The Supreme Court of South Carolina

In the Matter of Carolyn B. Branan, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 11, 1977, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated July 31, 2012, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
September 10, 2012

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32
September 12, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION TO FILE PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2012-UP-523-Anthony Upshaw v. S.C. Department of Employment and Workforce
(Administrative Law Court, Judge John D. McLeod)

2012-UP-524-State v. Robert Mathis
(Cherokee, Judge Roger L. Couch)

2012-UP-525-State v. Casey Ray Perkins
(Chester, Judge Brooks P. Goldsmith)

2012-UP-526-State v. Christopher Ryan Whitehead
(Kershaw, Judge G. Thomas Cooper, Jr.)

PETITIONS FOR REHEARING

4960-Lucey v. Meyer	Pending
4984-State v. B. Golston	Pending
4985-Boyd v. Liberty Life Insurance Co. et al.	Pending
4997-Allegro, Inc. v. Emmett J. Scully et al.	Pending
5008-Stephens v. CSX Transportation	Pending
5009-State v. B. Mitchell	Pending
5010-SCDOT v. Revels	Pending
5013-Watson v. Xtra Mile Driver Training	Pending
5016-SC Public Interest Foundation v. Greenville County	Pending
5017-State v. C. Manning	Pending
5019-Johnson v. Lloyd	Pending
5020-Rhame v. Charleston County School District	Pending
5021-Southern Glass & Plastics Co. Inc. v. Kemper	Pending
5022-Gregory A. Collins v. Seko Charlotte	Pending
5023-Robin Holmes v. Rita Kay Holmes	Pending

5025-State v. Randy Vickery	Pending
5026-State v. Glenn Lee	Pending
5027-Regions Bank v. Richard C. Strawn et al.	Pending
2012-UP-226-State v. C. Norris	Pending
2012-UP-267-State v. J. White	Pending
2012-UP-286-Rainwater v. Rainwater	Pending
2012-UP-295-L. Hendricks v. SCDC	Pending
2012-UP-321-State v. J. Tinsley	Pending
2012-UP-325-Abrams v. Nan Ya Plastics Corp., et al.	Denied 09/05/12
2012-UP-330-State v. D. Garrett	Pending
2012-UP-332-Tomlins v. SCDPPS	Pending
2012-UP-351-State v. K. Gilliard	Pending
2012-UP-353-Shehan v. Shehan	Pending
2012-UP-371-State v. T. Smart	Pending
2012-UP-385-Suresh J. Nandwani et al. v. Queens Inn Motel et al.	Pending
2012-UP-388-State of South Carolina ex rel. Robert M. Arial, Solicitor, Thirteenth Judicial Circuit v. $88,148.45, $322, and $80 and Contents of Safe Deposit Box 22031 and Moon Magruder et al.	Pending
2012-UP-417-HSBC v. McMickens	Pending
2012-UP-420-E. Washington v. A. Stewart	Pending
2012-UP-433-Jeffrey D. Allen, individually et al., v. S.C. Budget and Control Board Employee Insurance Program and Blue Cross and Blue Shield of South Carolina	Pending

2012-UP-443-Tony A. v. Candy A., O.K.S. and D.F.K Pending

2012-UP-479-Elkachbendi v. Elkachbendi Pending

2012-UP-480-State v. A. Gearhart Pending

2012-UP-481-State v. J. Campbell Pending

2012-UP-487-David Garrison and Diane G. Garrison v. Dennis Pagette and Melanie Pagette v. Nesbitt Surveying Co., Inc. Pending

2012-UP-493-State v. Travis Teasley Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4592-Weston v. Kim's Dollar Store Pending

4670-SCDC v. B. Cartrette Pending

4675-Middleton v. Eubank Pending

4685-Wachovia Bank v. Coffey, A Pending

4705-Hudson v. Lancaster Convalescent Pending

4711-Jennings v. Jennings Pending

4725-Ashenfelder v. City of Georgetown Pending

4742-State v. Theodore Wills Pending

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4766-State v. T. Bryant Pending

4770-Pridgen v. Ward Pending

4779-AJG Holdings v. Dunn Pending

4787-State v. K. Provet Pending

4798-State v. Orozco	Pending
4799-Trask v. Beaufort County	Pending
4810-Menezes v. WL Ross & Co.	Pending
4815-Sun Trust v. Bryant	Pending
4819-Columbia/CSA v. SC Medical	Pending
4823-State v. L. Burgess	Pending
4824-Lawson v. Hanson Brick	Pending
4826-C-Sculptures, LLC v. G. Brown	Pending
4831-Matsell v. Crowfield Plantation	Pending
4832-Crystal Pines v. Phillips	Pending
4833-State v. L. Phillips	Pending
4838-Major v. Penn Community	Pending
4842-Grady v. Rider (Estate of Rider)	Pending
4847-Smith v. Regional Medical Center	Pending
4851-Davis v. KB Home of S.C.	Pending
4857-Stevens Aviation v. DynCorp Intern.	Pending
4858-Pittman v. Pittman	Pending
4859-State v. Garris	Pending
4862-5 Star v. Ford Motor Company	Pending
4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending

4867-State v. J. Hill	Pending
4872-State v. K. Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending
4879-Wise v. Wise	Pending
4880-Gordon v. Busbee	Pending
4887-West v. Morehead	Pending
4888-Pope v. Heritage Communities	Pending
4889-Team IA v. Lucas	Pending
4890-Potter v. Spartanburg School	Pending
4894-State v. A. Jackson	Pending
4895-King v. International Knife	Pending
4897-Tant v. SCDC	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4912-State v. Elwell	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Lewin v. Lewin	Pending

4921-Roof v. Steele	Pending
4923-Price v. Peachtree	Pending
4924-State v. B. Senter	Pending
4926-Dinkins v. Lowe's Home Centers	Pending
4927-State v. J. Johnson	Pending
4932-Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending
4934-State v. R. Galimore	Pending
4936-Mullarkey v. Mullarkey	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. B. Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Crossland v. Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4956-State v. Diamon D. Fripp	Pending
4964-State v. A. Adams	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending

2010-UP-356-State v. Robinson	Pending
2010-UP-425-Cartee v. Countryman	Pending
2010-UP-494-State v. Nathaniel Noel Bradley	Pending
2010-UP-523-Amisub of SC v. SCDHEC	Pending
2010-UP-525-Sparks v. Palmetto Hardwood	Pending
2010-UP-552-State v. E. Williams	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-076-Johnson v. Town of Iva	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-091-State v. R. Watkins	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-125-Groce v. Horry County	Pending
2011-UP-127-State v. B. Butler	Pending
2011-UP-131-Burton v. Hardaway	Pending
2011-UP-132-Cantrell v. Carolinas Recycling	Pending
2011-UP-137-State v. I. Romero	Pending
2011-UP-138-State v. R. Rivera	Pending
2011-UP-145-State v. S. Grier	Pending
2011-UP-147-State v. B. Evans	Pending

2011-UP-148-Mullen v. Beaufort County School	Pending
2011-UP-152-Ritter v. Hurst	Pending
2011-UP-161-State v. Hercheck	Pending
2011-UP-162-Bolds v. UTI Integrated	Pending
2011-UP-174-Doering v. Woodman	Pending
2011-UP-175-Carter v. Standard Fire Ins.	Pending
2011-UP-185-State v. D. Brown	Pending
2011-UP-199-Davidson v. City of Beaufort	Pending
2011-UP-205-State v. D. Sams	Pending
2011-UP-208-State v. L. Bennett	Pending
2011-UP-218-Squires v. SLED	Pending
2011-UP-225-SunTrust v. Smith	Pending
2011-UP-229-Zepeda-Cepeda v. Priority	Pending
2011-UP-242-Bell v. Progressive Direct	Pending
2011-UP-263-State v. P. Sawyer	Pending
2011-UP-264-Hauge v. Curran	Pending
2011-UP-268-In the matter of Vincent Way	Pending
2011-UP-285-State v. Burdine	Pending
2011-UP-291-Woodson v. DLI Prop.	Pending
2011-UP-304-State v. B. Winchester	Pending
2011-UP-305-Southcoast Community Bank v. Low-Country	Pending

2011-UP-328-Davison v. Scaffe	Pending
2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-343-State v. E. Dantzler	Pending
2011-UP-346-Batson v. Northside Traders	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. L. Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-372-Underground Boring v. P. Mining	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Weinberg	Pending
2011-UP-385-State v. A. Wilder	Pending
2011-UP-398-Peek v. SCE&G	Pending
2011-UP-441-Babb v. Graham	Pending
2011-UP-447-Johnson v. Hall	Pending
2011-UP-456-Heaton v. State	Pending
2011-UP-462-Bartley v. Ford Motor Co.	Pending
2011-UP-463-State v. R. Rogers	Pending
2011-UP-468-P. Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. T. McCoy	Pending
2011-UP-475-State v. J. Austin	Pending
2011-UP-480-R. James v. State	Pending

2011-UP-481-State v. Norris Smith	Pending
2011-UP-483-Deans v. SCDC	Pending
2011-UP-495-State v. A. Rivers	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Hill v. SCDHEC and SCE&G	Pending
2011-UP-503-State v. W. Welch	Pending
2011-UP-516-Smith v. SCDPPPS	Pending
2011-UP-517-N. M. McLean et al. v. James B. Drennan, III	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-522-State v. M. Jackson	Pending
2011-UP-550-McCaskill v. Roth	Pending
2011-UP-558-State v. T.Williams	Pending
2011-UP-562-State v. T.Henry	Pending
2011-UP-565-Griggs v. Ashley Towne Village	Pending
2011-UP-572-State v. R. Welch	Pending
2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending
2011-UP-583-State v. D. Coward	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2011-UP-590-Ravenell v. Meyer	Pending
2012-UP-003-In the matter of the care and treatment of G. Gonzalez	Pending
2012-UP-008-SCDSS v. Michelle D.C.	Pending

2012-UP-010-State v. N. Mitchell	Pending
2012-UP-014-State v. A. Norris	Pending
2012-UP-018-State v. R. Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-037-Livingston v. Danube Valley	Pending
2012-UP-058-State v. A. Byron	Pending
2012-UP-060-Austin v. Stone	Pending
2012-UP-075-State v. J. Nash	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-089-State v. A. Williamson	Pending
2012-UP-091-State v. M. 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. Austin	Pending
2012-UP-218-State v. A. Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending

2012-UP-312-State v. E. Twyman	Pending
2012-UP-314-Grand Bees Development v. SCDHEC et al.	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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joetta P. Whitlock, Trustee of the
Joetta P. Whitlock Trust, Plaintiff,

v.

Stewart Title Guaranty Company, Defendant.

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR SOUTH CAROLINA
R. Bryan Harwell, United States District Judge

Opinion No. 27169
Heard May 1, 2012 – Filed September 12, 2012

CERTIFIED QUESTION ANSWERED

Gene M. Connell, Jr., of Kelaher, Connell & Connor, of Surfside Beach, and Courtney Connell Landsverk, of Simpsonville, for Plaintiff.

Louis H. Lang and Demetri K. Koutrakos of Callison Tighe & Robinson, of Columbia, for Defendants

---

JUSTICE KITTREDGE: We certified the following question from the United States District Court for the District of South Carolina:

> In the case of a partial failure of title which is covered by an owner's title insurance policy, where the title defect cannot be removed, should the actual loss suffered by the insured as a result of that partial failure of title be measured by the diminution in value of the insured property as a result of the title defect as of the date of the purchase of the insured property, or as of the date of the discovery of the title defect?

We have held in connection with a title insurance policy that "[t]he terms of individual insurance agreements can control the method of valuation." *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405, 411, 661 S.E.2d 62, 65 (2008). Although *Stanley* specifically addressed the *method* of valuing loss, the rubric of loss-valuation is not limited only to mathematical considerations. The specific matter of *timing* is an inherent part of the task of measuring damages. The question is thus answered by the insurance contract. Consequently, where the insurance contract unambiguously identifies a date for measuring the diminution in value of the insured property or otherwise unambiguously provides for the method of valuation as a result of the title defect, such date or method is controlling. Where, as here, the insurance contract does not unambiguously identify a date for measuring the diminution in value of the insured property or otherwise unambiguously provide for the method of valuation as a result of the title defect, such ambiguity requires a construction allowing for the measure of damages most favorable to the insured. In this case, the policy merely references "actual loss," but does not define the term or provide any guidance for determining the valuation date. Because of the ambiguity in the policy, the insured's damages should be measured as of the date of purchase of the property.

I.

On October 30, 2006, Plaintiff purchased a lot along the Intracoastal Waterway in Myrtle Beach. A mobile home and an out-building were situated on the property at the time of purchase. Plaintiff purchased the lot intending to build a single-family home on the property.

Since 1931, the property has been subject to a properly recorded spoilage easement allowing for the construction and maintenance of the Intracoastal Waterway.[1] At closing, Plaintiff purchased from Defendant an owner's title insurance policy in the face amount of $410,000—the amount of the purchase price. The existence of the spoilage easement was missed in the title search and therefore was not included as an exception to coverage in the title policy. The existence of the spoilage easement was not known by Plaintiff at the time she purchased the property.

In January 2010, Plaintiff sought a building permit from Horry County to construct a home on her property. Through that process, she learned of the spoilage easement, which prevented her from obtaining a building permit. It is undisputed that by 2010, the value of the property had decreased as a result of the downturn in the real estate market, irrespective of the diminution in value caused by the title defect.

Plaintiff filed an action seeking damages caused by the existence of the easement. The parties filed cross motions for summary judgment. Defendant argued the value of any loss should be measured as of the date of the discovery of the title defect. Plaintiff moved for summary judgment as to liability only and argued the case presented a jury issue regarding damages. Plaintiff contended that her damages, as measured by the diminution in property value, should be measured as of the date the property was purchased.

The United States District Court found Defendant was liable under the insurance policy and granted summary judgment in favor of Plaintiff. However, as to the issue of damages, the district court certified the above question to us.

II.

"Insurance policies are subject to the general rules of contract construction." *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). "The cardinal rule of contract interpretation is to ascertain and give legal

[1] According to Plaintiff, the spoilage easement allows the Army Corps of Engineers to dredge and maintain the Intracoastal Waterway and to place dredged material on Plaintiff's lot at any time.

effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "'Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.'" *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (quoting *Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)).

"Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *McGill*, 381 S.C. at 185, 672 S.E.2d at 574. "It is a question of law for the court whether the language of a contract is ambiguous." *McGill*, 381 S.C. at 185, 672 S.E.2d at 574. "'Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.'" *Clegg*, 377 S.C. at 655, 661 S.E.2d at 797 (quoting *Diamond State Ins. Co. v. Homestead Indust., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995)).

"A title insurer is generally liable for losses or damages caused by defects in the property's title, and defects for which title insurance policies provide coverage may generally be defined as liens and encumbrances that result in a loss in the title's value." *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405, 411, 661 S.E.2d 62, 65 (2008). "The terms of individual insurance agreements can control the method of valuation, but the purpose of title insurance has been stated as seeking to place the insured in the position that he thought he occupied when the policy was issued." *Id.* Generally, the measure of damages should "compare the encumbered value of the entire tract of . . . land with what the value of the entire tract of land would be without any encumbrances." *Id.* at 413, 661 S.E.2d at 66.

While we are aware of differing approaches to the certified question,[2] we are guided by the contract principle that parties may contract as they see fit, provided the contract terms do not offend public policy. In the context of establishing a method of valuation in a title policy, as noted above, "[t]he terms of individual insurance agreements can control the method of valuation." *Stanley*, 377 S.C. at 411, 661 S.E.2d at 65. The title policy here does not unambiguously set forth a

[2] Courts around the country have generally identified three points in time to measure an owner's actual loss: the date the property was purchased, the date the title defect was created, and the date the defect was first discovered.

method of valuation in line with the construction Defendant urges us to adopt. Thus, we need look no further than the general rule that ambiguities in an insurance contract must be construed in favor of the insured. In this case, that construction results in a date-of-purchase valuation date.

We fully appreciate the equity and inherent logic for valuing the property in this case as of the date of the discovery of the title defect as Defendant suggests. *See generally* Matthew C. Lucas, *Now or Then? The Time of Loss in Title Insurance*, 85 Fla. B.J. 10, 15 (2011). Defendant asserts that under a title policy the risk of a decline in the land's market value because of market conditions should be assumed by the purchaser, and the risk of the land's market value being impacted by a title matter should be assumed by the title insurance company. We conceptually agree with Defendant, but we are construing a contract of insurance, not attempting to fashion an equitable remedy. The insurance policy here simply fails to identify the valuation date as the date of discovery of the title defect or otherwise provide clear language that would require a valuation date in line with Defendant's position. The well-established rule concerning construction of ambiguous terms in insurance contracts compels a result adverse to Defendant's position.

III.

In sum, although we acknowledge the apparent inequity in our answer to the certified question, the resolution of this question is not a matter of equity. Rather, this Court is faced with the task of construing an insurance policy, and in the presence of an ambiguity we are constrained to interpret it most favorably to the insured. In this case, the date the property was purchased is the proper valuation date.

CERTIFIED QUESTION ANSWERED.

TOAL, C.J., HEARN, J., and Acting Justice James E. Moore, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent and would adopt the majority rule which values actual loss under an owner's title insurance policy as of the date of discovery of the title defect. I find persuasive the rationale for this choice as explained by the California Supreme Court:

> It seems quite apparent to us that liability should be measured by diminution in the value of the property caused by the defect in title as of the date of the discovery of the defect, measured by the use to which the property is then being devoted. When a purchaser buys property and buys title insurance, he is buying protection against defects in title to the property. He is trying to protect himself then and for the future against loss if the title is defective. The policy necessarily looks to the future. It speaks of the future. The present policy is against loss the insured "shall sustain" by reason of a defect in title. The insured, when he purchases the policy, does not then know that the title is defective. But later, after he has improved the property, he discovers the defect. Obviously, up to the face amount of the policy, he should be reimbursed for the loss he suffered in reliance on the policy, and that includes the diminution in value of the property as it then exists, in this case with improvements. Any other rule would not give the insured the protection for which he bargained and for which he paid. There may be some conflict in the authorities on this subject but the weight of authority and the better reasoned cases support the views above expressed.
>
> *Overholtzer v. Northern Counties Title Ins. Co.*, 253 P.2d 116, 130 (Ca. 1953).

Further, I do not agree with the majority that the contract's failure to specify when the actual loss occurs renders it ambiguous. In making this finding, the majority relies upon the *Stanley* opinion's statement that "the terms of individual [title] insurance agreements can control the method of valuation." *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405, 411, 661 S.E.2d 62, 65 (2008). *Stanley* is concerned with the methodology for measuring the damages caused by a title defect which affects only part of the property, not with the timing of that valuation. Moreover, if we were to read *Stanley* as deciding the issue of timing asked in this case, then we

should hold that the date of purchase is the only proper date for valuing the insured's loss.[3]

In my opinion, an insured suffers no actual loss until the defect is discovered: Until that juncture, the insured's loss is unrealized. Since only a loss that is actualized is insured, I would find that the date of discovery of the title defect is the proper date upon which to measure the diminution in the property's value. *Overholtzer*, *supra*; *see also Hartmann v. Shambaugh*, 630 P.2d 758 (N.M. 1981); *Swanson v. Safeco Title Ins. Co.*, 925 P.2d 1354 (Ariz. Ct. App. 1995); *Sullivan v. Transamerica Title Ins. Co.*, 532 P.2d 356 (Colo. App. 1975).

[3] *E.g.* "The Master's order clearly ties the valuation of Stanley's land to Stanley's testimony at trial that his land was worth $100,000 at the time of purchase . . . because the Master did not base his "time of purchase" valuation of Stanley's land on the amount of the prior condemnation settlement . . . we hold that the Master's conclusion that Stanley's land was worth $100,000 at the time of purchase is reasonably supported by the evidence in the record." *Stanley*, 377 S.C. at 410, 411, 661 S.E.2d at 65.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stacy W. Howard, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appeal From Richland County
John McLeod, Administrative Law Court Judge

Opinion No. 27170
Submitted December 1, 2011 – Filed September 12, 2012

AFFIRMED AS MODIFIED

Stacy W. Howard, of Kershaw, *pro se* Appellant.

Christopher D. Florian, of Columbia, for Respondent.

JUSTICE BEATTY: Stacy Howard ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections ("SCDC"), appeals the Administrative Law Court's ("ALC's") summary dismissal of his appeal from a prison disciplinary conviction. Appellant contends the SCDC's actions implicated a state-created liberty interest and, thus, the ALC erred in summarily dismissing his appeal pursuant to section 1-23-600(D)[1] of the

[1] S.C. Code Ann. § 1-23-600(D) (Supp. 2011) (outlining jurisdiction of the ALC for matters arising under the Administrative Procedures Act).

South Carolina Code. Additionally, Appellant challenges: (1) the enforcement of the policy that formed the basis for the disciplinary conviction, (2) the procedure employed to procure the conviction, and (3) the factual basis underlying the conviction. We affirm as modified.

I. Factual/Procedural History

On June 24, 2008, Appellant was cited with a disciplinary violation for "Unauthorized Services/Piddling (845) of SCDC Policy OP-22.14"[2] of the Inmate Disciplinary System. The citation was based on Appellant's preparation of a Post-Conviction Relief ("PCR") application for an illiterate inmate.

Appellant, who had been previously employed as a law library clerk, admitted that he had provided assistance to the inmate; however, he disputed that he offered "professional services." In support of this claim, Appellant submitted evidence that the law library was inadequate and the personnel were not trained to provide effective legal assistance. Based on these conditions, Appellant maintained that he provided assistance by reading the "proper law" to the inmate and filling out the PCR application with the inmate's "thoughts and contention[s]." Ultimately, Appellant challenged the SCDC's policy provision that barred inmates "from furnishing [legal] assistance to other prisoners" on the ground there was no "reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief."

After Appellant refused to accept an informal resolution of the incident, the matter was referred for a disciplinary hearing. Following a hearing, the Disciplinary Hearing Officer ("DHO") found Appellant guilty of the violation and issued a reprimand. This sanction resulted in Appellant's failure to earn

[2] The policy provides, "No inmate shall attempt to provide professional services/handicrafts for any person for any reason whether it is for profit or not."

good-time credits[3] for the month of the disciplinary infraction and a reduction in earned-work credit[4] for that month[5] and subsequent months.[6] Appellant did not lose any accrued good-time credits due to his conviction.

Appellant challenged his conviction using the internal prison grievance procedures. After Appellant received the final agency decision denying his grievance, he appealed to the Administrative Law Court pursuant to Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

In response, the SCDC moved to dismiss the appeal on the ground the ALC lacked jurisdiction to review the matter. In support of this motion, the SCDC relied on a recently-enacted amendment to the South Carolina

---

[3] S.C. Code Ann. § 24-13-210(A) (2007) (providing for good-time credits where a prisoner "has faithfully observed all the rules of the institution where he is confined and has not been subjected to punishment for misbehavior"). We note that Title 24 was substantially amended on June 11, 2010. These amendments, however, do not affect the disposition of the instant case.

[4] Id. § 24-13-230(A) (providing for earned-work credits where a prisoner is assigned to a productive duty assignment or who is regularly enrolled and actively participating in an academic, technical, or vocational training program).

[5] SCDC Policy OP-21.11 "provides for an inmate's failure to earn good time for a given month upon the inmate's violation of a rule."

[6] Appellant claims his sentence was extended based on the following: (1) the "minor" offense was treated as a "major" offense; and (2) his "2 for 5 EWC level was reduced to a 3 for 5 EWC level, which decreased his monthly work credits by 3.6214279 days credit per month in addition to the withholding of good-time for the month of the infraction." According to Appellant, the sanction "extended [his] maxout date from March 28, 2017 to November 2, 2017, which is a 217 day[] difference."

Administrative Procedures Act. The amendment[7] revised section 1-23-600(D) of the South Carolina Code to read in relevant part:

> An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the loss of the opportunity to earn sentence-related credits pursuant to Section 24-13-210(A) or Section 24-13-230(A).

S.C. Code Ann. § 1-23-600(D) (Supp. 2011) (emphasis added). Based on this amendment, the SCDC contended the ALC was without jurisdiction to hear "inmate appeals in which inmates have not lost good time, but have failed to earn good time for the month of their disciplinary infraction."

Appellant filed a brief in opposition to the SCDC's motion. In terms of his conviction, Appellant challenged the SCDC's enforcement of the policy on the ground there was no other legal assistance program available to illiterate inmates. Appellant further asserted he was denied minimal due process in the administrative proceedings as he was not allowed an opportunity to present documentary evidence or witnesses. Appellant also claimed the administrative findings were "arbitrary, capricious, and characterized by an abuse of discretion."

With respect to the imposed sanction, Appellant claimed the "erroneous extension of his sentence" implicated a state-created liberty interest and violated equal protection. Finally, Appellant asserted that section 1-23-600(D) is "being construed to such an extent that an iron curtain is drawn between Appellant and the Court." Specifically, Appellant claimed the SCDC's interpretation would essentially preclude all appeals from prisoners "in which they have only lost goodtime for the month of the infraction."

The ALC summarily dismissed Appellant's appeal. In so ruling, the ALC referenced the recent amendment cited by the SCDC and noted that the "statute applies not only to the loss of the right to earn good time for the

[7] Act No. 334, 2008 S.C. Acts 3308. This amendment became effective on June 16, 2008, eight days prior to Appellant's disciplinary violation.

month (of the infraction) but to the loss of the right to earn other credits such as earned work credits."[8]

Appellant appealed the ALC's order to the Court of Appeals. This Court certified the appeal pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II. Standard of Review

The ALC has subject matter jurisdiction under the Administrative Procedures Act ("APA") to hear properly perfected appeals from the SCDC's final orders in administrative or non-collateral matters. Slezak v. S.C. Dep't of Corr., 361 S.C. 327, 331, 605 S.E.2d 506, 507 (2004). Our standard of review derives from the APA. Al-Shabazz v. State, 338 S.C. 354, 379, 527 S.E.2d 742, 755 (2000). We may affirm, remand, reverse, or modify the appealed decision if the appellant's substantive rights have suffered prejudice because the decision is:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2011).

[8] We note the ALC incorrectly cited S.C. Code Ann. § 1-23-560(D) (2008). We believe, however, this citation was a scrivener's error as the ALC properly cited the amendment to section 1-23-600(D) and quoted the applicable portion of this statute.

III. Discussion

Although Appellant raises five issues, he essentially challenges the ALC's dismissal of his appeal and the underlying disciplinary conviction. Accordingly, in the interest of logical progression, we have consolidated Appellant's issues into these two sections.

A.

Initially, Appellant contends the ALC erred in finding that his appeal did not implicate a state-created liberty interest as the sanction imposed by the SCDC effectively extended his sentence due to the reduction in the rate at which he earned sentence-related credits. In addition, Appellant challenges the Legislature's enactment and the ALC's interpretation of the 2008 amendment to section 1-23-600(D). Appellant maintains the amendment rendered section 1-23-600(D) unconstitutional as it effectively denies "Appellant and SCDC inmates judicial review of an institutional disciplinary hearing when there is only a loss of the opportunity to earn sentence related credits."

Because section 1-23-600(D) eliminates judicial review of these types of grievances, Appellant avers that the statute violates his right to substantive and procedural due process. Appellant further contends the statute violates his right to equal protection as it essentially results in the disparate treatment of inmates who are convicted of disciplinary offenses. According to Appellant, inmates who are sanctioned to the "revocation" of good-time credits may receive judicial review of their convictions whereas those who are sanctioned to the "loss" of earning sentence-related credits will not be entitled to judicial review.

Given that section 1-23-600(D) eliminates an inmate's ability to challenge the legality of a disciplinary conviction that involves "the loss of the opportunity to earn sentence-related credits" and this Court's decision in

Al-Shabazz[9] precludes PCR for these grievances, Appellant ultimately claims an inmate will never be able to receive judicial review under these circumstances. Based on the foregoing, Appellant urges this Court to "strike down" section 1-23-600(D) as unconstitutional.

At least facially, it would appear that an analysis of this case would simply involve an application of the rules of statutory construction. "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Gay v. Ariail, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

Applying these rules, the plain terms of section 1-23-600(D) precludes the ALC from hearing all inmate appeals involving the loss of the opportunity to earn sentence-related credits. Thus, the Legislature definitively limited the parameters of the ALC's subject matter jurisdiction regarding certain appeals by inmates. The Legislature has the authority to limit the subject matter jurisdiction of a court that it has created. See Black v. Town of Springfield, 217 S.C. 413, 415, 60 S.E.2d 854, 855 (1950) ("The jurisdiction of a Court of the subject matter of an action depends upon the authority granted to it by the Constitution and laws of the State and is fundamental."); S.C. Code Ann. §§ 1-23-500, -600 (Supp. 2011) (creating the ALC and outlining the extent of its jurisdiction).

Because the effect of this statute also tangentially implicates state-created liberty interests, we believe it is necessary to clarify the amendment and re-evaluate our decision in Furtick v. South Carolina Department of Corrections, 374 S.C. 334, 649 S.E.2d 35 (2007). In Furtick, an inmate was found guilty of a disciplinary offense and reprimanded. As a result of the

---

[9] See Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (holding that, aside from two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence as authorized by section 17-27-20(a)).

sanction, Furtick alleged he did not earn his good-time credit for the month of the infraction. Id. at 336, 649 S.E.2d at 36. Furtick appealed from this disciplinary decision through the SCDC's internal grievance system. After receiving the SCDC's final denial of his grievance, Furtick appealed to the ALC. Id. The ALC dismissed the matter, finding Furtick had no liberty interest in good-time credits that he was unable to earn as a result of the rule violation. Id. On appeal, the circuit court affirmed the ALC's decision on the ground there was no liberty interest implicated in Furtick's grievance. Id.

Furtick appealed the circuit court's order to this Court, arguing the circuit court erred by finding the ALC lacked subject matter jurisdiction to review his grievance. Id. at 337, 649 S.E.2d at 36. A majority of this Court agreed with Furtick, stating "where a matter clearly implicates a loss of statutory sentence-related credits, the ALC may not summarily dismiss the action." Id. at 340, 649 S.E.2d at 38. In analyzing the specific facts of Furtick's case, the Court "reiterate[d] that the State of South Carolina clearly has created a liberty interest in good-time credits by enacting section 24-3-210." Id.

The Court referenced Al-Shabazz's holding that "the ALC has subject matter jurisdiction over an inmate's appeal when the claim sufficiently 'implicates a state-created liberty interest.'" Id. at 339, 649 S.E.2d at 38. The Court further clarified the ALC's jurisdiction in Slezak v. S.C. Dep't of Corr., 361 S.C. 327, 605 S.E.2d 506 (2004), stating "the ALC has jurisdiction over **all** inmate grievance appeals that have been properly filed." Id. at 340, 649 S.E.2d 38. However, the amendment to section 1-23-600(D) changed the extent of that jurisdiction.

The dissent, in Furtick, disagreed with the majority's decision on the ground "an inmate has no constitutionally significant interest in the loss of the opportunity to earn certain sentence-related credits." Id. at 341, 649 S.E.2d at 39. In reaching this conclusion, Chief Justice Toal reasoned that "[a] state creates a liberty interest in sentence-related credits only where an inmate has a legitimate expectation of receiving such credits." Id. at 342, 649 S.E.2d at 39. The dissent noted that "[g]enerally, an inmate is not entitled to due process protection for State action that may only speculatively affect the duration of his sentence." Id. (citing Sandin v. Conner, 515 U.S. 472 (1995)).

The dissent went on to distinguish Furtick's situation, i.e., the loss of the opportunity to earn good-time credit, from one where an inmate must forfeit accrued sentence-related credits. Id. at 343, 649 S.E.2d at 40. In making this distinction, the dissent stated that "an inmate does not have a legitimate expectation that he will receive good-time credits, but merely possesses only the hope that his behavior and observation of prison rules will be sufficient to entitle him to a reduction in his sentence." Id. Accordingly, the dissent held that "an inmate does not have a protected liberty interest in unearned good-time credits." Id. Similarly, the dissent found that "[b]ecause an inmate is not entitled to earn credit at a particular level, . . . an inmate has no protected liberty interest in maintaining a specific work credit level for sentence reduction purposes." Id.

Ultimately, the dissent agreed that the circuit court erred in holding the ALC lacked subject matter jurisdiction as Furtick had properly perfected his appeal. However, based on the conclusion that Furtick did not have a protected liberty interest in unearned sentence-related credits, the dissent determined the ALC's improper dismissal of Furtick's claim constituted harmless error as the ALC could have summarily dismissed the appeal without a hearing. Id. at 345, 649 S.E.2d at 41.

Upon further reflection and consideration of the recent amendment to section 1-23-600(D), we believe the dissent in Furtick correctly declined to find the loss of the opportunity to earn sentence-related credits implicated a state-created liberty interest. As noted by Chief Justice Toal, there is a difference between an inmate's forfeiture of accrued sentence-related credits versus the withholding of unearned, potentially available sentence-related credits. Clearly, an inmate does not acquire an interest in sentence-related credits until he or she earns them. As noted in sections 24-13-210(A) and 24-13-230(A), these credits are not automatically given to an inmate. Instead, an award of good-time credits at the end of each month is contingent upon an inmate "faithfully" observing all disciplinary rules during that month. Moreover, an award of work credits is given at the discretion of the Director of the Department of Corrections and is contingent upon an inmate's completed days of employment.

In reviewing the legislative history of the amendment to section 1-23-600(D), it is clear the Legislature was responding to this Court's decision in Furtick. As we interpret the amendment, the Legislature sought to limit the ALC's subject matter jurisdiction with respect to inmate appeals involving the loss of the opportunity to earn sentence-related credits. Notably, the amendment was enacted only months after this Court issued its opinion. Moreover, the preamble to the amendment states in part that it is intended to "prohibit the hearing of certain inmate appeals by the [Administrative Law] Court." Finally, the language used in the amendment essentially tracks the position espoused by the dissent.

Based on the foregoing, we acknowledge the Legislature's authority to limit the jurisdiction of the ALC. Moreover, an inmate's loss of the opportunity to earn sentence-related credits does not implicate a state-created liberty interest.[10] We are, nevertheless, concerned that this legislative action combined with this Court's decision in Al-Shabazz may violate an inmate's due process rights as it completely eviscerates all judicial review of an inmate's grievance involving the loss of earned sentence-related credits due to a disciplinary violation. As the SCDC concedes, "[a] literal reading of the amendment could remove all disciplinary appeals from the ALJ's jurisdiction because all major disciplinary appeals 'involv[e]' the failure to earn good-time credits, even if the case also involve[s] the loss of previously earned good-time credits." The SCDC acknowledges that "such a literal reading would not be permissible under the rules of construction."

Accordingly, we hold the ALC may summarily dismiss an inmate appeal that involves only the loss of the opportunity to earn sentence-related credits. However, a matter is reviewable by the ALC where an inmate's appeal also implicates a state-created liberty or property interest, such as the

[10] If we were to allow Furtick to remain good law, it would necessarily create a dual track for resolving issues raised by inmates regarding good-time credits. Specifically, the ALC would be the forum for disputes involving accrued good-time credits and the circuit court would be the forum for disputes involving the loss of an opportunity to earn good-time credits, Al-Shabazz notwithstanding. This method of resolution would lend itself to confusion and would constitute an inefficient use of judicial resources.

loss of accrued sentence-related credits. Stated another way, the ALC may not summarily decline to hear an inmate appeal solely on the ground that it involves the loss of the opportunity to earn-sentence related credits.

Turning to the facts of the instant case, the ALC should not have summarily dismissed Appellant's appeal as it involved more than a review of the loss of the opportunity to earn good-time credits and a reduction in earned-work credits. Appellant also challenged the SCDC's enforcement of the policy forbidding one inmate from providing legal assistance to another inmate. Because Appellant's claim constitutes an as-applied constitutional challenge to the policy, the ALC could have ruled on this claim. See Travelscape, LLC v. S.C. Dep't of Rev., 391 S.C. 89, 108-09, 705 S.E.2d 28, 38-39 (2011) (holding that the ALC may not rule upon a facial challenge to the constitutionality of a regulation or statute but may rule upon an as-applied challenge). However, for reasons that will be discussed, we find a remand to the ALC is unnecessary as Appellant has not demonstrated any grounds on which he could be granted relief.[11]

B.

Appellant claims the SCDC's policy provision regarding "Unauthorized Services/Piddling (845)" violates federal law. Specifically, Appellant contends the SCDC should not enforce a policy that prohibits him from helping an illiterate inmate gain access to the courts because the Kershaw Correctional Institution does not have an adequate law library or legal assistance programs for illiterate inmates. In support of his assertions, Appellant cites the United States Supreme Court's ("USSC") decision in Johnson v. Avery, 393 U.S. 483 (1969). We find Appellant's reliance on Johnson is misplaced.

[11] During the pendency of this appeal, the Court of Appeals reversed Appellant's underlying convictions and sentences. State v. Howard, 396 S.C. 173, 720 S.E.2d 511 (Ct. App. 2011). Thus, even if Appellant was entitled to relief with respect to the disciplinary sanction, it would be inconsequential as Appellant has been released from incarceration and is subject to a new trial.

In Johnson, a state prisoner serving a life sentence was transferred to the maximum security building for violation of a prison regulation prohibiting an inmate from assisting another inmate with respect to "Writs or other legal matters." Id. at 484. Subsequently, Johnson filed in federal district court a "motion for law books and a typewriter," in which he sought relief from his confinement in the maximum security building. Id. The district court treated the motion as a petition for a writ of habeas corpus and, after a hearing, held that the regulation was void because, absent any viable alternatives, it in effect "barred illiterate prisoners from access to federal habeas corpus." Id. The state appealed the district court's decision. Id. at 485. The Court of Appeals for the Sixth Circuit reversed, concluding that "the regulation did not unlawfully conflict with the federal right of habeas corpus" and was justified by the "interest of the State in preserving prison discipline and in limiting the practice of law to licensed attorneys." Id.

Ultimately, the USSC was called upon to determine whether the policy was constitutional in the absence of any alternative assistance provided by the State to assist illiterate inmates. Id. at 486. The Court found the regulation was invalid as it conflicted with the federal right of habeas corpus. Id. at 487. In so ruling, the Court found the State had adopted a rule which, in the absence of any other source of assistance, operated to forbid illiterate or poorly-educated prisoners from filing habeas corpus petitions. Id.

The Court explained that, "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners." Id. at 490. The Court, however, clarified that "[e]ven in the absence of such alternatives, the State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief: for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities." Id. at 490.

Significantly, the USSC did not establish a specific right for an inmate to provide legal assistance. Instead, the USSC found the discipline that

Johnson received as a result of his assistance conflicted with the right to file a writ of habeas corpus. See id. at 488 (stating "[t]he considerations that prompted (the regulation [barring inmate-to-inmate legal assistance]) are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus" (quoting Ex parte Hull, 312 U.S. 546, 549 (1941))). It is important to note that the USSC rendered its decision via Johnson's personal petition for habeas corpus. Absent Johnson's habeas claim, there would have been no justiciable controversy for the USSC to decide. Thus, there would have been no path to reach the issue regarding access to the courts.

In essence, if there is another source of assistance for illiterate inmates, then there is no violation of Johnson as there is no independent right to provide legal assistance to another inmate. See Gibbs v. Hopkins, 10 F.3d 373, 378 (6th Cir. 1993) ("[W]hile there is technically no independent right to assist, prison officials may not prevent such assistance or retaliate for providing such assistance where no reasonable alternatives are available." (emphasis added)); cf. Lewis v. Casey, 518 U.S. 343, 350-51 (1996) (recognizing that inmates have a right to receive legal advice from other inmates only when it is a necessary "means for ensuring a 'reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts'" (quoting Bounds v. Smith, 430 U.S. 817, 825 (1977))).[12]

Here, Appellant fails to allege that there is no other source of assistance for illiterate inmates. In fact, in his affidavit, Appellant references the law library in the Kershaw Correctional Institution and the "Kershaw Law Library Clerks." Thus, Appellant does not claim there was an absence of legal assistance, but, rather, that it was inadequate. Because there were reasonable alternatives available for the illiterate inmate, Appellant cannot sustain a claim pursuant to Johnson.

---

[12] Notably, the USSC has continued to limit constitutional protection for legal assistance between inmates. See Shaw v. Murphy, 532 U.S. 223 (2001) (holding that inmate did not possess a First Amendment right to provide legal assistance to fellow inmates beyond protection normally accorded prisoner's speech).

Alternatively, Appellant asserts that an inmate's access to the courts is somehow limited due to the inadequacy of the law library and the lack of qualified library personnel. Appellant challenges the adequacy of the legal resources and the effectiveness of the law library personnel pursuant to Bounds v. Smith, 430 U.S. 817 (1977), wherein the USSC held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Id. at 828. For several reasons, Appellant's assertion fails as a matter of law.

As a threshold matter, Appellant's claim is barred by the doctrine of standing as he has not demonstrated that the alleged inadequacy of the law library or library personnel caused him "actual injury," i.e., hindered him in pursuing his own legal claims. Instead, Appellant was providing assistance with respect to the inmate's PCR application. See Lewis, 518 U.S. at 349 ("The requirement that an inmate alleging a violation of Bounds must show actual injury derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches."); Hendricks v. S.C. Dep't of Corr., 385 S.C. 625, 629, 686 S.E.2d 191, 193 (2009) (discussing inmate's claim of denial of access to the courts under Bounds and stating "[i]nsofar as the right vindicated by Bounds is concerned . . . the inmate [] must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." (quoting Lewis, 518 U.S. at 351)). Moreover, Appellant's mere assertion of the inadequacy of the legal resources is not sufficient to prove an "actual injury" under Bounds. See Lewis, 518 U.S. at 351 ("Because Bounds did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense.").[13]

[13] To the extent the dissent claims that Appellant sustained an "actual injury" due to the disciplinary sanction, we find this interpretation is not consistent with Bounds. Pursuant to Bounds, an "actual injury" involves the denial of "meaningful access to the courts" due to the inadequacy of the legal resources

Furthermore, even if Appellant's claims of inadequate law resources are meritorious, he lacks standing to raise any access to the courts challenge as it is the illiterate inmate who would have sustained the "actual injury" to support such a claim. See Lewis, 518 U.S. at 356 ("When any inmate, even an illiterate or non-English-speaking inmate, shows that an actionable claim of this nature which he desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided, he demonstrates that the State has failed to furnish '*adequate* law libraries or *adequate* assistance from persons trained in the law'" (quoting Bounds, 430 U.S. at 828)).

Because there is no particularized right to provide legal assistance to another inmate under Johnson and there is no derivative right to affirmatively assert a Bounds violation, we cannot discern a legal basis on which Appellant could be granted relief. Even if we assume that Howard has a viable Johnson defense to the enforcement of the prison disciplinary policy, he has no cognizable injury as a result of the enforcement of the policy.

Alternatively, even if the SCDC's policy is found to be valid as applied, Appellant claims he was convicted of the disciplinary violation without due process of law because of the following substantive and procedural errors in the disciplinary hearing: (1) he was not allowed an opportunity to question his accuser, and (2) he was not permitted to present inmate witnesses and documentary evidence that would have refuted the charged offense.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's

---

available to an inmate. Lewis, 518 U.S. at 356-57. Furthermore, as previously discussed, the disciplinary sanction resulted in Appellant's failure to earn good-time credits for the month of the disciplinary infraction and a reduction in earned-work credit for that month and subsequent months. Because Appellant did not lose any accrued good-time credits and was not entitled to earned-work credits as these credits are discretionary, there is no basis to support the dissent's assertion that Appellant was injured by the disciplinary action.

protection of liberty and property." Al-Shabazz, 338 S.C. at 369, 527 S.E.2d at 750 (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569 (1972)). By overruling Furtick, any liberty interest claimed by Howard is negated. Furthermore, Howard does not claim the loss of a property interest.

Moreover, Howard's due process claims lack merit. In the first instance, Howard admitted the prohibited conduct. Secondly, an "inmate does not have a constitutional right to confront and cross-examine witnesses who testify against him, although prison officials have the discretion to grant that right in appropriate cases." Al-Shabazz, 338 S.C. at 371, 527 S.E.2d at 751 (citing Wolff v. McDonnell, 418 U.S. 539, 563-72 (1974)).

We note that any defenses Appellant may have had to his conviction, including a sustainable Johnson claim, could have been raised and reviewed pursuant to the internal prison grievance process. Accordingly, we reject Appellant's contention that he was convicted without due process of law. See Al-Shabazz, 338 S.C. at 373, 527 S.E.2d at 752 (holding that SCDC's disciplinary and grievance procedures are consistent with constitutional standards delineated in Wolff v. McDonnell, 418 U.S. 539 (1974), which established the minimum constitutional requirements for procedural due process when an inmate is disciplined for "serious misconduct").

IV. Conclusion

Because the plain language of section 1-23-600(D) would prohibit an ALC from hearing all inmate appeals involving the loss of the opportunity to earn sentence-related credits, we clarify that the ALC may not summarily dismiss an appeal solely on the basis that it involves the loss of the opportunity to earn sentence-related credits. Instead, the ALC must also consider whether the appeal implicates a state-created liberty or property interest.

After reconsidering our decision in Furtick, we find the loss of the opportunity to earn sentence-related credits does not implicate a state-created liberty interest. Accordingly, we overrule Furtick and adopt the dissent's reasoning in that opinion.

In conclusion, we affirm the ALC's dismissal of Appellant's appeal as we find that Appellant has failed to establish a legal basis on which to challenge the enforcement of the disciplinary policy underlying his conviction.

AFFIRMED AS MODIFIED.

TOAL, C.J., and HEARN, J., concur. PLEICONES, J., dissenting in a separate opinion. KITTREDGE, J., filing a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. In my view, the jurisdiction of the administrative law courts is a matter entirely within the discretion of the General Assembly, which created that system by statute and could abolish it at will. The majority recognizes this, as well as the fact that an inmate's right to *judicial* review of decisions that implicate constitutional interests is not and cannot be diminished by the removal of administrative review by an executive agency.[14] Administrative review promotes efficiency in government but does not alter its fundamental separation of powers and resulting right to judicial review of executive actions affecting certain interests. *See Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000). Indeed, Article I, § 22, of the South Carolina Constitution explicitly guarantees the right to judicial review of all final agency decisions that affect private rights or liberty or property interests.

By removing ALC review of administrative decisions involving loss of the ability to earn credits under S.C. Code Ann. § 1-23-600 (Supp. 2011), the General Assembly has in effect returned initial review of those decisions to the judicial branch. *Al-Shabazz*, *supra*; S.C. Const. art. I, § 22. Thus, the General Assembly's alteration of the ALC's jurisdiction does not create a constitutional question because the prisoner retains his right to judicial review, and the ALC's determination that it lacked jurisdiction was correct.

Unlike the majority, however, I cannot resolve the practical difficulties created by the General Assembly's alteration of ALC subject matter jurisdiction by finding that the opportunity to earn sentence-related credits is not a liberty interest. I continue to believe that *Furtick* was correctly decided for the reasons expressed by the majority in that case, namely, that *Wolff v. McDonnell*, 418 U.S. 539 (1974), is controlling. The *Wolff* Court acknowledged that "the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison." *Id*. at 557. Nevertheless, "the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id*.

[14] In my view, the majority's references to ALC review as judicial review is a misnomer which tends to blur the distinction between the executive and judicial branches in a context in which that distinction is important.

The General Assembly created such an interest in S.C. Code Ann. § 24-13-210(A) (2007). Moreover, the constitutional dimension of that interest is the same whether the discipline imposed is to withhold good-time credits already earned or the opportunity to earn them. Under § 24-13-210(A), a prisoner who "faithfully observe[s] all the rules of the institution where he is confined" is "entitled to a deduction from the term of his sentence[.]" The entitlement is not merely to speculatively hope about a future benefit that might be conferred as an exercise of pure discretion. Rather, the accrual of good-time credits lies within the prisoner's control under § 24-13-210.

The *Wolff* Court noted that the "analysis as to liberty parallels the accepted due process analysis as to property," citing, among other examples, the procedural due process required before a person may be deprived of his interest in a "government-created job[] held, absent 'cause' for termination." *Id*. at 557-58 (citing *Board of Regents v. Roth*, 408 U.S. 564 (1974)). The entitlement of an employee to hold his job absent cause for termination provides a useful analogy to the opportunity of an inmate to earn good-time credits. An employee's expectation that he will avoid incurring cause for termination while performing his job duties is no less speculative than a prisoner's expectation that he will avoid violating a prison rule while incarcerated. Indeed, the very fact that the opportunity to earn good-time credits is withheld as a sanction demonstrates that a liberty interest is implicated. *Id*. at 557 ("the State having created the right to good time and *itself recognizing that its deprivation is a sanction authorized for major misconduct*, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty'" (emphasis added)).

In this case, appellant alleges that he was disciplined for violating an unconstitutional policy and that the infraction was treated as a major offense. He avers that, as a sanction for the violation, his earned work credit level was reduced, extending his maxout date by 217 days. Yet the majority holds that no cognizable liberty interest has been affected, so that his claims may be dismissed without a hearing. In my view, the majority's holding, overruling *Furtick* and finding that appellant was not entitled to a hearing to review the imposition of a major disciplinary penalty when he was deprived of the right to earn good-time credits, contravenes the federal and state constitutions.

In my view, appellant was deprived of a liberty interest. When a claimant asserts that government action has wrongly deprived him of a liberty interest and the claim is fact intensive, a hearing to develop the factual basis of the claim is a necessary part of the review guaranteed by due process. *Id*. at 557-58 ("This analysis as to

liberty parallels the accepted due process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests."); *see also Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (recognizing that due process requires a trial-type hearing for fact-specific, adjudicatory decisions by administrative agencies). Thus, if a hearing is required to develop the factual basis of the claim, that hearing must be performed by the circuit court if the General Assembly has not provided for such a hearing within the administrative review process. *See Travelscape, LLC v. South Carolina Department of Revenue*, 391 S.C. 89, 108-09, 705 S.E.2d 28, 38 (2011).

Appellant presented a fact-intensive issue implicating a constitutional liberty interest and timely appealed. The factual basis for his constitutional arguments was not developed by the Department of Corrections, the ALC, or a court. Were appellant still incarcerated, I would remand to circuit court for a full airing of the issues.[15]

On the issue whether appellant was unconstitutionally penalized for helping an illiterate inmate prepare a post-conviction relief application, *Johnson v. Avery*, 393 U.S. 483 (1969), is squarely on point. The majority holds that *Johnson* did not establish a specific right for a prisoner to provide legal assistance and that, in the absence of an established right to provide legal assistance, appellant lacks standing to make a claim. In *Johnson*, however, the prisoner challenging the regulation (Johnson) was, like the appellant in this case, seeking to offer legal assistance to another inmate. The *Johnson* Court did not hold that he lacked standing to bring a claim. Rather, it held that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners." *Id*. at 490. Moreover, contrary to the majority's assertion, appellant suffered an actual injury when he

[15] Justice Kittredge correctly observes that Appellant has made no explicit request that we consider an exception to mootness in this case. In my view, Appellant could not have done so since his case did not become moot until after it was submitted for this Court's decision. Indeed, we cannot say on this record whether the case is moot. If Appellant is convicted upon retrial, we do not know what effect the disciplinary violation at issue here will have upon the credit he is awarded for time served. Finally, the facts alleged by Appellant fit squarely within the mootness exception for disputes that are capable of repetition yet evading review. *See Turner v. Rogers*, 131 S.Ct. 2507, 2515 (2011).

was punished for a major infraction and consequently became subject to a later maxout date, as noted above. Thus, it is doubly apparent that appellant had standing to bring this claim.

Furthermore, I do not agree with the majority's assertion that appellant failed to allege that there is no other source of assistance for illiterate inmates. Appellant states that the inmate he sought to assist is illiterate and that no one else would help him, and he asserts that no assistance is provided to illiterate inmates by persons trained in the law. The fact that appellant refers to a law library and law library clerks is not inconsistent with his assertion that assistance is not made available to illiterate inmates, as the majority appears to believe. Nor does the mere existence of law libraries and clerks ensure that illiterate prisoners are given adequate assistance to enable them to access the courts without the help of other prisoners.

Finally, appellant contends that he was convicted of a disciplinary violation without due process of law in that, among other contentions, he was denied the opportunity to call witnesses or present documentary evidence. The due process required for imposition of penalties for major infractions includes the opportunity to call witnesses and present documentary evidence. *Wolff*, 418 U.S. at 566; *Al-Shabazz*, 338 S.C. at 371, 527 S.E.2d at 751. In this case, the Department of Corrections does not contradict appellant's assertion that he was not afforded such an opportunity, and no factfinder passed on the issue. Thus, appellant was not afforded due process.

I therefore respectfully dissent. I would affirm *Furtick* and acknowledge the viability of appellant's claim under *Johnson*.

JUSTICE KITTREDGE: I would dismiss this appeal as moot. As the majority opinion indicates, Appellant has been released from prison, as his underlying convictions and sentences were reversed by the court of appeals during the pendency of this appeal. As a result, we are no longer presented with a justiciable controversy. In the words of the majority opinion, Appellant's claim for relief is now "inconsequential." Moreover, Appellant has not requested that we invoke any exception to mootness and proceed to the merits of his appeal. Accordingly, I would dismiss the appeal and refrain from issuing an advisory opinion.

The Supreme Court of South Carolina

In the Matter of Jonathan L. B. Davis, Respondent.

Appellate Case No. 2010-169626

ORDER

Petitioner petitions the Court to lift his interim suspension since he was found not guilty of the January 5, 2012, Driving under the Influence charge and the other criminal charges against him have been dismissed. The Office of Disciplinary Counsel does not oppose the request. The petition to lift interim suspension is granted.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

September 7, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services, Respondent,

v.

Mary C. and Daniel C., Defendants,

Of Whom Mary C. is the, Appellant,

and Daniel C. is the, Respondent.

Mary C., Appellant,

v.

Daniel C., Respondent.

Appeal From Greenville County
Rochelle Conits, Family Court Judge

Opinion No. 4891
Heard June 7, 2011 – Filed September 21, 2011
Withdrawn, Substituted and Refiled December 21, 2011

AFFIRMED IN PART and REVERSED IN PART

David Michael Collins, Jr., and J. Benjamin Stevens, both of Spartanburg; for Appellant.

Albert V. Smith, of Spartanburg; for Respondent Daniel C.

Deborah Murdock, of Mauldin; for Respondent South Carolina Department of Social Services.

Catherine Christophillis, of Greenville; Guardian ad Litem.

Virginia Ravenel, of Columbia; Robert Clark and Don Stevenson, both of Greenville; for Respondent Guardian ad Litem.

WILLIAMS, J.: On appeal from the family court, Mary C. (Mother) argues the family court improperly weighed the evidence in a South Carolina Department of Social Services (DSS) intervention action regarding the identity of her daughter's (Anna G.) sexual abuser. In addition, Mother claims the family court erred in assessing attorney's fees against Mother for the substitute counsel representing the volunteer guardian ad litem in the DSS intervention action and in assessing guardian ad litem fees against Mother for the appointed guardian in the private custody action. We affirm in part and reverse in part.

FACTS

Mother and Daniel C. (Father) were never married but had one child together, Anna G., who was born on December 11, 2004. Shortly after Anna G.'s birth, Mother filed a private custody action on March 4, 2005, against Father, requesting custody of Anna G., child support, contribution from Father for medical expenses from Mother's pregnancy, past and future

medical expenses for Anna G., a visitation schedule, and attorney's fees and costs. In his Answer, Father admitted paternity and agreed to Mother's claims for custody and child support but denied responsibility for Mother's pregnancy costs and attorney's fees.

On June 22, 2007, the parties consented to the appointment of a guardian ad litem (GAL), Catherine Christophilis, in the private custody action. Approximately three months later, Anna G.'s counselor notified DSS she believed Father was sexually abusing Anna G. based on Anna G.'s behavior and statements during the child's therapy sessions. The family court suspended Father's visitation rights while DSS investigated the sexual abuse allegations. After issuing its report, DSS filed an intervention action on March 17, 2008, against Mother and Father, alleging Anna G.'s placement with Father put child at substantial risk of sexual abuse. Father filed an Answer denying the allegations of abuse. Mother filed no responsive pleadings. At that time, a volunteer GAL, Colleen Hinton, was assigned to represent Anna G. in the intervention action.[1]

On May 22, 2008, the family court issued a sua sponte order to continue the final hearing in the private custody action until the sexual abuse allegations in the intervention action were litigated. Then, on August 4, 2008, the family court issued a pre-trial order consolidating the private custody action and the intervention action because "the issues involved in each [were] intertwined and closely related."

The family court held a hearing to resolve the allegations of sexual abuse on September 22 to 26, 2008, October 22, 2008, and January 8, 2009.

[1] Mr. Clark and Mother agree in their briefs that under the GAL Program, a staff attorney is employed on a contract basis to represent the volunteer GAL assigned to any abuse and neglect case. In this case, Robert Clark was assigned to represent Colleen Hinton, the volunteer GAL, for the intervention action. Subsequently, Mr. Clark hired Don J. Stevenson to cover the intervention portion of this case because Mr. Clark was already scheduled to be in court for DSS the same week. Mr. Clark filed a motion for attorney's fees on July 29, 2008, which the family court heard on January 8, 2009.

Although the family court initially consolidated the cases, the family court ruled it would only try the intervention action during the seven-day scheduled hearing because the issues in the custody action could not be addressed until it resolved the allegations of sexual abuse. After hearing testimony from numerous witnesses over the course of seven days, the family court found Anna G. was sexually abused but the perpetrator was unknown. The family court required Mother and Father to each pay the GAL $2,500 in fees for her services in the private custody action. In addition, the family court held Mother and Father must pay $2,593.75 to the substitute attorney (hired by appointed counsel) to represent the volunteer GAL in the intervention action. The family court then ordered that "the DSS portion of this case shall be closed, and DSS shall be dismissed from this action." Neither party objected to or appealed the family court's decision to close the intervention portion of the case. Mother then filed a Rule 59(e), SCRCP, motion to reconsider, which the family court denied. Mother appealed.[2] Neither DSS nor the guardians contest the family court's rulings.

[2] We note the family court consolidated the intervention and private custody action but only ruled on the intervention portion of the action prior to Mother's appeal to this court. Generally, an order that leaves some further act to be accomplished is considered interlocutory. See Bolding v. Bolding, 283 S.C. 501, 502, 323 S.E.2d 535, 536 (Ct. App. 1984) (dismissing appeal when order appealed from did not finally dispose of the whole subject matter in litigation). However, both parties agree, and we find, the intervention portion of this action should be addressed. First, the parties agree that the family court issued a final order in the DSS portion and separated these cases by consent. Second, we should address these issues based on the equities involved in this case and the best interests of Anna G. She has not seen Father since the family court issued its order, and because the family court has taken no further action in the custody portion of this case, we find dismissal under the circumstances would create an injustice to not only the parties, but more importantly, to Anna G. Additionally, we find support for our decision from Hooper v. Rockwell, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999), in which the supreme court held that an order issued after a merits hearing in a removal proceeding is immediately appealable. The supreme court stated,

STANDARD OF REVIEW

On appeal from the family court, this court reviews factual and legal issues de novo. Simmons v. Simmons, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); Lewis v. Lewis, 392 S.C. 381, 386, 709 S.E.2d 650, 651-52 (2011). Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the trial court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Lewis, 392 S.C. at 385, 709 S.E.2d at 651-52. The burden is upon the appellant to convince this court that the family court erred in its findings. Id.

LAW/ANALYSIS

A. Identity of Child's Sexual Abuser

Mother claims the family court erred in finding that an unknown perpetrator, as opposed to Father, sexually abused Anna G. because DSS established by a preponderance of the evidence that Father abused Anna G. We disagree.

> [A]ny order issued as a result of a merit hearing, as well as any later order issued with regard to treatment, placement, or permanent plan, is a final order that a party must timely appeal. At that point, investigators and DSS have presented evidence to the family court, the parents or guardians of the child have had an opportunity to challenge the evidence and present their case, and the family court has decided whether the allegations of the removal petition are supported by a preponderance of the evidence . . . .

Pursuant to section 63-7-1650 of the South Carolina Code (2010), DSS may petition the family court for authority to intervene and provide protective services without removal of custody if DSS concludes by a preponderance of the evidence the child is an abused or neglected child and the child cannot be protected from harm without intervention. See § 63-7-1650(A). The family court must hold a hearing to determine whether intervention is necessary within thirty-five days of the filing date. See § 63-7-1650(C). Intervention and protective services must not be ordered unless the family court finds the allegations of the petition are supported by a preponderance of the evidence, including a finding the child is an abused or neglected child and the child cannot be protected from further harm without intervention. See § 63-7-1650(E).

The following evidence was adduced at the seven-day intervention hearing prior to the family court issuing an order finding DSS failed to prove by a preponderance of the evidence that an unknown perpetrator, as opposed to Father, sexually abused Anna G.

Mother and Father met as co-workers at an airline in Greenville, South Carolina. Eventually, Mother and Father commenced a romantic relationship, yet each maintained opposite accounts of their first sexual encounter. In finding the history of the parties' relationship was pertinent to the case, the family court noted the variations in their stories and found Father's version to be credible.[3] At trial, Mother stated she did not remember having sex with Father because of an adverse reaction from a pain medication mixed with alcohol, whereas Father said they were sober and it was a consensual sexual encounter. In any event, the family court found and both parties admitted to having repeated consensual sexual encounters before Mother conceived Anna G. Father admitted to encouraging Mother to obtain an abortion and to cutting off contact with Mother until shortly before Anna

[3] The family court found, "[Mother's] parents were less than happy with this interracial relationship and most distressed when she became pregnant. I believe her version of the initial sexual encounter with [Father] is responsive to her parents' negative reaction to this relationship, thereby diminishing her accountability in this relationship."

G. was born but stated he changed his mind and wanted to become involved in the child's life before Mother gave birth to Anna G.

Mother initially permitted Father informal supervised visitation with Anna G. Approximately three months after Anna G. was born, Mother petitioned the family court for a formal visitation schedule as well as child support. Beginning in April 2005, the family court established a regular visitation schedule for Father with Anna G., which did not include overnight visitation. Father successfully increased his visitation with Anna G., but he did not begin overnight visitation with Anna G. until May 2007. No allegations of sexual abuse were made prior to the commencement of Anna G.'s overnight visitation with Father.

In late May 2007, shortly after Anna G.'s overnight visitation began with Father, Mother scheduled therapy sessions with Ms. Meredith Thompson-Loftis, a specialist in sexual abuse and post-traumatic stress disorders. Ms. Loftis testified that Anna G., who was almost three years old, began to display sexualized behaviors in August 2007, which included masturbating in front of Ms. Loftis, urinating on the floor despite being potty-trained, and stating after prompting from Ms. Loftis that she, her sister, and Father touched and licked her "bottom,"[4] while all were in Father's bed.

Ms. Lynn McMillan, an expert in forensic interviewing of child abuse, testified before the family court. Ms. McMillan stated Anna G. made disclosures about being sexually abused by her sister and Father in her forensic interview.

Ms. Cindy Stichnoch, an expert in the assessment and treatment of sexual behavior issues in children, testified before the family court. Ms. Stichnoch reviewed the DSS files; the written reports from Anna G.'s sessions with Ms. Loftis; the written reports and videos from Anna G.'s sessions with Ms. McMillan; treatment records from Anna G.'s pediatricians; Father's polygraph results; interview reports and affidavits from Mother,

[4] Ms. Loftis testified "bottom" was Anna G.'s word for her vaginal and anal area.

Father, and Father's two daughters; and the GALs' reports. Ms. Stichnoch disproved of Ms. Loftis' interviewing techniques, specifically her continuing to have therapy sessions with Anna G. about the sexual abuse allegations until a full assessment was conducted. Ms. Stichnoch stated a child of Anna G.'s age is easily influenced, and repetitive sessions and questions about the allegations could inadvertently and inappropriately reinforce those allegations with the child. Ms. Stichnoch also opined that Ms. McMillan inappropriately led Anna G. and continued to repeat the same questions to the child until she was satisfied with Anna G.'s responses.

Dr. Selman Watson, an expert in clinical and forensic psychology, testified at the hearing regarding his psychological evaluations of Mother and Father. Dr. Watson said Father was not a pedophile, and while Dr. Watson believed Anna G. had been sexually abused, he could not conclude with a reasonable degree of medical certainty that Father was the perpetrator.

Dr. Tracy Butcher, Anna G.'s pediatrician, also testified at the intervention hearing. She stated Mother had brought Anna G. to her office for numerous health and allergy issues since Anna G. was born. Dr. Butcher's notes reflected Mother began reporting that Anna G. suffered from nightmares and sleeping disturbances as early as March 2006, over a year before Father's overnight visitation began, but Dr. Butcher stated Mother's concerns over these issues escalated after overnight visitation commenced. Dr. Butcher testified she was concerned that Anna G. was still breastfeeding at twenty-four months because the child was using this to manipulate Mother. When questioned on cross-examination, Dr. Butcher testified she never observed any indicators that Anna G. was being sexually abused.

Father's two daughters, Jacqueline and Victoria, testified at trial. Both strongly denied that Father had ever acted inappropriately, either towards them or towards Anna G. Jacqueline, who was twenty on the date of trial, stated both she and her sister had a close relationship with Anna G. Jacqueline stated she had slept in the same bed with Father and had also slept in the same bed with Anna G. and her sister, Victoria, but nothing inappropriate happened during those times, and at no point had he ever

sexually abused her. Jacqueline also testified she had never seen Anna G. act out as she had in the presence of Mother or her therapist. Father's older daughter, Victoria, who was twenty-two at the time of the hearing, stated Father was loving and caring and taught his daughters how to be responsible. Victoria testified that because she works with young children as an early childhood major, she knows the differences between "what's curious . . . [and] what's weird. [Anna G.] act[s] just as normal with me as everybody else." Victoria stated while she considered herself "friends" with Mother before the sexual abuse allegations arose against Father, she considered Mother to be overbearing and overprotective, particularly with her instructions to Father on how to parent and care for Anna G. while in Father's custody.

Father's ex-wife, Gwendolyn C., also testified at the intervention hearing. She stated that despite being divorced, she and Father raised Jacqueline and Victoria together, and she never had any reason to believe he inappropriately touched one of their children. While Gwendolyn stated she had to seek court action to require Father to pay child support, she said he was a good father to her daughters and to Anna G. and that based on her observations, Anna G. was extremely affectionate towards and attached to Father.

After hearing testimony over the course of seven days, the family court issued a thirteen-page order, in which it found Anna G. had displayed sexualized behavior, but it could not find by a preponderance of the evidence that Father was the perpetrator. In so finding, the family court held Anna G.'s disclosures were not trustworthy based on the methodology employed to elicit her sexual abuse disclosures. The family court relied on Ms. Stichnoch's and Dr. Watson's conclusions that Ms. McMillan engaged in inappropriate leading and suggestive tactics, which were well below the appropriate standard and protocol for such interviews.

Moreover, in explaining the sexual abuse allegations, the family court held Anna G. had an extensive medical history, including digestive and reflux issues, allergies, as well as vaginal soreness and redness, all which were

medically documented prior to any abuse allegations. In reviewing the child's medical records, the family court found Anna G.'s yeast infections and diaper rash were to be treated with ointment prescriptions applied to her vaginal area two to four times per day, and these treatments coincided with Anna G.'s statements that Father touched her "bottom."

The family court emphasized Mother was controlling and micromanaging when it came to Father's visitation and his relationship with Anna G. Both Father and his daughters testified Mother was overbearing when it came to Anna G.'s care while in Father's custody, and the family court found the daughters' testimony to be "extremely credible." A review of Mother's extremely detailed food log and daily routine schedule as well as Mother's medication, vitamin, and supplement instructions to Father supports this conclusion.

While Mother clearly cares greatly for her child, we agree with the family court's finding that the conflict in the parties' parenting skills and Mother's desire to micromanage Father's visitation with Anna G. has partially contributed to the circumstances surrounding these allegations. Moreover, we find it troubling, as did the family court, that Anna G. continued to "display the level of sexualized behavior and distress after having absolutely no contact or visitation with [Father] in over one full year."

Based on the voluminous testimony from numerous witnesses and the family court's superior ability to determine their credibility, we strongly believe the family court was in the best position to determine whether Anna G. was being abused by Father. See Epperly v. Epperly, 312 S.C. 411, 414, 440 S.E.2d 884, 885-86 (1994) ("Since the testimony on this issue is so divergent, we adopt the findings of the Family Court on this issue as the sitting judge was in the best position to determine the credibility of the witnesses."). Throughout our de novo review of this case, Mother has not convinced this court that Father sexually abused Anna G. Thus, we affirm the family court on this issue.

B. Award of Attorney's Fees in DSS Action

Mother claims the family court committed reversible error when it required her to pay a portion of counsel's attorney's fees because the GAL Program, not Mother, was required to pay appointed counsel for representing the volunteer GAL in this abuse and neglect proceeding. We agree.

The GAL Program, including the services it provides by way of its volunteer GALs, is a creature of state statute, both in funding and in administration. See S.C. Code Ann. § 63-11-570 (2010) ("The General Assembly shall provide the funds necessary for the South Carolina Guardian ad Litem Program to carry out the provisions of [the GAL Program] . . . ."); see also S.C. Code Ann. § 63-11-500 (2010) ("This program must be administered by the Office of the Governor."); S.C. Code Ann. § 1-30-110 (2010) (requiring all funds associated with the GAL Program be administered by the Office of the Governor).

The purpose of the GAL Program is to provide volunteer GALs to serve as court-appointed special advocates for children in abuse and neglect proceedings. See § 63-11-500 ("This program shall serve as a statewide system to provide training and supervision to volunteers who serve as court-appointed special advocates for children in abuse and neglect proceedings within the family court, pursuant to Section 63-7-1620."); see also S.C. Code Ann. § 63-7-1620(1) (Supp. 2010) ("In all child abuse and neglect proceedings . . . [c]hildren must be appointed a GAL by the family court."). Once appointed, legal counsel must be provided to the GAL during the pendency of the abuse and neglect proceeding. See id. ("A GAL serving on behalf of the South Carolina Guardian ad Litem Program or Richland County CASA must be represented by legal counsel in any judicial proceeding pursuant to Section 63-11-530(C).").

In this case, the legal counsel provided by the GAL Program, Mr. Clark, had scheduling conflicts with other cases and chose to hire another attorney, Mr. Stevenson, to represent the volunteer GAL in the hearing before the family court. Mr. Clark admitted he is paid a flat fee by the GAL

Program to represent volunteer GALs. Mr. Clark then sought to recover attorney's fees on Mr. Stevenson's behalf at the close[5] of the intervention action.

In support of the family court's award of attorney's fees, Mr. Clark cites to Rule 41(a), SCRFC,[6] as authority to assess attorney's fees greater than $100 against Mother based on "extraordinary circumstances." However, Rule 41(a) only pertains to "legal counsel appointed for the child[.]" (emphasis added). Moreover, section 63-7-1620(2) clearly states legal counsel for the child in an abuse and neglect proceeding is not the same as

---

[5] Mr. Clark submitted a motion to require Mother and Father pay attorney's fees prior to trial, but the family court did not rule on his motion until after trial was concluded.

[6] Rule 41, SCRFC, states:

> **(a) Limitation on Fees.** In all child abuse and neglect proceedings, the court shall grant to legal counsel appointed for the child subject to child abuse and/or neglect proceedings, a fee not to exceed One Hundred ($100.00) Dollars. The court shall grant to a guardian ad litem appointed for a child subject to such proceedings a fee not to exceed Fifty ($50.00) Dollars.
>
> **(b) Exceptions.** If the court determines that extraordinary circumstances require the award of a fee larger than that which is specified in this rule, the court shall set forth in its order the salient facts upon which the extraordinary circumstances are based and shall award a fee to appointed legal counsel or guardian ad litem in an amount which the court determines to be just and proper.

legal counsel for the GAL. See § 63-7-1620(2) ("The family court may appoint legal counsel for the child. Counsel for the child may not be the same as counsel for . . . the child's guardian ad litem."). Because the plain language of Rule 41 clearly does not pertain to legal counsel appointed for the GAL, we find Rule 41 inapplicable.

Mr. Clark also contends that Mother should be responsible for paying these fees, despite the GAL Program being funded by the General Assembly, because the family court has the statutory authority to assess attorney's fees against any party subject to its jurisdiction. We disagree.

First, we find the family court has the authority to assess attorney's fees against parties subject to its jurisdiction pursuant to section 63-3-530(38) of the South Carolina Code (Supp. 2010)[7] as well as Rule 12, SCRFC.[8]

Despite the family court's broad authority under 63-3-530, we find the General Assembly did not intend for parties in abuse and neglect proceedings to pay legal counsel's attorney's fees when representing volunteer GALs. See Spartanburg Co. Dept. of Soc. Servs. v. Little, 309 S.C. 122, 420 S.E.2d 499

---

[7] Section 63-3-530(38) grants the family court exclusive jurisdiction

> to hear and determine an action where either party in his or her complaint, answer, counterclaim, or motion for pendente lite relief prays for the allowance of suit money pendente lite and permanently. In this action the court shall allow a reasonable sum for the claim if it appears well-founded. Suit money, including attorney's fees, may be assessed for or against a party to an action brought in or subject to the jurisdiction of the family court . . . .

[8] Rule 12, SCRFC, states, "If a guardian ad litem is represented by an attorney, the court in its discretion may assess reasonable attorneys' fees and costs."

(1992) (finding section 20-7-420(38) (currently 63-3-530(38)), which gives the family court authority to award attorney's fees against a party, is a statute of general authority that may be overridden by a more specific statute limiting the family court's authority). The provisions of the GAL Program, which necessarily include payment of the GAL Program's legal counsel, are statutorily required to be funded by the legislative branch and to be administered by the executive branch. See §§ 63-11-500, -570. Because the General Assembly has already provided for payment of the GAL Program's attorneys, we find Mother should not also be required to pay attorney's fees.

In this instance, the GAL Program paid Mr. Clark a flat fee for his services as part of Mr. Clark's contract with the GAL Program. Mr. Clark stated he had scheduling conflicts with other cases; however, instead of seeking a continuance, in this or any of his other cases, he chose to hire Mr. Stevenson to represent the volunteer GAL. Mr. Clark then sought to recover attorney's fees for Mr. Stevenson's services from Mother. Mr. Clark points to no authority that allows him to seek payment for a substitute attorney chosen by Mr. Clark when Mr. Clark is already being paid by the GAL Program. The substitution of counsel was not due to a conflict in the case that required Mr. Clark's withdrawal but rather out of convenience and as an alternative to seeking a continuance. In similar circumstances, many lawyers who are appointed in abuse and neglect proceedings choose to hire substitute counsel in lieu of serving as appointed counsel. In these instances, the fee arrangement is between the lawyers.

Moreover, if Mr. Clark and the GAL Program are contractually obligated to one another, we do not see how Mr. Clark's decision to hire substitute counsel due to scheduling conflicts should work a financial detriment to Mother. While Mr. Clark was required to represent the GAL by virtue of his contract with the GAL Program, neither the GAL nor Mother were contractually obligated to Mr. Clark. Because Mr. Clark presented no evidence that he incurred any fees, we find it inappropriate to award fees against Mother. See generally Williamson v. Middleton, 383 S.C. 490, 495-96, 681 S.E.2d 867, 870-71 (2009) (finding attorney could not recover attorney's fees when attorney presented no evidence that client actually

incurred fees and when no fee agreement existed between the client and attorney). Accordingly, we reverse the family court's decision on this issue.

C. Award of GAL Fees in Private Custody Action

Last, Mother contends the family court improperly ordered her to pay $2,500 in GAL fees in the private custody action. We agree.[9]

Appointment of a GAL in a private action is controlled by the South Carolina Private Guardian Ad Litem Reform Act (the Act).[10] When the family court appoints a GAL, it must set forth the method and rate of compensation for the GAL, which includes an initial authorization of a fee based on the facts of the case. See § 63-3-850(A) (Supp. 2010). If the GAL decides it is necessary to exceed the fee initially authorized by the family court, the GAL must provide notice to both parties and obtain the family court's written authorization or the consent of both parties to charge more than the initially authorized fee. Id.

Pursuant to section 63-3-810 of the South Carolina Code (2010), the family court properly appointed a GAL, Catherine Christophilis, in the private custody action. See § 63-3-810(A) ("In a private action before the family court in which custody or visitation of a minor child is an issue, the court may appoint a guardian ad litem . . . ."). While Ms. Christophilis is entitled to appropriate fees for her services as a GAL as set forth in the family court's initial appointment order, the family court explicitly reserved ruling on her fees until it resolved the private custody action. When the court addressed the fee issues at the end of the intervention action, Ms. Christophilis admitted she had not filed her fee affidavit with the court. The

---

[9] Father did not appeal the family court's decision to require him to contribute towards the attorney's fees or the GAL fees. Thus, the family court's ruling is law of the case as it pertains to Father. See In re Morrison, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting an unappealed ruling becomes law of the case and precludes further consideration of the issue on appeal).

[10] See S.C. Code Ann. §§ 63-3-810 to -870 (2010).

family court then stated, "Well, your fees are associated with the private action. . . . Just hold your fees until the private action." As a result, the family court took no evidence concerning Ms. Christophilis' entitlement to GAL fees. However, in its order, the family court required Mother and Father to pay a combined $5,000 in GAL fees to Ms. Christophilis, which is $2,500 greater than initially authorized pursuant to the family court's appointment order. Because the family court explicitly reserved all custody issues for the subsequent and separate phase of the proceeding, and as such, did not follow the mandates of section 63-3-850, the family court erred in awarding $2,500 in GAL fees against Mother.[11]

CONCLUSION

Based on the foregoing, the family court's decision is

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and THOMAS, JJ., concur.

[11] In addition, we note when the family court awarded fees to Ms. Christophilis in its order, it failed to "take into account" any of the requisite factors from section 63-3-850(B) (specifically (1) the complexity of the issues before the court; (2) the contentiousness of the litigation; (3) the time expended by the guardian; (4) the expenses reasonably incurred by the guardian; (5) the financial ability of each party to pay fees and costs; and (6) any other factors the court considered necessary). See Loe v. Mother, Father, & Berkeley Cnty. Dep't of Soc. Servs., 382 S.C. 457, 473-74, 675 S.E.2d 807, 816 (Ct. App. 2009) (remanding issue of whether statutory requirements from section 63-3-850(B) were satisfied when family court improperly reviewed the reasonableness of GAL fees pursuant to Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991)).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Derrick McDonald, Appellant.

Appellate Case No. 2008-104547

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

Opinion No. 5033
Heard June 19, 2012 – Filed September 12, 2012

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Melody Jane Brown, all of Columbia, and Solicitor Daniel E. Johnson, of Columbia, for Respondent.

SHORT, J.: Derrick McDonald appeals from his convictions of murder and burglary in the first degree. He argues the trial court erred in admitting the statement of his non-testifying co-defendant, given to a law enforcement officer during the course of the investigation, without adequately redacting the portions of the co-defendant's statement implicating McDonald because it denied him of his right to confront and cross-examine the witness. We affirm.

FACTS

Josh Zoch died from multiple blunt force trauma to his head after being beaten with a baseball bat the night of December 12, 2006. Zoch, McDonald, Christopher Whitehead, and Robert Cannon all worked at the same Sonic Restaurant at one time. McDonald and Cannon both gave statements to police admitting their and Whitehead's involvement in the murder. Cannon told the police they had beaten Zoch to punish him for being a "snitch."[1] Whitehead told the police he did not know a "damn thing" about Zoch's murder.

McDonald, Whitehead, and Cannon were tried together as co-defendants in May 2008. None of the three co-defendants testified at trial. The jury found all three guilty, and the trial court sentenced Cannon and McDonald each to two concurrent terms of thirty-five years imprisonment for murder and first-degree burglary. The court sentenced Whitehead to two concurrent sentences of life without parole for murder and first-degree burglary.[2] This appeal followed.

LAW/ANALYSIS

McDonald argues the trial court erred in allowing Cannon's written statement into evidence without adequately redacting the portions of the co-defendant's statement implicating McDonald because it denied him his right to confront and cross-examine the witness. We disagree.

---

[1] Throughout the trial, it was mentioned that Zoch was a police informant who had committed at least one first-degree burglary.

[2] The trial court sentenced him to life without parole pursuant to section 17-25-45 of the South Carolina Code because of his 2005 guilty plea to attempted armed robbery. S.C. Code Ann. § 17-25-45 (Supp. 2011).

"The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses." *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009); *see* U.S. Const. amends. VI and XIV. In *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004), the Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness.

In *Bruton v. United States*, 391 U.S. 123, 126-137 (1968), the United States Supreme Court held a non-testifying co-defendant's confession that inculpates another defendant is inadmissible at their joint trial, even if the jury is instructed that the confession can only be used as evidence against the confessor, because of the substantial risk that the jury would look to the incriminating extrajudicial statements in determining the other's guilt. In *Richardson v. Marsh*, 481 U.S. 200, 207-08 (1987), the Supreme Court clarified the rule announced in *Bruton* is a "narrow" one that applies only when the statement implicates the defendant "on its face," and the rule does not apply to statements that only become incriminating when linked to other evidence introduced at trial, such as the defendant's own testimony. In *State v. Evans*, 316 S.C. 303, 307, 450 S.E.2d 47, 50 (1994), our supreme court held *Bruton* did not bar a statement that "on its face" did not incriminate Evans even though its incriminating import was certainly inferable from other evidence that was properly admitted against him.

The *Richardson* court also noted *Bruton* can be complied with by the use of redaction:

> Even more significantly, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce. If limited to facially incriminating confessions, *Bruton* can be complied with by redaction – a possibility suggested in that opinion itself. If extended to confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial.

Richardson, 481 U.S. at 208-09 (citation omitted); s*ee State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 359 (Ct. App. 2008) (stating redaction has come into play as a tool to allow admission of a co-defendant's confession against the confessor in a joint trial because it permits the confession to be used against the non-testifying confessor, while avoiding implicating the co-defendant). However, in *Gray v. Maryland*, 523 U.S. 185, 192 (1998), the Supreme Court noted the *Richardson* decision limited the scope of *Bruton* to instances where the reference to the defendant was on the face of the statement; therefore, a statement that substituted blanks and the word 'delete' for the petitioner's proper name falls within the class of statements to which *Bruton's* protections apply. The court explained:

> Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that, in our view, the law must require the same result.

Id. at 192. Further, this court has held the "Confrontation Clause is not violated when a defendant's name is redacted but other evidence links the statement's application to the defendant, if a proper limiting instruction is given." *Page*, 378 S.C. at 482, 663 S.E.2d at 359.

At trial, the State argued replacing the co-defendants' names in Cannon's written statement with "another person" would resolve any confrontation problem.[3] Cannon's attorney objected on behalf of all three co-defendants, arguing the limited redaction would not satisfy *Bruton* and *State v. LaBarge*, 275 S.C. 168, 268 S.E.2d 278 (1980), "because the statement clearly implicates someone else and it's obviously prejudicial to the people who are sitting right here." Further, he stated "there's an easier way to do it, which is simply to not put a reference to what someone else did." The following colloquy occurred between Cannon's attorney and the judge:

---

[3] Following a *Jackson v. Denno*, 378 U.S. 368 (1964), hearing, the judge ruled Cannon's statement was admissible.

> **The Court**: But that's not the law. . . . We've been over this. I mean, I've been over this many times. And the courts have said when replacing the offensive language with "the other person," "the other guy" or "we" or "they" when there's no reference, specific reference to a co-defendant, it satisfies *Bruton*.
>
> **Mr. Kendrick**: Your Honor, and I understand that. I am just arguing my position for this record, is that that [sic] does not satisfy *Bruton*. I know you're ruling I'm wrong, but I have to put it on the record.

The judge ruled in favor of the State. Counsel renewed their objections when the State introduced Cannon's statement into evidence.

In summary, Cannon stated he and at least two others decided to "beat [Zoch's] ass because he is a snitch." The group arrived at Zoch's house at approximately 11:30 p.m. on December 12, 2006, and "busted" the side door in, finding Zoch asleep on the couch. Cannon's statement, when redacted, read:

> [W]e went to Sonic. I had on a ski mask . . . We then left Sonic and went to the Two Notch Walmart [sic] and another person got a ski mask. So we went riding and another person said [']you know we need to do something with these ski mask[s'], and I ask, and another person ask [']like what?'] and another person said [']like beat [Zoch's] ass because he's a snitch['] and I told another person I didn't think he was a snitch. Another person then ask if me and another person wanted to ride and we said whatever. . . . That was about 11 pm. . . . We pulled up to [Zoch's] about 11:30 pm. . . . Another person went to the side door and another person busted it in. . . . [Zoch] was asleep on the couch and another person yelled [']hey Bitch,['] and when [Zoch] looked up, another person hit [Zoch] with a glass lamp. Right after that . . . another person drag[ged] him off the couch part of the way. Then another person started pressuring another person to hit [Zoch] with the bat that was in the

> house and another person then hit [Zoch] in the back of [his] head. After that [Zoch] was basicly [sic] crawling trying to get up . . . At that time another person kicked [Zoch] in the ribs and ask[ed] [Zoch] where the weed was and [Zoch] was just grunting. That[s] when another person ask[ed] me to check the room and we started pulling draws [sic] and another person flipped the mattress . . . Then [Zoch] went unconscious and I got [Zoch] a towel and put it to his head. Another person said, [']fuck, we don't have anything['] and pushed the Christmas tree over on [Zoch]. Another person then got mad again and took the house phone. But before another person left, he got some frozen chicken from the freezer and put it on [Zoch]'s head to try and stop the bleeding. After that we went back out the same way we came in.

Cannon also answered some questions in his statement:

> Q. Did you[,] another person[,] and another person have on gloves?
> A. Yes.
> Q. What kind of gloves?
> A. Purple latex and I had on 2 pair WHT [sic] and purple ones on top.
> Q. Where was the bat from that was used to hit [Zoch]?
> A. It was in [Zoch's] house. I just looked over their [sic] and another person picked it up.
> Q. What were you[,] another person[,] and another person wearing that night?
> A. Black pants and shirts and ski mask.
> Q. What color was the ski mask?
> A. Mine was black and theirs was [sic] black or dark blue.

The court also gave the jury a limiting instruction:

> Now, some of the evidence in this case may have been admitted solely because of its relationship to the case

> against one of the defendants. This evidence cannot be considered in the case of any of the other defendants.

On appeal, McDonald argues that given the context of the record, Cannon's written statement clearly implicated him as a person involved in the burglary and murder of Zoch. Therefore, its admission violated his rights under the Confrontation Clause. He argues this case is similar to *LaBarge*, 275 S.C. 168, 268 S.E.2d 278. In *LaBarge*, the State presented a confession given by his co-defendant that implicated LaBarge in the crimes and, in accordance with *Bruton*, the statement was redacted in an attempt to exclude all direct references to LaBarge. *Id.* at 170, 268 S.E.2d at 279-80. Where the name "LaBarge" appeared, "Mister X" was substituted; however, in light of other testimony, "Mister X" pointed directly to LaBarge. *Id.* at 170, 268 S.E.2d at 280. Regardless, the court did not specifically hold the redaction would not have satisfied *Bruton*, but simply stated, "It can be forcefully argued that the method of redacting was ineffective." *Id.* Similarly, in *State v. Holder*, 382 S.C. 278, 285-86, 676 S.E.2d 690, 694 (2009), our supreme court found the substitution of Holder's name with the pronoun "she" was insufficient to obscure her identity because the jury could readily determine the statement referred to her as she was the only female defendant. The court held the redaction was analogous to that in *Gray* because, despite the redaction, it was apparent the co-defendant was referring to Holder, and the inference was one that could be made even without reliance on the other testimony developed at trial. *Id.* Therefore, the court found the admission of the redacted statement violated Holder's rights under the Confrontation Clause because her co-defendant did not testify and was not subject to cross-examination. *Id.* at 286, 676 S.E.2d at 694.

In contrast, in *United States v. Akinkoye*, 185 F.3d 192, 198 (4th Cir. 1999), the Fourth Circuit Court of Appeals held the defendants were not prejudiced because the confessions were retyped to replace the defendants' respective names with the neutral phrases "another person" or "another individual." Also, in *United States v. Vogt*, 910 F.2d 1184, 1191-92 (4th Cir. 1990), the Fourth Circuit Court of Appeals held that a redacted statement, in which the co-defendant's name was replaced with the word "client," did not on its face impermissibly incriminate the co-defendant even though the incriminating import was inferable from other evidence. The court further stated that even though it may not be easy for a jury to obey the cautionary instruction, "'there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s [rule].'" *Id.* at 1192 (quoting *Richardson v. Marsh*, 481 U.S. at 208).

We find that the neutral phrase "another person" inserted into Cannon's statement avoided any *Bruton* violation. The redacted statement only implicates the statement's maker, and it does not limit the participants to three, which would implicate the three defendants on trial. Further, the court gave the jury a limiting instruction. Therefore, we find the trial court properly allowed Cannon's redacted statement into evidence.

McDonald also argues Cannon's written statement was a violation of *Crawford v. Washington*, 541 U.S. 36 (2004), because the statement was given during the course of an investigation, and McDonald did not have an opportunity to confront and cross-examine Cannon.

Counsel for Cannon argued for all three co-defendants concerning redacting Cannon's written statement to the police. Counsel's argument was based on *Bruton* and did not mention *Crawford v. Washington*. Counsel did not raise a *Crawford* violation until hundreds of pages later in the transcript in regard to an oral statement made by Cannon during a polygraph exam. The judge noted this was the first time *Crawford* was mentioned, and Cannon's previous redacted statement had already been admitted. Counsel stated, "[F]or the record, I'm going to go ahead and put on the record that the other statements should have been suppressed due to *Crawford*, too." Because the *Crawford* issue was not raised when Cannon's written statement was redacted and admitted, this issue is not preserved for our review. *See State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); *State v. Burton*, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997) ("Failure to object when the evidence is offered constitutes a waiver of the right to object."); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue is not preserved for appeal where one ground is raised below and another ground is raised on appeal).

CONCLUSION

Accordingly, McDonald's convictions for murder and burglary in the first degree are

AFFIRMED.

HUFF, J., concurs.

FEW, C.J., concurs in a separate opinion.

FEW, C.J., concurring: I concur in the majority opinion insofar as it holds that the use of the term "another person" satisfied the requirements of *Bruton v. United States*, 391 U.S. 123 (1968). However, I disagree with the majority's treatment of *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* relates to the question of whether the Sixth Amendment right of confrontation is implicated by a particular statement. *See State v. Ladner*, 373 S.C. 103, 111, 644 S.E.2d 684, 688 (2007) (recognizing that *Crawford* held the confrontation clause is implicated *if* the statement is testimonial). The State agrees Cannon's statement is testimonial, and therefore McDonald had the right to confront Cannon. In my opinion, therefore, the *Crawford* issue the majority holds is unpreserved was never an issue at all, and there is no need to discuss *Crawford*. The question is properly analyzed under *Bruton*.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Richard Bill Niles, Jr., Appellant.

Appellate Case No. 2009-121246

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Published Opinion No. 5034
Heard February 14, 2012 – Filed September 12, 2012

REVERSED

Robert Michael Dudek, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Brendan J. McDonald, all of Columbia, for Respondent.

WILLIAMS, J.: On appeal, Richard Bill Niles, Jr. (Niles) argues the circuit court erred in declining to charge the jury on voluntary manslaughter because there was evidence that Niles was not the first aggressor. Niles asserts the circuit court incorrectly reasoned Niles was either acting in self-defense or shot the decedent during the commission of an armed robbery. Because voluntary manslaughter and

self-defense are not mutually exclusive, Niles contends he was entitled to a charge on voluntary manslaughter. We agree and reverse.

FACTS/PROCEDURAL HISTORY

On April 9, 2007, James Salter (Salter) was shot in a Best Buy parking lot in Myrtle Beach, South Carolina. Salter later died from his injuries. Niles, his fiancée Mokeia Hammond (Hammond), and Ervin Moore (Moore) were arrested and charged with murder, armed robbery, and possession of a firearm during the commission of a violent crime. Moore entered into a plea agreement with the State whereby Moore pled guilty to armed robbery, voluntary manslaughter, and possession of a firearm during the commission of a violent crime in exchange for his testimony against Niles and Hammond. Niles and Hammond were tried jointly on March 9, 2009.

At Niles' and Hammond's trial, Moore testified that on April 9, 2007, Niles and Hammond picked up Moore and headed to the beach where the trio "made a couple of drug sales at a couple of motels." Moore stated, "[W]e were smoking blunts in the car . . . [and when] we ran out of weed . . . we said we wanted to get some more weed." Moore maintained Niles "made a couple of phone calls," and they "ended up in the Best Buy parking lot." Moore testified Niles said "he was going to do a lick," which Moore understood to mean they were going to rob the drug dealer, later identified as Salter. Moore stated his job in the robbery was "to identify the weed" for Niles.

Upon arriving at the Best Buy parking lot, Moore exited his vehicle and got into Salter's vehicle. Moore stated Salter pulled a large ziploc bag of marijuana out from under his seat so Moore could see it. Moore maintained that by the time he inspected the marijuana, exited Salter's vehicle, and returned to the vehicle with Hammond, Niles had exited their vehicle. Moore testified he informed Niles that he saw the marijuana and stated, "The next thing I knew, I just heard two shots and I seen [Niles], he jumped back in the back seat behind [Hammond]." Moore further stated "after . . . [Niles] jumped in [the vehicle], after them two shots then the other guy fired a shot." Moore testified that after both Niles and Salter continued to fire shots at each other, Hammond drove out of the parking lot.

Though Moore testified on direct examination "the other guy didn't shoot until after [Niles] shot," on cross-examination, Moore admitted he did not actually see Niles shoot first. Moore stated he originally testified Niles shot first because Niles admitted he shot first when Niles jumped back into the vehicle.

Niles testified in his own defense. He denied he told Moore he was "going to do a lick" and testified Moore asked him to purchase a pound of marijuana for him. Niles affirmed that when they pulled into the Best Buy parking lot, Moore got out of the vehicle and into Salter's vehicle. Niles testified he was talking to Hammond about their upcoming wedding when Hammond suddenly told him, "Baby, they are fighting." Niles stated he looked over to Salter's vehicle and observed Moore and Salter "tussling in the car." Niles stated he noticed Moore trying to exit Salter's vehicle and heard Salter state to Moore, "[Y]ou ain't getting out of this car with my weed without no money." Niles maintained that when Moore exited Salter's vehicle and jumped into the vehicle with Niles and Hammond, Salter pulled out a gun and began shooting at the vehicle that Niles, Hammond, and Moore occupied. Niles testified, "I grabbed my pistol and that's when I shot two times." Niles maintained he was being shot at constantly by Salter and he shot back.

The circuit court charged the jury on self-defense, but it refused Niles' request to charge the jury on voluntary manslaughter. The circuit court refused the voluntary manslaughter charge reasoning that "either the victim started shooting and Mr. Niles was acting in self-defense or Mr. Niles started shooting . . . [and] killed the victim during the commission of an armed robbery."

Niles was convicted of murder, armed robbery, and possession of a firearm during the commission of a violent crime.[1] Niles received a thirty-year sentence for murder and armed robbery and a five-year sentence for the conviction of possession of a firearm during the commission of a violent crime, all to be served concurrently. Niles appeals.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.* If any evidence supports a jury charge, the circuit court should grant the request. *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). To warrant reversal, a circuit court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *Id.*

[1] While Niles was convicted of all charges, Hammond was only convicted of armed robbery and sentenced to fifteen years imprisonment.

LAW/ ANALYSIS

Niles argues the circuit court erred in failing to charge the jury on voluntary manslaughter because conflicting testimony was presented to support a jury charge on voluntary manslaughter.

To the contrary, the State asserts a jury charge of voluntary manslaughter was not appropriate in this case. The State argues only two scenarios are possible from the evidence presented at trial: (1) Salter shot first and Niles acted in self-defense by returning fire; or (2) Niles shot at Salter first, committing murder during the commission of an armed robbery. The State contends that Niles failed to present evidence showing legal provocation or sudden heat of passion, which are both prerequisites to support a charge on voluntary manslaughter. We agree with Niles.

"The evidence presented at trial determines the law to be charged to the jury." *State v. Hernandez*, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010). "To warrant a court's eliminating the offense of [voluntary] manslaughter, it should very clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to [voluntary] manslaughter." *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) (emphasis added). In determining whether the evidence requires a charge of voluntary manslaughter, the circuit court views facts in a light most favorable to the defendant. *State v. Byrd*, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996).

"Voluntary manslaughter is the unlawful killing of a human being in [a] sudden heat of passion upon sufficient legal provocation." *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). Both sufficient legal provocation and heat of passion must be present at the time of the killing to support a jury instruction on voluntary manslaughter. *Hernandez*, 386 S.C. at 660, 690 S.E.2d at 585.

Furthermore, a court is permitted to charge a jury on both voluntary manslaughter and self-defense if supported by the evidence. In *State v. Gilliam*, 296 S.C. 395, 396-97, 373 S.E.2d 596, 597 (1988), our supreme court held a jury charge on self-defense and voluntary manslaughter are not mutually exclusive, stating:

> Both self-defense and the lesser included offense of voluntary manslaughter should be submitted to the jury if supported by the evidence. The rationale for this rule is that the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and

> heat of passion to conclude the defendant was guilty of voluntary manslaughter.

(internal citation omitted).

Here, we find Niles' testimony that Salter fired the first shot at him, and he subsequently returned fire provides sufficient evidence to support a jury charge on voluntary manslaughter. Viewing the evidence in a light most favorable to Niles, we believe a jury could find Niles acted in a heat of passion upon sufficient legal provocation, thus supporting a voluntary manslaughter jury charge.

I. Legal Provocation

First, we find there is evidence, albeit conflicting, that Salter sufficiently provoked Niles.

An unprovoked attack with a deadly weapon or an overt threatening act can constitute sufficient legal provocation to support a jury charge on voluntary manslaughter. *State v. Starnes*, 388 S.C. 590, 597-98, 698 S.E.2d 604, 608 (2010). In *Gilliam*, our supreme court found adequate legal provocation to support a jury charge on voluntary manslaughter from the defendant's testimony that the victim made threatening statements to the defendant, drew a gun, and shot at the defendant. *Gilliam*, 296 S.C. at 396-97, 373 S.E.2d at 597. Further, in *State v. Linder*, 276 S.C. 304, 306-07, 278 S.E. 2d 335, 337 (1981), our supreme court held the evidence supported a jury charge on voluntary manslaughter when, under the defendant's version of the facts, a patrolman began shooting at the defendant before the defendant reached for his weapon, returned fire, and killed the patrolman.

Here, Niles testified:

> [W]hen [Moore] was getting out of the car and Salter was reaching underneath his seat I seen him pulling the gun and that's when he start[ed] firing off as [Moore] was jumping in the back seat and when he pulled the door to that's when . . . [Salter] was shooting in the car. That's when my fiancé[e] started screaming. [Hammond] ducked in my lap. She was screaming. So, while [Salter] was shooting in the car . . . I grabbed my pistol and that's when I shot two times.

We find Niles' testimony provided evidence that he shot Salter after Salter pulled a gun and began shooting at Niles. Accordingly, viewing the evidence in a light most favorable to Niles, we find his version of the facts provided sufficient legal provocation to support a jury charge on voluntary manslaughter. *See State v. Pittman*, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2008) ("This court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation."); *see also State v. Gadsden*, 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994) ("In determining whether the evidence required a charge of voluntary manslaughter, we view the facts in a light most favorable to the defendant.").

II. Heat of Passion

Second, we find evidence was presented at trial to show Niles acted in a heat of passion when he shot Salter.

To mitigate murder to voluntary manslaughter, sudden heat of passion, while it need not dethrone reason entirely, must be such that would "naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (internal quotation marks and citation omitted). "However, even when a person's passion is sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary person would have cooled, the killing would be murder and not manslaughter." *Hernandez*, 386 S.C. at 661, 690 S.E.2d at 585 (internal quotation marks and citation omitted). "Whether an accused cooled off prior to a violent act must be determined by a review of all the circumstances surrounding the event and the people involved." *Id.*

Niles testified that after Salter began shooting at his vehicle, Niles reached for his gun and returned fire. He stated:

> So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying

> to do. I didn't know if my fiancé[e] got shot or nothing. That's the first thing that came to my head, you know.

From Niles' testimony, we find there is evidence Niles acted in a sudden heat of passion. Looking at the totality of the circumstances, there is no evidence Niles had a period of time to cool down or reflect before reaching for his gun and firing back at Salter. *See State v. Knoten*, 347 S.C. 296, 307-09, 555 S.E.2d 391, 397-98 (2001) (holding it is error to refuse a jury charge on voluntary manslaughter when viewing the evidence in the light most favorable to the defendant, there is no evidence that a significant period of time elapsed between the attack of the defendant by the decedent and the defendant's fatal blows). Further, Niles' testimony that grabbing the gun and returning fire was the "the first thing that came to . . . [his] mind" supports that he was acting on impulse upon being shot at by Salter. *See Starnes*, 388 S.C. at 598, 698 S.E.2d at 609 (holding to constitute sudden heat of passion to warrant a jury charge of voluntary manslaughter, a defendant's fear immediately following an attack or threatening act must cause the defendant to lose control and create an uncontrollable impulse to do violence).

Accordingly, viewing the evidence in the light most favorable to Niles, we find evidence sufficient to support a charge on voluntary manslaughter; therefore, the circuit court erred in failing to charge the jury on voluntary manslaughter. *See State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding that if there is any evidence to support a jury charge, the circuit court should grant the request).

III. Prejudice

Furthermore, the error of the circuit court in failing to charge the jury with voluntary manslaughter prejudiced Niles. "The [circuit] court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v. Harrison*, 343 S.C. 165, 173, 539 S.E.2d 71, 75 (Ct. App. 2000). However, even if the circuit court "refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (internal citation omitted). The party complaining of the circuit court's refusal to give the requested instruction bears the burden of demonstrating prejudice to warrant a reversal. *Otis Elevator, Inc. v. Hardin Const. Co. Group, Inc.*, 316 S.C. 292, 299, 450 S.E.2d 41, 45 (1994).

We find Niles met his burden of showing he was prejudiced by the circuit court's refusal to give the requested jury instruction. Here, the circuit court failed to give any instruction on voluntary manslaughter. The jury charges the circuit court gave regarding self-defense, murder, armed robbery, and possession of a firearm during the commission of a violent crime do not cover the substance of voluntary manslaughter, nor do they explain the elements of voluntary manslaughter. Based on the evidence presented at trial, viewed in a light most favorable to the defendant, a jury could have found Niles guilty of voluntary manslaughter. Therefore, Niles was prejudiced by the circuit court's failure to instruct the jury on voluntary manslaughter. *See Harrison*, 343 S.C. at 175, 539 S.E.2d at 76 (holding defendant was prejudiced when based on the evidence at trial, a different verdict might have been reached if the jury had been charged with the instruction requested by the defendant).

Because the circuit court erred in refusing to charge the jury on voluntary manslaughter and that error prejudiced Niles, we reverse the circuit court. *See Harrison*, 343 S.C. at 173, 539 S.E.2d at 75 ("To warrant reversal, a [circuit court's] refusal to give a requested jury charge must be both erroneous and prejudicial.")

CONCLUSION

Accordingly, the circuit court's decision is

REVERSED.

THOMAS and LOCKEMY, JJ., concur.