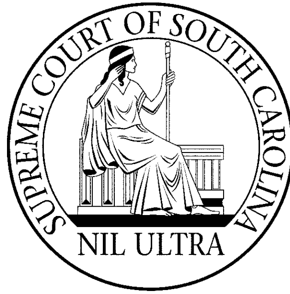

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 46
December 28, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jerry Buck Inman, Appellant.

Appeal From Pickens County
Edward W. Miller, Circuit Court Judge

Opinion No. 27081
Heard September 21, 2011 – Filed December 28, 2011

AFFIRMED

Chief Appellate Defender Robert M. Dudek, and Senior Appellate Defender Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

JUSTICE BEATTY: In this capital case, Jerry Buck Inman pleaded guilty to the murder, first-degree burglary, first-degree criminal sexual conduct, and kidnapping of a Clemson University student. The judge

sentenced Inman to death for murder and two consecutive thirty-year sentences for first-degree burglary and first-degree criminal sexual conduct.[1]

On appeal, Inman challenges the judge's acceptance of his guilty plea as he contends it was conditional in that defense counsel maintained Inman was entitled to be sentenced by a jury despite his plea of guilty.[2] Additionally, Inman asserts the judge erred in addressing his allegations of prosecutorial misconduct arising out of the Solicitor's treatment of the defense's expert witness during the sentencing proceedings. Specifically, Inman claims the judge erred in the following respects: (1) refusing to recuse the Solicitor's Office from any further involvement in the case; (2) declining defense counsel's request to question the Solicitor on the issue of prosecutorial misconduct; and (3) declining to grant a mistrial despite a finding of prosecutorial misconduct. We affirm Inman's guilty plea and sentences.

I. Factual/Procedural Background

A.

On the evening of May 25, 2006, Tiffany Marie Souers (the Victim), a rising junior at Clemson University, was alone in her off-campus apartment as her roommates were gone for the day. When one of her roommates returned to the apartment during the afternoon of May 26, 2006, she discovered the Victim's partially-clad body on the bedroom floor. An autopsy revealed the Victim had been sexually assaulted and died as the result of asphyxia due to ligature strangulation with a bathing suit top.

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[1] The judge did not impose a sentence for the kidnapping charge as Inman had been sentenced for the related murder. S.C. Code Ann. § 16-3-910 (2003).

[2] See S.C. Code Ann. § 16-3-20(B) (2003) (outlining bifurcated death penalty proceedings and stating "[i]f trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge").

Surveillance photographs taken during the early morning hours of May 26, 2006 captured a male, whose face was covered by a bandana, attempting to use the Victim's ATM card at two different bank machines in Clemson.

On June 5, 2006, law enforcement was able to identify Inman as the Victim's perpetrator based on DNA evidence obtained from the crime scene and processed through the National DNA Database, which had Inman's DNA evidence on file due to his prior out-of-state convictions for sexual offenses in 1987 and 1988. Using this information, law enforcement conducted a well-publicized nationwide search for Inman. On June 6, 2006 at approximately 11:45 p.m., law enforcement apprehended Inman in Dandridge, Tennessee.

Shortly after his arrest, Inman orally confessed to the crimes involving the Victim. Within the course of the next three hours, Inman gave separate written statements to an agent with the Tennessee Bureau of Investigation and to agents with the South Carolina Law Enforcement Division (SLED). In these two statements, Inman again confessed to the charged crimes and recounted in detail the events underlying these crimes. When asked to sign these statements, Inman declined and stated "we still have to go to court."

Ultimately, Inman was extradited to South Carolina and detained in the Pickens County Detention Center where a DNA sample was taken from him and again conclusively matched to the DNA evidence recovered from the Victim and her apartment. Subsequently, a Pickens County grand jury indicted Inman for murder, kidnapping, first-degree criminal sexual conduct, and first-degree burglary. The Thirteenth Circuit Solicitor's Office timely served Inman with its intent to seek the death penalty.[3]

After a circuit court judge determined that Inman was competent to stand trial,[4] defense counsel filed a motion to determine the mode of trial. In the motion, counsel informed the judge of Inman's intent to enter a guilty plea to the crimes and demand a jury trial for sentencing. After a hearing, the

[3] S.C. Code Ann. § 16-3-26(A) (2003).

[4] S.C. Code Ann. § 44-23-410 (Supp. 2010).

judge summarily denied the motion on the ground he was "constrained by the existing case law in South Carolina and the statutes."

B.

On August 19, 2008, Inman pleaded guilty to murder, first-degree criminal sexual conduct, first-degree burglary, and kidnapping. During the plea colloquy, the judge informed Inman of the charges, the maximum possible sentences, and the constitutional rights that he was waiving by pleading guilty, including the right to a jury trial. Although Inman indicated he understood these rights, defense counsel interjected that Inman should be entitled to enter a guilty plea and then proceed to a jury trial for sentencing. In response, the judge informed Inman that he could not enter a plea "conditioned" on the preservation of the jury trial issue. Inman stated that he understood and still wished to plead guilty. Inman then admitted his guilt and expressed satisfaction with his defense counsel. Subsequently, Solicitor Robert M. Ariail (the Solicitor) presented a factual basis for the charged offenses that consisted of a stipulated summary of the facts.

When the judge resumed questioning Inman, he again inquired whether Inman understood that by pleading guilty he was waiving his right to have a jury sentence him for the murder conviction. Inman responded in the affirmative. Defense counsel, however, reiterated that Inman should not have to waive the right to have a jury determine his sentence. He emphasized that he "just want[ed] to make sure [the issue] is preserved."

In response, the judge again explained to Inman that he could not accept a "conditional guilty plea." The judge also instructed that he could not determine whether the jury sentencing issue was preserved for appellate review as it was a decision for the South Carolina Supreme Court. Inman indicated that he understood the judge's explanation and expressed his desire to continue the plea proceeding. The judge accepted Inman's plea and instructed that the sentencing proceeding would be held on September 8, 2008.

The Solicitor then expressed his concern that defense counsel's statements about the preservation of an appellate issue effectively made the

plea conditional. Defense counsel disputed the conditional nature of the plea, but assured Inman that the "issue is preserved and will survive the guilty plea."

Based on this exchange, the judge debated whether to accept Inman's plea, but ultimately asked Inman whether his plea was "dependent" on the jury sentencing issue. After conferring with defense counsel, Inman acknowledged that his plea was not based on whether he would succeed on an issue raised on appeal. Inman stated, "I just want to enter the plea and get it over with, just go on from here with the sentencing phase."

At the conclusion of the plea colloquy, the judge accepted Inman's plea and found that it was freely, knowingly, voluntarily, and intelligently made.

C.

On September 8, 2008, the judge commenced the non-jury sentencing proceeding. In presenting its case for statutory aggravating circumstances, the State called two of the law enforcement officers to whom Inman confessed to the charged crimes. Additionally, Dr. Eric Dean Christensen, the forensic pathologist who conducted the Victim's autopsy, certified the Victim's death was caused by "asphyxia due to ligature strangulation." He further testified that there was "extensive bruising" on the Victim's body, which he believed was consistent with a physical struggle and the Victim being restrained. He also found physical evidence that suggested "traumatic sexual relations."

In terms of Inman's criminal history, the State offered extensive evidence of Inman's prior convictions in Florida and North Carolina as well as evidence of two unadjudicated incidents that occurred after Inman was released from the Florida Department of Corrections on September 1, 2005.

Subsequently, defense counsel initiated the case for mitigation. As the defense's first expert witness, counsel called Dr. David Richard Price, a forensic psychologist/neuropsychologist and clinical psychologist, who interviewed Inman and reviewed records regarding Inman's family, his prior crimes, his terms of incarceration, and his mental health records.

Based on these records, Dr. Price concluded that Inman suffered from the following: major depressive disorder, recurrent type; major depressive disorder with psychotic features; bipolar disorder; psychorhythmic disorder; schizoid personality disorder; dissociative identity disorder; and sexual paraphilia. In making these diagnoses, Dr. Price took into account Inman's extensive psychiatric history and his childhood, which included "pretty significant" records indicating that Inman had been sexually abused, physically abused, grew up in a "very unstable environment," suffered with a mother who was schizophrenic and an alcoholic father, began using drugs at an early age, and was incarcerated at age seventeen. Dr. Price also testified that Inman had attempted suicide on seven occasions, six of which occurred while he was incarcerated. He further stated that Inman believed the death penalty was the appropriate punishment for the murder of the Victim. Ultimately, Dr. Price opined that Inman committed the crimes against the Victim while he was under the influence of a mental and emotional disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired.

Defense counsel next called Dr. Marti Loring, a Georgia-licensed clinical social worker and board certified expert in traumatic stress who was employed at the Center for Mental Health and Human Development in Atlanta, Georgia. The defense offered Dr. Loring "as an expert in the field of trauma, abuse, forensic and therapeutic interviewing, and as a social historian in capital sentencing cases."

During *voir dire*, the Solicitor inquired whether Dr. Loring had "performed services under [her] licensed clinical social worker status" and whether she was licensed in South Carolina. Upon receiving Dr. Loring's response that she was not licensed in South Carolina, the Solicitor directed the judge's attention to section 40-63-200 of the South Carolina Code,[5] which deals with the unauthorized practice of social work within the State of South

[5] S.C. Code Ann. § 40-63-200(A) (2011) ("A person who practices or offers to practice as a social worker in this State in violation of this chapter or a regulation promulgated under this chapter . . . is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than one year, or both.").

Carolina. The Solicitor also pointed out that the statute "carries both civil and criminal penalties for violation." Based on this statute, the Solicitor argued that Dr. Loring was "not qualified as an expert in this state to testify or to render those services until she gets licensed."

In response, defense counsel argued that Dr. Loring's Georgia license was sufficient to qualify her as an expert witness in Inman's case. Counsel objected to the Solicitor's questioning and characterized it as "an inappropriate attempt to intimidate the witness with the authority that this Solicitor has in this state to indict." Counsel added that the Solicitor had put Dr. Loring "in a position where she may need to assert her Fifth Amendment privilege not to incriminate herself by answering the questions that I would otherwise have propounded to her."

The judge overruled the Solicitor's objection as he believed the intent of the statute was "to prevent persons from opening offices to conduct treatment in this state," which was distinguishable from Dr. Loring being retained as an expert for the defense.

After the judge determined that Dr. Loring was qualified to testify, defense counsel argued that the Solicitor's attempt to intimidate Dr. Loring constituted a violation of Inman's due process rights to present his defense. The Solicitor disputed this allegation and stated he could grant Dr. Loring immunity from prosecution in Inman's case. However, he clarified that he was not authorized to grant immunity for the other South Carolina cases in which she had testified.

Dr. Loring then expressed her concern about testifying and was granted an opportunity to consult with Bill Godfrey, an attorney who was present in the courtroom. When court reconvened, Dr. Loring stated she felt "threatened as a witness" and, as a result, invoked her Fifth Amendment right against self-incrimination upon the advice of counsel. Despite assurances by the judge that she would be granted immunity in Inman's case and prior cases, Dr. Loring maintained that she would not testify as she believed she would be "in violation of a criminal statute [that] would affect [her] professional reputation in other cases and in other jurisdictions."

The judge then held in abeyance any motions regarding Dr. Loring's testimony and permitted defense counsel to call its remaining four witnesses in mitigation.

The next day, defense counsel moved for a mistrial based on the Solicitor's *voir dire* of Dr. Loring. Specifically, counsel characterized the Solicitor's actions as prosecutorial misconduct. As additional support for this motion, defense counsel referenced an earlier capital case where the Solicitor had confronted another defense witness with a potential violation of section 40-63-200 of the South Carolina Code. Counsel claimed that in both of these instances the Solicitor had violated the South Carolina Rules of Professional Conduct[6] and section 16-9-340[7], which makes it a crime to intimidate a witness "by threat or force" or to "attempt to obstruct or impede the administration of justice in any court." Because counsel did not believe the actions of the Solicitor could be rectified, defense counsel moved for a mistrial as well as the recusal of the Solicitor's office in the case. In addition, defense counsel requested that the judge implement a sentence of life without parole as he claimed the Solicitor's conduct was "intentional."

In response, the Solicitor contended that he had neither threatened Dr. Loring nor moved to indict her "even though, theoretically, she would have violated the statute from a prior case."

At the conclusion of these arguments, counsel for Dr. Loring informed the court that Dr. Loring would not testify and intended to invoke her Fifth Amendment privilege against self-incrimination.

The judge did not rule on the mistrial motion, but instead granted a continuance in order for defense counsel to retain another social historian. The judge, however, added that he "wouldn't rule that Dr. Loring [was] completely out of the case."

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[6] South Carolina Rules of Professional Conduct, Rule 407, SCACR.

[7] S.C. Code Ann. § 16-9-340 (2003).

Seven months later, the judge held a hearing on April 14, 2009 to consider whether Dr. Loring should be released as a witness given the defense did not intend to call her and had retained another social historian. In his motion, counsel for Dr. Loring objected to the State's out-of-state witness subpoena of Dr. Loring as a necessary and material witness. At the conclusion of the hearing, the judge declined to withdraw his certification of the subpoena[8] and stated that the case would proceed the following week.

On April 15, 2009, a Superior Court in Atlanta, Georgia signed an order directing Dr. Loring to attend a hearing the next day at 3:00 p.m. to determine her material witness status in South Carolina. Because Dr. Loring was at work when the order was left at her residence on the morning of April 16, 2009, she did not appear at the hearing. Later that night, officers attempted to serve a warrant for her arrest. After Dr. Loring's counsel contacted the South Carolina plea judge regarding the Georgia matter, the judge intervened and persuaded the District Attorney's Office in Atlanta to "table" the warrant based on the assurance that Dr. Loring would appear at the Pickens County Courthouse on April 20, 2009.

On April 20-22, 2009, the judge reconvened the sentencing proceedings. At the beginning of the hearing, Dr. Loring's counsel recounted the events in Georgia and argued that this constituted additional evidence of the Solicitor's attempt to intimidate Dr. Loring. As a result, he moved to have Dr. Loring immediately released as a witness in Inman's case.

Defense counsel concurred in these arguments and stated that the "sequence of events in Georgia would go directly to the motion for prosecutorial misconduct and the mistrial that we requested orally on September 11, 2008."

In response, the Solicitor denied any involvement in the Georgia events and claimed it was "every bit the fault of Dr. Loring, under the Georgia system." To counter this statement, defense counsel called Dr. Loring as a witness to testify for the limited purpose of documenting what transpired in

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[8] On April 1, 2009, the judge granted the Solicitor's petition to subpoena Dr. Loring as a material witness.

Georgia. Although Dr. Loring came prepared to testify as a mitigation expert, she could not "assure [the court] a hundred percent that going through all this would not have an impact on [her]."

Following Dr. Loring's testimony, defense counsel renewed its motion for the "recusal of the Thirteenth Circuit Solicitor's Office." Counsel contended the Solicitor's actions were intentional in that he knew the elimination of Dr. Loring's testimony would significantly impact Inman's case. In support of this contention, defense counsel offered testimonial and documentary evidence that the Solicitor's office had been involved in a similar incident wherein the Solicitor questioned a defense expert, during the sentencing portion of a capital case, regarding a potential violation of the South Carolina psychologist licensing statutes. In that case, however, the defense withdrew the motion apparently in exchange for the State withdrawing its notice to seek the death penalty.[9]

Additionally, defense counsel offered evidence of two other capital cases, one in 2006[10] and another in 2007[11], where Dr. Loring testified as an

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[9] Because the defense withdrew its motion, prosecutorial misconduct based on witness intimidation was not an issue on appeal. State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006). However, the pertinent portions of the Laney trial transcript and defense motions reveal the Solicitor employed an identical tactic to that used against Dr. Loring in questioning defense counsel's expert witness, Dr. Everington, with respect to the lack of a South Carolina psychologist license.

[10] In State v. David Edens and Jennifer Holloway, a 2006 capital trial, Dr. Loring testified as a social historian without any objection from the Solicitor as to her qualifications or lack of a South Carolina license to practice social work. During the jury deliberations, the jurors requested to listen to Dr. Loring's trial testimony. Because the jury could not reach a unanimous verdict as to the death penalty, the defendants were sentenced to life without the possibility of parole. Weeks after the verdict, the Solicitor requested to meet with the jurors over dinner to discuss the verdict. One juror, who attended the dinner, testified the Solicitor appeared upset with the LWOP

expert witness in the defense's case for mitigation. The Solicitor did not challenge Dr. Loring's qualifications in either of these cases.

Defense counsel then sought to recuse the Solicitor's office as advocates and call certain members as witnesses in order to establish the defense's claim of intentional prosecutorial misconduct.

After the judge denied this motion, defense counsel called attorney Desa Ballard as an expert in the field of legal ethics and professional responsibility in South Carolina. Based on her assessment of the Solicitor's conduct, Ballard opined that the Solicitor had violated "a number of rules of professional responsibility in connection with his examination of Dr. Loring, which occurred in September of 2008." In view of the prior allegation of prosecutorial misconduct, Ballard believed the Solicitor was clearly aware that questioning Dr. Loring regarding the potential licensing violation was "improper" and constituted intimidation of a witness.

Defense counsel then declined to call Dr. Loring as witness. Instead, counsel renewed its motion for a mistrial based on prosecutorial misconduct. Counsel reiterated that he wished to call the Solicitor and members of his office as witnesses because he believed the testimony was relevant to the motion. In terms of relief, counsel sought a mistrial and, in turn, the imposition of a life without parole sentence as the Solicitor's deliberate misconduct precipitated the mistrial motion and, thus, implicated double jeopardy.

The judge denied each of defense counsel's motions. In so ruling, the judge initially rejected counsel's argument regarding double jeopardy as the judge found the Solicitor had not "deliberately goaded" the defense into requesting a mistrial. As to the merits of the mistrial motion, the judge concluded the Solicitor's questioning of Dr. Loring was inappropriate and constituted prosecutorial misconduct. However, the judge declined to grant a

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verdict and wanted an explanation as to why the jurors had not voted for a death sentence.

[11] State v. Motts, 391 S.C. 635, 707 S.E.2d 804 (2011).

mistrial as he found the evidence did not support a finding of "deliberate" prosecutorial misconduct. Additionally, the judge concluded that Inman had not been prejudiced as the misconduct occurred during a bench trial as opposed to a jury trial and Dr. Loring had voluntarily appeared at the hearing and was willing to testify.

Immediately thereafter, defense counsel moved for a continuance in order to prepare the mitigation evidence as he had not been in contact with Dr. Loring since the September 2008 hearing and his recently-retained social historian had not completed her research and was not prepared to testify. The judge implicitly denied this motion.

Over defense counsel's objections, the judge called and questioned Dr. Loring as a "court witness." Dr. Loring testified she compiled a social history about the life and family of Inman by interviewing Inman and members of his family as well as reviewing Inman's medical history, school records, and prison records. Relying on these records and interviews, Dr. Loring chronicled in detail the physical and sexual abuse that Inman endured during his childhood. She further testified as to Inman's use of drugs at an early age, his diagnosed mental illness, his suicide attempts, and his criminal history.

Throughout the questioning, defense counsel repeatedly sought to limit the testimony of Dr. Loring as counsel believed her opinions implicated attorney-work product as they had been previously discussed amongst the defense team.

After hearing closing arguments and Inman's personal statement, the judge sentenced Inman to death for murder and imposed two consecutive thirty-year sentences for first-degree burglary and first-degree criminal sexual conduct. In reaching this decision, the judge explained in both his oral and written order that the State had proven beyond a reasonable doubt three statutory aggravating circumstances to warrant the death penalty.[12] Specifically, the judge found that Inman murdered the Victim while in the

[12] S.C. Code Ann. § 16-3-20(C)(a)(1)(a), (b), (d) (2003 & Supp. 2010) (listing statutory aggravating circumstances that warrant a sentence of death).

commission of kidnapping, first-degree burglary, and first-degree criminal sexual conduct.

In terms of mitigating factors, the judge found Inman committed the murder while under the influence of mental or emotional disturbances[13] as there was evidence that Inman suffered from long-term mental health disorders. Despite these mental health disorders, the judge emphasized that these disorders did not excuse Inman from criminal responsibility for his actions involving the Victim.

Following the denial of his motion to reconsider and for a new trial, Inman appealed his plea of guilty and his sentence of death.

II. Discussion

A. Validity of Guilty Plea

Inman asserts his guilty plea to murder should be vacated on the ground it constituted an invalid conditional guilty plea. In support of this assertion, Inman directs this Court's attention to the portion of the plea colloquy where the judge expressed his opinion that the preservation of the jury sentencing issue was a decision for the Supreme Court. Inman characterizes the judge's statements as erroneous "speculations about appealability." Based on these statements and defense counsel's insistence that the issue was preserved for appeal, Inman claims the judge had a duty to reject the plea as it was conditional.

"In South Carolina, guilty pleas must be unconditional." State v. Downs, 361 S.C. 141, 145, 604 S.E.2d 377, 379 (2004). "[I]f an accused attempts to attach any condition or qualification thereto, the trial court should direct a plea of not guilty." State v. Truesdale, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982). "If the trial court accepts a conditional guilty plea, then the plea will be vacated on appeal." Downs, 361 S.C. at 145, 604 S.E.2d at 379. "The basis for this rule is, of course, the settled doctrine that a guilty plea

[13] Id. § 16-3-20(C)(b)(2), (6) (listing mitigating circumstances to be considered in capital sentencing proceedings).

constitutes *waiver* of all prior claims of constitutional rights or deprivations thereof." Truesdale, 278 S.C. at 370, 296 S.E.2d at 529.

Turning to the facts of the instant case, we find that Inman's guilty plea was unconditional. Significantly, Inman never attempted to reserve the right to challenge or deny the merits of his guilt. Any condition that he sought to attach to the plea involved an appellate challenge to section 16-3-20(B), which mandates that a judge rather than a jury determine sentencing in a capital case if the defendant enters a guilty plea. Under the mandatory appeal procedures in capital cases,[14] Inman was permitted to appeal this secondary sentencing issue; however, any decision as to this issue did not affect the entry or validity of his plea. Cf. Downs, 361 S.C. at 145-46, 604 S.E.2d at 379-80 (concluding appellant's capital guilty plea was unconditional where he never attempted to reserve the right to later deny his guilt, but instead sought to reserve the right to present evidence that he committed the crime while mentally ill, an issue that involved post-sentencing treatment).

Furthermore, even if Inman preserved his challenge to section 16-3-20(B), he specifically abandoned this issue on appeal as he correctly recognizes that this issue has been decided against his position. See State v. Allen, 386 S.C. 93, 687 S.E.2d 21 (2009), cert. denied, 130 S. Ct. 3329 (2010) (noting, in appeal of guilty plea and capital sentence, South Carolina precedent finding that section 16-3-20 does not violate the Sixth Amendment to the United States Constitution and concluding that it also did not violate the Eighth and Fourteenth Amendments; noting that the statute requires the sentencing judge to consider any mitigating circumstances allowed by law and that a defendant is not precluded from offering evidence of his remorse and acceptance of responsibility); State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005) (adhering to Downs and rejecting claims that section 16-3-20(B) was unconstitutional); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004) (citing Downs and concluding section 16-3-20(B) was constitutional); Downs, 361 S.C. at 146, 604 S.E.2d at 380 (discussing constitutionality of

[14] See S.C. Code Ann. § 16-3-25(A) (2003) ("Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina.").

section 16-3-20(B) and finding capital defendant who pleaded guilty waived his right to jury trial on both guilt and sentencing).

Finally, a review of the plea colloquy reveals Inman entered his plea knowingly and voluntarily as he repeatedly acknowledged that he understood the charges against him, the consequences of his plea, and the rights he was waiving by pleading guilty, including the right to have a jury determine his guilt and sentence. Accordingly, we conclude Inman's plea was valid. See Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)); Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000) ("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.").

B. Sentencing Proceedings

Having found that Inman's guilty plea was valid, we must next assess Inman's issues arising out of the sentencing proceedings.

1. Recusal of Solicitor's Office/Questioning Solicitor as a Defense Witness

Inman claims the judge abused his discretion by declining to recuse the Solicitor's office as advocates[15] and refusing to allow defense counsel to question the Solicitor and members of his staff on the claim of intentional prosecutorial misconduct.

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[15] As we interpret Inman's trial and appellate arguments, we believe Inman is challenging the judge's failure to recuse the Solicitor's office in two contexts: (1) as advocates so that defense counsel could question the Solicitor and members of his staff regarding the claim of prosecutorial misconduct, and (2) as to the entire case due to the finding of prosecutorial misconduct. Accordingly, in the interest of logical progression, we have addressed these two claims separately.

"[A] criminal defendant has a right to call the prosecuting attorney as a witness, subject to the trial court's usual discretion to exclude witnesses or evidence." State v. Quattlebaum, 338 S.C. 441, 453, 527 S.E.2d 105, 111 (2000) (citing State v. Lee, 203 S.C. 536, 28 S.E.2d 402 (1943)). In Quattlebaum, this Court emphasized that "litigants, and especially defendants in criminal cases, should not be hampered in their choice of those by whom they choose to prove their cases." Id. However, a defendant's right to call a prosecuting attorney as a witness is not without limitation as this Court has stated:

> Although a prosecuting attorney is competent to testify, his testifying is not approved by the Courts except where it is made necessary by the circumstances of the case, and, if he knows before the trial that he will be a necessary witness, he should withdraw and have other counsel prosecute the case. The propriety of allowing the prosecutor to testify is a matter largely within the trial Court's discretion.

Lee, 203 S.C. at 540, 28 S.E.2d at 403 (emphasis added). Other jurisdictions have agreed with this Court's limitation on a prosecutor as a defense witness and have further clarified that the testimony "must be relevant and material to the theory of the defense . . . [and] it must not be privileged, repetitious, or cumulative." Johnson v. State, 326 A.2d 38, 45 (Md. Ct. Spec. App. 1974) (citing State v. Lee, 203 S.C. 536, 28 S.E.2d 402 (1943)), aff'd, 339 A.2d 289 (Md. 1975).

It is evident that this Court and courts from other jurisdictions disfavor defense counsel calling a prosecuting attorney to testify in a case in which he is participating as an advocate. See Bennett v. Commonwealth, 374 S.E.2d 303, 313 (Va. 1988) ("[I]t is not desirable for the Commonwealth's Attorney to testify as a witness on a material point in a case. The circumstances are rare indeed where any lawyer may properly testify in a case in which he is participating as an advocate."); see also Erwin S. Barbre, Annotation, Prosecuting Attorney as A Witness in Criminal Case, 54 A.L.R.3d 100 (1973 & Supp. 2011) (analyzing cases where the propriety of a prosecuting attorney's testifying in a criminal case on behalf of the prosecution or on behalf of the defendant was at issue; recognizing that such a decision is

dependent upon the facts of the case, is discretionary, and generally does not require the prosecutor to withdraw or be recused from the case when called on behalf of the defendant).

However, even if a prosecutor is called as a witness by the defense, it is not always necessary for a trial judge to recuse the prosecutor or the prosecuting office in its entirety. In fact, "[t]here is no inherent right to disqualification when a member of the state attorney's office is called as a witness in a case prosecuted by a state attorney in the same office, unless actual prejudice can be shown." 81 Am. Jur. 2d Witnesses § 229 (2004 & Supp. 2011); People v. Superior Court of San Luis Obispo, 148 Cal. Rptr. 704, 710 (Cal. Ct. App. 5th Dist. 1978) ("The general rule is that a district attorney's office should not be recused from a case merely because one or more of its attorneys will be called as witnesses for the defense.").

Applying the foregoing to the facts of the instant case, we find the judge did not abuse his discretion in refusing to recuse the Solicitor's office as advocates and declining defense counsel's request to question the Solicitor.

Initially, we note that the judge's determination of prosecutorial misconduct did not necessitate the recusal of the entire Solicitor's office as this allegation primarily involved the Solicitor. See State v. Doran, 731 P.2d 1344 (N.M. Ct. App. 1986) (finding no merit to defendant's contention that entire staff of district attorney's office should have been disqualified where prosecutor testified at pretrial suppression hearing that was conducted by another assistant district attorney).

Furthermore, defense counsel's primary reason for calling the Solicitor as a witness was to establish that he intentionally committed misconduct. Because a determination of prosecutorial misconduct is not necessarily dependent upon the intent of the prosecutor, such testimony was neither relevant nor material to the defense's claim. See People v. Hill, 952 P.2d 673, 683-84 (Cal. 1998) (discussing concept of prosecutorial misconduct and stating "injury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally"; recognizing that the term "prosecutorial misconduct" is a misnomer to the extent it "suggests a prosecutor must act with a culpable state of mind"); Diggs v. State, 531

N.E.2d 461, 464 (Ind. 1988) ("A prosecutor's warning of criminal charges during a personal interview with a witness improperly denies the defendant the use of that witness's testimony regardless of the prosecutor's good intentions."). We emphasize that a determination of a prosecutor's intent is applicable where the prosecutor intentionally goads the defense into moving for a mistrial[16] or the prosecutor's actions implicate the attorney-client relationship.[17] Neither of these situations is present in the instant case.

Finally, any testimony from the Solicitor or members of his staff would have been cumulative as defense counsel submitted significant testimonial and documentary evidence regarding the Solicitor's use of this tactic in prior capital cases. Specifically, defense counsel cited the Laney case and offered evidence in the form of a trial transcript and testimony from the Public

[16] See State v. Parker, 391 S.C. 606, 612, 707 S.E.2d 799, 802 (2011) (stating that "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion" (quoting Oregon v. Kennedy, 456 U.S. 667, 676 (1982))).

[17] Citing Quattlebaum, Inman claims that "deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice" and, thus, the determination of "intent" is necessary to establish prosecutorial misconduct. Quattlebaum, 338 S.C. at 448, 527 S.E.2d at 109. We clarify that this statement in Quattlebaum is limited to a situation where the prosecutorial misconduct implicates a criminal defendant's attorney-client relationship and does not apply to all cases of prosecutorial misconduct as we held in Williams that prosecutorial misconduct involving witness intimidation required a defendant to demonstrate "both substantial interference and prejudice." State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1999). Recently, we implicitly recognized the limited nature of our holding in Quattlebaum. See State v. Morris, 376 S.C. 189, 200, 656 S.E.2d 359, 365 (2008) (finding the "irrebuttable presumption of prejudice" found in Quattlebaum was inapplicable where Appellant had not shown prosecutorial misconduct and had not demonstrated his prosecution was unconstitutional, improper, or that the government pursued a civil action or investigation solely to obtain evidence for a criminal prosecution).

Defender that established the Solicitor employed a line of questioning as used against Dr. Loring to a defense expert regarding a potential violation of the South Carolina psychologist licensing statutes. Defense counsel also offered evidence that the Solicitor, in two capital trials that preceded Inman's case, did not challenge Dr. Loring's lack of a South Carolina license to practice social work. Based on this evidence, defense counsel was able to support its theory that the Solicitor knew the line of questioning was objectionable and only employed it in Inman's case after he realized that jurors in the Edens/Holloway case relied heavily on Dr. Loring's testimony in sentencing the defendants to LWOP rather than death.

In view of the foregoing, we find the judge did not abuse his discretion in declining to recuse the Solicitor's office and refusing to permit defense counsel to call the Solicitor and members of his staff as witnesses. See Lee, 203 S.C. at 542, 28 S.E.2d at 404 (concluding trial judge did not err in refusing to allow defense counsel to call solicitor as witness where testimony would have been merely cumulative); see also Cooper v. State, 847 S.W.2d 521 (Tenn. Crim. App. 1992) (holding trial court did not err in refusing to allow defendant to call district attorney general and assistant attorney general as witnesses on issue of State's abuse of discretion in pursuing death penalty where defendant did not allege facts to show how his constitutional rights were violated); Bennett v. Commonwealth, 374 S.E.2d 303 (Va. 1988) (concluding trial court did not abuse its discretion in denying defendant's request to question Commonwealth's attorney on witness stand concerning reasons for which continuance had been granted and concerning possible violations of court order).

2. Witness Intimidation

Having found the judge did not abuse his discretion in refusing to recuse the Solicitor's office as advocates and declining to permit defense counsel to question the Solicitor and members of his staff, we must determine whether the Solicitor's *voir dire* of Dr. Loring constituted witness intimidation and, in turn, prosecutorial misconduct.

Inman asserts the judge erred in refusing to grant a mistrial and recuse the Solicitor's office from any further involvement in the case despite a

finding of prosecutorial misconduct arising out of the Solicitor's intimidation of Dr. Loring using "baseless criminal prosecution" and the subpoena of Dr. Loring as a State's witness.

In contrast, the State claims the judge properly denied the motion for a mistrial and recusal of the Solicitor's office. In support of this claim, the State argues that there was no misconduct as the *voir dire* was appropriate based on the applicable South Carolina licensing statute. However, even if the Solicitor committed misconduct, the State contends it was not prejudicial to Inman as the Solicitor granted Dr. Loring immunity from prosecution and she voluntarily testified during the sentencing hearing.

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19 (1967). "This right is a fundamental element of due process of law." Id.

As this Court has recognized, the constitutional right of a defendant to call witnesses requires that they be called without intimidation from the State. State v. Williams, 326 S.C. 130, 485 S.E.2d 99 (1997). In Williams, this Court explained:

> "Improper intimidation of a witness may violate a defendant's due process right to present his defense witnesses freely if the intimidation amounts to 'substantial government interference with a defense witness' free and unhampered choice to testify.'" . . . Where substantial interference is found, the next issue is whether the error can be deemed harmless. United States v. Saunders, supra. The rule in the Fourth Circuit appears to be that governmental intimidation can be deemed harmless error where the witness nonetheless testifies. Compare United States v. Teague, 737 F.2d 378 (4th Cir. 1984) (harmless where defendant was not denied either all or the helpful part of the witness' testimony as a result of the attempted intimidation) with United States v. MacCloskey, 682 F.2d 468 (4th Cir. 1982). Under this

> rule, the intimidation in this case could not be deemed harmless. We decline, however, to adopt such an automatic reversal rule and hold that in order to obtain relief, a defendant must demonstrate both substantial interference and prejudice.

Id. at 135, 485 S.E.2d at 102. However, even if the defendant demonstrates substantial interference and prejudice, a new trial is not always the requisite remedy. Instead, "[t]he remedy to be afforded a defendant in this situation is determined by the facts and circumstances of each case, depending on the prejudice suffered by the defendant." Id. at 136, 485 S.E.2d at 103.

In analyzing a claim of prosecutorial misconduct based on alleged witness intimidation, this Court has acknowledged the prosecutor's "fundamental power" to "bring charges against a person the prosecutor believes has committed a crime." State v. Needs, 333 S.C. 134, 145, 508 S.E.2d 857, 862 (1998). This power is, nevertheless, subject to "constitutional constraints." Id. For example, a prosecutor may not "lob baseless threats or charges at a potential defense witness in an effort to prevent the witness from testifying." Id. at 146, 508 S.E.2d at 863; see Lisa A. Wenger, Annotation, Admonitions Against Perjury or Threats to Prosecute Potential Defense Witness, Inducing Refusal to Testify, As Prejudicial Error, 88 A.L.R.4th 388 (1991 & Supp. 2011) (analyzing state and federal cases where prosecutor informs defense witness that that witness could face perjury charges or other prosecution if the witness testified).

We find the Solicitor's conduct toward Dr. Loring unequivocally constituted witness intimidation. Even if the Solicitor was legitimately concerned about Dr. Loring's qualifications as an expert witness, he could have filed a motion to disqualify her, which could have been addressed in a pre-trial hearing without the presence of Dr. Loring. By challenging Dr. Loring as soon as she took the stand, the Solicitor's method of questioning can only be viewed as an intimidation tactic. The Solicitor's claimed grant of immunity to Dr. Loring did not negate the atmosphere of intimidation as Dr. Loring repeatedly testified that she felt threatened.

Secondly, based on the testimonial and documentary evidence the defense presented on this issue, it is clear the Solicitor knew this line of

questioning was objectionable as it had formed the basis of a previous allegation of prosecutorial misconduct in the Laney case.

Furthermore, at the time of the September 2008 sentencing hearing, the Solicitor was on notice from this Court that an out-of-state expert witness's failure to comply with South Carolina licensing requirements did not preclude the witness from testifying. In fact, the Court had specifically held on February 25, 2008 that the lack of a South Carolina professional license was merely a factor for the judge to consider as to the witness's qualifications as an expert. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008) (discussing Baggerly and finding trial judge erred in disqualifying expert witness on the basis that witness failed to comply with South Carolina's home inspection licensing requirements, but concluding the error was harmless); see Baggerly v. CSX Transp., Inc., 370 S.C. 362, 635 S.E.2d 97 (2006) (recognizing conflict between Rule 702, SCRE's qualification for experts and a statute that defined the practice of engineering to include the offering of expert technical testimony; holding non-compliance with licensing requirements or with statutory law in specialized areas does not require trial judge to automatically refuse to qualify a witness as an expert); see also RE: Act No. 385 of 2006—relating to defining the "practice of medicine", S.C. Sup. Ct. Order dated Aug. 24, 2006 (staying the application of amendment to section 40-47-20(36) of the South Carolina Code and, in turn, permitting out-of-state physicians to offer testimony without seeking a South Carolina medical license before offering the testimony). Despite this Court's clear directive, the Solicitor combatively challenged Dr. Loring's lack of a South Carolina social worker license.

Finally, the Solicitor's decision to subpoena Dr. Loring as a witness, after the defense severed its ties with her, provides additional evidence of witness intimidation. Although the judge granted the State's petition to certify Dr. Loring as a material witness, the method of procuring her appearance at the sentencing hearing supports Inman's claim of witness intimidation. We believe it was disingenuous for the Solicitor to assert that there was no wrongdoing on the part of the State regarding the events that took place in Georgia. Based on Dr. Loring's testimony, it was clear that she was not attempting to abscond from Georgia and purposefully decline to appear at the sentencing hearing. Thus, we find the Solicitor's initiation of

the events in Georgia went beyond a necessary course of action. See Berger v. United States, 295 U.S. 78, 88 (1935) ("[A prosecutor] may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."), overruled on other grounds by Stirone v. U.S., 361 U.S. 212 (1960).

Based on the foregoing, we find there is evidence to support the judge's finding of prosecutorial misconduct as the Solicitor's actions were done for no other purpose than to intimidate Dr. Loring.[18]

3. Mistrial

Having concluded that the Solicitor's actions constituted prosecutorial misconduct, the question becomes whether a mistrial was warranted.

"The prejudicial effect of prosecutorial misconduct is determined by (1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) the curative actions taken by the court." United States v. Anwar, 428 F.3d 1102, 1112 (8th Cir. 2005) (citations omitted).

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous

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[18] We will not tolerate witness intimidation from anyone, including the Solicitor's office. Furthermore, we are deeply concerned that the Solicitor's behavior represents a pattern of misconduct that continues to undermine our state's system of justice. Specifically, this Court is concerned with the "win at all costs" attitude that appears to permeate the Solicitor's office. Because the plea judge determined that the Solicitor's conduct was not intentional, we reluctantly defer to that factual finding. However, we note that in the future such misconduct may result in disciplinary proceedings.

the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999).

As will be discussed, we find the judge correctly denied defense counsel's motion for a mistrial trial as Inman has not established prejudice sufficient to warrant such a severe remedy.

First, any assessment of prejudice to Inman must be viewed from the posture of a bench trial as opposed to a jury trial. It is well-established that it is a near insurmountable burden for a defendant to prove prejudice in the context of a bench trial as a judge is presumed to disregard prejudicial or inadmissible evidence. See Cole v. Commonwealth, 428 S.E.2d 303, 305 (Va. Ct. App. 1993) ("A judge, unlike a juror, is uniquely suited by training, experience and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both. Consequently, we presume that a trial judge disregards prejudicial or inadmissible evidence." (citations omitted)); see also People v. Jackson, 949 N.E.2d 215, 229 (Ill. App. Ct. 2011) ("In a bench trial, the danger of prejudice due to the trial judge's questions to a witness is lessened.").

Here, the judge correctly considered that Dr. Loring did not have a South Carolina social worker's license merely as a factor in her qualifications as an expert witness. Having found Dr. Loring qualified as an expert witness, the judge properly called and questioned her as a court's witness. Because Dr. Loring testified, Inman cannot claim he was prejudiced as his counsel declined the opportunity to question Dr. Loring. Williams, 326 S.C. at 135, 485 S.E.2d at 102 (recognizing that governmental intimidation of a witness can be deemed harmless error where the witness nonetheless testifies).

Furthermore, any testimony that was potentially excluded was arguably cumulative to that of Dr. Price, who testified in detail regarding Inman's childhood, his family, his mental health disorders, and his criminal history. Finally, a review of the judge's oral and written orders establishes that he thoroughly considered all mitigating evidence.

Although we find the Solicitor committed prosecutorial misconduct, we conclude Inman's sentence of death was not imposed in violation of his due process rights. See 16C C.J.S. Constitutional Law § 1644 (Supp. 2011) ("The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, and not the culpability of the prosecutor."). Accordingly, we find the judge did not abuse his discretion in declining to grant a mistrial.[19]

III. Proportionality Review

Based on our decision to affirm Inman's guilty plea and the judge's rulings regarding the sentencing proceedings, we must assess Inman's sentence of death as it is this Court's duty to conduct a proportionality review of Inman's death sentence. S.C. Code Ann. § 16-3-25(C) (2003).[20]

"The United States Constitution prohibits the imposition of the death penalty when it is either excessive or disproportionate in light of the crime and the defendant." State v. Wise, 359 S.C. 14, 28, 596 S.E.2d 475, 482 (2004). In conducting a proportionality review, we search for similar cases in which the sentence of death has been upheld. Id.; S.C. Code Ann. § 16-3-25(E) (2003) (providing that in conducting a sentence review the Supreme Court "shall include in its decision a reference to those similar cases which it took into consideration").

After reviewing the entire record, we conclude the sentence of death was not the result of passion, prejudice, or any other arbitrary factor, and the

[19] In light of our decision, we need not address Inman's related issue that the Solicitor's office should have been recused due to a finding of prosecutorial misconduct.

[20] See S.C. Code Ann. § 16-3-25(C) (2003) (providing that Supreme Court shall determine whether: (1) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; and (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant).

judge's finding of three statutory aggravating circumstances for the murder is supported by the evidence. In its case, the State presented evidence of Inman's confessions, which detailed the events of the Victim's murder, as well as testimony from the forensic pathologist that confirmed Inman committed the murder while in the commission of kidnapping, first-degree criminal sexual conduct, and first-degree burglary.

Furthermore, a review of prior cases establishes that the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. See State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008) (death sentence warranted where defendant was convicted of murder, ABWIK, criminal sexual conduct, kidnapping, and armed robbery); State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007) (death sentence warranted where defendant was convicted of murder, kidnapping, first-degree criminal sexual conduct, and grand larceny); State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (death sentence upheld where jury found aggravating circumstances of criminal sexual conduct, kidnapping, armed robbery, physical torture, and burglary); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) (death sentence upheld where defendant was convicted of murder, criminal sexual conduct, armed robbery, and grand larceny of a motor vehicle).

IV. Conclusion

In conclusion, we hold Inman entered a valid guilty plea as the entry of the plea was not conditioned on the preservation or outcome of the jury sentencing issue. Moreover, even if Inman properly preserved this issue, he has abandoned it on appeal and this Court has repeatedly rejected his argument. As to the propriety of the sentencing proceedings, we conclude the judge did not abuse his discretion in denying Inman's requests to recuse the Solicitor's office as advocates and to question members of the office. Although we find the Solicitor committed prosecutorial misconduct in his treatment of Dr. Loring, we conclude that Inman was not sufficiently prejudiced to warrant the grant of a mistrial.

AFFIRMED.

KITTREDGE, J., concurs. PLEICONES, J., concurring in a separate opinion. TOAL, C.J., and HEARN, J., concur in both opinions.

JUSTICE PLEICONES: I concur with the majority but write separately to elucidate my views of State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000), to the extent they differ from those expressed by the majority.

I agree with the majority that Quattlebaum should be limited to its facts. A one-size-fits-all solution is a poor response to prosecutorial misconduct. "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998)). As the United States Supreme Court has noted, interests beyond the supervision of prosecutorial behavior are implicated by a decision to grant a new trial. United States v. Hasting, 461 U.S. 499, 506-507 (1983). Although the duty to curb prosecutorial misconduct is compelling, other weighty concerns are also at stake, including the need to conserve judicial resources and to avoid imposing additional burdens on victims. Id. at 509. The Hasting Court rebuked the court below for failing to "consider the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past, or the practical problems of retrying these sensitive issues more than four years after the events." Id. at 507.

Even where constitutional protections are implicated, a new trial is called for only in situations where the defendant's right to a fair trial is fundamentally compromised. Id. at 509 ("[T]he Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations."). This is so because "the aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.'" Smith v. Phillips, 455 U.S. 209, 219 (1982) (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)). Likewise, I believe that we should seek to avoid a rule unduly punishing the citizens of this State for the misdeeds of solicitors. A rule that turns on whether the misconduct was intentional would have such an effect in some cases. As the Court notes parenthetically, "[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, and not the culpability of

the prosecutor" (citing 16C C.J.S. Constitutional Law § 1644 (Supp. 2011)). Thus, fairness should be the touchstone of the inquiry, and only in a limited set of exceptional circumstances should prejudice be presumed.

Direct intrusion into and eavesdropping on the defendant's confidential communications with counsel, as occurred in Quattlebaum, is the sort of violation that is likely to taint the entire trial, making it fundamentally unfair. But this is an exception, not the general rule. As the majority clarifies, Quattlebaum did not overrule prior case law that, under different facts, mandates an inquiry into whether the prosecutorial misconduct resulted in prejudice before a new trial is granted.

With regard to witness intimidation, the established rule in this State is that "in order to obtain relief, a defendant must demonstrate both substantial interference and prejudice." State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997). In the present case, there is no claim that any substantive mitigating testimony was lost. Indeed, there is no claim that any testimony was lost. The defendant's expert witness investigated appellant's social background and was able to testify to her opinions regarding it. Appellant claims only that the effectiveness of the expert's testimony on mitigating factors pertinent to sentencing was diminished by the solicitor's misconduct.

Even assuming that the effectiveness of the testimony was reduced by the solicitor's attempts to intimidate the witness, the testimony was given before a judge, not a jury. A judge is presumed to weigh evidence properly. See Ross v. Jones, 58 S.C. 1, 35 S.E. 402, 405-406 (1900). As the majority recognizes, the record shows that the sentencing judge was fully aware of the solicitor's conduct and related events surrounding the expert's testimony, even finding that it was prosecutorial misconduct. We must presume that he took them into account in considering the testimony.

The solicitor's conduct in this case was inexplicable and reprehensible. In light of the aggravated nature of the crime and the fact that the sentencing hearing took place before a judge, it is difficult to comprehend how the solicitor believed that intimidating an expert witness would be more likely to ensure a death sentence than to create a risk of reversal. See United States v. Teague, 737 F.2d 378, 382 (4th Cir. 1984) (describing prosecutors' warnings

to defense witnesses of the consequences of perjury as "dangerous and foolish . . . because they can violate a defendant's due process right to present his defense witnesses freely" and thereby risk upsetting a guilty verdict). Despite the behavior of the solicitor, I would not ascribe a uniform "attitude" to the solicitor's office. I would limit myself to the facts appearing in the record, which do not implicate the entire office. Moreover, I cannot assume without more evidence that the solicitor was responsible for the manner in which Georgia authorities handled the matter. Whatever the appropriate response to the solicitor's conduct may be, it does not include reversal.

Thus, for the reasons set forth above, I concur in the judgment of the majority.

TOAL, C.J. and HEARN, J., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jeremy Lane Edwards, Respondent,

v.

State Law Enforcement Division, Appellant.

Appeal From Florence County
Ralph King Anderson, Jr., Circuit Court Judge

Opinion No. 27082
Heard November 15, 2011 – Filed December 28, 2011

AFFIRMED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Attorney General David Spencer, and Assistant Attorney General Geoffrey K. Chambers, of Columbia, for Appellant.

Walker H. Willcox and Mark W. Buyck, both of Willcox, Buyck & Williams, of Florence, for Respondent.

CHIEF JUSTICE TOAL: State Law Enforcement Division (SLED) (Appellant), appeals the circuit court order relieving Jeremy Lane Edwards (Respondent) from the sex offender registration requirements of section 23-3-430 of the South Carolina Code. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In 1998, Respondent pled guilty to two counts of "Peeping Tom," pursuant to section 16-17-470 of the South Carolina Code.[1] Respondent served a probationary sentence including one hundred hours of community service. In 2004, Respondent received a pardon from the South Carolina Department of Probation, Parole, and Pardon Services (SCDPPPS). In 2009, Respondent filed petitions with the Horry, Greenville, and Florence County solicitors requesting that the circuit court issue an order mandating that he was no longer required to register as a sex offender. The Horry and Greenville County solicitors did not object to the petition. The Florence County solicitor could not respond to the petition, due to a conflict, and referred the case to the South Carolina Attorney General.

The Attorney General opposed the petition, and asserted that Respondent's pardon did not relieve him from the requirement that he register as a sex offender. The Attorney General argued that the amendments to section 23-3-430 were remedial and procedural in nature, and thus applied retroactively to Respondent's case. The circuit court disagreed, and ruled that the 2004 pardon relieved Respondent from the registration requirements of section 23-3-430, and that the 2005 and 2008 amendments did not apply retroactively.

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[1] Respondent claimed that while walking from a parking lot to his apartment he passed the open window of a female resident's apartment, and looked inside. A neighbor observed Respondent and reported the incident.

ISSUES

The parties raise three issues on appeal:

I. Whether the 2004 pardon relieved Respondent of the registration requirements of section 23-3-430 of the South Carolina Code.

II. Whether the amendments to section 23-3-430 clarified rather than changed the law requiring pardoned sex offenders to comply with the statute's registration requirements.

III. Whether the amendments to section 23-3-430 are procedural or remedial in nature, and therefore, apply retroactively.

STANDARD OF REVIEW

A declaratory judgment action is neither legal nor equitable, but instead its character is determined by the nature of the underlying issue. *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). The underlying issue in this case concerns interpretation of the state sex offender registration statute. Interpretation of a legislative enactment is a question of law. *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011); *Charleston Cnty. Parks and Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). In a case raising a novel question of law, this Court is free to decide the question with no particular deference to the lower court. *City of Rock Hill*, 391 S.C. at 152, 705 S.E.2d at 54.

DISCUSSION

I. Whether the 2004 pardon relieved Respondent of his registration requirements.

Respondent argues that the 2004 pardon relieved him of the requirement to register as a sex offender. We agree.

Section 24-21-940(A) of the South Carolina Code defines "pardon" as the circumstance when "an individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided." S.C. Code Ann. § 24-21-940 (2007). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Miller v. Aiken*, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005).

In *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000), this Court addressed the use of pardoned convictions as an enhancement device. In that case, SCDPPPS pardoned the defendant for ten offenses, including convictions for driving under the influence. *Id*. at 341, 531 S.E.2d at 922.

Five years after the pardon, police charged Baucom with another DUI offense, and he argued that his pardoned offenses should not be used to enhance that charge. *Id*. at 341–42, 531 S.E.2d at 922–23. The trial court disagreed and sentenced Baucom under section 56-5-2940 of the South Carolina Code, which at the time provided:

> Any conviction, entry of plea of guilty or of nolo contendere or forfeiture of bail, for the violation of any law or ordinance . . . that prohibits a person from operating a motor vehicle while under the influence of intoxicating liquor, drugs, or narcotics shall constitute a prior offense for the purpose of any prosecution for any subsequent violation hereof.

S.C. Code Ann. § 56-5-2940 (1991 & Supp. 1999).

The court of appeals affirmed the sentence, and held that the phrase "any conviction" necessarily included pardoned convictions. *Baucom*, 340 S.C. at 344, 531 S.E.2d at 924. This Court disagreed, holding that punishment is only one of the consequences absolved by a pardon under South Carolina law. *Id*. (noting that the individual is absolved of all

consequences of his crime and conviction and that all of his civil rights are restored).

In the instant case, SCDPPPS pardoned Respondent in 2004. Thus, in light of the command of section 24-21-940 of the South Carolina Code, the circuit court correctly held that the pardon relieved Respondent from all direct and collateral consequences of his pardoned crime, which would necessarily include placement on the sex offender registry and continuous compliance with its registration requirements.

II. Whether the amendments to section 23-3-430 clarified rather than changed the law requiring pardoned sex offenders to comply with the statute's registration requirements.

Appellant asserts that the General Assembly's amendments to section 23-3-430 of the South Carolina Code clarified already existing law on pardoned sex offenders rather than changing that law. We find this position without merit.

The General Assembly created the state's sex offender registry in 1994. However, at the time of its creation, the statute did not address what effect a pardon may have on a sex offender's registration requirement. In 2005, the General Assembly amended the statute to address this issue.

The newly amended statute provided:

> (F) If an offender receives a pardon for the offense for which he was required to register, the offender may not be removed from the registry except:
>
> (1) as provided by the provisions of subsection (E); or
> (2) if the pardon is based on a finding of not guilty specifically stated in the pardon.

S.C. Code § 23-3-430(F) (2007).

In 2008, the General Assembly amended paragraph F to add "the offender must *reregister* as provided by Section 23-3-460 . . . ." S.C. Code § 23-3-430(F) (Supp. 2010) (emphasis added). The statute currently provides in pertinent part, "[I]f an offender received a pardon for which he was required to register the offender must *reregister* as provided by Section 23-3-460 and may not be removed from the registry . . . ." *Id.* (emphasis added).

These amendments to section 23-3-430 occurred subsequent to the General Assembly's creation of the state's pardon statute. That statute provides, "[A]n individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided." S.C. Code Ann. § 24-21-940 (2007).

It is clear that the General Assembly's amendments to the sex offender registry statute changed rather than clarified the law. The statute was silent regarding pardons at its creation in 1994. In 2004, the General Assembly mandated, via section 24-21-940, that a pardon relieved an individual of all criminal and civil penalties accompanying her crime. In 2005 and 2008, the General Assembly ensured that the broad application of the pardon statute would not relieve sex offenders of their registration obligation.

The State relies on *Stuckey v. State Budget and Control Bd.*, 339 S.C. 397, 529 S.E.2d 706 (2000), in support of its position that the General Assembly's amendments clarify the legislature's original intent that, with only limited exceptions, even those with pardons should be required to register. In *Stuckey*, Appellant began employment as a public school teacher in August 1972 and was enrolled in the state retirement plan until she terminated her employment in June 1973. Appellant attended law school full-time from August 1973 to May 1976, and in October 1976 she began employment with the State Department of Education. In May 1995, Appellant filed a request with the South Carolina Retirement Systems (Agency) for two years retroactive educational leave pursuant to section 9-1-1140 of the South Carolina Code, which at the time provided, "[A] member who leaves

employment to attend graduate school and returns directly to employment may establish up to two years' retirement credit by paying the actuarial cost as determined by the [State Budget and Control] Board." S.C. Code Ann. § 9-1-1140 (1986).

Agency denied Appellant's request because she had not returned directly to covered employment. Agency interpreted "directly" to mean "immediately" but allowed for a grace period of ninety days in order to accommodate teachers who had an annual three month lapse in employment. *Stuckey*, 339 S.C. at 400–01, 529 S.E.2d at 707. This Court found that the General Assembly's amendment to section 9-1-1140 shed light on the legislature's intent. *Id*. at 401, 529 S.E.2d at 708. After Appellant filed her claim, the General Assembly amended the statute to provide, "[A] member who leaves covered employment to attend undergraduate or graduate school and returns to covered employment *within ninety days* after the member's last date of enrollment may establish up to two years' retirement credit by paying the actuarial costs as determined by the board." *Id*. (quoting S.C. Code Ann. § 9-1-1140 (Supp. 1997)) (emphasis added).

This Court found the subsequent statutory amendment clarified original legislative intent. *Id.* at 401, 529 S.E.2d at 708. However, the statute creating the sex offender registry did not speak to the issue of pardons, and thus, there was no language for the subsequent amendments to clarify. Thus, the facts and analysis of *Stuckey* are inapplicable to the amendments of section 23-3-430 of the South Carolina Code.

The purpose of the amendment evinces the legislature's intent to except the sex offender registry requirements from the broad relief afforded by the pardon statute, and no evidence can be shown of a previous legislative intent that would require clarification. As such, we find Appellant's position is without merit.

III. Whether the amendments to section 23-3-430 are procedural or remedial in nature.

Appellant argues that the amendments to section 23-3-430 of the South Carolina Code are procedural and remedial in nature, and thus apply retroactively to Respondent's case. It is a well-settled rule of statutory construction that absent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature. *S.C. Dept. of Revenue v. Rosemary Coin Machs., Inc.*, 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000); *Bartley v. Bartley Logging Co.*, 293 S.C. 88, 90, 359 S.E.2d 55, 56 (1987). The General Assembly did not explicitly provide that the amendments to section 23-3-430 apply retroactively. *See* S.C. Code Ann. § 23-3-430 (Supp. 2010). Therefore, the amendments may only apply to Respondent's case if this Court finds them to be remedial or procedural.

A. Remedial

A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability. *Smith v. Eagle Constr. Co.*, 282 S.C. 140, 143, 318 S.E.2d 8, 9 (1984). When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only. 82 C.J.S. Statutes § 585 (2009).

The State argues that the amendments are remedial because "the amendment enlarges the remedy provided to law enforcement to gather information about sex offenders." However, under this analysis, any law that expanded the police power could be considered retroactive because of the enlarged "remedy" given to the State in executing its responsibilities. Moreover, the amendments to section 23-3-430 of the South Carolina Code do not create a new right, but instead impose an obligation which did not exist prior to the amendments. The statute did not prevent Respondent's removal from the sex offender registry at the time of his pardon. However,

the statute's amendments, if applied retroactively, would require Respondent to remain on the sex offender registry.

The balance of authority on this subject weighs against this Court adopting the State's definition of remedial. *Hercules, Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) (holding that statutes affecting the remedy, not the right, are generally retrospective); *Kneisley v. Lattimer-Stevens Co.*, 533 N.E.2d 743, 745 (Ohio 1988) (finding a statute "substantive" instead of "remedial" where it imposed new or additional burdens, duties, obligations or liabilities as to past transaction); *Weisart v. Stewart*, 379 S.C. 300, 303 665 S.E.2d 187, 188 (Ct. App. 2009) (holding that a statute is remedial and applies retroactively when it creates new remedies for existing rights or enlarges rights of persons under disability); 82 C.J.S. Statutes § 585 (2009) (explaining that where a statute takes away or impairs vested rights acquired under existing laws, creates new obligations, imposes a new duty, or attaches a new disability, it will be construed as prospective only).

B. Procedural

The State argues that the 2008 amendment is procedural because it sets forth the circumstances in which an individual with a pardon is required to register as a sex offender. However, a "procedural" law sets out a mode of procedure for a court to follow, or "prescribes a method of enforcing rights." Black's Law Dictionary 1083 (1979). Moreover, a statute that limits a right is generally not procedural. *Merchants Mut. Ins. Co. v. S.C. Second Injury Fund*, 277 S.C. 604, 608, 291 S.E.2d 667, 669 (1982).

In *Wiesart v. Stewart*, the court of appeals addressed whether amendments to the sex offender registry statute were remedial or procedural. 379 S.C. 300, 665 S.E.2d 187 (Ct. App. 2009). In 1979, a Maryland court convicted Wiesart of indecent exposure, and in 1995 he pled guilty in Horry County to a controlled substance offense. *Id.* at 302, 665 S.E.2d at 188. Wiesart received probation, and his probation agent informed him that he would have to register as a sex offender because of his prior indecent exposure conviction. *Id.* at 302, 665 S.E.2d at 188. Prior to 1996, section

23-3-430 of the South Carolina Code required any person convicted of indecent exposure to register annually as a sex offender. *Id*. In 1996, the General Assembly amended the statute to include a person convicted of indecent exposure only "if the court makes a specific finding on the record based on the circumstances of the case the convicted person should register as a sex offender." *Id*.

Wiesart brought a declaratory judgment action asserting that he was entitled to a hearing on the issue of whether he was required to register as a sex offender. *Id*. The circuit court ruled that the statute was not retroactive. *Wiesart*, 379 S.C. at 302, 665 S.E.2d at 188. The court of appeals disagreed finding that the amendment was procedural because it set a mode of procedure for the trial court to follow. *Id*. at 303, 665 S.E.2d at 188.

In *State v. Frey*, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2005), the court of appeals reviewed a circuit court's decision to admit evidence of blood-alcohol analysis test results. *Id.* at 515, 608 S.E.2d at 877. Frey objected, arguing that the State did not present evidence that the blood sample was drawn by a qualified individual as required by the implied consent statute. *Id*. at 517–18, 608 S.E.2d at 877–88. The State countered that even if Frey's assertion was correct, suppression would not be warranted because Frey was not prejudiced by the failure to comply with the statute. *Id*. at 518, 608 S.E.2d at 878. The General Assembly revised the statute shortly after Frey's trial by adding subsection (e):

> [T]he failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence any test results, *if the trial judge or hearing officer finds* that such failure materially affected the accuracy or reliability of the tests results or the fairness of the testing procedure.

S.C. Code Ann. § 56-5-2950(e) (2006) (emphasis added).

The court of appeals noted that although the revision above became effective shortly after the trial of the case, the revision addressed procedural rather than substantive rights, and was therefore retroactive. *Frey*, 362 S.C. at 518 n.3, 608 S.E.2d at 878 n.3. The court of appeals found that the State failed to establish that Frey's blood sample was obtained in accordance with the statute. *Id.* at 519, 608 S.E.2d at 879. Thus, the court remanded the case to the circuit court for a determination of whether "such failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure." *Id.*

The amendments to section 23-3-430 do not provide a procedure for a court to follow, or prescribe a method for enforcing rights. Thus, the amendments are not procedural and cannot be applied retroactively to Respondent's case.

CONCLUSION

Respondent's 2004 pardon relieved him of all consequences of his conviction for the foregoing reasons. The General Assembly's 2005 and 2008 amendments to section 23-3-430 of the South Carolina Code cannot be applied retroactively to Respondent's case. Thus, we affirm the circuit court's order relieving Respondent of the requirement to register as a sex offender.

AFFIRMED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jane Doe, Appellant,

v.

South Carolina Department of Health and Human Services, Respondent.

Appeal from Richland County
Paige J. Gossett, Administrative Law Court Judge

Opinion No. 27083
Heard November 3, 2010 – Filed December 28, 2011

REVERSED AND REMANDED

Patricia Logan Harrison, of Columbia, and Stuart M. Andrews, Jr. and Jennifer I. Cooke, Nelson Mullins Riley & Scarborough, both of Columbia, for Appellant.

William H. Davidson, II, and Kenneth P. Woodington, Davidson & Lindemann, both of Columbia, for Respondent.

JUSTICE KITTREDGE: This appeal presents the question of whether Respondent South Carolina Department of Health and Human Services and its agent, the South Carolina Department of Disabilities and Special Needs (DDSN), "properly ceased Mental Retardation/Related Disability services to"[1] Appellant Jane Doe, a twenty-eight-year-old woman with undeniable cognitive and adaptive deficits. Based on a purported legal standard that the "onset of Mental Retardation must be before the age of eighteen (18) years according to accepted psychological doctrine[,]" the Hearing Officer concluded Doe was not mentally retarded. The Administrative Law Court (ALC) affirmed this legal determination, as well as the Hearing Officer's factual findings. Because the decision of the Hearing Officer and ALC is controlled by an error of law, we reverse and remand.

I.

BACKGROUND

A.

Medicaid is a program through which the federal government, through the Social Security Administration (SSA), provides financial assistance to states so that they may furnish medical care to needy individuals. Wilder v. Virginia Hosp. Assoc., 496 U.S. 498, 502 (1990). Participation in the program is voluntary; however, participating states must comply with requirements imposed by the Medicaid Act and related regulations. Id. To receive federal funding, a state must submit and have approved a "plan for medical assistance" that describes the nature and scope of the state's Medicaid program. Id. A state's plan must provide medical services for the "categorically needy" and, among other things, must provide services under any option to all Medicaid beneficiaries for whom they are medically

[1] Final Administrative Order, June 5, 2006.

necessary. See 42 U.S.C. § 1396a(a)(1), (a)(10)(A)(i), (a)(10)(B) (2006); Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 651 n.4 (2003).

Supplemental Security Income (SSI), which is Title XVI of the Social Security Act, provides support for those who are aged, blind, or disabled and subsist on a limited income. 20 C.F.R. § 416.1100 (2011). To receive SSI, a recipient must have a disability such that he cannot accomplish "substantial gainful activity" for profit. 20 C.F.R. § 416.905 (2011). Federal regulations provide that an individual found eligible for SSI is automatically enrolled in the Medicaid program and is entitled to the base level of benefits the state must provide to all Medicaid beneficiaries. 42 U.S.C. § 1396a(a)(10)(A)(i)(II) (2006); 42 C.F.R. § 435.909(b)(1) (2010); Pharm. Research, 538 U.S. at 651 n.4.

Since 1981, Medicaid has provided funding for state-run home and community based services ("HCBS") through a waiver program. For Medicaid-eligible individuals whose medical needs require an institutional level of care, the waiver program provides Medicaid funding to States to provide those individuals HCBS in lieu of institutional care.[2] 42 U.S.C. § 1396n(c) (2006); 42 C.F.R. § 441.300 (2010); see Olmstead v. L.C., 527 U.S. 581, 601 (1999). The waiver program permits an eligible recipient who is mentally retarded to receive Medicaid-funded HCBS, rather than institutional care in an Intermediate Care Facility for the Mentally Retarded (ICF/MR). Once an individual is found eligible for such waiver services, a state must conduct periodic reviews to ensure the recipient still meets the waiver program eligibility requirements. 42 C.F.R. § 441.302(c)(2) (2010).

For purposes of basic Medicaid eligibility, the definition for mental retardation, in relevant part, is as follows:

> Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested *during the developmental period; i.e., the*

[2] A showing that the average annual cost of HCBS would not exceed that of institutional services is also required. 42 U.S.C. § 1396n(c)(2)(D) (2006).

evidence demonstrates or supports onset of impairment before age 22.

20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.05 (2011) (emphasis added).[3]

B.

For a state to participate in the Medicaid HCBS waiver program, it must submit a detailed application on a form provided by the federal government describing the group of individuals to whom the services will be offered. 42 C.F.R. § 441.301(b)(3)(2010). For the purpose of defining eligibility for waiver services, a state is free to impose in its waiver application eligibility criteria which are more restrictive than basic Medicaid eligibility requirements. 42 C.F.R. § 441.301(b)(6) (2010).

Based on South Carolina's waiver application, to continue to be eligible to receive HCBS waiver services, a person must meet the following criteria:

1. The person has a confirmed diagnosis of mental retardation or a related disability.

   AND

2. The person's needs are such that supervision is necessary due to at least one of the following: impaired judgment, limited capabilities, behavior problems, abusiveness, assaultiveness or because of drug effects/medical monitorship.

   AND

3. The person is in need of services directed toward a) the acquisition of the behaviors necessary to function with as much self-

[3] Although this particular part of the regulations concerns benefits under a different portion of the Social Security Act, this listing of impairments is the operative listing for Supplemental Security Income and Medicaid purposes. 20 C.F.R. § 416.905 (2011).

determination and independence as possible; or b) the prevention or deceleration of regression or loss of current optimal functional status.

Attachment 1 to Appendix D-3, South Carolina's Mental Retardation/Related Disabilities (MR/RD) Waiver Document (Effective October 1, 2004-September 30, 2009).

The second and third eligibility criteria are commonly referred to collectively as "Level of Care." These criteria describe the minimum services and functional deficits necessary to qualify for Medicaid-sponsored institutional care in an ICF/MR. South Carolina's waiver application provides that Level of Care reevaluations will take place at least every twelve months.[4] Appendix D-2, South Carolina's Mental Retardation/Related Disabilities (MR/RD) Waiver Document (Effective October 1, 2004-September 30, 2009). South Carolina's waiver application with the federal government does not include any age-of-onset requirement and reveals no intent to vary from or otherwise limit the group of individuals encompassed by the SSI definition of mental retardation. On the waiver application in effect in 2005, South Carolina checked letter "f," thereby expressing its intent to provide waiver services to the group identified as "mentally retarded persons and persons with related disabilities." In addition, where asked whether it would impose any "addition[al] targeting restrictions" on the provision of waiver services, South Carolina stated "Not applicable."

In 1990, the South Carolina General Assembly adopted a definition of mental retardation that parallels the SSI definition adopted by the federal government in 1985. See Act. No. 496, 1990 S.C. Acts 2184, 2187; 50 Fed. Reg. 35038, 35068-69 (Aug. 28, 1985). The definition, codified at South Carolina Code section 44-20-30, states that mental retardation is "significantly subaverage general intellectual functioning existing

[4] South Carolina filed a Request for a Renewal to a § 1915(c) Home and Community-Based Services Waiver (Effective January 1, 2010) and a Request for an Amendment to a § 1915(c) Home and Community-Based Waiver (Effective March 1, 2011). However, neither the renewal or amendment waiver application altered the Level of Care evaluation criteria or frequency.

concurrently with deficits in adaptive behavior and manifested during the developmental period."[5] The term "developmental period" was new to the 1990 definition, and it is upon the construction of that term that this matter largely turns.

DDSN promulgated a regulation which recites the SSI/44-20-30 definition of mental retardation (with only minor changes in phrasing) and defined the term "developmental period" as the period from conception to age twenty-two, consistent with the SSI definition.[6] 26 S.C. Code Ann. Regs. 88-210(F) (Supp. 2010). Thus the definition of mental retardation under state law—Regulation 88-210(F)—mirrors the SSI definition with respect to the age-of-onset requirement. No South Carolina regulation imposes additional diagnostic criteria for mental retardation in the context of waiver services. Nevertheless, DDSN attempted through a "Policy of Determination of Eligibility" to impose more restrictive diagnostic criteria for mental

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[5] Prior to the 1990 Act, South Carolina defined a "mentally retarded person" as "any person, other than a mentally ill person primarily in need of mental health services, whose intellectual deficit and adaptive level of behavior require for his benefit, or that of the public, special training, education, supervision, treatment, care or control in his home or community, or in a service facility or program under the control and management of the Department." S.C. Code Ann. § 44-21-30 (1976).

Subsequent to the briefing and arguments in this case, the General Assembly, in 2011 Act No. 47, changed the references to mental retardation in section 44-20-30 to "intellectual disability." Although the definition of intellectual disability is the same as it was for mental retardation, it has been moved to subsection 12 of section 44-20-30. To ensure our references are consistent with the record in this case, we will continue to use the terminology in effect at the time this case arose and was argued.

[6] Chapter 88 of the South Carolina Code of Regulations draws its statutory authority from title 44, chapter 20 of the South Carolina Code. While chapter 88 continues to list its statutory authority as article 3 of chapter 21, title 44 of the 1976 Code, that article was repealed in 1990. The relevant statutory provisions were reenacted as article 5 of chapter 20. This change was part of the same act that adopted the new definition in section 44-20-30. 1990 S.C. Acts 2184, 2200-04. Notably, while the pre-1990 definition of mental retardation applied only to the article of title 44 in which it was located, the new definition in section 44-20-30 explicitly applied to the entire chapter. Thus, the General Assembly manifested its intent that the definition in section 44-20-30 would apply to the licensing provisions interpreted in chapter 88 of the South Carolina Code of Regulations. Those regulations dictate that the developmental period extends to age twenty-two. In the more than twenty years following these changes in the law, DDSN has not altered the regulations to reflect a contrary view.

retardation for eligibility for waiver services in the form of an age-eighteen-onset requirement for mental retardation. The policy states:

> DDSN evaluates referred individuals in accordance with the *definitions of Mental Retardation outlined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders*-Fourth Edition (DSM-IV, 1994) and the *American Association on Mental Retardation* (AAMR 9th Edition, 1992).
>
> Mental Retardation refers to substantial limitations in present functioning. *Diagnosis of mental retardation based on the DSM-IV and AAMR definitions* requires the following three criteria be met:
>
> . . . .
>
> 3. *The onset of mental retardation is before age 18 years.*

South Carolina Dep't of Disabilities and Special Needs Policy for Determination of Eligibility Guidelines to Operationalize Eligibility Policy (Effective July 1, 1998) (emphasis added).[7]

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[7] In ignoring Regulation 88-210 and finding DDSN's policy guidelines properly supplied more specific criteria outside the waiver application, the dissent acknowledges the fact that DDSN's policy guidelines are not regulations promulgated by a state agency; yet the dissent finds the policy guidelines are entitled to deference in interpreting section 44-20-30. In accordance with our statutory law, we hold an agency guideline does not have the force of law, and in any event, can never trump a regulation. Our law provides that "'[r]egulation' means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. *Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law*." S.C. Code Ann. § 1-23-10(4) (2005) (emphasis added). Thus, because the age-eighteen-onset requirement found in DDSN's policy guidelines has not been formally adopted as a regulation, it does not have the force and effect of law and is entitled to no deference. Indeed, the only South Carolina law addressing the age onset requirement is Regulation 88-210.

II.

FACTUAL/PROCEDURAL HISTORY

Jane Doe was born on March 24, 1983, the product of an indisputably complicated birth. She was born at thirty weeks gestation, weighing just two pounds, three ounces. At ten months old, she was diagnosed with cerebral palsy, and her doctors diagnosed her with a seizure disorder at age eleven. As a result of her conditions, she has limited use of her left hand, difficulty with balance, and an awkward gait. Additionally, Doe presents with other physical and emotional conditions, including the nerve disorder Reflex Sympathetic Dystrophy, anxiety, depression, and anger management problems.

In 2001, Doe applied for SSI benefits from the SSA. The psychological evaluation submitted to the SSA showed her Full Scale Intelligence Quotient (IQ) to be sixty-nine, Verbal IQ to be seventy-seven, and Performance IQ to be sixty-five. Using these scores and personal observations of Doe's functional abilities, the doctor examining her concluded "[s]he has multiple physical, mental, and emotional impairments, including cerebral palsy with left spastic hemiparesis and Mild Mental Retardation." The SSA awarded Doe SSI based on a primary diagnosis of mental retardation and a secondary diagnosis of cerebral palsy. That determination has never been challenged.[8] Respondent South Carolina Department of Health and Human Services (HHS) and its agent, DDSN, sought reimbursement from the federal government for services they supplied using the diagnostic code for mental retardation.

Doe is unquestionably disabled. Looking to her IQ scores beginning at age twelve, Doe's full-scale IQ scores ranged from a low of sixty-six to a high of seventy-three.

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[8] In other litigation involving Doe, the United States Court of Appeals for the Fourth Circuit noted that Doe "has developmental disabilities including epilepsy, mild mental retardation, and cerebral palsy." Doe v. Kidd, 501 F.3d 348, 351 (4th Cir. 2007).

DDSN approved Doe's application for waiver services in March 2003, and provided her with HCBS. Because Doe's parents were unable to care for her at home, DDSN placed Doe in a Community Training Home II (CTH II) facility operated by the Newberry County Disabilities and Special Needs Board.[9]

In 2005, DDSN re-evaluated and terminated Doe's eligibility for waiver services. Doe contended her benefits should not be terminated and requested a fair hearing to review that decision pursuant to 42 U.S.C. § 1396a(a)(3) (2006) and section 126-380 of the South Carolina Code of Regulations. Relying on DDSN's definition of mental retardation in its policy guidelines that the onset of mental retardation must occur prior to age eighteen, the Hearing Officer referenced "accepted psychological doctrine" and concluded Doe was not mentally retarded.[10] Finding the absence of mental retardation (and related disability) dispositive, the Hearing Officer did not reach the issue of whether Doe met the Level of Care requirements for waiver services eligibility. The ALC affirmed the Hearing Officer. This appeal followed.

III.

STANDARD OF REVIEW

Our standard of review is governed by the Administrative Procedures Act. S.C. Code Ann. § 1-23-380(5) (Supp. 2010). The Court may affirm the agency's decision, remand the matter, or reverse or modify it

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[9] A CTH II is not an ICF/MR facility; it is classified as respite care rather than institutional care. Patients in a CTH II receive twenty-four hour supervision and some training depending on their assessed needs and care. A CTH II facility has one to two staff responsible for up to four individuals. During the pendency of this appeal, DDSN agreed to continue providing Doe HCBS benefits.

[10] The hearing officer further determined that Doe did not meet the definition of a related disability. Because we conclude the hearing officer applied the incorrect definition of mental retardation, we need not reach Doe's separate challenge to the related disability finding.

> if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority granted of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. We reverse because the decisions of the Hearing Officer and ALC are controlled by an error of law.

IV.

LAW/ANALYSIS

A.

It is Doe's position that the SSA determination of disability and receipt of basic Medicaid through SSI is binding on DDSN's determination of whether she is entitled to receive waiver services. In the alternative, Doe argues it was error to impose an age-eighteen-onset requirement in determining whether she is mentally retarded and that DDSN must use the age-twenty-two-onset definition of mental retardation.

We disagree that, in the context of waiver services, DDSN is bound by the SSA's determination that Doe is disabled, for Doe conflates her entitlement to basic Medicaid services by virtue of her SSI disability with the issue of whether she is eligible to receive HCBS through the optional Medicaid waiver program. The federal government has made it manifestly clear that states have wide discretion in designing a waiver program that is tailored to the needs of the particular state. For example, in the "Application

for a §1915(c) Home and Community-Based Services Waiver" promulgated by the Centers for Medicare & Medicaid Services, the purpose of the HCBS Waiver Program is as follows:

> The Medicaid Home and Community-Based Services (HCBS) waiver program is authorized in § 1915(c) of the Social Security Act. The program permits a State to furnish an array of home and community-based services that assist Medicaid beneficiaries to live in the community and avoid institutionalization. The State has broad discretion to design its waiver program to address the needs of the waiver's target population. Waiver services complement and/or supplement the services that are available to participants through the Medicaid State plan and other federal, state and local public programs as well as the supports that families and communities provide.
>
> The Centers for Medicare & Medicaid Services (CMS) recognize[] that the design and operational features of a waiver program will vary depending on the specific needs of the target population, the resources available to the State, service delivery system structure, State goals and objectives, and other factors. A State has the latitude to design a waiver program that is cost-effective and employs a variety of service delivery approaches, including participant direction of services.

Therefore, it is clear that states may impose additional criteria to the SSI definition of mental retardation for the purposes of waiver services eligibility, and the SSI's prior determination of Doe as mentally retarded is not binding on the state's waiver services eligibility determination of whether Doe is mentally retarded.

B.

Although we reject Doe's initial argument, we do agree with her contention that it was error to impose an age-eighteen-onset requirement in

determining whether she is mentally retarded. South Carolina's waiver application allows it to do one very specific thing: substitute home or community based services (HCBS) for mandatory Medicaid services with respect to a defined subset of categorically needy persons, without providing HCBS to every categorically needy person in the State. 42 C.F.R. § 440.240(b) (2010) ("The [State] plan must provide that the services available to any individual in the following groups are equal in amount, duration, and scope for all recipients within the group: (1) The categorically needy . . . ."); id. § 440.250(k) ("[T]he services provided under [a] waiver [of § 440.240] need not be comparable for all individuals within a group."); id. § 441.301(b)(6) (requiring a waiver request to "[b]e limited to one of the . . . target groups or any subgroup thereof" and defining the target groups as the aged, disabled, mentally retarded, developmentally disabled, and mentally ill). Thus, the scope of HCBS furnished under the waiver program and recipient eligibility criteria are defined by the waiver application. However, South Carolina's waiver application with the federal government does not include any age-of-onset requirement.

To the extent a state is permitted to issue regulations interpreting the general eligibility requirements included in its waiver application, South Carolina regulations reveal no intent to vary from the requirement that the onset of mental retardation occur prior to age twenty-two. Rather, the only regulation addressing eligibility for HCBS states that HCBS "may be provided to Medicaid eligible persons eighteen years of age or older, who have been determined by community long term care to require a skilled or intermediate level of care." 27 S.C. Code Ann. Regs. 126-304 (1976). No South Carolina regulation imposes additional diagnostic criteria for mental retardation in the context of waiver services.

Moreover, we find DDSN's policy guidelines are not entitled to any deference in this regard. The scope of DDSN's rulemaking authority is defined by the South Carolina General Assembly, and DDSN may exercise such authority only in that manner. As discussed above, in 1990, the General Assembly adopted a definition of mental retardation in line with the SSI definition adopted by the federal government in 1985. Thereafter, DDSN

promulgated regulation 88-210(F), which recites the SSI/44-20-30 definition of mental retardation and defines the term "developmental period" as the period from conception to age twenty-two, consistent with the SSI definition.[11] Thus, the informal agency policy issued by DDSN, purporting to implement an age-eighteen-onset requirement should be disregarded in determining what classes of mentally retarded South Carolinians are entitled to Medicaid waiver services because it lacks the force and effect of law and is in direct conflict with Regulation 88-210(F), which defines the developmental period as extending to age twenty-two.

V.

CONCLUSION

In sum, it is clear that South Carolina *could have* listed additional criteria in the waiver application for the purpose of defining the population to whom it would provide waiver services. Likewise, DDSN *could have* promulgated regulations incorporating those additional criteria as part of the definition of mental retardation. But no such steps were taken. Rather, South Carolina adopted a broad definition of mental retardation in section 44-20-30, using language that parallels the SSI definition, and in Regulation 88-210, DDSN interpreted that definition in a manner consistent with the SSA. DDSN's interpretation of section 44-20-30 in its policy guidelines directly conflicts with Regulation 88-210 and should be disregarded.

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[11] The dissent asserts that Regulation 88-210 is inapplicable to the question before us because it refers only to licensing, not eligibility. This ignores the fact that Regulation 88-210 is an interpretation of the same statute, section 44-20-30, purportedly interpreted by DDSN's policy guidelines. We adhere to the basic principle that the same word should not be given disparate meanings within a single statutory scheme. Further, the plain language of the regulation shows that the definitions in 88-210 apply to the licensing of *all* programs "for the care, maintenance, education, training or treatment" of mentally retarded persons that operate for at least ten hours per week, unless specifically excluded. 26 S.C. Code Ann. Regs. 88-105. Nothing in the text of 88-105 or 88-210 excludes non-residential waiver services from the scope of the definitions found therein, and the dissent does not appear to contest that some of the programs subject to the definitions in 88-210 are waiver services. Therefore, in our view, Regulation 88-210 expresses the view that the term "developmental period" in section 44-20-30 has the same meaning in the context of waiver services as it does in the context of basic Medicaid services.

We find the Hearing Officer and ALC erred in applying an age-eighteen-onset requirement for mental retardation. We reverse and remand for consideration of whether, applying the proper legal standard for mental retardation (onset prior to age twenty-two), Doe is eligible to continue to receive waiver services.

REVERSED AND REMANDED.

TOAL, C.J. and BEATTY, J., concur. HEARN, J. concurring in part and dissenting in part in a separate opinion in which PLEICONES, J., concurs.

JUSTICE HEARN: Respectfully, I concur in part and dissent in part. I agree with the majority's holding that South Carolina can impose more restrictive criteria for mental retardation in its waiver application or in a regulation. Where I part company with the majority, however, is with respect to whether Regulation 88-210(F) applies in this case. Because I do not believe it does, I would find this absence of controlling statutory or regulatory criteria permitted DDSN to apply its own diagnostic criteria to Doe and would affirm.

I.

As the majority correctly notes, the starting point for our analysis is the waiver application itself. Although many states elected to supply a wide range of specific diagnostic criteria in their applications,[12] South Carolina has not done so.[13] Similarly, Section 44-20-30(11) of the South Carolina Code (2002) simply defines mental retardation as "significantly subaverage general

[12] For example, Mississippi's application defines mental retardation as an IQ score of approximately seventy or below, age of onset prior to age eighteen, and a determination of deficits in adaptive behavior. Application for 1915(c) HCBS Waiver, Mississippi, App. B-6(d). Alaska defines the condition as an IQ of less than seventy, plus or minus five points; age of onset prior to age twenty-two; and "a substantial disability to the individual's ability to function in society." Application for 1915(c) HCBS Waiver, Alaska, App. B-6(d). Iowa simply incorporates by reference the definition of mental retardation found in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV). Application for 1915(c) HCBS Waiver, Iowa, App. B-1(b).

[13] South Carolina is not alone. Massachusetts' application, for example, merely defines the target group as "[p]articipants age 18 and older with an intellectual disability as defined by the Massachusetts DDS who meet the ICF-MR level of care and who are determined through an assessment process to require Community Living Supports due to a moderate level of assessed need." Application for 1915(c) HCBS Waiver, Massachusetts, App. B-1(b). Virginia's application does the same thing: "Waiver services are limited to the following groups: individuals of any age with a diagnosis of intellectual disability/mental retardation . . . ." Application for 1915(c) HCBS Waiver, Virginia, App. B-1(b).

intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Due to this lack of guidance, in 1998 DDSN itself adopted the criteria from the DSM-IV and the American Association on Mental Retardation, Ninth Edition, defining mental retardation as: (1) an IQ of approximately seventy or below; (2) a score of approximately seventy or below on standardized measures of adaptive behavior; and (3) onset before the age of eighteen. These guidelines have not been promulgated into an official regulation.

Section 88-210(F) of the South Carolina Code of Regulations differs from DDSN's guidelines in that it extends the developmental period to the individual's twenty-second birthday. *See* 26 S.C. Code Ann. Regs. 88-210(F) (2009). The majority accordingly posits that Regulation 88-210(F) conflicts with, and thus trumps, DDSN's guidelines as to the developmental period. However, the regulatory definition of "developmental period" by its terms applies only to the regulations in question, *see id.* § 88-210, which concern the licensing of various facilities by DDSN and not eligibility for waiver services, *see id.* § 88-105. The majority thus states correctly that the scope of this regulation is "the licensing of *all* programs" for the treatment of the mentally retarded, even if those facilities provide waiver services. However, two unitalicized words are of particular import yet side-stepped by the majority: "licensing" and "programs." Just as with statutes, we apply the plain meaning of regulations "without resort to subtle or forced construction to limit or expand the regulation's operation." *Byerly v. Connor*, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992). Because Regulation 88-210(F) plainly applies only to the licensing of programs and not eligibility for services, it has no application in the case before us. As the majority itself recognizes, the *only* regulation concerning eligibility for waiver services provides no guidance as to what constitutes mental retardation. *See* 27 S.C. Code Ann. Regs. 126-304(A) (1976) ("Home and community based services may be provided to Medicaid eligible persons eighteen years of age or older, who have been determined by community long term care to require a skilled or intermediate level of care."). The policy guidelines at issue here clearly are not at odds with this regulation, nor do they conflict with Regulation 88-210(F) as they do not concern the licensing of programs.

In support of its conclusion that the regulation applies, the majority details the history of Regulation 88-210 and section 44-20-30 to conclude that Regulation 88-210(F) actually is an interpretation of section 44-20-30(11). When this regulation was passed, the licensing provisions were contained in Article 3 of Chapter 21, and that chapter and article were (and still are) cited as the sole authority for it. The majority then points out that these provisions were subsequently moved to Article 5 of Chapter 20 at the time the General Assembly added the undefined term "developmental period" to the definition of mental retardation found in the general provisions of Article 1 of Chapter 20. In my opinion, importing the specific licensing definition of developmental period into the general provisions solely based on this renumbering of the statutes lets the tail wag the dog, and I accordingly decline to divine any expansion of the regulation's scope. The majority therefore "resort[s] to subtle . . . construction to . . . expand" the regulation's operation. *See Byerly*, 307 S.C. at 444, 415 S.E.2d at 799. To borrow the majority's words, "[i]n the more than twenty years following these changes [to Title 44]," DDSN has never sought to expand the regulation beyond its plainly stated boundaries.

Even accepting as correct the majority's contention that Regulation 88-210(F) controls, the only criteria provided is that the symptoms of mental retardation must present themselves prior to age twenty-two. The open question therefore is what those symptoms must be in the absence of a comprehensive definition found in the waiver application or a regulation, namely whether the remainder of the diagnostic criteria in the guidelines apply or the SSI definition controls.

By acknowledging DDSN is free to adopt its own criteria which are more restrictive than those found in the SSI definition and narrowing its focus on the conflict between the guidelines and Regulation 88-210(F), the majority ostensibly agrees the guidelines are in effect unless they conflict with state law. However, the majority at times seems to suggest that the SSI definition has been adopted as a matter of state law and therefore is the controlling definition. In particular, the majority consistently references the

SSI definition and how it "parallels," "mirrors," is "in line with", and is "consistent with" state legislative enactments. Furthermore, the majority writes that Regulation 88-210(F) "recites" the SSI definition of mental retardation and "interpret[s] [section 44-20-30(11)] in a manner consistent with" it. The majority also states that "the scope of HCBS furnished under the waiver program and recipient eligibility criteria are defined by the waiver application," and this application "reveals no intent to vary from or otherwise limit the group of individuals encompassed by the SSI definition of mental retardation." It accordingly appears the majority holds that state law incorporates the SSI definition. The conclusion which follows is that DDSN's guidelines are invalid *in toto* because they wholly conflict with this definition. To the extent this is the majority's holding, I disagree.[14]

In my opinion, section 44-20-30(11) and Regulation 88-210(F) are not similar to the SSI definition in any substantial regard. The SSI definition for mental retardation is as follows:

> Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of impairment before age 22.
> The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.
> A. Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing, or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded; or
> B. A valid verbal, performance, or full scale IQ of 59 or less; or

[14] If the majority is not holding that the SSI definition applies, I do not understand the relevance of the many comparisons between this definition and section 44-20-30(11), Regulation 88-210(F), and the waiver application.

C. A valid verbal, performance, or full scale IQ of 60-70 and a physical or other mental impairment imposing an additional and significant work-related limitation or function; or
D. A valid verbal, performance, or full scale IQ of 60-70, resulting in at least two of the following:
   1. Marked restriction in activities of daily living; or
   2. Marked difficulties in maintaining social function; or
   3. Marked difficulties in maintaining concentration, persistence, or pace; or
   4. Repeated episodes of decompensation, each of extended duration.

20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.05. Section 44-20-30(11) simply defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." When these two sections are juxtaposed, it is clear that the *only* mirror image between the two is in the first line of the SSI definition. In my opinion, there is nothing to suggest that the General Assembly implicitly agreed to incorporate the remaining 156 words by using language similar to the first line of the SSI definition of mental retardation.

Like section 44-20-30(11), Regulation 88-210(K) defines mental retardation in broad terms. The only difference is that subsection (F) defines developmental period as being before the individual's twenty-second birthday. While it does provide one more piece of the puzzle—and only as to the licensing of programs and not waiver eligibility—it conspicuously lacks the myriad other diagnostic criteria present in the SSI definition. I accordingly disagree that section 44-20-30(11) and Regulation 88-210(F) are similar to the SSI definition and would find no intent to adopt the SSI definition of mental retardation as a matter of state law. Because it is not the law of this State, I would stay true to the majority's central premise that states are free to set their own diagnostic criteria and find the SSI definition does not inform our analysis.

Due to the lack of controlling statutory or regulatory guidance, it was incumbent upon DDSN to set its own criteria for mental retardation. I certainly agree that such policy guidance ordinarily does not have the effect of law and can never trump a valid regulation or statute. *See* S.C. Code Ann. § 1-23-10(4) (2005). However, I do not read the majority's opinion as suggesting that such guidance must be wholly disregarded in cases where there are no controlling statutes or regulations. In this case, I do not believe there is any controlling law, and it was therefore necessary for DDSN to issue its own criteria. I would accordingly adhere to our precedents deferring to agency interpretations of statutes and hold the hearing officer did not err in applying DDSN's standard, including onset before age eighteen. *See Byerly Hosp. v. S.C. State Health & Human Servs. Fin. Comm'n*, 319 S.C. 225, 229, 460 S.E.2d 383, 386 (1995) ("[B]ecause the Commission has been designated as the single state agency for implantation of Medicaid, great deference must be accorded its interpretations of Medicaid laws and regulations.").

II.

Because I believe the hearing officer did not commit an error of law in applying DDSN's definition of mental retardation, I proceed to reach the other issues raised on appeal by Doe.

A. Evidence of Mental Retardation

Turning to facts of this case, Doe's scores place her right on the border of mental retardation under DDSN's definition. Between the ages of twelve and seventeen, her full scale IQ scores ranged from a low of sixty-eight—which was felt to be an underestimate of her abilities—to a high of seventy-three. Additionally, the only adaptive behavior score obtained before her eighteenth birthday was a seventy. At this point, it is left to the professional judgment of those reviewing Doe's application to determine whether she is mentally retarded under DDSN's standards. While the record contains diagnoses made by various individuals, including physicians who treated Doe, that she was mentally retarded before she turned eighteen, the record also contains testimony of DDSN officials expressing concern about the bald nature of some of these diagnoses and evidence that Doe's levels of

functioning may have been higher than meets the eye. Additionally, the record contains findings that she is in the borderline range of intelligence, which is not equivalent to mental retardation. The record contains similarly conflicting evidence of the impact her intellectual deficits have on her adaptive skills.

Viewing the record in its entirety, I cannot say the ALC erred in affirming the hearing officer. I believe there is substantial evidence to support the conclusion that Doe does not suffer from mental retardation. Indeed, there may be substantial evidence to support the opposite conclusion as well. But, the fact that reasonable minds may reach an opposite result based on the same evidence does not render the hearing officer's order invalid. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) (stating the fact that one could draw inconsistent conclusions from the same body of evidence does not render the agency's decision unsupported by substantial evidence). The parties here presented voluminous evidence of Doe's condition, each side fleshing out its position amply. In the end, this case boiled down to a quintessential factual determination and battle of the experts. Under our standard of review, I would find no error in the hearing officer's decision.[15]

Doe next argues the hearing officer and the ALC erred in not giving controlling weight to the diagnoses of mental retardation made by her treating physicians. She bases her argument on 20 C.F.R. § 404.1527(d)(2), which provides, "If [the SSA] find[s] that a treating source's opinion on the issue(s) of the nature and severity of [the] impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not

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[15] At various points, Doe also argues that DDSN and HHS should be estopped from denying she suffers from mental retardation because they sought reimbursement from the federal government for services they supplied using the diagnostic code for mental retardation. However, it appears Doe did not learn of this fact until discovery. To the extent such an act could give rise to estoppel against the government, Doe's argument must fail because she cannot prove any reliance on this billing practice. *See Grant v. City of Folly Beach*, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001).

inconsistent with the other substantial evidence in [the] case record, [the SSA] will give it controlling weight." Without discussing whether DDSN had sufficient reason to not give controlling weight to these diagnoses, the language in this regulation by its very terms applies only to SSA determinations of disability. No party here disputes that Doe is disabled. Instead, we are faced with a state agency determination of whether Doe is eligible for ICF/MR waiver services. I can find no statutes or regulations, and Doe has not directed us to any, which require a state agency in DDSN's position to give controlling weight to a treating physician's diagnosis.

This is not to say, however, that a treating physician's diagnosis is not entitled to any weight. To the contrary, DDSN and the hearing officer ought to examine and consider the opinions of those doctors as relevant, probative evidence of an applicant's condition. Under the facts of a particular case, DDSN and the hearing officer may attach any such weight to these diagnoses as they see appropriate and the facts permit. While the policy behind 20 C.F.R. § 404.1527(d)(2) is a good one, there is no similar requirement under our regulations, and this Court is not in a position to create one. Instead, the diagnoses should be considered along with the whole body of evidence in the record. On appeal, the ALC and the appellate courts also should consider them in light of all the other evidence in determining whether DDSN's decision is supported by substantial evidence, or is arbitrary or capricious.[16]

In a similar vein, Doe also argues the hearing officer restricted the rights of her treating physicians to practice medicine by not giving controlling weight to their diagnoses. Every state seeking to offer waiver services must provide in the application "[a] description of who will make these evaluations and how they will be made." 42 C.F.R. § 441.303(c)(1). South Carolina's approved program specifically permits non-physicians to

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[16] For example, if a treating physician's diagnosis has not been called into question or there are no competing diagnoses, not giving it controlling weight may be arbitrary and an abuse of discretion. That situation is not present in the case before us.

determine whether an applicant suffers from mental retardation.[17] South Carolina Waiver, App. B-6(c). In this case, DDSN and the hearing officer disagreed with the diagnoses made by Doe's treating physicians. As discussed, while the fact that some doctors did diagnose her as being mentally retarded certainly is relevant evidence, it is just evidence. Simply because DDSN officials and the hearing officer in a regulatory action disagreed with the diagnoses of Doe's treating physicians in no way limits their ability to practice medicine. Not only did these officials have the authority to determine eligibility for MR/RD waiver services, it would be absurd to hold that a disagreement with a physician infringes on that doctor's ability to practice medicine in any way.

Doe finally argues the hearing officer erred in considering evidence outside of the record. In particular, Doe argues the hearing officer concluded the SSA awarded SSI benefits for an unidentified condition other than mental retardation based on his own experiences as an SSA disability examiner and disability hearing officer. However, I believe Doe's argument is not preserved for review as she has raised it for the first time before this Court. Doe accordingly argues that because she is an incompetent, we should relax our preservation rules. *See Galloway v. Galloway*, 249 S.C. 157, 160, 153 S.E.2d 326, 327 (1967). It is within our discretion to relax the preservation requirement when the rights of a minor or incompetent are concerned. *Ex parte Morris*, 367 S.C. 56, 65, 624 S.E.2d 649, 654 (2006). I would decline to do so in this case because Doe was at all times well-represented by counsel. *Cf. Cumbie v. Cumbie*, 245 S.C. 107, 113, 139 S.E.2d 477, 480 (1964) (reaching unpreserved issue because "[i]t is quite apparent here that the guardian ad litem for the incompetent and the minor defendants treated the appointment as a pure formality, and, as far as the record goes, made no

[17] The waiver application in effect at the time permitted physicians to make an eligibility determination. Based on this, Doe argues that because her treating physicians found her to be mentally retarded, their diagnoses control. However, this argument assumes that her treating physicians were actually "performing initial evaluations of level of care for waiver participants." Nothing in the record indicates that they were performing such a function here.

effort whatever to protect the interests of either the incompetent or said minors").

B. Related Disability

Doe argues she has two related disabilities, cerebral palsy and epilepsy. At no point did DDSN ever question whether she suffers from either of those conditions. Instead, the relevant discussion was the *extent* of those conditions, including whether they both had the requisite effect on Doe's adaptive skills and, in particular, whether her epilepsy was as severe as she contended it was. While the witnesses in this case did observe and document her seizures, there was no SSA diagnosis of epilepsy as there was for cerebral palsy.[18] Accordingly, she first argues the hearing officer erred in not following the procedures outlined in 42 C.F.R. § 435.541 when evaluating her seizures. *See* 42 C.F.R. § 435.541(c)(4)(i) ("The [state] agency must make a determination of disability in accordance with the requirements of this section if any of the following circumstances exist: . . . The individual applies for Medicaid as a non-cash recipient . . . and . . . [a]lleges a disabling condition different from, or in addition to, that considered by SSA in making its determination . . . ."). However, this requirement only applies when a state agency instead of the SSA is making a *disability* determination instead of the SSA, which only occurs in specific situations not applicable here. *See* Medicaid Program; Eligibility Determinations Based on Disability, 54 Fed. Reg. 50,755 (Dec. 11, 1989). Doe is not asking DDSN to determine whether she is disabled by her epilepsy; she is asking DDSN to determine whether this condition is a related disability for purposes of receiving HCBS. Because these are two different determinations, I do not believe the hearing officer erred in not following 42 C.F.R. § 435.541 with respect to Doe's epilepsy.

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[18] The doctor performing the SSI examination concluded "[s]he has multiple physical, mental, and emotional impairments, including cerebral palsy with left spastic hemiparesis and Mild Mental Retardation." Based on this assessment, which included a fairly thorough review of Doe's condition, the SSA awarded her SSI with a primary diagnosis of mental retardation and a secondary diagnosis of cerebral palsy.

She next argues that the hearing officer erred in applying the definition of related disability found in section 44-20-30(15)[19] as opposed to the Medicaid[20] definition. Although I believe the hearing officer did not err in

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[19] Section 44-20-30(15) provides,

> "Related disability" is a severe, chronic condition found to be closely related to mental retardation or to require treatment similar to that required for persons with mental retardation and must meet the following conditions:
>
> (a) It is attributable to cerebral palsy, epilepsy, autism, or any other condition other than mental illness found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of persons with mental retardation and requires treatment or services similar to those required for these persons.
> (b) It is manifested before twenty-two years of age.
> (c) It is likely to continue indefinitely.
> (d) It results in substantial functional limitations in three or more of the following areas of major life activity: self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living.

DDSN has offered no additional guidance with respect to related disabilities.

[20] The regulatory definition reads in part,

> Persons with related conditions means individuals who have a severe, chronic disability that meets all of the following conditions:
>
> (a) It is attributable to--
> (1) Cerebral palsy or epilepsy; or
> (2) Any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar

applying the definition from section 44-20-30(15), any error involved would be harmless. Both definitions contain the same requirement for limitation in three of six major life areas, and as I conclude below, the hearing officer's findings that Doe's conditions are not so limiting is supported by substantial evidence. Doe also argues the hearing officer in any event erred in his application of the definition of related disability found in section 44-20-30(15). I agree with Doe that the hearing officer erred in his interpretation, but I would find this error harmless as well for the same reason.

The record establishes that Doe's adaptive behavior scores were within the range for mental retardation, and therefore within the range for a related disability. Additionally, the evidence shows that her limitations arose prior to her twenty-second birthday and are likely to continue indefinitely. However, I believe there is substantial evidence to support the conclusion that Doe has not met the requirement of experiencing "substantial limitations" in three of the six major life areas listed in the statute.

The hearing officer described her limitations as follows:

> [Doe] walks with a mild limp, with an awkward gait and she has some difficulty with balance secondary to her left hemiparesis. [Doe] has weakness in her left arm with some contracture in her left hand. She can only use her left hand as an assist/stabilizer for small objects and she has difficulty using zippers, and buttoning small buttons. [Doe] is independent with dressing, bathing, toileting, eating, transferring from one surface to another and ambulation; however, she may require some prompting to perform some of these activities at times.

> to that of mentally retarded persons, and requires treatment or services to those required for these persons.

42 C.F.R. § 435.1010.

In his final order, the hearing officer made a series of specific findings leading to the conclusion that Doe does not have a substantial limitation in any of the six major life areas listed in the statute. In sum, he found,

> [Doe's] Cerebral Palsy and Epileptic Seizure Disorder do not prevent [Doe] from performing all self-care activities with little or no assistance or supervision. Her Cerebral Palsy and Epileptic Seizure Disorder do not affect her understanding and use of language or learning; however, [Doe's] longstanding mental disorders and learning disorder and/or borderline intellectual function do affect these areas. She is able to be independently mobile despite her physical handicaps. [Doe's] Cerebral Palsy and Epileptic Seizure Disorder do not limit [Doe's] capacity for independent living; however, her longstanding mental disorders are the biggest obstacle to this area of major life activity. [Doe's] Cerebral Palsy and Epileptic Seizure Disorder do not result in substantial functional limitations in self-care, understanding and use of language, learning, mobility, self-direction or capacity for independent living; therefore, she does not have a Related Disability.

As the ALC recognized, Doe has submitted voluminous evidence to support her position that she does indeed suffer from a related disability. Numerous witnesses recounted the limitations Doe's conditions place on her daily life, and no one before the Court contends that Doe can lead a truly normal life. DDSN, on the other hand, introduced equally voluminous evidence to demonstrate that her limitations may not be as severe as they appear and are perhaps the product of her intentional efforts to not integrate herself into the community. In the end, the hearing officer found that any limitations Doe does have generally result from mental illness and disorders, not cerebral palsy and epilepsy.[21] Once again, we are faced with an extremely close factual determination. But, also once again, it is not the

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[21] Doe again argues the hearing officer failed in not giving controlling weight to the conclusions of the physicians who treated Doe's seizures and cerebral palsy. As I concluded *supra*, failure to do so is not legal error.

province of an appellate court to weigh the evidence before it on appeals from administrative proceedings. Based on our standard of review, I believe there is substantial evidence to support the finding that Doe does not have substantial limitations in any of the major life areas and accordingly does not suffer from a related disability. Additionally, I can discern no evidence that this finding by the hearing officer was arbitrary, capricious, or an abuse of discretion. Rather, it appears to be a well-reasoned decision following a thorough review of the evidence presented.

C. Due Process Claims

Doe finally argues the hearing officer violated her constitutional due process rights in three ways: (1) basing his decision on reasons other than those contained in the notice provided by DDSN to Doe; (2) determining Doe failed to exhaust her administrative remedies; and (3) permitting DDSN to engage in retaliatory conduct. I disagree.

As to her first argument, a state cannot withdraw Medicaid benefits without providing notice and an opportunity to heard. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 786-87 (1980). In order to meet the requirements of procedural due process, the State must provide adequate notice, adequate opportunity to be heard, the right to introduce evidence, and the right to confront and cross-examine witnesses. *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003).

Initially, I do not believe Doe's notice arguments are preserved for review. Nowhere in the record does it appear she raised this issue to the hearing officer or the ALC. Indeed, Doe concedes as much by preemptively arguing in her initial brief that we should relax our preservation rules because she is an incompetent. As discussed previously, I would decline to do so under the facts of this case. Furthermore, I question the merits of her argument. Doe claims the hearing officer engaged "[i]n a classic case of trial by ambush" when he considered the results of evaluations performed by school psychologists offered by DDSN from her high school years. However, Doe's argument ignores the fact that she had three months from the

close of DDSN's case-in-chief to prepare her own case.[22] It would therefore appear she had ample notice and opportunity to respond to this alleged ambush.

Second, Doe contends the ALC erred in finding she has not exhausted her remedies with respect to her argument that DDSN did not provide her with free choice of facilities for treatment. This issue is now moot in light of the decision of the United States Court of Appeals for the Fourth Circuit that her freedom of choice claim fails as a matter of law. *See Doe v. Kidd*, 501 F.3d 348, 358-60 (4th Cir. 2007) (*Doe I*).

Finally, Doe argues the final DDSN evaluation, the one which led to the termination of her benefits, was in retaliation for a separate civil rights lawsuit she filed in federal court.[23] In her brief to this Court, Doe engages in a lengthy discussion of the record but cites no law to support her contentions. She then argues due process entitles her to notice and an opportunity to respond to the final 2005 evaluation, again citing no law and making only passing references to the Fourteenth Amendment and the Medicaid Act. The essence of her arguments, however, is more of an attack on the credibility of DDSN's final decision, not that DDSN engaged in retaliatory conduct. Because I have already resolved that issue, I find no error in rejecting this claim.

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[22] Although Doe was the party who brought the case before the hearing officer, DDSN presented its evidence first January 24-26, 2006, and Doe presented her case April 27-28, 2006.

[23] Doe filed a lawsuit alleging violations of the Medicaid Act, Americans with Disabilities Act, and various state laws against DDSN, HHS, and certain state officials. *Doe I*, 501 F.3d at 352. *Doe I* disposed of Doe's claim regarding her freedom of choice of providers. *Id*. at 358-60. The Fourth Circuit subsequently disposed of her remaining argument that DDSN violated her civil rights by not providing her residential services with reasonable promptness. *Doe v. Kidd*, No. 10-1191, 2011 WL 1058542, at *4-5 (4th Cir. Mar. 24, 2011) (*Doe II*). *Doe II* has no impact on our decision in this case as the Fourth Circuit specifically left open the issues regarding Doe's eligibility and retaliation claims for us to consider. *Id.* at *9.

III.

The case before us is the culmination of a long and contentious dispute regarding one young woman's eligibility for certain Medicaid benefits. Throughout this process, tensions have flared as the parties have engaged in a vigorous dispute over some very complicated and emotionally-charged issues. At the center of all of this is a now twenty-eight-year-old woman with undeniable cognitive and adaptive deficits. After a review of the regulations concerning the labyrinthine Social Security and Medicaid Acts, I agree there is no rule requiring states to be bound by the federal government's disability determination or the SSI definition of mental retardation. I believe there is an express policy of granting states wide latitude in designing and implementing programs to best meet their needs and the needs of the target population. Where I part company with the majority, however, is with respect to whether South Carolina has adopted a different definition of mental retardation. In my opinion, DDSN acted within its authority in adopting its present definition and would apply it in this case.

As to Doe's remaining arguments, based on our standard of review, I would find the hearing officer's determination that Doe does not suffer from mental retardation or a related disability is supported by substantial evidence. In administrative appeals, this Court does not make findings of fact or weigh evidence; we sit only to ensure that the findings below are supported by substantial evidence and are not arbitrary, capricious, or an abuse of discretion. As discussed, both parties presented copious evidence of the nature and extent of Doe's conditions. Accordingly, it was the job of the hearing officer to make this incredibly close factual call. Simply because reasonable minds may disagree with the result does not make it unsupported by substantial evidence or arbitrary or capricious. I also believe the hearing officer did not commit any errors of law. Therefore, I would affirm the order of the ALC.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kevin Cornelious Odems, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 27084
Heard November 30, 2011 – Filed December 28, 2011

REVERSED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark R. Farthing, all of Columbia; and Kevin Scott Brackett, of York, for Respondent.

CHIEF JUSTICE TOAL: Kevin Cornelius Odems (Petitioner) appeals the court of appeals' decision affirming his 2005 convictions for first degree burglary, grand larceny, criminal conspiracy, and malicious injury. The State's case against Petitioner consisted solely of circumstantial evidence. Petitioner argues that the State failed to present *substantial* circumstantial evidence of his involvement in any of the crimes charged, and thus the circuit court should have directed a verdict on all four counts. We agree and reverse.

FACTUAL/PROCEDURAL BACKGROUND

On March 21, 2005, Margaret Burns noticed a brown car she did not recognize turning into her cousin's driveway. Burns telephoned law enforcement while she continued to watch the car from her own vehicle parked across the street from the house. Burns observed two men knocking on the door of her cousin's house, and later observed one of the men place something in the car's trunk. Burns unsuccessfully attempted to follow the car once it departed.

Approximately ninety minutes after Burns notified police, a nearby sheriff's deputy spotted a brown Cadillac. The sheriff's deputy pulled the car over, and ordered the driver out of the car. The driver, Derrick Dawkins, exited the car, as he spoke to two men located inside the car, Petitioner and Frederick Bell. Dawkins testified at trial that he told Petitioner that his license had been suspended, and that shortly thereafter "everybody ran."

A short time later Petitioner knocked at the door of Donna Beane. Petitioner informed Beane that he needed a ride. Beane did not know Petitioner, but allowed him to use her telephone to call for a ride. Petitioner did not call for a ride, but told Beane that if police arrived she should inform them that he was her boyfriend. Beane claimed that Petitioner told her "he was with somebody that didn't have a driver's license or that had a suspended driver's license and that the person had gotten pulled over and that he didn't

want to get in any trouble." Beane refused Petitioner's request just as police officers arrived. Police took Petitioner into custody as well as Dawkins and Bell who were found hiding in Beane's backyard.

A police search of the Cadillac recovered several items identified as stolen from the victim's home, including a camcorder, a money jar containing between $300 and $400, a camera, three watches, and a gun. The estimated total value of the stolen items was over $1,000.

The York County grand jury indicted Petitioner for first degree burglary, grand larceny, criminal conspiracy, and malicious injury to an electric utility system. At trial, Petitioner moved for a directed verdict at the close of the State's evidence. The circuit court denied the motion. The jury convicted Petitioner of the four charges, and the circuit court sentenced Petitioner to fifteen years imprisonment. The court of appeals affirmed Petitioner's convictions, holding the circuit court did not err in refusing to grant a directed verdict on the charges.

ISSUE PRESENTED

Did the court of appeals err in holding the circuit court properly refused to direct a verdict for Petitioner on the charges of first degree burglary, grand larceny, criminal conspiracy, and malicious injury to an electronic utility meter?[1]

STANDARD OF REVIEW

On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. *State v. Lollis*, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001) (citing *State v. Burdette*, 335 S.C. 34,

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[1] Petitioner presents each of the four charges as separate issues in his appeal to this Court. However, the facts supporting the State's case against Petitioner, and the propriety of the circuit court's refusal to direct a verdict, are the same for each issue. Thus, we address all four of Petitioner's issues together.

46, 515 S.E.2d 525, 531 (1999)). The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. *State v. Pinckney*, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000) (emphasis added). A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. *State v. Shrock*, 283 S.C. 129, 132, 322 S.E.2d 450, 451–52 (1984).

LAW/ANALYSIS

Petitioner argues that the court of appeals erred in affirming the circuit court's refusal to direct a verdict on the four charges for which he was convicted. We agree. This Court has repeatedly affirmed the principle that when the State fails to produce substantial circumstantial evidence that the defendant committed a particular crime, the defendant is entitled to a directed verdict. *State v. Rothschild*, 351 S.C. 238, 243, 569 S.E.2d 346, 348 (2000).

Two cases from this Court's jurisprudence are instructive in explaining the proof required in cases built wholly on circumstantial evidence. In *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011), the State accused Bostick of killing his neighbor, Polite, and burning down her home. The State presented the following evidence against Bostick: (1) investigators found personal items belonging to Polite, including a watch and two sets of car keys, in a burn pile located on the Bostick family property; (2) Bostick's shoes contained a pattern that matched gasoline, and gasoline was the accelerant used to start the house fire; (3) and investigators found blood on the clothes Bostick was wearing the day of the murder, but that evidence could not be matched to Polite's DNA. *Id.* at 141–42, 708 S.E.2d at 778. However, the State never introduced a motive or a murder weapon into evidence. *Id.* Thus, "the evidence presented by the State raised, at most, a mere suspicion that Bostick committed this crime." *Id.* at 142, 708 S.E.2d at 778.

In *State v. Lollis* this Court reviewed a court of appeals' decision affirming a circuit court's refusal to direct a verdict on a charge of second degree arson. 343 S.C. 580, 581, 541 S.E.2d 254, 255 (2001). Lollis lived in a mobile home with his common law wife, Tammy Burgess. *Id*. at 582, 541 S.E.2d at 255. Burgess confessed to setting fire to the home and claimed that Lollis had no knowledge of her plans. *Id*. According to Burgess, she burned the home in order to erase the couple's mortgage debt. *Id*. However, the State charged both Lollis and Burgess in the arson of the mobile home. *Id*.

The State relied on four pieces of circumstantial evidence to convict Lollis: (1) the marital relationship between Burgess and Lollis; (2) Lollis's alleged financial trouble; (3) the fact that Lollis placed his personal valuables from the home in a storage room one day prior to the fire; and (4) Lollis's possession of the storage room key on the day of the fire. *Id.* at 584, 541 S.E.2d at 256. However, alternate evidence showed that Lollis was current on his mortgage at the time of the fire. *Lollis*, 343 S.C. at 585, 541 S.E.2d at 257. Moreover, Lollis testified he had no reason to burn down his home because of extensive remodeling being done at the time of the fire, and that he moved his belongings into storage in order to protect them from damage due to that remodeling work. *Id.* at 582–83, 541 S.E.2d at 255.

This Court held that the State's evidence did not "reasonably tend" to prove Lollis's guilt:

> First, Burgess admitted to starting the fire without assistance from Lollis, without his knowledge, and the State presented no evidence of an agreement between them. Second, the State presented no evidence of Lollis' financial trouble . . . . Furthermore, Lollis did not have insurance on his personal property lost in the fire. Finally, Lollis presented a plausible explanation for placing valuables in the storage room on the day of the fire—he was trying to protect them from drywall dust as he remodeled his home.

Id. at 585, 541 S.E.2d at 257 (holding that a mere arousal of suspicion is an improper basis to deny a motion for directed verdict).

The circumstantial evidence presented in Petitioner's case is analogous to that found in *Bostick* and *Lollis*. The State's case against Petitioner relied primarily on three pieces of circumstantial evidence: (1) the fact that less than ninety minutes after the burglary, police located Petitioner in the getaway car with the burglars and the stolen goods; (2) Petitioner fled from law enforcement; and (3) Petitioner asked an uninvolved person to lie for him. *State v. Odems*, 385 S.C. 399, 404–05, 684 S.E.2d 573, 575 (Ct. App. 2009).

Even when viewed in the light most favorable to the State, the circumstantial evidence presented does not reasonably tend to prove Petitioner's guilt. The sole eyewitness in Petitioner's case described only two men at the scene. A forensic investigator testified that she collected twelve sets of fingerprints in the car and from the stolen goods. These sets included prints from both Dawkins and Bell, but not Petitioner. Dawkins testified during the State's case-in-chief and explained how Petitioner ended up in the car with the stolen goods even though he did not participate in the burglary[2]:

> We stopped at a little gas station up the road up there and that's where I ran into [Petitioner] at, at the gas station . . . . He asked me can he get a ride. I said yeah, you can get a ride, man. I didn't let him know what was going on, what just happened you know, so we jumped in the car, we left.[3]

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[2] Bell refused to answer when asked what happened on the day of the burglary with regard to Petitioner. However, Bell testified that he was with Dawkins when the home was burglarized, but that when they were later stopped by police, Petitioner was with them. Bell admitted that he never provided police a statement implicating Petitioner.

[3] The State notes that Petitioner, Dawkins, and Bell are cousins. The prosecutor stated at trial that "they're all cousins," and, "[T]his defendant, whose testimony is is [sic] cousins with with [sic] Derrick Dawkins. He's cousins and friends with Frederick Bell. He's from—they're all from Kings

The court of appeals emphasized Petitioner's flight from law enforcement in finding *State v. Crawford* controlling. 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005).

In *Crawford*, the defendant was present at the scene of a rental store burglary. *Id.* at 634–35, 608 S.E.2d at 890. Police then located Crawford in the getaway car, but he fled before an arrest could take place. *Id.* The driver told the arresting officer that Crawford and the third passenger stole tools from the rental store. *Id.* at 631–32, 608 S.E.2d at 888. However, at trial, the driver testified that he could not say definitively whether Crawford participated in the robbery. *Id.* at 632, 608 S.E.2d at 889. The other passenger in the car testified that he acted alone during the robbery, and that he did not inform the driver or Crawford that he planned on breaking into the store. *Id.* The court of appeals upheld the circuit court's denial of a directed verdict on a charge of criminal conspiracy. *Crawford*, 362 S.C. at 645–46, 608 S.E.2d at 896.

The flight in *Crawford* is distinguishable from that of Petitioner. In *Crawford*, the statements from the driver and passenger provided substantive direct evidence of at least Crawford's presence at the crime scene, and in the case of the driver's first statement, a direct implication in the crime itself.

Mountain." However, the State failed to present evidence of any agreement or collusion between Petitioner, Dawkins, and Bell. The existence of a familial relationship between the three individuals does not affect the validity of Dawkins's testimony or the analysis of the State's circumstantial evidence. In *Lollis*, this Court accepted the testimony of Lollis's common law wife in finding that the State's evidence did not "reasonably tend" to prove Lollis's guilt. *Lollis*, 343 S.C. at 582, 541 S.E.2d at 255. In *Bostick*, the defendant's sisters testified that Bostick argued with the victim and entered her house on the day the victim was killed and her home burned. *Bostick*, 392 S.C. at 138, 708 S.E.2d at 776. However, this testimony did not elevate the State's circumstantial evidence above "mere suspicion." *Id.* at 142, 708 S.E.2d at 778. Thus, it is clear that the simple and solitary fact that certain testimony comes from a relative of the accused has not been shown to affect this Court's analysis of whether circumstantial evidence is substantial.

Thus, the totality of the circumstances could have created an inference that Crawford had knowledge he was being sought by authorities. *Id.* at 635, 608 S.E.2d at 890.

In relying on *Crawford*, the court of appeals noted that flight evidence is relevant when the flight and the offense charged are connected. *State v. Odems*, 385 S.C. 399, 404, 684 S.E.2d 573, 575 (Ct. App. 2009) (citing *State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006)). However, in Petitioner's case, the State failed to present evidence connecting Petitioner's flight with anything other than Dawkins's statement regarding his suspended driver's license.

In *Crawford* there was no doubt regarding the defendant's presence at the scene of the crime, regardless of whether it could actually be proven that he participated in the crime. In Petitioner's case, there is no evidence before this Court placing Petitioner at the crime scene, or discounting the testimony of Dawkins and Beane regarding Petitioner's reason for attempting to flee arrest. We decline to hold that flight alone is substantial circumstantial evidence of a defendant's guilt.

Petitioner's overall actions may appear suspicious, but mere suspicion is insufficient to support a guilty verdict. *See State v. Arnold*, 361 S.C. 386, 389–90, 605 S.E.2d 529, 531 (2004) (holding that the trial court must grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty). The traditional circumstantial evidence definition illustrates the deficiency in the State's evidence against Petitioner. This definition provided that if the State relies on circumstantial evidence to prove its case, the jury may not convict the defendant unless:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and . . . all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 606 n.2, 677 S.E.2d at 626 n.2 (citing *State v. Edwards*, 298 S.C. 272, 274–76, 379 S.E.2d 888, 889 (1989), *abrogated by State v. Cherry*, 361 S.C. 588, 595–606, 606 S.E.2d 475, 478–82 (2004)).

Despite the Court's abandonment of the use of this particular definition as a jury charge in *State v. Cherry*, the definition illustrates the lack of evidence against Petitioner.[4] The State's key circumstantial evidence: (1)

[4] In *State v. Grippon*, this Court held if the jury is properly instructed on reasonable doubt, it is unnecessary for the trial court to instruct the jury that "circumstantial evidence must be so strong as to exclude every other reasonable hypothesis other than guilt." 327 S.C. 79, 83, 489 S.E.2d 462, 464 (1997). This Court then recommended the following charge in cases relying on circumstantial evidence:

> Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact . . . . Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence . . . . Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence . . . . After weighing all the evidence if you are not convinced of the guilt of the defendant by a reasonable doubt, you must find [the defendant] not guilty.

Id. at 83–84, 489 S.E.2d at 464.

In *Cherry*, this Court rejected the traditional circumstantial evidence charge in favor of the *Grippon* charge. *Cherry*, 361 S.C. at 601, 606 S.E.2d at 482 (holding that the traditional circumstantial evidence definition served to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence).

However, the evaluation of circumstantial evidence requires the connection of collateral facts in order to reach a conclusion, and this process is not required when evaluating direct evidence. *Id*. at 603, 606 S.E.2d at

Petitioner's location in the getaway car a relatively short time after the robbery; (2) Petitioner's flight from law enforcement; and (3) Petitioner's attempt to enlist the assistance of an uninvolved individual, do not point to his guilt for the crimes charged to the exclusion of every other reasonable hypothesis—namely, the notion that he did in fact join Dawkins at a gas station following the crime.

Simply put, the State offered no direct evidence that Petitioner committed robbery in the first degree, grand larceny, criminal conspiracy, or malicious injury. However, substantial circumstantial proof of Petitioner's involvement in one of the four offenses would prove Petitioner's involvement as to all offenses. The circumstantial evidence presented by the State proves only that: (1) when stopped by the sheriff's deputy, Petitioner was in the vehicle used by Dawkins and Bell to leave the scene of the robbery; and that (2) following the stop, Petitioner fled along with Dawkins and Bell.

The State asks this Court to uphold Petitioner's convictions based on evidence which does not satisfy the standard adopted by this Court regarding the proof necessary in a circumstantial evidence case. *See Bostick*, 392 S.C. at 139–41, 708 S.E.2d at 777–78 (identifying three of this Court's seminal cases analyzing the substantial circumstantial evidence standard).

CONCLUSION

The circumstantial evidence presented by the State does not reasonably tend to prove Petitioner's guilt, and fails this Court's well-settled directive that circumstantial evidence that is not substantial is insufficient to go to a jury. Thus, we reverse the court of appeals' decision affirming Petitioner's 2005 convictions.

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483. Thus, the traditional circumstantial evidence definition provides more detailed information about the relation of circumstantial evidence to the determination of guilt. *Id.* The definition does not, however, change the standard for evaluating evidence: every circumstance must be proved beyond a reasonable doubt. *Id.*

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kareen Donyell Lee, Petitioner,

v.

State of South Carolina, Respondent.

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No.4901
Heard, October 5, 2011 – Filed November 2, 2011
Withdrawn, Substituted and Refiled December 21, 2011

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and

Assistant Attorney General Karen Ratigan, all of Columbia, for Respondent.

KONDUROS, J.: In this post-conviction relief (PCR) action, Kareen Donyell Lee contends the PCR court erred in not finding plea counsel ineffective for failing to have him evaluated for competency before his guilty plea when a competency evaluation conducted approximately six months after his plea revealed he had an intelligence quotient (IQ) of 61 and was not competent to stand trial. We affirm.

FACTS

In June 2005, Lee pled guilty to two counts of breaking into a motor vehicle, unlawful carrying of a pistol, two counts of attempted second-degree burglary, and two counts of second-degree burglary. He was twenty-two years old at the time of the guilty pleas. Lee pled guilty at the same time as two other defendants in unrelated cases. Lee answered last of the three in response to the majority of the plea court's questions and responded similarly to the other two with "Yes, sir" or "No, sir" to most questions. The plea court asked Lee to speak up several times throughout the proceeding. When the plea court asked Lee why he was not speaking up, he responded that he was a "soft spoken person." Lee received concurrent sentences of five years' imprisonment for each charge of breaking into a motor vehicle, one year for unlawful carrying of a pistol, fifteen years for each attempted burglary charge, and fifteen years for each second-degree burglary charge. He did not appeal his guilty pleas and sentences.

At the time of the pleas, Lee was on probation. The guilty pleas were a violation of probation, necessitating a probation violation hearing. Prior to the hearing, a judge ordered a competency evaluation for Lee because his probation violation counsel reported difficulty in communicating. In Lee's December 2005 forensic evaluation conducted by the South Carolina Department of Disabilities and Special Needs (DDSN), he was found not competent to stand trial.

On May 2, 2006, Lee filed a PCR application. Lee's December 2005 forensic evaluation was offered at the PCR hearing. The evaluation indicated Lee scored 61 on a 1996 IQ test. He had completed high school and obtained a driver's permit, but he had no stable employment history. Records cited in the evaluation revealed Lee had once been hospitalized for behavioral problems, received other mental health services for about five months, was diagnosed with mild mental retardation and disruptive behavior disorder, and had a significant history of setting fires and engaging in cruelty to animals. The evaluation stated that Lee was evaluated in 2002 by the Department of Mental Health to determine his capacity to stand trial. According to the 2005 evaluation, in 2002 the doctor found evidence of mental retardation but issued no opinion on competency and referred Lee to DDSN for further evaluation. However, the 2005 evaluation noted that the solicitor's office notified DDSN in 2004 that it was not going to pursue further evaluation through DDSN.

The 2005 evaluation further stated Lee demonstrated a basic understanding of the charges that resulted in his probation and those he committed while on probation. He knew crimes vary in seriousness and punishment is commensurate. He defined guilty as "you did it" but was unsure of defense counsel's role. While Lee understood the solicitor was an antagonistic party, he did not seem to understand the requirement that the solicitor prove guilt. The evaluation concluded Lee was not able to communicate effectively with counsel and "the fact that he would not be able to provide adequate assistance in his defense are sufficient grounds for issuing an opinion that he is not at this time competent to stand trial."

The psychologist who conducted the evaluation testified at the PCR hearing. He said Lee may have been found incompetent in the past, he had received mental health treatment as early as 2000, and his records from school and DDSN indicated a history of mental retardation. Specifically, the psychologist stated Lee did not understand the plea bargain concept. The psychologist believed Lee's incompetence was caused by mental retardation which would have been present in June 2005, the time of the guilty pleas.

However, the psychologist admitted he had only met with Lee one time and acknowledged his report stated Lee would not be competent for a hearing held sometime after December 2005.

Lee's aunt testified he lived with her for five years after his mother died. His aunt said Lee began to collect social security checks for a disability based on his mental status when he turned eighteen years old. His aunt averred she informed plea counsel Lee had a disability and was "not supposed to" make decisions without her or Lee's brother. She said plea counsel agreed to inform her of Lee's court date but plea counsel failed to do so. She stated that in the same conversation, plea counsel informed her she may be going on maternity leave. His aunt testified she visited Lee in jail the week before he pled guilty and he never mentioned his upcoming court date. She agreed Lee had entered guilty pleas in the past following earlier evaluations, but she was present for those pleas. Additionally, she testified he underwent a mental evaluation in 2002 through the court system. Lee's aunt further testified that Lee was a follower. She explained: "[I]f it sounds like he should say yes, then he would say yes . . . . [I]f it sounds like he should say no, then he will say no."

Plea counsel testified she met with Lee at least three times and he appeared to understand a discussion about pleading guilty. Plea counsel said when she has clients facing serious charges, she makes them explain their situation so she knows they understand. In Lee's case, the explanation he gave did not raise any "red flags." Plea counsel did not recall the discussion with Lee's aunt, and she stated no one informed her of Lee's prior mental evaluations or disability checks. Plea counsel confirmed she was pregnant around the time of Lee's case and did take maternity leave for a few months. Plea counsel said Lee never told her of any prior mental health treatment. Plea counsel testified:

> One of my standard questions I ask defendants even before we plea is do you have any type of mental disability, have you ever been treated for any type of

> mental disability in the past? His response to that was no. That was before the plea.
>
> He never informed me of that during any of the previous meetings. . . . If he doesn't tell me that he's got a problem, I don't see a problem in talking with him and he understands what I'm speaking with him about and indicates that he understands, I'm not a mind reader. I'm not able to find that out.

She admitted if Lee had told her he was on disability, she would have investigated, but she stated she had "no basis to initiate any type of investigation."

The PCR court found Lee failed to prove he was incompetent on the day of his guilty plea. The PCR court noted Lee told the plea court he did not suffer from any mental condition. Additionally, the PCR court found persuasive the psychologist's admission that the evaluation could not speak to Lee's competency at the time of the plea hearing. Further, the PCR court noted Lee had several prior convictions in 2000, 2001, 2003, and 2004, but he presented no evidence that he had been evaluated in connection with those plea hearings. The PCR court found plea counsel's testimony was "extremely credible" and Lee failed to prove her ineffective. The PCR court found plea counsel met several times with Lee, was never informed of his mental health history, and was "not required to be clairvoyant." The PCR court denied Lee's application. Lee petitioned this court for writ of certiorari, which we granted. This appeal followed.

STANDARD OF REVIEW

An appellate court gives great deference to the PCR court's findings of fact and conclusions of law. Shumpert v. State, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008). If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses. Solomon v. State, 313 S.C. 526, 529, 443

S.E.2d 540, 542 (1994). Any evidence of probative value in the record is sufficient to uphold the PCR court's ruling. Caprood v. State, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000).

LAW/ANALYSIS

Lee asserts plea counsel was ineffective in failing to obtain a competency evaluation of him prior to his guilty pleas. We disagree.

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove counsel's performance was deficient, and the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 687-88, 692 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show counsel was deficient, the applicant must establish counsel failed to render reasonably effective assistance under prevailing professional norms. Strickland, 466 U.S. at 688; Cherry, 300 S.C. at 117, 386 S.E.2d at 625; see also Matthews v. State, 358 S.C. 456, 459, 596 S.E.2d 49, 50-51 (2004) ("In order to find that petitioner's trial counsel was ineffective for refusing to request a Blair[[1]] hearing on petitioner's competency to stand trial, petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings."). To show "prejudice within the context of counsel's failure to fully investigate the petitioner's mental capacity, 'the [petitioner] need only show a reasonable probability that he was either insane at the time [the crime was committed] or incompetent at the time of the plea.'" Matthews, 358 S.C. at 459, 596 S.E.2d at 50 (alterations by court) (quoting Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992)).

Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea. Jeter, 308 S.C. at 232, 417 S.E.2d at 595. To prevail in a PCR action, the petitioner must prove by a preponderance of the evidence he was incompetent when he entered his guilty plea. Matthews, 358 S.C. at 458-59, 596 S.E.2d at 51; see also Rule 71.1(e), SCRCP. Any evidence of probative value to support the PCR court's

[1] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

factual findings is sufficient to uphold those findings on appeal. Jeter, 308 S.C. at 232, 417 S.E.2d at 596. "The test of competency to enter a plea is the same as required to stand trial." Id. "The accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him." Id.

In Matthews, 358 S.C. at 459, 596 S.E.2d at 51, a psychiatrist, in describing petitioner's mental condition, referred to petitioner's quick, nonsensical responses to questions. When the psychiatrist "asked petitioner where he was, he gave the quick, basic response of 'here.' When asked if he was in a prison, cafeteria, or zoo, petitioner responded, 'zoo.' When asked what his name was, petitioner responded, 'me.'" Id. at 459-60, 596 S.E.2d at 51. The supreme court reversed the PCR court's finding counsel effective, holding that through the psychiatrist's testimony, "petitioner clearly established by a preponderance of the evidence that he was incompetent at the time he entered his guilty plea. Consequently, petitioner's trial counsel was deficient for failing to request a Blair hearing so that the court could examine petitioner's fitness to stand trial." Id. at 460, 596 S.E.2d at 51. The supreme court held "trial counsel's failure to request a Blair hearing prejudiced petitioner under the Jeter standard because there was, at minimum, a 'reasonable probability' that petitioner was incompetent at the time of his guilty plea." Id.

In Jeter, 308 S.C at 233, 417 S.E.2d at 596, the court found "[t]he evidence addressed at the PCR hearing was insufficient to show deficient performance on the part of [plea] counsel." Plea counsel discussed petitioner's case and his options with petitioner on several occasions prior to his plea. Id. The supreme court found plea counsel reasonably relied on his own perceptions, particularly because counsel was familiar with petitioner from previous representation. Id. The family who testified at the PCR hearing never raised any concerns regarding petitioner's competency to plea counsel. Id. The supreme court affirmed the PCR's court determination that plea counsel's failure to request "a psychiatric evaluation was not outside the range of reasonable professional assistance." Id.

In Matthews, the supreme court did not specifically address trial counsel's deficiency. Seemingly, the court found petitioner's mental state so obvious that trial counsel would have had to be deficient not to notice. Unlike Matthews, in which a psychiatrist testified defendant answered questions with nonsensical answers and that his mental capacity had been the same for a number of years, this case is more aligned with Jeter, as plea counsel testified that Lee's answers did not raise any suspicions. Even the psychiatrist testified Lee had a basic understanding of his charges and to some degree the criminal process.

In this case, under our standard of review, we are constrained to affirm the PCR court's decision.[2] Some evidence in the record supports the PCR court's findings. Although the PCR court found Lee did not present evidence of incompetence at the time of plea, the psychiatrist's testimony that Lee's mental status dated back to when he was in school and he had a documented history of mental retardation was sufficient to show a reasonable probability that he was incompetent at the time of the plea. However, Lee also had to demonstrate plea counsel's performance was deficient. Plea counsel could not be deficient if she had no indication of Lee's mental status.[3] Although

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[2] We do not know Lee's adaptive functioning and whether plea counsel should have recognized a cognitive issue from her conversations with him, as in Matthews. We encourage defense counsel to always inquire whether a defendant receives a Supplemental Security Income (SSI) check or a Social Security Administration (SSA) check as a threshold determination. While our holding is appropriate under our standard of review, a man with a questionable IQ and a history with mental health and mental retardation issues pled guilty on several occasions with multiple lawyers without the benefit of a Blair hearing.

[3] At oral argument, Lee argued plea counsel should have been alerted to his mental status due to a prior evaluation. The record contains no documentation of the evaluation. It does contain Lee's aunt's statement that an evaluation occurred, the psychologist's reference to it in his report and his testimony, and PCR counsel's questioning plea counsel if she was aware Lee was evaluated in 2002 regarding his capacity to stand trial in another case.

Lee's aunt testified she informed plea counsel of Lee's mental status, plea counsel testified she did not recall a conversation with her. Further, plea counsel testified Lee indicated he had no prior mental conditions and none of his answers led her to suspect otherwise. We are required to defer to the PCR court's findings of credibility, and the PCR court found plea counsel "extremely credible." Accordingly, the PCR court's order is

AFFIRMED.

FEW, C.J., and THOMAS, J., concur.

PCR counsel stated that the recommendation from the examination was to refer Lee to DDSN for further evaluation as to his competency. However, PCR counsel posited that evaluation did not occur "because [the solicitor's office] informed DDSN via letter that they were not going to pursue further evaluation through DDSN." Plea counsel responded that she did not know anything about the evaluation and what had occurred afterwards.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Robert Troy Taylor, Appellant.

Appeal from Williamsburg County
Judge George C. James, Circuit Court Judge

Opinion No. 4920
Heard March 10, 2011 – Filed December 21, 2011

AFFIRMED

Jeremy Adam Thompson, of Columbia, for Appellant.

Assistant Deputy Attorney General Salley W. Elliott, of Columbia, for Respondent.

LOCKEMY, J.: Robert Troy Taylor appeals his convictions and sentence of life without parole for criminal sexual conduct with a minor in the second degree and kidnapping. Taylor argues the trial court erred in (1) granting the State's Batson motion, (2) admitting evidence of Taylor's prior conviction for criminal sexual conduct with a minor, (3) denying his motion

for a directed verdict, and (4) sentencing him to life without parole. We affirm.

FACTS

Taylor was the pastor of the church Victim attended in Murrells Inlet, South Carolina. In November 1998, when Victim was 11, Taylor organized a camping trip with Victim and a group of six or seven boys from the church. Taylor took the boys to an area "just outside [the city of] Andrews" on Highway 521 and the group hiked about a mile into the woods to a campsite "right next to the Black River." Taylor and the boys set up a tent and a large tarp, made a fire, and cooked food. At approximately 11 p.m., the boys retired to their sleeping bags under the tarp. Later that night, Taylor woke Victim, placed his hand over Victim's mouth, and carried him to the tent. Once inside the tent, Taylor removed Victim's clothes and forced Victim to touch his penis and anus. Taylor also touched Victim's penis and anus. Next, Taylor raped Victim. After raping Victim, Taylor instructed Victim not to reveal the rape to anyone and returned Victim to his sleeping bag. Taylor slept next to Victim and held him throughout the course of the night.

In August 1999, Taylor and a few other adults from the church organized a trip to the beach. After leaving the beach, the group returned to the church to use the showers. Once all the showers were occupied, Taylor asked Victim and another boy if they would like to use the showers at his house. Victim and the other boy accompanied Taylor to his home near the church. While Victim was showering, Taylor entered the bathroom, removed his clothes, and entered the shower. Taylor forced Victim to touch his penis and Taylor touched Victim's penis and anus. Next, Taylor raped Victim. After raping Victim, Taylor instructed Victim not to divulge the rape to anyone. Taylor drove Victim and the other boy back to the church.

Approximately five years after the 1999 rape, Victim, then 17, told his parents about the two rapes. Taylor was indicted for second degree criminal sexual conduct with a minor in Georgetown County for the 1999 rape. Taylor pled guilty and was sentenced to eight years' imprisonment suspended upon the service of five years and three years' probation. In May 2006, Taylor was indicted for second degree criminal sexual conduct with a minor

and kidnapping for the 1998 rape. The State served Taylor with notice of its intent to seek a sentence of life without parole pursuant to section 17-25-45 of the South Carolina Code (Supp. 2010). Taylor was convicted on both counts and the trial court sentenced him to life without parole. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.

LAW/ANALYSIS

I. Batson

Taylor argues the trial court's finding that his strike of Juror 146 was racially motivated is clearly erroneous. We disagree.

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the State from striking a venire[]person on the basis of race." State v. Hicks, 330 S.C. 207, 211, 499 S.E.2d 209, 211 (1998) (citing Batson v. Kentucky, 476 U.S. 79 (1986)). The trial court must hold a Batson hearing when members of a cognizable racial group are struck and the opposing party requests a hearing. State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999). First, the proponent of the strike must present a race or gender neutral explanation for the challenged strike. Id. In response the opponent of the strike must show the race or gender neutral explanation given by the proponent was mere pretext. Id. at 629, 515 S.E.2d at 91. Pretext is generally established by showing similarly situated members of another race or gender who were seated on the jury. Id.

"Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and

credibility. Id. at 509, 682 S.E.2d at 823. "Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an 'evaluation of the [attorney's] mind lies peculiarly within a trial [court's] province.'" Id. (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991)). This court will give the trial court's finding great deference on appeal and review the trial court's ruling with a clearly erroneous standard. Edwards, 384 S.C. at 509, 682 S.E.2d at 822.

Here, the State moved to quash the jury after Taylor used ten strikes to strike white jurors. In regard to Juror 146, Taylor noted Juror 146 was an administrative assistant and offered the following explanation:

> I have found over the years that the more education jurors have the less likely they are to adopt argument—they usually come with their own idea or agenda. Over the years, I[have] learned to shy away from jurors with higher education. And, in addition to that, I also know her husband personally and we just do [not] get along.[1]

In response, the State pointed to Juror 138, an accountant, as a similarly situated African-American juror with equal or more education than Juror 146. The trial court inquired regarding Taylor's reasoning for concluding Juror 146 had a high level of education. Taylor responded: "Well, she [is] an [a]dministrative [a]ssistant. Inasmuch as she would be in management that she would have got there by promotion or her qualification[s]. Certainly she would have met the qualification to be in management. But she is in management."

Before ruling on the State's Batson motion, the trial court allowed Taylor to revisit his explanation for striking Juror 146. Taylor explained that

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[1] Taylor has not argued on appeal that defense counsel's poor personal relationship with Juror 146's husband was a proper race neutral explanation for the strike. Accordingly, we are precluded from addressing the issue. See State v. Carriker, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (finding issue unpreserved because it was not raised by the appellant).

in striking Juror 146 based upon her education level, in essence, he was striking her based upon her position in management. According to Taylor, jurors with management level employment "come with an agenda" and are "constantly manifesting their discretion as it relates to how you handle people." Ultimately, the trial court found Taylor offered a race neutral explanation for the other nine strikes he used. However, the trial court found Taylor's strike of Juror 146 violated Batson because he accepted Juror 138 with more formal education and a higher level employment position. A jury was re-struck and Juror 146 was seated on the jury.

We are concerned with the potential for prejudice with Juror 146 seated on the re-struck jury. However, based on our standard of review, we are unable to find anything clearly erroneous in the trial court's determination Taylor failed to offer a race neutral explanation for striking Juror 146. Taylor explained he struck Juror 146 based on her education and/or employment level. However, Taylor seated Juror 138, an African-American, with a similar education and/or employment level. Although employment is a race neutral reason for striking a juror, the State demonstrated Taylor's explanation was mere pretext by pointing to a similarly situated African-American juror whom Taylor seated. See State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) (noting "it is legitimate to strike potential jurors because of their employment"). Considering the record as a whole, we see nothing clearly erroneous in the trial court's determination and defer to the trial court's finding of purposeful discrimination.

II. Rules 403 and 404(b), SCRE

Taylor contends the trial court erred in allowing the admission of Victim's testimony regarding the 1999 rape as evidence of a common scheme or plan because they are not sufficiently similar. Assuming the 1999 rape is evidence of a common scheme or plan, Taylor maintains its probative value was substantially outweighed by the danger of unfair prejudice. We disagree.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs

when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

South Carolina Rule of Evidence 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, evidence of other crimes, wrongs or acts may be "admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. Evidence of other crimes, wrongs, or acts is admissible to show a common scheme or plan when a "close degree of similarity [exists] between the crime charged and the prior bad act." State v. Gaines, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008). Thus, the trial court must examine "the similarities and dissimilarities between the crime charged and the bad act evidence"; if the "similarities outweigh the dissimilarities, the bad act evidence is admissible" as evidence of a common scheme or plan. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009). "A close degree of similarity establishes the required connection between the two acts and no further 'connection' must be shown for admissibility." Id. at 434, 683 S.E.2d at 278. In sexual abuse cases, the trial court should consider all relevant factors in determining the degree of similarity, including "(1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery." Id. at 433-34, 683 S.E.2d at 278.

Here, the trial court weighed the similarities between the two crimes and determined they fell within the common scheme or plan exception under Rule 404(b), SCRE. In making this determination, the trial court relied on State v. Edwards for the proposition that "[t]he common scheme or plan exception is commonly applied in cases of sexual assault where conduct both before and after the acts charged is held admissible to show 'continued illicit intercourse between the same parties.'" 373 S.C. 230, 235, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Mathis, 359 S.C. 450, 463, 597 S.E.2d 872, 879 (Ct. App. 2004)). In our view, the concept of continued illicit intercourse between the same parties in sexual abuse cases is another way of stating the common scheme or plan exception to Rule 404(b). See State v. Clasby, 385 S.C. 148, 159, 682 S.E.2d 892, 898 (2009) (concluding evidence

of the defendant's continued illicit sexual abuse "prior to the indicted offenses constitutes the archetypal 'common scheme or plan' evidence"); State v. Tutton, 354 S.C. 319, 328, 580 S.E.2d 186, 191 (Ct. App. 2003) ("Where there is a pattern of continuous misconduct, as commonly found in sex crimes, that pattern supplies the necessary connection to support the existence of a plan. Presumably, this is so because the same evidence that establishes the continuous nature of the assaults will generally suffice to prove the existence of the common scheme or plan as well."). Therefore, we proceed with the analysis used in Wallace.

Turning to the Wallace factors, the 1998 and 1999 rapes occurred nine months apart when Victim was 11 to 12 years old. Taylor was the Victim's pastor. While the physical locations where the rapes occurred are not identical, both rapes occurred in connection with church organized outings. After both rapes Taylor threatened Victim to prevent him from revealing the rapes. Finally, the type of sexual battery in 1998 is identical to the sexual battery in 1999. In sum, with the exception of the physical location of the rapes, all the Wallace factors are highly similar. The similarities between the 1998 rape and the 1999 rape outweigh the dissimilarities, and we conclude a very close degree of similarity exists between the rapes. Accordingly, Taylor's argument is without merit.

Even if evidence of "other crimes, wrongs, or acts" is admissible as evidence of a common scheme or plan, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Clasby, 385 S.C. at 155-56, 682 S.E.2d at 896; Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). We are cognizant of the prejudicial effect of admitting evidence of other crimes, wrongs, or acts based upon the degree of similarity with the charged crime. See Wallace, 384 S.C. at 436, 683 S.E.2d at 279 (noting "the mere presence of similarity only serves to enhance the potential for prejudice") (Pleicones, J. dissenting). However, here, both rapes were committed in an identical manner under almost identical circumstances on the same victim. Therefore, we conclude the trial court properly found the probative value of the 1999 rape substantially

outweighed the danger of unfair prejudice to Taylor. See State v. Mathis, 359 S.C. 450, 464, 597 S.E.2d 872, 879-80 (Ct. App. 2004) (finding the probative value of evidence of earlier assaults on the victim substantially outweighed the danger of unfair prejudice where all the earlier assaults were attempted in the same manner and under similar circumstances).

III. Venue

Taylor argues the trial court erred in denying his motion for a directed verdict because the State failed to prove the 1998 rape occurred in Williamsburg County. We disagree.

Generally, a criminal defendant "has a right to be tried in the county in which the offense is alleged to have been committed." State v. Brisbon, 323 S.C. 324, 327, 474 S.E.2d 433, 435 (1996). Thus, a defendant "is entitled to a directed verdict when the State fails to present evidence that the offense was committed in the county alleged in the indictment." State v. Williams, 321 S.C. 327, 333, 468 S.E.2d 626, 630 (1996). However, this is a low evidentiary threshold. Brisbon, 323 S.C. at 328, 474 S.E.2d at 436. The State is not required to affirmatively prove venue, it is sufficient if evidence exists from which venue can be inferred. Id. at 327, 474 S.E.2d at 435. In the absence of conflicting evidence, even slight evidence of venue is sufficient. Id.

Here, Victim testified the campsite was "just outside of Andrews" on Highway 521, about a "mile in the woods," "right next to the Black River." Victim's mother also testified she was told the campsite was on the "other side of Andrews." Victim explained he first reported the rape to the Georgetown County authorities who were uncertain whether the campsite was in Georgetown County or Williamsburg County. The Georgetown County authorities referred Victim to Sergeant Laura Rogers, a victims advocate for the Williamsburg County Sheriff's Office. Rogers reviewed the statement Victim gave to the Georgetown County authorities and took additional oral and written statements from Victim. Rogers explained Victim's statements contained landmarks which she used to personally locate the campsite in Williamsburg County. We find the State presented sufficient

evidence to establish the 1998 rape occurred in Williamsburg County. Thus, the trial court properly denied Taylor's motion for a directed verdict.

IV. Life Without Parole

Taylor contends the trial court erred in sentencing him to life without parole (LWOP). Taylor argues the 1999 rape is inextricably connected to the 1998 rape because it was admitted as evidence of a common scheme or plan. Therefore, Taylor maintains the 1998 rape and the 1999 rape should be considered one offense pursuant to section 17-25-50 of the South Carolina Code (2003). However, we believe this issue is not preserved for our review.

At trial, Taylor moved to quash the State's notice of its intent to seek a sentence of life without parole. Taylor argued his conviction for the 1998 rape did not support a sentence of life without parole because it occurred prior to his predicate most serious offense, the 1999 rape.[2] The trial court denied Taylor's motion. After trial, Taylor filed a motion to reconsider. At the hearing on his motion to reconsider, one of Taylor's contentions was the 1998 and 1999 rapes were so closely connected in time that they should be treated as one offense pursuant to section 17-25-50 of the South Carolina Code (2003). In response, the State submitted the 1998 and 1999 rapes were not committed as part of a continuous course of conduct or crime spree. The

[2] In 1982, the Legislature passed section 17-25-45 of the South Carolina Code (1982), adding a provision that stated "a conviction shall be considered a second conviction only if the date of the commission of the second crime occurred subsequent to the imposition of the sentence for the first offense." Bryant v. State, 384 S.C. 525, 530, 683 S.E.2d 280, 282-83 (2009). In 1995, the Legislature amended section 17-25-45 to abandon the requirement that a second offense occur after the imposition of a sentence for the prior offense. Id. at 530-31, 683 S.E.2d at 283. In 2006, the Legislature again amended section 17-25-45(F) to clarify that the sentence for the predicate most serious offense does not have to be served before a sentence of life without parole can be imposed for a subsequent offense. Id. at 531, 683 S.E.2d at 283. Here, Taylor makes his argument under the 1982 statute. Since the incident here occurred in 1998, the 1982 statute is not relevant, and the 1995 amended statute is applicable.

trial court inquired whether its ruling admitting evidence of the 1999 rape as evidence of a common scheme or plan required it to also find the 1998 and 1999 rapes were one continuous event pursuant to section 17-25-50. The State maintained the rapes were not so closely connected in time that they should be considered one offense. Taylor then reiterated his argument a LWOP sentence was improper in his case because the predicate most serious offense occurred after the 1998 rape. The trial court denied Taylor's motion to reconsider. In its order the trial court noted Taylor argued his LWOP sentence was improper because evidence of the 1999 rape was admitted as evidence of a common scheme or plan.[3] The trial court found no authority existed supporting the proposition and denied the motion.

We find the issue of whether the crimes should have been considered one serious offense due to their close temporal proximity and inextricable connection is unpreserved because our review of the record reveals Taylor never raised it during trial. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue must be "raised to and ruled upon by the trial judge to be preserved for appellate review") (emphasis added); State v. Carriker, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (finding issue unpreserved because it was not raised by the appellant). Taylor appears to approach the issue at the post-trial motion hearing.[4] Even so, this is insufficient to preserve the issue for our review because it was not raised at trial. See Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a post-trial motion is not preserved for appellate review); see also Wilder, 330 S.C. at 77, 497 S.E.2d at 734 (holding post-trial motions are not necessary to preserve issues that have already been ruled on; they are used to preserve those that have been raised to the trial

[3] After a review of the record, it appears only the trial court raised the issue of whether a finding of a common scheme or plan under Lyle would require a finding that the 1998 and 1999 rapes were one continuous event for purposes of sentencing.

[4] Taylor contends, in a persuasive argument, that the definition of "inextricably connected" and "continuous course of conduct," as applied to these facts, entitles him to lenity or other relief in the application of section 17-25-50. However, he did not raise this issue at trial; thus, we are bound by the laws of preservation.

court but not yet ruled on by it). The balance of the argument on the issue at the post-trial motion hearing was raised by the trial court, which is also insufficient to preserve the issue for our review. Duncan v. Hampton Cnty School Dist. No. 2, 335 S.C. 535, 545, 517 S.E.2d 449, 454 (Ct. App. 1999) (finding issue unpreserved where it was raised sua sponte by the trial court and not by the respondent). Furthermore, on appeal, Taylor argues "[t]he [trial court] improperly sentenced [Taylor] to life without parole because the substantive facts of the predicate offense were admitted as common scheme or plan evidence." However, at trial and during argument on his motion to reconsider, Taylor repeatedly maintained the trial court erred in sentencing him to life without parole because the predicate most serious offense, the 1999 rape, occurred after the 1998 rape. Taylor cannot argue one ground for error at trial and a different ground for error on appeal. See State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003). Accordingly, this issue is not preserved for our review.

CONCLUSION

For the foregoing reasons, Taylor's convictions and sentence of life without parole are

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Christopher Price, Claimant,

v.

Peachtree Electrical Services, Inc., Employer, and Builders Mutual Insurance Company, Carrier, Respondents,

v.

Bob Wire Electric, Inc., self-insured Employer, through South Carolina Home Builders Association SIF, Appellants.

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

Opinion No. 4923
Heard October 5, 2011 – Filed December 21, 2011

VACATED

Kirsten Leslie Barr, of Mount Pleasant, for Appellants.

Richard C. Detwiler, of Columbia, for Respondents.

KONDUROS, J.: Christopher Price was injured while working for Peachtree Electrical Services (Peachtree) in December 2002. In 2003, while in the employment of Bob Wire Electrical (Bob Wire), Price was injured again. Bob Wire and the South Carolina Home Builders Self Insurers' Fund (collectively Appellants) appeal the circuit court's order affirming the decision of the Appellate Panel of the Workers' Compensation Commission (the Commission) requiring Bob Wire to reimburse Peachtree for benefits Peachtree paid to Price after the 2003 injury. We vacate the single commissioner's, the Appellate Panel's, and the circuit court's orders.

FACTS

Price injured his back in an accident arising out of and in the course and scope of his employment with Peachtree on December 9, 2002, while working at a restaurant owned by the Divine Dining Group, Inc. Peachtree and its carrier admitted liability for the injury, voluntarily paid temporary total disability compensation, and authorized medical treatment including a surgery performed by Dr. William L. Mills of Coastal Orthopaedic Associates. Price was released to full-duty work at maximum medical improvement on August 8, 2003, with a ten percent impairment rating to the whole body and thirteen percent to the spine. Price did not return to work for Peachtree but went to work part-time for Bob Wire and suffered another injury in November 2003.[1] Price did not return to work at Bob Wire and never filed a claim against Bob Wire. Instead, he returned to Dr. Mills and complained of worsening and continuing back pain stemming from the 2002 accident. Peachtree again provided benefits to Price, paying him the same

[1] According to Price's testimony, his supervisor at the time was working on the other side of the wall where they were pulling and installing electrical cables. Price fell to the ground and moaned in pain, and his supervisor checked on him.

temporary total benefits as in 2002, and authorized medical treatment, which included an additional surgery.

In May 2004, Price filed a negligence claim against Divine Dining for his injuries arising out of the 2002 accident. The complaint sought past and future medical bills, past and future physical pain and suffering, past and future lost wages, past and future mental pain and suffering, and permanent disability. In February 2005, Price filed a Form 50 seeking total disability stemming from his back injury, which the form indicated was caused by the 2002 accident. Price was given a twenty percent impairment rating after the second accident. In April 2005, Peachtree added Bob Wire as a party to the workers' compensation action. Peachtree's attorney indicated Bob Wire was added as soon as Peachtree discovered, by reading Price's deposition testimony in the negligence action, a second injury had occurred.

Price settled his negligence claim against Divine Dining for $540,000 in April 2006. In June 2006, Peachtree entered into a clincher agreement with Price for $50,000, whereby Peachtree released its liens against the proceeds of the negligence action and Price released Peachtree from all further liability. Each covenanted not to waive any claims either of them may have against Bob Wire. Bob Wire was not informed of the clincher agreement.

The single commissioner determined no evidence demonstrated Bob Wire ever knew of a second accident and no evidence showed the injury in 2003 was not just a continuation of the injury Price had already suffered. On appeal, the Appellate Panel reversed the single commissioner, finding Price had suffered a second accident in 2003 and holding Bob Wire responsible for reimbursing Peachtree for benefits Peachtree paid to Price as a result of the second accident. The matter was remanded to the single commissioner to determine "the average weekly wage and benefits, etc., and apportionment of benefits paid and/or to be paid in a manner consistent with the findings set forth herein." Bob Wire attempted to appeal from this order, but the appeal was dismissed as untimely.

On remand to the single commissioner, Peachtree submitted evidence regarding the compensation and medical treatment it had provided to Price.

Bob Wire argued Peachtree had waived its right to seek reimbursement for these costs from Bob Wire by entering into the clincher agreement with Price regarding the 2002 injury. The single commissioner was unpersuaded and ordered that Bob Wire reimburse Peachtree for all causally-related medical treatment and temporary total disability compensation provided to Price by Peachtree after November 3, 2003, in the amount of $112,789.42 and $47,023.88 respectively. The Appellate Panel and circuit court affirmed the single commissioner's order. This appeal followed.

LAW/ANALYSIS

Bob Wire contends the Commission lacks subject matter jurisdiction[2] to deal with Peachtree's equitable claim for reimbursement because the Commission's authority is derived strictly from statute in derogation of the common law. We agree.

As a threshold matter, Peachtree contends the findings in the Appellate Panel's first order of May 2007 (First Order) constitute the law of the case because the appeal from that order was dismissed as untimely. We disagree.

Peachtree is correct in asserting that, in effect, no immediate appeal was taken from the First Order because Bob Wire's appeal was late.[3] However, we disagree that Bob Wire was required to immediately appeal the First Order to prevent its findings from becoming the law of the case. An intermediate order may be appealed if it involves the merits of the case as described in section 14-3-330(1).[4] Section 14-3-330 merely allows the

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[2] Subject matter jurisdiction refers to "the authority of a court to entertain a particular action." Cribb v. Spatholt, 382 S.C. 475, 481, 676 S.E.2d 706, 709-10 (Ct. App. 2009).

[3] Bob Wire filed its appeal of the First Order outside the thirty-day time limit set forth in section 42-17-60 of the South Carolina Code (Supp. 2006).

[4] Appeals from the Commission are governed by section 42-17-60 of the South Carolina Code (Supp. 2010). See Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 265, 266, 692 S.E.2d 894, 894 (2010) (holding if a more specialized statute concerning appealability

aggrieved party to appeal an intermediate order involving the merits; it does not require an appeal at that time. The aggrieved party may wait until a final judgment is rendered and then appeal. See Lancaster v. Fielder, 305 S.C. 418, 421, 409 S.E.2d 375, 377 (1991) ("[I]f there is a final judgment, and the party timely files his notice of intent to appeal from that judgment, under section 14-3-330(1) this [c]ourt can review any intermediate order or decree necessarily affecting the judgment not before appealed from.").

Accordingly, Bob Wire was not required to appeal the First Order immediately following its issuance to avoid the findings therein becoming the law of the case.[5] Instead, Bob Wire, as it was permitted to do, appealed the final judgment of the single commissioner on remand. Bob Wire continued to raise the jurisdictional question on subsequent appeals to the Appellate Panel, the circuit court, and this court. Therefore, the findings of the First Order regarding subject matter jurisdiction did not constitute the law of the case, and the issue is properly preserved for our consideration in this appeal.

Turning our attention to that issue, our jurisprudence has long recognized the power of the Commission is derived strictly from statute.

> The right to workmen's compensation is wholly statutory, not existing except under the circumstances provided in the Workmen's Compensation Acts. It is not a common law right for the reason that the Acts

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exists, it is controlling); see also Allison v. W.L. Gore & Assocs., 394 S.C. 185, ___, 714 S.E.2d 547, 549 (2011) (discussing appealability of workers' compensation claim as governed by section 42-17-60). At the time of this case, section 42-17-60 of the South Carolina Code provided that workers' compensation appeals were to be taken in the same manner as other appeals. See S.C. Code Ann. § 42-17-60 (Supp. 2006) (stating a party could appeal "under the same terms and conditions as govern appeals in ordinary civil actions"). Thus, the general appealability statute at section 14-3-330 of the South Carolina Code (1977 & Supp. 2010) is controlling.

[5] We decline to address whether the First Order constituted an appealable interlocutory order as such a determination is not necessary to the disposition of this issue.

> are in derogation of, or departures from, the common law, and are not amendatory, cumulative or supplemental thereto, nor declaratory thereof, but wholly substitutional in character . . . .

Marchbanks v. Duke Power Co., 190 S.C. 336, 363, 2 S.E.2d 825, 836 (1939) (internal quotation marks and citations omitted). Therefore, the Commission's jurisdiction and authority is circumscribed by the Workers' Compensation Act (the Act).

Peachtree argues unless an express provision prohibits an action, the Commission can deal with any issue arising under the Act. See S.C. Code Ann. § 42-3-180 (1985) ("All questions arising under this Title, if not settled by agreement of the parties interested therein with the approval of the Commission, shall be determined by the Commission, except as otherwise provided in this Title."); see also James v. Anne's, Inc., 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010) (finding the Commission had authority to prorate a lump sum award because nothing in the Act prohibited, either expressly or impliedly, the proration language at issue). However, only disputes ancillary to an employee's right to compensation arise under the Act. See Labouseur v. Harleysville Mut. Ins., Co., 302 S.C. 540, 544, 397 S.E.2d 526, 529 (1990) (discussing the Commission's purview to determine policy cancellation and stating "[w]hen the employee's rights are not involved, an employer/insured must present all such issues to the circuit court"); see also Roper Hosp. v. Clemons, 326 S.C. 534, 539, 484 S.E.2d 598, 600 (Ct. App. 1997) (holding a medical provider's common law claims for payment of employee's medical bills did not fall within the purview of the Act and claims would properly be litigated in circuit court). Claims not affecting the employee's right to compensation are within the purview of the circuit court, not of the Commission.

In this case, the claim presented is a common law, equitable claim for reimbursement made by Peachtree, an employer, against Bob Wire, another employer. The matter directly in contention does not affect Price's right to compensation. He has been completely compensated for the 2002 accident pursuant to the clincher agreement between himself and Peachtree, and any future benefits for which Bob Wire may be liable are a separate and distinct

matter from any benefits Peachtree may have paid previously. Therefore, the Commission lacked subject matter jurisdiction to determine Peachtree's right to reimbursement from Bob Wire, and that claim should have been dismissed.

Because our determination as to the jurisdiction of the Commission is dispositive of the case, we need not address Bob Wire's remaining issues. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address additional issues when one issue is dispositive). Because the Commission lacked subject matter jurisdiction to hear Peachtree's claim for reimbursement, the single commissioner's order, the Appellate Panel's order, and the circuit court's order are hereby

VACATED.

FEW, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Bradley Scott Senter, Appellant.

Appeal From Horry County
Michael G. Nettles, Circuit Court Judge

Opinion No. 4924
Heard November 17, 2011 – Filed December 21, 2011

AFFIRMED

Appellate Defender Dayne C. Phillips, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Christina Catoe, all of Columbia; and John Gregory Hembree, of Conway, for Respondent.

LOCKEMY, J.: Bradley Senter appeals his convictions of assault and battery with intent to kill (ABWIK) and criminal domestic violence of a high and aggravated nature (CDVHAN). Senter argues the trial court erred in (1) denying his directed verdict and new trial motions and (2) denying his request to waive his right to a jury trial. We affirm.

FACTS/PROCEDURAL BACKGROUND

On November 13, 2006, Senter shot his estranged wife, Dena Senter Lester (the Victim), inside his home.[1] The Victim escaped and, after unsuccessfully trying to alert a neighbor, collapsed in the front yard. According to the Victim, Senter grabbed her by the arms, dragged her to a secluded area in the yard, and told her, "Oh no, you're not going to be out here where somebody will find you." The Victim then used the panic button on her car remote to set off her car alarm. When Senter left the Victim to shut off the alarm, she again ran to a neighbor's house for help. After receiving no answer, the Victim returned to the spot where Senter moved her and "played dead." Senter returned to the Victim and, after inspecting her wound, went inside the house. The Victim then ran toward the sound of a tractor on an adjacent golf course. Joseph Estock, the tractor driver, called 911 while the Victim hid behind the tractor. While Estock was on the phone with 911, Senter appeared on the golf course. According to Estock, Senter told him to "hang up the phone now, turn around, and start walking. You don't know what she did to me." After Estock left, Senter stood over the Victim and mocked her religious beliefs and threatened to shoot her and himself before walking away. Thereafter, police arrived and Senter was taken into custody. The Victim was airlifted to the hospital where she was treated for a collapsed lung and broken ribs, and underwent surgery to remove the bullet from her liver.

On January 25, 2007, Senter was indicted by the Horry County Grand Jury for ABWIK and CDVHAN. After denying Senter's request to waive his

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[1] Senter asked the Victim to come to his home the morning of November 13, 2006, to pick up signed divorce papers and give him a haircut.

right to a jury trial, the trial court found Senter was competent to stand trial.[2] At trial, Senter did not deny he shot the Victim; however, defense counsel argued Senter suffered from a mental illness and didn't understand or have control over his conduct. The Victim, in addition to Senter's mother and sister, testified Senter believed his family members were conspiring with the FBI to have charges brought against him. Additionally, two doctors diagnosed Senter with delusional disorder and determined he had a fixed, false belief that the FBI was trying to destroy his life. Senter was voluntarily hospitalized to treat his mental illness three times between January and March 2005.

At the close of the State's case, defense counsel moved for a directed verdict as to both the ABWIK and CDVHAN charges. Defense counsel argued there was no evidence Senter intended to kill the victim. The trial court denied the motion, finding a specific intent to kill was not an element of ABWIK. Following the presentation of its case, the defense renewed its motion for a directed verdict and again argued there was no evidence Senter intended to kill the victim. Additionally, defense counsel asked the trial court to direct a verdict of not guilty by reason of insanity. The trial court took the motion under advisement. Following testimony from the State's reply witnesses, the trial court denied Senter's motion for a directed verdict.

On June 5, 2008, the jury found Senter guilty of ABWIK and CDVHAN. On June 20, 2008, the trial court denied Senter's post-trial motion for a new trial. The trial court found there was "no question that [Senter] was mentally ill;" however, the court stated it was not in a position to substitute its judgment for that of the jury. The trial court noted a reasonable jury could conclude Senter was sane and capable of "conform[ing] his conduct to the law." Thereafter, the trial court sentenced Senter to twenty years' imprisonment.[3] This appeal followed.

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[2] Defense counsel informed the trial court Senter was found competent to stand trial by the Department of Mental Health, and stated the defense had "no reason to believe" Senter was not competent to stand trial.

[3] This sentence consisted of ten years on the CDVHAN conviction and ten years consecutive on the ABWIK conviction.

ISSUES ON APPEAL

1. Did the trial court err in denying Senter's directed verdict and new trial motions?

2. Did the trial court err in denying Senter's request to waive his right to a jury trial?

STANDARD OF REVIEW

In criminal cases, appellate courts review errors of law only and are bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

LAW/ANALYSIS

I. Directed Verdict and New Trial Motions

Senter argues the trial court erred in denying his directed verdict and new trial motions because there was no substantial evidence of sanity. We disagree.

When reviewing the denial of a motion for a directed verdict, an appellate court must review the evidence, and all inferences therefrom, in the light most favorable to the State. State v. Strickland, 389 S.C. 210, 214, 697 S.E.2d 681, 683 (Ct. App. 2010). "If there is any evidence, direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced, the appellate court must find the case was properly submitted to the jury." Id. "The decision whether to grant a new trial rests within the sound discretion of the trial court, and [the appellate court] will not disturb the trial court's decision absent an abuse of discretion." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009).

A defendant is insane if, "at the time of the commission of the act constituting the offense, [he], as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or

to recognize the particular act charged as morally or legally wrong." S.C. Code Ann. § 17-24-10(A) (2003). "[T]he key to insanity is 'the power of the defendant to distinguish right from wrong in the act itself – to recognize the act complained of is either morally or legally wrong'." State v. Lewis, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997) (quoting State v. Wilson, 306 S.C. 498, 506, 413 S.E.2d 19, 23 (1992)). "A criminal defendant is presumed to be sane; the State does not have to prove sanity." State v. Smith, 298 S.C. 205, 208, 379 S.E.2d 287, 288 (1989). "However, when a defendant offers evidence of insanity, the State no longer enjoys the presumption, but must present evidence to the jury from which the jury could find the defendant sane." Id. "Even though a defendant presents expert testimony, the State is not required to also produce expert testimony; lay testimony may be sufficient." Id.

At trial, Senter presented evidence of his insanity. Lisa Cleary, Senter's sister, testified Senter told her the "FBI was corrupt" and had "orchestrated his whole life and that they were the reason for his failures." According to Cleary, Senter also told her that her sixteen-year-old daughter was involved with the FBI. Cleary further testified she took Senter to two mental health facilities for evaluation, brought him to Duke University for medical testing, and paid for counseling.

Dr. Marla Domino, a court appointed psychologist with the South Carolina Department of Mental Health, testified Senter suffered from delusional disorder. She found Senter's mental illness manifested in a false, fixed belief that "the FBI was out to get him" and that the FBI had fabricated his wife's shooting to "destroy his life." Dr. Domino further testified that "because of his delusional disorder," Senter "did not know right from wrong at the time of the incident," and therefore, he was not criminally responsible for the shooting.

Cathy Battle, a professional counselor, testified she referred Senter to another counselor with a psychiatric background and recommended he enter an inpatient facility after he discussed his recurring suspicions and fears about the FBI during their session.

Dr. Rikki Halavonich, director of the psychiatry department at the Medical University of South Carolina, diagnosed Senter with delusional disorder, persecutory type and opined that Senter's mental illness "affected his thinking on that day as well as for at least a couple of years prior to that to the point that he did not appreciate moral and/or legal right from moral and/or legal wrong." Dr. Halavonich also testified that, in her opinion, Senter was not criminally responsible for the shooting.

To prove Senter's sanity, the State relied on testimony from several witnesses. Susan Vonspreckelsen, the Victim's neighbor, testified Senter came to her home the morning of the shooting looking for the Victim. According to Vonspreckelsen, when she told Senter the Victim was not there he asked to come inside and look around. She said Senter "seemed calm" and "a little intense, but no different than usual." In addition, Estock, the golf course tractor driver, testified Senter had a serious look on his face but he "wasn't really agitated" when he approached him on the golf course. Estock testified Senter told him in a "calm voice" to hang up the phone and walk away.

We find Senter's contention that the State failed to present evidence of his sanity is without merit. In addition to the testimony of the above-listed witnesses as to Senter's mental state on the day of the shooting, other evidence tended to establish Senter planned to harm the Victim and knew his conduct was wrong. For example, in the months leading up to the shooting, Senter endorsed all of the property settlement checks he received from the Victim with the statement: "Will be paid regardless of any medical, arrest, or any other event." Senter also refused to meet the Victim in a public place to exchange divorce papers, and insisted she come to his home. In addition, Senter moved the Victim from public view after she collapsed in his front yard, retrieved the spent shell casing after the shooting, and disabled the car alarm. We believe the jury could have determined these actions indicated Senter planned to shoot the Victim and knew his actions were wrong. Thus, we find the evidence of Senter's sanity was sufficient to create an issue for the jury. The weight to be accorded this evidence and the conclusion to be drawn from this evidence was for the jury to decide. For these reasons, we find the trial court properly submitted the case to the jury.

II. Jury Trial Waiver

Senter argues the trial court erred in denying his request to waive his right to a jury trial. This argument is not preserved for our review.

First, we note "there is no federally recognized right to a criminal trial before a judge sitting alone." Singer v. U.S., 380 U.S. 24, 34, 85 S. Ct. 783, 790 (1965). "A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury." Id. at 36, 85 S. Ct. at 790. There is "no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury – the very thing that the Constitution guarantees him." Id.

After jury selection, but prior to the commencement of trial, Senter waived his right to a jury trial. The State objected to Senter's waiver, arguing he did not have the State's consent pursuant to Rule 14(b), SCRCrimP.[4] Defense counsel argued Rule 14(b), SCRCrimP, was unconstitutional and deprived Senter of his right to waive a jury trial. The trial court denied Senter's request to waive his right to a jury trial.

On appeal, Senter argues the trial court's ruling violated his rights to due process and the effective presentation of a defense. Specifically, Senter maintains the "expert testimony and psychiatric theory" presented at trial "were too difficult for a lay jury to deal with fairly." Senter argues he has the right to present a defense that can be comprehended, understood, and fairly considered. Because Senter failed to raise this argument to the trial court, it is not preserved for our review. See State v. Carmack, 388 S.C. 190, 200, 694 S.E.2d 224, 229 (Ct. App. 2010) (holding arguments must be raised to and ruled upon by the trial court to be preserved for appellate review). Senter also argues the trial court erred in failing to find Rule 14(b), SCRCrimP, was unconstitutional. Senter failed to cite any authority to support this argument. Accordingly, we find it is abandoned. See State v. Jones, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) (holding

[4] Pursuant to Rule 14(b), SCRCrimP, "[a] defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge."

"short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review").

CONCLUSION

For the foregoing reasons, the decision of the trial court is hereby

AFFIRMED.

HUFF and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Latane S. Sanders, Appellant/Respondent,

v.

Roy Sanders, Respondent/Appellant.

Appeal From Greenville County
Billy A. Tunstall, Jr., Family Court Judge

Opinion No. 4925
Heard October 4, 2011 – Filed December 21, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Joseph M. Ramseur, Jr., of Greenville, for Appellant/Respondent.

Kimberly F. Dunham, of Greenville, for Respondent/Appellant.

WILLIAMS, J.: On appeal, Latane Sanders (Wife) contests the family court's decision to treat her AG Edwards account (AG account) as marital property. Alternatively, Wife argues the family court erred by dividing the marital estate equally. On cross-appeal, Roy Sanders (Husband) claims the family court erred in determining the date for valuation of the marital assets, valuing and awarding the marital home, and classifying certain items as nonmarital assets. We affirm in part, reverse in part, and remand.

FACTS

Husband and Wife were married on August 9, 1973, and no children were born of the marriage. On the date of the final hearing, Husband was fifty-eight years old and Wife was fifty-seven years old. After thirty-five years of marriage, Wife discovered Husband engaged in an adulterous affair and filed a complaint, seeking among other things, alimony, equitable division of marital assets and debts, and attorney's fees and costs. Husband did not file a responsive pleading.

At the final hearing on March 31, 2009, the family court heard testimony from the parties and their witnesses. It also received into evidence numerous financial documents pertaining to the parties' income and inheritance, as well as evidence regarding the assets and debts of the marital estate.

In its final order, the family court granted Wife a divorce on the statutory grounds of adultery. Despite having liquidated the account six months prior to filing for divorce, the family court found Wife's AG account, which contained $96,000, was a marital asset and included this amount in the marital estate. The family court relied upon Wife's expert witness in valuing the marital residence and granted Wife ownership of the residence while requiring her to pay Husband his share of the value of their home. In addition, the family court valued Wife's three different retirement accounts as of the date of the final hearing based on "passive market depreciation" since the date of filing. The family court also found that items identified as Wife's

nonmarital personal property on the Schedule A list were properly established as nonmarital assets.

Both parties filed Rule 59(e), SCRCP, motions. In an order dated July 24, 2009, the family court denied both parties' motions to reconsider. This cross-appeal followed.

STANDARD OF REVIEW

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

LAW/ANALYSIS

I. Wife's Appeal

A. AG Edwards Account

Wife asserts the family court erred in finding her AG account to be a marital asset. We disagree.

Section 20-3-630 of the South Carolina Code (Supp. 2010) defines marital property as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held . . . ." However, "property acquired by either party by inheritance, devise, bequest, or gift from a party other than the spouse" is exempted as marital property under section 20-3-630. S.C. Code Ann. § 20-3-630(A)(1) (Supp. 2010).

The nonmarital character of inherited property may be lost if "the property becomes so comingled as to be untraceable; is utilized by the parties in support of the marriage; or is titled jointly or otherwise utilized in such manner as to evidence an intent by the parties to make it marital property." Hussey v. Hussey, 280 S.C. 418, 423, 312 S.E.2d 267, 270-71 (Ct. App. 1984). The phrase "so comingled as to be untraceable" is important because the mere comingling of funds does not automatically make them marital funds. Wannamaker v. Wannamaker, 305 S.C. 36, 40, 406 S.E.2d 180, 182 (Ct. App. 1991).

At trial, Wife presented evidence that she inherited at least $196,000 from her mother, father, and sister. In addition, the record reveals several different instances in which Wife would deposit an inheritance check into the parties' joint checking account with Bank of America (joint account), only to transfer the exact sum a few days later into her AG account. Based on this information alone, we agree with Wife that the act of depositing an inheritance into the parties' joint account does not automatically render the inherited funds to be marital property. See Miller v. Miller, 293 S.C. 69, 71, 358 S.E.2d 710, 711 (1987) ("An unearned asset that is derived directly from nonmarital property also remains separate unless transmuted, as does property acquired in exchange for nonmarital property.").

Here, however, the evidence shows the funds from the AG account were often used by Wife in support of the marriage, evincing her intent to make it marital property. See Johnson v. Johnson, 296 S.C. 289, 295, 372 S.E.2d 107, 110 (Ct. App. 1988) ("As a general rule, transmutation is a matter of intent to be gleaned from the facts of each case."). When questioned at trial, Wife conceded funds were used from the AG account to improve the marital residence, purchase furniture, cover medical expenses, go on vacation, and to pay for household expenses. Moreover, Wife admitted on cross-examination that money readily moved back and forth from Husband's business account into the joint account and from the AG account into the joint account to pay for marital expenses. Wife's concession was corroborated by the testimony of Husband's expert witness, Wyatt Henderson

(Henderson), who informed the family court he was able to trace transactions in which money was moved from Husband's business account to the joint checking account and then the same day transferred into the AG account. In addition, Henderson could only trace $81,000 of the total amount Wife claimed to have inherited, rendering the remaining funds "so comingled as to be untraceable." See Wannamaker, 305 S.C. at 40, 406 S.E.2d at 182. Based on this evidence, the family court found "Wife's AG Edwards account was commingled with marital funds to the extent the inherited and gifted funds can no longer be traced and identified." We agree with the family court that Husband proved assets from the inheritance were transmuted into marital property. Husband demonstrated Wife commingled the inheritance funds with funds from the parties' marital account and used funds from the account to support the marriage. See Wannamaker, 305 S.C. at 39, 406 S.E.2d at 182 (holding that to show transmutation, the spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties regarded the property as the common property of the marriage). Moreover, during oral argument, counsel for Wife conceded that the record is unclear as to the total amount of either parties' exact contributions during their thirty-five year marriage. Therefore, we find no error.

In addition to finding the AG account part of the marital estate, the family court questioned Wife's withdrawals from this account. Shortly after discovering Husband's adultery, Wife withdrew funds in $9,000 increments from the AG account, totaling $96,000, to repay a debt she owed. Wife did not present any evidence of an actual obligation or a receipt acknowledging satisfaction of a $96,000 debt. Although the family court did not explicitly find Wife fraudulently withdrew $96,000 from the AG account, we find, in our review of the record, that Wife attempted to "unfairly extinguish ownership of marital property before the date of filing." See Shorb v. Shorb, 372 S.C. 623, 632, 643 S.E.2d 124, 128 (Ct. App. 2007). Accordingly, we affirm the family court's finding that Wife's AG account should be included in the marital estate.

B. Equitable Division of Marital Estate

Wife argues, in the alternative, that even if the AG account is to be included in the marital estate, the family court erred in dividing the marital estate equally. We disagree.

"Although statutory factors provide guidance, there is no formulaic approach for determining an equitable apportionment of marital property." Lewis, 392 S.C. at 391, 709 S.E.2d at 655. "Upon dissolution of the marriage, marital property should be divided and distributed in a manner [that] fairly reflects each spouse's contribution to its acquisition, regardless of who holds legal title." Id. The ultimate goal of apportionment is to divide the marital estate, as a whole, in a manner that fairly reflects each spouse's contribution to the economic partnership and also the effect on each of the parties of ending that partnership. See Johnson, 296 S.C. at 298, 372 S.E.2d at 112.

In making an equitable apportionment of marital property, the family court must give weight in such proportion as it finds appropriate to all of the following factors:

> (1) the duration of the marriage along with the ages of the parties at the time of the marriage and at the time of the divorce; (2) marital misconduct or fault of either or both parties, if the misconduct affects or has affected the economic circumstances of the parties or contributed to the breakup of the marriage; (3) the value of the marital property and the contribution of each spouse to the acquisition, preservation, depreciation, or appreciation in value of the marital property, including the contribution of the spouse as homemaker; (4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets; (5) the health, both physical and emotional, of each spouse; (6)

> either spouse's need for additional training or education in order to achieve that spouse's income potential; (7) the nonmarital property of each spouse; (8) the existence or nonexistence of vested retirement benefits for either spouse; (9) whether separate maintenance or alimony has been awarded; (10) the desirability of awarding to the spouse having custody of any children the family home as part of equitable distribution or the right to live in it for reasonable periods; (11) the tax consequences to either party as a result of equitable apportionment; (12) the existence and extent of any prior support obligations; (13) liens and any other encumbrances on the marital property and any other existing debts; (14) child custody arrangements and obligations at the time of the entry of the order; and (15) any other relevant factors that the family court expressly enumerates in its order. S.C. Code Ann. § 20-3-620(B) (Supp. 2010).

These criteria are intended to guide the family court in exercising its discretion over apportionment of marital property. Johnson, 296 S.C. at 297, 372 S.E.2d at 112. The family court has the discretion to decide what weight to assign various factors. Greene v. Greene, 351 S.C. 329, 340, 569 S.E.2d 393, 399 (Ct. App. 2002). On review, this court looks to the fairness of the overall apportionment, and if the end result is equitable, the fact that this court might have weighed specific factors differently than the family court is irrelevant. Johnson, 296 S.C. at 300, 372 S.E.2d at 113.

Here, the family court's order explicitly states that the court considered all the statutory factors in equitably apportioning the parties' assets. The family court indicated in its order it based the division of assets on the following specific factors: the parties' income; the nonmarital assets and debts; the parties' health; the value of the parties' retirement accounts; the duration of the marriage; and the direct contributions of both parties to the marriage. Our review of the record convinces us the family court sufficiently addressed the statutory factors governing equitable apportionment.

Furthermore, in considering the overall fairness of the apportionment, we find the end result to be equitable. Accordingly, we find the family court's equitable distribution is supported by a preponderance of the evidence. See Deidun v. Deidun, 362 S.C. 47, 58, 606 S.E.2d 489, 495 (Ct. App. 2004) ("If the end result is equitable, the fact that the appellate court would have arrived at a different apportionment is irrelevant.").

II. Husband's Cross-Appeal

A. Date of Valuation

Husband first asserts the family court erred in valuing his assets as of the date of filing while valuing Wife's assets as of the date of the final hearing. We agree.

In general, marital property that is subject to equitable distribution is valued as of the date the marital litigation is filed or commenced. Fields v. Fields, 342 S.C. 182, 186, 536 S.E.2d 684, 686 (Ct. App. 2000). However, the parties may be entitled to share in any appreciation or depreciation in marital assets occurring after separation but before divorce. See Dixon v. Dixon, 334 S.C. 222, 228, 512 S.E.2d 539, 542 (Ct. App. 1999) ("It is an unfortunate reality that, given the volume of cases handled by our family courts, there often is a substantial delay between the commencement of an action and its ultimate resolution. Thus, it is not unusual for the value of marital assets to change, sometimes substantially, between the time the action was commenced and its final resolution.").

In the present case, Husband asserts it is inequitable to value Wife's retirement as of the date of the final hearing while utilizing Husband's financial declaration valued as of the date of filing. Husband cites to Gardner v. Gardner, 368 S.C. 134, 137, 628 S.E.2d 37, 38 (2006), in support of his argument. In Gardner, the Husband's retirement account was the asset at the center of the disagreement between the parties. Id. at 136, 628 S.E.2d at 38. While litigation was pending, the Husband died and his son was appointed as the personal representative of the estate. Id. at 135, 628 S.E.2d at 37. As a

result of the Husband's death, the retirement account ceased to exist, but the supreme court noted that "other assets awarded to both Husband and Wife declined in value during the litigation." Id. at 136, 628 S.E.2d at 38 (emphasis added). Because there was not an accurate accounting as to the appropriate values for the marital property while the litigation was pending, the supreme court held that the date of the filing of the litigation should be used as the date of valuation. Id. at 136-137, 628 S.E.2d at 38.

In Gardner, both the Husband and the Wife had assets that declined in value from the date of filing until the time of Husband's death while litigation was pending. Id. at 136, 628 S.E.2d at 38. Here, despite the fact that the final hearing was approximately two years after Wife filed for divorce, Husband failed to offer any evidence of the values for the marital property at the time of the final hearing. If there is in fact appreciation or depreciation to his accounts, then it is incumbent upon Husband to present evidence of such changes at trial. See Arnal v. Arnal, 363 S.C. 268, 293, 609 S.E.2d 821, 834 (Ct. App. 2005) ("[B]oth parties are entitled to share in any appreciation or depreciation that occurs to marital property after separation but before divorce."). Moreover, it is undisputed that Wife's accounts declined in value and, therefore, it would be unfair to value her accounts as of the date of the commencement of the action. See Johnson, 296 S.C. at 300, 372 S.E.2d at 113 (holding an appellate court looks to the fairness of the overall apportionment).

Husband's failure to present evidence of an updated financial declaration at the final hearing precludes this court from definitively valuing Husband's assets. Instead of penalizing Wife by utilizing a value of an asset that no longer exists and utilizing the date of filing as Husband requests, we find the better practice is for both parties to share in any appreciation or depreciation in marital assets. See Smith v. Smith, 294 S.C. 194, 203, 363 S.E.2d 404, 409 (Ct. App. 1987) ("We know of no authority . . . that holds that only one spouse is entitled to any appreciation in marital assets that occurs after the parties separate and before the parties are divorced. We would think both parties would be entitled to any such appreciation."). Following the precedent established in Gardner of valuing both parties' assets

at the same point in time while also acknowledging that Wife was diligent in providing an updated financial declaration, we reverse and remand this issue with specific instructions to allow additional evidence on the values of Husband's retirement accounts at the time of the final hearing and to divide the retirement accounts consistent with the findings in this opinion.

B. Valuation of Marital Residence

Husband next asserts the family court erred in utilizing Wife's valuation of the marital residence. In addition, Husband contends the family court committed error in granting Wife possession of the marital property. We disagree.

"The family court has broad discretion in valuing the marital property. A family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented." Pirri v. Pirri, 369 S.C. 258, 264, 631 S.E.2d 279, 283 (Ct. App. 2006); see also Woodward v. Woodard, 294 S.C. 210, 215, 363 S.E.2d 413, 416 (Ct. App. 1987) (affirming the family court's valuation of property that was within the range of evidence presented); Smith, 294 S.C. at 198, 363 S.E.2d at 407 (noting that the family court has the discretion to accept one party's valuation over another party's valuation).

We find sufficient evidence in the record to support the family court's valuation of the marital home and acreage. Both parties presented expert testimony regarding the value of the ten and one-half acres on which the parties' mountain-view home was situated. Wife's appraiser, Jim Martin, testified the fair market value of the property was $235,000.[1] Husband's appraiser, Tim Kastner, determined the house and land was worth $360,000. In addition, Husband specifically testified, as he was qualified to do as owner of the property, that the marital home and ten and one-half acres had a value

[1] The family court noted in its final order that, prior to being retained by Wife, Mr. Martin was first engaged by Husband's attorney to appraise the house and land for purposes of this litigation and that he concluded the property was worth $235,000.

of $380,000. See Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 560, 671 S.E.2d 79, 86 (Ct. App. 2008) ("As a general principle, a landowner who is familiar with her property and its value, is allowed to give her estimate as to the value of the land and damage thereto, even though she is not an expert.") (internal citation omitted). In accepting Wife's valuation of the marital home and land, the family court specifically found Mr. Martin's appraisal more credible and reliable than Mr. Kastner's appraisal due to a significant error discovered on cross-examination that was material to Mr. Kastner's valuation. As a result, the family court concluded Mr. Kastner's error undermined his ultimate opinion of the fair market value of the property. Because the family court was free to accept Wife's valuation over Husband's valuation, we find the family court properly utilized Wife's valuation of the marital home and acreage.

C. Wife's Nonmarital Assets

Last, Husband claims the family court erred in finding items 178 through 237 on Schedule A were Wife's nonmarital assets. We agree and remand this issue to the family court.

In the instant case, the family court made the following pertinent finding of fact:

> Attached hereto as Schedule A is a list of the parties' furniture, personal property, and furnishings. Schedule A allocates each item as either a marital asset or a non-marital asset to each party. The characterization of this property as marital or non-marital was a contentious issue. Wife claimed that she purchased many items of furniture and furnishings using money she inherited or which she was gifted. Wife also claimed that certain items of personal property, including several items of jewelry, where [sic] gifted to her by Husband's mother. As Husband's mother did not testify, I find that any gifts

> <u>of personal property she made were marital. I further find that Wife's inheritance and gifts were transmuted and the items she purchased with such funds are marital.</u> Those items identified on Schedule A as Wife's non-marital were properly established as non-marital assets.

(emphasis added). However, this finding of fact is inherently contradictory to the family court's conclusion of law that "Wife shall retain sole and exclusive ownership of the items of personal property and furniture set forth under the column labeled 'Wife's Non-Marital' in Schedule A."

A review of Schedule A characterizes most of the items Husband contests as Wife's non-marital property with an acquisition source as a "[g]ift to Wife from Wife's mother."[2] The family court specifically found that "Wife's inheritance and gifts were transmuted and the items she purchased with such funds are marital." While there is evidence to sustain this finding and subject items 178 through 237 to equitable division, the family court directly contradicts itself in concluding Wife "shall retain sole and exclusive ownership of the items of personal property and furniture set forth under the column labeled 'Wife's Non-Marital' in Schedule A." Moreover, it is perplexing to this court why Husband contests all of the items 178 through 237 on appeal when the family court listed items 183, 203, 221, and 222 on Schedule A as Husband's nonmarital property.

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[2] While this court recognizes Schedule A includes many more personal property items characterized as Wife's non-marital property with an acquisition source as a "[g]ift to Wife from Wife's mother" or "[i]nherited from Wife's mother," we decline to address these remaining property items as Husband only contests items 178 through 237. Therefore, the family court's allocation of those assets is the law of the case. <u>See</u> <u>In re Morrison</u>, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting an unappealed ruling becomes law of the case and precludes further consideration of the issue on appeal).

While the family court is instructed to "set forth the specific findings of fact and conclusions of law to support [its] decision," its failure to do so does not always require a remand. Rule 26(a), SCRFC. "[W]hen an order from the family court is issued in violation of Rule 26(a), SCRFC, the appellate court 'may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence.'" Griffith v. Griffith, 332 S.C. 630, 646-47, 506 S.E.2d 526, 535 (Ct. App. 1998) (quoting Holcombe v. Hardee, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991)). However, we find the record in the instant case is insufficient to allow such a review due to the contradictory nature of the family court's order and Husband's appeal of items 178 through 237 of Schedule A in its entirety. Accordingly, we reverse and remand to the family court for further proceedings on this issue.

CONCLUSION

In summary, the family court's rulings to include Wife's AG account as a marital asset and to equitably divide the marital assets are affirmed. In addition, the valuation of the marital residence is affirmed. The ruling as to different dates for valuing Wife's and Husband's retirement accounts is reversed and remanded for further proceedings consistent with this opinion. In addition, the case is also remanded for further proceedings regarding the disposition of items 178-237 in Schedule A. Accordingly, the family court's order is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and GEATHERS, JJ., concur.