The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF JAMES STONE CRAVEN, PETITIONER

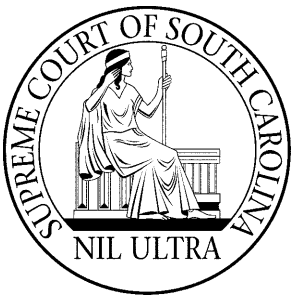
On June 11, 2007, Petitioner was definitely suspended from the practice of law for two years. In the Matter of Craven, 373 S.C. 614, 647 S.E.2d 176 (2007).

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than January 19, 2010.

Columbia, South Carolina
November 20, 2009



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 50
November 23, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Larry Hendricks, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appeal From Richland County
Carolyn C. Matthews, Administrative Law Court Judge

Opinion No. 26744
Submitted September 17, 2009 – Filed November 23, 2009

AFFIRMED

Larry E. Hendricks, of Ridgeland, *pro se* Appellant.

Barton Jon Vincent, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This Court certified this case for review pursuant to Rule 204(b), SCACR to review the Administrative Law Court's

(ALC) finding that Larry Hendricks (Appellant) was not entitled to relief. We affirm.

FACTS/PROCEDURAL HISTORY

Appellant, an inmate at Ridgeland Correctional Institution, attempted to photocopy legal documents he created.[1] Appellant was informed that due to a change in policy he would not be allowed to photocopy his documents. Appellant filed a Grievance Form against the South Carolina Department of Corrections (SCDC) challenging the constitutionality of SCDC Policy GA-01.03, Inmate Access to the Courts.[2] SCDC Policy GA-01.03 states:

> 1) Inmates may not purchase photocopies of any materials contained in the law library regardless of his/her ability to pay.
> 2) Inmates may request photocopies of legal materials and documents to support a pleading. Legal materials that may be copied to support a pleading include:
>
> Disciplinary reports/forms;
> Institutional or State Classification Committee reports/forms and;
> Letters, forms, reports, and other documents received from SCDC or other outside officials, that have answers or other information from personnel within SCDC that have to do with the subject of the pleading.
>
> 3) Materials and documents that will NOT be copied include:
>
> Drawings, pictures, or photographs;
> Documents that have been solely originated, generated, written, typed, or created by the inmate (the inmate may copy the information by hand);
> Transcripts of school, college or vocational training;

[1] The Record does not state what type of documents Appellant wanted to copy, but Appellant did note they were for the United States Supreme Court.

[2] SCDC Policy GA-01.03 went into effect January 4, 2005.

Magazine or newspaper clippings (unless they specifically relate to the pleading); and

Personal correspondence that is not related to the pleading.

4) No copies of blank legal forms will be made.

SCDC Policy GA-01.03, Inmate Access to the Courts.

In his Grievance, Appellant contended that "[t]here is no reasonable penological reason for this policy, accept [sic] to hinder an inmate's access to the courts." Appellant argued that not being able to photocopy legal documents he generated unconstitutionally hindered his access to the courts. Appellant's Grievance was denied by the Institutional Grievance Coordinator and the Warden. Appellant then made an internal appeal, which was denied based on SCDC Policy GA-01.03.

Under the Administrative Procedures Act (APA), Appellant appealed SCDC's finding to the ALC. The ALC affirmed SCDC's decision.[3] Appellant appealed the ALC finding, and pursuant to Rule 204(b), SCACR, this Court certified the case from the court of appeals.

STANDARD OF REVIEW

The APA establishes the standard of review and the court's authority in reviewing decisions of the ALC:

> The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the

[3] "ALJs have no authority to pass upon the constitutionality of a statute or regulation." *Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). The ALC's Order affirming SCDC's finding did not state whether or not SCDC Policy GA-01.03 was constitutional. The ALC was correct to abstain from determining the constitutionality of SCDC Policy GA-01.03.

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

S.C. Code Ann. § 1-23-610(B) (Supp. 2008).

LAW/ANALYSIS

Appellant argues SCDC Policy GA-01.03 unconstitutionally hindered his meaningful access to the courts. We disagree.

In *Bounds v. Smith*, 430 U.S. 817 (1977), the United States Supreme Court stated, "[O]ur decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts." *Bounds*, 430 U.S. at 824. The Court in *Bounds* held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. In determining whether meaningful access has been denied the inquiry is "whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825.

"The requirement that an inmate alleging a violation of *Bounds* must show actual injury derives ultimately from the doctrine of standing." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). "Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's

law library or legal assistance program is subpar in some theoretical sense." *Id.* at 351. "Insofar as the right vindicated by *Bounds* is concerned . . . the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim."[4] *Id.*; *see also Pellegrino v. Loen*, 743 N.W.2d 140, 144-45 (S.D. 2007) (finding no actual injury, thus no denial of meaningful access to the courts).

In the present case, Appellant argues, "I have, almost twice, missed deadlines because of this and am fearful that with the amount of litigation needed in my criminal case, I may miss a deadline because of a policy that has not [sic] logical stated penological reason for its establishment." Nowhere in the Record does Appellant state he suffered an actual injury due to SCDC Policy GA-01.03. Appellant merely claims that he might be injured in the future by missing a deadline. This falls short of the actual injury requirement demanded by *Lewis*.[5] Because no actual injury has occurred,

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[4] *Lewis* gave examples of what might be construed as an injury that denies meaningful access to the courts:

> [A prisoner] might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

Lewis, 518 U.S. at 351.

[5] In this case, there was no actual injury to Appellant due to SCDC Policy GA-01.03. However, we take this opportunity to caution SCDC that its policy not allowing inmates to make photocopies when he or she is willing and able to pay is not reasonable. *See Johnson v. Parke*, 642 F.2d 377, 380 (10th Cir. 1981) ("[W]hen numerous copies of often lengthy complaints or briefs are required, it is needlessly draconian to force an inmate to hand

Appellant's meaningful access to the courts has not been unconstitutionally hindered.

CONCLUSION

Because Appellant has not suffered an actual injury, we affirm the decision of the ALC.

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

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copy such materials when a photocopying machine is available and the inmate is able and willing to compensate the state for its use.").

The Supreme Court of South Carolina

Michael Hunt, Joe A. Taylor, A. Shane Massey, J. Roland Smith, and Tom Young, Jr., Respondents,

v.

Avondale Mills, Inc., and South Carolina Public Service Commission, Defendants,

of whom Avondale Mills, Inc. is Appellant.

ORDER

This matter is before the Court by way of a notice of appeal from an order of the circuit court granting respondents' motion to temporarily enjoin appellant's collection of fees based on a rate change. Appellant has also filed a petition for a writ of supersedeas. Respondents have filed a return in opposition to the petition for a writ of supersedeas.

We find the circuit court did not have subject matter jurisdiction to issue the temporary injunction and therefore vacate the order on appeal. Although the circuit court sought to distinguish this case on the ground that it

does not involve the *amount* of the rate change, but *notice* of the rate change, any complaint regarding lack of notice of a rate change is required to be brought before the South Carolina Public Service Commission (PSC). South Carolina Code Ann. § 15-77-50 (2005) states that the circuit courts do not have jurisdiction over actions or controversies "involving rates of public service companies" for which specific procedures for review are provided in Title 58. The PSC is vested with the "power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State . . . ."

In addition to applications for rate changes, applications may be made to the PSC by any person "by petition in writing, setting forth any act or thing done, or omitted to be done, with respect to which, under the provisions of Articles 1, 3, and 5 of this chapter, the [PSC] has jurisdiction or is alleged to have jurisdiction." S.C. Code Ann. § 58-5-270 (Supp. 2008). Individual consumer complaints must be filed with the Office of Regulatory

Staff, which has the responsibility of mediating consumer complaints under the provisions of Articles 1, 3, and 5. Id. However, if a complaint is not resolved to the satisfaction of the complainant, the complainant may request a hearing before the PSC. Id. Complaints may involve the "fairness, reasonableness, or sufficiency of any schedule . . . [or] rate" of a public utility. Id.

Moreover, South Carolina Code Ann. § 58-5-290 (1976), entitled "Correction by Commission of improper rates *and the like*,"[1] states the following:

> Whenever the Commission shall find, after hearing, that the rates, fares, tolls, rentals, charges or classifications or any of them, however or whensoever they shall have theretofore been fixed or established, demanded, observed, charged or collected by any public utility for any service, product or commodity, or that the rules, regulations or practices, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, noncompensatory, inadequate, discriminatory or preferential or in any wise in violation of any provision of law, the Commission shall, subject to review by the courts, as herein provided, determine the just and reasonable fares, tolls, rentals, charges or classifications, rules, regulations or practices to be thereafter observed and

[1] (Emphasis added).

> enforced and shall fix them by order as herein provided.

"In connection with a determination under Section 58-5-290 the commission may consider all facts which in its judgment have a bearing upon a proper determination of the question . . . ." S.C. Code Ann. § 58-5-300 (Supp. 2008). Finally, appellate review of any ruling by the PSC on such matters may be sought from this Court or the Court of Appeals. S.C. Code Ann. §§ 58-5-330 and -340 (Supp. 2008). These statutes clearly provide a mechanism by which respondents could have and should have raised the issue of improper notice of the rate change before the PSC; therefore, the circuit court did not have subject matter jurisdiction to entertain this matter. Accordingly, the order of the circuit court on appeal is hereby vacated.

The petition for a writ of supersedeas is denied and the notice of appeal is hereby dismissed, as they are now moot.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

November 4, 2009

The Supreme Court of South Carolina

In re: Amendments to Rule 608,
South Carolina Appellate Court Rules

O R D E R

The South Carolina Bar's Rule 608 Task Force has requested the Court amend Rule 608, SCACR, to end the practice of appointing attorneys as guardians *ad litem* (GALs) in the Family Court. The Bar's Task Force asserts other organizations, such as the South Carolina Guardian *ad Litem* Program, which is funded by the General Assembly and administered by the Office of Executive Policy and Programs, and Richland County CASA, which is privately funded and organized, are responsible for providing volunteer GALs in abuse and neglect and termination of parental rights cases. Both programs recruit, train, and supervise volunteers to act as GALs in such matters in all forty-six counties of South Carolina.

In reviewing the practice of appointing GALs in the family court, we believe programs such as the South Carolina Guardian *ad Litem* Program and Richland County CASA have the requisite expertise and resources to best serve the needs of children and the general public in providing GALs in matters in which they are required. The vast majority of attorneys who are

appointed have no training or experience as GALs, and there is no appropriate supervision of those attorneys. The Court believes the participants are better served when attorneys who are appointed are appointed as advocates. Furthermore, the South Carolina Guardian *ad Litem* Program has made significant strides in the past several years in recruiting and training sufficient numbers of volunteers.

Accordingly, we grant the request of the Bar's Task Force to amend Rule 608. Effective July 1, 2010, Rule 608 is amended, as reflected in the attachment, to eliminate the appointment of attorneys as GALs pursuant to Rule 608. Attorneys appointed as GALs prior to the amendment shall continue to serve until appropriately relieved under the rules or until the matters have been properly concluded.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
November 20, 2009

Rule 608
Appointment of Lawyers for Indigents

(a) Purpose. This rule provides a uniform method of appointing lawyers to serve as counsel for indigent persons in the circuit and family courts.

. . .

(e) Active Members Who Have Not Completed the Trial Experiences Required by Rule 403, SCACR. An active member who has not completed the trial experiences required by Rule 403, SCACR, but has been admitted to practice law in South Carolina for one (1) year or more shall be fully eligible for appointment under this rule, and, at his or her expense, will be expected to associate another lawyer if necessary to carry out the appointment.

. . .

(g) Minimizing Appointments.

(1) The unnecessary appointment of lawyers to serve as counsel places an undue burden on the lawyers of this State. Before making an appointment, a circuit or family court judge must insure that the person on whose behalf the appointment is being made is in fact indigent. Further, a lawyer should not be appointed as counsel for an indigent unless the indigent has a right to appointed counsel under the state or federal constitution, a statute, a court rule or the case law of this State.

(2) A lawyer should only be appointed as counsel under this rule when counsel is not available from some other source. For example, an appointment under the rule for a criminal defendant should not be made when there is a public defender available to take the appointment.

. . .

Last amended by Order dated November 20, 2009, effective July 1, 2010.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In The Matter Of The Care And Treatment Of Leo McClam, Respondent,

v.

The State Of South Carolina, Appellant,

and The South Carolina Department Of Mental Health Is The, Intervenor/Appellant.

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

Opinion No. 4623
Submitted May 1, 2009 – Filed October 13, 2009
Withdrawn, Substituted and Refiled November 19, 2009

APPEAL DISMISSED

Deborah R.J. Shupe, Mark W. Binkley, and L. Kimble Carter, all of Columbia, for Appellants.

LaNelle DuRant, of Columbia, for Respondent.

THOMAS, J.: The South Carolina Department of Mental Health (SCDMH) and the State of South Carolina (collectively Appellants) contend the trial court improperly expanded the operation of the Sexually Violent Predator Act (SVP Act) in transferring inmate Leo McClam to a private treatment facility. We dismiss the appeal as moot.[1]

FACTS AND PROCEDURAL HISTORY

McClam was committed in 2000 to the South Carolina Department of Mental Health Behavioral Disorders Treatment Program (BDTP) after adjudication as a Sexually Violent Predator (SVP) pursuant to the SVP Act, sections 44-48-10 through -170 of the South Carolina Code (2002 & Supp. 2008).

In 2006, Circuit Court Judge Michael G. Nettles held an annual hearing in response to a petition for release filed by McClam. In the petition, McClam sought an order finding probable cause to believe his mental abnormality or personality disorder had so changed that he was safe to be at large and, if released, was not likely to commit acts of sexual violence. McClam attended the hearing with his court-appointed attorney. An assistant attorney general appeared on behalf of the State.

Judge Nettles then issued an order in which he found McClam had not shown probable cause to believe his mental abnormality or personality disorder had so changed that he was safe to be at large and, if released, not likely to commit acts of sexual violence. In the same order, however, Judge Nettles granted McClam's pro se Motion for Independent Evaluation. Judge Nettles approved Dr. Thomas V. Martin, of Martin Psychiatric Services in Columbia, to perform the evaluation and ordered, as part of the evaluation, that Dr. Martin conduct a penile plethysmograph (PPG) of McClam without advance notice to McClam of when the test would be administered. According to the order, McClam was to be monitored by a Public Safety Officer of SCDMH at all times until he was delivered to the facility

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

administering the PPG, at which time a staff member of the administering facility would monitor him until the test began. As part of the evaluation, Judge Nettles also directed Dr. Martin to conduct a review to determine if SCDMH had services available that would motivate McClam to complete treatment.

Dr. Martin evaluated McClam and issued a report in which he concluded as follows:

> Mr. McClam has been committed to the [SVP Program] for over five years without successful completion of treatment. It is therefore my recommendation that Mr. McClam be transferred to an alternate secure mental health treatment facility that is equipped with trained staff to treat sexually deviant individuals with severe mood and psychotic illnesses. This would better afford Mr. McClam the opportunity to stabilize with medication, develop techniques to complete his basic activities of daily living, and develop more appropriate social and interpersonal skills that would eventually lend towards establishing healthier relationships. I have consulted with health care administrators at Just Care, Inc. of Columbia, SC who are willing to accept Mr. McClam in transfer for completion of his sex offender and psychiatric treatment on an inpatient level.[2]

Several months after Dr. Martin issued his report, Judge Nettles held a hearing to determine whether McClam should be transferred to a different facility for more effective treatment. After this hearing, Judge Nettles ordered "that McClam be transferred to Just Care as recommended by Dr.

[2] Just Care is a private detention healthcare company and is not operated by SCDMH.

Martin in order to achieve a psychiatric balance" and that the matter be reviewed in six months. In support of this decision, Judge Nettles observed that the parties were at a stalemate and that McClam was not making any progress in his current treatment program. Neither McClam nor the State took formal exception to this order, a copy of which was also sent to SCDMH.

After receiving the order, SCDMH moved to intervene and join as a party in the matter. Simultaneously, SCDMH filed a notice of and motions for relief from and stay of the Judge Nettles' order transferring McClam to Just Care. SCDMH argued (1) it was a necessary party that was not joined in the proceedings; (2) the order affected the rights of two non-parties, SCDMH and Just Care, Inc.; and (3) the order required SCDMH to violate the explicit terms of the SVP Act in that the order allowed treatment of a sexually violent offender at a facility not operated by SCDMH. As to the third argument, SCDMH contended that if it followed the order, it would "abdicate its statutory responsibilities to control, care and treat Leo McClam including deference to the private sector in the exercise of professional judgment regarding treatment."

After a hearing on SCDMH's motions, Judge Nettles granted leave to SCDMH to intervene in the case; however, he allowed his prior order authorizing McClam's transfer to Just Care to stand. Regarding his refusal to change the order, Judge Nettles explained that "[a]lthough he's not in the physical care of [SCDMH], certainly they still are in charge of the care, custody, and control of this individual." Judge Nettles further clarified his order by specifically providing SCDMH could "take whatever factors they find be [sic] appropriate." In a written order issued pursuant to the hearing, Judge Nettles ruled "McClam's placement at the Just Care facility is to be determined by [SCDMH] in collaboration with the staff at Just Care" and the case would be reviewed in six months. After SCDMH and the State received written notice of entry of this order, a timely notice of appeal on behalf of SCDMH and the State was filed.

While the appeal was pending in this Court, Judge Nettles held the six-month review as mandated by his prior order. At the hearing, Judge Nettles received into evidence an affidavit from Peggy C. Wadman, M.D., the Forensic Medical Director of SCDMH, in which Dr. Wadman stated in part that McClam had finished the SVP Treatment Program and was currently being evaluated by his treatment team for possible release. Dr. Wadman also stated "[i]t has been necessary for the SCDMH staff to provide all psychiatric, sexual disorder and medical treatment to Mr. McClam since his transfer to Just Care."

A few days after the six-month review, the Darlington County Probate Court issued an order first committing McClam "to a state mental health facility for in-patient care and treatment" and then ordering him to "undergo an out-patient treatment program at Florence County (Pee Dee) mental health facility for a period not to exceed 12 months." In his order, the probate court judge noted his decision was made "[a]fter a full hearing on the issues involved" and the reason for the mandatory treatment was that McClam "lack[ed] sufficient insight or capacity to make responsible decisions with respect to his treatment" and it was likely that McClam, because of his condition, would inflict serious harm to himself or others.

After the probate court issued its order, Judge Nettles issued a written order pursuant to the six-month review hearing directed that "in light of his completion of all treatment segments to the Sexually Violent Predator Treatment Program Leo McClam shall be transferred from Just Care back to the Sexually Violent Predator Treatment Unit" within ten days.

Several weeks after Judge Nettles issued his order, a hearing took place before Circuit Court Judge Thomas Russo on a petition by McClam for his release from confinement. Two days after this hearing, Judge Russo authorized McClam's release from confinement and ordered him to comply with the statutory requirements of registration as a SVP. In his order, Judge Russo also noted inter alia (1) SCDMH had sought and obtained an order from the probate court committing McClam to inpatient treatment; (2) SCDMH authorized McClam to petition for release and advised the South

Carolina Attorney General's Office that McClam was safe to be at large and, if released, would not be likely to commit acts of sexual violence; and (3) although the testimony at the hearing was undisputed that McClam was not safe to be at large, the State could not prove beyond a reasonable doubt that McClam would be likely to commit acts of sexual violence if he was released.

During the pendency of this appeal in this Court, McClam moved to dismiss the matter as moot. Although this Court denied the motion, the parties were permitted to address this issue in their briefs.

LAW/ANALYSIS

We agree with McClam this appeal should be dismissed as moot and therefore decline to address the merits of the issues presented.[3]

"[M]oot appeals result when intervening events render a case nonjusticiable." Sloan v. Greenville County, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." Id. (brackets in original).

In the civil context, there are three general exceptions under which an appellate court can issue a ruling on an appeal on an otherwise moot controversy: (1) if the issue raised is "capable of repetition but evading review"; (2) if the question is one of "imperative and manifest urgency to necessitate establishing a rule for future conduct in matters of important public interest"; and (3) if the trial court's decision "may affect future events, or have collateral consequences for the parties." Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

[3] Appellants contend McClam's transfer to a private treatment facility was neither authorized by the SVP Act nor required by due process.

According to the facts presented in this appeal, McClam has successfully completed the SVP Program and has been released from confinement with the consent of SCDMH. Although the State opposed McClam's petition for release, the record before us does not indicate it appealed the order ending his confinement. Any decision by this Court concerning the validity of the order transferring him to Just Care would have no practical effect on his placement because he is no longer "committed to the custody of the Department of Mental Health for control, care, and treatment . . . at a facility operated by the Department of Mental Health." S.C. Code Ann. § 44-48-100 (2002 & Supp. 2008). The rationale for Appellants' argument that McClam's transfer to Just Care was improper, namely the need to segregate SVPs from other persons under the supervision of SCDMH, is no longer a concern here.

As to the exceptions under which this Court can take jurisdiction of an otherwise moot dispute, we agree with McClam that none of these apply here. First, the record contains no indication the issue presented in this appeal "can be repeatedly presented to the trial court yet escape review at the appellate level because of its fleeting and determinate nature." Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc., 406 S.E.2d 65, 67 (W.Va. 1991) (cited in Curtis, 345 S.C. at 568, 549 S.E.2d at 596). The legislative findings behind the SVP Act emphasize the need for "long-term control, care, and treatment of sexually violent predators." S.C. Code Ann. § 44-48-20 (2002 & Supp. 2008) (emphasis added). We recognize the possibility exists that an appeal involving the placement of an inmate in the SVP Program will not be adjudicated before the inmate's discharge from the program. Nevertheless, no evidence was presented here that McClam's release, which was obtained with the authorization of SCDMH during the pendency of this appeal, is a common occurrence that would typically prevent an appellate court from ruling on the propriety of an order authorizing the transfer of an inmate in the SVP Program to a different facility. To the contrary, this is apparently the first time an appellate court has been called upon to decide the issue presented in this appeal, notwithstanding the fact that, according to an affidavit from the Director of the Forensic Evaluation and Treatment Service of SCDMH, 1,029 offenders

have been referred for commitment to the SVP Program since the passage of the SVP Act in 1998.

Second, the question presented here is not one of imperative and manifest urgency that requires establishing a rule for future conduct in matters of important public interest. The South Carolina General Assembly has already established such a rule. See S.C. Code Ann. § 44-48-100(A) (2002 & Supp. 2008) ("At all times, a person committed for control, care, and treatment by the Department of Mental Health pursuant to this chapter [i.e. the SVP Act] must be kept in a secure facility, and the person must be segregated at all times from other patients under the supervision of the Department of Mental Health.").

Finally, we hold there was no showing that the decision to transfer McClam to Just Care could affect future events or have collateral consequences for the parties. As noted earlier, we are not aware of any similar controversies that have been presented to either this Court or the South Carolina Supreme Court. Furthermore, as noted in Judge Nettles' order authorizing McClam's transfer to Just Care, the reasons prompting McClam's desire for a transfer from BDTP to another facility were predominantly interpersonal, reflecting "the ineffective therapeutic alliance established between him and the treatment staff." As noted by McClam in his respondent's brief and not disputed by Appellants in their reply brief, numerous personnel changes have taken place among the SVP Program staff such that, if McClam should again be committed to the Program, it is not likely he will have the same treatment team that he had during his earlier commitment.

CONCLUSION

The order authorizing McClam's transfer to Just Care during his treatment would no longer affect his placement in the SVP Program because McClam has completed the Program and been released from confinement. This appeal is therefore moot, and, as we have noted, none of the exceptions under which we can take jurisdiction of such a dispute are applicable.

APPEAL DISMISSED.

HEARN, C.J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Andrew F. Stringer, III, Respondent,

v.

State Farm Mutual Automobile Insurance Company, Appellant.

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4631
Heard April 29, 2009 – Filed November 10, 2009
Withdrawn, Substituted, and Refiled November 20, 2009

REVERSED

Charles R. Norris, of Charleston, and John P. Riordan, of Greenville, for Appellant.

Donald Leverette Allen, of Anderson, for Respondent.

THOMAS, J.: We consider this case *en banc* to determine whether the language of an insurance policy provides coverage for an accident that occurred following receipt of a notice of cancellation, or whether coverage may be resurrected based on representations of a State Farm Mutual

Automobile Insurance Co., employee to the insured after the accident. We answer both questions in the negative and reverse.

FACTUAL/PROCEDURAL BACKGROUND

Andrew F. Stringer, III paid a premium of $424.76 to State Farm in exchange for a six-month automobile insurance policy that provided coverage from February 15, 2002, to August 15, 2002. The policy stated the premium was subject to increase "during the policy period based upon corrected, completed, or changed information." During the policy period, a policy adjustment caused Stringer's premium to increase by $47.25.[1] State Farm sent a bill to Stringer for this increase in premium, which he failed to pay. On July 11, 2002, State Farm mailed a notice of cancellation to Stringer, informing him the policy would be cancelled on July 29, 2002, unless he paid $47.25 on or before that date.[2] The notice further stated that payment after July 29, 2002, would reinstate the policy, however, "[t]here [would be] no coverage between the date and time of cancellation and the date and time of reinstatement." Stringer took no action in response to this notice.

On July 31, 2002, Stringer was involved in an automobile accident with an uninsured driver. Subsequently, Stringer notified State Farm employee Sherri Jennings of the accident. Stringer testified Jennings informed him there would be uninterrupted coverage if he paid the $47.25 due.[3] On August 2, Stringer paid the additional premium, and Jennings issued a receipt and mailed a form FR-10 to the Department of Motor Vehicles verifying that Stringer had valid coverage on the date of the accident.

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[1] The trial court found the increase in premium was due to the addition of a driver to the policy at the request of Stringer. On appeal, State Farm takes exception to this finding and argues a traffic accident in October 2001 caused Stringer's premium to increase. The cause for the increase in premium is of no consequence to our analysis.

[2] The policy allowed State Farm to cancel Stringer's policy for failure to pay the premium when due.

[3] At trial, Jennings denied making this statement.

Ultimately, State Farm refused to pay Stringer's claim under the policy, contending the policy was not in effect when the accident occurred. Stringer commenced this action to determine whether coverage existed at the time of the accident. The trial court ruled Stringer was entitled to uninterrupted coverage because he fulfilled his obligations under the policy by paying the entire premium prior to the expiration of the six-month policy period. In addition, the trial court found Jennings's post-accident and post-cancellation representations of coverage precluded State Farm from denying coverage. State Farm appealed. In a split decision, a three-judge panel of this court affirmed the trial court's order. See Stringer v. State Farm Mut. Auto. Ins. Co., Op. No. 4474 (S.C. Ct. App. Filed Dec. 23, 2008) (Shearouse Adv. Sheet No. 48 at 68-78). We granted State Farm's petition for *en banc* review.

ISSUES

Whether the trial court erred in finding Stringer was entitled to uninterrupted automobile insurance coverage after receiving a notice of cancellation from State Farm based on: (I) the language of the policy or (II) representations of coverage by a State Farm employee.

STANDARD OF REVIEW

The determination of coverage under an insurance policy is an action at law. Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 241, 597 S.E.2d 165, 167 (Ct. App. 2004). On appeal, we are limited to determining whether the trial court based its ruling on an error of law or on a factual conclusion without evidentiary support. S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E Underwriters Risk Retention Group, 347 S.C. 333, 338, 554 S.E.2d 870, 873 (Ct. App. 2001).

LAW/ANALYSIS

I. Policy Language

State Farm contends the trial court erred in construing the terms of the policy liberally in favor of Stringer without finding the policy ambiguous. In addition, State Farm argues the trial court erred in finding the language of the

policy provided for continuous and uninterrupted coverage on the date of Stringer's accident. We agree in part.

Ambiguous terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. Diamond State Ins. Co. v. Homestead Indus., Inc., 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). "However, in cases where there is no ambiguity, contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense." Garrett v. Pilot Life Ins. Co., 241 S.C. 299, 304, 128 S.E.2d 171, 174 (1962).

In our view, the trial court neither found the policy ambiguous nor construed the policy in favor of Stringer. In its order, the trial court determined Stringer was covered under the policy because he "complied with the terms of the insurance contract, drafted by State Farm, in that he made all of his premium payments . . . before the end of the current policy period." While the trial court referenced the proposition of law requiring courts to construe an ambiguous insurance policy in favor of the insured, it never made any specific findings of fact to support the conclusion the policy in question is ambiguous as a matter of law.[4] Because the trial court did not find the policy to be ambiguous, we review only the plain language of the insurance policy to determine whether any evidence supports the trial court's ruling that Stringer was entitled to uninterrupted coverage. See USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) ("Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary, and popular meaning." (quoting Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1997))).

The trial court found Stringer entitled to uninterrupted coverage because he complied with the terms of the insurance policy by paying the additional premium prior to the end of the policy period on August 15, 2002. The trial court relied solely on the following policy provision in making this finding: "[t]he policy period is shown . . . on the declarations page and is for

[4] We further hold that even if the trial court found the policy ambiguous, this was error.

successive periods of six months each for which you pay the renewal premium. Payments must be made on or before the end of the current policy period." (Emphasis added by trial court). The trial court erred in isolating the statement "[p]ayments must be made on or before the end of the current policy period," from its proper context. See Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 593, 225 S.E.2d 344, 349 (1976) ("[T]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract." (citing 13 Appleman Ins. Law and Practice, § 7382, p. 43-45 (1976))); Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975) ("[T]he parties have a right to make their own contract and it is not the function of this Court to rewrite it or torture the meaning of a policy to extend coverage never intended by the parties."). In proper context, this sentence clearly refers to renewal and provides that payments of renewal premiums must be made before the end of the current policy period. This sentence does not contemplate whether the insured's payment of an additional premium before the expiration of the current policy period provides for uninterrupted coverage. Accordingly, the trial court erred in failing to consider the context in which this provision appears.

In reviewing the language of the insurance policy as a whole, no evidence supports the trial court's conclusion that Stringer was entitled to uninterrupted coverage. The policy in question provides that the initial $424.76 premium was subject to increase "during the policy period based upon corrected, completed, or changed information." Further, pursuant to the policy, Stringer agreed to pay any additional premium that might become due during the policy period. In this case, changed information caused an additional premium of $47.25 to be due in order to keep the policy in effect until August 15, 2002. State Farm sent two notifications to Stringer, informing him that failure to pay the additional premium on or before July 29, 2002, would result in cancellation of the policy on that date. State Farm specifically retained the right to cancel the policy for failure to pay the premium when due as the policy states: "[State Farm] will not cancel your policy before the end of the current policy period unless . . . you fail to pay the premium when due."

In this case, Stringer's failure to pay the increase in premium by July 29, 2002, effectively cancelled his coverage under the plain language of the policy on that date. Thus, when Stringer was involved in an automobile accident two days later, he was not covered under the policy. In addition, the cancellation notice specifically and unequivocally provided that "[t]here is no coverage between the date and time of cancellation and the date and time of reinstatement." Thus, Stringer's payment of $47.25 on August 2 failed to provide coverage from the date his policy was cancelled–July 29–to the date his policy was reinstated–August 3.[5] While payment of the additional premium reinstated Stringer's coverage from August 3 to the end of the policy period, the payment of the additional premium could not resurrect the policy to provide coverage during the gap between July 29, 2002, and August 3, 2002. Accordingly, the trial court erred in finding payment of the additional premium during the policy period provided for uninterrupted coverage.[6]

II. Employee Representation

Finally, State Farm argues the trial court erred in finding uninterrupted coverage based on post-accident and post-cancellation representations of coverage made by Jennings. We agree.

Notwithstanding Stringer's failure to plead estoppel in this action at law, such a defense still fails on the merits. See Rule 8(c), SCRCP (stating

[5] Although payment was made on August 2, Stringer's policy was not reinstated until the following day.

[6] We note Jeffrey v. Sunshine Recycling, Op. No. 4626 (S.C. Ct. App. filed October 28, 2009) (Shearouse Adv. Sh. No. 47), in which this court found no lapse in workers' compensation coverage occurred because a reinstatement notice failed to specifically identify any coverage lapse. In Jeffrey, according to section II.D.5 of the Assigned Risk Plan of the South Carolina Workers' Compensation Assigned Risk Plan Operating Rules and Procedures, any lapse in coverage should have been specifically identified. Thus, Jeffrey is distinguishable from this case as there is no such policy language, nor is this matter within the realm of workers' compensation law.

that all affirmative defenses shall be pleaded); see also Wright v. Craft, 372 S.C. 1, 21, 640 S.E.2d 486, 497 (Ct. App. 2006) (finding that estoppel must be "affirmatively pleaded as a defense and cannot be bootstrapped onto another claim"). In appropriate circumstances, estoppel can be used to prevent the insurer from denying coverage to the insured. Koren v. Nat'l Home Life Assurance Co., 277 S.C. 404, 407, 288 S.E.2d 392, 394 (1982). In order to prevail on a claim of estoppel, the insured must demonstrate: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reasonable reliance on the other party's conduct; and (3) a prejudicial change in position. Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct. App. 1994).

Here, the trial court did not find uninterrupted coverage based on estoppel.[7] Rather, the trial court concluded Stringer was entitled to uninterrupted coverage because he reasonably relied on Jennings's representations of coverage. As the elements of estoppel make clear, reasonable reliance alone does not provide a basis upon which to prevent State Farm from denying coverage. Accordingly, the trial court erred in determining reasonable reliance sufficiently bound State Farm to coverage.

In addition, nothing in the record demonstrates Stringer satisfied the remaining elements of estoppel. Namely, Stringer has failed to prove that he suffered a prejudicial change in position or detrimentally relied on the representations of Jennings. See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 359, 628 S.E.2d 902, 912 (Ct. App. 2006) (indicating the lack of detrimental reliance is fatal to a claim of estoppel). Stringer has failed to do so because Jennings' representation of coverage occurred after the accident took place. While our appellate courts have prevented insurance companies from denying coverage, they have done so when the insurer, or its agent, makes representations of coverage before the loss occurred. See Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. 411, 424, 171 S.E.2d 486, 492 (1969) (holding an insured was entitled to rely on representations that he was "fully covered"; accordingly, when an accident later occurred, the insurer could not deny coverage); Giles v. Landford & Gibson, Inc., 285 S.C. 285, 289, 328 S.E.2d 916, 918-19 (Ct. App. 1985)

[7] We also note that the record indicates Stringer stated that recovery was not being sought on an estoppel theory.

(finding that when an insured specifically requested particular coverage and an employee, in writing the policy, represented the policy provided such coverage, the insurer could not deny coverage when the loss subsequently occurred). These cases are not analogous to the case *sub judice* because here, the representation of coverage occurred after the loss.

As we stated in dictum in Jones v. State Farm Mutual Automobile Insurance Co., "[The Appellant] cites no legal authority establishing that a policy, once effectively canceled, can somehow become renascent by virtue of a qualified representation of coverage by an agent after a loss." 364 S.C. 222, 236, 612 S.E.2d 719, 726 (Ct. App. 2005). Similarly, we have failed to find any legal authority to support this proposition. Accordingly, the trial court erred in determining Stringer was entitled to uninterrupted coverage based on representations of coverage made by Jennings after the accident.

CONCLUSION

Because neither the plain language of the policy nor the representations made to Stringer operate to provide uninterrupted coverage or to resurrect the policy, the ruling of the trial court is

REVERSED.[8]

HEARN, C.J., WILLIAMS, PIEPER, KONDUROS, and LOCKEMY, JJ., CURETON, A.J., concur.

HUFF and SHORT, JJ., dissent.

HUFF and SHORT, JJ. (dissenting): We would affirm the judgment of the court below, and therefore, we respectfully dissent from the majority opinion. In doing so, we adopt the opinion of Judge Ralph King Anderson,

[8] In light of our decision on the aforementioned issues, it is not necessary for this court to address State Farm's additional arguments on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

Jr. that originally constituted the majority opinion of the panel that heard this case. See Stringer v. State Farm Mut. Auto. Ins. Co., Op. No. 4474 (S.C. Ct. App. Filed Dec. 23, 2008) (Shearouse Adv. Sh. No. 48 at 68).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Gene Tony Cooper, Jr., Appellant.

Appeal From Lexington County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 4633
Heard September 15, 2009 – Filed November 19, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka and Senior Assistant Attorney General William Edgar Salter, III, of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

SHORT, J.: Gene Cooper appeals his convictions for murder, armed robbery, conspiracy to commit armed robbery, and kidnapping, arguing the trial court erred in: (1) denying Cooper's motion to dismiss the charges against him because his constitutional right to a speedy trial was violated; (2) finding Phillip Farmer was an unavailable witness and allowing Farmer's prior testimony to be read into the record because it denied Cooper his constitutional right to confrontation; and (3) ruling Cooper could be impeached with his 1977 convictions for housebreaking and grand larceny because the convictions were too remote and were highly prejudicial. We affirm.

FACTS

Cooper was indicted in January 1990 for murder, kidnapping, armed robbery, forgery, and conspiracy. On February 22, 1991, he was convicted on all charges and sentenced to death. However, almost three years later, the South Carolina Supreme Court reversed Cooper's conviction for murder and remanded the case for a new trial.[1] The Supreme Court affirmed Cooper's convictions for kidnapping, armed robbery, forgery, and conspiracy.[2] The following year, Cooper filed an application for Post Conviction Relief (PCR) pertaining to his four non-capital convictions. Counsel for both parties agreed that Cooper's retrial for murder should await the disposition of his PCR challenge. Following an evidentiary hearing, the PCR court granted Cooper relief for all of his non-capital convictions. The State appealed, and the South Carolina Supreme Court affirmed the granting of PCR.[3] The State did not petition for rehearing, and the Supreme Court sent the remittitur to the Lexington County Circuit Court on August 29, 2002.

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[1] See State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994).

[2] Cooper remained incarcerated from his arrest in 1989 until his retrial in 2006.

[3] See State v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002).

Almost a year later, however, Cooper's retrial had still not been scheduled. On July 15, 2003, Cooper filed an amended demand for speedy trial, and a month later, a hearing was held in the circuit court before Judge Westbrook.[4] During the hearing, the State made a motion to disqualify Cooper's attorney, David Bruck, from the case for having contact with Cooper's co-defendant, Bo Southerland. Bruck asserted he had no prior knowledge of the State's motion to disqualify him from the case. Judge Westbrook took the matter under advisement, and set another hearing to discuss the speedy trial and disqualification issues. On August 25, 2003, the parties held an in-chambers conference to discuss the issues, and at that time, the deputy solicitor stated the solicitor's office would call Cooper's case for trial during spring 2004, between April and June.

The case was not called in spring 2004, and on February 10, 2005, Cooper filed a renewed demand for a speedy trial. Five days later, a hearing on the motion was held before Judge Keesley. Cooper moved to have the trial set for June or July 2005. The assistant solicitor said he could not set a date without Solicitor Donnie Myers being present, and the court should wait to set a date until a judge was selected for the case. On April 25, 2005, Judge Keesley ordered the case be heard before the end of 2005, or Cooper could move for bail or for dismissal of the charges. The order also provided notice was to be given to defense counsel of the trial date within thirty days of the order.

The following month, Solicitor Myers filed a motion to disqualify and recuse Cooper's attorneys. Myers stated that during Bruck's PCR representation of Cooper, Bruck contacted and communicated with Southerland, and obtained statements from him exculpating Cooper without approval from Southerland's attorneys. Myers asserted Bruck stipulated to the unauthorized communications; thus, Bruck and the other attorneys should be removed from the case and prohibited from talking with Cooper's newly-appointed attorneys.

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[4] Cooper's motion was titled "Defendant's Amended Demand for Speedy Trial," but the record does not contain a copy of an un-amended motion.

Cooper filed a motion to dismiss all charges for lack of a speedy trial on June 1st. In the motion, Bruck stated that in response to Judge Keesley's April 25, 2005 Order, he sent an e-mail to the judge opposing counsel's request that the trial be set for the first of August because of a conflict with his schedule as a law professor at an out-of-state school.[5] On July 12, 2005, a hearing was held before Judge Keesley concerning Cooper's motion for speedy trial; the State's motion to excuse Cooper's counsel; and the Eleventh Circuit Solicitor's motion to withdraw from the case due to a conflict of interest. The solicitor's office moved to be excused because the deputy solicitor was a law clerk to the judge who presided over Cooper's first trial and was present for attorney-client issues.[6] The State also argued Bruck should be removed from the case because of his improper contact with Southerland. On July 13, 2005, Judge Keesley filed his order, (1) denying the State's motion to remove Cooper's counsel; (2) granting the State's motion to disqualify the Eleventh Circuit Solicitor's Office; (3) denying Cooper's motion to dismiss; and (4) denying Cooper's motion for bail.

In September 2005, the First Circuit Solicitor's Office was appointed to the case, and in December, Chief Justice Toal appointed Judge Pieper to hear the case. Shortly thereafter, on December 29, Cooper filed a renewed motion to dismiss all charges for lack of a speedy trial, or in the alternative for release on bail. Cooper re-asserted everything from his prior motions. Cooper also asserted that despite Judge Keesley's second order, the State appeared to have taken no action other than deliver the file to the Attorney General's Office and request assignment of a new solicitor. The State filed a response to Cooper's Motion, arguing this case was different from most speedy trial cases involving pre-indictment or pre-trial delay because the case had already been tried once. The State conceded the length of delay in this case triggered further analysis of the reasons the trial was delayed and whether Cooper was prejudiced; however, the State claimed the case was

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[5] Bruck also sent copies of the e-mail to opposing counsel.

[6] The motion to have the solicitor's office removed was not made known to Cooper until a June 29, 2005 letter.

delayed for three years and four months, beginning from August 29, 2002, the date the Supreme Court sent down the remittitur. The State contended Cooper was not prejudiced by the delay because he had already been tried and convicted for the crimes. Cooper filed a reply to the State's response, asserting the State cited no authority for its position that Cooper's rights were diminished by his intervening conviction and appellate reversal, and Cooper argued it should have required less time for the State to retry the case. Cooper also claimed his many motions for speedy trial differentiated this case from other speedy trial cases and weighed heavily in granting his motion to dismiss.

On February 8, 2005, a hearing was held before Judge Pieper concerning the speedy trial issue. Judge Pieper issued his order on April 21, 2006, denying Cooper's motion. Cooper's second trial was held before Judge Pieper from May 22 to June 1, 2006. At the conclusion of the State's case and the conclusion of the presentation of evidence, Cooper made motions for directed verdict, which were denied. Cooper also renewed his motion to dismiss the indictments due to a speedy trial violation at the conclusion of all the evidence; however, Judge Pieper denied the motion. The jury convicted Cooper of each of the charged offenses. Judge Pieper sentenced Cooper to life imprisonment for murder, twenty-five years for armed robbery, and five years for conspiracy to commit armed robbery. He did not impose a sentence for the kidnapping conviction. This appeal followed.

STANDARD OF REVIEW

In a criminal case, the appellate court reviews errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The court is bound by the findings of the trial court unless they are unsupported by the evidence, clearly wrong, or controlled by an error of law. State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997). The reviewing "[c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

LAW/ANALYSIS

I. Speedy Trial

Cooper argues the trial court erred in denying his motion to dismiss the charges against him because his constitutional right to a speedy trial was violated. We disagree.

A criminal defendant is guaranteed the right to a speedy trial. U.S. Const. amend. VI; S.C. Const. art. I, § 14; State v. Pittman, 373 S.C. 527, 548, 647 S.E.2d 144, 155 (2007). "This right 'is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.'" Id. (quoting U.S. v. MacDonald, 456 U.S. 1, 8 (1982)). There is no universal test to determine whether a defendant's right to a speedy trial has been violated. State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978).

A reviewing court should consider four factors when determining whether a defendant has been deprived of his or her right to a speedy trial: 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of the right; and 4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972); see also State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997). These four factors are related and must be considered together with any other relevant circumstances. Barker, 407 U.S. at 533. "Accordingly, the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." Pittman, 373 S.C. at 549, 647 S.E.2d at 155. However, in Doggett v. U.S., 505 U.S. 647, 652 n.1 (1992), the United States Supreme Court suggested in dicta that a delay of more than a year is "presumptively prejudicial." Also, in State v. Waites, our supreme court found a two-year and four month delay was sufficient to trigger further review. Waites, 270 S.C. at 108, 240 S.E.2d at 653. Therefore, "a delay may be so lengthy as to

require a finding of presumptive prejudice, and thus trigger the analysis of the other factors." Pittman, 373 S.C. at 549, 647 S.E.2d at 155.

Cooper argues the delay of forty-four months in bringing his case to trial the second time exceeded any delay in almost any reported South Carolina case, and the State's reason for the delay was both arbitrary and unreasonable. Cooper argues his many motions for speedy trial should be weighted heavily in favor of granting his motion to dismiss. He also asserts his incarceration on death row "amounted to no small prejudice" and his "anxiety and concern as he waited for the state to call his case also cannot be diminished." He further asserts that witnesses' memories were clearly affected by the delay at trial.

In his April 21, 2006 order denying Cooper's motions, Judge Pieper addressed each of the four Barker factors. As to the length of delay in bringing the case to trial, Judge Pieper noted that "a total delay of at least forty-four months [was] sufficient to trigger review of the other factors."[7] However, he found "the delay was to some degree the result of prosecutorial and governmental negligence, and partly justifiable." He also stated that while none of the excuses alone were sufficient to justify the delay, when considered together, they sufficiently justified a majority of the delay. See Waites, 270 S.C. at 108, 240 S.E.2d at 653 (holding that the "constitutional guarantee of a speedy trial is protection only against delay which is arbitrary or unreasonable"). Specifically, Judge Pieper determined the main excuses for the delay were: (1) the complexity of the case and the amount of time required to prepare for trial; (2) the Eleventh Circuit Solicitor's Office's relocation due to mold contamination and an overcrowded docket; (3) confusion over which judge, if any, had been assigned to the case; and (4) the recusal of the Eleventh Circuit Solicitor's Office from the case in July 2005, preventing the First Circuit Solicitor's Office from being appointed until September 2005. Therefore, Judge Pieper concluded "the state's conduct in this instance was not apparently willful and was largely justifiable."

[7] We note the forty-four month delay in re-trying Cooper's case is troubling; however, in this case, we find it was justifiable.

In considering Cooper's assertion of his right to a speedy trial, Judge Pieper noted that "[i]t cannot be argued that since 2003 the defendant ever failed to assert his right to a speedy trial" and "nothing in the procedural history of the case could support a finding that the defendant failed to properly assert his right to a speedy trial." In consideration of the fourth and most important factor, prejudice, Judge Pieper found the main prejudice Cooper suffered was pretrial incarceration.

After weighing the four Barker factors and "the lack of demonstrable evidence of trial prejudice," Judge Pieper determined the "presumption of prejudice has been persuasively rebutted"; therefore, he denied Cooper's motion. Further, Judge Pieper noted the State withdrew its notice to seek the death penalty; thus, the withdrawal could be construed as a benefit to Cooper resulting from the delay. See Brazell, 325 S.C. at 76, 480 S.E.2d at 70-71 (noting the three-year and five-month delay was negated by the lack of prejudice to the defense). Therefore, we find Judge Pieper's decision was supported by the evidence.

II. Unavailable Witness

Cooper argues the trial court erred in finding Phillip Farmer was an unavailable witness and allowing Farmer's prior testimony to be read into the record because it denied Cooper his constitutional right to confrontation. We disagree.

The confrontation clause of the Sixth Amendment of the Constitution of the United States is applicable to the States, and the primary interest secured by the confrontation clause is the right of cross-examination. State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002); Starnes v. State, 307 S.C. 247, 249, 414 S.E.2d 582, 583 (1991). "The right to confrontation has been referred to as a 'trial right.'" Starnes, 307 S.C. at 249, 414 S.E.2d at 583 (quoting Barber v. Page, 390 U.S. 719, 725 (1968)). This trial right includes the opportunity to cross-examine and have a jury weigh the demeanor of the witness. Barber, 390 U.S. at 725 (1968). Thus, "the appropriate question under the confrontation clause is whether there has been any interference

with the defendant's opportunity for effective cross-examination at trial." Starnes, 307 S.C. at 250, 414 S.E.2d at 584.

"[T]here has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." Barber, 390 U.S. at 722. "[A] witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[8] Id. at 724-25. Rule 804(a)(5), SCRE, provides that a witness may be declared "unavailable" if the declarant "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means."

Cooper argues the State's efforts to procure Farmer's presence from Texas were unreasonable. Cooper also asserts the State knew it would be unable to obtain Farmer's presence at trial eleven days prior to the trial; however, the State did not make a motion for continuance, or even bring the problem to the court's attention. He argues the State's failure to have Farmer available to testify in person denied him his constitutional right to confrontation because Farmer is a pathological liar and it was imperative for the trial jury to observe his demeanor in person.[9]

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[8] In Barber v. Page, the United States Supreme Court found Barber's right to confrontation had been violated when "the State made absolutely no effort to obtain the presence of [the witness] at trial other than to ascertain that he was in a federal prison outside of Oklahoma." 390 U.S. at 723. Further, the Court found the "sole reason why [the witness] was not present to testify in person was because the State did not attempt to seek his presence." Id. at 725. In contrast, here, the State attempted to have Farmer brought to South Carolina to testify, but was unable to do so due to circumstances beyond the State's control.

[9] At trial, the State introduced Farmer's previous testimony that he called Cooper to initiate a conspiracy between himself and Cooper to rob the

The State asserted the Solicitor was unable to secure Farmer's presence from a Texas penitentiary through a normal out-of-state subpoena because South Carolina is not a signatory state to the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (the Act). At trial, the State submitted two affidavits in support of its motion to have Farmer declared an "unavailable" witness under Rule 804(a)(5): one from Senior Assistant Solicitor B. Harrison Bell, and one from James M. Frazier, III, an Assistant General Counsel for the Office of General Counsel for the Texas Department of Criminal Justice.

In his affidavit, Frazier testified that because South Carolina is not a signatory to the Act, the Texas Department of Criminal Justice would not honor a mere subpoena for Farmer to appear as a witness in South Carolina. Instead, Texas required an executive agreement between the governor of South Carolina and the governor of Texas. The prisoner witness must then have a hearing before a district judge who will decide whether the prisoner witness will be transported to the requesting state. Frazier also testified that Texas will not release a prisoner without a hearing and an order of transport from a district judge. He further testified there are only two judges in Texas who hold hearings for prisoner witness renditions to other states. He confirmed Bell made a request to have Farmer transported, and he submitted the appropriate paperwork to Texas, which was received on May 10, 2006. Frazier testified he contacted the court to set up a hearing; however, neither judge was available for the remainder of the month of May. He notified Bell of this on May 11, 2006. He said he had "no reason to believe the South

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decedent. To impeach Farmer's previous testimony, Cooper introduced the testimony of Kimberly Turner, a Ph.D. student in clinical psychology who had interviewed Farmer in jail. In Farmer's new statement to Turner, he stated he had only heard from Cooper after the murder, and he was "completely surprised" by the phone call. Farmer told her that he had put a "spin" on his testimony in favor of the State at the first trial to make "Cooper look worse than he was." He said he wanted to "tell the truth this time."

Carolina authorities were aware of that unavailability before this week when I first informed them of such."

Judge Pieper reviewed the rendition request and noted it was initiated in April, but was delayed because a duplicate had not been submitted to the South Carolina Secretary of State. However, he reviewed the "pertinent procedures and statutory requirements" and did not see any requirement to submit a duplicate; thus, he did not attribute the delay to the prosecution. He found that both the South Carolina and Texas governors had signed the paperwork in early May; however, no Texas judge was available to hold the hearing as required by Texas law. Thus, Judge Pieper stated "it's difficult for me to say that the State acted unreasonably" when Texas did not have any judges available to hear the rendition request. Additionally, Judge Pieper noted that Farmer was under oath at the first trial and Cooper had engaged in "the full right of confrontation." Judge Pieper further noted that neither party had requested a continuance. Therefore, we find Judge Pieper's decision was supported by the evidence.

III. Prior Crimes

Cooper argues the trial court erred in ruling Cooper could be impeached with his 1977 convictions for housebreaking and grand larceny because the convictions were too remote and were highly prejudicial. We disagree.

Rule 609(b) of the South Carolina Rules of Evidence provides:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by

> specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b), SCRE. "Rule 609(b) establishes a presumption against admissibility of remote convictions . . . and the State bears the burden of establishing facts and circumstances sufficient to substantially overcome that presumption." State v. Colf, 337 S.C. 622, 626-27, 525 S.E.2d 246, 248 (2000). In determining whether the probative value of a prior conviction outweighs its prejudicial effect, the court should apply five factors: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Id. at 627, 525 S.E.2d at 248.

Cooper was released from prison in 1988 for his 1977 convictions for armed robbery, housebreaking, and grand larceny.[10] Cooper was being re-tried for a murder that occurred in 1989. Cooper objected to the introduction of his prior crimes under Rule 609 because they were more than ten years old.

After considering the balancing test required by Rule 609(b), Judge Pieper did not allow Cooper's conviction for armed robbery to be used for impeachment because of its similarity to the armed robbery in this case. However, Judge Pieper did allow Cooper's convictions for housebreaking and larceny to be admitted for impeachment purposes because they are crimes of dishonesty that weigh on Cooper's credibility, and the probative value of the convictions outweighed their prejudicial effect. See Colf, 337 S.C. at 628,

[10] Cooper pleaded guilty to armed robbery, housebreaking, and grand larceny, and received a sentence of fifteen years. He was released from prison in 1988 for his 1977 convictions. Cooper was arrested for murder that occurred in 1989 and his retrial was in May 2006. Thus, although eighteen years had passed between his release for his prior convictions and his retrial for murder, Cooper's 1988 release for the prior crimes was very close in time to the October 1989 offenses for which he was being retried.

525 S.E.2d at 249 ("The fact that larceny reflects on credibility and the importance of credibility to the jury's decision are both factors the trial court should have weighed in making the admissibility determination."). Additionally, Cooper's attorney conceded the crimes of housebreaking and larceny were not so similar to the charge in this case to be prejudicial to Cooper. Furthermore, Judge Pieper gave a limiting charge to the jury explaining Cooper's convictions could only be considered for impeachment purposes. Therefore, we find Judge Pieper's decision was supported by the evidence.

CONCLUSION

Accordingly, the trial court's order is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.