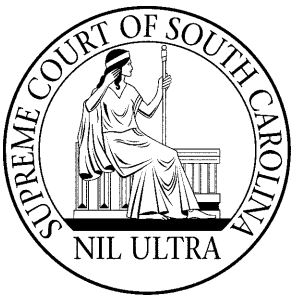

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
June 19, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS AND ORDERS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2013-UP-261-Markola McLaughlin v. Sonny M. Ninan
(Greenville, Judge Robin B. Stilwell)

2013-UP-262-State v. David Pacetti
(Charleston, Judge R. Markley Dennis, Jr.)

2013-UP-263-State v. Antwan Dominique Grayson
(Greenville, Judge Robin B. Stilwell)

2013-UP-264-In the matter of the care and treatment of John Edward Darnell
(Greenville, Judge G. Edward Welmaker)

2013-UP-265-State v. Jodie C. Turner
(Greenville, Judge C. Victor Pyle, Jr.)

2013-UP-266-Aubry G. Alexander, Sr. v. SCDOT
(Orangeburg, Judge Edgar W. Dickson)

2013-UP-267-State v. William Sosebee
(York, Judge John C. Hayes, III)

2013-UP-268-State v. Willie Poole
(Greenville, Judge Edward W. Miller)

2013-UP-269-Vincent A. Torres Robinson v. State
(Kershaw, Judge James R. Barber)

2013-UP-270-SCDSS v. Lisa Jawn W. and Nathan Miles D., Sr,
(Pickens, Judge W. Marsh Robertson)

2013-UP-271-State v. Robert C. Johnson
(Horry, Judge Larry B. Hyman, Jr.)

2013-UP-272-James Bowers v. State
(Beaufort, Judge Alexander S. Macaulay)

2013-UP-273-State v. Michael Milledge
(Greenville, Judge Robin B. Stilwell)

2013-UP-274-LOP Capital, LLC v. COSIMO, LLC et al.
(Spartanburg, Judge Gordon G. Cooper)

PETITIONS FOR REHEARING

5078-In re: Estate of Atn Burns Livingston	Pending
5099-R. Simmons v. Berkeley Electric Cooperative, Inc.	Pending
5112-Roger Walker v. Catherine W. Brooks	Denied 06/10/13
5113-Regions Bank v. William S. Owens et al.	Denied 06/11/13
5117-Colonna v. Marlboro Park	Pending
5119-State v. Brian Spears	Denied 06/13/13
5120-Frances Castine v. David W. Castine	Pending
5122-Ammie McNeil v. SCDC	Pending
5126-Ajoy Chakrabarti v. City of Orangeburg	Pending
5130-Brian Pulliam et al. v. Travelers Indemnity Company	Pending
5131-Lauren Proctor v. Whitlark & Whitlark	Pending
5132-State v. Richard Brandon Lewis	Pending
5133-Boykin Contracting Inc. v. K Wayne Kirby	Pending
5135-MicroClean Technology v. EnviroFix	Pending
5137-Ritter and Assoc., Inc. v. Buchanan Volkswagen	Pending
5138-Chase Home Finance, LLC v. Cassandra S Risher et al.	Pending
2013-UP-155-State v. Andre Boone	Pending
2013-UP-158-CitiFinancial v. Squire	Pending
2013-UP-162-Martha Lynne Angradi v. Edgar Jack Lail et al.	Pending
2013-UP-170-Cole Lawson v. Weldon T. Strahan et al.	Pending
2013-UP-180-State v. Orlando Parker	Pending

2013-UP-183-Robert Russell v. SCDHEC Pending

2013-UP-188-State v. Jeffrey A. Michaelson Pending

2013-UP-189-Thomas Torrence v. SCDC Pending

2013-UP-199-Wheeler Tillman v. Samuel Tillman Pending

2013-UP-206-Adam Hill, Jr., v. Henrietta Norman Pending

2013-UP-207-Jeremiah DiCapua v. Thomas D. Guest, Jr. Pending

2013-UP-209-State v. Michael Avery Humphrey Pending

2013-UP-218-Julian Ford, Jr., v. SCDC Pending

2013-UP-224-Mulholland-Mertz v. Corie Crest Homeowners Pending

2013-UP-230-Andrew Marrs v. 1751, LLC d/b/a Saluda's Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4670-SCDC v. B. Cartrette Granted 06/08/11

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4779-AJG Holdings v. Dunn Pending

4832-Crystal Pines v. Phillips Pending

4851-Davis v. KB Home of S.C. Pending

4872-State v. Kenneth Morris Pending

4880-Gordon v. Busbee Pending

4888-Pope v. Heritage Communities Pending

4890-Potter v. Spartanburg School Pending

4895-King v. International Knife	Pending
4898-Purser v. Owens	Pending
4909-North American Rescue v. Richardson	Pending
4923-Price v. Peachtree Electrical	Pending
4926-Dinkins v. Lowe's Home Centers	Pending
4933-Fettler v. Genter	Pending
4934-State v. Rodney Galimore	Pending
4935-Ranucci v. Crain	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. Bentley Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Robert Crossland v. Shirley Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4956-State v. Diamon D. Fripp	Pending
4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending
4964-State v. Alfred Adams	Pending
4970-Carolina Convenience Stores et al. v. City of Spartanburg	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4982-Katie Green Buist v. Michael Scott Buist	Pending

4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending
4997-Allegro v. Emmett J. Scully	Pending
5001-State v. Alonzo Craig Hawes	Pending
5003-Earl Phillips as personal representative v. Brigitte Quick	Pending
5006-J. Broach and M. Loomis v. E. Carter et al.	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5011-SCDHEC v. Ann Dreher	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5016-The S.C. Public Interest Foundation v. Greenville Cty. et al.	Pending
5017-State v. Christopher Manning	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5025-State v. Randy Vickery	Pending
5031-State v. Demetrius Price	Pending
5032-LeAndra Lewis v. L.B. Dynasty	Pending
5033-State v. Derrick McDonald	Pending
5034-State v. Richard Bill Niles, Jr.	Pending
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Pending

5041-Carolina First Bank v. BADD	Pending
5044-State v. Gene Howard Vinson	Pending
5052-State v. Michael Donahue	Pending
5053-State v. Thomas E. Gilliland	Pending
5055-Hazel Rivera v. Warren Newton	Pending
5059-Kellie N. Burnette v. City of Greenville et al.	Pending
5060-Larry Bradley Brayboy v. State	Pending
5061-Williams Walde v. Association Ins. Co.	Pending
5065-Curiel v. Hampton Co. EMS	Pending
5071-State v. Christopher Broadnax	Pending
5072-Michael Cunningham v. Anderson County	Pending
5074-Kevin Baugh v. Columbia Heart Clinic	Pending
5077-Kirby L. Bishop et al. v. City of Columbia	Pending
5081-The Spriggs Group, P.C. v. Gene R. Slivka	Pending
5082-Thomas Brown v. Peoplease Corp.	Pending
5087-Willie Simmons v. SC Strong and Hartford	Pending
5097-State v. Francis Larmand	Pending
5110-State v. Roger Bruce	Pending
2010-UP-356-State v. Darian K. Robinson	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-108-Dippel v. Horry County	Pending

2011-UP-109-Dippel v. Fowler	Pending
2011-UP-199-Amy Davidson v. City of Beaufort	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-447-Brad Johnson v. Lewis Hall	Pending
2011-UP-468-Patricia Johnson v. BMW Manuf.	Pending
2011-UP-475-State v. James Austin	Pending
2011-UP-495-State v. Arthur Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2011-UP-517-N. M. McLean et al. v. James B. Drennan, III	Pending
2011-UP-558-State v. Tawanda Williams	Pending
2011-UP-562-State v. Tarus Henry	Pending
2011-UP-572-State v. Reico Welch	Pending
2011-UP-583-State v. David Lee Coward	Pending
2011-UP-588-State v. Lorenzo R. Nicholson	Pending
2012-UP-010-State v. Norman Mitchell	Pending
2012-UP-014-State v. Andre Norris	Pending
2012-UP-018-State v. Robert Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-058-State v. Andra Byron Jamison	Pending

2012-UP-060-Austin v. Stone	Pending
2012-UP-078-Seyed Tahaei v. Sherri Tahaei	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-089-State v. A. Williamson	Pending
2012-UP-091-State v. Mike Salley	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-217-Forest Beach Owners' Assoc. v. C. Bair	Pending
2012-UP-218-State v. Adrian Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending
2012-UP-290-State v. Eddie Simmons	Pending
2012-UP-292-Demetrius Ladson v. Harvest Hope	Pending
2012-UP-295-Larry Edward Hendricks v. SCDC	Pending

2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-321-James Tinsley v. State	Pending
2012-UP-330-State v. Doyle Marion Garrett	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-365-Patricia E. King and Robbie King Jones, as representatives of W.R. King and Ellen King v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King et al.	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-479-Elkachbendi v. Elkachbendi	Pending
2012-UP-481-State v. John B. Campbell	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-504-Palmetto Bank v. Cardwell	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending

2012-UP-561-State v. Joseph Lathan Kelly	Pending
2012-UP-563-State v. Marion Bonds	Pending
2012-UP-569-Vennie Taylor Hudson v. Caregivers of SC	Pending
2012-UP-573-State v. Kenneth S. Williams	Pending
2012-UP-576-State v. Trevee J. Gethers	Pending
2012-UP-577-State v. Marcus Addison	Pending
2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway	Pending
2012-UP-580-State v. Kendrick Dennis	Pending
2012-UP-585-State v. Rushan Counts	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending
2012-UP-616-State v. Jamel Dwayne Good	Pending
2012-UP-623-L. Paul Trask, Jr., v. S.C. Dep't of Public Safety	Pending
2012-UP-627-L. Mack v. American Spiral Weld Pipe	Pending
2012-UP-647-State v. Danny Ryant	Pending
2012-UP-654-State v. Marion Stewart	Pending
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending
2012-UP-663-Carlton Cantrell v. Aiken County	Pending
2012-UP-674-SCDSS v. Devin B.	Pending
2013-UP-007-Hoang Berry v. Stokes Import	Pending

2013-UP-010-Neshen Mitchell v. Juan Marruffo	Pending
2013-UP-014-Keller v. ING Financial Partners	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending
2013-UP-020-State v. Jason Ray Franks	Pending
2013-UP-037-Cary Graham v. Malcolm Babb	Pending
2013-UP-056-Lippincott v. SCDEW	Pending
2013-UP-066-Dudley Carpenter v. Charles Measter	Pending
2013-UP-069-I. Lehr Brisbin v. Aiken Electric Coop.	Pending
2013-UP-070-Loretta Springs v. Clemson University	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-078-Leon P. Butler, Jr. v. William L. Wilson	Pending
2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health	Pending
2013-UP-082-Roosevelt Simmons v. Hattie Bailum	Pending
2013-UP-084-Denise Bowen v. State Farm	Pending
2013-UP-085-Brenda Peterson v. Hughie Peterson	Pending
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Pending
2013-UP-095-Midlands Math v. Richland County School Dt. 1	Pending
2013-UP-127-Osmanski v. Watkins & Shepard Trucking	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

James C. Miller, Petitioner.

Appellate Case No. 2011-194606

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 27271
Heard May 2, 2013 – Filed June 19, 2013

REVERSED

Appellate Defender David Alexander, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Tommy Evans, Jr., of South Carolina Department of Probation, Parole & Pardon Services, of Columbia, for Respondent.

JUSTICE BEATTY: This Court granted a petition for a writ of certiorari to review the decision of the Court of Appeals in *State v. Miller*, 393 S.C. 59, 709 S.E.2d 135 (Ct. App. 2011), in which it considered the novel question of whether a defendant's probation for a criminal offense should be tolled during his civil commitment pursuant to the Sexually Violent Predator (SVP) Act.[1] The Court of Appeals affirmed a circuit court order tolling James C. Miller's probation while he is in the SVP program. We reverse.

I. FACTS

On September 6, 2001, Miller pled guilty to committing a lewd act on a child under the age of sixteen and criminal domestic violence of a high and aggravated nature (CDVHAN). For the lewd act conviction, Miller was sentenced to fifteen years in prison, suspended upon the service of ten years in prison and five years of probation. The sentencing sheet on this charge indicates Miller was ordered to undergo sex abuse counseling while in the South Carolina Department of Corrections, and that he was to have no contact with children while on probation. Miller received a concurrent sentence of ten years in prison for the CDVHAN conviction.

Miller's probation began on or about December 1, 2005.[2] However, Miller was not released from custody because, prior to his release from prison, he was referred for review as to whether he should be deemed an SVP and subjected to civil commitment. Miller was ultimately found by a jury to be an SVP. He has been in commitment pursuant to the SVP program and housed at the Edisto Unit since November 29, 2006.[3] Miller's commitment was affirmed by the Court of

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[1] S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2012). Amendments to some of the provisions in the SVP Act were passed by the General Assembly subsequent to the current matter.

[2] According to a report of the South Carolina Department of Probation, Parole, and Pardon Services, Miller's probation began on December 1, 2005 and was scheduled to end on November 30, 2010.

[3] An SVP remains under the supervision of the South Carolina Department of Mental Health and is housed in the Edisto Unit on the grounds of the South Carolina Department of Corrections. *See* S.C. Department of Mental Health webpage, *available at* http://www.state.sc.us/dmh/dir_facilities.htm.

Appeals and this Court. *In re the Care and Treatment of Miller*, 385 S.C. 539, 685 S.E.2d 619 (Ct. App. 2009), *aff'd*, 393 S.C. 248, 713 S.E.2d 253 (2011).

On August 28, 2008, Miller's probation officer issued a probation citation and supporting affidavit. In the box on the citation form for specifying the alleged violation, it is indicated: "Citation issued to give court subject-matter jurisdiction over indictment number 2001-GS-32-2716." A hearing was held before the circuit court on December 19, 2008, at which the court initially expressed some reservation about tolling probation in a matter involving a civil commitment. However, the court thereafter issued an "Order Tolling Probation" on March 24, 2009.

The Court of Appeals affirmed. *State v. Miller*, 393 S.C. 59, 709 S.E.2d 135 (Ct. App. 2011). The Court of Appeals held the circuit court did not exceed its discretion in finding Miller was unable to comply with all of the conditions of his probation while committed as an SVP and that he would benefit from supervision while in the community. *Id.* at 63, 709 S.E.2d at 137.

The Court of Appeals further stated this Court has recognized that the circuit court has the authority to toll probation in at least two instances: (1) partial revocation and continuance, and (2) absconding from supervision. *Id.* The Court of Appeals stated, however, that it was "mindful that in both these instances the probationer has generally committed some affirmative act to violate the conditions of probation." *Id.* The court acknowledged "Miller was civilly committed against his will," but noted "he admitted to committing a lewd act on a minor under the age of sixteen[,] which contributed to the basis for his civil commitment." *Id.*

The Court of Appeals rejected Miller's argument that tolling his probation in these circumstances converts his civil commitment into a punitive commitment by extending the length of his criminal sentence. *Id.* at 64, 709 S.E.2d at 137-38. This Court has granted Miller's petition for a writ of certiorari.

II. STANDARD OF REVIEW

The determination of probation matters lies within the sound discretion of the trial court. *See generally State v. Ellis*, 397 S.C. 576, 726 S.E.2d 5 (2012); *State v. Allen*, 370 S.C. 88, 634 S.E.2d 653 (2006). An appellate court will reverse the trial court's decision where there has been an abuse of discretion. *Allen*, 370 S.C. at 94, 634 S.E.2d at 656.

"An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." *Id.*

III. LAW/ANALYSIS

Miller contends the Court of Appeals erred in holding the circuit court properly tolled his probation during his civil commitment as an SVP. Miller asserts the applicable statutes do not specifically authorize such tolling, and he has committed no misconduct that would justify the imposition of equitable tolling because the probation citation was issued only to bring his probation status before the circuit court.

Statutory Authority for Probation

"In South Carolina, parole and probation are governed by statute." *State v. Crouch*, 355 S.C. 355, 360, 585 S.E.2d 288, 291 (2003). Statutory law authorizes the circuit court to suspend the imposition or the execution of a criminal sentence and place the defendant on probation, except for crimes punishable by death or life imprisonment. S.C. Code Ann. § 24-21-410 (2007).[4] "Probation is a form of clemency." *Id.*

"The period of probation or suspension of sentence shall not exceed a period of five years and shall be determined by the judge of the court and may be continued or extended *within the above limit*." *Id.* § 24-21-440 (emphasis added). Thus, while the court may extend the length of the probation originally given, the total period of probation may not exceed the statutory maximum of five years.

"Probation, a suspension of the period of incarceration, is clearly part of a criminal defendant's 'term of imprisonment[,'] as is actual incarceration, parole, and the suspended portion of a sentence[.]" *Thompson v. S.C. Dep't of Pub. Safety*, 335

[4] Section 24-21-410 was amended in 2010, but the amendment does not affect the current appeal.

S.C. 52, 55-56, 515 S.E.2d 761, 763 (1999). Therefore, whether a violation of probationary terms has occurred and the consequences of any such violation are matters for the courts. *Duckson v. State*, 355 S.C. 596, 598 n.2, 586 S.E.2d 576, 578 n.2 (2003). If a defendant has violated the terms of his probation, the circuit court may revoke the defendant's probation or suspension of sentence, or, in its discretion, the court may require the defendant to serve all or a portion only of the sentence imposed. S.C. Code Ann. § 24-21-460 (2007).

Tolling Recognized Under South Carolina Law

There is no explicit reference to tolling in the statutes governing probation. However, South Carolina's appellate courts have expressly recognized the general authority of the circuit court to toll probation.

In *State v.Dawkins*, 352 S.C. 162, 573 S.E.2d 783 (2002), the circuit court ruled the defendant's probationary term was tolled and therefore did not begin to run until after he successfully completed his mandatory two-year term of service in a community supervision program (CSP) pursuant to S.C. Code Ann. § 21-24-560 (Supp. 1998) for his no-parole offense.[5] *Id.* at 164-65, 573 S.E.2d at 783-84.

On appeal, this Court noted this was a statutory construction case, and interpreted South Carolina Code section 24-21-560(E), which "provides, '[a] prisoner who successfully completes a [CSP] pursuant to this section has satisfied his sentence and must be discharged from his sentence.'" *Id.* at 165, 573 S.E.2d at 784 (alterations in original). While observing that "all parties agree the statutory scheme is convoluted," the Court held that a prisoner's successful completion of the mandatory CSP for no-parole offenses completely discharges his sentence, including his five-year probationary period, as this result was mandated by the terms of the statute. *Id.* at 167, 573 S.E.2d at 785. Although this Court reversed the circuit court's tolling of probation, it did so because the probation was

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[5] A "no parole offense" is one in which a prisoner must serve at least 85% of the actual term of imprisonment imposed. *See Dawkins*, 352 S.C. at 164 n.1, 573 S.E.2d at 784 n.1; *see also* S.C. Code Ann. § 24-13-100 (2007) (stating a "no parole offense" refers to "a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more"); *id.* § 24-13-150(A) (defendant must serve 85% of actual term of imprisonment imposed).

subsumed by the CSP, not because tolling is prohibited. The Court stated it "believe[d] the legislature intended mandatory participation in the CSP to serve as a more rigorous term of probation for those convicted of no-parole offenses, in lieu of normal probation." *Id.*

Thereafter, in *State v. Crouch*, this Court generally observed tolling could be appropriate in circumstances involving "absconding or partial revocation and continuance." 355 S.C. at 359 n.2, 585 S.E.2d at 290 n.2. The Court found the judge erroneously revoked a sentence and tolled the running of probation when the appellant's probation had already ended. *Id.* at 359-60, 585 S.E.2d at 290-91. However, the Court concluded it need not address whether probationary sentences could be tolled so as to turn concurrent sentences into consecutive ones. *Id.* at 361, 585 S.E.2d at 291.

In *State v. Hackett*, 363 S.C. 177, 609 S.E.2d 553 (Ct. App. 2005), the Court of Appeals affirmed a circuit court's ruling that the defendant's probation could be tolled during the period the defendant had absconded from supervision. In doing so, the Court of Appeals reasoned there was no explicit prohibition in section 24-21-440 (providing probation may not exceed five years) on tolling probation. *Id.* at 181, 609 S.E.2d at 555. In addition, in construing the legislative intent, the circuit court could not logically give Hackett credit against his five-year probationary period for the time he absconded, because to do so would be to allow Hackett to escape revocation of his probation and any further punishment, "free and clear of all consequences, as long as he manages to elude apprehension for a set amount of time," which "would lead to an absurd result." *Id.* at 181-82, 609 S.E.2d at 555-56. The Court of Appeals relied for support upon *United States v. Green*, in which the federal district court stated, "It would be unreasonable to conclude that a probationer could violate conditions of probation and keep the clock running at the same time, thereby annulling both the principle and purpose of probation." *Id.* at 182-83, 609 S.E.2d at 556 (quoting *United States v. Green*, 429 F. Supp. 1036, 1038 (W.D. Tex. 1977)).

Application of Tolling in Current Matter

In the current appeal, the Court of Appeals stated it was mindful that in instances where the Supreme Court of South Carolina had previously recognized tolling was appropriate, "the probationer has generally *committed some affirmative act to violate the conditions of probation*." *Miller*, 393 S.C. at 63, 709 S.E.2d at

137 (emphasis added). Nevertheless, the Court of Appeals appeared to find this standard was met based on Miller's *past* misconduct: "Miller was civilly committed against his will, [but] he admitted to committing a lewd act on a minor under the age of sixteen[,] which contributed to the basis for his civil commitment." *Id.* We find Miller's past misconduct is irrelevant in this particular analysis, as it would not form the basis for finding a probation violation nor would it support tolling of probation because the conduct occurred before sentencing.

The general rule applied in most jurisdictions is that the tolling of probation is appropriate where the authorities could not supervise the defendant due to the defendant's wrongful acts. It is based on the principle that a defendant should not be allowed to profit from his own misconduct which prevents supervision by probationary authorities. *See generally* 24 C.J.S. *Criminal Law* § 2153 (2006) ("The period of probation is tolled while the probationer is a fugitive from justice or serving a sentence imposed by another court. The period during which the probationer is imprisoned for violating his or her probation tolls the probationary term for the duration of the imprisonment." (footnote omitted)). The references to tolling by our own appellate courts have also focused on fault-based grounds. Thus, we conclude that the tolling of probation must be premised on a violation of a condition of probation or a statutory directive.

The State does not allege that Miller has violated a condition of his probation. Indeed, the State makes no allegation of fault by Miller. The State argues only that Miller's probationary period should be tolled because he is receiving mental health treatment in the SVP program and is, therefore, unavailable for community supervision.

The SVP program in this state is administered under the supervision of the Department of Mental Health. *See generally* S.C. Code Ann. § 44-48-20 (Supp. 2012) (providing the General Assembly has found that an involuntary, civil commitment process is desirable for those found to be an SVP and observing that "[t]he civil commitment of [SVPs] is not intended to stigmatize the mentally ill community"); *id*. § 44-48-30(1)(a)-(b) (defining an SVP as one who (1) "has been convicted of a sexually violent offense," and (2) "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment").

Notwithstanding its punitive attributes, this Court and many others, to include the United States Supreme Court, have concluded that an SVP program is a civil, non-punitive treatment program. *Seling v. Young*, 531 U.S. 250, 267 (2001) (concluding confinement under Washington's SVP program was civil and not intended as punishment); *Kansas v. Hendricks*, 521 U.S. 346, 361-65 (1997) (holding a similar SVP program was civil and that involuntary commitment for a mental abnormality was not punitive); *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002) (stating the SVP Act is a civil, non-punitive statutory scheme); *In re Care and Treatment of Matthews*, 345 S.C. 638, 648, 550 S.E.2d 311, 316 (2001) ("Our [SVP] Act specifies the purpose of the Act is **civil** commitment."). The SVP program is treated as a civil program for all other purposes, and we see no existing basis for treating this type of civil commitment for persons with mental illness any differently than other forms of civil commitment.

Traditionally, a civil commitment, whether in a drug treatment center, mental health clinic, or other facility, does not give rise to tolling, and it appears inconsistent to treat those under civil commitment in the SVP program any differently in the absence of some legislative directive to do so. As it stands now, commitment to the SVP treatment program is indeterminate and could last a life time. Although we certainly appreciate the policy considerations that weigh on both sides in this matter, the decision to carve out a categorical exception for those committed in the SVP program, as opposed to other forms of civil commitment, is a matter best left to the General Assembly, since probation exists solely by statute, and the General Assembly has not, to date, seen fit to make this exception.

IV. CONCLUSION

Based on the foregoing, we reverse the decision of the Court of Appeals, which upheld the tolling of Miller's probation during his civil commitment in the SVP program.

REVERSED.

TOAL, C.J., KITTREDGE, J., and Acting Justice James E. Moore, concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Troy Taylor, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2009-123871

ON WRIT OF CERTIORARI

Appeal from Georgetown County
Michael G. Nettles, Circuit Court Judge

Opinion No. 27272
Submitted September 1, 2012 – Filed June 19, 2013

AFFIRMED

Jeremy A. Thompson of Columbia, South Carolina, for Petitioner Robert Troy Taylor.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Christina J. Catoe, all of Columbia, South Carolina, for Respondent State of South Carolina.

CHIEF JUSTICE TOAL: Robert Troy Taylor (Petitioner) contests the post-conviction relief (PCR) court's finding that he did not receive ineffective assistance of counsel after his plea counsel failed to advise him of the recidivist consequences of his guilty plea, and did not adequately investigate one of the charges prior to his guilty plea. We affirm.

FACTUAL/PROCEDURAL HISTORY

On April 20, 2006, in Georgetown County, Petitioner pleaded guilty as charged to the indicted offenses of one count of criminal sexual conduct with a minor in the second degree (CSC 2nd) and two counts of committing lewd act upon a minor (lewd act).[1]

[1] Petitioner waived presentment to the grand jury on the CSC 2nd charge and pleaded guilty as indicted to the two lewd act charges. Specifically, Petitioner pleaded guilty to sexual encounters occurring in 1988, 1989, and 1999 and involving three separate male minors. At Petitioner's plea, the State averred that Petitioner engaged in the lewd acts in 1988 and 1989 with Victims 1 and 2, both aged twelve at the time of the incidents, while Petitioner served as their youth pastor. According the Indictment, Petitioner forced these Victims to engage in inappropriate touching as they were sleeping in the bed with Petitioner. The CSC 2nd charge arose from an incident in 1999, in which Victim 3 alleged Petitioner sodomized him during a church-sanctioned trip to the beach during Petitioner's tenure as head pastor at Low County Baptist Church in Murrells Inlet, South Carolina. Although Petitioner admitted to the facts of these allegations during his plea, at sentencing, he presented the following mitigation: (1) Petitioner and his parents claimed Petitioner was a victim of generational sexual abuse, and as pastor at Low County Baptist, he often used the sexual abuse inflicted upon him as a child as a tool in his ministry; (2) many of the members of Petitioner's church were present at the plea to support him; (3) since the incidents, Petitioner had married and fathered three children, two biological children and an adopted teen-aged son from Romania; and (4) the young children submitted letters on Petitioner's behalf, and the teen-aged son spoke on Petitioner's behalf in court, pleading for leniency for Petitioner and claiming Petitioner had never sexually abused him.

During his guilty plea, Petitioner stated unequivocally that he committed the acts alleged by the State, and engaged in a detailed colloquy with the court affirming that he entered into the plea voluntarily, knowingly, and intelligently. The circuit court sentenced Petitioner to concurrent sentences of imprisonment for a period of eight years, suspended upon the service of five years, plus three years' probation, for each of the charges. No direct appeal was taken with respect to these convictions or the sentences.

At the time of the Georgetown County plea, plea counsel also represented Petitioner on pending charges in Williamsburg County involving one of the Georgetown County victims. Unbeknownst to Petitioner at the time of the Georgetown plea, he became eligible to receive a sentence of life without the possibility of parole (LWOP), pursuant to section 17-25-45(A) of the South Carolina Code, or the "two-strike" law, upon a subsequent conviction of another "most serious" crime. *See* S.C. Code Ann. § 17-25-45(A) (2003).[2]

Petitioner proceeded to trial on the Williamsburg charges in July 2007, and a jury found him guilty of CSC 2nd and kidnapping. The circuit court judge sentenced Petitioner to two consecutive LWOP sentences, pursuant to section 17-25-45 of the South Carolina Code, due to his prior conviction for CSC 2nd in Georgetown County. Petitioner filed a direct appeal upon his conviction in the Williamsburg County case, which was affirmed. *See State v. Taylor*, Op. No. 4920 (S.C. Ct. App. filed Dec. 21, 2011) (Davis Adv. Sh. No. 46 at 107).

On April 3, 2007, Petitioner filed an application for PCR, and an evidentiary hearing was convened on November 20 and 21, 2008.

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[2] CSC 2nd is considered a "most serious" offense for purposes of sentencing enhancement under this section. *See* S.C. Code Ann. § 17-25-45(C)(1) (Supp. 2011) (enumerating "most serious" offenses). At the time of Petitioner's plea, an LWOP sentence was mandatory under section 17-25-45(A). *See* S.C. Code Ann. § 17-25-45(G) (2003) (providing the provisions of section 17-25-45(A) are mandatory). Under its present iteration, section 17-25-45(G) provides that the Solicitor has discretion to seek sentencing enhancement under section 17-25-45(A). *See* S.C. Code Ann. § 17-25-45(G) (Supp. 2011) ("The decision to invoke sentencing under this section is in the discretion of the solicitor.").

At the evidentiary hearing, plea counsel admitted he did not advise Petitioner that his plea to CSC 2nd in Georgetown County could be used as a predicate offense that would expose him to an LWOP sentence on the Williamsburg County charges,[3] and that this was a grave mistake in his representation.[4]

Petitioner testified that he was unaware of the potential for an LWOP sentence in the Williamsburg County case until after he pleaded guilty to the Georgetown County charges.[5] He testified further that he and plea counsel never discussed that pleading guilty in Georgetown would result in a "strike," and that he

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[3] Plea counsel explained that the Williamsburg County charge was originally for lewd act, and at the time of the Georgetown County plea, counsel had not read the warrant indicating the charge had intensified, and he had not yet seen the discovery in the Williamsburg County case. However, plea counsel stated that he would have discussed the ramifications of pleading guilty in Georgetown with Petitioner if he realized the severity of the Williamsburg County charges. On the other hand, Petitioner testified that although he had been charged initially with lewd act in Williamsburg County, he became aware of the increased severity of the Williamsburg County charges in November 2005. Petitioner testified that he was unaware until the PCR hearing that plea counsel misapprehended the severity of these charges in Williamsburg County at the time of his Georgetown County plea.

[4] For example, at one point during the proceeding, plea counsel explained: "And—And I'm gone [sic]—I'm going to continue to say this: I made a mistake in this case. The mistake is I didn't tell [Petitioner] about the second strike . . . . I certainly will never make that mistake again."

[5] Petitioner testified he understood that all of his charges, including those alleged in Williamsburg County, were connected and that he "was taking the trash out at the same time . . . . up until [he and plea counsel] literally were walking through the door to go in front of [the plea judge]." Petitioner testified that, "at that point, [plea counsel] said, 'I was not able to take care of the stuff in Williamsburg, but go ahead and do this, and we'll take care of that later.'"

would not have chosen to plead guilty in Georgetown County had he known the plea could expose him to an LWOP sentence on the Williamsburg County charges.[6]

Upon realizing his mistake, however, plea counsel testified he sought to mitigate the impact it would have on the Williamsburg County charges. To this end, plea counsel testified he approached the Solicitor in charge of Petitioner's case in Williamsburg County, and they came to an informal agreement under which the Solicitor would allow Petitioner to plead to the lesser-included offense of lewd act with no sentencing recommendation made by the State during the plea. Plea counsel testified he was confident that Petitioner would receive an identical and concurrent sentence to his sentence for the Georgetown County charges. Plea counsel testified the deal was contingent upon Petitioner's acceptance of these terms, yet Petitioner remained adamant that he would not plead guilty to the Williamsburg County charges. Around this time, the relationship between Petitioner and plea counsel began to deteriorate because Petitioner was angry with plea counsel for failing to inform him of the consequences of the Georgetown County plea. Therefore, prior to the formalization of the agreement orchestrated by plea counsel, Petitioner fired plea counsel and hired new counsel to handle the Williamsburg County case. Petitioner's new counsel never communicated with the Solicitor concerning the plea deal, and Petitioner proceeded to trial on the Williamsburg County charges.

At the evidentiary hearing, the PCR court also questioned Petitioner extensively about the particulars of his exchange with the Georgetown County plea judge, and Petitioner admitted that he declared unequivocally at the plea that he was guilty of the charges and subsequently engaged in a lengthy colloquy with the

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[6] Conversely, plea counsel testified that Petitioner chose not to proceed to trial on the Georgetown County charges as initially planned because, prior to trial, his wife's divorce attorney provided a disc to the Solicitor containing a recorded conversation in which Petitioner admitted to the facts of the Georgetown County allegations. Plea counsel testified that once Petitioner listened to the recorded conversation, he decided to plead guilty to the Georgetown County charges instead of proceeding to trial. At the PCR hearing, Petitioner denied the conversation related to the crimes charged and that he decided to plead guilty because of the existence of the recorded conversation.

plea judge concerning the voluntariness of his plea. However, Petitioner asserted that he was not in fact guilty of CSC 2nd, and that plea counsel failed to investigate evidence that would have exonerated him.

Specifically, Petitioner pointed to a discrepancy in the alleged date on which the CSC 2nd occurred. The arrest warrant indicated the CSC occurred in June or July 1999. Shortly before the Georgetown County plea, the indictment was prepared, alleging the CSC 2nd occurred "on or about August 5, 1999 through August 7, 1999." According to the statement of facts presented at the plea proceeding, the victim alleged he and Petitioner had gone to the beach. When Petitioner discovered the boys waiting to shower at the church, he offered to allow the victim to shower at his home, where they engaged in the sexual act forming the allegations against Petitioner.

Petitioner presented evidence at the PCR hearing that the showers at the church were not in operation that summer, which he claimed plea counsel could have presented as evidence to refute the victim's testimony for either the June/July dates or the August dates. In addition, Petitioner testified he was assisting several members of the church with renovations on another member's home on August 5–7, 1999. Therefore, he claimed he could not have committed the crimes on the dates alleged in the Indictment. Although Petitioner claimed he would not have pleaded guilty to the Georgetown County charges had he known about the date change in the Indictment, the Record reveals that Petitioner was advised by the time of the plea that the dates for the alleged CSC 2nd had changed to August 5–7. Moreover, plea counsel testified that Petitioner never advised counsel of his potential alibi or the information available to him for purposes of discrediting the victim's testimony about the showers at the church. In fact, plea counsel testified that, prior to the plea, Petitioner informed him he knew of a witness who would exonerate him. However, counsel testified that when he interviewed the supposed witness, he remembered nothing about the time period in question or the particular beach trip. According to plea counsel, Petitioner never advised him of the fact that there were no working showers at the church. Furthermore, plea counsel testified he did not discover any information which would have aided Petitioner in defending against the CSC 2nd charge.

The PCR court issued an Order of Dismissal denying Petitioner's application as to all issues. Specifically relevant to this appeal, the PCR court found that the recidivist consequence of Petitioner's plea resulting in enhancement of Petitioner's

sentence was a collateral consequence of the plea about which counsel had no duty to advise Petitioner. The PCR court further found that, even if the recidivist consequence were a circumstance about which Petitioner should have been advised, he did not find credible Petitioner's testimony that he would have gone to trial on the Georgetown charges had he known about the consequence, as Petitioner indicated he expected to be exonerated on the Williamsburg County charges. Consequently, Petitioner believed an LWOP sentence would have been "a mere future contingency that he thought would never apply to him." In addition, the PCR judge found Petitioner, a thirty-six year old, failed to point to a significant difference between an LWOP sentence and the fifty year sentence, of which he would have to serve eighty-five percent, he would face on the Williamsburg County charges if he had not had a prior conviction for a "most serious" offense. Finally, the PCR judge found the Solicitor offered to allow Petitioner to plead to a lesser-included offense in the Williamsburg County case, which would not have subjected him to an LWOP sentence, and although plea counsel strongly urged Petitioner to accept the offer, Petitioner chose to exercise his right to a jury trial, thereby subjecting himself to an LWOP sentence. Accordingly, the PCR judge found Petitioner's LWOP sentence was a direct result of his knowing and voluntary decision to reject the plea offer in the Williamsburg County case and his ultimate conviction on those charges.

With respect to the failure to investigate claim, the PCR court found that Petitioner failed to prove counsel's performance fell below reasonable professional norms or that he suffered any prejudice because: (1) counsel and Petitioner reviewed discovery prior to the plea; (2) through his investigation, counsel learned pertinent witnesses had no memory of the events surrounding the allegations, but some recalled facts that were harmful to Petitioner's case; (3) Petitioner and his family were aware of the date change prior to the plea, and at no time did Petitioner tell counsel that the new dates impacted his decision to plead guilty; (4) the alibi testimony presented by Petitioner did not necessarily refute that the crime occurred; and (5) Petitioner never mentioned the inoperability of the showers to his counsel. Based on these facts, the PCR court found counsel's investigation was reasonable under the circumstances.

Petitioner appealed to this Court for a writ of certiorari, and we granted review on the briefs pursuant to Rule 215, SCACR.

ISSUES PRESENTED

I. Whether plea counsel's failure to advise Petitioner of the recidivist consequence of his plea on another pending criminal charge constitutes ineffective assistance of counsel.

II. Whether defense counsel's failure to conduct a sufficient investigation into the criminal sexual conduct charge constitutes ineffective assistance of counsel.

STANDARD OF REVIEW

On appeal in a PCR action, this Court applies an "any evidence" standard of review. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The "PCR court's ruling should be upheld if it is supported by any evidence of probative value in the record." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (citing *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 686). As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 668). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); *see also Hill v. Lockhart*, 474 U.S. 52, 56 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970))). "The second, or 'prejudice,' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. 52 at 59. In other words,

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Holden, 393 S.C. at 572, 713 S.E.2d at 615 (quoting *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); *see also Hill*, 474 U.S. at 59 (footnote omitted). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citations omitted).

LAW/ANALYSIS

I. Counsel's Failure to Advise on Recidivist Consequences of Pleading Guilty

This petition presents the novel question of whether plea counsel's failure to advise Petitioner of CSC 2nd's status as a "most serious" offense, which could be used to enhance his sentence for pending charges under section 17-25-45, constitutes ineffective assistance of counsel.

Petitioner argues that the United States Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), forecloses this Court from considering the direct/collateral consequences distinction and consequently renders plea counsel's

performance deficient in this case.[7] On the other hand, the State argues that the Supreme Court never meant for *Padilla* to apply retroactively, but regardless, *Padilla*'s application is limited to the consequence of deportation.[8] In the alternative, Petitioner argues his plea was still involuntarily entered because of plea counsel's failure to inform him of the recidivist consequences of pleading guilty to CSC 2nd under our State's direct/collateral consequence distinction. On the other hand, the State argues that the LWOP sentence was not a certainty at the time of the Georgetown plea because Petitioner's receipt of an LWOP sentence "required application of legal principles entirely extraneous to the criminal statutes" in question, and the "future imposition of an LWOP sentence was entirely contingent upon events occurring after Petitioner's guilty plea, and upon actions taken by individuals other than the plea court." Thus, Respondent contends, the recidivist consequence was collateral.

In our opinion, Petitioner's *Padilla* claim is a red herring, as *Padilla* has no application to Petitioner's plea, and further, we need not determine whether or not

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[7] In *Padilla*, the PCR petitioner had lawfully resided in the United States for forty years, and faced deportation after he pleaded guilty in Kentucky to transporting a large quantity of marijuana in his truck. *Padilla*, 130 S. Ct. at 1477. On collateral attack, the petitioner argued his counsel rendered deficient advice for failing to inform him of the deportation consequence of pleading guilty to the drug charge, but also affirmatively advising him prior to his plea that he "did not have to worry" about his immigrant status. *Id.* at 1478. In actuality, upon pleading guilty, deportation under the circumstances became "virtually mandatory." *Id.* The Kentucky Supreme Court denied Petitioner relief, classifying deportation as a collateral consequence, and therefore holding the Sixth Amendment did not shield the petitioner from his attorney's wrong advice concerning the immigration consequences of his conviction. *Id.* at 1478 & 1481. On appeal, the United States Supreme Court reversed due to the unique nature of deportation, stating that deportation could not be categorized as either a direct or collateral consequence. *Id.* at 1481–82 (internal citations omitted). Thus, the Supreme Court held that plea counsel was defective in failing to affirmatively advise the criminal defendant whether his guilty plea carried a risk of deportation. *Id.* at 1483–84.

[8] Incidentally, during the pendency of this Court's consideration of this case, the United States Supreme Court held that *Padilla* does not apply retroactively. *Chaidez v. United States*, 133 S. Ct. 1103, 1007 (2013).

the failure to advise of the recidivist consequences of a plea is a direct or collateral consequence here because Petitioner cannot demonstrate that he was prejudiced by counsel's mistake, which is fatal to Petitioner's claim. *See Roscoe v. State*, 345 S.C. 16, 20 n.6, 546 S.E.2d 417, 419 n.6 (2001) ("Although we have consistently held a defendant must have a full understanding of the consequences of his plea and of the charges against him, . . . the defendant must also demonstrate prejudice to be entitled to relief on PCR." (internal citations omitted)). To satisfy the prejudice prong, Petitioner must prove, through the presentation of probative and credible evidence, that he would have gone to trial instead of pleading guilty but for counsel's deficient advice. *See Smith v. State*, 369 S.C. 135, 139, 631 S.E.2d 260, 261–62 (2006).

Despite Petitioner's assertions to the contrary, there is probative evidence in the Record before us that he would not have chosen to proceed to trial on the Georgetown County charges had counsel told him about the strike.

The PCR court found that Petitioner lacked credibility, and neither Petitioner nor the witnesses he called to testify provided specific reasons why knowledge of the recidivist statute would have caused Petitioner to change his plea. More importantly, the PCR court found that Petitioner expected to be exonerated in the Williamsburg case, and therefore, at the time he pleaded guilty in Georgetown County, "[LWOP] would have been a mere future contingency that he thought would never apply to him." Moreover, the Solicitor had in fact offered Petitioner a plea bargain, allowing him to plead guilty to the lesser-included offense of lewd act, which would not have subjected Petitioner to the LWOP sentence. Plea counsel (prior to his discharge) strongly advised Petitioner to accept the plea bargain and claimed he was confident that Petitioner would receive a sentence concurrent to that received in Georgetown County. As stated by the PCR court, "[h]ad he agreed to do so, [Petitioner] most likely would not have served any additional time in prison, and he absolutely would not currently be serving a[n] [LWOP] sentence." Thus, the PCR court found "that [Petitioner] . . . proceeded to trial in Williamsburg with full awareness that he would receive [an LWOP sentence] if convicted, and he alone had the opportunity to completely avoid what might be considered a harsh result." We could not agree more with the PCR court's assessment. In addition to the reasons cited by the PCR judge, we note that counsel presented additional evidence at the PCR hearing that the catalyst for

Petitioner's decision to plead guilty to the Georgetown County charges was listening to a tape recording in the possession of the Solicitor detailing his involvement in the incidents forming the allegations against him.

Thus, under these facts, we hold that counsel was not ineffective for failing to inform Petitioner of the recidivist consequence of his guilty plea because Petitioner has not demonstrated he was prejudiced by counsel's deficient performance.

II. Failure to Investigate

Petitioner contends plea counsel was ineffective in failing to investigate the CSC 2nd charge when Petitioner could show inaccuracies in the victim's claims concerning the dates of the alleged crime. We disagree.

Specifically, Petitioner argues that because his arrest warrant stated the CSC 2nd allegedly occurred "between the date[s] of June 01, 1999 and July 30, 1999," but the Indictment provided to him prior to his plea indicated the CSC 2nd occurred "on or about August 5, 1999 through August 7, 1999," which were also the dates provided to the plea judge by the Solicitor during the plea as the potential dates the CSC 2nd could have occurred, counsel should have investigated these factual discrepancies. Petitioner further claimed that the CSC 2nd could not have occurred between the dates of August 5–7, 1999, and presented evidence in support of this claim at the PCR hearing.

Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. *Strickland*, 466 U.S. at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (citation omitted). In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court's principle concern is whether the investigation "*was itself reasonable*." *Wiggins v. Smith*, 539 U.S. 510, 522–23 (2003) (emphasis in original) (citation omitted). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006).

The PCR court found: (1) Petitioner was aware of the date change on his CSC 2nd indictment prior to entering his plea, and did not advise counsel the new dates impacted his decision to plead guilty; (2) Petitioner unequivocally admitted his guilt at the plea proceeding, which was in "sharp contrast" to the allegation that he had an alibi; (3) the indictment alleged the incident occurred "on or about" August 5–7, and was not limited to those specific days; (4) Petitioner's alibi was only for August 5–7, and, therefore, did not cover the entire period; and (5) Petitioner failed to advise counsel of his contention that the showers at the church were not working the summer of the incident, and counsel had no reason to suspect otherwise. Thus, the PCR court concluded that plea counsel's investigation was reasonable in light of the circumstances.

We agree with the State that probative evidence in the Record supports the PCR court's findings. *McCray v. State*, 317 S.C. 557, 559, 455 S.E.2d 686, 687–88 (1995) (citation omitted) (this Court must affirm the rulings of the PCR judge if there is any evidence to support the decision). Thus, we affirm the PCR court's finding that plea counsel conducted a reasonable investigation under the circumstances.

CONCLUSION

For the foregoing reasons, the decision of the PCR court is

AFFIRMED.

KITTREDGE and HEARN, JJ., concur. PLEICONES and BEATTY, JJ., concur in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cassandra Regina Crawford, Petitioner,
v.
Central Mortgage Company, Respondent.

Appellate Case No. 2012-205608

James W.O. Warrington, Sr., Petitioner,
v.
The Bank of South Carolina, Respondent.

Appellate Case No. 2012-206826

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Opinion No. 27273
Heard June 19, 2012 – Filed June 19, 2013

JUDGMENT FOR RESPONDENTS

David K. Haller of Haller Law Firm, of Charleston, for Petitioners, Cassandra R. Crawford and James W.O. Warrington, Sr.

Dean Anthony Hayes, of Korn Law Firm, P.A., of Columbia, for Respondent, Central Mortgage Co.; Mark S. Sharpe and John H. Warren, III of Warren & Sinkler, LLP, of Charleston, for Respondent, The Bank of South Carolina.

John T. Moore, Benjamin Rush Smith, III and Carmen

Harper Thomas, all of Nelson Mullins Riley & Scarborough, of Columbia, for Amicus Curiae, South Carolina Bankers Association.

Samuel C. Waters, Reginald P. Corley, Jaclynn Bowers Goings and Mary R. Powers, all of Rogers Townsend & Thomas, of Columbia, for Amicus Curiae, Mortgage Bankers Association of the Carolinas, Inc.

CHIEF JUSTICE TOAL: These cases present the novel question of whether a loan modification constitutes the unauthorized practice of law. Cassandra Crawford and James Warrington (collectively, Petitioners) own properties facing foreclosure. Prior to these foreclosure actions, Petitioners obtained loan modifications from their respective lenders to extend their loans' maturity dates and receive additional time to pay. Petitioners failed to make timely payments under the modified loan terms, and now seek to prevent foreclosure by arguing that their lenders engaged in the unauthorized practice of law by modifying the loans without an attorney. We disagree, and hold that modifying a loan without the participation of an attorney does not constitute the unauthorized practice of law.

FACTS/PROCEDURAL BACKGROUND

I. Crawford

Crawford purchased a home in Mount Pleasant, South Carolina in 2005. She financed the purchase by obtaining a mortgage from Central Mortgage Company (Central). Under the terms of the 2005 loan documents, Crawford borrowed $290,000 with an adjustable interest rate of 7.875 percent per annum and agreed to make monthly payments of $1,903.13 for 360 months. A licensed attorney supervised the closing of the original note and mortgage.

Crawford failed to make timely payments on the original mortgage, and requested a loan modification from Central. Central approved her request by letter dated November 7, 2008. Central notified Crawford that the modification would reduce her interest rate from 7.875 percent per annum to a new fixed rate of 5.875 percent per annum for the remaining life of the loan, and extend the time to repay the loan until November 1, 2048. Central also informed Crawford that past-due payments, escrow shortages, and legal fees/costs would be capitalized, including a delinquent interest of $5,709.09 and escrow shortage of $718.65, for a total

capitalization of $6,427.74. Central added this amount to Crawford's current unpaid balance of $289,985.46, resulting in a new unpaid balance of $296,413.20.

Crawford took the notification and modification documents to the law firm that had closed her original loan and had the documents witnessed and notarized.[1] On November 17, 2008, an attorney at the law firm mailed the signed modification documents back to Central. Central recorded the loan modification on November 21, 2008, at the Charleston County Register of Deeds.

Crawford subsequently requested a second loan modification. On January 21, 2010, Central informed Crawford she was eligible for a second modification. Under the second modification agreement, the unpaid principal balance became $320,875.39, but the maturity date remained November 1, 2048. Central further reduced the interest rate on the loan from 5.875 percent per annum to 2.25 percent per annum for the first five years, 3.25 percent per annum for the sixth year, 4.25 percent per annum for the seventh year, and 5 percent per annum for the eighth through thirty-ninth years. The modification resulted in a monthly principal and interest payment ranging from $1,034.65 for years 1 through 5, and $1,490.72 for years 8 through 39. Crawford signed and executed the agreement in front of a notary as required by the loan documents. Under a document entitled "Attorney Selection Notice," Central informed Crawford that "[b]y signing below, it is understood and agreed that you may hire a lawyer or attorney to advise you regarding this transaction and its consequences." Crawford signed her acknowledgement of the notice on January 28, 2010, and returned the agreement to Central for recording. Crawford never hired an attorney, and Central admits that the loan modification agreement was not prepared by a licensed attorney.

On July 14, 2010, Central filed a an action in the circuit court alleging Crawford defaulted on monthly mortgage payments since April 1, 2010, and

[1] Crawford and Central disagree as to whether the firm's attorney actually reviewed the loan documents with Crawford. Crawford "does not recall or believe that the 2008 modification was actually reviewed by an independent attorney," while Central claims that "a partner at the firm informed [Central's] counsel that the law firm's involvement would have included a review of the documents being signed." Central has chosen not to pursue this matter as this case concerns the second loan modification. Central acknowledges that the second modification, occurring in 2010, was not supervised by an attorney.

seeking foreclosure of the mortgage. Crawford petitioned this Court for declaratory relief in the Court's original jurisdiction. On March 8, 2012, this Court issued an order granting Crawford's petition and expediting this matter for oral argument pursuant to Rule 245, SCACR.

II. Warrington

Warrington purchased land on Goat Island in Charleston County and financed it with a commercial loan obtained from The Bank of South Carolina (the Bank). Warrington, a real estate investor, intended to develop the property by subdividing it into parcels for resale. Consequently, he obtained a variable rate loan from the Bank, set at the Bank's prime rate, and with interest-only payments due in two years' time. A licensed attorney oversaw the closing of the original note and mortgage.

Warrington could not make payment after the original note matured in November 2008. Warrington requested and received three successive loan modifications from the Bank to extend the loan maturity date and provide him additional time to pay. The first modification extended the maturity date to March 20, 2009, with interest-only payments required in the interim. Warrington's unpaid balance was $474,542.70, and his interest rate rose one-quarter percent to 4.25 percent per annum. The second modification extended the maturity date to October 20, 2009, again with payments to be made on an interest-only basis. The unpaid balance remained $474,542.70, but at an increased interest rate of 6 percent per annum. The third modification did not necessitate periodic interest payments but extended the maturity date of the loan to March 20, 2010, at which time all principal and interest was due in a single payment. The unpaid balance remained $474,542.70, but the interest rate increased to 6.5 percent.

The Bank prepared each of the three modification agreements using standard modification forms containing blanks. The Bank's employees filled in these blanks with input from various loan officers. The modification agreements were signed in the Bank's office and recorded by the Bank without the participation of a licensed attorney. The Bank's employee primarily responsible for executing the modification agreement testified he did not give any legal advice to Warrington during this process.

On March 20, 2010, when the loan matured, Warrington could not pay the amount due, and the loan went into default. Approximately nine months later, on January 25, 2011, the Bank filed a foreclosure action against Warrington in circuit

court. On January 26, 2012, Warrington petitioned this Court in its original jurisdiction for declaratory relief. On March 8, 2012, this Court granted Warrington's petition and stayed further proceedings in the lower court pursuant to Rule 245, SCACR.

As these two cases, which the Court heard separately, involve the same legal issues, they have been consolidated for review. *See* Rule 214, SCACR ("Where there is more than one appeal from the same order, judgment, decision or decree, or where the same question is involved in two or more appeals in different cases, the appellate court may, in its discretion, order the appeal to be consolidated.").

ISSUES

I. Whether lenders engage in the unauthorized practice of law by preparing and mailing loan modification documents to borrowers and recording the executed documents without the participation of a licensed attorney.

II. Whether the Court should deem Petitioners' mortgages void if the Court finds a loan modification completed without the involvement of a licensed attorney constitutes the unauthorized practice of law.[2]

[2] The Bank also raised two additional issues. First, whether the master-in-equity's judgment for Bank based on Warrington's discovery abuse is res judicata as to Warrington's case, and whether Warrington waived his right for declaratory relief by participating in the foreclosure action in the lower court. This Court granted Warrington's petition for declaratory relief prior to the filing of the master-in-equity's judgment, and therefore no final judgment exist for res judicata to apply. Additionally, the Bank's waiver claim is not grounded in proper law or supported by appropriate argument, and is thus abandoned. *See In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory); *see also Solomon v. City Realty Co.*, 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974) (deeming a conclusory argument abandoned).

ANALYSIS

I. Unauthorized Practice of Law

Petitioners allege that Central and the Bank (collectively, Respondents) engaged in the unauthorized practice of law by modifying a loan without the participation of a licensed attorney. We disagree.

The South Carolina Constitution delegates the duty to regulate the practice of law in South Carolina to this Court. *See* S.C. Const. art. V, § 4; *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992); *see also* S.C. Code Ann. § 40-5-10 (2011). "The generally understood definition of the practice of law 'embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts.'" *State v. Despain*, 319 S.C. 317, 319, 460 S.E.2d 576, 577 (1995) (quoting *In re Duncan*, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909)). The practice of law, however, "is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability." *State v. Buyers Serv. Co., Inc.*, 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987). The unauthorized practice of law jurisprudence in South Carolina is driven by the public policy of protecting consumers. *See In re Unauthorized Practice of Law Rules*, 309 S.C. at 307, 422 S.E.2d at 123 ("We hope by this provision to strike a proper balance between the legal profession and other professionals which will ensure the public's protection from the harms caused by the unauthorized practice of law."). For this reason, this Court has consistently refrained from adopting a specific rule to define the practice of law. *Id*. at 305, 422 S.E.2d at 124 (stating "it is neither practicable nor wise" to formulate a comprehensive definition of the practice of law). Instead, whether an activity constitutes the practice of law remains flexible and turns on the facts of each case. *Id.*

Previously, in *State v. Buyers Service Company, Incorporated*, 292 S.C. 426, 357 S.E.2d 15 (1987) and *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003), this Court addressed the unauthorized practice of law in the context of real estate transactions. In *Buyers Service*, we divided the purchase of residential real estate into four steps: (1) title search; (2) preparation of loan documents; (3) closing; and (4) recording title and mortgage, and held that a licensed attorney must supervise

each of these steps.[3] *Id*. at 430–34, 357 S.E.2d at 17–19 (emphasizing protection of the public as the paramount concern).

In *Doe v. McMaster*, 355 S.C. 306, 312, 585 S.E.2d 773, 776 (2003), the Court mandated attorney supervision for the refinancing of mortgages.[4] In that case, the lender attempted to distinguish *Buyers Service* by arguing that in *McMaster* the transaction centered on refinancing an existing mortgage rather than dealing with the purchase of a new property. *Id.* at 312, 585 S.E.2d at 776. We held this essentially a distinction without a difference because refinancing a mortgage entails the same four steps involved in purchasing a property. *Id. McMaster*, like *Buyers Service*, emphasized the public policy of advancing consumer interests. *Id*. at 311 n.3, 585 S.E.2d 776 n.3 (citation omitted) ("[T]his Court grounds its unauthorized practice rules in the State's ability to protect consumers in the state and not as a method to enhance the business opportunities for lawyers.").

Petitioners argue loan modifications "change the existing terms of the legal rights of the parties" by altering interest rates and repayment terms. Petitioners further assert that because the modification agreements have a "legal effect," the agreements must constitute the unauthorized practice of law. We disagree.

This case is distinguishable from both *Buyers Service* and *McMaster*. A loan modification is an adjustment to an existing loan to accommodate borrowers who have defaulted. In contrast, refinancing is the issuance of an entirely new loan, often used by home owners to take advantage of lower interest rates. Thus, the same public policy that requires attorney supervision for home purchases and

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[3] *See also Doe Law Firm v. Richardson*, 371 S.C. 14, 18, 636 S.E.2d 866, 868 (2006) ("Viewed in isolation, it cannot be said that the disbursement of loan proceeds in and of itself "entail[s] specialized legal knowledge and ability," such that it constitutes the practice of law . . . . [H]owever, the disbursement of funds in the context of a residential real estate loan closing cannot and should not be separated from the process as a whole. Accordingly, we hold that the disbursement of the funds must be supervised by an attorney.").

[4] *See also Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 139, 714 S.E.2d 532, 534–35 (2011) (holding a lender engaged in the unauthorized practice of law by refinancing a mortgage without attorney supervision).

refinancing does not apply to loan modifications. Requiring attorney supervision over a loan modification would create a cost to the consumer outweighed by the benefit. Additionally, the existence of a robust regulatory regime and competent non-attorney professionals militates against extending the attorney supervision requirement to loan modifications.

Thus, we hold that lenders do not engage in the unauthorized practice of law by preparing and mailing loan modifications to borrowers and recording the executed documents without participation of a licensed attorney. Given our rejection of the allegation that Respondents practiced law without authorization, it is unnecessary to reach Petitioners' issue as to whether this Court should deem their mortgages void. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

CONCLUSION

For the foregoing reasons, we hold that modifying a loan without attorney supervision does not constitute the unauthorized practice of law.

JUDGMENT FOR RESPONDENTS.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Emma Hamilton, Employee, Appellant,

v.

Martin Color-Fi, Inc., Employer, and Liberty Mutual Insurance Company, Carrier, Respondents.

Appellate Case No. 2012-210487

Appeal From the South Carolina Workers' Compensation Commission

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Opinion No. 5144
Heard May 9, 2013 – Filed June 19, 2013

AFFIRMED

Joseph T. McElveen, Jr., of Bahnmuller Goldman McElveen Ford Bultman & Rodriguez, PA, of Sumter, for Appellant.

Candace G. Hindersman, of Willson Jones Carter & Baxley, P.A., of Columbia, for Respondents.

KONDUROS, J.: Emma Hamilton appeals the order of the Workers' Compensation Commission's Appellate Panel (Appellate Panel) arguing the Appellate Panel erred in finding (1) her employer terminated temporary total disability benefits in compliance with statutory requirements, (2) she had reached maximum medical improvement (MMI), (3) she recieved the neccessary medical

treatment to lessen her period of disability, (4) she was not a credible witness, and (5) the award for permanent partial disability to her arm was appropriate. We affirm.

FACTS/PROCEDURAL HISTORY

Emma Hamilton worked as a machine operator for Martin Color-Fi, Inc. in Sumter, South Carolina. On July 22, 2008, she was injured at work when her right hand and forearm were caught in rollers and "crushed." She went to Tuomey Hospital Emergency Room and was treated for pain. The next day she began treatment with an orthopedist, Dr. James Gee. She continued to experience intermittent pain and weakness but Dr. Gee noted steady improvement. He ordered a nerve conduction study on October 22, 2008 because of her continued complaints. On November 26, 2008, Hamilton had an MRI of her wrist. Dr. Gee explained to Hamilton both tests came back essentially normal and she would improve over time.

Dr. Gee referred Hamilton to Dr. Michael Green, a hand specialist. Dr. Green believed she was at MMI and assigned her a 2% permanent disability rating, which he later changed to a 1% rating. At Dr. Green's suggestion, the insurance carrier authorized work hardening. This was discontinued because Hamilton continued to report pain in her hand and wrist. Dr. Gee advised her time would be the best cure and she needed to work on strengthening her hand herself.

Dr. Blake Moore conducted an independent medical evaluation (IME) of Hamilton on June 1, 2009. He stated she had not yet achieved MMI and would benefit from further treatment potentially, including surgery. He gave her a 7% whole person impairment rating.

Dr. Gee referred her to a hand specialist, Dr. David Fulton, for another IME on June 30, 2010. He placed Hamilton at MMI stating he saw no need to continue medical treatment and no permanent impairment.

Hamilton worked light duty at Martin Color-Fi until she was laid off in December 2008. She testified she does light chores around the house and has not looked for another job since she was laid off.

On October 12, 2010, Martin Color-Fi and its carrier, Liberty Mutual Insurance Company (collectively, Respondents), filed a Form 21 with the Workers' Compensation Commission requesting a stop payment of temporary compensation because Hamilton had reached MMI. They further requested to pay the permanent

disability amount and to receive a credit for overpayment of temporary compensation. Hamilton filed a Form 50 on November 22, 2010, asking for additional treatment. Respondents filed a Form 51, denying the need for additional medical treatment.

A hearing was held on December 15, 2010, in front of a single commissioner. He set forth an order declaring Hamilton had reached MMI, she was entitled to 10% permanent partial disability, and Respondents were entitled to a stop payment of temporary total compensation as of June 30, 2010. He calculated her total compensation at $7,575.70. He found Respondents were entitled to a credit for overpayment against the award for permanent partial disability from that date in the amount of $11,019.20. Hamilton appealed to the Appellate Panel, which affirmed in full. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law. *Stone v. Traylor Bros., Inc.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).

The substantial evidence rule governs the standard of review in a workers' compensation decision. *Frame v. Resort Servs. Inc.*, 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004).

> "Substantial evidence" is not a mere scintilla of evidence . . . [but] is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached . . . .

Lark, 276 S.C. at 135, 276 S.E.2d at 306.

LAW/ANALYSIS

I. Stop Payment

Hamilton argues the Appellate Panel erred in finding she reached MMI on June 30, 2010, because her authorized health care provider did not report she reached MMI. She asserts only Drs. Green and Fulton, her IME doctors, stated she was at MMI. We disagree.

The relevant South Carolina Regulation states:

> After the one hundred fifty day period, when the claimant is receiving temporary compensation and the authorized health care provider reports the claimant has reached maximum medical improvement, the employer's representative shall continue payment of temporary compensation until the Commission finds the employer's representative may terminate compensation unless compensation has been suspended according to R.67-505.

S.C. Code Ann. Regs. 67-506(B) (2012).

The record contains substantial evidence Hamilton's authorized health care provider found she had reached MMI. The Appellate Panel found Dr. Gee placed Hamilton at MMI in a report dated May 27, 2009. Dr. Gee is Hamilton's authorized health care of provider. His report specifically states "at some point between February 25, 2009 and March 25, 2009, [he] felt she reached maximum medical benefits as far as active orthopedic care was concerned." Additionally, Dr. Green placed Hamilton at MMI on February 11, 2009. Dr. Fulton found she reached MMI when he saw her on June 30, 2010. The Appellate Panel determined Hamilton reached MMI on June 30, 2010.

Nowhere does Reg. 67-506(B) require the date the authorized health care provider gives for the patient's MMI match the date given by the Appellate Panel. Nor does it state the Appellate Panel is barred from considering MMI dates offered by other physicians. *Id*. Here, Hamilton's authorized health care provider determined she reached MMI before the date the Appellate Panel chose. Other doctors placed her

at MMI around the same time as her authorized provider or on the same date the Appellate Panel found. Accordingly, we affirm the Appellate Panel's decision.

II. MMI

Hamilton contends the Appellate Panel erred in finding she had reached MMI because Drs. Green, Fulton, and Gee either did not find she was at MMI or their findings were unsupported by evidence. Hamilton maintains Dr. Green's recommendation of work hardening contradicts a finding of MMI. She asserts because Dr. Fulton did not use the term "maximum medical improvement," his report is not adequate. Likewise, Hamilton questions Dr. Gee's finding of MMI because he also suggested work hardening. We disagree.

MMI "is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." *O'Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). MMI is a factual determination made by the Appellate Panel that will be upheld unless not supported by substantial evidence.

"[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. *Bass v. Kenco Grp.*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).

The Appellate Panel found Drs. Green, Fulton, and Gee all determined at some point Hamilton was at MMI. The record contains substantial evidence to support these findings. Dr. Green believed work hardening could increase her strength in the injured hand and she had reached maximum medical benefits with regard to motion. He stated she could work unrestricted activities. Dr. Fulton determined she could work without restriction and no further treatment was medically

necessary. As previously discussed, Dr. Gee reported that Hamilton reached MMI sometime between February and March 2008.

Hamilton also questions the decision of the Appellate Panel to give more weight to the findings of Drs. Green and Fulton than Dr. Moore and the Appellate Panel's finding she was at MMI when Dr. Moore stated she had not reached MMI yet. She claims his report is the most thorough and should, therefore, be given more deference.

The regulations do not forbid the assignment of more or less weight to different reports. Hamilton does not deny that Drs. Green and Fulton are "hand specialists"; she only asks the Appellate Panel be stopped from giving their opinions more weight. Nothing suggests the Appellate Panel overreached in giving more credence to the reports of more specialized physicians.

South Carolina jurisprudence makes clear the Appellate Panel determines the weight of the evidence. The Appellate Panel had all four doctors' reports available to them and decided the reports of Drs. Green, Fulton, and Gee were more convincing than Dr. Moore's. Nothing in the record suggests this determination was beyond their scope or flawed. The Appellate Panel makes the final determination on credibility. Accordingly, the Appellate Panel did not err in finding Hamilton had reached MMI.

III. Necessary Medical Treatment

Hamilton argues the Appellate Panel erred in finding she was not entitled to further medical treatment. She claims that while she saw four doctors to manage her injury, she was only treated by Dr. Gee, and she categorizes his care as minimal. Although he ordered a nerve conduction study and MRI of the wrist, Hamilton believes he ignored the findings of the tests. In his report, Dr. Moore wrote surgery ought to be considered based on his reading of the MRI. Hamilton also points to the note found in the nerve conduction study requesting the neurologist "rule out other potential contributing factors." She posits this note restricted the neurologist to only eliminate other potential causes of her wrist problems rather than look for the underlying cause. We disagree.

Section 42-15-60 of the South Carolina Code outlines the employer's financial responsibilities to an employee receiving workers' compensation. It states:

> The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. In addition to it, the original artificial members as reasonably may be necessary must be provided by the employer.

S.C. Code Ann. § 42-15-60(A) (Supp. 2012).

The record contains substantial evidence to support the Appellate Panel's finding Hamilton was not entitled to further medical treatment. Hamilton was seen and treated by Dr. Gee for over two years. Many of the notes from those visits indicate Dr. Gee believed time would be a major factor in her improvement. He did not pursue a more aggressive course because he reasoned usage of the wrist over time would produce a better result.

Further, substantial evidence indicates the MRI and nerve conduction studies were not ignored. Dr. Moore focused on the fact the MRI revealed "subtle sclerosis with increased signal and small subchondral cystic degenerative changes." However, Dr. Gee specifically states Hamilton's MRI was essentially normal. He and Dr. Fulton also found the nerve conduction study results were normal. Drs. Green, Fulton, and Gee all agreed she would not benefit from further medical treatment. Dr. Gee, as the authorized treating physician, completed a Form 14B stating he believed within a reasonable degree of medical certainty Hamilton did not require more treatment. Dr. Moore's report conflicted with the other recommendations; however, the Appellate Panel had access to all the reports and determined medical care should be stopped. Accordingly, the Appellate Panel did not err in ordering medical care be stopped.

IV. Hamilton's Credibility

Hamilton contends the Appellate Panel erred in finding her uncredible. She maintains the Appellate Panel has no cause to question her credibility. She argues the mere attempt to use a post hole digger was held against her. We disagree.

The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (citing *Ford v. Allied Chem. Co.*, 252 S.C. 561, 167 S.E.2d 564 (1969)). It is not the task of an appellate court to weigh the evidence as found by the Appellate Panel. *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 494-95, 541 S.E.2d 526, 529 (2001).

The Appellate Panel was in the best position to gauge the credibility of a witness because they saw and talked with her. No other evidence in the record points to Hamilton's credibility, however this court differentiates between the use and the attempted use of a post hole digger. Therefore, the Appellate Panel did not err in finding her uncredible.

V. 10% Permanent Partial Disability

Hamilton contends the Appellate Panel erred in determining her disability to be 10% and requests a greater award of partial disability. She does not attempt to show a loss of earning capacity. Hamilton does state that the doctor's impairment rating is unreliable. She points to Dr. Greene's initially stating she suffered a 2% permanent impairment to her right arm and later changing it to 1%. We disagree.

The only injury Hamilton sustained was to her right arm. Therefore, she is eligible to receive permanent partial disability under section 42-9-30(13) which grants "for the loss of an arm, sixty-six and two-thirds percent of the average weekly wages during two hundred twenty weeks." S.C. Code Ann. § 42-9-30(13) (Supp. 2012). To come under the statute, a claimant must show an injury and a loss of earning capacity. *Bass v. Kenco Grp.*, 366 S.C. 450, 460-61, 622 S.E.2d 577, 582 (Ct. App. 2005).

"[T]he extent of an injured workman's disability is a question of fact for determination by the [Appellate Panel] and will not be reversed if it is supported by competent evidence." *Colvin v. E. I. Du Pont De Nemours Co.*, 227 S.C. 465, 473, 88 S.E.2d 581, 585 (1955).

In this case, Dr. Green assigned Hamilton an impairment rating in her right arm of 2%, which was later changed to 1%. Dr. Fulton stated he saw no permanent partial impairment of her right arm. Dr. Fulton gave her a 7% whole person rating. Hamilton does not point to any facts other than Dr. Fulton's recommendation in support of her contention her disability percentage should be higher. The opinions

submitted by the two other doctors support the determination of the Appellate Panel. Therefore, sufficient evidence justified the Appellate Panel's finding of 10% permanent disability.

CONCLUSION

Based on the foregoing, the Appellate Panel's decision is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.