Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

September 28, 2007

M E D I A R E L E A S E

Public Hearings have been scheduled to begin on **Tuesday, December 4, 2007,** commencing at **9:30 a.m.** regarding the qualifications of the following candidates for judicial positions:

SUPREME COURT

Seat 3

The Honorable John C. Few, Greenville, S.C.
The Honorable Diane S. Goodstein, Summerville, S.C.
The Honorable Kaye G. Hearn, Conway, S.C.
The Honorable Deadra L. Jefferson, Charleston, S.C.
The Honorable John W. Kittredge, Greenville, S.C.
The Honorable A. Eugene Morehead, III, Florence, S.C.

COURT OF APPEALS

Seat 6

The Honorable Robert S. Armstrong, Seabrook, S.C.
The Honorable Timothy L. Brown, Greenville, S.C.
The Honorable John D. Geathers, Columbia, S.C.
The Honorable J. Mark Hayes, II, Spartanburg, S.C.
J. René Josey, Florence, S.C.
The Honorable Aphrodite Konduros, Greenville, S.C.
The Honorable James E. Lockemy, Dillon, S.C.
The Honorable John M. Milling, Darlington, S.C.

CIRCUIT COURT

Ninth Judicial Circuit, Seat 2

P. Michael DuPree, Johns Island, S.C.
Kristi Lea Harrington, Hanahan, S.C.
The Honorable Jack A. Landis, Moncks Corner, S.C.
William J. Thrower, Hollywood, S.C.

At-Large, Seat 11

The Honorable Alison Renee Lee, Columbia, S.C.

At-Large, Seat 12

The Honorable Thomas A. Russo, Florence, S.C.

At-Large, Seat 13

James E. Chellis, Summerville, S.C.
Allen O. Fretwell, Greenville, S.C.
Eugene C. Griffith, Jr., Newberry, S.C.
Larry B. Hyman, Jr., Conway, S.C.
Linda S. Lombard, Charleston, S.C.
Samuel S. Svalina, Hilton Head, S.C.
William B. von Herrmann, Conway, S.C.

FAMILY COURT

Fourth Judicial Circuit, Seat 3	**The Honorable James A. Spruill**, Cheraw, S.C.
Fifth Judicial Circuit, Seat 3	**Dana A. Morris**, Camden, S.C.
	The Honorable Jeffrey M. Tzerman, Camden, S.C.
Sixth Judicial Circuit, Seat 2	**Betsy White Burton**, Winnsboro, S.C.
	Coreen B. Khoury, Lancaster, S.C.
	W. Thomas Sprott, Jr., Winnsboro, S.C.
Ninth Judicial Circuit, Seat 5	**The Honorable Jocelyn B. Cate**, Hollywood, S.C.
Twelfth Judicial Circuit, Seat 1	**Robert H. Corley**, Mullins, S.C.
	Timothy H. Pogue, Marion, S.C.
Thirteenth Judicial Circuit, Seat 5	**The Honorable Robert N. Jenkins, Sr.**, Travelers Rest, S.C.
Fourteenth Judicial Circuit, Seat 2	**Catherine D. Badgett**, Ridgeland, S.C.
	Sally G. Calhoun, Beaufort, S.C.
	Peter L. Fuge, Bluffton, S.C.
	Peggy M. Infinger, Beaufort, S.C.
	Deborah A. Malphrus, Ridgeland, S.C.
Fifteenth Judicial Circuit, Seat 3	**Melissa Johnson Emery**, Myrtle Beach, S.C.
	Anita R. Floyd, Garden City, S.C.
	Ronald R. Norton, Murrells Inlet, S.C.

ADMINISTRATIVE LAW COURT

Seat 5	**The Honorable Paige J. Gossett**, Columbia, S.C.

MASTER-IN-EQUITY

Berkeley County	**The Honorable Robert E. Watson,** Moncks Corner, S.C.
Georgetown County	**Joe M. Crosby**, Georgetown, S.C.
Sumter County	**Richard L. Booth**, Sumter, S.C.

RETIRED

Supreme Court	**The Honorable James E. Moore,** Greenwood, S.C.
Circuit Court	**The Honorable Edward B. Cottingham,** Bennettsville, S.C.
Circuit Court	**The Honorable C. Victor Pyle, Jr.,** Greenville, S.C.
Family Court	**The Honorable Haskell T. Abbott, III,** Conway, S.C.
Family Court	**The Honorable Wylie H. Caldwell, Jr.,** Florence, S.C.

Persons desiring to testify at the public hearings must furnish written notarized statements of proposed testimony. These statements must be **received no later than 12:00 Noon on Friday, November 30, 2007.** The Commission has witness affidavit forms that may be used for proposed testimony. While this form is not mandatory, it will be supplied upon request. Statements should be mailed or delivered to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, 104 Gressette Building, Post Office Box 142, Columbia, South Carolina 29202.

All testimony, including documents furnished to the Commission, must be submitted under oath. Persons knowingly giving false information, either orally or in writing, shall be subject to penalty.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

Questions concerning the hearings and procedures should be directed to the Commission at (803) 212-6092.

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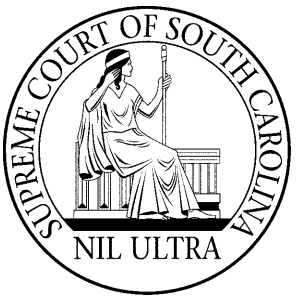

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 36

October 8, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Rodman C. Tullis, Respondent.

Opinion No. 26383
Heard September 18, 2007 – Filed October 8, 2007

DISBARMENT

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

Rodman C. Tullis, of Spartanburg, Respondent, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel filed formal charges against respondent, Rodman C. Tullis, alleging misconduct in eight different matters. Respondent failed to file an answer, and he was found to be in default. After a hearing,[1] the sub-panel and the full panel recommended that respondent be disbarred and be required to pay various costs.

[1] Respondent did not appear at the hearing or at the oral argument before this Court.

The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court. In re McFarland, 360 S.C. 101, 600 S.E.2d 537 (2004); In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001). Under the Rules for Lawyer Disciplinary Enforcement (RLDE), respondent is in default and therefore is deemed to have admitted all factual allegations of the formal charges. See Rule 24 RLDE, Rule 413, SCACR. The charges of misconduct against respondent likewise are deemed admitted, and therefore, the Court must only determine the appropriate sanction. E.g., Matter of Thornton, 327 S.C. 193, 489 S.E.2d 198 (1997).

In In re Murph, 350 S.C. 1, 4, 564 S.E.2d 673, 675 (2002), the Court stated the following:

> An attorney usually does not abandon a license to practice law without a fight. Those who do must understand that "neglecting to participate [in a disciplinary proceeding] is entitled to substantial weight in determining the sanction."… An attorney's failure to answer charges or appear to defend or explain alleged misconduct indicates an obvious disinterest in the practice of law. Such an attorney is likely to face the most severe sanctions because a central purpose of the disciplinary process is to protect the public from unscrupulous or indifferent lawyers.

(Citation omitted).

We find respondent, *inter alia*, failed to adequately communicate with his clients, failed to act with diligence and competence; misused and mismanaged trust account funds; and failed to respond to Disciplinary Counsel inquiries and notices of full investigation regarding these matters.

Based on the admitted facts, respondent violated the following Rules of Professional Conduct (RPC), found in Rule 407, SCACR:

- Rule 1.1 – Competence
- Rule 1.2 – Scope of Representation
- Rule 1.3 – Diligence

- Rule 1.4 – Communication
- Rule 1.5 – Fees
- Rule 1.8 – Conflict of Interest; Prohibited Transactions
- Rule 1.15 – Safekeeping of Property
- Rule 1.16 – Declining or Terminating Representation
- Rule 4.4 – Respect for Rights of Third Persons
- Rule 8.1 – Bar Admissions and Disciplinary Matters
- Rule 8.4(d) & (e) – Dishonesty or Misrepresentation, and Conduct Prejudicial to the Administration of Justice

We further find the following violations of the RLDE, Rule 413, SCACR:

- Rule 7(a)(1) (violating the Rules of Professional Conduct)
- Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute or conduct demonstrating an unfitness to practice law)
- Rule 7(a)(6) (violating the oath of office taken upon admission to the practice of law).

Accordingly, respondent has engaged in misconduct which warrants the severe sanction of disbarment. See, e.g., In re Murph, 350 S.C. at 5, 564 S.E.2d at 675-76 (attorney disbarred for, *inter alia*, failing to: represent a client competently; act with reasonable diligence and promptness; keep a client reasonably informed; deliver promptly to a client or third person funds that the client or person was entitled to receive; and respond to a lawful demand for information from a disciplinary authority); In the Matter of Edwards, 323 S.C. 3, 448 S.E.2d 547 (1994) (attorney disbarred for, *inter alia*, failing to represent his clients diligently and competently; failing to keep clients informed, misappropriating or improperly using client funds, knowingly presenting false testimony, and failing to cooperate in investigation of disciplinary charges against him).[2]

[2] We also note respondent's extensive disciplinary history, see, e.g., In the Matter of Tullis, 330 S.C. 502, 499 S.E.2d 811 (1998) (public reprimand); In re Tullis, 348 S.C. 235, 559 S.E.2d 833 (2002) (definite suspension), as well as the fact that

In addition to disbarment, we also order respondent to pay both restitution of $410.00 to chiropractor Princess Porter and the costs of these disciplinary proceedings.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has compiled with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., MOORE, WALLER, PLEICONES, JJ., and Acting Justice Perry M. Buckner, concur.

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he was suspended in 2005 for failure to comply with CLE requirements and failure to pay Bar dues.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nationwide Mutual Insurance Company, Appellant,

v.

James W. Smith, Jr. and Elizabeth Smith, Respondents.

Appeal From Lexington County
Clyde N. Davis, Jr., Circuit Court Judge

Opinion No. 4295
Submitted May 1, 2007 – Filed September 26, 2007

REVERSED AND REMANDED

John Robert Murphy, of Columbia, for Appellant.

Bradley Baker, of Lexington, for Respondents.

HUFF, J: James W. Smith, Jr. and Elizabeth Smith (the Smiths) were involved in an automobile accident with an uninsured motorist. Nationwide Mutual Insurance Company (Nationwide) brought a declaratory judgment action to determine whether the insurance policy covering the vehicle in which the Smiths were riding was void for lack of an insurable interest. The

trial court granted summary judgment in favor of the Smiths. Nationwide appeals.[1]

FACTS

On October 29, 2003, the Smiths were involved in a motor vehicle accident in Lexington County, South Carolina. At the time of the accident, James W. Smith, Jr. was driving and Elizabeth Smith was a passenger in a 1999 Montero Sport (Montero) owned by James W. Smith, Jr. The accident was caused when Martha Lawrence (Lawrence) collided with the vehicle in front of the Smiths and then hit the Smiths causing the Montero to overturn. Lawrence was driving an uninsured vehicle. As a result of the accident the Smiths pursued uninsured motorist claims on the Nationwide Policy Number: 61 39 K 931345.

At the time of the accident, the Montero was a listed vehicle on the Nationwide Policy Number: 61 39 K 931345. While the Montero was owned by and registered to James W. Smith, Jr., the Nationwide policy covering the Montero was taken out and owned by his father, James W. Smith, Sr. (Father).[2] Father was the named insured under the policy, which provided uninsured motorist (UM) coverage in the amounts of $50,000 per person and $100,000 per occurrence. The policy also covered a 1992 Ford Ranger (Ranger), owned by Father and his grandson, Christopher Smith. The UM policy covering the Ranger also provided UM coverage in the amounts of $50,000 per person and $100,000 per occurrence. In addition to Father, the policy listed drivers Elizabeth Smith and Christopher Smith.[3]

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

[2] Father was residing with the Smiths and his grandson at the time the accident occurred. Father did not drive due to medical reasons and from time to time relied on the Smiths to drive him to and from doctor visits and to obtain prescriptions.

[3] Nationwide concedes that both the Smiths are Class I insureds under the Father's policy. There are two classes of insureds: (1) the named insured, his spouse and relatives residing in his household; and, (2) any person using,

Nationwide denied coverage and filed a declaratory judgment action for a determination that the policy covering the Montero was void for lack of an insurable interest. The Smiths answered and counterclaimed. Both Nationwide and the Smiths filed motions for summary judgment.

At the hearing, Nationwide sought a declaration that the policy was void as to the Montero and the Smiths were precluded from collecting UM coverage from that policy. Nationwide argued Father lacked an insurable interest in the vehicle because he did not own the Montero, did not control the Montero, or was not responsible for or could be held liable for its operation or use. Nationwide also raised the issue as to whether the Smiths would be entitled to UM coverage under the Ranger's policy. Nationwide noted four cases addressing the issue were pending before the supreme court. Depending on the outcome of the pending cases, Nationwide argued the Smiths would either be entitled to nothing or the basic statutory limit of $15,000 per person, $30,000 per occurrence.

The Smiths argued because they used the Montero to transport Father, Father benefited from its use and therefore had an insurable interest in the Montero. Regardless, they averred the insurable interest requirement for liability coverage was irrelevant when dealing with UM coverage. Because the uninsured motorist statute mandates insurers to provide UM coverage to the named insured and resident relatives of the named insured's household at all times, the Smiths claimed the insurable interest argument had no bearing on UM coverage.

The trial court found the insurable interest requirement for liability insurance was irrelevant to the case as the issue before the court dealt with UM coverage and not liability coverage. The trial court characterized Nationwide's position as an attempt to circumvent the statutory mandate that

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with the consent of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicle. Concrete Servs., Inc. v. U.S. Fid. & Guar. Co., 331 S.C. 506, 509, 498 S.E.2d 865, 866 (1998). The right to stack is available only to a Class I insured. Id.

automobile insurance carriers must provide UM coverage on all policies issued. The trial court concluded the Smiths were entitled to $50,000 per person, $100,000 per occurrence in UM coverage on the Montero and that James W. Smith, Jr. and Elizabeth Smith each could stack the $50,000 UM coverage provided on the Montero policy and the $50,000 UM coverage provided on the Ranger. The total coverage available to each was held to be $100,000 for a total of $200,000 in UM coverage for the occurrence.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). However, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Bennett v. Investors Title Ins. Co., 370 S.C. 578, 588, 635 S.E.2d 649, 654 (Ct. App. 2006). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004).

LAW/ANALYSIS

Nationwide claims the trial court erred in holding the insurable interest requirement for liability insurance was irrelevant when dealing with UM coverage. We agree.

Initially, we note that in South Carolina all automobile insurance policies are statutorily required to contain UM coverage. S.C. Code Ann. § 38-77-150 (2002) (requiring all automobile insurance policies contain a provision to protect against damages an insured is legally entitled to recover which "arise out of the ownership, maintenance or use" of an uninsured vehicle). South Carolina mandates that UM coverage must be provided in an amount equal to the minimum liability limits, id., and requires insurance carriers to offer, at the option of the insured, UM coverage up to the limits of the insured's liability coverage. S.C. Code Ann. § 38-77-160 (2002). Thus, UM coverage does not exist in and of itself, but rather is a requirement of and dependent on a valid automobile insurance policy.

An automobile insurance policy, like other forms of insurance, must be supported by an insurable interest in the named insured. American Mut. Fire Ins. Co. v. Passmore, 275 S.C. 618, 620, 274 S.E.2d 416, 417 (1981) (citations omitted); Couch on Insurance 3d §41:1 (2005) (stating,"[t]oday, it is universally held, either by force of statute or upon public policy grounds, that insurable interest is necessary to the validity of a policy, no matter what the subject matter."). "The insurable interest required does not depend upon the named insured having either a legal or equitable interest in the property, 'but it is enough that the insured may be held liable for damages to its operation and use.'" Passmore, 275 S.C. at 620-21, 274 S.E.2d at 417-18 (quoting Nationwide Mutual Ins. Co. v. Douglas, 273 S.C. 243, 255, 255 S.E.2d 828 (1979)(Lewis, C.J., dissenting)). Where a named insured does not have any insurable interest in the vehicle, the insurance policy is illegal. Id. at 621-22, 274 S.E.2d at 418. Thus, liability insurance is dependent upon an insurable interest and since liability insurance cannot be issued without UM coverage, UM coverage, consequently, is indirectly dependent on the existence of an insurable interest.

The trial court ignored the requirement that an individual must have an insurable interest in the vehicle in which he seeks coverage by making a distinction between liability coverage and UM coverage. The court based its distinction on Unisun Insurance Company v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000) and Hogan v. Home Insurance Company, 260 S.C. 157,

194 S.E.2d 890 (1973). In both cases, the insurance company involved attempted to exclude UM coverage to an insured under a valid policy.

In Schmidt, the defendant, a guest of the named insured, was injured while riding in the named insured's vehicle while driven by an unauthorized driver. 339 S.C. at 364-65, 529 S.E.2d at 281. The insurance company attempted to exclude coverage because once the vehicle was driven without permission it was no longer covered under the policy. Id. at 365, 529 S.E.2d at 281. This court denied coverage, finding when the vehicle was driven without permission it no longer was a vehicle "to which the policy applied." Id. The definition of insured under South Carolina Code Ann. §38-77-30(7) defines "insured" to mean, "the named insured and, while resident of the same household, the spouse of any named insured and relatives . . . and any person who uses with the consent. . . the motor vehicle to which the policy applies." The supreme court found the "motor vehicle to which the policy applies" is "the motor vehicle designated in the policy" and thus are words of identification and not words of exclusion. Id. at 367, 529 S.E.2d at 282 (citing Davidson v. Eastern Fire & Cas. Ins. Co., 245 S.C. 472, 477-78, 141 S.E.2d 135, 138 (1965)). The court concluded the vehicle qualified as an uninsured vehicle and the defendant was covered under the uninsured portion of the policy. Id.

In this case, the trial court finds the motor vehicle to which the policy applies is the Montero Sport as it is the motor vehicle designated in the policy. However, in Schmidt the policy the court relies on to find coverage is a valid insurance policy. In this case, the policy which the court relies on to find coverage may not be a valid policy. If there is no valid policy, there can be no motor vehicle to which the policy applies, nor can there be a motor vehicle designated in the policy.

Likewise, the court relies on Hogan to distinguish the insurable interest requirement for liability coverage from UM coverage. In Hogan, the named insured's son was killed while riding in a vehicle she retained title to but which was actually owned by and driven by her nephew. 260 S.C. at 159, 194 S.E.2d at 890-91. An exclusion in the insurance policy provided UM coverage did not apply to injuries sustained by an "uninsured" while

occupying a car other than the insured vehicle owned by the named insured or a resident relative. Id. at 159-160, 194 S.E.2d at 891. The court held the exclusion invalid because it conflicted with the statutory mandate that UM coverage apply to the named insured and resident relatives without regard to the use of the insured vehicle. Id. at 162, 194 S.E.2d at 892.

Again, as in Schmidt, the issue before the Hogan court dealt with an exclusion included in a valid insurance policy. It is undeniable that under a valid insurance policy Nationwide could not exclude coverage in this case. The question, however, is not whether Nationwide is unduly excluding coverage; rather, the issue is whether there exists a valid insurance policy.

We acknowledge the purpose of the uninsured motorist statute is to provide benefits and protection against the peril of injury or death by an uninsured motorist to an insured motorist and his family. Ferguson v. State Farm Mut. Auto Ins. Co., 261 S.C. 96, 100, 198 S.E.2d 522, 524 (1973). We also remain ever mindful the statute is remedial in nature, enacted for the benefit of the injured persons, and is to be liberally construed so that the purpose intended may be accomplished. Gunnels v. American Liberty Ins. Co., 251 S.C. 242, 247, 161 S.E.2d 822, 824 (1968). However, we do not believe that entitles this court to pervert the well settled rule of law in this country that an insured must possess an interest in the subject matter of the policy. Where an insurable interest does not exist at the time the contract for insurance was made, the insurance policy is void from its inception. Abraham v. New York Underwriters Ins. Co., 187 S.C. 70, 78, 196 S.E.2d 531, 534 (1938).

Therefore, in this case, the question whether Father lacked an insurable interest in the Montero is relevant to determining the amount of UM coverage available to the Smiths. UM coverage provides "benefits and protection against the peril of injury or death by an uninsured motorist to an insured motorist, his family, and the permissive users of his vehicle." Ferguson, 261 S.C. at 100, 198 S.E.2d at 524. An insured is entitled to stack UM coverage in an amount no greater than the amount of coverage on the vehicle involved in the accident. S.C. Farm Bureau Mut. Ins. Co. v. Mooneyham, 304 S.C. 442, 446, 405 S.E.2d 396, 398 (1991). Stacking is defined "as the insured's

recovery of damages under more than one policy until all of his damages are satisfied or the limits of all available policies are met." Giles v. Whitaker, 297 S.C. 267, 268, 376 S.E.2d 278, 279 (1989). "If none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with the excess or underinsured coverage." S.C. Code Ann. §38-77-160 (2002). This court has interpreted the statute to mean UM coverage is personal and portable, meaning coverage follows the person. Nationwide Mut. Ins. Co. v. Erwood, 364 S.C. 1, 6, 611 S.E.2d 319, 322 (Ct. App. 2005). The "personal and portable" nature of UM coverage was recently upheld by the supreme court. Nationwide Mut. Ins. Co. v. Erwood, 373 S.C. 88, __, 644 S.E.2d 62 (2007) (Erwood II). The court reiterated that UM coverage follows the insured not the vehicle and upheld the court of appeals decision that an insured was entitled to receive UM benefits in the basic limits from the policy maintained on a non-involved vehicle. Id. at __, 644 S.E.2d at 63.

In this case, the Smiths must first look to recover the amount of UM coverage on the Montero, as it was the vehicle involved in the accident and serves as the measuring vehicle for the stacking of additional UM coverage. If Father had an insurable interest in the Montero, thereby making the policy valid, the Smiths would be able to recover the UM coverage provided under the policy. In addition, the Smiths would be able to stack the UM coverage provided on the Ranger.

However, if, as Nationwide asserts, the policy is void as to the Montero for a lack of insurable interest, the Montero will have no liability coverage and the Smiths may not look to it for UM coverage. Yet, the Smiths would not be without coverage. According to S.C. Code Ann. §38-77-160 and the recent Erwood II decision, the Smiths may look to the UM coverage maintained on the non-involved vehicle. See S.C. Code Ann. §38-77-160 (2002); Nationwide Mut. Ins. Co. v. Erwood, 373 S.C. at __, 644 S.E.2d at 63-64.

Nationwide acknowledged Erwood, pending before the supreme court at the time of trial and filing of appeal, would answer the coverage issue in this case in the event the Montero policy was found to be void and the Smiths

were limited to coverage under the Ranger's policy. The defendant in Erwood was a passenger on an uninsured motorcycle when it was involved in an accident. The defendant, however, owned an insured automobile providing UM coverage in the required statutory minimum amount of $15,000. Ultimately in Erwood II, the supreme court found the insured was entitled to UM coverage from her non-involved vehicle because of the personal and portable nature of UM coverage. Since the UM coverage on her non-involved vehicle was the statutory minimum of $15,000, the court limited her coverage to the statutory limit. Nationwide asserts if Erwood were to be upheld the Smiths would be limited to the statutory minimum of $15,000. We disagree. According to Erwood II, the Smiths would be limited in recovery to the UM coverage provided on the Ranger, the non-involved vehicle.

Because the trial court found whether Father had an insurable interest was irrelevant to this case, it did not address whether Father actually had an insurable interest. As discussed above, we hold the issue of insurable interest is pivotal in determining the recovery available to the Smiths. Therefore, we REVERSE the grant of summary judgment and REMAND. In light of our disposition, we need not address Nationwide's remaining issues. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993) (appellate court need not address a remaining issue when resolution of prior issue is dispositive).

REVERSED AND REMANDED

BEATTY, J., concurs

ANDERSON, J., dissents in a separate opinion

ANDERSON, J. (dissenting in a separate opinion): Because I agree with the disposition and reasoning of the master-in-equity, I **VOTE** to **AFFIRM** and adopt the analysis in his order as my dissent:

ORDER OF MASTER-IN-EQUITY CLYDE N. DAVIS, JR.

South Carolina Code Ann. § 38-77-150 mandates that all automobile insurance carriers may not issue or deliver policies unless the policies contain a provision providing uninsured motorist coverage. The uninsured motorist statute is remedial and was enacted for the benefit of injured persons; the statute is to be liberally construed to accomplish this purpose. Gunnels v. American Liberty Ins. Co., 251 S.C. 242, 161 S.E.2d 822 (1968); Franklin v. Devore, 327 S.C. 418, 489 S.E.2d 65 (Ct. App. 1997). Provisions inconsistent with uninsured motorist statutes are void. Kay v. State Farm Mut. Auto. Ins. Co., 349 S.C. 446, 562 S.E.2d 676 (2002).

The merit of Nationwide's position in the case at hand hinges upon whether Nationwide can circumvent the requirement of South Carolina Code Ann. § 38-77-150 to deny James W. Smith, Jr. and Elizabeth Smith uninsured motorist coverage benefits simply because the vehicle was owned by James W. Smith, Jr. and James W. Smith, Sr. had no ownership interest in the Montero Sport. The evidence reveals that the Montero Sport was the primary means of transportation for the family that included James W. Smith, Jr., Elizabeth Smith, and James W. Smith, Sr. The evidence establishes that the vehicle was driven primarily by Elizabeth Smith who was a listed driver on the policy. James W. Smith, Sr. did not drive at all due to medical reasons. The vehicle was often used to transport James W. Smith, Sr. to and from doctors' visits and to obtain prescriptions. The testimony reveals that this was done several times a month. James W. Smith, Sr. certainly derived a benefit from the Montero Sport. The Montero Sport and Elizabeth Smith were added to the policy, premiums for both were collected and retained by Nationwide, and Nationwide should not be allowed to avoid payment of an uninsured claim due to what amounts to a technicality.

This Court is persuaded by the decision of the South Carolina Supreme Court in Unisum Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000), and holds that the insurable interest argument is irrelevant in this case, as we are dealing with uninsured coverage and not liability coverage. In the case of Schmidt, the South Carolina Supreme Court addressed a similar factual scenario. In Schmidt, the Defendant was injured while riding in a car driven by an unauthorized driver. Schmidt at 364-65, 529 S.E.2d at 281. The parties in Schmidt stipulated that January O'Neale's father gave her a BMW with strict instructions not to let anyone else drive the car. Schmidt at 365, 529 S.E.2d at 281. On the date in question, Miss O'Neale and her friend Jennifer Hurst went to a party at the home of Christopher Schmidt. Id. During the party, Schmidt drove the BMW with Hurst asleep in the back seat. Id. Schmidt lost control of the vehicle, hit a tree and Hurst was injured. Id. The parties agreed that Schmidt did not have permission to drive the vehicle, but that Hurst's use of the BMW at all times was consensual. The insurance carrier for the BMW was State Farm, and they successfully denied liability coverage due to the fact that Schmidt did not have permission to operate the vehicle. Id. Hurst then attempted to collect under the uninsured coverage of the State Farm policy covering the BMW. Hurst argued that since she was a permissive occupant, she was covered. The trial court sided with Hurst, but the South Carolina Court of Appeals reversed. The Court of Appeals held that for Hurst to be an insured under the statutory definition of insured, she must be a guest in a vehicle "to which the policy applied." Schmidt at 365, 529 S.E.2d at 281. The Court of Appeals held that when Schmidt drove off in the vehicle without permission, the State Farm policy no longer applied to the vehicle. Id. Based on their conclusion, the Court of Appeals never addressed whether the BMW was an uninsured motor vehicle.

The South Carolina Supreme Court then reversed the Court of Appeals. The South Carolina Supreme Court first looked at

the definition of insured under South Carolina Code Ann. § 38-77-30(7) which defines insured to mean:

> the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

The South Carolina Supreme Court then stated that the Court of Appeals had erred in concluding that the O'Neale vehicle was not a vehicle "to which the policy applied." Schmidt at 366-67, 529 S.E.2d at 282. The Court then held that the " 'motor vehicle to which the policy applies' is 'the motor vehicle designated in the policy' " Schmidt at 367, 529 S.E.2d at 282 (citing Davidson v. Eastern Fire & Cas. Ins. Co., 141 S.E.2d 135, 138 (1965)). The South Carolina Supreme Court then stated that the words "to which the policy applies" are words of identification and not words of exclusion as used by the Court of Appeals. Schmidt at 367, 529 S.E.2d at 282. The South Carolina Supreme Court then looked at the definition of an uninsured vehicle and concluded that the O'Neale vehicle qualified as an uninsured vehicle pursuant to South Carolina Code Ann. § 38-77-30(13) and that Hurst was covered under the uninsured portion of the policy. Id. The Supreme Court stated that the purpose of the uninsured motorist law is "to provide benefits and protection against the peril of injury or death by an uninsured motorist to an insured motorist and his family . . ." Schmidt at 368, 529 S.E.2d at 283 (citing Ferguson v. State Farm Mut. Ins. Co., 261 S.C. 96, 100, 198 S.E.2d 522, 524 (1973).

Applying the holding of the South Carolina Supreme Court in Schmidt to the case at hand, one must conclude that the Smiths

should be covered under the uninsured motorist provision of the policy covering the Montero. As in Schmidt, they are insureds under South Carolina Code Ann. § 38-77-30(7), as they resided with the insured, James W. Smith, Sr. and are related by blood and marriage to the insured James W. Smith, Sr. Furthermore, the motor vehicle to which the policy applies would be the Montero Sport, as that is "the motor vehicle designated in the policy." Furthermore, the Nationwide Policy at issue on page U1, which is the Uninsured Motorists and Underinsured Motorist provision, states: "We will pay damages, including derivative claims, because the bodily injury suffered by you or a relative, and because of property damage. Such damages must be due by law to you or a relative for the owner or driver of: 1. an uninsured motor vehicle . . ." Therefore, the uninsured motorist coverage provision of the Nationwide policy covering the Montero should cover James W. Smith, Jr. and Elizabeth Smith when applying the reasoning of the South Carolina Supreme Court in Schmidt and the policy language of the Nationwide policy.

This Court is also persuaded by the holding of the South Carolina Supreme Court in Hogan v. Home Ins. Co., 260 S.C. 157, 194 S.E.2d 890 (1973). In Hogan, the South Carolina Supreme Court reviewed the judgment from the South Carolina lower court, which held that a policy clause excluding uninsured motorist coverage to the insured and her family, unless they were riding in the vehicle named in the policy, violated the South Carolina Motor Vehicle Safety Responsibility Act (S.C. Code Ann. § 46-750.31 to -.32 (1962 Code of Laws)).

The Supreme Court of South Carolina then points out the distinction between liability and uninsured motorist coverage. The Court states that the liability contract is only required to insure "persons defined as insured, against loss from liability imposed by law for damages arriving out of the ownership, maintenance or use of the motor vehicle described in the policy;

while uninsured motorist coverage obligates the insured to pay all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured vehicle." Hogan at 162, 194 S.E.2d at 892 (internal quotations omitted). Uninsured motorist coverage is not to provide coverage for the uninsured vehicle but to afford additional protection to an insured. Id. Unlike the provisions relative to liability coverage, the Statute plainly affords uninsured motorist coverage to the named insured and resident relatives of his/her household at all times and without regard to the activity in which they were engaged at the time. Id. The Supreme Court stated such coverage is nowhere limited in the Statute to the use of the insured vehicle and cannot be so limited by policy provisions. Id. The Hogan decision is significant because the Supreme Court was examining similar statutory language which is applicable today.

Nationwide's argument that having no insurable interest defeats uninsured coverage is supported by no case law that refers to uninsured motorist coverage. Within their memorandum, Nationwide has cited the South Carolina cases of American Mut. Fire Ins. Co. v. Passmore, 275 S.C. 618, 274 S.E.2d 416 (1981), and Benton & Rhodes, Inc. v. Kenneth Henry Edmund Boden, et al. Benton & Rhodes, Inc. v. Boden, 310 S.C. 400, 426 S.E.2d 823 (Ct. App. 1993). These cases can easily be distinguished from the case at hand, as neither refer or pertain to uninsured motorist coverage. The case of Passmore involved a situation in which Helen Whitehead agreed to sell her 1970 Chevrolet Nova to Lonnie Reed in exchange for a down payment and assumption of the existing indebtedness. Per the agreement, Mr. Reed was required to obtain liability insurance on the vehicle. Because Mr. Reed had poor credit, he could not obtain liability insurance and approached a friend, Leaman Foxworth, who agreed to place the vehicle on his policy. The girlfriend of Lonnie Reed was then involved in a collision with James Passmore on May 21, 1977. The trial judge held that an

insurance interest was not required for liability insurance in South Carolina, and the Supreme Court reversed the Trial Court's decision and remanded the matter. The Supreme Court held that with regard to liability coverage, the insurable interest does not depend upon the named insured having either a legal or equitable interest in the property, but it is enough that the insured may be held liable for damages to its operation and use. Passmore at 620-21, 274 S.E.2d at 417-18. Benton & Rhodes does not involve automobile insurance.

CONCLUSION

In conclusion, Nationwide's argument that there is no uninsured coverage on the Montero Sport is not supported by the evidence or the case law, is irrelevant, and to hold there is no uninsured motorist coverage on the Montero Sport would be against public policy. The Smiths are entitled to Fifty Thousand ($50,000.00) Dollars per person, One Hundred Thousand ($100,000.00) Dollars per occurrence of uninsured coverage on the Montero Sport and then they would each be able to stack the Fifty Thousand ($50,000.00) dollars uninsured motorist coverage provided by the Montero Sport policy and the Fifty Thousand ($50,000.00) Dollars uninsured motorist coverage provided by the 1992 Ford Ranger. The total coverage available to each should be One Hundred Thousand ($100,00.00) Dollars for a total of Two Hundred Thousand ($200,000.000) Dollars in total uninsured motorist coverage for this occurrence. Stacking would be allowed, as James W. Smith, Jr. and Elizabeth Smith are relatives of the insured, James W. Smith, Sr., and resided with him at the time of the accident, thus they are Class I insureds. Therefore they can stack the available uninsured motorist coverage per Concrete Servs., Inc. v. United States Fidelity & Guar. Co., 331 S.C. 506, 498 S.E.2d 865 (1998), and South Carolina Code Ann. § 38-77-160.

(some minor typographical and citation errors corrected)

Accordingly, I **VOTE** to **AFFIRM.**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

I. Jenkins Mikell, Jr. and Pinkney V. Mikell, Respondents,

v.

County of Charleston and Timothy E. Scott, A.D. Jordan, Curtis E. Bostic, Carolyn Condon, Ed Fava, Barrett Lawrimore, Francis J. Roberts, Leon E. Stavrinakis, and Charles T. Wallace in their capacity as Members of Charleston County Council, George Lee Mikell, Julia Mikell Flowers, Daisy Mikell Pedrick, Mary Mikell, John Mikell, and Peter's Point Associates, LP, Defendants,

of whom George Lee Mikell, Julia Mikell Flowers, Daisy Mikell Pedrick, Mary Mikell, John Mikell, and Peter's Point Associates, LP, are the Appellants.

Appeal From Charleston County
Mikell R. Scarborough, Master-In-Equity

Opinion No. 4296
Submitted May 9, 2007 – Filed October 4, 2007

REVERSED

Morris A. Ellison, Perrin Quarles Dargan, III, Carolyn H. Blue, of Charleston, for Appellants.

Capers G. Barr, III and Frances Isaac Cantwell, both of Charleston, for Respondents.

BEATTY, J.: In this appeal from the rezoning of the Peter's Point Planned Development, George Lee Mikell, Julia Mikell Flowers, Daisy Mikell Pedrick, Mary Mikell, John Mikell, and Peter's Point Associates, LP, (hereinafter "Appellants")[1] contend the master-in-equity erred in finding a conflict between the planned development and the Charleston County Zoning and Land Development Regulations ("ZLDR") and subsequently voiding the planned development. We reverse.[2]

[1] Although Charleston County and the members of its council are listed in the caption on appeal, we note they were dismissed as parties by order of this court pursuant to their motion to withdraw their appeal.

[2] This case was originally scheduled for oral argument. The parties, however, consented to a request by this court to have the case submitted on the record.

FACTS

Appellants are the sole owners of 162 acres of land located on Edisto Island, South Carolina, also known as Peter's Point Plantation. The land in question is a peninsula-like tract formed by the confluence of two tidal creeks. The land is divided into six parcels whose zoning is governed by the ZLDR. Under the ZLDR, five of the parcels were zoned Agricultural Residential (AGR). The ZLDR provides that base zoning district AGR parcels have a maximum recommended density for residential use of one dwelling unit per acre. The last parcel was zoned Agricultural Preservation (AG-10), which provides for a recommended density of one dwelling unit per ten acres. In order to achieve the highest allowed density of one dwelling unit per five acres, an application must be processed through the planned development process. Without application for maximum density, the original zoning plan allowed for the development of approximately sixty-four units.

On December 17, 2003, Appellants filed a Zoning Change Application requesting the land in question be rezoned as a planned development that would include single family homes. The permitted uses of the planned development would include detached single family homes on lots having at least one acre; agriculture; horse or other animal production; commercial timber operations; and stables. The application stated that the new planned development would shift the number of units within the tracts of Peter's Point and would allow more units in the previously zoned AG-10 tract. The application proposed to reduce the total number of dwelling units from sixty-four to fifty-five and reduce the total number of waterfront lots to fifty-one.

On June 22, 2004, the Charleston County Council (County Council) adopted Ordinance No. 1300, which rezoned the land in question pursuant to Article 3.5 of the ZLDR from AGR/AG-10 districts to a planned development district. This change reduced the overall number of units allowed, but reallocated them, increasing the number of dwelling units in the AG-10 area from ten to thirty-nine units. On July 1, 2004, adjoining property owners and distant cousins of Appellants (hereinafter "Respondents") filed a

Complaint against Appellants stating that the rezoning violated the ZLDR by increasing the density ratio of the previously zoned AG-10 area from a density ratio of one dwelling per ten acres to one dwelling per 2.73 acres. Both parties filed motions for summary judgment.

Although the parties raised several issues during the summary judgment hearing, the master limited his analysis by stating, "[t]he issue in this case turns on the construction of various provisions of the ZLDR, particularly those of Article 4.5.3, the AG-10 regulations, and those of Article 3.5, the planned development regulations, in a manner that effectuates the intent of County Council." After analyzing this issue, the master ultimately granted summary judgment in favor of Respondents.

In reaching this decision, the master found Ordinance No. 1300 conflicted with Article 4.5.3B of the ZLDR which limits the density in an AG-10 district to no higher than one residential dwelling unit per five acres. The master rejected Appellants' contention that Article 3.5 of the ZLDR, which states that planned developments may provide for variations from other ordinances concerning the density of a parcel, was controlling. The master reasoned that Article 4.5.3.B, the more specific ZLDR provision, took precedence over the more general provisions of Article 3.5. In support of this reasoning, the master relied on what he believed was the intent of County Council in adopting the ZLDR. Specifically, the master found that by enacting the AG-10 and AG-8 regulations, "Council evinced an intent to limit itself in increasing density in these districts, by requiring a planned development and then capping the number of units that could be achieved by way thereof."

Based on this analysis, the master held that because the planned development was adopted contrary to the ZLDR, it was arbitrary, capricious and exceeded the authority of the County Council. The master also concluded there was insufficient evidence in the record to determine whether or not the planned development met the criteria for creating a planned development contained in the ZLDR. As a result, the master remanded the matter to County Council to make specific findings and for the identification and designation of the open space and other criteria necessary for the

establishment of a planned development. The master subsequently denied Appellants' motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRCP, which states that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005); Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004); see Schmidt v. Courtney, 357 S.C. 310, 317, 592 S.E.2d 326, 330 (Ct. App. 2003) (stating all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

DISCUSSION

Appellants contend the master erred in voiding the planned development by finding a conflict between Ordinance No. 1300 and the ZLDR. We agree.

"It is well settled that when interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used." Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). "In construing ordinances, the terms must be taken in their ordinary and popular meaning." Id. at 68, 459 S.E.2d at 843.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "The first question of statutory interpretation is whether the statute's meaning is clear on its face." Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Daisy Outdoor Adver. Co. v. S.C. Dep't of Transp., 352 S.C. 113, 120, 572 S.E.2d 462, 466 (Ct. App. 2002).

"Rezoning is a legislative matter, and the court has no power to zone property." Bear Enters. v. County of Greenville, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995). "The decision of the legislative body is presumptively valid, and the property owner has the burden of proving otherwise." Id. Our supreme court has explained:

> The authority of a municipality to enact zoning ordinances, restricting the use of privately owned property is founded in the police power. The governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the Courts, and they will not be interfered with in the exercise of their police power to accomplish desired end unless there is plain violation of the constitutional rights of citizens. There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and where the Planning and Zoning Commission and the city council of a municipality have acted after considering all of the facts, the Court should not disturb the finding unless such action is arbitrary, unreasonable, or in obvious abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority. Likewise, the power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations. The burden of proving the invalidity of a zoning ordinance is on the party attacking it to establish that the acts of the city council were arbitrary, unreasonable and unjust.

Rush v. City of Greenville, 246 S.C. 268, 276, 143 S.E.2d 527, 530-31 (1965). Accordingly, "[t]he Court will not overturn the action of [county council] if the decision is fairly debateable because the [county's] action is presumed to have been a valid exercise of power and it is not the prerogative of the Court to pass upon the wisdom of the decision." Rushing v. City of Greenville, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); Lenardis v. City of Greenville, 316 S.C. 471, 472, 450 S.E.2d 597, 598 (Ct. App. 1994).

Turning to the facts of this case, we believe County Council's decision to adopt Ordinance No. 1300 was "fairly debatable" and did not constitute an action that was arbitrary, unreasonable, or unjust. First, without question, County Council was authorized to adopt the planned development ordinance.

Section 6-29-740 of the South Carolina Code permits "the local governing authority [to] provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map." S.C. Code Ann. § 6-29-740 (2004). Moreover, Article 2.1.2 of the ZLDR states that County Council shall have final decision-making authority on matters concerning planned developments, including zoning map amendments. Thus, these provisions provide County Council with final decision-making authority in rezoning actions pursuant to a planned development application such as in the instant case. Accordingly, we find the master erred in ruling that "[i]n approving Ordinance 1300, the Council exceeded the authority devolved upon it by its own laws."

County Council's decision to adopt Ordinance No. 1300 was not only authorized, it was supported by the portion of the ZLDR pertaining to planned developments. Planned developments are governed by Article 3.5 of the ZLDR, and Article 3.5.1 defines a planned development as a "type of zoning district (PD) and a type of development plan." As stated in Article 3.5.2A, the planned development regulations are "intended to encourage innovative land planning and site design" by "[r]educing or eliminating the inflexibility that sometimes results from strict application of zoning standards that were designated primarily for development on individual lots." More importantly, Article 3.5.7 specifically provides for deviations from other zoning designations:

> Planned Developments may provide for variations from other ordinances and the regulations of other established zoning districts concerning use, setbacks, lot area, density, bulk and other requirements to accommodate flexibility in the arrangement of uses for the general purpose of promoting and protecting the public health, safety, and general welfare.

(emphasis added); see S.C. Code Ann. § 6-29-740 (2004) (outlining planned development districts).[3] Article 3.5.7 goes on to outline criteria that must be

[3] Section 6-29-740 provides:

met for a proposed development that is applying for a higher density than allowed by the base zoning district. As evidenced by the outlined ZLDR provisions and section 6-29-740, planned developments are intended to provide flexibility for County Council to exercise its discretion in addressing requirements in base zoning districts, in this case a density requirement.

Although Article 4.5.3B, the ZLDR section pertaining to AG-10 properties, states that "In order to achieve the highest allowed density of 1

> In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that will result in improved design, character, and quality of new mixed use developments and preserve natural and scenic features of open spaces, the local governing authority may provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property. The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts. Planned development districts may provide for variations from other ordinances and the regulations of other established zoning districts concerning use, setbacks, lot size, density, bulk, and other requirements to accommodate flexibility in the arrangement of uses for the general purpose of promoting and protecting the public health, safety, and general welfare. Amendments to a planned development district may be authorized by ordinance of the governing authority after recommendation from the planning commission. These amendments constitute zoning ordinance amendments and must follow prescribed procedures for the amendments. The adopted plan may include a method for minor modifications to the site plan or development provisions.

S.C. Code Ann. § 6-29-740 (2004).

dwelling unit per 5 acres, a request must be processed through the Planned Development process as designated in Art. 3.5 of this Ordinance," the planned development section of the ZLDR, i.e., Article 3.5, allows for a greater maximum density than one dwelling unit per five acres by specifically providing for variations in density from other ordinances and the regulations of other established base zoning districts. Accordingly, we do not agree with the master that a conflict exists between the two ZLDR provisions.

Furthermore, there is nothing to suggest that County Council cannot change an ordinance that it created. To the contrary, section 6-29-760 of the South Carolina Code allows for the enactment or amendment of any zoning regulation or map. This section authorizes municipalities to amend such regulations, restrictions, and boundaries. See S.C. Code Ann. § 6-29-760 (2004) (outlining procedure for enactment or amendment of zoning regulation or map). Hence, a municipality has the legislative power to amend its general zoning ordinance and rezone small areas, so long as its action is not arbitrary or unreasonable. See Bob Jones Univ., Inc. v. City of Greenville, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963) ("A municipal zoning ordinance is presumably valid. Hence, the burden of proof is upon the party attacking the amendment to establish that the acts of the city council were arbitrary, unreasonable and unjust.")(citations omitted). Because County Council's actions were authorized and its decision to adopt Ordinance No. 1300, which rezoned the six-parcel, multiple zoning districts of Peter's Point Plantation, was at least "fairly debateable," we hold the master erred in voiding the ordinance. Accordingly, we reverse the master's decision and reinstate Ordinance No. 1300.

CONCLUSION

For the reasons stated herein, the master's decision is

REVERSED.[4]

ANDERSON and HUFF, JJ., concur.

[4] In light of our decision, we need not address Appellants' remaining two issues. See Hagood v. Sommerville, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (stating the appellate court need not address additional issues when resolution of prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rafeal Brown, **Petitioner,**

v.

The State of South Carolina, **Respondent.**

Appeal from Marlboro County
John M. Milling, Circuit Court Judge

Opinion No. 4297
Heard September 11, 2007 – Filed October 5, 2007

AFFIRMED

Wanda H. Carter, of Columbia, for Petitioner.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Karen Ratigan, all of Columbia, for Respondent.

ANDERSON, J.: The post-conviction relief (PCR) judge denied Rafeal Brown's application for relief holding that, even if counsel was ineffective, Brown failed to establish prejudice. This court granted certiorari to consider whether trial counsel erred in failing to object to a Doyle error at trial. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On the night of August 5, 1994, Brown was dancing with a girl inside the Castleblanca Club, a nightclub in Clio. After a male patron passing the pair made what Brown considered to be a threatening gesture, the two began to fight. The fight caused great commotion in the club and more patrons joined in. The crowd moved outside into the parking lot. The testimony of several eyewitnesses at trial revealed that Brown grabbed a gun from a friend's hand and shot multiple times into the crowd. Two bystanders were struck by the bullets, and Brown ran on foot from the scene. One victim, Louis Bostic, died the day of the shooting and the other, Ron Bostic, died five days later.

At trial, Brown took the stand in his own defense. He alleged, for the first time, that one of his friends was the shooter and that the eyewitnesses coordinated stories to frame him. On cross examination, the solicitor asked Brown why he had not given a statement to police relating the version of events he now gave at trial. Additionally, during his closing argument, the solicitor argued the lack of a statement indicated Brown's guilt. Brown's counsel made no objections.

Following his conviction, Brown appealed under Anders v. California, 386 U.S. 738 (1967). The appeal was dismissed by the South Carolina Supreme Court. State v. Brown, Op. No. 96-MO-256 (S.C. Sup. Ct. filed Dec. 12, 1996). Brown then filed for post-conviction relief in December 1996 and amended the application in June 2003. An evidentiary hearing was held in September 2003 in Darlington County.

At the PCR hearing, Brown argued his counsel was ineffective for failing to object to the solicitor's questions about and references to his failure

to provide a statement to police. Specifically, Brown averred the solicitor made numerous comments that constituted Doyle violations. During cross-examination, the solicitor stated:

> "Everybody else gave the police a statement the next morning at nine o'clock."
>
> "And during all that time, some ten months, you haven't given [the police] a statement, have you?"
>
> "And when you came in at 3:00 in the morning you didn't call the police and tell them Eric David had shot somebody, did you?"
>
> "You didn't call the police and tell them Eric David had a gun, did you?"

Brown contended the solicitor committed a Doyle violation with the following comment made during closing argument:

> "He hasn't given a statement. He hasn't given a statement because he is guilty."

In response to Brown alleging ineffective assistance, trial counsel testified that it is fairly typical for solicitors to ask on cross-examination why the defendant didn't take particular actions if innocent. Counsel opined Brown's failure to make a statement did not affect the outcome of the trial. In light of the numerous eyewitnesses who gave statements to police and testified at trial, counsel explained his strategy was to draw the jurors' attention to the discrepancies amongst the witnesses' stories. Counsel stated that he typically does not object during closing argument for fear of creating a negative impression with the jury.

In denying post-conviction relief, the PCR judge found there was "overwhelming evidence in the case for conviction of [Brown]." Further, the judge held "that even if there were a failure to object to certain testimony, that [Brown] has failed to establish prejudice in this matter." The PCR judge found that trial counsel "articulated valid strategic reasons for deciding not to

object to portions of the solicitor[']s examination and of his closing argument. [Brown] has not shown that counsel was deficient in that choice of tactics."

ISSUE

Did the PCR judge err in not finding trial counsel ineffective for failing to object to a Doyle violation at trial?

STANDARD OF REVIEW

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Edwards v. State, 372 S.C. 493, 494, 642 S.E.2d 738, 739 (2007); Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). "[P]etitioner must meet the standard established in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)." State v. Edmond, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2006). To establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668 (1984).

"Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690; Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Rule 71.1(e), SCRCP; Van Dohlen v. State, 360 S.C. 598, 603, 602 S.E.2d 738, 741 (2004); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability that the result at trial would have been different…." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Simmons v. State, 308 S.C. 481, 419 S.E.2d 225 (1992). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial."

Strickland, 466 U.S. at 694; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). "Furthermore, when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E2d 590, 596 (2007) (citing Strickland, 466 U.S. at 695).

"This court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Marlar v. State, 373 S.C. 275, 279, 644 S.E.2d 769, 771 (Ct. App. 2007) (citing Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)); McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). An appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Custodio v. State, 373 S.C. 4, 9, 644 S.E.2d 36, 38 (2007); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, an appellate court will not affirm the decision when it is not supported by any probative evidence. State v. Edmond, 341 S.C. 340, 347, 534 S.E.2d 682, 686 (2006); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

LAW/ANALYSIS

Brown argues the PCR judge erred in not finding trial counsel ineffective for failing to object to comments made by the solicitor that Brown never gave the police a statement. Specifically, Brown contends the solicitor's line of questioning and comments on his silence violated his constitutional rights under Doyle v. Ohio, 426 U.S. 610 (1976).

I. DOYLE v. OHIO

In Doyle, the Supreme Court held "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving Miranda warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." Doyle, 426 U.S. at 619. In that case, the defendants received Miranda warnings when they were arrested for selling marijuana. They made no statements to the police. At their separate trials, the defendants testified, for the first time, about their innocence explaining they had been framed by a government informant. The State then attempted to impeach the defendants'

credibility on cross-examination by questioning them about their post-arrest silence. The State did not suggest that the evidence was admissible as evidence of guilt, but asserted the jury needed all relevant evidence surrounding the truthfulness of the defendants' exculpatory statements. Doyle, 426 U.S. at 617.

The Court held "the Miranda decision compels rejection of the State's position." Id. at 617. The Court elucidated:

> '[W]hen a person is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, … it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.'

Id. at 619 (quoting United States v. Hale, 422 U.S. 171, 182-183 (1975)). The Court explained that Miranda warnings convey an implicit assurance to an arrested person that he will not be penalized for remaining silent, thus, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id. at 618.

In Jenkins v. Anderson, 447 U.S. 231 (1980), the Supreme Court addressed impeachment using pre-arrest silence. The Court distinguished the case from Doyle noting this defendant had not yet received the Miranda warnings. "In this case, no governmental action induced the petitioner to remain silent before arrest." Id. at 240. The defendant stabbed and killed a man, but he was not taken into custody until he turned himself in two weeks later. After testifying at his murder trial that the stabbing was in self-defense, the prosecutor sought to impeach the defendant by asking whether he reported the incident to the police prior to his arrest. In his closing argument, the prosecutor again made reference to the pre-arrest silence. The defendant was found guilty of manslaughter.

The Court held the use of pre-arrest silence did not deny due process and explained:

> In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given Miranda warnings. Consequently, the fundamental unfairness present in Doyle is not present in this case. We hold that prearrest silence does not violate the Fourteenth Amendment.

Id. at 240. Additionally, the Court noted:

> Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. 3A J. Wigmore, Evidence § 1042, p. 1056 (Chadbourn rev. 1970). Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative.

Id. at 239.

Doyle and its progeny have thus made clear that it is the breach of the implied assurance contained in the Miranda warnings that violates the fundamental fairness required by the Due Process Clause. Wainwright v. Greenfield, 474 U.S. 284, 291 (1986).

In Wainwright, the defendant appealed a conviction for sexual battery. He was arrested two hours after the crime, and he was read the Miranda warnings three times. He repeatedly stated that he understood his rights and that he wanted to speak with an attorney before making any statement. In his closing argument, the prosecutor suggested these repeated refusals were inconsistent with his insanity defense.

The Court held use of the respondent's post-arrest, post-Miranda silence was a violation of due process under Doyle. "The point of the Doyle

holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony." Wainwright, 474 U.S. at 292. Cf. Roberts v. United States, 445 U.S. 552, 561 (1980) (holding that postconviction, presentencing silence does not resemble postarrest silence induced by assurances in Miranda warnings); Greer v. Miller, 483 U.S. 756, 763 (1987) (cross-examination concerning inconsistent postarrest, post-Miranda statements "makes no unfair use of silence, because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent") (quoting Anderson v. Charles, 447 U.S. 404, 407-408 (1980)).

The courts of South Carolina have consistently recognized the significance of Doyle on post-arrest silence. Moreover, our supreme court and appellate court have warned solicitors against violation of the Doyle prohibition. State v. Myers, 301 S.C. 251, 258-259, 391 S.E.2d 551, 555 (1990); State v. Arther, 290 S.C. 291, 350 S.E.2d 187 (1990); State v. Holliday, 333 S.C. 332, 509 S.E.2d 280 (Ct. App. 1998); State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (Ct. App. 1991).

In State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986), our supreme court granted certiorari to determine if a defendant convicted of murder and assault and battery with intent to kill was denied due process. The defendant relied on an insanity defense and provided psychiatric testimony that he was insane at the time of the crime. Upon cross-examination, the prosecutor asked the psychiatrist if he was aware of the defendant's refusal to make a statement to police. Defense counsel objected before the psychiatrist answered, but the trial court did not give a curative instruction. Our supreme court reversed the defendant's conviction and enunciated:

> An accused has the right to remain silent and the exercise of that right cannot be used against him. The State cannot, through evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent. State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984). See also, Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). Testimony that a defendant refused to comment on an accusation against him is an

> unconstitutional comment on his post-arrest silence. State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986). State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982).

Id. at 394-95, 350 S.E.2d at 924.

In State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (Ct. App. 1991), this court found a defendant had been denied due process by the prosecutor's efforts to impeach with post-arrest, post-Miranda silence. In this assault with intent to commit criminal sexual conduct trial, Gray did not give any statement to the police but took the stand at trial and asserted his innocence. The prosecutor on cross-examination asked if he was read his rights after being arrested and whether he understood them. Gray responded affirmatively and the prosecutor next asked if he then gave the story he was now presenting to the jury. Gray replied he only told the police he would not give a statement. The prosecutor then asked whether he expected the jury to believe him, at which point defense counsel objected. The objection was overruled and the prosecutor repeated his last question.

In reversing Gray, this court asseverated, "[c]ross examination by the state of the defendant for impeachment purposes on the defendant's silence after receiving the Miranda warnings is a violation of the Due Process Clause of the Fourteenth Amendment." Id. at 484, 405 S.E.2d at 421 (citing Doyle v. Ohio, 426 U.S. 610 (1976)). See also Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000) (relying on Doyle, state may neither comment upon nor present evidence at trial of a defendant's exercise of his right to remain silent); State v. Reid, 324 S.C. 74, 78, 476 S.E.2d 695, 696 (1996) ("It is a violation of due process for a State to permit comment on a defendant's post-arrest silence since the giving of Miranda warnings might induce silence by implicitly assuring a defendant his silence will not be used against him.") (overruled on other grounds by State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002)); State v. Myers, 301 S.C. 251, 258-259, 391 S.E.2d 551, 555 (1990) (finding unpreserved Doyle violation where prosecutor repeatedly commented on defendant's post-arrest silence); State v. Johnson, 293 S.C. 321, 323, 360 S.E.2d 317, 319 (1987) (referring to Doyle, when an accused asserts a constitutional right, the State may not comment upon it or use it to argue in favor of guilt or punishment); State v. Woods, 282 S.C. 18,

20, 316 S.E.2d 673, 674 (1984) (reversing conviction where solicitor introduced evidence that defendant exercised right to remain silent); State v. Hill, 360 S.C. 13, 16, 598 S.E.2d 732, 733 (Ct. App. 2004) (prosecutor committed Doyle violation by asking defendant on cross-examination why he had not given police the exculpatory story he testified to at trial); State v. Holliday, 333 S.C. 332, 509 S.E.2d 280 (Ct. App. 1998) (reversing conviction because defendant repeatedly asked on cross-examination why he had not told his version of events until trial).

II. DOYLE INAPPOSITE

In the case sub judice, the PCR judge correctly found Brown was not entitled to relief under Doyle because it was not error for the solicitor to refer to the fact Brown did not make a statement to the police. The United States Supreme Court has held the use of post-arrest silence for impeachment purposes is allowed when no Miranda warnings are given. Brecht v. Abrahamson, 507 U.S. 619, 628 (1993). Here, there is nothing in the record to indicate the Petitioner received Miranda warnings.

In Brecht v. Abrahamson, 507 U.S. at 628 (1993), the United States Supreme Court inculcated the Bench and Bar in this country:

> **IN DOYLE V. OHIO, 426 U.S. at 619, 96 S. Ct. at 224,WE HELD THAT "THE USE FOR IMPEACHMENT PURPOSES OF [A DEFENDANT'S]SILENCE, AT THE TIME OF ARREST AND AFTER RECEIVING MIRANDA WARNINGS, VIOLATE[S] THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT." THIS RULE "RESTS ON THE 'FUNDAMENTAL UNFAIRNESS OF IMPLICITYLY ASSURING A SUSPECT THAT HIS SILENCE WILL NOT BE USED AGAINST HIM AND THEN USING HIS SILENCE TO IMPEACH AN EXPLANATION SUBSEQUENTLY OFFERED AT TRIAL.'" WAINWRIGHT V. GREENFIELD, 474 U.S. 284, 291, 106 S. Ct. 634, 638, 88 L. Ed. 2d 623 (1986) (quoting SOUTH DAKOTA V. NEVILLE, 459 U.S. 553, 565, 103 S. Ct. 916, 923, 74 L. Ed. 2d 748 (1983)). THE "IMPLICIT**

> **ASSURANCE" UPON WHICH WE HAVE RELIED IN OUR DOYLE LINE OF CASES IS THE RIGHT-TO-REMAIN-SILENT COMPONENT OF MIRANDA. THUS, THE CONSTITUTION DOES NOT PROHIBIT THE USE FOR IMPEACHMENT PURPOSES OF A DEFENDANT'S SILENCE PRIOR TO ARREST, JENKINS V. ANDERSON, 447 U.S. 231, 239, 100 S. Ct. 2124, 2129, 65 L. Ed. 2d 86 (1980), OR AFTER ARREST IF NO MIRANDA WARNINGS ARE GIVEN, FLETCHER V. WEIR, 455 U.S. 603, 606-607, 102 S. Ct. 1309, 1312, 71 L. Ed. 2d 490 (1982) (*per curiam*). SUCH SILENCE IS PROBATIVE AND DOES NOT REST ON ANY IMPLIED ASSURANCE BY LAW ENFORCEMENT AUTHORITIES THAT IT WILL CARRY NO PENALTY. See 447 U.S. at 239, 100 S. Ct. at 2129.**

Id. at 628 (emphasis added). See also Greer v. Miller, 483 U.S. 756, 763 (1987) (the Miranda warnings' implicit assurance provides "the prerequisite of a Doyle violation").

In a case setting the precedent for Brecht, the United States Supreme Court in Fletcher v. Weir, 455 U.S. 603 (1982), guarded against the expansion of Doyle. The Supreme Court held that, in the absence of Miranda warnings, the state does not violate a defendant's due process by permitting cross-examination on post-arrest silence when a defendant takes the stand. Fletcher, 455 U.S. at 607.

The defendant in Fletcher fatally stabbed a man during a fight in a nightclub parking lot. He left the scene immediately and did not report the incident to the police. At trial he took the stand and, for the first time, offered the exculpatory statement that the stabbing was in self-defense and accidental. Nothing in the record indicated that the police had read Fletcher his Miranda warnings immediately after arrest. The prosecutor cross-examined him as to why he failed to offer his self-defense explanation to police.

On appeal, the Court of Appeals for the Sixth Circuit found an arrest in itself was sufficient governmental action to trigger a defendant's right to remain silent. Weir v. Fletcher, 658 F.2d 1126, 1131 (1981). They opined "impeachment of a defendant with post-arrest silence is forbidden by the Constitution, regardless whether Miranda warnings are given." Id. at 1130. The Supreme Court reacted to this specific assertion stating, "[b]ecause we think the Court of Appeals gave an overly broad reading to our decision in Doyle v. Ohio…we reverse its judgment." Fletcher, 455 U.S. at 604. The Court explicated:

> In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.

Id. at 607.

In Brecht v. Abrahamson, 507 U.S. 619 (1993), Brecht shot and killed his brother-in-law in Wisconsin and immediately left the scene in his sister's car. He crashed the car in a nearby town and told an officer who stopped to help that his sister had already arranged for a tow truck. Brecht then hitchhiked to Minnesota where he was apprehended. He was returned to Wisconsin and given the Miranda warnings.

Brecht took the stand at his first-degree murder trial and testified the shooting was accidental. The State disputed the defense on the basis that he did not seek help for his brother-in-law, fled the scene, and lied to the officer who stopped to help with the wrecked car. The State highlighted Brecht's failure to tell this account to the first officer, the man who gave him a ride, and the arresting officers. Over defense counsel's objections, the State asked Brecht if he had told anyone at any time prior to trial that the shooting was an accident. Brecht answered that he had not. The State made several

references to Brecht's silence in the closing argument. Brecht was convicted and sentenced to life imprisonment.

On appeal, the Wisconsin Court of Appeals found the State's references to Brecht's post-Miranda silence violated Doyle and were so prejudicial as to warrant reversal. The Wisconsin Supreme Court found the Doyle violation harmless and reinstated the conviction. Brecht then sought habeas corpus. The District Court set aside the conviction on the basis the Doyle violation was not harmless error. Next, the Court of Appeals for the Seventh Circuit reversed having taken issue with the appropriate harmless error standard for federal habeas review. The United States Supreme Court granted certiorari to establish the proper harmless-error standard but first analyzed whether the State's cross-examination of Brecht was improper. The Court agreed the State violated Doyle. Brecht, 507 U.S. at 628-29.

The Court noted that Brecht did not claim the shooting was accidental until he testified at trial. The Court stated "[i]t was entirely proper-and probative-for the State to impeach his testimony by pointing out that petitioner had failed to tell anyone *before the time he received his Miranda warnings* at his arraignment about the shooting being an accident." Id. (emphasis added). In contrariety, the Court expounded:

> The State's references to [Brecht's] silence after that point in time, or more generally to [Brecht's] failure to come forward with his version of events at any time before trial … crossed the Doyle line. For it is conceivable that, once petitioner had been given his Miranda warnings, he decided to stand on his right to remain silent because he believed his silence would not be used against him at trial.

Id.

South Carolina courts have recognized "Doyle holds that the Due Process Clause prohibits the government from commenting on an accused's post-Miranda silence." State v. Simmons, 360 S.C. 33, 39, 599 S.E.2d 448, 450 (2004).

Relying on Brecht, this court in State v. Holliday, 333 S.C. 332, 509 S.E.2d 280 (Ct. App. 1998), found the State committed a Doyle violation for referring to a defendant's silence both before and after receiving the Miranda warnings. Brothers Jeremy and Aaron Holliday were convicted of carjacking and resisting arrest among other charges after unsuccessfully attempting to steal a car. The morning after their arrest, the magistrate read the Miranda warnings at a bond hearing and asked both if they had anything to say. Jeremy confessed he was trying to steal the car. Aaron made no statement. At trial, he offered, for the first time, an exculpatory explanation.

During an in camera Jackson v. Denno hearing, 378 U.S. 368 (1964), the trial court held that Aaron's silence was inadmissible. Nonetheless, over defense counsel's objections, the solicitor's cross-examination repeatedly referred to Aaron's failure to tell anyone this version of events. On appeal, this court noted "some of the solicitor's questions dealt with Aaron's failure to tell his story to anyone before he received his Miranda warnings, [but] other questions … clearly implicate the time period following the Miranda warnings…. Therefore, the solicitor's questions referencing Aaron's silence violated the Doyle rule." Holliday, 333 S.C. at 341, 509 S.E.2d at 284. "In light of the Supreme Court's application of Doyle in Brecht, we find the solicitor's questions in this case improper." Id. at 343, 509 S.E.2d at 285.

In State v. McIntosh, 358 S.C. 432, 443, 595 S.E.2d 484, 490 (2004), our supreme court analyzed Doyle to find a prosecutor had improperly commented on a defendant's silence, but clarified:

> The State may point out a defendant's silence prior to arrest, or his silence after arrest but prior to the giving of Miranda warnings, in order to impeach the defendant's testimony at trial. Due process is not violated because '[s]uch silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty.' Brecht v. Abrahamson, 507 U.S. 619, 628, 113 S. Ct. 1710, 1716, 123 L. Ed. 2d 353, 366 (1993); Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124, 56 L. Ed. 2d 86 (1980).

This court affirmed convictions in State v. Bell, 347 S.C. 267, 554 S.E.2d 435 (2001), despite the prosecutor's comments on the defendant's post-arrest silence. As with the case at bar, the record in Bell did not indicate the defendant ever received the Miranda warnings, and we refused to presume they had been given at the time of arrest.

Bell was charged with possession of crack cocaine and possession with intent to distribute crack cocaine, but she was not arrested for one week after the drugs were found in her home. At trial, Bell took the stand and alleged the drugs belonged to her boyfriend. During cross-examination, the prosecutor asked how the police responded to the story. She answered that the police had never asked and she had never told. Defense counsel's subsequent objection was sustained, and the trial judge issued a curative order. The prosecutor then suggested she had never told her family this story. Again, defense counsel objected and the judge overruled. Bell moved for a mistrial arguing the trial court erred in permitting the State to comment on her post-arrest silence. The motion was denied.

On appeal, we found no evidence the Miranda warnings were given; thus, we found no violation of Bell's right to due process. In arriving at this decision, we recognized that Doyle is only applicable after Miranda warnings have been given. Bell, 347 S.C. at 269-70, 554 S.E.2d at 436. Next, we acknowledged that the United States Supreme Court distinguished Fletcher from Doyle because no Miranda warnings were given to Fletcher. Id. at 270, 554 S.E.2d at 436-37. Lastly, we revisited Brecht for the Supreme Court's reiteration that the Doyle rule is based on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using the silence to impeach him at trial. Id. at 270-71, 554 S.E.2d at 437. Applying Doyle and its progeny, we ruled:

> [T]here is no evidence in the record that Bell ever received Miranda warnings, and we will not presume the warnings were given at the time of arrest. See United States v. Cummiskey, 728 F.2d 200, 205 (3rd Cir. 1984) ("Although nothing in the [Fletcher] record indicated the time Miranda warnings were given, the Supreme Court did not presume that the warnings were given at the time of arrest. Accordingly, we do not believe that we are

> authorized to engage in such a presumption." (citation omitted)). Although there was testimony that Bell was arrested approximately one week after the search of her apartment, her arrest alone is insufficient to implicitly induce Bell to remain silent. See Fletcher, 455 U.S. at 603, 102 S. Ct. at 1309. Therefore, we find no due process violation occurred as a result of the State's cross-examination of Bell.

Id. at 271, 554 S.E.2d at 437. Cf. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) (holding Doyle inapplicable to defendant's statement made to a friend prior to arrest and prior to Miranda warnings); State v. Hill, 360 S.C. 13, 16, 598 S.E.2d 732, 733 (Ct. App. 2004) (cross-examining defendant on post-arrest, post-Miranda silence permissible where defendant gives exculpatory testimony and alleges to have told police same version on arrest); State v. Kimsey, 320 S.C. 344, 346, 465 S.E.2d 128, 130 (Ct. App. 1995) (finding where defendant confesses one story to the police then "gives a different version of his involvement in the offense at trial, Doyle does not apply").

In the case at bar, there is no evidence in the record that Brown ever received the Miranda warnings. The investigating officer testified about his investigation of the crime and his activities in speaking with eyewitnesses. However, there was no testimony recounting conversations with Brown nor did the officer indicate whether Brown received Miranda warnings upon his arrest. A signed waiver of rights form was not introduced by the solicitor, nor did Brown introduce evidence of such a form at the PCR hearing. Therefore, Brown did not meet his burden of proving the solicitor committed a Doyle violation and that trial counsel erred in failing to object. See, e.g., State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 645 (1998) (appellant has burden to provide a sufficient record for review).

Incontrovertibly, the evidentiary record extant in the case sub judice demonstrates that no Doyle violation occurred because Petitioner was **NOT** advised on his Miranda warnings.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

To establish a claim of ineffective assistance of counsel in this proceeding, Brown must prove (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced his case. Strickland v. Washington, 466 U.S. 668 (1984); State v. Edmond, 341 S.C. 340, 534 S.E.2d 682 (2000).

Brown claimed that his counsel was deficient in failing to object to the solicitor's comments on his silence during cross-examination and in closing argument. He asserted that, because the trial came down to his word versus the testimony of the eight eyewitnesses, the outcome relied on his credibility.

a. TRIAL STRATEGY

"[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

In Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992), the petitioner, who was convicted of murdering her husband, alleged she had received ineffective assistance of counsel because witnesses were not called who could possibly have supported her suicide defense. Our supreme court affirmed her conviction and stated "[i]f there is any probative evidence in the record to support the PCR judge's decision, his ruling must be affirmed. Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id. at 548, 419 S.E.2d at 779 (citations omitted). Counsel reported he only called those witnesses who were believable. He interviewed other witnesses but found they lacked credibility.

The petitioner in Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), had been sentenced to death for murder, armed robbery, and kidnapping. In his PCR petition he alleged ineffective assistance of counsel, but our supreme court found the trial strategies reasonable. Defense counsel did not present evidence of the petitioner's future adaptability to prison. Counsel testified to do so would have required introduction of unfavorable psychiatric and disciplinary reports from the petitioner's detention as a juvenile and incarceration as an adult. Counsel did not develop testimony that the petitioner knew the victim believing this would impact negatively with the jury. Lastly, defense counsel's statement's during the sentencing phase admitting the petitioner was, inter alia, "far down the rung of society" was an appeal to the jury's sense of mercy. Id. at 13, 430 S.E.2d at 522.

In Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000), a petitioner seeking PCR after an armed robbery conviction alleged trial counsel's numerous errors amounted to ineffective assistance. Our supreme court affirmed that counsel had articulated valid trial strategies. Counsel believed requesting curative instructions brings into focus the item kept out. Id. at 110, 525 S.E.2d at 517. Defense counsel introduced a detective's report with a description of the robber, but he articulated he did so to show the differences between the report and witness testimony. Id.

In Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002), an assault victim's friend testified that he gave the victim a school yearbook with the defendant's picture in it because he heard a rumor the petitioner was involved in the crime. The victim subsequently identified the petitioner from the yearbook. On appeal to the PCR judge, the petitioner alleged his counsel was ineffective for not objecting to this hearsay testimony. Although our supreme court disagreed that the testimony was hearsay, they concluded counsel offered a valid strategy in that he used the testimony to reinforce the notion that the identification was founded in rumor and innuendo. Id. at 33, 561 S.E.2d at 610.

Counsel was found deficient in Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002), for the failure to object to the state's vouching for the credibility of a key witness. At the PCR hearing, counsel explained he "thought seriously about making a mistrial motion and objection to all of that

at the time. However, based upon the strategy of the case, [he] decided not to." Id. at 226, 565 S.E.2d at 284. No further explanation was given. Our supreme court noted "counsel never articulated any strategy at all. A blanket statement by counsel at a PCR hearing that he employed 'strategy' does not automatically insulate the lawyer from being found ineffective." Id. at 228, 565 S.E.2d at 284 n.2.

In Sanchez v. State, 351 S.C. 270, 569 S.E.2d 363 (2002), the defendant appealed his criminal sexual conduct conviction. Our supreme court held representation was ineffective because of counsel's failure to object to a police officer's hearsay testimony about the six year old victim's demonstration of the assault using an anatomically correct doll. Trial counsel felt the testimony would be useful to show the accusations were vague. Id. at 274, 569 S.E.2d at 365. However, this strategy was deemed unreasonable as the hearsay corroborated the victim's testimony at trial. Id. at 276, 569 S.E.2d at 366.

Our supreme court affirmed a petitioner's convictions for trafficking cocaine and possession of cocaine in McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Defense counsel was not ineffective for failing to preserve for appeal the trial court's refusal to allow cross-examination of the state's chemist regarding his own drug arrest. The trial judge decided defense counsel could inquire whether the chemist was under the influence of drugs while testing the cocaine evidence in this case, but he could not inquire into the chemist's arrest. Defense counsel chose not to ask the permitted questions at all. Counsel explained that, without being able to inquire about the chemist's arrest, asking only the permitted questions would not have advanced the petitioner's case. In addition to finding defense counsel had proffered the questions, our supreme court held "counsel gave a valid reason for consciously deciding not to ask those questions." Id. at 483, 575 S.E.2d at 845.

In Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224 (2006), Ellenburg alleged his defense counsel was ineffective for failing to object to the solicitor's comments made during closing argument. At his trial for safecracking and second degree burglary, an accomplice testified to his version of events. Defense counsel argued in closing that the story was a half

truth told to avoid being subjected to a polygraph machine by the police. The solicitor responded by asking why the accomplice would lie when faced with the prospect of taking a lie detector test. Our supreme court held defense counsel's mention of the polygraph test was "a reasonable way to cast doubt on [the accomplice's] testimony implicating [Ellenburg]." Id. at 69, 625 S.E.2d at 226. Additionally, because the defense opened the door to the polygraph issue, the solicitor's statement in closing was not improper. Id.

In Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006), our supreme court disagreed with the PCR court that defense counsel was ineffective for failing to object to certain hearsay testimony introduced in a criminal sexual conduct trial. Counsel had reasonable strategy because she felt an objection would likely lead to the more damaging introduction of a videotape of the child victim talking about the abuse. Id. at 73, 634 S.E.2d at 644.

Our supreme court in Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), found defense counsel ineffective for not more fully investigating and challenging gunshot residue when such evidence was crucial to the outcome of the case. Specifically, defense counsel's decision to not cross-examine the State's gunshot residue expert and instead focusing on the manner in which evidence was collected was not an objectively reasonable strategy.

In the case sub judice, the PCR judge's finding that Brown's counsel did not render ineffective assistance was based on counsel's articulation of valid trial strategies. Testimony from Brown's counsel at the post-conviction relief hearing revealed it was not his strategy to object to all issues generated in a trial because he felt doing so creates a negative impression with the jury. Additionally, counsel testified the State's evidence made this as strong a case as he had seen. He believed the best strategy was to highlight for the jury the discrepancies between the eyewitnesses' testimony and hope they would find it dubious.

It is manifest and irrefutable that trial counsel was **NOT** ineffective. Apodictically, there was no legal or factual basis for an objection bottomed and premised on Doyle. Trial counsel conducted a salutary and salubrious representation of Brown.

b. PREJUDICE

The PCR court found that even if there were a failure to object, Brown failed to establish prejudice. We decline to address this issue because of our disposition of Issues I and II.

CONCLUSION

We hold that trial counsel was not ineffective for failing to make certain objections because the record does not show a Doyle violation occurred. Furthermore, we do **NOT** address the issue of prejudice because of our ruling on the Doyle issue. Accordingly, Brown's conviction and sentence are

AFFIRMED.

Kittredge, J., concurs.

Hearn, C.J., concurs in result only in a separate opinion.

HEARN, C.J., concurring in a separate opinion: I concur in the result reached by the majority, but would simply dismiss the writ of certiorari as improvidently granted.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Stalk, Respondent,

v.

State of South Carolina, Petitioner.

Appeal from Lancaster County
Kenneth G. Goode, Circuit Court Judge
Post Conviction Judge

Paul E. Short, Jr., Circuit Court Judge
Plea Judge

Opinion No. 4298
Heard September 11, 2007 – Filed October 5, 2007

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General David Spencer, all of Columbia, for Petitioner.

Joseph L. Savitz, III, of Columbia, for Respondent.

ANDERSON, J.: The post-conviction relief (PCR) court granted James Stalk's (Stalk) application for relief after finding Stalk's guilty plea was involuntary due to counsel's unreasonable conduct and failure to prepare. This court granted the State's petition to review the PCR court's decision. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Stalk was indicted on one count of first-degree burglary and six counts of second degree burglary, four counts of grand larceny, and one count of aggravated resisting arrest. The first-degree burglary was reduced to second-degree. Stalk pled guilty to all charges. He was sentenced to (1) fifteen years imprisonment for the seven burglary charges, with one count served consecutively to the other six; (2) ten years for the grand larceny indictments, served consecutively to the burglary sentences; and (3) ten years for aggravated resisting arrest, served consecutively to the larceny sentences. In the aggregate, Stalk was sentenced to fifty years imprisonment.

Stalk agreed with and affirmed the State's recitation of the facts at the guilty plea proceeding. The State reported that officers investigating the burglary and larceny crimes identified Stalk as a suspect and visited his residence to question him. While there, the officers observed a number of items in Stalk's apartment that had been reported stolen. When they attempted to arrest Stalk he resisted and injured the officers in the struggle that ensued.

At the plea proceeding Stalk testified that he was thirty-two years old and had an eleventh grade education. He worked in construction and was not married. He admitted to treatment for drug abuse that he did not complete. Stalk denied any physical or emotional problems that might prevent him from understanding why he was in court. The plea court asked Stalk:

> Q: Do you understand that each of these seven indictments allege that you did in Lancaster County on the dates specified in

the indictments willfully and unlawfully entered [sic] the dwellings of the persons specified in the indictments without consent and with the intent to commit a crime therein? Do you understand that?

A: Yes, sir.

. . .

Q: Do you understand that the court could sentence you up to fifteen years in regard to each indictment for burglary in the second degree?

A: Yes, sir.

Q: In the four indictments charging you with grand larceny it is alleged that you did in Lancaster County on the dates specified in each of the four different indictments feloniously take and carry away the personal property of the said individuals named in the indictments with the intent to deprive the owners permanently of the possession of said property and that the property was valued at more than five thousand dollars in each of the four indictments. Do you fully understand the charge of grand larceny?

A: Yes, sir.

Q: Do you understand the court could have sentenced you up to ten years in regard to each of the four different indictments on each offense?

A: Yes, sir.

Q: The last indictment alleges that you did in Lancaster County on or about August 11, 1998, knowingly and willfully beat, injure or wound Captain Rollings and Lt. Bailey, law enforcement officers of this State, while resisting the efforts of

said officers to place you under lawful arrest. Do you understand this charge of resisting arrest . . . ?

A: Yes, sir.

Q: Do you understand the court could sentence you to up to ten years in prison for a violation of that law?

A: Yes, sir.

Q: Do you fully understand that adding all of the maximum sentences that could be imposed you could receive a sentence of up to one hundred and fifty-five years in prison on all of these charges?

A: Yes, sir.

Q: Understanding the charges contained in all of the separate indictments against you, understanding the maximum sentences you could receive, how do you wish to plead, guilty or not guilty?

A. Guilty.

The plea court advised Stalk that by entering a guilty plea he waived or gave up his constitutional rights to (1) remain silent and not be compelled to testify against himself; (2) be tried by a jury of peers or equals to which the State would be required to prove his guilt beyond a reasonable doubt; and (3) confront and cross-examine any witnesses the State called to testify against him at a trial of his case. The court asked Stalk:

Q: Do you wish to give up these rights and plead guilty today?

A: Yes, sir.

Stalk professed he was not threatened or forced to plead guilty or promised anything in exchange for pleading guilty. He confirmed he entered the plea of his own free will and accord. Stalk then stated he was guilty and

he did commit the seven burglaries, four grand larcenies, and one resisting arrest as indicated in the factual record and in the indictments. The plea court questioned Stalk's counsel as follows:

> Q: Have you had a full opportunity to explain to [Stalk] the charges contained in each of these bills of indictment, advise him of all of his constitutional rights as well as the maximum sentences he could receive?
>
> A: Yes, sir.
>
> Q: Does Mr. Stalk fully understand these matters?
>
> A: I believe he does, your honor.
>
> Q: Does he indicate how he wishes to plead?
>
> A: Guilty.
>
> Q: From your investigation of his cases do you agree with his decision?
>
> A: I do, your honor.

Stalk declared he was satisfied with his counsel's representation in the following colloquy:

> Q: Are you satisfied with the services of your lawyer, Mr. [ ]?
>
> A: Yes, sir.
>
> Q: Has he done everything you have asked him to do for you in regards to your cases?
>
> A: Yes, sir.
>
> Q: Has he refused to do anything you have asked him to do?

A: No, sir.

The court accepted Stalk's plea of guilty, finding it was voluntarily, knowingly and intelligently made, with the advice and counsel of a competent lawyer with whom Stalk said he was satisfied. Prior to sentencing, Stalk's counsel addressed the court:

> [I]t is rare that anybody with near this number of pending charges would sit down with me and then later sit down with me and the solicitor and this is what I did. While Mr. Stalk certainly is a burglar, he is an honest burglar, he told them exactly what happened and has not tried to hide from the consequences of his actions. He had done some time in jail, got out, he was engaged, she was pregnant, he was unable to find work, and he resorted back to bad habits. He has been in jail a while now, he understands that he could have been facing as you indicated a hundred and fifty-five years, he could have been facing a potential life sentence on the original charges, and I indicated to him that any sort of negotiations less than that would certainly be to his advantage. He left it in my and the solicitor's hands to come up with this negotiation and he has cooperated in basically leaving it up to us and the State to come up with something less than the worse case scenario. We ask for mercy.

Stalk filed an application for post-conviction relief, which the PCR court granted.[1] The State appealed and filed a petition for writ of certiorari in the Supreme Court. The matter was transferred to this court and the State's petition granted.

[1] Stalk's attorney was not available to testify at the PCR hearing. The PCR court held the record open for the submission of his testimony by deposition. However, Stalk's counsel remained unavailable and attempts to depose him were unsuccessful. The record on appeal includes Stalk's PCR testimony, the transcript of the plea hearing, and other records of the Clerk of Court.

ISSUES

I. Did the PCR court err in finding Stalk's guilty plea was rendered involuntary by the ineffective assistance of his counsel?

II. Did the PCR court err in granting relief when Stalk presented no evidence of prejudice?

STANDARD OF REVIEW

This court gives great deference to the PCR court's findings of fact and conclusions of law. Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). On review, a PCR court's findings will be upheld if there is any evidence of probative value sufficient to support them. Id. (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). However, where there is no evidence of probative value to support the findings of the PCR court, the appellate court will reverse. Bright v. State, 365 S.C. 355, 358, 618 S.E.2d 296, 298 (2005); Magazine v. State, 361 S.C. 610, 615, 606 S.E.2d 761, 763 (2004) (citing Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000)).

LAW/ANALYSIS

The essential allegation raised by Stalk involves the involuntary nature of his guilty plea due to the alleged lack of preparation and unreasonable conduct of his appointed counsel.

In the order granting Stalk's application for relief, the PCR court reasoned:

> [Stalk] testified that he was coerced by his counsel who seemingly was unprepared. The applicant testified that his first meeting with his counsel, [ ], was in the presence of the prosecuting attorney, [ ]. The applicant further testified that his counsel never met with him to discuss his case, never discussed the pending charges, and never discussed possible defenses.

> Despite having pleaded guilty and answering the Court in the affirmative at this guilty plea, the applicant testified that he understood that the sentences would all run concurrently. The applicant further testified that he was coerced into pleading guilty because he had no confidence in his lawyer. He stated that he would probably not have pled guilty had his lawyer been prepared.
>
> Upon cross-examination, Mr. Stalk insisted that [his attorney] failed to call the co-defendant. He also confirmed previous testimony that [his attorney] had only met with him once prior to entering the plea and that the meeting took place in the presence of the prosecuting attorney. As such [Stalk] was unduly coerced into the plea agreement and would have otherwise insisted on going to trial.

The PCR court concluded:

> [Stalk] has established that he did not receive effective assistance from his court appointed attorney. This Court further finds that the State has offered no evidence to refute the allegations of [Stalk]. Furthermore, this Court finds that due to the conduct of [Stalk]'s attorney, [Stalk] was prejudiced in not having the opportunity to go forward with trial. Based on [Stalk]'s unrefuted testimony, this Court finds that there is a reasonable probability that [Stalk] would have insisted on going to trial.

The State contends that the PCR court erred in granting Stalk relief. We agree.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citing Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)); Bannister v. State, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant

decisions in the case." Morris v. State, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006); Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

Strickland v. Washington, 466 U.S. 668, 687 (1984), established a two-prong test for evaluating claims of ineffective assistance of counsel. The first prong of the test requires that a defendant prove his counsel's deficiency by demonstrating counsel's performance fell below an objective standard of reasonableness. Bennett v. State, 371 S.C. 198, 203, 638 S.E.2d 673, 675 (2006) (citing Strickland). The second part of the test requires a defendant to show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.

An applicant may attack the voluntary, knowing, and intelligent character of a guilty plea entered on the advice of counsel by demonstrating that counsel's representation was below an objective standard of reasonableness. Porter v. State, 368 S.C. 378, 383-84, 629 S.E.2d 353, 356 (2006); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). The "prejudice," requirement focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Hill v. Lockhart, 474 U.S. 52, 59 (1985). In other words, the applicant must prove prejudice by showing that, but for counsel's inadequacy, there is a reasonable probability he would not have pleaded guilty and, instead, would have insisted on going to trial. Suber, 371 S.C. at 558, 640 S.E.2d at 886.

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 242 (1969); Roddy v. State, 339 S.C. 29, 33-34, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both." Pittman v. State, 337 S.C. 597, 625, 524 S.E.2d 623, 659 (1999).

"[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty

plea and the record of the post-conviction hearing." Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984). "When determining issues relating to guilty pleas, this Court will consider the entire record, including the transcript of the guilty pleas and the evidence presented at the PCR hearing." Roddy, 339 S.C. at 33, 528 S.E.2d at 420. In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 370 (1997).

1. Ineffective Assistance of Counsel

Stalk claimed his attorney met with him only one time prior to the plea hearing and was inadequately prepared. He asserted counsel did not go over the warrants, did not ask him about potential defenses or witnesses, did not inform him of his right to a jury trial, and did not ask about Stalk's sentencing expectations. Stalk admitted his attorney told him that he faced a potential one hundred fifty-five year aggregate sentence if convicted at trial. Additionally, Stalk averred he only had ten or fifteen minutes to make up his mind about whether to plead guilty. He stated he felt coerced to plead guilty because he lacked confidence in his attorney.

Testimony from Stalk's counsel at the plea hearing indicated he first sat down with Stalk alone and then "later" sat down with Stalk and the Solicitor. Counsel believed Stalk understood he could face one hundred fifty-five years—a potential life sentence—if found guilty at trial. Consequently, he advised Stalk that any negotiation resulting in less time would be to his advantage.

On cross-examination at the PCR hearing, Stalk initially stated he met with his attorney one time, in the presence of the Solicitor. However, on redirect, Stalk's testimony suggests he met with counsel earlier in the day before meeting with counsel and the Solicitor:

> Q: [Your attorney] indicates in his statement to the court that he had met with you prior to—how soon prior to

that guilty plea did he meet with you? He said he met with you before meeting with you and [the Solicitor]. How much time elapsed from that first meeting and your meeting with—

Stalk: On the same day.

Q: Was it the same day?

Stalk: The same day it was a bond hearing and I met with him about a bond hearing.

Q: Prior to meeting with him and [the Solicitor] did you met with [your attorney] also that same day before meeting with [the Solicitor]?

Stalk: I met with him here, back here.

In our view, Stalk's conflicting testimony provides little reliable evidence that he met only once with his attorney.

We do not agree with the PCR court that Stalk established ineffective assistance of his court appointed attorney. In basing his finding on Stalk's "unrefuted testimony," the PCR court apparently disregarded Stalk's testimony at the plea hearing. Stalk's PCR testimony blatantly and completely contradicted his earlier attestations at the plea hearing concerning the voluntariness of his guilty plea. At the PCR proceeding Stalk averred:

Stalk: When I went up there, mostly I was talking to the Judge. He asked me did I understand what was going on and I said, "Yes." He asked me did I know what I was pleading to and I said, "Yes."

Q: Why did you say that? When he was asking you these questions, did you really understand what he was asking?

Stalk: No, I was still mixed up.

Q: Why didn't you stop him and tell him you didn't understand?

Stalk: I don't know, I don't know.

The transcript of the guilty plea clearly refutes Stalk's assertion that he did not understand the terms of the guilty plea. See Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him); see also Moorehead v. State, 329 S.C. 329, 333, 496 S.E.2d 415, 417 (1998) ("Respondent's explanation that he answered the trial court affirmatively on counsel's alleged advice that the questions were meaningless does not support the grant of PCR.").

The plea colloquy record indicates Stalk was fully informed of his constitutional rights, understood the crimes with which he was charged, and was cognizant of the maximum sentences he might receive. Any possible misconceptions concerning his constitutional rights, the charges, or potential sentences on Stalk's part were cured by the colloquy during the essentially perfect plea proceeding conducted by the learned judge. See Pittman, 337 S.C. at 625, 524 S.E.2d at 659; Wolfe, 326 S.C. at 165, 485 S.E.2d at 370.

2. Prejudice

Stalk maintained that he "probably would have requested a jury trial" had his attorney spent time with him, properly prepared his case, and informed him of the charges and penalties he faced. Although Stalk claimed his attorney did not "do what he was supposed to do," he was unable to tell the court what his attorney could have done to help his case.

Stalk: I would have advised him to bring my co-defendant, my co-defendant on the same charges I got.

Q: I'm not sure if I am following you. You are saying that you would have wanted your co-defendant indicted for the same charges?

Stalk: Yes, sir.

Q. Well, how would that have helped your case?

Stalk: I don't know, but it would probably be more than it did.

If, in fact, Stalk meant to suggest his attorney should have called the co-defendant as a witness, he still failed to show how he was prejudiced by the lack of that testimony. "This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998); see, e.g., Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR. Porter v. State, 368 S.C. 378, 386-87, 629 S.E.2d 353, 358 (2006) (holding no evidence showed counsel's failure to interview a potential witness would have yielded a result different from that which defendant's counsel believed at the time of the plea; defendant pled guilty in light of the complete information that was available at that time).

In addition, Stalk testified he believed his sentences would run concurrently rather than consecutively, suggesting he would not have pled guilty had he known otherwise. There is no evidence, whatsoever, in the record, prior to Stalk's PCR testimony, that he was induced to plead guilty based his understanding the sentences would run concurrently. "Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been

made." Wolfe, 326 S.C. at 165, 485 S.E.2d at 371. Moreover, counsel's plea negotiations for Stalk proved advantageous. The first degree burglary count was reduced to second degree, and Stalk received a sentence considerably less than the one hundred fifty-five years he might have received if convicted by a jury. See Bright v. State, 365 S.C. 355, 360, 618 S.E.2d 296, 298 (2005) (reversing PCR court's grant of relief when defense counsel negotiated favorable plea on respondent's behalf).

CONCLUSION

Although this court generally affords great deference to the PCR court's findings, in this case we conclude the record is devoid of any probative evidence to support granting Stalk post-conviction relief. Accordingly, we **REVERSE** the decision of the PCR court and **REINSTATE** Stalk's guilty plea and sentences.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mary E. Miller, **Respondent,**

v.

Burl E. Miller, Jr., **Appellant.**

Appeal From Greenville County
Timothy L. Brown, Family Court Judge

Opinion No. 4299
Submitted September 1, 2007 – Filed October 5, 2007

AFFIRMED AS MODIFIED

Burl E. Miller, Jr., of Savannah, Georgia, Appellant Pro Se .

Mary E. Miller of Greenville, Respondent Pro Se.

ANDERSON, J.: Burl E. Miller, Jr. (Husband) contends the family court erred by: (1) holding him in contempt for barring Respondent's (Wife's) entry into the marital home to retrieve property, removing property from the marital home, and secreting the property in another location; (2) requiring the return of certain property to Wife; (3) failing to find Wife in

contempt; and (4) ordering him to pay a portion of Wife's attorney's fees. We affirm as modified.[1]

FACTUAL/PROCEDURAL BACKGROUND

Wife initiated an action for separate support and maintenance, equitable division of marital property, and other related relief in August of 2004. Husband and Wife reached an agreement resolving all issues on a temporary basis. The family court approved the parties' agreement as the Temporary Order of the Court, finding "[b]oth parties expressed their opinion that they believed the [temporary] agreement to be in their best interests . . . . The parties further affirmed their understanding that their agreement will be set forth in a Temporary Order of this Court, and as such, that the agreement is enforceable by the contempt powers of this Court."

The Temporary Order provided, in pertinent part, that:

> 1. The former marital home will be placed on the market for sale, with the [Husband] making necessary repairs to the master bathroom, the kitchen ceiling, and the fountain in the front yard. [Husband] will replace the original locks on the doors and replace the doorknobs.
>
> 2. [Husband] will make the monthly mortgage payment on the home, in the approximate amount of $2,200.00 and [Wife] will pay for the lawn maintenance. The parties will split the utility bills for the home while it is on the market . . . .
>
> 3. Each party will keep the vehicle in his or her respective possession and pay the expenses of said vehicles. The parties will each obtain insurance on the vehicles in his or her possession, and neither will list the other as a driver on the others' automobile insurance policy.
>
> . . .

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

> 8. [Wife] will remove all remaining property from the former residence, to prepare it for sale, and she will store such property at her residence.
>
> 9. The parties will be mutually restrained from liquidating or transferring any marital assets or property of any type to other parties, hiding or secreting said property and/or assets and/or removing money from any bank accounts other than those necessary to pay the monthly household bills and expenses.

Wife vacated the marital home shortly after the parties separated in order to prepare the home for sale. Husband lived with his parents when the parties separated but moved back into the home in October, 2004, and remained there until the end of November, 2004.

On several occasions Wife attempted to gain access to the marital home to retrieve remaining property as directed by the Temporary Order. Wife testified Husband prevented her from entering the marital home. Witnesses Sandy Weaver and Genie Shealy generally corroborated Wife's testimony that Husband had not allowed her entry into the home after several attempts. Wife averred Husband changed the locks on the doors without her knowledge or consent, making entry impossible.

On one occasion Wife pre-arranged a time with Husband to remove the remaining items from the home. She rented a U-Haul truck and enlisted the help of several family members. Wife claimed Husband had one week's notice of this scheduled removal. However, on the day Wife and her family planned to secure the property, Husband's friend, apparently acting on Husband's behalf, barred them from entering the home. When wife eventually entered the home on a later date, she found the remaining property she was to retrieve pursuant to the Temporary Order, including a vintage Ford Mustang, had been removed.

On cross-examination Wife admitted she had alternative access to the home through the garage door. However, Wife's attorney had advised her not to enter the home on her own while Husband was living there.

Husband denied he hindered Wife's entry into the home, maintaining he prevented her entry at the originally appointed time only because he had to go out of town and needed to reschedule. He claimed she could have arranged to enter at a later time. Husband acknowledged, however, that he had removed items, including the Ford Mustang, from the marital home and was currently storing property in a another location.

Wife filed an initial Rule to Show Cause motion on or about December 7, 2004, charging, inter alia, that Husband had refused to allow Wife access to the marital home to retrieve remaining property as ordered by the Court. Wife filed an Amended Contempt Complaint on January 27, 2005, for additional violations of the Temporary Order, alleging Husband (1) refused to cooperate in the preparation and sale of the marital home, (2) changed the locks on the doors of the marital home, (3) prevented her from retrieving her personal belongings, and (4) moved the majority of her belongings to another state without Wife's knowledge or consent.

Husband filed a Rule to Show Cause, Answer and Counterclaim against Wife on February 9, 2005, complaining that Wife violated the Temporary Order by failing to (1) return business records and computer accessories, (2) pay for lawn maintenance, and (3) remove and store at her residence the remaining property in the marital home.

The family court found Husband in contempt for barring Wife from entering the marital home to retrieve remaining property and ordered him to return the Ford Mustang and all its parts to Wife within thirty (30) days of the hearing.[2] Wife was ordered to return business records and computer accessories to Husband within thirty (30) days.

Husband filed a Motion for Reconsideration. In an Amended Order dated March 31, 2005, noting that neither party proved all the allegations set forth in his or her Contempt Complaint, the family court held:

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[2] The family court addressed other issues not relevant to this appeal, including the Temporary Order's requirement that Husband and Wife split the utility bills while the home was on the market.

6. It is explicit and unequivocal that [Husband] is in willful contempt of this Court for refusing to allow [Wife] to retrieve her personal belongings from the marital home, for removing the belongings from the marital home, and from South Carolina, and for secreting the belongings in or near Savannah, Georgia, without [Wife]'s knowledge or consent which he had no right to do. This has been proven to a clear and convincing standard of proof. The [temporary] order clearly allows and required the [Wife] to remove all marital property from the marital home. [Husband] should, and hereby shall, return [Wife]'s property to her, at his own expense, within thirty (30) days of this Order. This includes the Ford Mustang automobile and all parts, at an agreed upon location and time and in the condition as when removed. Should [Husband] not return the property within that time, he shall immediately begin serving a sentence of twelve (12) months incarceration in the Greenville County Detention Center. [Husband] to be released by the return of such property. The act of removal and the act of barring the wife is criminal contempt. These acts have been proven beyond a reasonable doubt.

. . .

8. The [Husband] did change the locks on the doors and occupy the marital home, thereby making it impossible for the wife to enter the home. He or his friend actually barred the [Wife]. The Court further finds that [Wife] did not enter the marital home to retrieve her personal belongings, as set forth in the Temporary Order, due to the [Husband]'s preventing [Wife] from doing so. Therefore, the Court finds that [Wife] is not in contempt on such charges.

ISSUES

I. Did the family court err and abuse its discretion in finding Husband in contempt for refusing to allow Wife to retrieve

remaining property from the marital home, removing the property from the marital home, and secreting the property in or near Savannah, Georgia?

II. Did the family court err in finding Husband in criminal contempt?

III. Did the family court err in ordering Husband to return the Ford Mustang and all parts to Wife?

IV. Did the family court err in finding Wife was not in contempt for failure to remove and store remaining property from the marital home because Husband prevented her from entering the home to retrieve the property?

V. Did the family court err and abuse its discretion in ordering Husband to pay two-thirds (2/3) of Wife's attorney's fees and costs in the amount of $5,321.63?

Husband contends the family court erred in not finding Wife in contempt for failure to pay for lawn maintenance. The family court did not rule on this issue at the hearing or in the Amended Order, and Husband neglected to raise it in his Motion for Reconsideration. Therefore, this issue is not preserved and we decline to address it on review.

STANDARD OF REVIEW

An appellate court should reverse a decision regarding contempt "only if it is without evidentiary support or the trial judge has abused his discretion." Durlach v. Durlach, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004) (quoting Stone v. Reddix-Smalls, 295 S.C. 514, 516, 369 S.E.2d 840 (1988)); see also Henderson v. Henderson, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989) ("A finding of contempt rests within the sound discretion of the trial judge."). "An abuse of discretion occurs either when the court is controlled by some error of law or where the order, based upon findings of fact, lacks evidentiary support." Townsend v. Townsend, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003).

"A determination of contempt is a serious matter and should be imposed sparingly; whether it is or is not imposed is within the discretion of the trial judge, which will not be disturbed on appeal unless it is without evidentiary support." Floyd v. Floyd, 365 S.C. 56, 72, 615 S.E.2d 465, 473 (Ct. App. 2005) (quoting Haselwood v. Sullivan, 283 S.C. 29, 32-33, 320 S.E.2d 499, 501 (Ct. App. 1984)).

LAW/ANALYSIS

I. CONTEMPT

"The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice." Floyd, 365 S.C. at 73, 615 S.E.2d at 474 (quoting Curlee v. Howle, 277 S.C. 377, 382, 287 S.E.2d 915, 917 (1982)); State v. Stanley, 365 S.C. 24, 38, 615 S.E.2d 455, 462 (Ct. App. 2005); see also In re Brown, 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998) ("The power to punish for contempt is inherent in all courts and is essential to preservation of order in judicial proceedings."); State ex rel. McLeod v. Hite, 272 S.C. 303, 306, 251 S.E.2d 746, 748 (1979) (instructing that a court has the inherent authority to punish offenses calculated to obstruct, degrade, and undermine the administration of justice, and such power cannot be abridged).

The United States Supreme Court discussed the court's contempt power in an 1888 case, In re Terry:

> [C]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates. . . . "The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts; and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction

> over any subject, they became possessed of this power." And such is the recognized doctrine in reference to the powers of the courts of the several states. . . . "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers." Without such power . . . the administration of the law would be in continual danger of being thwarted by the lawless.

128 U.S. 289, 303 (1888) (internal citations omitted) (quoted with approval in State v. Goff, 228 S.C. 17, 22-23, 88 S.E.2d 788, 790-91 (1955)).

"Contempt results from the willful disobedience of an order of the court." Bigham v. Bigham, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975); Smith v. Smith, 359 S.C. 393, 396, 597 S.E.2d 188, 189 (Ct. App. 2004); S.C. Code Ann. § 20-7-1350 (Supp. 2004) (A party may be found in contempt of court for the willful violation of a lawful court order.). "A willful act is one which is 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.' " Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001) (quoting Spartanburg County Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988)). "Where a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt." Smith-Cooper v. Cooper, 344 S.C. 289, 301, 543 S.E.2d 271, 277 (Ct. App. 2001).

The determination of contempt ordinarily resides in the sound discretion of the trial judge. State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994). "In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order." Hawkins v. Mullins, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004); Eaddy v. Oliver, 345 S.C. 39, 42, 545 S.E.2d 830, 832 (Ct. App. 2001). "[B]efore a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." Widman, 348 S.C. at 119,

557 S.E.2d at 705. "Once the moving party has made out a prima facie case, the burden then shifts to the respondent to establish his or her defense and inability to comply with the order." Id. at 120, 557 S.E.2d at 705.

"It is within the trial court's discretion to punish by fine or imprisonment all contempts of authority before the court." Brandt v. Gooding, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006) (citing S.C. Code Ann. § 14-5-320 (1976)). "In addition, courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice." Id. (citing State ex rel. McLeod v. Hite, 272 S.C. 303, 305, 251 S.E.2d 746, 747 (1979)).

A. Direct v. Constructive Contempt

"Direct contempt is defined as contemptuous conduct occurring in the presence of the court." State v. Kennerly, 331 S.C. 442, 450, 503 S.E.2d 214, 219 (Ct. App. 1998) aff'd by 337 S.C. 617, 524 S.E.2d 837 (1999) (citing State v. Goff, 228 S.C. 17, 88 S.E.2d 788 (1955)). "South Carolina courts have always taken a liberal and expansive view of the 'presence' and 'court' requirements. This State's courts have held the 'presence of the court' extends beyond the mere physical presence of the judge or the courtroom to encompass all elements of the system." Kennerly, 337 S.C. at 620, 524 S.E.2d at 838. "[T]he court consists not of the judge, the jury, or the jury room individually, but all of these combined. The court is present wherever any of its constituent parts is engaged in the prosecution of the business of the court according to the law." Id. at 620-21, 524 S.E.2d at 838 (citing Goff, 228 S.C. at 23, 88 S.E.2d at 791).

"Constructive contempt is contemptuous conduct occurring outside the presence of the court." Kennerly, 331 S.C. at 451, 503 S.E.2d at 219 (citing Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994)).

"The distinction between direct and constructive contempt is important because it determines how the contempt proceedings must be brought." Id. "A rule to show cause for direct contempt may be issued without a supporting affidavit or verified petition." Id. However, a charge of constructive contempt brought by a rule to show cause must be based on an affidavit or

verified petition. Id. "The failure to support the rule to show cause by an affidavit or verified petition is a fatal defect." Lynch, 314 S.C. at 267, 442 S.E.2d at 617.

In Kennerly, the pivotal question was whether the contemnor's conduct constituted direct or constructive contempt. Kennerly was a juror in a capital murder trial in which the defendant was found guilty and received a sentence of life imprisonment rather than the death penalty. Kennerly, 331 S.C. at 446-49, 503 S.E.2d at 216-18. The solicitor filed a petition alleging Kennerly was in contempt of court for failing to disclose her relationship with the defendant during voir dire and for initiating premature discussions with other jurors in violation of the judge's instructions. Id. The trial court found Kennerly guilty of contempt and she appealed, arguing the solicitor's rule to show cause was not based upon a sworn affidavit or a verified pleading. Id. at 449-50, 503 S.E.2d at 18. She maintained the contemptuous conduct was not direct contempt because it occurred outside the presence of the court. Likewise, she averred the solicitor's unverified petition was fatal to a charge of constructive contempt. Id.

The court found Kennerly's conduct occurred where the jury was required to be, in the jury room and hotel where sequestered, and while the jurors were performing their legal duties. "Because Kennerly's conduct occurred within the sight and hearing of an integral and constituent part of the court, her conduct was 'in the presence of the court' and constituted direct contempt." Kennerly, 337 S.C. at 622, 524 S.E.2d at 839. Kennerly's behavior was not constructive contempt, and, therefore, the absence of an affidavit or verified petition was not fatal to the solicitor's action.

B. Civil v. Criminal Contempt

The determination of whether contempt is civil or criminal depends on the underlying purpose of the contempt ruling. In Floyd v. Floyd, we provided a comprehensive review of the differences between civil and criminal contempt:

> The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised,

including the nature of the relief and the purpose for which the sentence is imposed. The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant.

The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

An unconditional penalty is criminal in nature because it is solely and exclusively punitive in nature. The relief cannot undo or remedy what has been done nor afford any compensation and the contemnor cannot shorten the term by promising not to repeat his offense. If the relief provided is a sentence of imprisonment, . . . it is punitive if the sentence is limited to imprisonment for a definite period. If the sanction is a fine, it is punitive when it is paid to the court. However, a fine that is payable to the court may be remedial when the contemnor can avoid paying the fine simply by performing the affirmative act required by the court's order.

In civil contempt cases, the sanctions are conditioned on compliance with the court's order. The conditional nature of the punishment renders the relief civil in nature because the contemnor can end the sentence and discharge himself at any moment by doing what he had previously refused to do. If the relief provided is a sentence of imprisonment, it is remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order . . . . Those who are imprisoned until they obey the order, carry the keys of their prison in their own pockets. If the sanction is a fine, it is remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine or if the contemnor can avoid the fine by complying with the court's order.

365 S.C. 56, 75-76, 615 S.E.2d 465, 475-76 (Ct. App. 2005) (citing Poston v. Poston, 331 S.C. 106, 111-12, 502 S.E.2d 86, 88-89 (1998)).

The distinction between civil and criminal contempt is critical, because criminal contempt triggers additional constitutional safeguards. Civil contempt must be proved by clear and convincing evidence. Durlach v. Durlach, 359 S.C. 64, 71, 596 S.E.2d 908, 912 (2004). In a criminal contempt proceeding, the burden of proof is beyond a reasonable doubt. Floyd, 365 S.C. at 76, 615 S.E.2d at 76. Intent for purposes of criminal contempt is subjective, not objective, and must necessarily be ascertained from all the acts, words, and circumstances surrounding the occurrence. State v. Passmore, 363 S.C. 568, 572, 611 S.E.2d 273, 275 (Ct. App. 2005) (citing State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994)).

In Bloom v. Illinois, 391 U.S. 194 (1968) the Supreme Court held prosecutions for serious criminal contempts are subject to the jury trial protections of the Sixth Amendment. Subsequently, in Codispoti v. Pennsylvania, 418 U.S. 506, (1974), the Supreme Court held criminal defendants sentence to imprisonment of more than six (6) months are entitled to a jury trial. See Curlee v. Howle, 277 S.C. 377, 383, 287 S.E.2d 915, 918 (1982); Passmore, 363 S.C. at 572, 611 S.E.2d at 275.

"Incarceration under certain factual circumstances may be included as a component of civil contempt." Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 609, 567 S.E.2d 514, 521 (Ct. App. 2002). However, unlike the constitutional protection afforded a criminal contemnor, the United States Supreme Court has held that a civil contempt proceeding resulting in incarceration does not require a jury trial. Shillitani v. U.S., 384 U.S. 364 (1966). In Shillitani, two witnesses refused to testify before a grand jury after being given immunity. 384 U.S. at 365. They were sentenced to two years imprisonment for contempt of court with the provision for release if they answered the grand jury's questions. Id. The court reasoned the character and purpose of the contempt rendered it civil rather than criminal. Id. at 368. The sentence of imprisonment was conditional, imposed for the obvious purpose of compelling the two grand jury witnesses to obey the court's orders

to testify. Id. at 370. "While any imprisonment has punitive and deterrent effects, it must be viewed as remedial if the court conditions the release upon the contemnor's willingness to [obey a court's order]." Id. "The conditional nature of the imprisonment, based entirely upon the contemnor's continued defiance, justified holding civil contempt proceedings absent the safeguards of indictment and a jury." Id. at 370-71.

In Curlee v. Howle our supreme court followed the Shillitani test to determine whether a jury trial was warranted in a contempt proceeding. 277 S.C. at 382, 287 S.E.2d at 917. A father who willfully disregarded a family court order was sentenced to one year of confinement, suspended upon paying the mother $14,960.43. Id. The court first asked whether the contempt was civil or criminal. Looking to the purpose of the contempt finding, it was obviously to compel the contemnor to pay the expenses, not punishment. The court concluded "the conditional nature of the imprisonment, based entirely upon [the father]'s refusal to pay [the mother]'s expenses, justified holding the civil contempt proceeding without a jury trial."

C. The Case Sub Judice

Husband argues the family court's findings are without evidentiary support. Specifically, Husband contends there is no evidence that he willfully violated the terms of the Temporary Order by barring Wife from entering the marital home, preventing her from retrieving her belongings, and secreting her belongings in another location. Moreover, Husband alleges the family court erred in ordering Husband to return the Ford Mustang and all its parts to Wife. We disagree.

1. Marital Property

The record clearly reflects Husband's contemptuous conduct. The Temporary Order allowed and required Wife to remove all marital property from the marital home. The Order unequivocally stated: "[Wife] will remove all remaining property from the former residence, to prepare it for sale, and she will store such property at her residence."

Wife and two witnesses attested to the fact Husband willfully interfered with Wife's attempts to effectuate the Temporary Order. Evidence showed the Husband had moved back into the marital home, changed locks, and thwarted Wife's scheduled entry to remove remaining property as ordered. When Wife eventually gained access to the marital home, she discovered the remaining property, including the vintage Ford Mustang, had been removed.

Husband does not dispute the existence of a valid court order requiring Wife to remove remaining property. He claims, instead, that the Temporary Order is unclear, ambiguous, and did not specifically prohibit him from removing property from the marital home. Referring to the relevant provisions of the Temporary Order, the family court reasoned "it's obvious that property was to be there and all other property other than what's set forth here was to be at that house and she's to take possession of it." "As to the personal property, it is explicit and unequivocal that the wife was to be allowed to retrieve it, she was to get it all."

Husband denied he took any of Wife's property to Savannah, Georgia. He attributed the removal of Wife's property to people helping him move out of the marital home at the end of November. However, Husband did intentionally relocate the Ford Mustang to another location. He insisted the provision in the Temporary Order requiring that "[e]ach party will keep the vehicle in his or her respective possession and pay the expenses of said vehicles" permitted his moving the automobile.

The 1970 Mach I Ford Mustang was basically a chassis, without the engine parts, in the process of being restored. Though at the time of the Temporary Order Husband was not living in the marital home where the automobile was stored, he, nevertheless, claimed possession of all body and interior parts. Wife, on the other hand, maintained the vehicle was part of the "remaining property" that she was ordered to retrieve and store.

Husband urges the language of the Temporary Order does not accurately reflect the record of the temporary hearing. He claims the agreement at the hearing was that Wife would remove remaining "furnishings," not "remaining property." Husband relies on this discrepancy to argue the Ford Mustang was not part of the property Wife was required to

retrieve. However, this argument is not preserved. Husband failed to address the discrepancy between the language at the temporary hearing and in the Order in a post-trial motion. A party must make a post-trial motion where there are inaccuracies in the order or inconsistencies between an oral ruling and a written order. Grant v. South Carolina Coastal Council, 319 S.C. 348, 355, 461 S.E.2d 388, 392 (1995); Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993) (appellant waived issue of nonconformity between oral order and subsequent written order by failing to raise issue below, which could have been raised through motion to alter or amend judgment after receipt of allegedly nonconforming written order).

The family court ruled the Ford Mustang was included in the remaining property Wife was to remove and ordered Husband to return the Ford Mustang and all its parts to Wife. It is without dispute that the Ford Mustang was stored in the garage of the marital home at the time of the Temporary Order and neither party was in possession of it. Nor was the Ford Mustang the type of operating vehicle described in the Temporary Order that was to be maintained and insured by each party.

Our sole purpose in reviewing the family court's contempt finding here is to ascertain whether evidentiary support existed for the ruling. Accordingly, after a thorough study of the record, we determine evidentiary support existed for finding Husband in contempt and for ordering him to return the Ford Mustang to Wife. The family court was entirely within its discretion in determining the creditability of the witnesses and in assigning weight to their testimony.

Moreover, because the family court determined Husband prevented Wife from retrieving the remaining property, the family court did not err in failing to find Wife in contempt for her non-compliance with the Temporary Order. When a party is unable through no fault of her own to obey an order of the court, she is not to be held in contempt.

2. Criminal Contempt Finding

Husband next complains the family court erred in finding him in criminal contempt. In the Amended Order the family court ruled Husband's "act of removal" and "act of barring" Wife constituted criminal contempt that was proven beyond a reasonable doubt. The family court ordered Husband to return Wife's property. His failure to do so would result in a sentence of twelve (12) months incarceration, with the provision that he would be "released by the return of such property."

The family court committed an error in nomenclature by designating the contempt criminal rather than civil. The precedent emanating from the South Carolina and United States Supreme Courts differentiating civil and criminal contempt is controlling. See Curlee v. Howle, 277 S.C. 377, 287 S.E.2d 915 (1982); Shillitani v. U.S., 384 U.S. 364 (1966).

Without doubt, this is a civil contempt proceeding. The family court's Amended Order does not subject Husband to an unconditional, fixed term of imprisonment.[3] Husband, if imprisoned, could obtain his release by complying with the court's directive; he held the keys to his prison. The

[3] Although the family court issued several contempt rulings and imposed somewhat confusing sentences at the conclusion of the contempt hearing, the final ruling in the Amended Order controls. "It is well settled that a judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling." Corbin v. Kohler Co., 351 S.C. 613, 621, 571 S.E.2d 92, 97 (Ct. App. 2002) (quoting Badeaux v. Davis, 337 S.C. 195, 204, 522 S.E.2d 835, 839 (Ct. App. 1999)). See also Owens v. Magill, 308 S.C. 556, 419 S.E.2d 786 (1992) (ruling judge was not bound by prior oral ruling and could issue written order which conflicted with prior oral ruling). "To the extent the written order may conflict with the prior oral ruling, the written order controls." Parag v. Baby Boy Lovin, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct. App. 1998). "The written order is the trial judge's final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties." Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) (citing Rule 58, SCRCP).

contempt ruling was obviously intended to compel Husband's compliance with the requirements of the Temporary Order. Although mistakenly referred to as criminal contempt, substantively, the family court's finding of contempt was civil in nature.

II. ATTORNEY'S FEES

Husband asserts the family court erred in ordering him to pay two-thirds (2/3) of Wife's attorney's fees because Wife did not prevail in the majority of issues. Additionally, Husband contends the family court erred in failing to consider each party's ability to pay his or her own fees, the beneficial results obtained by the attorney, the parties' respective financial conditions, and the effect of the attorney's fee on the parties' standard of living. We disagree.

In advancing his argument, Husband incorrectly applies the standard for award of attorney's fees in a domestic action. In this contempt action, however, a different standard controls the court's analysis.

Courts, by exercising their contempt power, can award attorney's fees under a compensatory contempt theory. Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 178-79, 557 S.E.2d 708, 711-12 (Ct. App. 2001). Compensatory contempt seeks to reimburse the party for the costs it incurs in forcing the non-complying party to obey the court's orders. "In a civil contempt proceeding, a contemnor may be required to reimburse a complainant for the costs he incurred in enforcing the court's prior order, including reasonable attorney's fees. The award of attorney's fees is not a punishment but an indemnification to the party who instituted the contempt proceeding." Poston v. Poston, 331 S.C. 106, 114, 502 S.E.2d 86, 90 (1998); Lindsay v. Lindsay, 328 S.C. 329, 345, 491 S.E.2d 583, 592 (Ct. App. 1997) ("A compensatory contempt award may include attorney fees."); Curlee v. Howle, 277 S.C. 377, 386-87, 287 S.E.2d 915, 919-20 (1982) ("Compensatory contempt is a money award for the [Wife] when the [Husband] has injured the [Wife] by violating a previous court order . . . . Included in the actual loss are the costs of defending and enforcing the court's order, including litigation costs and attorney's fees."). The court is not required to provide the contemnor with an opportunity to purge himself

of these attorney's fees in order to hold him in civil contempt. Floyd v. Floyd, 365 S.C. 56, 76, 615 S.E.2d 465, 476 (Ct. App. 2005) (citing Poston, 331 S.C. at 111-15, 502 S.E.2d at 88-91). "[T]he award of attorney's fees is not part of the punishment; instead, this award is made to indemnify the party for expenses incurred in seeking enforcement of the court's order." Id. at 77, 615 S.E. 2d at 476 (quoting Poston, 33 S.C. at 111-15, 502 S.E.2d at 88-91).

The family court found Wife necessarily incurred attorney's fees and costs in securing Husband's compliance with the Temporary Order. We discern no abuse of discretion in ordering Husband to pay a portion of those fees and costs.

CONCLUSION

We hold the evidentiary record supported the family court's finding Husband in civil contempt. The family court did not abuse its discretion by ordering Husband to return the Ford Mustang and all parts to Wife. Nor did the family court err in failing to find Wife in civil contempt when she, through no fault of her own, failed to comply with the Temporary Order. The family court considered the proper standard for awarding attorney's fees in a contempt action and was within its discretion in awarding fees and costs to Wife.

Accordingly, the Amended Order of the family court is

AFFIRMED AS MODIFIED.

THOMAS, J. and CURETON, A.J., concur.