, Inc.

Gene M. Connell, Jr., of Kelaher, Connell & Connor, P.C., of Surfside Beach, for Amicus Curiae.

CHIEF JUSTICE TOAL: Appellant, Attorney General Condon ("Attorney General"), filed an objection to the circuit court's award of attorneys' fees to counsel for Respondents ("Respondents").

FACTUAL / PROCEDURAL BACKGROUND

Respondents filed a class action suit on behalf of C. Bruce Littlejohn, and those similarly situated against the State of South Carolina and the Department of Revenue ("DOR") on July 10, 2000. The complaint alleged that plaintiff Littlejohn and other South Carolina citizens 85 years of age and older had failed to receive the one percent sales tax exemption provided for in S.C. Code Ann. §§ 12-36-2620 and 12-36-2630 as a result of the action and/or inaction of certain retailers and the State and DOR.[1] The Complaint alleged that the State had been unjustly enriched by the illegal tax collections, and requested a refund of taxes paid by the plaintiffs.

Subsequently, the State and DOR filed a motion to dismiss the complaint on grounds that the circuit court lacked subject matter jurisdiction. While the motion to dismiss was pending, plaintiffs amended their complaint to add several retail establishments as defendants.[2] The circuit court held a

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[1] Section 12-36-2620 provides for a five percent sales and use tax, comprised of two components - a four percent tax and a one percent tax. Section 12-36-2630 provides for a seven percent tax on accommodations for transients, comprised of three components – a four percent tax, a one percent tax, and a two percent tax. Both sections exempt persons 85 years of age and older from paying the one percent tax when purchasing tangible personal property for his or her own personal use. The record reflects that Chief Justice Littlejohn realized he consistently paid this one percent tax and approached Respondents to recover the taxes paid.

[2] Plaintiffs filed two amended complaints. The first amended complaint added Wal-Mart Stores, Inc. and Hyatt-Regency Hilton Head, Inc., on behalf of retailers and hotels/motels similarly situated. The Second Amended

hearing to consider the State's motion to dismiss, and took the motion under advisement. While the motion was under advisement, the parties continued discovery, and ultimately commenced settlement negotiations. In September 2001, the parties reached a settlement.

Settlement Agreement

The settlement agreement specified that the State and DOR would refund a total of $7.5 million to the defendant retailers and hotels to be held in trust and refunded to those members of the plaintiffs' class that made a claim. The agreement contained a mathematical formula for calculating the refund due to each class member. The settlement agreement left the power to calculate and award attorneys' fees with the circuit court under the following guidelines:

> The Court shall determine the appropriate amount of attorneys' fees for Plaintiff class counsel. The Plaintiffs recognize that none of the Defendants shall recommend or otherwise take a position on the amount of attorneys' fees and that the amount of such attorneys' fees shall be decided by the Court; provided, however, Defendant State of South Carolina may file with the Court a statement that members of the Budget and Control Board recommend to the Court that the Plaintiff's class counsel attorneys' fees be set at an amount that maximizes payment to class members and recommend that attorneys' fees be based on actual refunds paid to the Plaintiff class. Nothing in this agreement prohibits public officials, as individuals or as public officials, from discussing the amount of attorneys' fees awarded

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complaint added CVS Pharmacy, Inc., KMART Corporation, Eckerd Corporation, Piggly Wiggly Retail Stores, Inc., Piggly Wiggly #32, Inc., Piggly Wiggly #75, Inc., Harris Teeter, Inc., and Winn-Dixie, Raleigh, Inc.

by the Court or taking a position before the Court about such fees.[3]

On September 21, 2001, the circuit court gave preliminary approval to the settlement, set a thirty day time period for objections, and scheduled a hearing for December 27, 2001, in order to review any objections, give final approval of the settlement, and determine attorneys' fees. The Attorney General, appearing for the first time in this action, filed objections to the award of attorneys' fees in the settlement agreement. None of the parties objected to the settlement or to the award of attorneys' fees. At the December hearing, the Attorney General argued that attorneys' fees should be based on a reasonable hourly rate.

Award of Attorneys' Fees

The circuit court gave final approval to the settlement agreement in January 2002, and issued an order awarding attorneys' fees in the amount of 28% of the $7.5 million common fund ($2.1 million), plus $52,174.22 in costs. The circuit court's order awarding fees includes a discussion of the procedural history of the case and of Respondents' efforts in initiating and settling the case. In addition, the circuit court used the factors for establishing a reasonable fee enumerated in Rule 1.5, Rules of Professional Conduct, Rule 407, SCACR, to determine the appropriate fee. The court's order included application of the following factors: (1) the novelty and difficulty of the issues, (2) the skills of counsel, (3) the time and labor of counsel, (4) the likelihood that acceptance of this case would preclude other employment by counsel, (5) the fees customarily charged in similar cases, (6) the amount involved and the award obtained, (7) the time and limitations imposed by the client, (8) the nature and length of the professional relationship between the client and counsel, (9) the experience, reputation, and ability of counsel, and (10) whether the fee contemplated was fixed or contingent. *See Jackson v. Speed,* 326 S.C. 289, 486 S.E.2d 750 (1997) (listing the factors the court should consider in determining a reasonable

[3] The term "the Court" is used to refer to the circuit court throughout the settlement agreement.

attorney's fee).[4] After applying the factors to the present case, the circuit court found that an award of 28% of the common fund, plus costs, was a fair and reasonable attorneys' fee.

The Attorney General filed a notice of appeal from the order awarding attorneys' fees and costs. This Court certified the case for review before the appeal pursuant to Rule 204(b), SCACR. Respondents filed a motion to dismiss the appeal on grounds that the Attorney General lacked standing to appeal. This Court denied the motion to dismiss, but did so "without prejudice to [Respondents'] right to argue this issue in its brief." The following issues are presently before the Court:

I. Is the Attorney General's appeal from the circuit court's award of attorneys' fees properly before this Court?

II. If so, was the circuit court's award of attorneys' fees reasonable?

LAW /ANALYSIS

I. Attorney General's Ability to Appeal

Respondents argue that the Attorney General's appeal from the circuit court's award of their attorneys' fees should be dismissed. For several reasons, we agree.

In support of their contention, Respondents cite *Bailey v. North Carolina,* 540 S.E.2d 313 (N.C. 2000). In *Bailey*, plaintiffs (a consolidated class of state and federal retirees) sued North Carolina over the constitutionality of a tax exemption cap on retirement benefits. *Id.* After extensive litigation, in which the State was represented by the Attorney

[4] The factors considered in the circuit court's order include all of the factors this Court listed in *Jackson*, although they are arranged in a different order and some are stated in slightly different terms.

General, the State reached a settlement with the plaintiffs, and the circuit court awarded attorneys' fees to plaintiffs' counsel. *Id.* Subsequently, the Attorney General appealed from the award of fees, alleging that the fees awarded were excessive and against the public interest.[5] *Id.* Ultimately, the North Carolina Supreme Court dismissed his appeal as improper and also held that the Attorney General was precluded from seeking review of attorneys' fees by way of a petition for a writ of certiorari. *Id.*

Although the North Carolina Supreme Court discussed whether the Attorney General had standing at all to assert this appeal, the court chose to base its decision on the Attorney General's failure to intervene as required by Rule 24 of the North Carolina Rules of Civil Procedure ("NCRCP"). Rule 24, NCRCP, provides the procedure for intervention of right and permissive intervention. To intervene under either subsection of Rule 24, NCRCP, the person wishing to intervene "shall serve a motion to intervene upon all parties affected thereby." The Attorney General did not move to intervene. As such, the court reasoned,

> [a]s a review of the record reveals neither an intervention motion on the part of the Attorney General nor an order granting such a motion from the trial judge, we are constrained by law to conclude that the Attorney General, at least in regard to his asserted role as "defender of the public interest," is not a party to this action.

Id. at 155-56. The court then dismissed the appeal as improper because only "parties" are entitled by law to appeal under Rule 3 of the North Carolina Rules of Appellate Procedure. *Id.* "A careful reading of Rule 3 reveals that its various subsections afford no avenue of appeal to either entities or persons

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[5] The North Carolina Supreme Court framed the Attorney General's argument as follows: "In short, the Attorney General argues that the amount awarded as fees to Class Counsel is excessive and concludes that since none of the prevailing class members have appealed the allocation of such fees, his office must carry the mantle – in the public interest." *Bailey,* 540 S.E.2d at 318.

who are nonparties to a civil action. Therefore, as we have already determined the Attorney General is not a party to the case *sub judice*, we can find no grounds on which to allow his appeal." *Id.* at 156.

Likewise, Rule 24 of the South Carolina Rules of Civil Procedure, ("SCRCP"), provides for both intervention of right and permissive intervention, and requires that a "a person desiring to intervene shall serve a motion to intervene upon the parties." In addition, Rule 201(b), SCACR, provides that only "a *party* aggrieved by an order, judgment, or sentence may appeal." (emphasis added). In the case at hand, it is undisputed that the Attorney General was not a party to the action originally, and never intervened to become a party.

In his reply brief, the Attorney General avoids discussing the impact of his failure to move for intervention pursuant to Rule 24, SCRCP. In fact, the Attorney General appears to admit that he is a nonparty, but argues that his duty to protect the public interest enables him to bring this appeal, even as a nonparty. Like the North Carolina Attorney General in the *Bailey* case, our Attorney General claims statutory and common law authority give him the ability to appeal in this case, apparently regardless of the Rules of Civil Procedure.[6] In support of his right to appeal, the Attorney General cites South Carolina Code Ann. § 1-7-40, which provides that the Attorney General

[6] The Attorney General attempts to distinguish *Bailey* from the present case by arguing that (1) the North Carolina Attorney General's authority to act in the public interest is not as broad as the South Carolina Attorney General's authority, and (2) North Carolina agreed not to involve itself in the determination of attorneys' fees in its settlement agreement with the plaintiffs, and South Carolina did not in this case. The Attorney General focuses on language within the settlement agreement that permits public officials to take a position on the fees. As pointed out earlier, however, this statement refers to taking a position on fees before the circuit court, which the Attorney General was permitted to do in this case. *Supra,* fn. 3.

> shall appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or is interested, and in these causes in any other court or tribunal when required by the Governor or either branch of the General Assembly.

S.C. Code Ann. § 1-7-40 (Supp. 2002). Because the State and the DOR are parties to this action, the Attorney General reasons that he can automatically "appear" for the State. In addition to the Code, the Attorney General cites several South Carolina cases in which the Attorney General's authority, as the State's chief law officer, to represent the State and to protect the public's interests has been recognized by this Court. *See State ex rel. Condon v. Hodges; State ex rel. Daniel v. Broad River Power Co.,* 157 S.C. 1, 153 S.E. 537 (1929); *State ex rel. Wolfe v. Sanders,* 118 S.C. 498, 110 S.E. 808 (1920).[7]

This Court has recognized that the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions involving the welfare of the State and its citizens, including vindication of wrongs committed collectively against the citizens of the State. *See Condon v. Hodges,* 349 S.C. 232, 526 S.E.2d 623 (2002); *State v. Beach,* 271 S.C. 425, 248 S.E.2d 115 (1978). However, this Court has never held that the Attorney General's authority to do so is

[7] It is interesting to note that the Attorney General instituted each of the above actions, and was a named party in each one. The Attorney General also cites two cases from other jurisdictions for the proposition that the Attorney General may take an appeal even though he is not a named party to a suit. *In re Estate of Tomlinson,* 359 N.E.2d 109 (Ill. 1979); *Shevin v. Kerwin,* 279 So.2d 836 (Fl. 1973) (allowing Attorney General to appeal from lower court decision holding state statute unconstitutional although he was not a party before the lower court). Although Illinois does seem to allow nonparties to appeal if they have an interest in the action that is "direct, immediate and substantial," this rule applies to all parties, not just the Attorney General. South Carolina has no comparable tradition of allowing nonparties to appeal.

unlimited or somehow uniquely exempts him from acting in accordance with the Rules of Civil Procedure. *See Beach.* The Attorney General cites *Watson v. Wall,* in which the Attorney General intervened in a will dispute in order to protect the public's interest in the charitable trust at issue, in support of his authority to assert the appeal in the present case. 299 S.C. 500, 93 S.E.2d 918 (1956). In *Watson,* however, the Attorney General moved to intervene, and, consequently, was named a party to the action. *Id.* Further, in *Watson,* the Attorney General had specific statutory support for his intervention under his duty "'to enforce the application of funds given or appropriated to public charities.'" *Id.* at 515, 93 S.E.2d at 925 (quoting S.C. Code §§ 1-240 (1952)).

In our opinion, *Watson* actually supports the Respondents' contention that the Attorney General is *required*, like everyone else, to formally intervene and become a named party before he can file an appeal. Accordingly, we dismiss this appeal based on the Attorney General's failure to move for intervention as required by Rule 24, SCRCP. Such a ruling avoids the necessity of addressing the Attorney General's *standing* to become involved in this action, and makes clear that the Attorney General is required to follow the Rules of Civil Procedure when he wishes to become involved in a case.

In addition, we note that this holding serves the public interest in the finality of settlement agreements, particularly in settlements with the State. The settlement agreement in this case contains a "no appeal" provision. The agreement provides,

> [i]t is expressly acknowledged and agreed that the parties and their counsel will not institute, participate in, or encourage, any appeal from an order implementing this Agreement, provided, however, any party has the right to appeal an order which is substantially different from the terms of this Agreement, or which alters the consideration to be given by or to any party.

The stated purpose of the settlement agreement is "to settle this conflict by the terms set forth herein such that the Agreement forever ends all litigation."

The agreement mandates that "[a]ny interpretation of language in this Agreement must be made so as to effectuate the [stated] purpose."

The Attorney General uses the statement within the Attorneys' Fees section of the settlement agreement to support his right to appeal. As discussed, the settlement agreement does not prevent public officials "from discussing the amount of attorneys' fees awarded by the Court or taking a position before the Court about such fees." However, it is clear from the settlement agreement's repeated reference to "the Court" that it is referring to the circuit court. As such, this provision must be construed to give the Attorney General, as a public official, the right to take a position on fees before the circuit court only, which the Attorney General did at the December 27, 2001, circuit court hearing. This is the interpretation most consistent with the no appeal provision in the agreement, and with the agreement's mandate to interpret language to further the parties' stated purpose of reaching a final settlement.

II. Attorneys' Fees

In light of our decision on the preceding issue, it is unnecessary for us to address the reasonableness of attorney's fees. We note, however, that the circuit court's order demonstrates that the court considered each of the factors set out by this Court in *Jackson v. Speed,* 326 S.C. 289, 486 S.E.2d 750 (1997), and those factors enumerated in Rule 1.5, RPC, Rule 407, SCACR in determining that 28% of the common fund was a reasonable fee.

To prevail on appeal, this Court must find that the circuit court's findings of fact are not supported by "***any*** competent evidence." *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) (citing *Baron Data Sys., Inc. v. Loter,* 297 S.C. 382, 377 S.E.2d 296 (1989) (emphasis added). Although Respondents were awarded a very substantial sum ($2.1 million) for their work on this case that took 10 months to settle, Respondents achieved a good result for the class, including securing the prospective enforcement of the tax exemption, and took the risk of not earning any fee at all. Therefore, we would be inclined to find that there is evidence to support

the circuit court's findings on each factor under the "any competent evidence" standard.[8]

CONCLUSION

For the foregoing reasons, we **DISMISS** this appeal.

MOORE, WALLER, BURNETT, JJ., and Acting Justice Edward B. Cottingham, concur.

[8] Rather than focusing on the contingency fee agreement in this case as the Attorney General claims the circuit court did, the circuit court spent much more energy on the "fees customarily charged in similar cases" factor. The analysis under this factor is particularly persuasive to us. *See Paul, Johnson, Alston & Graulty,* 886 F.2d 268, 272 (9th Cir. 1989) (finding that fees ordinarily "range from 20 percent to 30 percent of the common fund created").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Greenville County Magistrate
Michael B. Abraham, Respondent.

Opinion No. 25671
Submitted June 17, 2003 - Filed June 30, 2003

PUBLIC REPRIMAND

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

Oscar W. Bannister, of Greenville, for Respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand.[1] Respondent has also resigned his position and has agreed never to seek nor accept a judicial office in South Carolina without the express written permission of the Supreme Court of South Carolina. We accept the agreement and publicly reprimand respondent, the most severe sanction we are able to impose in these circumstances.

Respondent admits in the Agreement for Discipline by Consent that he made use of internet facilities, while on duty at the magisterial offices

[1] Respondent was placed on interim suspension by way of order of this Court dated May 6, 2003.

furnished by Greenville County, which was contrary to the published directives of Greenville County and the South Carolina Judicial Department. Respondent also admits that, in connection with this matter, he submitted information to the Office of Disciplinary Counsel which he knew or should have known was incorrect or incomplete.

By his conduct, respondent has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall observe high standards of conduct so that the integrity and independence of the judiciary is preserved); Canon 2(A)(a judge shall avoid impropriety and the appearance of impropriety by acting at all times in a manner that promotes public confidence in the integrity of the judiciary); and Canon 4(A)(2)(a judge shall conduct all of the judge's extra-judicial activities so that they do not demean the judicial office). Respondent has also violated the following provisions of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1)(it shall be a ground for discipline for a judge to violate the Code of Judicial Conduct) and Rule 7(a)(7)(it shall be a ground for discipline for a judge to willfully violate a valid court order issued by a court of this state).

We accept the agreement for a public reprimand because respondent is no longer a magistrate and because he has agreed not to hereafter seek nor accept another judicial position in South Carolina without first obtaining permission from this Court.[2] As previously noted, this is the strongest punishment we can give respondent, given the fact that he has already resigned his duties as a magistrate. See In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996)("A public reprimand is the most severe sanction that can be imposed when the respondent no longer holds judicial office.") Accordingly, respondent is hereby publicly reprimanded for his conduct.

[2] Respondent has agreed that, in the event he does seek such permission from this Court, he shall not do so without prior notice to Disciplinary Counsel and without allowing Disciplinary Counsel to disclose to this Court any information related to this matter and any information relevant to the issue of respondent holding judicial office.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Walter Moultrie, III, Respondent,

v.

State of South Carolina, Petitioner.

Appeal from Berkeley County
James E. Lockemy, Circuit Court Judge

ON WRIT OF CERTIORARI

Opinion No. 25672
Submitted May 29, 2003 - Filed June 30, 2003

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, of Columbia, for petitioner.

Harry L. DeVoe, Jr., of New Zion, for respondent.

JUSTICE MOORE: Respondent was convicted of first degree criminal sexual conduct with a minor (CSCM) and sentenced to

eighteen years. His conviction was affirmed on appeal to the Court of Appeals by memorandum decision. Respondent then brought this action for post-conviction relief (PCR) which was granted. We reverse.

FACTS

Respondent was charged with CSCM for digitally penetrating his six-year-old niece's vagina and tearing her vaginal wall just below the cervix. Both CSCM and assault and battery of a high and aggravated nature (ABHAN) were submitted to the jury. Respondent was convicted of CSCM.

On PCR, the judge granted relief for counsel's failure to request a King[1] charge, which was required at the time of trial.[2] A King charge would have instructed the jury to resolve any doubt in favor of the lesser offense.

ISSUE

Was respondent prejudiced by trial counsel's failure to request a King charge?

DISCUSSION

Under S.C. Code Ann. § 16-3-655(1) (2003), CSCM is a sexual battery on a child less than eleven years old. A sexual battery is any intrusion, however slight, into the victim's body. §16-3-651(h). Respondent testified, contrary to the victim's testimony, he did not penetrate her. He claimed her injury occurred when she fell out of a bunk bed while he was asleep in another room. Medical testimony

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[1] State v. King, 158 S.C. 251, 155 S.E. 409 (1930).

[2] After Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999), a King charge is no longer required.

indicated the victim's internal injury could have been caused only by penetration of the vagina and not by an external blow.

Under the evidence presented, respondent was guilty of a sexual battery or no battery at all. In such a case, the defendant is not entitled to a charge of ABHAN as a lesser-included offense of CSCM. State v. Forbes, 296 S.C. 344, 372 S.E.2d 591 (1988). Where there is no evidence to support an instruction on the lesser offense, a PCR applicant cannot show prejudice from the failure to request a King charge. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994). Since respondent was not entitled to a charge on ABHAN, there is no prejudice from counsel's failure to request a King charge. Accordingly, PCR was improperly granted. Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000) (grant of PCR reversed where there no prejudice is shown).

REVERSED.

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

The Supreme Court of South Carolina

RE: Rule 608, SCACR

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the following amendments are made to Rule 608, SCACR:

(1) The last sentence of section (c)(1)(A) is amended to read: "This list shall be used to appoint counsel for indigents in death penalty cases [see (b)(7) above] and criminal cases, including juvenile delinquency matters."

(2) The last sentence of section (c)(1)(B) is amended to read: "This list shall be used to appoint counsel for indigents in all cases other than those specified in (A) above, including post-conviction relief matters that are not death penalty cases."

(3) The first sentence of section (f)(2) is amended to read: "The appointment of counsel in all other criminal cases, including juvenile

delinquency matters, shall be made from the criminal list specified in (c)(1)(A) above."

(4) The phrase "eight (8) appointments" is replaced with the phrase "ten (10) appointments" everywhere it appears in sections f(3) and (10).

These amendments shall be effective July 1, 2003.

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

June 27, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Leroy Dupree,

Appellant.

Appeal From Richland County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 3657
Submitted March 26, 2003 – Filed June 30, 2003

AFFIRMED

Katherine Carruth Link, of the South Carolina Office of Appellate Defense and of 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 W. Rutledge Martin, all of Columbia; and Solicitor Warren B. Giese, of Columbia, for Respondent.

ANDERSON, J.: Leroy Dupree was charged with trafficking in crack cocaine in an amount of ten grams or more, but less than twenty-eight grams. He waived his right to trial by jury. The circuit court judge found Dupree guilty of trafficking in crack cocaine; concluded the conviction was a second offense for enhancement purposes; and sentenced Dupree to fifteen years, plus a fine of $25,000. On appeal, Dupree asserts the judge erred in (1) failing to suppress evidence seized in a search and (2) sentencing him for a second offense of trafficking, where the enhancement was based on a prior conviction of possession with intent to distribute rather than a prior conviction of trafficking. We affirm.[1]

FACTS/PROCEDURAL BACKGROUND

On January 19, 2001, Deputy Trinette Mullineaux, with the Richland County Sheriff's Department, appeared before the magistrate and signed an affidavit to obtain a search warrant for "crack cocaine, paraphernalia, paperwork, and other items associated with the use, storage, and distribution of crack cocaine." In the affidavit, Deputy Mullineaux revealed the "location to be searched is Bobby Dove's Trailer Park off 1711 Percival, Lot #10." The affidavit supporting the search warrant provided:

> Within the past (72) hours, a confidential and first time informant of the Richland County Sheriff's Department has purchased crack cocaine from the described location. The informant was searched before and after the purchase and was observed by narcotics agents while making the purchase entering and exiting the location. Based on the affiant's and other Richland County Sheriff's Departments [sic] narcotic agents experience in drug enforcement, it is known that subjects present at the scene of illegal drug distribution and/or possession commonly have drugs

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

> in their possession and also store and or transport in vehicles in their possession.

The magistrate issued the search warrant. Officers with the Sheriff's Department executed the search warrant on January 25, 2001. Sergeant Jerry Maldonado kicked the door down because it was locked. He entered the mobile home before any other officer. Immediately, Sergeant Maldonado noticed Dupree in the living room "by the couch on the left-hand side." The police discovered "some crack cocaine that was on [Dupree's] person." In addition to the crack cocaine, the officers seized over $800 in cash, a gun, and some marijuana.

Prior to trial, defense counsel moved to suppress the crack cocaine seized pursuant to the search warrant arguing that the warrant was not supported by probable cause. Counsel claimed there was "no indicia of reliability alleged in the search warrant as to [the first-time] informant's veracity or reliability" and "no corroborative investigation alleged on the face of the warrant."

At the hearing on the motion to suppress, Deputy Mullineaux testified regarding the information she presented to the magistrate on January 19, 2001. Deputy Mullineaux stated that she advised the magistrate she "had received several . . . different information sources that this particular residence was dealing narcotics." Deputy Mullineaux declared:

> What I also presented to [the magistrate] was after I'd received this information, I went with a confidential informant to this residence. Drove—had another agent stand by and I went with the confidential informant to the vehicle—to the residence, observed the confidential informant get out of the vehicle and go to the back of his door, which he had purchased crack and turned that crack back over to me once he came back to the vehicle; that was the controlled buy that we had made to obtain this search warrant.

Deputy Mullineaux chose the particular confidential informant because he was well known to Dupree and "was able to purchase crack at this

particular residence." The confidential informant accompanied Deputy Mullineaux to the location where the controlled buy occurred. The confidential informant was searched before he purchased the crack cocaine. At this time, the confidential informant had no drugs on his person. The officer watched the confidential informant get out of the vehicle and walk to the back door of the mobile home. When the confidential informant returned from the residence, he had crack cocaine in his possession and turned it over to Deputy Mullineaux.

On cross-examination of Deputy Mullineaux, the following exchange occurred:

> Q: When you had prepared [the search warrant], did the magistrate ask you for sworn oral testimony or did you elicit that on your own?
>
> A: Yes, sir, he asked me to stipulate how the buy had occurred and what information I had on this particular case. . . . I informed him about the control[led] buy that we made there and about the information that I had received, which is why I even attempted a controlled buy at this particular location.

Deputy Mullineaux said that she gave the same information to the magistrate that she testified to at the hearing. The judge denied Dupree's motion to suppress the crack cocaine, finding there was probable cause for the magistrate to issue the warrant.

During the trial, when the Solicitor moved to admit the crack cocaine into evidence, defense counsel made a timely objection based on the same grounds asserted at the prior hearing on the motion to suppress. The objection was overruled.

The judge found Dupree guilty as charged. Dupree was sentenced to fifteen years, plus a fine of $25,000.

ISSUES

I. Did the trial court err in denying Dupree's motion to suppress the crack cocaine seized in the search of the mobile home?

II. Did the trial court err in sentencing Dupree for a second offense of trafficking where the enhancement was based on a prior conviction of possession with intent to distribute rather than a prior conviction of trafficking?

STANDARD OF REVIEW

An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002); State v. Arnold, 319 S.C. 256, 460 S.E.2d 403 (Ct. App. 1995). This review, like the determination by the magistrate, is governed by the "totality of the circumstances" test. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000); King, 349 S.C. at 148, 561 S.E.2d at 643. The appellate court should give great deference to a magistrate's determination of probable cause. Jones, 342 S.C. at 126, 536 S.E.2d at 678; State v. Dunbar, Op. No. 3631 (S.C. Ct. App. filed April 21, 2003) (Shearouse Adv. Sh. No. 15 at 44) (Anderson, J., dissenting); King, 349 S.C. at 148, 561 S.E.2d at 643.

Affidavits are not meticulously drawn by lawyers, but are normally drafted by non-lawyers in the haste of a criminal investigation, and should therefore be viewed in a common sense and realistic fashion. State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1976); Arnold, 319 S.C. at 260, 460 S.E.2d at 405. Our task is to decide whether the magistrate had a substantial basis for concluding probable cause existed. State v. Adolphe, 314 S.C. 89, 441 S.E.2d 832 (Ct. App. 1994). The term "probable cause" does not import absolute certainty. State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971); Arnold, 319 S.C. at 260, 460 S.E.2d at 405. Rather, in determining whether a search warrant should be issued, magistrates are concerned with probabilities and not certainties. Sullivan, 267 S.C. at 617, 230 S.E.2d at 624. Searches

based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause. Bennett, 256 S.C. at 241, 182 S.E.2d at 294; Arnold, 319 S.C. at 260, 460 S.E.2d at 405.

LAW/ANALYSIS

I. VALIDITY OF SEARCH WARRANT

Dupree contends the trial judge erred in denying his motion to suppress evidence obtained as a result of the search of the mobile home. Specifically, Dupree maintains the search warrant affidavit and additional information provided to the magistrate did not support a finding of probable cause because the State failed to (1) demonstrate the reliability of the confidential informant and (2) provide any specific factual detail concerning what had transpired or been observed when the informant was in the residence. We disagree.

A magistrate may issue a search warrant only upon a finding of probable cause. State v. Tench, 353 S.C. 531, 579 S.E.2d 314 (2003); State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997); State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002). "The South Carolina General Assembly has enacted a requirement that search warrants may be issued 'only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant.'" State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999) (quoting S.C. Code Ann. § 17-13-140 (1985)).

The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause. State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995). The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued. State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct. App. 1996); State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995). In determining the validity of the warrant, a reviewing court may consider only information brought to the

magistrate's attention. State v. Owen, 275 S.C. 586, 274 S.E.2d 510 (1981); State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001).

The United States Supreme Court, in Illinois v. Gates, 462 U.S. 213 (1983), rejected the application of a rigid two-pronged test in which an informant's veracity and basis of knowledge were considered as separate and independent requirements to finding probable cause. Weston, 329 S.C. at 290, 494 S.E.2d at 802. "Instead, the Court adopted a totality of the circumstances test where veracity and basis of knowledge were relevant to, but not inflexible requirements of, a determination of probable cause." Id. The magistrate's task in determining whether to issue a search warrant is to make a practical, common sense decision concerning whether, under the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in the particular place to be searched. Gates, 462 U.S. at 238; Tench, 353 S.C. at __, 579 S.E.2d at 316; Bellamy, 336 S.C. at 143, 519 S.E.2d at 348; King, 349 S.C. at 150, 561 S.E.2d at 644; see also State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000) (under totality of circumstances test, reviewing court considers all circumstances, including status, basis of knowledge, and veracity of informant, when determining whether or not probable cause existed to issue search warrant). Under this formula, veracity and basis of knowledge are treated "as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." Gates, 462 U.S. at 230. These are relevant considerations in the totality of the circumstances analysis. Bellamy, 336 S.C. at 144, 519 S.E.2d at 349.

A deficiency in one of the elements of veracity and reliability may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. Gates, 462 U.S. at 233; Bellamy, 336 S.C. at 144, 519 S.E.2d at 349; Martin, 347 S.C. at 527-28, 556 S.E.2d at 709. The Gates case enunciated the following examples of the interaction of the relevant considerations:

> If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal

> activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip. Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity--which if fabricated would subject him to criminal liability--we have found rigorous scrutiny of the basis of his knowledge unnecessary. Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case.

Gates, 462 U.S. at 233-34 (citations omitted).

State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981), although decided under the more stringent pre-Gates standard, is instructive. In Viard, a confidential informant made a controlled buy of drugs at the residence of the Viards. Id. at 148, 276 S.E.2d at 532. The residence was searched, pursuant to a warrant, and a quantity of drugs seized. Id. at 148-49, 276 S.E.2d at 532. The trial judge granted the Viards' motion to suppress the drugs, holding the affidavit supporting the search warrant did not contain information about the informant's reliability and failed to set forth sufficient underlying facts to enable the magistrate to make an independent finding of probable cause. Id. at 149, 276 S.E.2d at 532. The Supreme Court, applying the more strict pre-Gates test, reversed the trial court's grant of the Viards' motion to suppress the drugs. The Court explained:

> Although reliability may be established by the informant having previously supplied accurate information, this is not the exclusive means by which credibility may be shown. Reliability can also be established by the independent verification of the information, prior to the search. See: State v. Camargo, 23 Ariz. App. 47, 530 P.2d 893 (1975); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966).
>
> Here, the warrant must be upheld not on the basis of the past credibility of the informant, but upon the independent

> verification of facts by the affiant. The information furnished by the informant taken as a whole in the light of all of the circumstances disclosed is reliable. Moreover, the controlled buy was evidence of the credibility and trustworthiness of the informant. See: Camargo, supra; Tamburino v. Commonwealth, 218 Va. 821, 241 S.E.2d 762 (1978).
>
> Although the affidavit was inartfully drawn, a common-sense reading of it supports the magistrate's finding of probable cause. Affiant alleged his informant had been at the residence, saw drugs there within the past 72 hours, and purchased drugs during a controlled buy which field tested positive for depressants. We conclude the affidavit contained sufficient underlying facts and information upon which the magistrate made her independent determination of probable cause.

Viard, 276 S.C. at 150-51, 276 S.E.2d at 532.

Furthermore, the case of United States v. Smith, 914 F.2d 565 (4th Cir. 1990), is illustrative. The Fourth Circuit Court of Appeals articulated:

> Smith challenges the search of his motel room by asserting that there was a lack of probable cause . . . .
>
> Smith attacks the conclusory nature of the affidavit, specifically asserting that the affidavit supporting the search warrant did not establish probable cause because the affiant (Lieutenant Dotson) failed to explain how the "reliable confidential informant" was indeed reliable or how he knew that the informant had observed cocaine in Room 254. This argument is manifestly without merit. The affidavit clearly states that the informant was observed entering a room with no cocaine in his possession, exiting the room, and then turning over cocaine to Dotson. Thus, it is clear that the magistrate had a "'substantial basis for . . . concluding'" that there was "a fair probability that contraband or evidence of a crime" would be found in Room 254.

> Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983) (citation omitted).

Smith, 914 F.2d at 568.

An informant's controlled buy of drugs can constitute probable cause sufficient for a magistrate to issue a warrant. See United States v. Clyburn, 24 F.3d 613 (4th Cir. 1994); see also United States v. Cook, 949 F.2d 289 (10th Cir. 1991) (finding probable cause where informant was searched for money and drugs, was given money and seen to enter defendant's apartment, from which he exited and was searched again, revealing presence of crack cocaine and absence of money); Langford v. State, 962 S.W.2d 358 (Ark. 1998) (declaring that controlled buy established probable cause where officer searched informants to ensure they had no drugs, watched them enter and leave the home where they purchased the drugs, and then received drugs from informants); State v. Sherlock, 768 P.2d 1290 (Haw. 1989) (holding affidavit was sufficient to establish probable cause where officer searched informant before and after controlled buy and watched him enter particular apartment); State v. Toler, 787 P.2d 711 (Kan. 1990) (ruling judge had substantial basis for concluding probable cause existed to issue search warrant where informant was searched before controlled buy, was kept in sight until he entered defendant's residence, and immediately upon exit turned drugs over to police); State v. Knowlton, 489 A.2d 529 (Me. 1985) (noting that controlled buy was sufficient corroboration under Gates even though affidavit failed to describe in explicit detail the police surveillance of informant during controlled buy); Commonwealth v. Warren, 635 N.E.2d 240, 242 (Mass. 1994) (stating "[a] controlled purchase of narcotics, supervised by the police, provides probable cause to issue a search warrant"); Commonwealth v. Hill, 747 N.E.2d 1241, 1250 n.9 (Mass. App. Ct. 2001) (emphasizing that a controlled buy is "one of the most significant means of corroboration of an otherwise unverified tip."); State v. Cavegn, 356 N.W.2d 671 (Minn. 1984) (observing that controlled buy was sufficient corroboration where informant was searched before and after going into apartment building to buy drugs); State v. Emmi, 628 A.2d 939 (Vt. 1993) (recognizing that police control of drug purchase provides basis for police to conclude that informant has, in fact, obtained drugs from claimed source; fruits of controlled purchase and supervision by police of purchase help assure that judicial officer to whom

application for warrant is made has information from which to make an independent determination of an informant's basis of knowledge and veracity).

In Search and Seizure: A Treatise on the Fourth Amendment, Wayne R. LaFave illuminates:

> [A] situation in which the corroboration will suffice to show veracity is that in which the informant has not been working independently, but rather has cooperated closely with the police, as is true when the informant makes a controlled purchase of narcotics. That is, where there is "physical proximity and active participation in the informant's intrigue" by the police, so that it is not "independent police work" which corroborates, but rather "the police corroboration is a co-ordinant and intrinsic part of the informer's operation," the risk of falsehood has been sufficiently diminished. As explained in State v. Barrett[, 320 A.2d 621, 625 (Vt. 1974)]:
>
> > The purpose of the search of the informer and his being escorted to the place of purchase was to eliminate both as much as possible of the hearsay aspects of the search warrant request and to reduce the reliance on "veracity" to a minimum. The magistrate had enough facts to support a finding of probable cause, and had them in a form which rendered extended evaluation of the informant's credibility unnecessary.

2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.3(f) (3d ed. 1996) (footnotes omitted).

If the controlled buy was properly conducted, it alone can provide facts sufficient to establish probable cause for a search warrant. See Hignut v. State, 303 A.2d 173, 180 (Md. Ct. Spec. App. 1973) ("So long as the controls are adequate, the 'controlled buy' alone may well establish probable cause to search a suspect premises . . . ."); Sadler v. State, 905 S.W.2d 21 (Tex. App.

1995) (determining that circumstances of controlled buy, standing alone, may be sufficient to reasonably confirm informant's information and give probable cause to issue search warrant). The Court of Appeals of Georgia, in Davis v. State, 568 S.E.2d 161 (Ga. Ct. App. 2002), inculcated:

> The controlled buy supervised by law enforcement officers would alone have provided probable cause. "Even if an officer cannot provide information regarding the veracity of an informant or the basis of his knowledge, a tip may be proved reliable if portions of the tip are sufficiently corroborated." Here, officers witnessed the delivery of the cocaine and confirmed the accuracy of many of the informant's predictions concerning Davis's behavior. This "sufficiently corroborated" the informant's information and showed its reliability.

Davis, 568 S.E.2d at 165 (citations omitted). Where the affidavit is based in part on information provided by an informant of unknown reliability, police corroboration of details provided in the tip may establish probable cause. Illinois v. Gates, 462 U.S. 213 (1983); cf. State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000) (warrant based solely on information provided by confidential informant must contain information supporting credibility of informant and basis of his knowledge; however, independent verification by law enforcement officers cures any defect).

Based on the totality of the circumstances, we hold the affidavit provided the magistrate with a substantial basis for finding probable cause to search the mobile home. State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997) (duty of reviewing court is simply to ensure that magistrate had substantial basis for concluding that probable cause existed). Although the affidavit provides the informant is a first-time informant, there are sufficient other indicators of the reliability of his statements. See Gates, 462 U.S. at 233 (deficiency in one of elements of veracity and reliability may be compensated for, in determining overall reliability of a tip, by strong showing of basis of knowledge or by some other indicia of reliability). The information provided by the confidential informant was corroborated by the independent police investigation. The affidavit indicated that Deputy Mullineaux had conducted an independent investigation by setting up the

controlled buy. Deputy Mullineaux searched the informant prior to the controlled buy at the mobile home. At this time, the informant had no drugs on his person. The officer observed the informant enter and exit the mobile home. When the informant returned, Deputy Mullineaux searched him again. At this time, the informant was in possession of crack cocaine and reported obtaining the crack cocaine in the mobile home for which the warrant was obtained. This amounts to sufficient police corroboration of an informant's information based on the controlled buy. See United States v. Clyburn, 24 F.3d 613 (4th Cir. 1994) (clarifying that an informant's controlled buy of crack cocaine constituted probable cause for issuance of a search warrant); United States v. Martin, 920 F.2d 393 (6th Cir. 1990) (rejecting defendant's claim that the informant was unreliable on the ground that the informant's charges had been verified through a controlled buy of cocaine). The affidavit advised that an informant had made a controlled purchase of crack cocaine from the mobile home. The affidavit clearly states the confidential informant was observed entering the mobile home with no crack cocaine in his possession, exiting the mobile home, and then turning over the crack cocaine to Deputy Mullineaux. The controlled buy was evidence of the credibility and trustworthiness of the informant. Furthermore, when the officers executed the search warrant, they did in fact find crack cocaine.

In the affidavit, Deputy Mullineaux noted: "Based on the affiant's and other Richland County Sheriff's Department narcotic agents experience in drug enforcement, it is known that subjects present at the scene of illegal drug distribution and/or possession commonly have drugs in their possession . . . ." "[E]vidence of a sale of drugs supports an inference that more will be found at the place of operation." State v. Maffeo, 642 P.2d 404, 406 (Wash. Ct. App. 1982) (citing 1 Wayne R. LaFave, Search and Seizure § 3.7 (1978); United States v. Valenzuela, 596 F.2d 824 (9th Cir. 1979)).

Under these facts, a substantial basis existed to support the magistrate's finding of probable cause. The magistrate had ample probable cause to issue the warrant. Given all the circumstances set forth in the affidavit, there was a "fair probability" that crack cocaine would be found in the mobile home. See Gates, 462 U.S. at 238. Concomitantly, the court did not err in denying Dupree's motion to suppress the crack cocaine.

We hold that if a controlled buy is properly conducted, the controlled buy alone can provide facts sufficient to establish probable cause for a search warrant.

II. SENTENCE ENHANCEMENT

Dupree complains the circuit court judge erred in sentencing him "for a second offense of trafficking, where the enhancement was based on a prior conviction of possession with intent to distribute rather than a prior conviction of trafficking." We disagree.

The State requested the court treat the trafficking conviction as a second offense in sentencing Dupree under S.C. Code Ann. § 44-53-375(C) (2002). The State asserted "this is a second level conviction for enhancing purposes." In Virginia in 1991, Dupree pled guilty to "possession with intent to distribute a Schedule II controlled substance, to-wit, cocaine." Defense counsel asked the judge to treat this conviction as a first offense "because the prior drug conviction on which the [S]tate was relying was a conviction for possession with intent to distribute, not trafficking." Defense counsel maintained "the specific statute, the crack statute, would take precedence over any general statute." The court rejected this contention and sentenced Dupree to a term within the range provided by § 44-53-375(C) for a second trafficking offense.

A. Statutory Authority: Sections 44-53-375(C) & 44-53-470

South Carolina Code Ann. § 44-53-375(C) (2002) provides in pertinent part:

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of ice, crank, or crack cocaine, as defined and otherwise limited in Sections 44-53-110, 44-53-210(b)(4), 44-53-

> 210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as "trafficking in ice, crank, or crack cocaine" and, upon conviction, must be punished as follows if the quantity involved is:
>
> > (1) ten grams or more, but less than twenty-eight grams:
> >
> > > (a) for a first offense, a term of imprisonment of not less than three years nor more than ten years, no part of which may be suspended nor probation granted, and a fine of twenty-five thousand dollars;
> > >
> > > (b) for a second offense, a term of imprisonment of not less than five years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars.

Pursuant to S.C. Code Ann. § 44-53-470 (2002), "[a]n offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this article or under any State or Federal statute relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs."

B. Statutory Construction

Penal statutes are strictly construed against the State and in favor of the defendant. State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002); State v. Fowler, 322 S.C. 157, 470 S.E.2d 393 (Ct. App. 1996). The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. State v. Baucom, 340 S.C. 339, 531 S.E.2d 922 (2000); City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the

language used, and that language must be construed in the light of the intended purpose of the statute. State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). The determination of legislative intent is a matter of law. City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998).

The legislature's intent should be ascertained primarily from the plain language of the statute. Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649 (1996); City of Sumter Police Dep't, 330 S.C. at 375, 498 S.E.2d at 896. When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning. Hudson, 336 S.C. at 246, 519 S.E.2d at 581.

The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. Southern Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 412 S.E.2d 377 (1991). Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997); see also Stephen, 324 S.C. at 340, 478 S.E.2d at 77 (statutory provisions should be given reasonable and practical construction consistent with purpose and policy of entire act). In interpreting a statute, the language of the statute must be construed in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992); Hudson, 336 S.C. at 246, 519 S.E.2d at 582. Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992).

If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another

meaning. Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494. When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994). However, if the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Hudson, 336 S.C. at 247, 519 S.E.2d at 582. The statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Brassell, 326 S.C. at 561, 486 S.E.2d at 495. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. City of Sumter Police Dep't, 330 S.C. at 376, 498 S.E.2d at 896.

C. "Second Offense" Category

Dupree contends that possession with intent to distribute cocaine does not qualify as a prior offense for the purpose of § 44-53-375(C)(1)(b). We disagree.

Dupree cites Rainey v. State, 307 S.C. 150, 414 S.E.2d 131 (1992), in support of his argument. Rainey pled guilty to distribution of crack cocaine and resisting arrest. He was sentenced as a second offender for the distribution charge to thirty years, suspended upon the service of twenty-five years, and a payment of a $50,000 fine. Our Supreme Court affirmed the case on direct appeal. The post-conviction relief (PCR) judge granted Rainey's application for PCR. On appeal, the Supreme Court held:

> Respondent was sentenced as a second offender under the crack cocaine statute[, S.C. Code Ann. § 44-53-375 (Supp. 1990),] based on his prior convictions for distribution of marijuana and possession with intent to distribute marijuana. Pursuant to § 44-53-375(B), an enhanced sentence is required for "a second offender, or if, in the case of a first conviction of a violation of this section, the offender has been convicted of any [law] . . . relating to *narcotic drugs* . . . ." (Emphasis added). Since respondent does not have a prior crack cocaine conviction and marijuana is not a narcotic drug as defined by S.C. Code

> Ann. § 44-53-110 (1985), he should not have been sentenced as a second offender under § 44-53-375(B).

Rainey, 307 S.C. at 151, 414 S.E.2d at 132 (footnote omitted). The State asserted Rainey was a second offender under § 44-53-470. In affirming the order of the PCR judge, the Court explained:

> Because there is a conflict between § 44-53-375(B) and the general second offense statute, the later, more specific crack cocaine statute must prevail. The PCR judge was correct in finding that respondent is not a second offender under § 44-53-375(B) and should not, therefore, have been sentenced as one.

Rainey, 307 S.C. at 152, 414 S.E.2d at 132.

Rainey is inapposite to the case at bar. The Rainey Court was construing the previous § 44-53-375(B). Section 44-53-375(B) permitted "second offender sentencing" in regard to a prior offense "relating to *narcotic drugs*." Rainey, 307 S.C. at 151, 414 S.E.2d at 132 (emphasis in original). Marijuana is not a narcotic drug. The statute has since been amended and now reads in relevant part:

> (B) A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver ice, crank, or crack cocaine, in violation of the provisions of Section 44-53-370, is guilty of a felony and, upon conviction:
>
> . . . .
>
> (2) for a second offense or if, in the case of a first conviction of a violation of this section, the offender has been convicted of any of the laws of the United States or of any state, territory, or district relating to narcotic drugs, **marijuana**, depressant, stimulant, or hallucinogenic drugs, the offender must

> be imprisoned for not more than twenty-five years and fined not less than fifty thousand dollars.

S.C. Code Ann. 44-53-375(B)(2) (2002) (emphasis added). Section 44-53-375(C)(1)(b), the statute under which Dupree was sentenced, does not contain language similar to that in § 44-53-375(B), which was the focus of Rainey.

The case of Thomas v. State, 319 S.C. 471, 465 S.E.2d 350 (1995), is enlightening. Thomas was convicted of trafficking in marijuana and sentenced as a third-time offender under S.C. Code Ann. § 44-53-370(e)(1) (Supp. 1994). Thomas had prior convictions for possession of marijuana with intent to distribute and distribution of marijuana. When Thomas' direct appeal was dismissed, he filed an application for PCR on the ground his sentence exceeded the maximum allowed by law. The PCR judge granted Thomas a resentencing hearing.

On appeal, the State claimed the PCR judge erred in finding the trial judge had improperly interpreted the term "subsequent or second offense." The Court noted that § 44-53-470 defines "second or subsequent offense" as "when an offender 'has at any time been convicted under this article or under any State or Federal statute relating to narcotic drugs, *marihuana*, depressant, stimulant, or hallucinogenic drugs.'" Id. at 472, 465 S.E.2d at 351 (emphasis in original). The Court discussed:

> Respondent argues the references to second or subsequent offenses in § 44-53-370(e)(1) refer only to convictions of trafficking in marijuana, not other drug offenses. Relying on Rainey v. State, 307 S.C. 150, 414 S.E.2d 131 (1992), respondent contends the definition set out in § 44-53-470 does not apply to § 44-53-370(e). In Rainey, the defendant was convicted under the former crack cocaine statute, S.C. Code Ann. § 44-53-375. His prior offense was for marijuana. Under former § 44-53-375(B), the prior offense had to be related to narcotic drugs. However, under the definition set out in § 44-53-470, a prior offense is any drug offense. Finding a conflict between § 44-53-470 and § 44-53-375(B) and applying the rule that the more recent legislation

> supersedes prior law, the Court held the defendant should not have been sentenced as a second offender. Here, §§ 44-53-370(e)(1) and 44-53-470 are not in conflict. Since there is no conflict, Rainey does not apply.

Thomas, 319 S.C. at 472-73, 465 S.E.2d at 351 (footnote omitted). The Court, in a footnote, recognized that § 44-53-375(B) has been amended and now states a prior offense includes those for marijuana. In reversing the order of the PCR judge, the Court expounded:

> Here, both statutes are part of the same general law and can be read together without any conflict. Cf. In re Keith Lamont G., 304 S.C. 456, 405 S.E.2d 404 (1991) (statutory sections that are part of the same general statutory law must be construed together). Further, the cardinal rule of statutory construction is that legislative intent is to prevail. Browning v. Hartvigsen, 307 S.C. 122, 414 S.E.2d 115 (1992). The legislature could not have intended second or subsequent offenses under § 44-53-370(e)(1) to include only the offense of marijuana trafficking when there is a specific statute which defines second or subsequent offenses as any drug offense. Therefore, we hold respondent was correctly sentenced as a third-time offender.

Thomas, 319 S.C. at 473, 465 S.E.2d at 352.

Thomas v. State is analogous to the present case. Sections 44-53-375(C)(1)(b) and 44-53-470 are not in conflict. **There is no specific enhancement language in § 44-53-375(C)**. **It merely delineates offenses**. Because there is no conflict between these statutory sections, Rainey does not apply. Section 44-53-470 applies to § 44-53-375(C). The trial judge correctly sentenced Dupree as a second offender.

CONCLUSION

Accordingly, Dupree's conviction is

AFFIRMED.

CURETON and HUFF, JJ., concur.