The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
(803) 734-1080
FAX (803) 734-1499

N O T I C E

IN THE MATTER OF MARK R. CALHOUN, PETITIONER

On December 3, 2001, Petitioner was definitely suspended from the practice of law for eighteen months, retroactive to December 7, 2000. In the Matter of Calhoun, 347 S.C. 444, 556 S.E.2d 392 (2000). He has now filed a petition to be reinstated.

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 June 24, 2002.

Columbia, South Carolina

April 24, 2002

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29211
(803) 734-1080
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N O T I C E

IN THE MATTER OF KENNETH L. EDWARDS, PETITIONER

On August 4, 1997, Petitioner was definitely suspended from the practice of law for eighteen months. In the Matter of Edwards, 327 S.C. 148, 488 S.E.2d 864 (1997). He has now filed a petition to be reinstated.

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:

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Columbia, South Carolina

April 24, 2002

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

April 29, 2002

ADVANCE SHEET NO. 13

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Concerned Dunes West Residents, Inc., Ruthann Epstein, Sue Hensch, Mary Eckbreth, Keith Grybowski, Larry Schellenberger, Jeff Zimmer, Ronald Fulcher, and David Fulton, individually, and on behalf of all others similarly situated, Plaintiffs,

v.

Georgia-Pacific Corporation, Dunes West Property Owners' Association, Inc., and Allan Feker d/b/a U.S. Residential Golf Properties, Inc., a Florida corporation, Defendants,

and

Georgia-Pacific Corporation, Plaintiff,

v.

Allan Feker and Dunes
West Residential Golf
Properties, Inc., Defendants.

ON CERTIFICATION FROM THE UNITED
STATES DISTRICT COURT

Opinion No. 25453
Heard December 13, 2001 - Filed April 22, 2002

CERTIFIED QUESTION ANSWERED

W. Jefferson Leath, Timothy W. Bouch, and G. Hamlin O'Kelley, III, of Leath, Bouch & Crawford, of Charleston; and W.H. Bundy, Jr., of Smith, Bundy, Bybee & Barnett, of Mt. Pleasant, for plaintiff Concerned Dunes West Residents, Inc., and the individually named plaintiffs.

Daniel S. Reinhardt, of Troutman Sanders, L.L.P., and John E. Burgess, of Georgia-Pacific Corporation, both of Atlanta, Georgia; and H. Brewton Hagood, of Rosen, Rosen & Hagood, L.L.C., of Charleston, for defendant/plaintiff Georgia-Pacific Corporation.

G. Trenholm Walker and Lindsay K. Smith-Yancey, of Pratt-Thomas, Epting & Walker, P.A., of

Charleston, for defendants Allan Feker and Dunes West Residential Golf Properties, Inc.

John A. Massalon, of Wills & Massalon, L.L.C., of Charleston, for defendant Dunes West Property Owners' Association, Inc.

PER CURIAM: This Court accepted the following five questions on certification from the United States District Court:

1. If the roads and other common elements transferred to the property owners association on March 20, 1998, were defective at the time of the transfer, what is the extent of Georgia-Pacific Corporation's or any of its subsidiary corporations' liability to the property owners association at this time?

2. If the roads and other common elements transferred to the property owners association on March 20, 1998, were defective at the time of the transfer, what is the extent of Allan Feker doing business as U.S. Residential Golf Properties' and Dunes West Residential Golf Properties' liability to the property owners association at this time?

3. During the period of time that the developer has control of the property owners association what is the developer's obligation to maintain the roads and other common areas of Dunes West?

4. When control of the property owners association passes to the Dunes West property owners, what are Georgia-Pacific Corporation's or any of its subsidiary corporations' obligations as to the condition of said roads and other common elements at the time of said transfer?

5. When control of the property owners association passes to the Dunes West property owners, what are Allan Feker doing business as U.S. Residential Golf Properties' and Dunes West Residential Golf Properties' obligations as to the condition of said roads and other common elements at the time of said transfer?

We are confident that the answer we set forth to question 1 will provide the district court with sufficient guidance on the issues before that court and confine this opinion to an examination of that question.

FACTS

We summarize the district court's findings of fact as follows: A subsidiary of Georgia-Pacific Corporation executed an agreement with Wild Dunes Associates for the purpose of developing a planned unit development ("PUD") located in Charleston County. Pursuant to the agreement, Georgia-Pacific Corporation conveyed 4,325 acres to the developers. In 1991, the developers recorded the declaration of covenants, conditions, and restrictions for the development. All new lots or tracts of land in the PUD were subject to the covenants.

Subsequently, a second wholly-owned subsidiary of Georgia-Pacific Corporation purchased the interest of Wild Dunes Associates in the development venture. The two Georgia-Pacific Corporation subsidiaries continued to develop the residential property.

Eagle Creek Construction Company ("Eagle Creek") constructed the roads and drainage systems in the early phases of the development. Eagle Creek completed construction in 1991. In 1993, the developers discovered defects in the roads constructed by Eagle Creek, and filed a lawsuit against Eagle Creek to recover the costs to repair the roads. While the lawsuit against Eagle Creek was pending, the developers hired engineers to design repair plans for the defective roads. Between 1994 and 1996, the developers spent more than one million-one hundred thousand ($1,100,000) dollars

repairing the roads.

After settling its lawsuit against Eagle Creek, the developers learned that significant additional road and drainage repairs were needed within the development.

Only one week after discovering that the roads were in further need of repair, and prior to the completion of any further repairs, the developers entered into an Asset Purchase Agreement for the sale of all remaining undeveloped portions of the property to a buyer named Allan Feker ("Feker").

Prior to consummating the sale of the undeveloped portions of the PUD to Feker, the developers executed a deed conveying the roads and other common areas within the development to the Dunes West Property Owners Association ("POA").[1] Pursuant to the recorded covenants, the POA was responsible for maintaining all common areas within the PUD.

Feker assigned his rights under the Asset Purchase Agreement to his corporation, Dunes West Residential Golf Properties, Inc., ("DWRGP"). DWRGP took title to the undeveloped property and became the new developer of the PUD. DWRGP has continued to develop Dunes West and sell lots and tracts of land.

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[1]The POA consists of all property owners within the PUD. The owners are charged an annual assessment to be used to maintain the common areas. The recorded covenants grant the developers *de facto* control over the POA, and provide that any property owned by the developers is exempt from assessments. However, if assessments against property owners are insufficient to maintain the roads and other common areas, the covenants require the developers to make up any shortfall. The developers' liability is limited to the assessments generated by property owned by the developers were this property subject to assessments.

In litigation before the district court, the Concerned Dunes West Residents are proceeding in a derivative capacity on behalf of the POA and seeking to recover the cost to repair the roads and other common areas from Georgia-Pacific Corporation as the previous developer, and Allan Feker doing business as U. S. Residential Golf Properties as successor developer.

ISSUE

> If the roads and other common elements transferred to the POA on March 20, 1998, were defective at the time of the transfer, what is the extent of Georgia-Pacific Corporation's or any of its subsidiary corporations' liability to the POA at this time?

ANALYSIS

In Goddard v. Fairways Dev. Gen. Partn., 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993), the Court of Appeals held that the developer of a planned unit development ("PUD") owes a fiduciary duty to the property owners association and its members, much like that owed by promoters of a corporation to investors. As such, the developer has a responsibility to insure that the common areas are in good repair at the time they are conveyed to the property owners association or to provide the association with funds sufficient to effectuate any needed repairs to those areas. Id. at 414, 426 S.E.2d at 832.

The facts of Goddard are similar to those in the instant dispute. In Goddard, Fairways Development General Partnership began developing a PUD, with plans to build approximately 90 units. The PUD was governed by recorded covenants and restrictions. The covenants called for the formation of the Fairway Villas Homeowners Association, with mandatory membership for all unit owners. The homeowners association owned the common areas within the development, and was responsible for maintaining these areas. Funding for the homeowners association was accomplished through assessments against each unit. The homeowners association was organized to grant the developer control over the association until nearly all the lots within

the PUD had been developed and sold. Further, the developer had the unilateral ability to determine assessments against individual owners while the developer was not required to pay assessments.

After selling five residential units, the developer transferred ownership of the common areas to the homeowners association. Practically, the five property owners were burdened with maintaining all common areas. After it became apparent that the assessments generated by these five property owners were insufficient to maintain the common areas, the individual property owners brought suit against the developer and the homeowners association seeking relief on a number of grounds. The homeowners argued, *inter alia*, that the developer had a responsibility to insure that the common areas were in good repair at the time they were conveyed to the homeowners association and that the association had sufficient funds to maintain the common areas. The Court of Appeals stated:

> In the case of Duncan v. Brookview House, Inc., 262 S.C. 449, 205 S.E.2d 707 (1974), our Supreme Court held that the promoters of a corporation are fiduciaries to each other and to the corporation they are creating. Id. at 456, 205 S.E.2d at 710. Here, we think there is a corollary between the promoters of a corporation and the developers of a PUD. Both are entrusted by interested investors to bring about a viable organization to serve a specific function. Both should be expected to use good judgment and act in utmost good faith to complete the formation of their organizations.
>
> While the evidence shows the Developer provided some maintenance of the common areas at its own expense until it belatedly organized the Association, there is evidence that the common areas were substandard at the time the Developer turned them over to the Association. There is also some evidence the Developer seized the opportunity in 1987 to "unload" the common areas on the Association without a plan to establish a reserve or a plan to fund the Association until such time as

> assessments were adequate to cover maintenance expenses. It seems unfair to the villa owners for the Developer to burden them with substandard or deteriorated common areas that required an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures.

Goddard, at 414-16, 426 S.E.2d at 832-33 (internal citations omitted).[2]

The district court in this case was aware of Goddard, but expressed doubt as to whether Goddard accurately reflected the law of this state. We hold today that it does: The developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard.[3]

The appellate courts of Illinois have reached a similar conclusion when addressing condominium developers' obligations to property owners associations taxed with maintaining common areas. For example, in Maercker Point Villas Condo. Assoc. v. Szymski, 655 N.E.2d 1192 (Ill. App. 1995), the court held that a condominium developer stood in a fiduciary relationship to the owners association. As a fiduciary, the developer "had the duty not to hinder 'the ability of the corporation [i.e., the owners association] to continue the business for which it was developed.'" Id. at 1194. The court found that by leaving the association underfunded at the time the developer relinquished control of the association's board of directors, the developer violated his fiduciary duty. See also Board of Managers of Weathersfield Condo. Assoc. v. Schaumburg Ltd. Part., 717 N.E.2d 429 (Ill. App. 1999) (developer of condominium had fiduciary duty to adequately fund owners

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[2]Neither party in Goddard petitioned this Court for writ of certiorari.

[3]At least one court has agreed with this premise and cited Goddard approvingly. See Chesus v. Watts, 967 S.W.2d 97 (Mo. App. 1998).

association for maintenance/repair of common areas).[4]

While Maercker addressed condominium developers' duties to condominium owners associations, the Illinois Court of Appeals, relying on Maercker, found that a fiduciary duty to adequately fund reserves likewise runs from the developer of a townhome project to the townhome owners association. Seven Bridges Court Assoc. v. Seven Bridges Development, Inc., 714 N.E.2d 601 (Ill. App. 1999). However, the public policy of Illinois does not preclude the developer from contractually limiting its fiduciary duty to adequately fund the association with a reserve account by including unambiguous language to that effect in the declaration of covenants and restrictions. Id. at 606.

Other courts have recognized a POA's right to maintain a cause of action against the developer for defects in the construction of common areas. See e.g., Strathmore Gate-East at Lake St. George Homeowners' Assoc., Inc. v. Levitt Homes, Inc., 537 So.2d 657 (Fla. Dist. App. 1989) (homeowners association, as owner of common areas taxed with the burden of maintaining the common areas, could maintain a cause of action against developer for defects in the construction of the common areas).

In Orange Grove Terrace Owners Assoc. v. Bryant Properties, Inc., 222 Cal. Rptr. 523 (Cal. App. 1986), the issue before the court was "whether a homeowners association has a cause of action for damages to the common

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[4]Illinois law provides by statute that a condominium developer must "pay a proportionate share of the common expenses for each unit which has not been sold by such developer. The proportionate share shall be in the same ratio as the percentage of ownership in the common elements set forth in the Declaration." 765 Ill. Comp. Stat. § 605/9(a) (1992). The court in Maercker, supra, indicated this section did not create new legal obligations, but merely codified or clarified preexisting law. See Maercker, 655 N.E. 2d at 1194; see also Board of Managers of Weathersfield Condo. Assoc., supra, 717 N.E.2d at 434.

areas of a condominium project caused by negligent acts or omissions of the developer occurring prior to formal organization of the association." Id. at 524. Finding for the plaintiff/homeowners association, the court observed:

> [t]he record shows that the defendants' work was substantially accomplished prior to formal organization of the homeowners' association provided for in the covenants, conditions and restrictions . . . and, therefore, before the Association assumed its management duties with respect to the common areas. The timing of the Association's organization was a matter wholly within the control of the defendants, who could readily foresee that the Association, which was obligated by the covenants and conditions promulgated by defendants to maintain and repair the common areas, and to assess the condominium owners sums sufficient for that purpose, would be damaged by an injury to the common areas caused by the defendants' negligence in undertaking repairs in the course of the condominium conversion. A developer may not make decisions for the Association that benefit its own interest at the expense of the association and its members.

Id. at 526 (citations omitted).

While the cases cited above have employed different means,[5] they accomplish the same end: That is, developers are held responsible for the condition of the common areas at the time these areas are deeded to the POA.

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[5]For example, Goddard and two of the Illinois cases hold that the developer is a fiduciary to the property owners association, and as such must establish adequate reserves to perform its obligations under the covenants. Courts in Florida and California permitted property owners associations to maintain causes of action against developers for the developers' negligence in constructing or repairing the common areas; the California court allowed the association to pursue damages arising before the association's formation.

If these areas are not in good repair at the time of conveyance, the developer is liable for the costs of repairs. Goddard is consistent with this result.

Under the facts certified to this Court, Goddard required the developer to ensure that the roads and other common areas were in good repair at the time ownership of the common areas was transferred to the POA, or, in the alternative, to provide the POA with sufficient funds to bring these common areas up to standard as of the date of transfer. That is to say, the developer has a fiduciary duty to the POA to transfer common areas that are in good repair; if the developer transfers substandard common areas, the developer must, at the time of transfer, provide the POA with the funds necessary to bring the common areas up to a standard of reasonably good repair. The developer who breaches this duty, by transferring common areas that are not in reasonably good repair and without the funds necessary to bring the common areas up to standard, is liable to the POA for all damages proximately flowing from the breach, including damages for the continued deterioration of these areas.

REMAINING QUESTIONS

Question 3 asks:

> During the period of time that the developer has control of the property owners association what is the developer's obligation to maintain the roads and other common areas of Dunes West?

Pursuant to the Declaration of Covenants, Conditions and Restrictions for Dunes West, recorded on September 18, 1989, maintenance of the roads and common areas within Dunes West is the sole responsibility of the POA. Funding for such maintenance is accomplished through annual and special assessments, in an amount determined by the POA, levied against property owners. Lots owned by the developer are exempt from paying assessments. However, during the period of time the developer exerts *de facto* control over

the POA, the developer is responsible for making up all shortfalls in the POA's operating budget up to an amount equal to the assessments which would have been generated by the property owned by the developer were this property subject to assessments.

Thus, question 3 is answered by reference to the Declaration of Covenants, Conditions and Restrictions for Dunes West. Assuming the district court questions the validity and enforceability of the Declaration of Covenants, Conditions and Restrictions for Dunes West against the POA or individual property owners, we decline to express an opinion on that issue because it does not involve a novel question of state law.

As to question 2, any liability of Allan Feker, U. S. Residential Golf Properties, or DWRGP arising from the condition of the common areas on the date the common areas were transferred to the POA arises by operation of contracts between the original developers and Allan Feker, or U. S. Residential Golf Properties, or DWRGP. The issue involves no novel question of law, and we therefore decline to answer question 2.

Questions 4 and 5 assume a dispute which may never arise. We decline to answer those questions. See Sangamo Weston, Inc. v. National Sur. Corp., 307 S.C. 143, 414 S.E.2d 127 (1992) (even when answering questions on certification, this Court will not issue advisory opinions nor alter precedent based on questions presented in the abstract).

CERTIFIED QUESTION ANSWERED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

J. Larry Faulkenberry, Respondent,

v.

Norfolk Southern
Railway Company, Appellant.

Appeal From Kershaw County
James R. Barber, III, Circuit Court Judge

Opinion No. 25454
Heard December 12, 2001 - Filed April 29, 2002

AFFIRMED

Robert L. Widener, Robert W. Dibble, Jr., and Robert A. Muckenfuss, all of McNair Law Firm, P.A., of Columbia, for appellant.

Robert J. Sheheen, of Savage, Royall & Sheheen, of Camden, for respondent.

Elizabeth Van Doren Gray, of Sowell, Gray, Stepp & Laffitte, LLC, of Columbia, for amicus curiae Qwest

Communications International, Inc.

JUSTICE WALLER: This is a property dispute concerning ownership of a 200' wide strip of land between Monticello Road and the Broad River in Columbia, upon which Appellant, Norfolk Southern Railway Co. (Railroad) operates its railroad. The circuit court ruled the property in question is owned by Respondent, J. Larry Faulkenberry. We affirm.

FACTS

There is no dispute as to the underlying facts in this matter. Railroad's track bisects Faulkenberry's 200 acre piece of property, leaving approximately 97 acres on the western side of the tracks, which abut the Broad River. Railroad seeks to prevent Faulkenberry from using a crossing over the tracks.

Railroad claims title to the property pursuant to an 1845 Act which created its predecessor in interest, the Greenville and Columbia Railroad Company. Faulkenberry claims title under the last known recorded instrument of record in the chain of title for the property on both sides of the tracks. Title records prior to 1865 do not exist as they were burned by General Sherman in 1865 during the Civil War. Railroad does not dispute that Faulkenberry owns the property to the east and west of the railroad tracks in fee simple. The only issue is what right or title each party has to the strip of land encompassed by the railroad tracks.

The Greenville and Columbia Railroad Company, was formed pursuant to 1845 Act No. 2953 (Act).[1] Sections 9-12 of the 1845 Act set forth Railroad's powers with respect to acquisition of property upon which to operate. Those sections provide, in pertinent part:

> 9. That [Railroad] shall have power and capacity **to purchase, take and hold in fee simple** or for years, to them and their successors,

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[1] It is undisputed that construction of Railroad was completed by 1852.

any lands, tenements or hereditaments, . . . and in like manner to purchase all private rights of way or water courses that may lie on or across the route through which the said Railroad may pass. . .

10. That in any case where lands or private rights of way may be required . . . and the same **cannot be purchased** from the owner . . . for want of agreement as to price or from any other cause, the same **may be taken by the Company at a valuation** to be made by the Commissioners. . . appointed by the Court of Common Pleas. . . . and the lands **and right of way** so valued by the Commissioners. **. . shall vest in the said Company in fee simple**, so soon as the valuation thereof may be paid, or tendered and refused. . . .

11. That in the **absence of any written contract** between the said Company and the owner . . . of land, through which the said Railroad may be constructed . . . it **shall be presumed that the land** upon which the said Railroad may be constructed, together with one hundred feet on each side of the center of said road, **has been granted to the said Company** by the owner. . . and the said **Company shall have good right and title** to the same, (and shall have, hold and enjoy the same) unto them and their successors, **so long as the same may be used only for the purposes of the said road and no longer**, unless the person or persons to whom any right or title to such lands, tenements or hereditaments descend or come, shall prosecute the same within two years next after the construction of such part or portion of the said road as may be constructed upon the land of the said person or persons so having or acquiring such right to the title as aforesaid, and **if any person or persons to whom any right or title to such lands. . . belong. . . do not prosecute the same within two years** next after the construction of the part of the said road upon the lands of the person or persons so having or acquiring such right or title as aforesaid, then he or they, and all claiming under him or them **shall be forever barred to recover the same**. . .

> 12. That all lands not heretofore granted to any person nor appropriated by law to the use of the State, within one mile from the centre from the main track of the said road that may be constructed, be, and they are hereby vested in the said Company and their successors, so long as the same may be used for the purposes of the said road and no longer.

(Emphasis supplied). Railroad acquired the land used for its tracks pursuant to Section 11, above. The circuit court, pursuant to numerous cases of this Court, held Railroad acquired only an easement to use the tracks, rather than a fee simple determinable, and that, in any event, Faulkenberry was entitled to an easement by necessity.[2]

ISSUE

> Did Railroad acquire a fee simple determinable in the land occupied by the tracks by virtue of section 11 of 1845 Act No. 2593?

DISCUSSION

As noted above, Railroad acquired its interest in the land at issue under section 11 of the 1845 Charter, which granted to it and its successors "good right and title . . . so long as the same may be used only for the purposes of the said road and no longer." The Act required the person having title to prosecute for compensation within two years or be forever barred to recover the same. At issue is whether this language granted a fee simple determinable estate in the property, or whether it merely created an easement.

Railroad correctly points out that "so long as" language in a deed is generally held to create a "fee simple determinable" estate. See Purvis v.

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[2] The circuit court ruled that, in any event, Faulkenberry was entitled to an easement by necessity to cross the railroad tracks. In light of our holding, we need not address this alternate ruling.

McElveen, 234 S.C. 94, 98-99, 106 S.E.2d 913, 915 (1959) (fee simple determinable is an estate in fee with a qualification annexed to it). See also 28 Am. Jur.2d Estates § 28 (1966)(an estate in fee simple is created by any limitation which 1) creates an estate in fee simple and 2) provides the estate shall automatically expire upon the occurrence of the stated event).

Although use of a qualification ("so long as," "until," or "during") is generally used to indicate a determinable estate, it does not necessarily indicate a grant is in fee.[3] Notably, in 1868, the General Assembly enacted 1868 Act No. 43, § 7, providing that, upon payment of compensation, "the right of way over said lands. . . shall **vest** in [Railroad]. . . **so long as** the same shall be used for such highway, and no longer; but the fee in such lands . . . shall remain in the owner thereof. . ." (Emphasis supplied). Clearly, under 1868 Act No. 43, § 7, the interest created is an easement, rather than a fee simple determinable, notwithstanding use of the phrase "so long as."[4] Accordingly, we find use of the

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[3] Other courts have recognized the existence of a determinable easement, or an easement subject to a condition subsequent. See Howell v. Clyde, 493 S.E.2d 323 (N.C. App. 1997); Higdon v. Davis, 337 S.E.2d 543 (N.C. 1985); Weir v. Consolidated Rail Corp., 465 N.E.2d 1341 (OH 1983); Gerhard v. Stevens, 442 P.2d 692 (CA 1968); Eggleston v. Fox, 232 A.2d 670 (N.J. 1967). Although this Court has never recognized a defeasible easement, we have held an easement no longer used for its stated purposes has been abandoned and therefore extinguished. See Immanuel Baptist Church v. Barnes, 274 S.C. 125, 264 S.E.2d 142 (1980) (owner of easement may relinquish that easement by express or implied abandonment). See also Saluda Motor Lines v. Crouch, 300 S.C. 43, 386 S.E.2d 290 (Ct. App. 1989)(where railroad ceased to use its right-of-way for railroad purposes, it abandons right-of-way).

[4] The General Assembly simultaneously enacted the Constitution of 1868 providing that "[p]rivate property shall not be taken or applied for public use, or for the use of corporations. . . without the consent of the owner or a just compensation being made therefor. . . . [L]aws may be made securing . . . the right of way over the lands of either persons or corporations . . . but a just compensation shall. . . be first made." 1868 CONST., Art. 1 § 23, Art. 12 § 3.

phrase "so long as" does not necessitate a finding of a fee simple determinable estate.

Both this Court and the Court of Appeals have held the language of section 11 granted only an easement to Railroad. Waring v. Cheraw and Darlington Ry., 16 S.C. 416 (1882); Ragsdale v. Southern Ry. Co., 60 S.C. 381, 38 S.E. 609 (1901); Southern Ry. v. Beaudrot, 63 S.C. 266, 41 S.E. 299 (1902); Hill v. Southern Ry., 67 S.C. 548, 46 S.E. 486 (1903)(recognizing Railroad acquired only a right of way under 1837 charter); Harman v. Southern Ry., 72 S.C. 228, 51 S.E. 689(1905); Southern Ry. v. Gossett, 79 S.C. 372, 60 S.E. 956 (1908); Boney v. Cornwell, 117 S.C. 426, 109 S.E. 271 (1921); Eldridge v. Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998).

Railroad asserts all of these cases were wrongly decided based upon an erroneous reading of Justice Wardlaw's dissent in the "seminal" case of Lewis v. Wilmington and Manchester R.R. Co., 45 S.C.L. (11 Rich.) 91 (1857), and upon an erroneous retroactive application of the 1868 Constitution and/or 1868 Act No. 43, § 7.[5] We disagree.

Lewis construed an 1846 Charter containing provisions virtually identical to those in the 1845 Charter in question. There, the plaintiff had purchased a tract of land from the prior owner after the railroad had already been constructed. The Court construed a portion of the Charter which barred recovery "unless the person . . . owning the said land at the time that the part of the said road which may be on the said land was finished, or those claiming under him . . . shall apply for an assessment of the value . . . within ten years ."

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[5] Railroad correctly points out that **if** the 1845 Charter operated to grant it a fee simple determinable estate in the property under the tracks, then the Legislature could not retroactively divest it of vested property rights. See Robinson v. Askew, 129 S.C. 188, 123 S.E. 822 (1924)(constitutional provision may be given retroactive effect so long as it does not divest vested rights); Muldrow v. Caldwell, 173 S.C. 243, 175 S.E. 501 (1934) (same with respect to statutory provisions).

A majority of the Court held Lewis could claim no right to an assessment, as that right was provided for "him who is the owner at the time the road is finished. It is not the land but the right to compensation that is involved in this controversy." The Lewis majority went on to state, however, that "[t]he **land or right of way is vested in the company in fee simple as soon as the valuation is paid** . . . and if application for an assessment is not made within ten years after the completion of the road, the **owner is forever barred from recovering the land or having an assessment, which manifests the intention of the Legislature to divest the owner's title**." 11 Rich at 94. (Emphasis mine). Justice Wardlaw dissented. Under his construction of the applicable sections of the 1846 charter, if the vendee (Lewis) permitted the railroad to utilize the land for ten years without complaint, then the land "would become subject to the Company's right to enjoy the slip occupied by them, so long as they continued to use it for their road, and no longer; – but if compensation should be claimed and paid, the fee simple absolute would thereby be vested in the company." Id. at 95.

Railroad contends the opinions of this Court and the Court of Appeals, subsequent to Lewis, have misconstrued Justice Wardlaw's dissent as indicating that only an easement was created, when in fact, Justice Wardlaw's dissent actually reflects a fee simple determinable. We disagree. Initially, we find Justice Wardlaw's dissent could be read as finding either an easement or a fee simple determinable. Moreover, we do not read subsequent case law as relying solely upon Justice Wardlaw's dissent.

In Ragsdale v. Southern Ry. Co., 60 S.C. 381, 38 S.E. 609 (1901), the Court construed a Charter to the Spartanburg and Union Railroad which had provisions identical to those of sections 9, 10 and 11 above. The Court noted that, under sections 9 and 10, the Legislature had specifically provided that land taken by and paid for by the railroad would vest in fee simple. However, the Court noted that no such words were used in section 11, which provided only that the company shall have "good right and title. . . so long as the same may be used only for the purpose of said road." The Ragsdale Court, after citing Justice Wardlaw's dissent in Lewis, concluded "[t]he legislature wisely made a distinction in the tenure by which the railroad company held the land when it

was under one or the other of said sections. Having reached the conclusion that the rights of the parties are different under the foregoing sections, . . . [o]ur interpretation of the foregoing sections is that the railroad company acquired only a right of way over the land described in the complaint." 60 S.C. at ___,38 S.E. at 612. Although Ragsdale cited Justice Wardlaw's dissent in Lewis, it is patent that the primary rationale for the holding in Ragsdale is the discrepancy between the legislature's specific grant of a fee simple in sections 9 and 10 of the 1845 Charter, and the lack of such a specific grant in section 11. Moreover, several subsequent cases relied upon Ragsdale to find an easement. See Southern Ry. v. Beaudrot, 63 S.C. 266, 41 S.E. 299 (1902)(citing Ragsdale, court concluded it may be conceded railroad obtained only a right of way); Southern Ry. v. Gossett, 79 S.C. 372, 60 S.E. 956 (1908)(citing Beaudrot for proposition that railroad only obtained easement under 1845 charter); Boney v. Cornwell, 117 S.C. 426, 109 S.E. 271 (1921)(under 1848 charter, railroad acquired only an easement, and not a fee simple defeasible title; court cited Ragsdale for proposition that easement right of way rather than fee was created). See also Hill v. Southern Ry., 67 S.C. 548, 46 S.E. 486 (1903)(recognizing railroad acquired only a right of way under 1837 charter); Harman v. Southern Ry., 72 S.C. 228, 51 S.E. 689(1905)(court construed deed from grantor as granting an easement, noting the right of way obtained was same as that it would have acquired had it been obtained pursuant to the statutory grant under section 11 of the 1845 charter).

Most recently, in Eldridge v. Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998), the Court of Appeals addressed the interest acquired by railroad where it obtained property in three different manners: 1) by statutory grant under section 11 of its 1845 Charter, 2) through condemnation, and 3) by deed. As to the statutory grant under section 11, the Court of Appeals cited the prior authority of Ragsdale, Beaudrot, and Boney for the proposition that railroad's interest was an easement only.

We adhere to the wealth of authority in this state and hold the 1845 Charter created only an easement in Railroad, such that Faulkenberry is entitled to use the disputed crossing. We note, however, that although Faulkenberry may cross the railroad tracks, he may not do anything which would

unreasonably interfere with Railroad's use of its easement. Marion County Lumber Co. v. Tilghman Lumber Co., 75 S.C. 220, 55 S.E. 337 (1906) (owner of the dominant estate cannot materially interfere with use and enjoyment of servient estate's easement; owners must be held during continuance of easement to have abandoned every use of the land except such as might be made consistent with the reasonable enjoyment of the easement). See also Brown v. Gaskins, 284 S.C. 30, 33, 324 S.E.2d 639, 640 (Ct.App.1984).[6]

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

[6] We note that Faulkenberry is also prohibited from utilizing Railroad's easement in any manner inconsistent with the right of utilities, telephone and telegraph companies, etc. to construct, maintain, and operate lines upon the rights of way of railroad companies. See S.C. Code Ann. § 58-9-2020, 58-27-130 (Supp. 2001).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Todd William Wright, Appellant.

Appeal From Union County
J. Nicholson, Jr., Circuit Court Judge

Opinion No. 25455
Heard May 24, 2001 - Filed April 29, 2002

AFFIRMED

Kenneth E. Sowell, of Simpsonville, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Senior Assistant Attorney General Harold M. Coombs, Jr., `all of Columbia, and Solicitor Thomas E. Pope, of York, for respondent.

JUSTICE WALLER: Todd William Wright was convicted of criminal domestic violence of a high and aggravated nature (CDVHAN) and sentenced to 10 years imprisonment, suspended upon service of 8 years, and 5 years probation. We affirm.

FACTS

Wright, 6' tall and weighing 216 lbs., beat and kicked his wife Wendy on the evening of February 16, 1999. Her injuries were so severe that two of her ribs were fractured and her spleen had to be removed. Wright was indicted for criminal domestic violence of a high and aggravated nature.[1] The aggravating factors alleged in the indictment were "a difference in the sexes of the victim and the defendant" and/or that "the defendant did inflict serious bodily harm upon the victim by kicking her in the mid-section requiring her to seek medical attention."

Wright objected to the judge's charge on the aggravating circumstance of "a difference of the sexes," contending it violated equal protection.[2] The objection was overruled; Wright was found guilty as charged.

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[1] The offense of CDVHAN incorporates the elements of ABHAN. S.C. Code § 16-25-65 (Supp. 2000). The elements of ABHAN are 1) the unlawful act of violent injury to another, accompanied by circumstances of aggravation. Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). Subsection C of section 16-25-65 specifically states that it does not codify the common law offense of ABHAN but, rather, creates a statutory offense of CDVHAN.

[2] U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

ISSUE

Does the aggravating circumstance of a "difference in the sexes" violate equal protection?

DISCUSSION

Wright contends the judge's charge on the aggravating circumstance of a "difference in the sexes" violated his right to equal protection. We disagree.

The equal protection clause prevents only irrational and unjustified classifications, not all classifications. South Carolina Public Svc. Authority v. C&S Nat'l Bank, 300 S.C. 142, 386 S.E.2d 775 (1989). For a gender-based classification to pass constitutional muster, it must serve an important governmental objective and be substantially related to the achievement of that objective. Craig v. Boren, 429 U.S. 190, 197 (1976); Griffin v. Warden, CCI, 277 S.C. 288, 286 S.E.2d 145, cert. denied, 459 U.S. 942, 103 S.Ct. 255, 74 L.Ed.2d 199 (1982). A law will be upheld where the gender classification realistically reflects the fact that the sexes are not similarly situated in certain circumstances. In the Interest of Joseph T, 312 S.C. 15, 430 S.E.2d 523 (1993). See also Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981) (holding that as long as the rule of nature that the sexes are not similarly situated in certain circumstances is realistically reflected in a gender classification, the statute will be upheld as constitutional). "The relevant inquiry ... is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the [legislature] is within constitutional limitations." Id. at 473.

In Michael M., supra, Justice Stewart wrote:

> [In] [certain narrow] circumstances, a gender classification based on clear differences between the sexes in [sic] not invidious, and a legislative classification realistically based upon those differences is not unconstitutional. . . . When men and women are not in fact similarly situated in the area covered by the legislation in question,

> the Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded. While those differences must never be permitted to become a pretext for invidious discrimination, no such discrimination is presented by this case. The Constitution surely does not require a State to pretend that demonstrable differences between men and women do not really exist.

450 U.S. at 478 and 481 (Justice Stewart concurring).

In State v. Gurganus, 250 S.E.2d 668, 672-673 (1979), the North Carolina Supreme Court upheld a statute enhancing the punishment for males convicted of assault on a female, stating,

> We base our decision instead upon the demonstrable and observable fact that the average adult male is taller, heavier and possesses greater body strength than the average female. See Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). We take judicial notice of these physiological facts, and think that the General Assembly was also entitled to take note of the differing physical sizes and strengths of the sexes. Having noted such facts, the General Assembly could reasonably conclude that assaults and batteries without deadly weapons by physically larger and stronger males are likely to cause greater physical injury and risk of death than similar assaults by females. Having so concluded, the General Assembly could choose to provide greater punishment for these offenses, which it found created greater danger to life and limb, without violating the Fourteenth Amendment. We recognize that classifications based upon average physical differences between the sexes could be invalid in certain situations involving equal employment opportunity, participation in sports and other areas. . . . We believe that an analytical approach taking into account such average differences is an entirely valid approach, however, when distinguishing classes of direct physical violence. This is particularly true where, as here, the acts of violence classified are all

> criminal when engaged in by any person whatsoever and have no arguably productive end. See Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976). Certainly some individual females are larger, stronger and more violent than many males. The General Assembly is not, however, required by the Fourteenth Amendment to modify criminal statutes which have met the test of time in order to make specific provisions for any such individuals. The Constitution of the United States has not altered certain virtually immutable facts of nature, and the General Assembly of North Carolina is not required to undertake to alter those facts. [The North Carolina statute] establishes classifications by gender which serve important governmental objectives and are substantially related to achievement of those objectives. Therefore, we hold that the statute does not deny males equal protection of law in violation of the Fourteenth Amendment to the Constitution of the United States.

See also Buchanon v. State, 480 S.W.2d 207, 209 (Tex. 1972) (statute making assault or battery committed by adult male on an adult female an aggravated assault did not deny equal protection since "[i]t is a matter of common knowledge, and a proper subject for judicial notice, that women, as a general rule, are of smaller physical stature and strength than are men"). Accord Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908) (recognizing differences in body structure and physical strength of sexes); People v. Silva, 33 Cal. Rptr.2d 181 (Cal. 1994) (upholding against equal protection challenge criminal domestic abuse statute criminalizing willful injury upon person of opposite sex with whom assailant cohabits; noting obvious distinction that women are physically less able to defend themselves against their husbands than vice-versa).

We find that the "difference in gender" aggravator is legitimately based upon realistic physiological size and strength differences of men and women such that it does not violate equal protection. Accord Gurganus, supra. Cf Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (different treatment of men and women reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not

similarly situated); Rostker v. Goldberg, 453 U.S. 57, 72- 83 (1981) (holding that draft registration applicable only to men was justified because women are excluded from combat). We therefore affirm Wright's convictions.

AFFIRMED.

MOORE and BURNETT, JJ., concur. TOAL, C.J., concurring in result only in a separate opinion in which PLEICONES, J., concurs.

Chief Justice Toal, concurring in result only.

While I concur with the majority's decision to affirm Wright's CDVHAN conviction, I disagree with the majority's conclusion that the "difference in the sexes" aggravating circumstance does not violate equal protection. I believe the "difference in the sexes" aggravating circumstance, as a gender-based classification, violates equal protection. However, the violation is harmless in this instance because the jury found another aggravating circumstance, infliction of serious bodily injury, which does not violate equal protection.

I agree with the majority that the "difference in the sexes" aggravator is inherently gender-based, but would find that it does not satisfy the second prong of the analysis employed by the majority. As explained by the majority, to pass constitutional muster, a gender-based classification must (1) serve an important governmental objective and (2) be substantially related to the achievement of that objective. *Craig v. Boren; Griffin v. Warden*. The burden rests on the state to make this showing. Although the "difference in the sexes" classification is presumably intended to serve the governmental objective of preventing domestic violence, I would find it is not substantially related to achieving this objective.

The CDVHAN statute was designed to address violence in the home; it applies when any person harms any member of their household.[3] The statute then is designed to prevent domestic violence against men, women, and children by perpetrators of both sexes. Having an aggravating circumstance based solely on gender does not substantially further this objective or the narrower objective of protecting women from domestic abuse. In my opinion, this gender-based classification is no different than the classification discussed by the majority and struck down by this Court in *In the Interest of Joseph T.* In that case, this Court held a statute criminalizing communication of indecent messages to females

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[3]Household member includes spouses, former spouses, parents and children, relatives to the second degree, persons with a child in common, and males and females who are cohabiting or previously cohabited. S.C. Code Ann. § 16-25-10 (Supp. 2001).

violated Equal Protection. *Id.* Although the Court recognized that some gender-based classifications which realistically reflect that men and women are not similarly situated can withstand equal protection scrutiny on occasion, it clarified that distinctions in the law which were based on "old notions" that women should be afforded "special protection" could no longer withstand equal protection scrutiny. *Id.*

In my opinion, this "difference in gender" aggravating circumstance is a distinction that perpetuates these "old notions." There is no logical purpose for it except to protect physically inferior women from stronger men; a purpose based on out-dated generalizations of the sexes no longer favored in legal analysis. *See United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (reiterating that gender classifications cannot be used as they once were to create or perpetuate the legal, social, and economic inferiority of women and cautioning reviewing courts to take a hard look at generalizations or tendencies of the sexes). Similarly, the cases relied upon by the majority are based on out-dated generalizations of the sexes no longer favored. The equal protection analysis set forth by the majority relies almost entirely on the 1979 North Carolina Supreme Court opinion *State v. Gurganus,* 250 S.E.2d 668 (1979). No court, federal or state, has ever relied on the analysis the majority cites from *Gurganaus.* In fact, *Gurganus* has been cited only once by any court, and then only for a rule of statutory interpretation in a case that did not involve equal protection issues. *Guilford County Bd. of Educ. v. Guilford County Bd. of Elections,* 430 S.E.2d 681 (N.C. Ct. App. 1993).

Deterring domestic violence is more efficiently and appropriately accomplished through other aggravators, such as the "great disparity in ages or physical conditions of the parties" and "infliction of serious bodily injury" aggravators. In many cases, there may be a great disparity in strength between a male and a female, but if there is not, there is no reason why a difference in gender should serve as an aggravating circumstance to "protect" women to the detriment of men. Therefore, I would find that the "difference in the sexes" aggravating circumstance violates equal protection because it fails to substantially relate to the government objective of preventing domestic violence. However, I would affirm Wright's conviction because the jury also found a

permissible, gender-neutral aggravating circumstance: infliction of serious bodily injury.

Accordingly, I respectfully concur in result only.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jamie Mizzell and
Jimmy Allen "Tootie"
Mizzell, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Colleton County
Luke N. Brown, Jr., Circuit Court Judge

Opinion No. 25456
Heard March 20, 2002 - Filed April 29, 2002

REVERSED

Chief Attorney Daniel T. Stacey, of South Carolina Office of Appellate Defense; and Robert Edward Lominack, of Law Offices of David I. Bruck, of

Columbia, for petitioners.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia; and Solicitor Walter M. Bailey, Jr., of Summerville, for respondent.

JUSTICE BURNETT: Brothers Jamie Mizzell ("Jamie") and Jimmy "Tootie" Mizzell ("Tootie") (collectively, "petitioners") were charged with first degree burglary, grand larceny, and possession of a firearm during the commission of a violent crime. At trial, a jury convicted petitioners of second degree burglary and grand larceny. The Court of Appeals affirmed. See State v. Mizzell, 341 S.C. 529, 535 S.E.2d 134 (Ct. App. 2000). We granted certiorari to review the Court of Appeals' decision. We reverse.

FACTS

On September 24, 1996, Howard Woods' ("Woods") home was burglarized. Woods stated he left his home in the afternoon, returning later to find the front door kicked in and numerous guns missing. Woods testified knowing petitioners from a hunting club.

Investigator Fowler ("Fowler"), the lead investigator, testified that upon reaching Woods' home, he found the door opened. He discovered no fingerprints or any other physical evidence to further the investigation. After receiving a tip, Fowler went to the home of Thomas Harley ("Harley") and recovered nine of Woods' rifles. Harley admitted buying rifles from petitioners. Harley testified a man and woman were in the truck with petitioners when he bought the rifles.

The State's key witness, Donald Steele ("Steele"), testified he and his wife accompanied petitioners to Woods' home. Steele drove a small

pick-up truck to the home. After arriving, Steele claimed petitioners kicked in the door and entered. Steele testified petitioners exited the home carrying guns. Steele further testified to witnessing petitioners sell several of the guns to a man, presumably referring to Harley.

On cross-examination, Steele admitted the State charged him with the same crimes as petitioners. The trial court excluded evidence of the possible sentence Steele faced but permitted petitioners to examine Steele about the sentence in general terms.

ANALYSIS/DISCUSSION

Petitioners argue the trial court erred in violating their rights under the Sixth Amendment's Confrontation Clause[1] by limiting the cross-examination of Steele. Specifically, petitioners assert the trial court should have permitted defense counsel to elicit from Steele the possible punishment he could receive if he were convicted of the charged crimes. We agree.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994) (quoting State v. Schmidt, 228 S.C. 301, 303, 342 S.E.2d 401, 402 (1986)). The Sixth Amendment is applicable to the states through the Fourteenth Amendment.[2] See Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Brown, 303 S.C. 169, 399 S.E.2d 593

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[1]U.S. Const. amend. VI.

[2]U.S. Const. amend. XIV.

(1991). "'On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. Witnesses § 560a (1957)); see Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.").

A criminal defendant may show a violation of the Confrontation Clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986). The trial judge retains discretion to impose reasonable limits on the scope of cross-examination. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); accord Delaware v. Van Arsdall, supra. Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate. State v. Graham, supra. If the defendant establishes he was unfairly prejudiced by the limitation, it is reversible error. State v. Brown, supra.

The trial judge prohibited questioning Steele about a specific possible sentence because the charges against Steele and petitioners were the same. "The purpose of preventing disclosure of the potential sentence facing the defendant is that such evidence is irrelevant to the jury and could possibly prejudice the State's right to a fair trial." Illinois v. Brewer, 615 N.E.2d 787, 790 (Ill. App. Ct. 1993). We implicitly recognized this interest in State v. Brown, supra.

The jury is, generally, not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence. However, other constitutional concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant's right to effectively cross-examine a co-conspirator

witness of possible bias outweighs the need to exclude the evidence.

In State v. Brown, supra, we held the trial court erred in excluding evidence of a witness' possible punishment because it would allow the jury to learn of Brown's own potential sentence, if convicted.

The witness admitted, on direct examination, she testified in exchange for being charged with only one count of conspiracy for which she could face a maximum sentence of seven and one-half years. On cross-examination, the trial judge precluded the defense from asking the witness the maximum punishment she faced if found guilty of trafficking in cocaine, the crime initially charged against her.

We found Brown was unfairly prejudiced because the witness "was permitted to avoid a mandatory prison term of more than three times the duration she would face on her plea to conspiracy [was] critical evidence of potential bias that appellant should have been permitted to present to the jury." Id., 303 S.C. at 171, 399 S.E.2d at 594. Moreover, the witness provided the only evidence to link Brown to the cocaine trafficking. Id., 303 S.C. at 171-72, 399 S.E.2d at 594.

Because of the error of law and the unfair prejudice to Brown, we held the denial of meaningful cross-examination outweighed the State's interest in excluding the evidence. Id., 303 S.C. at 172, 399 S.E.2d at 594.

The case *sub judice* is distinctive because the co-conspirator witness was charged with the same crimes as petitioners but had neither agreed to a plea bargain nor pled guilty. Petitioners assert the State should not be allowed to rely on this distinction to exclude this testimony because the absence of the agreement, if anything, suggests the witness will testify more favorably to the State's position. Petitioners argue Steele would reasonably have felt the quality of his cooperation would determine the degree of benefit he would later receive. See Boone v. Paderick, 541 F.2d 447, 451 (4th Cir. 1976) ("[A] promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the

quality of the evidence produced; the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor."). We agree.

Generally, a judge may prevent the introduction of evidence which informs the jury of the possible sentence defendants may receive if convicted because it is either irrelevant or substantially prejudicial. See Illinois v. Brewer, supra; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) (construing Rule 403, SCRE, to allow a judge to exclude relevant evidence if the danger of unfair prejudice substantially outweighs its probative value); Rule 402, SCRE ("Evidence which is not relevant is not admissible.").

The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such evidence. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency. Accordingly, we conclude the Court of Appeals erred in holding the trial judge properly excluded testimony concerning Steele's potential sentence if convicted of the same crimes as petitioners.

Our inquiry does not end upon finding the trial court committed an error in limiting the cross-examination of Steele. "A violation of the defendant's Sixth Amendment right to confront the witness is not *per se* reversible error" if the "error was harmless beyond a reasonable doubt." Graham, 314 S.C. at 385, 444 S.E.2d at 527. Whether an error is harmless depends on the particular facts of each case and upon a host of factors including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the

prosecution's case.

Van Arsdall, 475 U.S. at 684, 106 S.Ct. at 1438, 89 L.Ed.2d at 686; see State v. Clark, 315 S.C. 478, 445 S.E.2d 633 (1994) (applying Van Arsdall factors); see also State v. Graham, supra, (the Van Arsdall factors are not exhaustive).

"Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). In determining whether an error is harmless, "the reviewing court must review the entire record to determine what effect the error had on the verdict." Clark, 315 S.C. 478, 484, 445 S.E.2d 633, 636 (Toal, J. dissenting); see, e.g., Arnold v. State, supra.

Considering the Van Arsdale factors, we note much of Steele's testimony was either cumulative or corroborated by other witnesses. Both Woods and Fowler testified the front door to the home had been kicked in or tampered with to gain entry. Harley testified he bought rifles from petitioners and observed a male and female (presumably Steele and his wife) in the truck.

Critically, however, Steele was the only witness to testify as an eyewitness to petitioners' burglary of the home. The lack of physical evidence placing petitioners at the scene enhanced the importance of Steele's testimony. As in Brown, the co-conspirator witness is the only link placing petitioners at the scene of the crime.

The State contends any error is harmless because the trial judge permitted petitioners to cross-examine Steele about any plea agreement and to question the veracity of his testimony. Additionally, the State asserts the trial court's error did not prejudice the outcome of the trial because Steele was allowed to testify, if convicted, he could go to jail for a "long time."

Steele's general admission he "could get a long sentence for

these crimes," denies petitioners' Confrontation Clause rights under the Sixth Amendment. A "long sentence" may have different meanings to different jurors.

We believe the defendant's Sixth Amendment right to effective cross-examination in this case outweighs the right of the State to shield the jury from knowledge of the possible sentence for a defendant who faces the same charges as a witness against him. A witness admitting he is subject to a "long sentence" is quite different from a witness admitting he could be sentenced to a maximum of life in prison, the sentence faced by Steele if convicted of first degree burglary.[3] See S.C. Code Ann. § 16-11-311(B) (Supp. 2001).

In State v. Sherard, supra, two juvenile co-conspirators implicated Sherard in a robbery-murder scheme. In exchange for their testimony, the two were allowed to plead guilty as accessories in family court. Sherard was waived up to general sessions court on charges of murder and attempted armed robbery.

On cross-examination one of the co-conspirators admitted his charges of murder and attempted armed robbery were reduced in exchange for his testimony. He further testified that if he were found guilty of murder in general sessions court, he would face a mandatory life sentence. However, the trial judge prevented Sherard from asking the second co-conspirator witness the penalty he could have suffered if convicted of the original charges. The trial judge did allow the witness to testify he knew the reduced charges would result in much less severe penalties.

We found Sherard suffered no prejudice from the trial court's decision. Critically, we distinguished our decision from Brown where "no

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[3]A "[b]urglary in the first degree is a felony punishable by life imprisonment. For purposes of this section, "life" means until death. The court, in its discretion, may sentence the defendant to a term of not less than fifteen years." S.C. Code Ann. § 16-11-311(B) (Supp. 2001).

evidence was presented to the jury regarding the sentence the witness avoided in pleading guilty and testifying for the State." Id., 303 S.C. at 175, 399 S.E.2d at 596. While we found the trial court afforded the defense ample opportunity to demonstrate the bias of the witnesses, we found it critical that "during cross-examination of [the first co-conspirator witness], the jury was made fully aware that a charge of murder carries a mandatory life sentence." Id. In the present case, the jury only knew Steele was subject to the vagaries of a "long" prison term, whatever that may mean.

Because Steele was the only witness to directly link petitioners to the burglary, we cannot say the trial court's error was harmless beyond a reasonable doubt. See Arnold v. State. Accordingly, we find the trial court committed prejudicial error in limiting petitioners cross-examination into Steele's possible sentence.

CONCLUSION

For the aforementioned reasons we REVERSE the court below.

TOAL, C.J., MOORE and WALLER, JJ., concur. PLEICONES, J., concurring in result.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Greg Williams and Bill Wines, individually and as trustees and members of The Christian Church of North Myrtle Beach, and as representatives of others similarly situated as members of The Christian Church of North Myrtle Beach, Harrill Lovelace and Clay Crowder, individually and as members of The Christian Church of North Myrtle Beach, and as representatives of others similarly situated as members of the The Christian Church of North Myrtle Beach, and Darrel Hall, Respondents,

v.

Joel Wilson, Danny Banks, J.W. Mullins, Bob Williamson and E. Richard Powell, individually and as present or former

trustees of The Christian Church of North Myrtle Beach, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 25457
Heard February 21, 2002 - Filed April 29, 2002

AFFIRMED IN PART; REVERSED IN PART

Randall K. Mullins and Elizabeth J. Saraniti, both of Mullins Law Firm, P.A., of North Myrtle Beach, for petitioners.

Robert L. Barnett, of Barnett & Wright, P.A., of Myrtle Beach, for respondents.

JUSTICE MOORE: This is a church dispute. We granted a writ of certiorari to review the Court of Appeals's decision[1] affirming the master's finding that the dismissal of the preacher by church trustees was a

[1]Williams v. Wilson, 341 S.C. 136, 533 S.E.2d 592 (Ct. App. 2000).

nullity and the congregation's election of new trustees was valid. We affirm in part and reverse in part.

FACTS

Petitioners (Trustees), who are the founders of The Christian Church of North Myrtle Beach (NMB Church), voted to dismiss the church's preacher, respondent Darrell Hall. In response, the congregation voted to oust Trustees, elected replacement trustees, and overrode the dismissal of Preacher Hall. Trustees retaliated by freezing the church's assets and locking its doors.

Respondents, who are church members, then commenced this declaratory judgment action to determine Preacher Hall's employment status and the legitimacy of the newly elected trustees, and for injunctive relief. After issuing a temporary injunction, the circuit court referred the case to the master-in-equity. The master found NMB Church was a congregational church and, as such, the congregation held the ultimate authority over all church matters. Accordingly, he ruled the ouster of Trustees was legitimate and Preacher Hall's dismissal was a nullity. Further, he enjoined Trustees from interfering with the congregation's access to church assets. On appeal, the Court of Appeals affirmed.

ISSUES

1. Did the Court of Appeals properly affirm the master's finding that NMB Church is a congregational church?

2. Did the Court of Appeals's analysis infringe the right to freedom of religion?

3. Was the special congregational meeting at which the new trustees were elected a legal meeting?

DISCUSSION

Standard of review

We begin by noting our agreement with the Court of Appeals's finding that this is an action in equity and therefore the applicable standard of review is our own view of the preponderance of the evidence. *See* Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). Whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main purpose in bringing the action. Doe v. South Carolina Medical Malpractice Liability Joint Underwriting Assoc., 347 S.C. 642, 557 S.E.2d 670 (2001). Respondents' main purpose in bringing this action was to enjoin Trustees' present and future interference in church matters. Accordingly, this is an equitable action and we may take our own view of the evidence.

Further, it is important to note our limited jurisdiction over church matters. Church disputes may be resolved by the courts only if resolution can be made without extensive inquiry into religious law. It is not the function of the courts to dictate procedures for a church to follow. Pearson v. Church of God, 325 S.C. 45, 478 S.E.2d 849 (1996); Knotts v. Williams, 319 S.C. 473, 462 S.E.2d 288 (1995). To preserve "complete religious liberty, untrammeled by state authority," we limit our inquiry into church affairs and respect the boundaries of church self-governance. Pearson, 325 S.C. at 52, 478 S.E.2d at 852-53.

Form of church governance

The NMB Church was founded by Trustees as a Christian Church, which is also referred to as the Church of Christ, in 1994. Trustees were members of another Christian Church, the Grand Strand Christian Church, and all but two of them remained members of that church even after founding

the NMB Church.[2] Trustees acquired the church property in June 1994 and constructed the church building on it. The church was incorporated as a nonprofit corporation in March 1995. Trustees hired Preacher Hall at the end of May 1996 and he began his tenure at NMB Church on June 18, 1996.

On June 30, Trustees approved a "Constitution and By-Laws" (hereinafter "the bylaws") that became effective July 1, 1996. The bylaws provide regarding trustees as follows:

ARTICLE I, SECTION III

> 1. The church is set up as a "Trust" under the direction of the Trustees named herein.

ARTICLE IV, SECTION 11

> 3. TRUSTEES: The Church formed under the direction of a Board of Trustees, named here as they may add to or change:
>
> [naming Trustees]
>
> A. DUTIES OF TRUSTEES: Trustees shall act as legal agents of the Church in all business matters. Hold legal title to all church property and handle all business transactions related thereto; have supervision over all endowment and trust funds; and discharge such duties as the law of South Carolina enjoins upon them.
>
> > A1) As an advisory board to the church leaders of [NMB Church]

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[2]Under Christian Church doctrine, a person can be a member of only one church at a time.

A2) Duties as given in the Article of Organization[3]

B. MINIMUM NUMBER OF TRUSTEES (6)
C. QUALIFICATIONS: Must be active member of the Christian Church
D. ELIGIBILITY: Shall be based upon the decision of other trustees.

On the subject of a preacher, the bylaws provide:

ARTICLE VII, SECTION 1

1. The Minister shall be elected for an indefinite term, and a contract agreeable to the Board of Elders and Deacons and Minister shall be entered into.

. . .

3. The Elders shall appoint the Pulpit Committee. . . . When a vacancy occurs in the pulpit, it shall be their duty to carry on proper correspondence with candidates for the pulpit. The recommended candidate's qualifications shall be submitted to the Church Board[4] for their approval. If approved, the recommended candidate shall be invited to meet with the Elders and Deacons prior to conducting a Worship Service. . . . Then following the service a congregational vote shall be cast to determine whether the candidate shall be elected to fill the pulpit. . . .

4. The congregation reserves the right to dismiss any Minister at any time. . . . The dismissal of a Minister of this congregation

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[3]There is no "Article of Organization" included in the bylaws.

[4]The term "Church Board" is not defined in this document but appears in context to refer to the Board of Trustees.

> shall be by the recommendation of majority of all Elders and Deacons and a majority vote of the eligible members present at a congregational meeting.

The contested action regarding the preacher and new trustees took place at a special congregational meeting held on June 14, 1998, after the approval of these bylaws.

The evidence is uncontested that Christian Churches are independent congregational churches governed by their own congregations. The congregation selects the church's trustees and the trustees are always members of that church. In a congregational church, the congregation is the highest authority. Knotts v. Williams, *supra*.

In a church dispute, the party asserting a deviation from governance conforming to the affiliated church convention must demonstrate by a preponderance of the evidence that the church adopted an alternative government. Bowen v. Green, 275 S.C. 431, 272 S.E.2d 433 (1980). Here, the burden is on Trustees to show the NMB Church was established as other than a congregational church since they are asserting that they, and not the congregation, are the highest authority.

The testimony of Trustees at the hearing before the master is conflicting on their intent as the founders of NMB Church. Trustee Spruill testified the Board of Trustees was intended to act as an advisory committee that "would derive its authority from the principal that was recognized or represented. That being the church." He stated that although the church had not ordained any elders, which is "a spiritually guided process," the church was now able to handle its own affairs. His understanding was "the trustees serve a legal capacity at the pleasure of the elders and in turn the elders are elected by the congregation members. Therefore the ultimate authority flows to the members." Trustees Powell and Wilson, on the other hand, felt they had the authority to control the church property and dismiss the preacher because the church was set up as a "trust."

Whatever the original intent of the Trustees in 1994 when the church was founded, they memorialized its form of government by approving the church bylaws in 1996. The church bylaws clearly reserve to the congregation the right to dismiss the preacher which is consistent with the convention of Christian Churches as congregational. Accordingly, Trustees had no authority to dismiss Preacher Hall and the master properly ruled the dismissal was a nullity.

The bylaws, however, do not clearly follow the Christian Church convention of congregational authority in regard to the election of trustees. There is no express provision regarding the election of trustees. Article IV, section II(3)(A), provides: "The Church [is] formed under the direction of a Board of Trustees, named here as they may add to or change." This language may be construed as creating a self-perpetuating Board, which would remove from the congregation the right to elect new trustees.

We find this language is not sufficient, however, to carry Trustees' burden of proving an alternative church government vesting them with the highest authority. The same provision of the bylaws also specifies that the Board of Trustees is "an advisory board to the church leaders," language which supports the conclusion a congregational form of government was intended. The ambiguity of the bylaws and the conflicting testimony regarding the intent of the founders is insufficient to prove the adoption of an alternative to the conventional Christian Church governance by congregation.

Further, although the bylaws provide that the Board of Trustees will "hold legal title to all church property and handle all business transactions related thereto [and] have supervisions (*sic*) over all endowment and trust funds," this provision does not clearly give Trustees the ultimate authority over church matters but merely indicates the Trustees' function as business managers who will answer to the congregation. Accordingly, the bylaws do not overcome the presumption that the church is ultimately governed by the congregation according to the Christian Church convention.

We find Trustees have failed to carry their burden of proving an

alternative form of church governance and conclude the master properly found the NMB Church is a congregational church.

Freedom of religion

In affirming the master, the Court of Appeals noted that "South Carolina recognizes at least two forms of governance for churches: (1) hierarchical; and (2) congregational." It found Trustees had failed to show all the legally required elements of a trust and therefore the NMB Church was not a trust but congregational. Trustees contend this analysis limits the church's ability to choose its own form of government and infringes its right to the free exercise of religion.[5]

We agree the Court of Appeals's abbreviated analysis in determining the church's form of government appears to limit the form of church government to those recognized forms. As discussed above, however, the preponderance of the evidence, including the intent of the founders and the church bylaws, supports the ruling that the NMB Church is in fact a congregational church. Our analysis does not infringe on the church's ability to chose any alternative form of government.

Election of new trustees

Finally, Trustees contend the meeting at which the congregation voted to reinstate Preacher Hall and to elect the new trustees was illegal because notice was not given to Trustees. This issue affects only the validity of the election of new trustees since the dismissal of Preacher Hall by Trustees was a nullity and his reinstatement by the congregation was not required.

The bylaws provide that notice of a special congregational meeting must be given for the two preceding Sundays and written notice sent five

[5]See S.C. Const. art. I, § 2.

days before the meeting to all members of the church.[6] Only two Trustees were members of the NMB Church, Trustee Powell and Trustee Williamson.[7] Under the bylaws, they were entitled to notice and it is undisputed they did not receive it.[8] These two Trustees were not aware of the meeting until the day it occurred. Both did attend and neither objected at the meeting that they were not given notice.

In response to Trustees' claim the meeting was held illegally, respondents contend Trustees have failed to show prejudice from the lack of notice. Rather than inquiring into prejudice, in light of our restraint in dealing with church disputes, we resolve this issue by simply requiring compliance with the church's own bylaws rather than determining whether a deviation was harmless. *See* Hatcher v. South Carolina Dist. Council of Assemblies of God, Inc., 267 S.C. 107, 226 S.E.2d 253 (1976) (civil courts will accept as conclusive the decision of a legally constituted ecclesiastical tribunal having jurisdiction of the matter absent fraud, collusion, or arbitrariness).

In conclusion, since the congregational meeting was not properly noticed to all members as required, we reverse the Court of Appeals's decision on this issue. Although the congregation has authority to elect its trustees under the congregational form of church governance as discussed above, this authority was not properly exercised according to the church

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[6]This provision regarding a "special congregational meeting" (Article VI, section I, ¶3), rather than the provision governing a "special business meeting" of Trustees (¶ 2), applies in light of our conclusion that the election of trustees is accomplished by the congregation and not the trustees.

[7]As noted above, the other Trustees remained members of the Grand Strand Christian Church and under church doctrine a person can be a member of only one church at a time.

[8]Preacher Hall admitted he intentionally omitted giving Powell and Williamson notice of the meeting.

bylaws.

CONCLUSION

We affirm the holding that Preacher Hall's dismissal by Trustees was a nullity but reverse the holding that the new trustees were properly elected.[9]

AFFIRMED IN PART; REVERSED IN PART.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

[9]Although Trustees will retain their positions until further action by the congregation, the injunction forbidding them from interfering with the congregation's access to church assets accords with congregational control and remains valid.

The Supreme Court of South Carolina

In re: Amendments to Rule 405(a)(3) and Rule 414 (b)(6), SCACR.

ORDER

Pursuant to Art. V, § 4 of the South Carolina Constitution, Rule 405(a)(3) and Rule 414(b)(6) are amended to read:

> has received a JD or LLB degree from a law school which was approved by the Council of Legal Education of the American Bar Association at the time the degree was conferred.

These amendments shall be effective immediately.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 18, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Tomongo James William McCord,

Appellant.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 3482
Heard March 5, 2002 - Filed April 22, 2002

AFFIRMED IN PART & REVERSED IN PART

Senior Assistant Appellate Defender Wanda H. Haile, of S.C. Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Ralph E. Hoisington, of N. Charleston, for respondent.

HEARN, C.J.: Tomongo McCord appeals his convictions for first degree criminal sexual conduct (CSC), first degree burglary, kidnapping, and strong arm robbery. McCord contends the trial court erred in its rulings regarding (1) the victim's in-court identification of him, (2) DNA evidence, (3) a composite drawing of the suspect, (4) the solicitor's closing argument, and (5) his entitlement to credit for time served. We affirm in part and reverse in part.

FACTS

This action arises out of the 1993 robbery and sexual assault of a victim living in a gift shop she owned and operated. The victim was sleeping in her bedroom when she was awakened by the sound of breaking glass. She went to investigate and saw a man in the hallway. He lunged at her and knocked her to the ground. The man told her he wanted money and he would cut her if she did not stop screaming. She told him the money was in the front of the building. The man grabbed her wrists and started towards the front, but then changed his mind and forced her into the bedroom, turned on the light, and sexually assaulted her.

After the assault, the man forced the victim to the front of the building where the cash register was located. The victim turned on a hall light as they made their way to the front and then turned on lights in the display case next to the register. The man took money out of the register and fled through a back door. The victim immediately called 9-1-1 and reported she had been raped.

The police arrived and discovered a concrete pelican had been used to break a back window. A total of thirteen latent fingerprints and palm prints were taken at the scene. The victim was transported to a local hospital where a CSC protocol kit was performed.

In 1996, four of the thirteen prints were positively identified as

McCord's by comparing them to a computer database of known prints. The victim was shown a photographic line-up in 1996 which included McCord's photo, but she chose not to make an identification. She requested a physical lineup instead, which was never held. The rape kit, including semen found on the victim, was transmitted to SLED in 1998, and later a private laboratory, for testing. Blood tests revealed McCord's genetic profile was consistent with the donor of the semen, and the chances of someone else having that genetic profile were approximately 1 in 1.2 billion.

McCord was convicted of first degree CSC, first degree burglary, kidnapping, and strong arm robbery. He received consecutive sentences of thirty years for each charge except robbery, for which he received a consecutive sentence of ten years. McCord appeals.

DISCUSSION

I. Victim's In-Court Identification of McCord

McCord first contends the trial court erred in permitting the victim to identify him at trial claiming the identification was unreliable and equivalent to a suggestive show-up. We disagree.

"Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error." State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." State v. Cheeseboro, 346 S.C. 526, 540, 552 S.E.2d 300, 307-08 (2001) (citing Manson v. Brathwaite, 432 U.S. 98 (1977)).

"To determine the admissibility of an identification, the court must determine (1) whether the identification process was unduly suggestive and (2) if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." Id. at 540, 552 S.E.2d

at 308 (citing the two-prong analysis set forth in Neil v. Biggers, 409 U.S. 188 (1972)). "The central question is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." State v. Stewart, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980). The following factors should be considered in evaluating the totality of the circumstances to determine the likelihood of a misidentification: (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Cheeseboro, 346 S.C. at 541, 552 S.E.2d at 308.

In this case the victim testified that when the perpetrator pushed her into the bedroom, "[h]e . . . turned on the bedroom light so it was fully lit." She stated that during the sexual assault, she focused on identifying factors about his appearance:

> I decided to concentrate on what I could tell somebody about him, how could I remember this person, what I see about him that I could identify him. . . . I'm staring at his face the whole time. I put my hand up there to measure the face with my hand in case he hit me again I would be able to remember who this was. I smelled the smells of him, the color of his skin, the eyes, everything.

She further testified that as she was forced to the front of the building, she turned on the kitchen light and the lights near the cash register. She stated the time elapsed from her first encounter with the perpetrator in the hallway until he left the premises was approximately fifteen minutes. As to her degree of attention, the victim stated, "I watched him the whole time. I never took -- turned my back on him. I stared at his face the whole time."

Finally, the victim explained that she was not "unable" to make a selection from the sole photographic lineup; rather, she chose not to select a suspect from the photographic lineup preferring a physical lineup. She stated

she did not study all of the pictures in detail because she had asked for a physical lineup, and she "wanted to see the whole body connected with the head." However, a physical lineup was never conducted. The victim stated she was "positive" of her identification of McCord.

We find no abuse of discretion in the trial court's admission of the identification testimony. Here, the victim testified she did not misidentify the perpetrator, but rather chose not to make a selection from the one photographic lineup she was shown until a physical lineup was conducted. She described the scene as well-lit, as both she and the perpetrator turned on various lights as they moved through several rooms in the building. The victim also had a heightened degree of attention during the incident, which she described in great detail, and she was with the perpetrator for some fifteen minutes, which was not a brief encounter. Therefore, considering the totality of the circumstances, we conclude the trial court did not abuse its discretion in admitting the identification testimony. See State v. Patrick, 318 S.C. 352, 357, 457 S.E.2d 632, 635-36 (Ct. App. 1995) (finding no abuse of discretion in admission of identification where the victim was with the perpetrator under "well-lighted conditions," the victim testified she looked at him carefully, observed another trial involving the defendant and immediately knew the defendant "was the one"); see also State v. Blanchard, 920 S.W.2d 147, 149 (Mo. Ct. App. 1996) ("The fact that a witness is unable to make a positive identification from a photo array does not negate the reliability of their positive in-court identification.") (citation omitted); Commonwealth v. Wilson, 649 A.2d 435, 445 (Pa. 1994) (finding no error in admission of in-court identification where trial was six and one-half years after the alleged crime).

II. DNA Testing

McCord next contends the trial court erred in failing to suppress the State's DNA evidence because it "was based in part on an analysis of [his] blood, which was seized in violation of the [F]ourth [A]mendment." He asserts South Carolina law enforcement officers performed DNA testing on a blood sample he had previously given to federal authorities in an unrelated case, and that this use constituted an impermissible search and seizure. We disagree.

In 1997, the FBI obtained blood samples from McCord in an unrelated case pursuant to a written consent form.[1]

Prior to trial, McCord moved to suppress this DNA evidence. The trial court denied the motion, finding McCord's consent was broad enough to cover the use of the sample in this case. Additionally, because federal authorities already had the right to develop McCord's DNA profile, state law enforcement officers were entitled to compare the evidence they had obtained against this known sample of McCord's blood. The court analogized this procedure to cases where fingerprint evidence is compared against known prints on file in an FBI database.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV; see also S.C. Const. art. I, § 10 (containing similar proscription under South Carolina law). The United States Supreme Court has declared that evidence seized in violation of the Fourth Amendment must be excluded in federal criminal proceedings. See State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). The Court later applied the Fourth Amendment and its exclusionary rule to the individual states. Id. (citation

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[1]The form provided as follows:

> I, Tomongo McCord, do hereby consent and agree to provide the Violent Crime Task Force Officers [d]irected by the U.S. Attorneys Office, blood samples, under medical supervision, and for what ever purpose the Violent Crime Task Force Department may see fit.
>
> I understand that this evidence may be used against me in court and that I have the constitutional right to refuse to provide this sample. No threats, force, or promises have been made by anyone to induce me to give up this right.

(Emphasis added.)

omitted). Thus, all citizens enjoy this federal constitutional protection in every criminal proceeding, whether state or federal. Id.

In Smith v. State, 744 N.E.2d 437 (Ind. 2001), the Supreme Court of Indiana found the defendant had a legitimate expectation of privacy in blood, hair, and saliva samples, and the DNA contained therein, at the time they were taken. The court held, however, that comparison of the defendant's DNA profile obtained in an unrelated rape prosecution with evidence in several unsolved cases did not constitute a search and seizure and did not violate the Fourth Amendment. The court reasoned the defendant had no possessory or ownership interest in the DNA profile, "[n]or does society recognize an expectation of privacy in records made for public purposes from legitimately obtained samples." Id. at 439.

The Georgia Court of Appeals rendered a similar result in Bickley v. State, 489 S.E.2d 167, 169-70 (Ga. Ct. App. 1997). In Bickley, the State presented evidence that the defendant's DNA sample matched semen samples from the two rapes charged in that case. The DNA sample was taken from the defendant pursuant to a search warrant issued in connection with a rape in another county. The defendant moved to suppress the DNA results on the basis the authorities should have gotten a second search warrant before using his DNA results from another incident. The Bickley court held the trial court did not err in failing to suppress the DNA evidence because "[t]he sharing of the DNA evidence between law enforcement officials in different counties did not require a second search warrant." Id. at 170. The court further stated that "no matter how many times defendant's blood is tested, the DNA results would be identical. . . . We agree with the trial court that '[i]n this respect, DNA results are like fingerprints which are maintained on file by law enforcement authorities for use in further investigations.'" Id. (footnote omitted); see also Wilson v. State, 752 A.2d 1250, 1272 (Md. Ct. Spec. App. 2000) (holding privacy claims or unreasonable search and seizure arguments are no longer applicable once a person's blood sample has been lawfully obtained).

We find that the DNA evidence here was properly admitted. No improper search or seizure occurred as McCord's expectation of privacy was

extinguished when he voluntarily gave the blood sample to federal authorities without any limitation on the scope of his consent.[2]

III. Composite Drawing of Suspect

McCord next asserts the trial court erred in allowing a photocopy of a composite drawing of the suspect into evidence "because it violated the best evidence rule and denied [him] his right to a fair trial guaranteed under the fourteenth amendment due process clause and article 1, 3 of the South Carolina State Constitution."

Although the trial court initially ruled the composite was admissible, after several colloquies throughout the course of the trial, the court rescinded its prior ruling and marked the composite for identification only. Furthermore, at the conclusion of trial, the State withdrew its request to admit the composite into evidence. Because the composite was not admitted into evidence, there is no error.

IV. Solicitor's Closing Argument

McCord next contends the trial "court erred in attempting to cure a Doyle[3] violation that was not harmless error."

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[2]Assuming the blood sample was obtained in violation of the Fourth Amendment, such violation would not require exclusion of the DNA test results because they inevitably would have been discovered by lawful means. The State had a search warrant to test McCord's blood with which he refused to comply. No argument was raised at trial that the warrant would not have been executable. See Nix v. Williams, 467 U.S. 431, 446-47 (1984) ("Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. . . . Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.").

[3]Doyle v. Ohio, 426 U.S. 610 (1976) (holding an accused has the right to remain silent and the exercise of that right cannot be used against him).

During closing arguments, the solicitor stated that defense counsel had attacked the State's witness on fingerprint evidence, then stated, "But did you see him put up any experts of their own?" The trial court sustained defense counsel's objection, instructed the jury to disregard the remark, and gave a curative instruction. Thereafter, the solicitor commented that the jury was "entitled . . . to consider the evidence which is presented to you and the lack of any evidence presented to you. That goes for both sides. The State and the defense." The trial court again sustained defense counsel's objection, admonished the solicitor not to say that again, and gave a curative instruction to the jury. McCord failed to object to either curative instruction or request a mistrial.

"[I]t is well settled that if the trial judge sustains an objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed cured." State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996). Furthermore, "[n]o issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial." Id. at 510, 476 S.E.2d at 912. Therefore, we find this issue is not preserved for review because the trial court sustained defense counsel's objections and gave a thorough curative instruction without objection or request for a mistrial.

V. Denial of Credit for Time Served

McCord lastly contends the trial court erred in not crediting him with time served prior to sentencing. We agree.

The jury returned its verdict on October 12, 1999. During sentencing, the solicitor advised the trial court that McCord was currently

serving a federal sentence of 105 months for burglarizing a gun shop and possession of a firearm by a convicted felon.[4]

Defense counsel, however, asserted McCord was not in federal custody at this time. Counsel stated McCord "has been in jail on this charge – these warrants were served on him on January 7th of 1997" and counsel requested credit "for that time." Counsel stated it was his understanding McCord was required to serve first his state time, then the federal sentence.

After further colloquy, the trial court stated: "[T]here is so much confusion about what that – whether it's federal, whether it's state. I'm inclined, and I do this not to further punish him but for the fact that I have not imposed the life sentence, I decline to give him any credit for any time served thus far." The trial court concluded, "It's within my right to give him credit. But by the fact that I did not impose a life sentence I decline. And that's specifically the reason for it."

Section 24-13-40 of the South Carolina Code states in relevant part:

> In every case in computing the time served by a prisoner, full credit against the sentence shall be given for time served prior to trial and sentencing. Provided, however, that credit for time served prior to trial and sentencing shall not be given: . . . (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

S.C. Code Ann. § 24-13-40 (Supp. 2001) (emphasis added).

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[4]The colloquy at trial indicates that the solicitor presented the trial court with a certified copy of the federal sentence; however, it was never placed in the record before this court.

The trial court denied McCord credit for time served due to (1) the confusing state of the documentation as to whether McCord was serving time on another sentence, and (2) the fact that the court did not give McCord a life sentence. However, this matter is not discretionary with the trial court. See Allen v. State, 339 S.C. 393, 395, 529 S.E.2d 541, 542 (2000). To the extent the trial court stated it would not award credit based on the fact that McCord was not given a life sentence and asserted "that's specifically the reason for it," this ruling was in error because section 23-13-40 mandates credit for time served unless an exception applies. Accordingly, we reverse the trial court's ruling in this regard to give credit for time served. After reviewing documentation this court received pursuant to our request at oral argument from both appellate defense and the attorney general's office, we find McCord is entitled to credit for time served beginning June 10, 1997, the date he was incarcerated in the Charleston County Detention Center pending trial on the State's charges against him.

Accordingly, we affirm McCord's convictions, but reverse the trial court's failure to give credit for time served.

AFFIRMED IN PART and REVERSED IN PART.

CONNOR and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Brent C. McLauren,

Appellant.

Appeal From Dorchester County
Luke N. Brown, Jr., Special Circuit Court Judge

Opinion No. 3483
Heard April 10, 2002 - Filed April 29, 2002

AFFIRMED

Assistant Appellate Defender Robert M. Pachak, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General

Melody J. Brown, all of Columbia; and Solicitor Walter M. Bailey, of Summerville, for respondent.

ANDERSON, J.: Brent C. McLauren, a self described "jailhouse lawyer," was convicted of the practice of law without being admitted or sworn. He was sentenced to three years, consecutive to time already being served. McLauren appeals, arguing: (1) the trial judge erred in allowing him to represent himself; and (2) S.C. Code Ann. § 40-5-310 should not be construed to prohibit "jailhouse lawyers" from helping, without compensation, inmates draft post-conviction relief ("PCR") applications. We affirm.

FACTS/PROCEDURAL HISTORY

McLauren was an inmate at the Allendale Correctional Institution. McLauren filed a PCR application on behalf of Mark E. Rourk, also an inmate at the Allendale Correctional Institution. The PCR application stated that it had been completed by "Brent C. McLauren, Jr., Esq. … Of Legal Counsel to Petitioner." The application included a cover letter that stated "Brent C. McLauren, Jr., Esq." The documents submitted included a PCR application, a memorandum of law, motions, an affidavit of service, and a statement of legal counsel. The documents were filed in Dorchester County. McLauren is not and never has been a licensed attorney in South Carolina.

McLauren was indicted for the violation of S.C. Code Ann. § 40-5-310. Section 40-5-310 states:

> No person may practice or solicit the cause of another person in a court of this State unless he has been admitted and sworn as an attorney. A person who violates this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years, or both.

At trial, McLauren represented himself. The judge appointed Marva Hardee-Thomas of the Dorchester County Public Defender's Office to assist McLauren and sit at the table with him during the trial. Following a jury trial, McLauren was found guilty. He was sentenced to three years, consecutive to the time he was already serving. McLauren appeals.

ISSUES

I. Did the trial court err in allowing McLauren to represent himself without determining if the waiver of counsel was valid?

II. Should § 40-5-310 be construed to prohibit "jailhouse lawyers" from helping, without compensation, inmates draft PCR applications?

III. Did the trial judge err by denying McLauren's motion for directed verdict?

LAW/ANALYSIS

I. Pro Se Representation/Waiver of Right to Counsel

McLauren argues the trial court erred in allowing him to represent himself without determining if his waiver of counsel was valid. We disagree.

At McLauren's arraignment, the following colloquy occurred in connection with McLauren's representation:

The Court: Mr. McLauren, do you have an attorney?

McLauren: No, [Y]our Honor. I would, in fact, elect to represent myself in this matter.

The Court: All right. I'll be glad to let you represent yourself. We got some old sayings which I'm sure you're familiar with —

McLauren: Yes, Your Honor, I am.

The Court: — about representing yourself. But you're entitled to an attorney if you can't afford one. I'll be glad to give you one. I've got some good attorneys in the courtroom if you'd like, but if you would like to waive that ….

McLauren: I would waive that, Your Honor.

The Court: All right, sir. Go ahead.

After McLauren pleaded not guilty, the trial judge offered to appoint an attorney to assist him. McLauren stated he did not think it would be necessary. The following exchange occurred:

The Court: All right, sir. Well, would you like me to — the site is here in this county, and I've got some good attorneys out there. And you don't have to use them, but would you like me to appoint one to assist you in any way they can?

McLauren: I don't think that would be necessary, Your Honor.

The Court: Let me tell you what I'm going to do.

McLauren: Okay.

The Court: Just to be on the safe side[,] I'm going to

> appoint a young lady who I watched from starting her practice when she finished law school, as a matter of fact. She tried many cases in here. Turn around and see her, that's Ms. Thomas right there. I'm going to appoint her to represent you. But she'll confer with you. And if you want to at the appropriate time defend yourself, I'll just have her there to give you any advice that you feel like you would like to have.

McLauren represented himself throughout the trial with Hardee-Thomas at the defense table. He was found guilty.

"It is well-established that an accused may waive the right to counsel and proceed pro se." State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997) (citing, inter alia, Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) and State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977)). "Although a defendant's decision to proceed pro se may be to the defendant's own detriment, it 'must be honored out of that respect for the individual which is the lifeblood of the law.'" Id. (quoting Faretta, 422 U.S. at 834, 95 S. Ct. at 2541).

"The trial judge has the responsibility to ensure that the accused is informed of the dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel." Id. (citing Faretta and Dixon). "The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding." Id. (citing Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992)).

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused

must 'knowingly and intelligently' forgo those relinquished benefits." Faretta, 422 U.S. at 835, 95 S. Ct. at 2541 (citations omitted). To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992); Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990); see also Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) ("Faretta requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.'") (citation omitted). In the absence of a specific inquiry by the trial judge addressing the disadvantages of a pro se defense as required by the second Faretta prong, the appellate court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. Bridwell, 306 S.C. at 519, 413 S.E.2d at 31; Prince v. State, 301 S.C. at 424, 392 S.E.2d at 463.

Factors the courts have considered in determining if an accused had sufficient background to understand the disadvantages of self-representation include:

(1) the accused's age, educational background, and physical and mental health;

(2) whether the accused was previously involved in criminal trials;

(3) whether he knew of the nature of the charge and of the possible penalties;

(4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case;

(5) whether he was attempting to delay or manipulate the proceedings;

(6) whether the court appointed stand-by counsel;

(7) whether the accused knew he would be required to comply with the rules of procedure at trial;

(8) whether he knew of legal challenges he could raise in defense to the charges against him;

(9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and

(10) whether the accused's waiver resulted from either coercion or mistreatment.

State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992) (citing Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986) and Strozier v. Newsome, 926 F.2d 1100 (11th Cir. 1991)).

Given McLauren's background and understanding of the legal system and legal rights, in addition to the nature of the charge and the language that he used at trial, we find McLauren made a valid waiver. We consider the Cash factors as follows:

First, McLauren was a mature man with both formal and informal education. There was no evidence in the record of any physical or mental impairment.

Second, McLauren had previously been involved in criminal proceedings. The record indicates he had a criminal record dating back to 1965. At the time of trial, he was serving time in jail for unrelated charges.

In addition to his involvement in criminal proceedings as a defendant, the evidence indicated McLauren was involved in the criminal proceedings of other individuals at Allendale Correctional Institution. Out of the presence of the jury, McLauren told the judge, "And I have no problem with admitting that I'm a jailhouse lawyer …." Kenneth Long, inmate grievance coordinator at Allendale Correctional Institution, testified that he was aware McLauren assisted other prisoners with legal work. Lieutenant Louis Farris, also an employee of Allendale Correctional Institution, stated he had heard that McLauren often gave and rendered assistance to other prisoners. Five prisoners each testified about McLauren's assistance to themselves or others in the jail.

Third, McLauren knew of the nature of the charge. At trial, McLauren addressed questions by the court and made motions. He understood he was charged with practicing law without a license and attempted to distinguish jailhouse lawyers as an exception to the statute he was charged with violating.

Fourth, although McLauren was not represented by an attorney before trial and appeared pro se at his arraignment, the court assigned an attorney from the public defender's office to assist him during the trial if he needed any legal advice. This attorney was available to him throughout the trial and sat at the defense table with him.

Fifth, there is no indication that McLauren was attempting to delay or manipulate the proceedings. On the contrary, he made a motion for a speedy trial. The trial began on January 13, 2000, only a few months after his arraignment on September 20, 1999.

Sixth, the trial judge appointed stand-by counsel for McLauren. An attorney from the public defender's office sat at the table with him and at times answered questions from the court.

Seventh, the record indicates that McLauren knew to comply with procedural rules and had at least some familiarity with the rules. He made motions, called several witnesses, and objected at times to the prosecutor's questions.

Eighth, the record indicates McLauren knew of legal challenges he could raise in defense to the charges against him. He argued a novel theory of law that there was an exception to the statute that allowed prisoners to represent other prisoners without compensation.

Ninth, the exchange between McLauren and the court did not consist merely of pro forma answers to pro forma questions. McLauren's language and actions at trial indicated he had an understanding of the legal system.

Tenth, there was no evidence that McLauren's waiver resulted from coercion or mistreatment. McLauren expressly stated that he wanted to represent himself and that he would waive his right to an attorney. There is no indication he wanted to do this because he had been coerced or mistreated.

We find McLauren's waiver was knowing and voluntary. He was advised of his right to counsel, and even though the trial judge did not make a specific inquiry addressing the disadvantages of self-representation, McLauren had a sufficient background to make a valid waiver under the Cash factors.

II. Section 40-5-310

McLauren argues § 40-5-310 should not be construed to prohibit jailhouse lawyers from helping, without compensation, inmates draft PCR applications. He contends that many such inmates are indigent, uneducated, and otherwise without any other available means to adequately pursue post-conviction relief. We disagree.

Section 40-5-310 provides the following:

> No person may practice or solicit the cause of another person in a court of this State unless he has been admitted and sworn as an attorney. A person who violates this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years, or both.

There is no dispute McLauren was not admitted to the Bar at the time he prepared and filed the documents for Rourk. He admitted several times he practiced law, stating at one point, "[I]f I was in society practicing law in the same capacity that I practice law while incarcerated …." In a cross examination question, he stated, "You should be aware that I've been practicing law, if that's what you want to call it …." He later stated, "I have no problem with admitting that I'm a jailhouse lawyer …."

McLauren argues in his brief that he did not "practice or solicit the cause of another person **in a** court of this State." (emphasis added). This argument is without merit.

"The generally understood definition of the practice of law 'embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts.'" State v. Despain, 319 S.C. 317, 319, 460 S.E.2d 576, 577 (1995) (quoting In re Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909)). Our Supreme Court has defined the practice of law to include the preparation and filing of legal documents involving the giving of advice, consultation, explanation, or recommendations on matters of law. State v. Robinson, 321 S.C. 286, 468 S.E.2d 290 (1996). The reason preparing documents for others must be held to constitute the practice of law is not for the economic protection of the legal profession. Despain, 319 S.C. at 320, 460 S.E.2d at 578. Rather, it is for the protection of the public from the potentially severe economic and emotional consequences that may flow

from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law. Id. (citing State v. Buyers Serv. Co., 292 S.C. 426, 357 S.E.2d 15 (1987)). Just because McLauren was not **in court** for Rourk does not mean that he was not practicing law, as he was preparing and submitting documents on Rourk's behalf, which in itself constitutes the practice of law.

III. Section 40-5-80

McLauren argues § 40-5-80, when read in connection with § 40-5-310, should be construed to allow him to help other inmates in preparation of their PCR applications as long as he does not take fees or gratuities.

Section 40-5-80 provides the following:

> This chapter shall not be construed so as to prevent a citizen from prosecuting or defending his own cause, if he so desires, **or the cause of another, with leave of the court first had and obtained**; *provided*, that he declare on oath, if required, that he neither has accepted nor will accept or take any fee, gratuity or reward on account of such prosecution or defense or for any other matter relating to the cause.

(emphasis added, italics in original).

McLauren stated he did not receive compensation for his services. We agree that § 40-5-80 does not prevent representation of another without compensation. However, the express language of § 40-5-80 requires that leave be obtained **first**. Robinson, 321 S.C. at 290, 468 S.E.2d at 292 (analyzing S.C. Code Ann. § 40-5-80). Further, it is within the trial judge's sound discretion whether to allow such representation. Id. There is no evidence that McLauren obtained leave from the court before giving advice and preparing the PCR application. Since he did not obtain leave, his argument is without merit.

IV. McLauren's Directed Verdict Motion

McLauren avers the trial judge erred by denying his motion for directed verdict, which he made at the conclusion of the State's case. We disagree.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Williams, 303 S.C. 274, 400 S.E.2d 131 (1991); State v. Green, 327 S.C. 581, 491 S.E.2d 263 (Ct. App. 1997). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997).

The evidence is overwhelming that the defendant violated § 40-5-310. Numerous acts are revealed in the evidentiary record in regard to McLauren's conduct as reviewed under the aegis and ambit of § 40-5-310.

CONCLUSION

We rule that South Carolina does **not** allow "jailhouse lawyers" to practice law under the guise of an inmate giving advice or preparing legal documents for another inmate. The evidence is overwhelming in this case that the defendant practiced law in violation of § 40-5-310.

We conclude that the express language of § 40-5-80 requires that leave of court be obtained before representation of another by a person not licensed to practice law is allowed without compensation. The court must exercise **sound discretion** whether to allow such representation. An open-ended, unfettered application of § 40-5-80 by courts would essentially emasculate § 40-5-310.

The defendant freely and voluntarily waived his right to counsel. A "Cash factors" review convinces this Court that the defendant possessed a sufficient background to waive his right to counsel.

Accordingly, based on the foregoing reasons, McLauren's conviction for the practice of law without being admitted or sworn is

AFFIRMED.

CURETON, J., and THOMAS, Acting Judge, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Builder Mart of America, Inc., Builder Mart of Albemarle, Inc. and William T. Huckabee, III,

Appellants,

v.

First Union Corporation,

Respondent.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3484
Submitted October 1, 2001 - Filed April 29, 2002

AFFIRMED

William A. Jordan and B. Allen Clardy, Jr., both of Jordan & Clardy, of Greenville, for appellants.

H. Sam Mabry, III, and J. Derrick Quattlebaum, both of Haynsworth, Sinkler & Boyd, of Greenville, for respondent.

STILWELL, J.: Builder Mart of America (BMA), Builder Mart of Albemarle (Albemarle), and William Huckabee (collectively Appellants) brought this action against First Union Corporation (First Union) alleging multiple causes of action arising from a loan transaction. An order of default was entered against First Union. Upon receiving notice of a damages hearing, First Union moved to set aside the default and to dismiss the action based on lack of personal and subject matter jurisdiction. The trial court held that it lacked both, vacated the default judgment, and dismissed the action. We affirm.[1]

FACTS/PROCEDURAL BACKGROUND

BMA is a South Carolina corporation with its principal place of business in Greenville. Albemarle, a franchisee of BMA, is a North Carolina corporation owned by Huckabee with its principal place of business in Stanley, North Carolina. First Union is a bank holding company organized under the laws of North Carolina with its principal and only place of business in Charlotte, North Carolina, and owns 100% of the stock of First Union National Bank of North Carolina (FUNB(NC)).

FUNB(NC) loaned Albemarle $500,000 pursuant to a secured promissory note. The note specifically identified the lender as FUNB(NC), and the funds advanced were transferred to either Albemarle or Huckabee in North Carolina. The collateral which secured the obligation was located in its entirety in North Carolina, and the security interests in the collateral were filed and perfected in North Carolina. The note provided that the terms of the agreement would be governed by and construed in accordance with North Carolina law.

Albemarle was indebted to BMA and, as part of the loan transaction, BMA agreed to subordinate its rights to collateral in favor of FUNB(NC). This subordination agreement was memorialized in a letter from BMA's president,

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

Brian MacKenzie, to John Robertson, vice president of FUNB(NC). The letter provided in part as follows:

> BMA agrees to use its best efforts to assist [FUNB)(NC)] to maximize the liquidation value of inventory and accounts receivable at [Albemarle] in the event default occurs on the [FUNB(NC)] note. . . . [FUNB(NC)] agrees to notify BMA in advance of its intentions to exercise its options in the event of a default by [Albemarle] with respect to the [FUNB(NC)] loans.

Albemarle defaulted on the note, and FUNB(NC) called the loan. MacKenzie advised Robertson that BMA had become aware of FUNB(NC)'s intent to call the loan and referred to the subordination agreement. MacKenzie stated, "we stand ready to assist you in the disposition of inventory assets at [Albemarle] so that both BMA and [FUNB(NC)] can recover the funds advanced." FUNB(NC)'s legal counsel informed MacKenzie that Albemarle was in default and FUNB(NC) had requested Albemarle to peacefully surrender collateral, but Albermarle had failed to do so. Counsel further advised BMA that FUNB(NC) intended to institute legal proceedings against Albemarle unless the loan was satisfied in full. FUNB(NC) subsequently filed an action against Albemarle and Huckabee. The parties entered into a liquidation agreement which provided that an auctioneer would conduct a going-out-of-business sale at Albemarle and the remaining uncollected accounts receivable would be sold at public sale in North Carolina. After liquidating the collateral, FUNB(NC) filed an action against Albemarle and Huckabee for the deficiency. The parties eventually settled, and FUNB(NC) filed a voluntary dismissal with prejudice. Appellants then commenced this action against First Union Corporation.

LAW/ANALYSIS

A. Specific Personal Jurisdiction

1. Registration in South Carolina

First Union is a North Carolina corporation with its principal place of business in Charlotte, North Carolina. First Union does not own any property,

have any employees or agents, loan money, provide checking accounts, borrow money or transact banking activities in South Carolina. Appellants argue that South Carolina can validly exercise personal jurisdiction because First Union is registered as a bank holding corporation with the South Carolina Board of Financial Institutions and has designated an agent for service of process. We find no merit in this argument.

"A corporation can be qualified to do business in South Carolina and have appointed an agent for service of process but still not be conducting sufficient activities in South Carolina to be subject to suit here." S.C. Code Ann. § 33-15-101, Reporter's Comments § 2 (Rev. 1990). "We think the application to do business and the appointment of an agent for service to fulfill a state law requirement is of no special weight. . . . Applying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another." Ratliff v. Cooper Labs., Inc., 444 F.2d 745, 748 (4th Cir. 1971) (citation omitted). See also White v. Stephens, 300 S.C. 241, 387 S.E.2d 260 (1990) (Power of attorney executed and recorded in South Carolina was insufficient to support jurisdiction where the power was never exercised in this State.).

2. First Union's Involvement in the Loan

Appellants contend First Union was involved in the negotiations resulting in the subordination agreement between FUNB(NC) and BMA, which they allege was breached. We disagree.

South Carolina's long-arm statute confers jurisdiction on state courts over "persons," including corporations, "who act[] directly or by an agent as to a cause of action arising from the person's (a) transacting any business in this State; . . . or (g) [entering] into a contract to be performed in whole or in part by either party in this State. . . ." S.C. Code Ann. § 36-1-201(28), (30) (1976); S.C. Code Ann. § 36-2-803(1)(a),(g) (1976). Since South Carolina's long-arm statute extends to the full reach of jurisdiction permitted by the Due Process Clause, we limit our inquiry to the issue of whether due process has been satisfied. Atlantic Soft Drink Co. v. S.C. Nat'l Bank, 287 S.C. 228, 231, 336 S.E.2d 876, 878 (1985).

Personal jurisdiction under the long-arm statute is subject to a two-step analysis: (1) the power prong and (2) the fairness prong. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992); Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 402 S.E.2d 177 (1991). The court must determine whether the defendant's minimum contacts with the forum state are sufficient to satisfy due process in applying the long-arm statute. The focus must center on the contacts generated by the defendant, not the unilateral actions or letters of the complaining party. Aviation Assocs. at 507-08, 402 S.E.2d at 180. The contacts must be sufficient that the defendant would reasonably anticipate being haled into court or has purposefully availed itself of activities within the forum state. Id.

The subordination agreement was negotiated between FUNB(NC) and BMA, as evidenced in the letter addressed to the vice president of FUNB(NC) in Albemarle which stated BMA would assist FUNB(NC) in the liquidation in the event of default. FUNB(NC)'s senior vice president who handled the liquidation, the vice president of FUNB(NC)'s Albemarle branch, a FUNB(NC) employee in the special assets division who handled the Albemarle account, and the account manager involved in the transaction all provided affidavits stating they had no authority to enter into contracts on behalf of First Union. The FUNB(NC) employees also stated FUNB(NC) is a separate legal entity from First Union, and First Union was not involved in the transactions with Appellants. We agree with the trial court that any alleged breach of the subordination agreement resulted from FUNB(NC)'s actions rather than First Union's. There is no evidence First Union had any involvement with the transactions, and the individuals involved were not acting as its employees or agents.

Even assuming for the sake of argument that the courts of South Carolina could exercise jurisdiction over FUNB(NC) because of its actions, that fact alone would not be sufficient to extend jurisdiction over First Union. Although FUNB(NC) is a subsidiary of First Union, the companies are separate legal entities operating under separate boards of directors with separate employees, assets, and places of business. "'As a general rule, a parent or holding corporation is not liable on the contracts of its subsidiary. The mere fact of the

ownership of a majority of all the stock of its subsidiary does not render the parent corporation liable on the contracts of the subsidiary.'" Carroll v. Smith-Henry, Inc., 281 S.C. 104, 105-106, 313 S.E.2d 649, 650 (Ct. App. 1984) (quoting jury charge taken from 19 Am. Jur. 2d Corporations § 716 (1965)). Furthermore, "[t]he mere acquisition and control of a domestic subsidiary's capital stock does not subject the foreign parent to the jurisdiction of that State's courts." Yarborough & Co. v. Schoolfield Furniture Indus., Inc., 275 S.C. 151, 153, 268 S.E.2d 42, 44 (1980).

3. Contract Requiring Performance in South Carolina

Appellants argue First Union's involvement confers personal jurisdiction because the subordination agreement was a contract made in and requiring performance in South Carolina. Appellants argue that BMA's offer to assist FUNB(NC) with liquidation of the collateral would necessitate performance of the contract in South Carolina at their outlets. However, the loan documents make no mention of any specific method or manner of disposition of the collateral. BMA asserts that its unilateral letter to FUNB(NC) necessarily implies that the contract required performance in South Carolina. Such an inference is not supported by the complaint or any other evidence in the record. Thus, inferring performance of the liquidation of collateral under the contract in South Carolina "would require this court to engage in impermissible speculation." Internat'l Mariculture Res. v. Grant, 336 S.C. 434, 438, 520 S.E.2d 160, 162 (Ct. App. 1999) (citing Yarborough at 153, 268 S.E.2d at 43 ("When jurisdiction is challenged, the plaintiff has the burden of presenting facts sufficient to support jurisdiction.")). Although the letter and supporting affidavits clearly set forth BMA's understanding, they are silent as to FUNB(NC)'s understanding or intentions. Unilateral contacts or assertions are insufficient to confer jurisdiction. Aviation Assocs. at 507-08, 402 S.E.2d at 180.

4. Crutchfield Letter

Appellants also point to a letter from the president of First Union, Ed Crutchfield, to Huckabee expressing concern and thereby demonstrating some

minimal knowledge of and involvement with the Albemarle loan. "Although a single act may support jurisdiction, it must create a 'substantial connection' with the forum." Aviation Assocs. at 508, 402 S.E.2d at 180 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174 (1985)). BMA's reliance on a letter from the president of First Union to a resident of North Carolina who is the owner of a North Carolina corporation to somehow vest a South Carolina court with jurisdiction in this case is unavailing. We are unable to discern any reason why this letter provides any nexus to the State of South Carolina, much less the substantial connection necessary for this state to exercise personal jurisdiction. Like BMA's letter to FUNB(NC), Crutchfield's letter to Huckabee is insufficient to establish contacts sufficient to vest South Carolina courts with jurisdiction and comport with due process.

5. Fairness Prong and North Carolina's Interest

In addition, the fairness prong dictates that South Carolina not exercise personal jurisdiction in this instance. Under the fairness prong, we examine such factors as the burden on the defendant, the extent of the plaintiff's interest, South Carolina's interest, efficiency of adjudication, and the several states' interest in substantive social policies. See Southern Plastics at 263, 423 S.E.2d at 132. The loan was executed and performed in North Carolina and provides that North Carolina law controls any disputes arising from it. While choice of law analysis is separate and distinct from personal jurisdiction analysis, which state's law controls is a factor to be considered under the fairness prong of due process. Burger King v. Rudzewicz, 471 U.S. 462, 481-82, 105 S. Ct. 2174, 2187 (1985). Since the dismissal of this case, plaintiffs have proceeded with an identical lawsuit in North Carolina, naming both First Union and FUNB(NC) as parties. Efficiency argues against parallel lawsuits.

North Carolina is clearly the more appropriate forum for resolution of this dispute. While the existence of another forum will not always preclude our exercise of jurisdiction, to do so in this case would contravene the limited jurisdiction exercised by each state's courts and impinge on the sovereignty of our sister state. While primarily viewed as a due process concept, "[t]he concept of minimum contacts . . . [also] acts to ensure that the States through their

courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92, 100 S. Ct. 559, 564 (1980). Under principles of interstate federalism,

> the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Id. at 293, 100 S. Ct. at 565. The courts of South Carolina must comply with the constitutional limits of due process, which in this case requires us to deny personal jurisdiction based on our long-arm statute. Therefore, we decline to exercise specific personal jurisdiction on these facts.

B. General Personal Jurisdiction

Appellants finally argue that South Carolina has general personal jurisdiction over First Union through the activities, unrelated to the loan in this case, of its wholly owned subsidiary, First Union National Bank of South Carolina (FUNB(SC)). Appellants contend that South Carolina should exercise jurisdiction based on First Union's unified marketing and advertising strategy and its holding itself out to the general public as a single entity, rather than separate subsidiary corporations. Because the activities of FUNB(SC) are unrelated to this loan transaction, we hold that South Carolina cannot exercise general personal jurisdiction over First Union based on the mere presence in this state of a wholly owned subsidiary and unified advertising strategy.

Courts in a few earlier decisions refused to allow corporations to escape jurisdiction by flawless corporate structuring on paper where the corporation in reality holds itself out to the public as a unified public entity. See, e.g. FDIC v. British-Am. Corp., 726 F. Supp. 622, 629-30 (E.D.N.C. 1989) ("[A] parent corporation is not doing business in a state merely because of the presence of its

wholly owned subsidiary. . . ." However, a parent cannot "hide behind the fiction of a subsidiary and enjoy the benefits of a forum while at the same time avoiding the responsibilities attendant therewith." It would be a "travesty" to allow the parent to hold itself out to the public and shareholders as doing business yet "selectively avoid process from [the state's] courts at its whim."). However, such decisions are anomalous in light of the due process constraints placed on the exercise of personal jurisdiction by the United States Supreme Court's "minimum contacts" cases flowing from the International Shoe progeny, such as Asahi, Burger King, Helicopteros, and World-Wide Volkswagen. Internat'l Shoe Co. v. Wash., 326 U.S. 310, 66 S. Ct. 154 (1945); Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 107 S. Ct. 1026 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S. Ct. 2174 (1985); Helicopteros Nactionales de Colombia, S.A. v. Hall, 466 U.S. 408, 104 S. Ct. 1868 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559 (1980).

A large majority of courts in more recent cases have uniformly declined to extend jurisdiction to the parent based solely on the activities of a subsidiary where those activities are unrelated to the cause of action and do not bear a substantial connection to the case at hand. "The presence of the subsidiary alone does not establish the parent's presence in the state." Jazini v. Nissan Motor Co., 148 F.3d 181, 184 (2d Cir. 1998). For the courts to have personal jurisdiction, Appellant must show that the subsidiary functions as the agent or mere department of the parent—that is, that the subsidiary does all the business which the parent corporation could do if here on its own. Id. at 184. Moreover, "the agency rule ordinarily does not apply to a holding company inasmuch as the parent could simply use another subsidiary to accomplish the same result."

In making this determination, the courts look at four factors: (1) common ownership, (2) financial independence, (3) degree of selection of executive personnel and failure to observe corporate formalities, and (4) the degree of control over marketing and operational policies. Jazini at 185. It is essential that all four factors be present with sufficient factual specificity to confer jurisdiction on state courts. Id.; accord Weiss v. La Suisse, 69 F. Supp. 2d 449, 458 (S.D.N.Y. 1999) ("vaguely described interaction" fell far short of prima

facie showing of four factors beyond mere common ownership and overlap in directors needed to survive motion to dismiss). Here, Appellants have not provided proof of any of the factors beyond mere allegations, much less proof of all four to the requisite degree of specificity. "[W]e are not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944 (1986). While the test for exercising general personal jurisdiction over a foreign corporation is a stringent one, it

> is the consequence of the problems inherent in attempting to sue a foreign corporation that has carefully structured its business so as to separate itself from the operation of its wholly-owned subsidiaries . . . —as it may properly do. The rules governing establishment of jurisdiction over such a foreign corporation are clear and settled, and it would be inappropriate for us to deviate from them or to create an exception to them because of the problems plaintiffs may have in meeting their somewhat strict standards.

Jazini at 185. Likewise, the third circuit declined to extend liability or jurisdiction to the parent based on agreements entered by its subsidiary. E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187 (3d Cir. 2001). Applying general agency principles, the court held appellant must demonstrate both that the subsidiary was acting for the parent as its agent and that the cause of action arose out of or relates to the cause of action alleged in the complaint. Id. at 198-99.

As the United States Supreme Court has explained, "when the 'minimum contact' that is a substitute for physical presence consists of property ownership it must, like other minimum contacts, be related to the litigation." Burnham v. Super. Ct. of Cal., 495 U.S. 604, 620, 110 S. Ct. 2105, 2115 (1990) (emphasis added). The court refused to extend jurisdiction based on general agency principles to unrelated causes of action. Accord Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 856-57 (5th Cir. 2000) (Appellant had not made a prima facie showing that holding company exercised such undue control that

subsidiary was alter ego of parent, as required for attributing continuous and systematic contacts based on general jurisdiction.).

Thus, while the weight of authority is somewhat split, the few courts that have addressed the issue have found unified marketing and advertising and holding out to the public as a single entity, without more, insufficient to confer jurisdiction. See Newman v. Comprehensive Care Corp., 794 F. Supp. 1513, 1519 (D. Or. 1992) (Court did not have general jurisdiction where plaintiffs did not show substantial or continuous and systematic contacts. Activities of the parent were irrelevant to jurisdiction absent indication that formal separation was not scrupulously maintained. Despite overlapping directors and isolated commercial loans, contacts unrelated to cause of action were irregular, and national advertising was insufficient to confer general jurisdiction.). Here, the complaint in no way alleges that the activities of FUNB(SC) are related to the underlying loan transaction, and thus our fact-specific inquiry abruptly ends.

The record before us is devoid of annual reports, brochures, or evidence to establish that First Union exercises a unified marketing and advertising strategy. Typically, the burden is on the appellant to provide an adequate record to support its claims. Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal."); see, e.g. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 215, 493 S.E.2d 826, 834 (1997) (Appellant has the burden of providing court with sufficient record on which to make a decision.); Hill v. Dotts, 345 S.C. 304, 309, 547 S.E.2d 894, 897 (Ct. App. 2001). However, even assuming without deciding that we may take judicial notice of First Union's annual reports, television advertisements, and signposts that simply say "First Union" in South Carolina, these without more are insufficient reason to exercise jurisdiction because any South Carolina presence through the activities of FUNB(SC) is unrelated to the present litigation, and because Appellants have failed to carry their prima facie burden of proof of establishing an agency relationship between the parent and subsidiary sufficient under the minimum contacts analysis. In short, the presence of FUNB(SC) in this state does not provide even the minimum contacts

necessary for South Carolina to exercise general personal jurisdiction over First Union and remain consistent with the requirements of due process.[2]

CONCLUSION

The circuit court properly concluded it did not have personal jurisdiction over First Union. Because South Carolina cannot exercise personal jurisdiction consistent with the limits of due process, we need not decide whether subject matter jurisdiction is proper under the door closing statute. S.C. Code Ann. § 15-5-150 (1976 & Supp. 2001).

AFFIRMED.

GOOLSBY and HUFF, JJ., concur.

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[2] We do not decide and express no opinion whether First Union would be subject to personal jurisdiction for loans to South Carolina residents or entities or activities of FUNB(SC).