OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

May 29, 2001

ADVANCE SHEET NO. 19

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The Supreme Court of South Carolina

Glenn Kennedy, Charles Wolfe, Terry Knighton, and Jerry Lanford, Individually and on Behalf of a Class of Persons Similarly Situated, Appellants,

v.

The South Carolina Retirement System and the South Carolina Budget and Control Board, Respondents.

O R D E R

A Petition for Rehearing was granted on July 24, 2000. The attached opinion is substituted for the opinion filed on May 22, 2000.

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
May 22, 2001

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Glenn E. Kennedy, Charles Wolfe, Terry Knighton, and Jerry Landford, Individually and on Behalf of a Class of Persons Similarly Situated, Appellants,

v.

The South Carolina Retirement System and the South Carolina Budget and Control Board, Respondents.

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

Opinion No. 25133
Reheard December 5, 2000 - Refiled May 22, 2001

AFFIRMED

Michael Eugene Spears, of Spartanburg, for appellant.

Stephen Van Camp, of South Carolina Retirement System, of Columbia; and R. Kent Porth and Elizabeth H. Campbell, both of Nexsen Pruet, Jacobs & Pollard, of Columbia, for Respondent South Carolina Retirement System. Joseph D. Shine and Edwin E. Evans, both of State Budget and Control Board, of Columbia, for Respondent State Budget and Control Board. Richard Mark Gergel and W. Allen Nickles, both of Gergel, Nickles & Solomon, of Columbia, for Respondents. Lesley A. Bowers, of Columbia, for Amicus Curiae, Protection and Advocacy for People With Disabilities, Inc. Mary J. Bradwater, of Columbia, for Amicus Curiae, The South Carolina School Boards Association. Edwin Johnson, II, of McNair Law Firm, of Columbia, for Amicus Curiae, The South Carolina Chamber of Commerce. Deena Smith McRackan, of Charleston, for Amici Curiae, The South Carolina Education Association and The South Carolina Education Association-Retired. Vance J. Bettis, of Gignilliat, Savitz & Bettis, of Columbia, for Amicus Curiae, The South Carolina State Employees Association, for respondents. Richard J. Breibart, of Lexington, for Amicus Curiae, The Fraternal Order of Police. Ray E. Chandler, of Coffey Chandler & Johnson, of Manning, for Amicus Curiae the South Carolina State Fireman's Association. Scott T. Price, of Columbia, for Amicus Curiae the South Carolina School Boards Association.

CHIEF JUSTICE TOAL: Four retired state employees ("the

Employees") brought suit against the South Carolina Retirement System and the South Carolina Budget and Control Board (collectively "the Retirement System") claiming their retirement benefits have been miscalculated. The trial court ruled in favor of the Retirement System and the Employees have appealed.

FACTUAL/PROCEDURAL BACKGROUND

In 1986, the General Assembly amended S.C. Code Ann. § 9-1-10(17) (Supp. 1998) of the South Carolina Retirement System.[1] This statute provides the definition of "average final compensation" for a retiring state employee. Average final compensation is one element used in the Retirement System Act to calculate the monthly retirement benefits of a state employee. *See* S.C. Code Ann. § 9-1-1550(B)(1) (Supp. 1999).[2] The dispute in this case is over the 1986 amendment's effect on the calculation of the average final compensation of an employee with respect to the value of unused annual leave.

Before 1978, the Retirement System gave a retiring employee credit for all accrued unused annual leave when calculating the average final compensation for retirement benefits. The statutory section read:

> (17) "Average final compensation" with respect to those members retiring on or after July 1, 1970, shall mean the average annual earnable compensation of a member during the three

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[1]The General Assembly also amended S.C. Code Ann. § 9-11-10(14) (Supp. 1998) involving the Police Officer Retirement System. The issues regarding that amendment are identical to the issues regarding the amendment of section 9-1-10(17). To avoid redundancy, we only discuss the amendment's effect on section 9-1-10(17) and will address the issues in terms of that statute. There are no significant differences between the two sections and our decision applies equally to each provision.

[2]The formula provided in this section is:

.0182 x "Average Final Compensation" x Years of Service = Annual Retirement Allowance

> consecutive fiscal years of his creditable service producing the highest average.

Under this statute and its predecessors going back to the creation of the system in 1945, the Retirement System, as a matter of policy, gave credit for unused annual leave even though there was no specific requirement in the statutory section that it do so. Furthermore, there was no limit on the amount of accrued annual leave for which an employee could receive credit.

In 1978, the General Assembly amended the section and addressed unused annual leave for the first time. After the 1978 amendment, the section read:

> (17) "Average final compensation" with respect to those members retiring on or after July 1, 1970, shall mean the average annual earnable compensation of a member during the three consecutive fiscal years of his creditable service producing the highest such average***; an amount up to and including forty-five days termination pay for unused annual leave may be added to the pay period immediately prior to retirement and included in the average as applicable***.[3]

The 1978 amendment had two major effects on the use of unused annual leave in the average final compensation calculation. First, the amendment placed a forty-five day cap on the amount of unused annual leave for which an employee could receive credit. Second, the unused annual leave could only be calculated in the average final compensation equation if the pay period immediately prior to the employee's retirement was one of the three highest in the employee's career. As a consequence of this second restriction, employees would regularly have to retire on the last day of their last fiscal year to ensure that any unused annual leave would be included in the calculation. Servicing a large volume of retirement claims at one time created an administrative problem for the Retirement System.

In 1986, the General Assembly amended section 9-1-10(17) to read as

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[3]The bold type indicates the language added to the section.

follows:

> (17) "Average final compensation" with respect to those members retiring on or after July 1, 1986, means the average annual earnable compensation of a member during the twelve consecutive quarters of his creditable service on which regular contributions as a member were made to the System producing the highest such average; **a quarter means a period January through March, April through June, July through September, or October through December**. An amount up to and including forty-five days' termination pay for unused annual leave **at retirement** may be added to the **average final compensation**. . . .[4]

Both sides in this matter agree that the General Assembly intended to alter the calculation of average final compensation. The dispute in this case is over the nature of the change in unused annual leave benefits.

The parties disagree about whether the amendment changed the method of adding any unused annual leave to the average final compensation equation. Before the 1986 amendment, it is undisputed that the value of the unused annual leave was added ***into*** the average final compensation equation ***before*** the total was averaged. After the amendment, the Employees claim the value of the unused annual leave should be added ***to*** the average final compensation equation ***after*** the average has been taken. The Retirement System's position is that the unused annual leave should still be added ***into*** the average final compensation equation ***before*** the average is taken.

The Employees filed suit against the Retirement System in November 1995, seeking a declaratory judgment as to the meaning of section 9-1-10(17). The trial court noted that section 9-1-10(17), defining average compensation, does not contain the provisions for the payment or calculation of retirement benefits to the employee. The payment and benefit calculation provisions are contained in section 9-1-1550. Analyzing this relationship, the trial court found "harmony of these provisions is critical in the calculation of a retiree's monthly

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[4]The bold type indicates the new language.

benefit." The trial court then noted that the 1986 amendment dividing the definition of average final compensation into two separate sentences, where it had previously been only one, added confusion to the process. The trial court determined that the first sentence of section 9-1-10(17) alone was the definition of average final compensation. The trial court then found that the second sentence discussing the addition of unused annual leave to the first sentence's definition of average final compensation produced a new number that the Employees called "total final compensation." The trial court determined that this new "total final compensation" number was not referenced in section 9-1-1550 so there existed an ambiguity about how the General Assembly intended to compute average final compensation in relation to the unused annual leave.

The trial court then looked to the rules of statutory construction to determine the intent of the General Assembly in regards to the calculation of average final compensation. First, the trial court analyzed what it determined to be the legislative history of the 1986 amendment. The trial court also looked at the Retirement System's statutory scheme as a whole. The trial court gave deference to the interpretation of the statute by the Retirement System. Furthermore, the trial court determined that the use of the word "may" in reference to the addition of unused time to the average final compensation resulted in total discretion on the part of the Retirement System as to whether any unused annual leave would be added into the equation. Finally, the trial court found that even if the Employees were correct in their interpretation, S.C. Const. art X, § 16 prevented them from recovering the requested relief.

LAW/ANALYSIS

I. Section 9-1-10(17) is Ambiguous

The first question of statutory interpretation is whether the statute's meaning is clear on its face. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 545 S.E.2d 890, 892 (1995). We find the language of section 9-1-10(17) is

ambiguous on its face because it is unclear at what point the General Assembly intended the unused annual leave to be added in the average final compensation equation.

The section can be read, as the Employees argue, that up to 45 days are added to the equation **after** the average is taken. The section can also be read as the Retirement System argues, adding up to 45 days of unused annual leave to the average final compensation equation **before** taking the average of the 12 highest quarters. The use of the phrase "average final compensation" in the section that defines "average final compensation" is confusing. Also, ambiguity arises from the General Assembly's use of the phrase "added to." In a statute, the word "to" can be read as a word of either inclusion or exclusion depending on the intent of the General Assembly. BLACK'S LAW DICTIONARY 1487 (6th ed. 1990).[5] The plain language of the section fails to reveal the General Assembly's intention with regard to the meaning of "added to."[6]

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[5]"**To.** While this is ordinarily a word of exclusion, when used in describing premises, it has been held that the word in a statute may be interpreted as exclusionary or inclusionary depending on the legislative intent as drawn from the whole statute. *Clark v. Bunnell*, 470 P.2d 42, 44 (Colo. 1970). It may be a word of inclusion, and may also mean 'into.'"

[6]Plaintiff Wolfe's unused annual leave had a value of $5,875. Under the Retirement System's approach, Wolfe's average final compensation would be calculated as follows:

$$\frac{\$96{,}190 \text{ (the total of his 12 highest quarters)} + \$5{,}875}{3} = \mathbf{\$34{,}022}$$

As a retired police officer, Wolfe's average final compensation would then be put into section 9-11-60 (.0214 x "Average Final Compensation" x Years of Service = Annual Retirement Allowance)

.0214 x $34,022 x 30 = $21,842.13 (Annual Retirement Allowance)

$21,842.13 / 12 = $1,820.18 (monthly benefits payment to Wolfe)

Therefore, since the plain language of the statute lends itself to two equally logical interpretations, this Court must apply the rules of statutory interpretation to resolve the ambiguity and to discover the intent of the General Assembly. Where the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. *The Lite House, Inc. v. J.C. Roy, Co.*, 309 S.C. 50, 53, 419 S.E.2d 817, 819 (Ct. App. 1992).[7] When looking beyond the language of section 9-1-10(17) and comparing this section with the overall structure of the South Carolina State Retirement System, we find the General Assembly intended the 45 days of unused annual leave to be added to the computation **before** taking the average of the 12 highest quarters.

The most powerful indication of legislative intent is the lack of legislative

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Under the Employees approach, Wolfe's average final compensation would be calculated as:

$$\frac{\$96,190 \text{ (the total of his 12 highest quarters)}}{3} = \$32,064 + \$5,875 = \mathbf{\$37,939}$$

Put into section 9-11-60:

.0214 x $37,939 x 30 = $24,356.84 (Annual Retirement Allowance)

$24,356.84 / 12 = $2,029.74 (monthly benefits payment to Wolfe)

$2,029.74 - Monthly Payment Under Employee's approach
$1,820.18 - Monthly Payment Under Retirement System's approach
$ 209.56 Difference Between Methods

[7]Although the court may look beyond the borders of the act itself, the trial court erred in relying heavily on the testimony of Purvis Collins to determine legislative intent. Under South Carolina law, neither a drafter nor a legislator can testify as to legislative intent. *Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 20 S.E.2d 813 (1942).

history and debate which accompanied the adoption of section 9-1-10(17).[8] If section 9-1-10(17) is interpreted to mean the unused leave is added **after** the average is taken, a dramatic increase in benefits will result. In effect, this interpretation would increase the dollar value for unused annual leave three fold,[9] and would allow members to retire with benefits calculated on an "average" salary which is greater than any salary they earned during employment. The Retirement System's consulting actuary testified the actuarial present value of the unfunded liability created by the Employees' interpretation is $1.177 billion dollars.[10] Therefore, had the legislature intended the statute to

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[8]Contrary to the dissent's assertion, this Court has used the lack of legislative history as a factor in interpreting a *statute*. *See Robertson v. State*, 276 S.C. 356, 278 S.E.2d 770 (1981) (wherein we concluded, after a review of a statute's legislative history which revealed no specific reason for a change in its wording, that the legislature did not intend the change to affect substantial rights); *see also Chestnut v. South Carolina Farm Bureau Mut. Ins. Co.*, 298 S.C. 151, 378 S.E.2d 613 (Ct. App. 1989). As in *Robertson*, there is nothing in the legislative history surrounding the enactment of section 9-1-10(17) which would indicate the legislature intended to dramatically effect the calculation of retirement benefits.

[9]For example, plaintiff Wolfe's monthly benefits increase by $209.45 per month under this interpretation.

[10]The actuary arrived at this figure by determining the funding required to pay the increase in benefits for current retirees, and the funding required to pay the increase in benefits for current employees who may retire. The actuary calculated the liability based on employees retiring in the future with an average of 22.5 days of unused annual leave. However, if the Employees' interpretation stands, retiring employees will have a great incentive to retire with the full 45 days, and therefore the estimated $1.177 billion liability might well be much greater. The Employees do not present their own actuary, or dispute the Retirement System's actuary. They simply argue the Court should only look at the amount of money it would take to pay the current litigants, since future retirees are not before this Court. The Employees' argument is without merit. The statute, and therefore the Court's interpretation of the statute, applies not

be applied as argued by the Employees, they would have been dramatically increasing the payments to retirees.

If the General Assembly intended to add the leave **after** the average was taken, it is reasonable to assume the history and circumstances surrounding the amendment would indicate the General Assembly intended to increase benefits, thereby adding $1.177 billion in liability to the State Retirement System. The history in no way indicates the legislature intended to make such a dramatic increase in benefits. First, the title of the 1986 Appropriations Act, which included the amendment to section 9-1-10, did not reference an increase in benefits.[11] *See Ex Parte Georgetown County Water & Sewer Dist.*, 284 S.C. 466, 468-69, 327 S.E.2d 654, 656 (1985) ("The purpose of Article III, § 17 is to prevent the General Assembly from being misled into the passage of bills containing provisions not indicated in their titles.") The title to the 1986 Appropriations Act provides, in relevant part:

> To amend sections 9-1-10 and 9-11-10 of the 1976 Code, relating to the South Carolina Retirement System and the South Carolina Police Officers Retirement System, so as to change the definition of average final compensation from average annual earnable compensation of a member during three consecutive fiscal years to twelve consecutive quarters.

The plain language of the title gives no indication or notice that the amendment would triple the dollar value for unused annual leave.

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only to the Employees as plaintiffs in this case, but also to all state employees who have retired and who will retire in the future.

[11]The dissent argues the title of a bill has never been a factor in determining legislative intent. In interpreting a statute in *Whetstone v. South Carolina Dep't of Highways and Pub. Transp.*, 272 S.C. 324, 327, 252 S.E.2d 35, 37 (1979), this Court stated its interpretation was supported by the ". . . underlying legislative history as exemplified by the original title of the pre-codified Act."

Secondly, had the General Assembly intended to increase benefits and spend $1.177 billion, it is reasonable to assume they would have engaged in floor debate. They did not.[12] Furthermore, no fiscal impact analysis was undertaken. *See* S.C. Code Ann. § 2-7-72 (Supp. 1999) (Bills and resolutions requiring expenditure of funds shall have impact statements).[13] Finally, the legislature did not determine whether the increase would impact the actuarial soundness of the State Retirement System as a whole. While we hold the amendment to section 9-1-10(17) does not violate S.C. Const. art. X, § 16, the fact that the legislature has never funded the increase as required by article X, § 16 is further evidence the legislature did not intend to bestow such an increase when it amended section 9-1-10(17).

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[12]Upon reviewing the Legislative History surrounding the 1986 Appropriations Act, we find no evidence of floor debates, or any meaningful discussion of the amendment to section 9-1-10(17), although there are numerous other debates surrounding the 1986 Appropriations Act. The dissent suggests the lack of debate only means there was little controversy surrounding the amendment's enactment. However, it is hard to imagine, especially in light of the numerous amicus briefs filed in this case, there would have been little debate or controversy had everyone been aware the amendment would mean a dramatic increase in retirement benefits for a defined group.

[13]For example, in the same year section 9-1-10(17) was amended, the General Assembly passed House Bill No. 3637, which amended the Police Officers Retirement System so as to include National Guard and Reserve Service in the Retirement calculation. House Bill 3637 was accompanied by a fiscal impact statement. The dissent argues this Court has never used the lack of a fiscal impact statement as a factor in statutory interpretation. Financial bills almost always include an impact statement, and, therefore, this Court has most likely not been confronted with the absence of such a statement in a financial bill. The amendment to section 9-1-10(17), if interpreted as the Employees argue, would add an enormous increased cost to the South Carolina Retirement System. It is far from unreasonable to assume our legislature would have undertaken an impact analysis had they intended to bestow such a great increase in retirement benefits.

Policy considerations also weigh in favor of the Retirement System's interpretation. It must be assumed the legislature intends to maintain the soundness of the State Retirement System. If the Court accepts the Employees' interpretation, the dramatic increase in liability might render the System unsound. Donald Overholser ("Overholser"), the Retirement System's actuary, testified the interpretation sought by the Employees would make the entire State Retirement System actuarially unsound. Thomas Cavanaugh ("Cavanaugh") of Gabriel, Roeder, Smith & Company also testified the $1.177 billion unfunded liability would leave the System actuarially unsound.[14] Cavanaugh and Overhoser were qualified by the court without objection as experts in the field of actuarial valuation. The Employees presented no expert testimony or any testimony to contradict Cavanaugh and Overholser's conclusion. Instead, the Employees claim the Court and the actuaries should only consider the amount of money it would take to pay off their plaintiff class, not the effect of the interpretation on the system as a whole. This position ignores the rule of statutory construction that, absent a change by the legislature, the statute will apply to all state employees who will retire in the future.

Furthermore, we find the Employees' interpretation of the statute, which would have the unused annual leave added after the total is averaged, leads to an absurd result that the Legislature could not have intended. *See Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137, 143 (1999) ("Statutes should not be construed so as to lead to an absurd result."); *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994) (the court should reject a meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature). We hold the Employees' interpretation of the statute leads to the absurd result of rendering the State Retirement System actuarially unsound.

As discussed previously, the Retirement System's actuary, Overholser, and Cavanaugh testified that the present value of the unfunded liability created

[14]This is further evidence of legislative intent to add unused leave before the final average is taken.

by the Employees' interpretation is $1.177 billion dollars.[15] Overholser further testified the inclusion of an additional unfunded liability of $1.177 billion dollars would increase the unfunded amortization period of the System from nineteen to fifty-five years.[16] The Government Accounting Standards Board mandates that public pension plans' amortization period should not exceed thirty years. On the evidence presented to the trial court, the State Retirement System would become actuarially unsound if this Court adopts the Employees' interpretation. Furthermore, an employer's bond and credit rating can be affected by an amortization period in excess of thirty years, and can impact an employer's ability to borrow.

Construing the statute so as to cause such a devastating impact on the fiscal integrity of the State Retirement System, especially in the absence of any fiscal impact report or meaningful debate from the Legislature, would lead to an absurd result that could not have been intended by the legislature.

II. The Use of the Term "May" Does Not Grant the Retirement System Unlimited Discretion

The Retirement System argues that the use of the phrase "may" in section 9-1-10(17)[17] gives the Retirement System complete discretion as to whether and how to add the unused annual leave. We disagree.

The term "may" is used in section 9-1-10(17) to allow the Retirement

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[15]The dissent argues the unfunded liability number is much lower. Although we find $1.177 billion to be the correct figure, even a quarter of that figure, as suggested by the dissent, would cause dire consequences to the Retirement System.

[16]The Police Officers Retirement System would increase from a period of seven years to infinity.

[17]"An amount up to and including forty-five days' termination pay for unused annual leave at retirement may be added to the average final compensation . . ."

System to add unused annual leave into an employee's benefits calculation if the employee retires with any unused leave. The use of the word "may" signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning in the present statute. *See State v. Wilson*, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980). In this section, since it is very common for employees to retire without any accrued annual leave, the use of the word "may" allows the Retirement System to add such leave, if it exists, to the equation.

The construction given to the word "may" by the trial court would result in unfettered discretion by the Retirement System in determining whether to grant or deny credit for unused annual leave. It would allow the Retirement System to treat employees with the same number of unused annual leave days differently. This discretion would be entirely inappropriate in a statute defining retirement benefits computation. Absolute equality of treatment to similarly situated beneficiaries is the hallmark of a qualified defined benefits pension plan. The only reasonable construction of the word "may" is that it allows the Retirement System to include up to 45 days, and no more, in the calculation, if the employee has such unused leave when he retires.

III. The Testimony of Purvis Collins about Legislative Intent Was Inadmissible

The Employees argue that the trial court erred in admitting the testimony of Purvis Collins and relying on his testimony in construing section 9-1-10(17). We agree.

Purvis Collins, who at the time of this case was retired and is now deceased, was the director of the Retirement System for 24 years. Mr. Collins has been recognized nationally as one of the country's leading governmental retirement system administrators. This Court has the highest respect for Mr. Collins' knowledge, ability, and integrity. Nevertheless, as a matter of law, the testimony of Mr. Collins, an executive branch officer, as the "author" of a legislative amendment, is not admissible as evidence of legislative intent. Not even members of the General Assembly are permitted to so testify. "It is a settled principle in the interpretation of statutes that even where there is some

ambiguity or some uncertainty in the language used, *resort cannot be had to the opinions of legislators or of others concerned in the enactment of the law,* for the purpose of ascertaining the intent of the legislature." *Greenville Baseball, Inc. v. Bearden*, 200 S.C. 363, 371, 20 S.E.2d 813, 817 (1942)(emphasis added). In the current matter, the Retirement System claims that Collins' testimony is admissible because it only addressed "problems surrounding the 1978" version of the statute and not the legislative intent. The record does not support the Retirement System's position.

Collins' testimony goes well beyond any limited role claimed for it by the Retirement System. Collins testified extensively about how he drafted the amendment and what he intended the amendment to accomplish. Such testimony of what he intended as "author" of the amendment, as well as what problems he intended the amendment to address, are not proper legislative history for a court to take into account. *See Tallevast v. Kaminski*, 146 S.C. 225, 143 S.E. 796 (1928).

Collins' testimony is not completely inadmissible. In his role as the head of the South Carolina Retirement System, Collins' testimony is relevant, although not controlling, to the extent that it discusses how the executive branch interpreted the amendment after its enactment. *See Nucor Steel v. South Carolina Public Serv. Comm'n*, 310 S.C. 539, 426 S.E.2d 319 (1992). For the reasons discussed, we find the executive agency's interpretation does reflect the legislative intent of the section.

In light of our holding, we do not need to address the Employees' claims concerning the class certification and statute of limitations.

CONCLUSION

Based on the foregoing, we **AFFIRM** in result the decision of the trial court.

MOORE, WALLER and PLEICONES, JJ., concur. BURNETT, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE BURNETT (concurring in part and dissenting in part): I concur with Parts II and III of the majority opinion.[18] However, I respectfully dissent from Part I of the opinion.

The dispute in this case concerns the General Assembly's 1986 amendment to the definition of "average final compensation" for State employee retirement purposes found in South Carolina Code Ann. § 9-1-10(17) (Supp. 1999).[19] See Act. No. 540, Part II, § 25A, 1986 Acts 4897.[20] More particularly, the dispute concerns the amendment's effect on the calculation of the value of unused annual leave.

Prior to 1978, § 9-1-10(17) defined "average final compensation" as follows:

> (17) "Average final compensation" with respect to those members retiring on or after July 1, 1970, shall mean the average annual earnable compensation of a member during the three consecutive fiscal years of his creditable service producing the highest average.

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[18]In addition, I would adhere to the Court's original opinion on the issues of class certification and the statute of limitations. Kennedy v. South Carolina Retirement Sys., Op. No. 25133 (S.C. Sup. Ct. filed May 22, 2000) (Shearouse Adv. Sh. No. 20 at 18).

[19]The definition of "average final compensation" now appears at § 9-1-10(4) (Supp. 2000).

[20]The General Assembly also amended a similar provision applicable to the Police Officers' Retirement System. S.C. Code Ann. § 9-11-10(14) (Supp. 1999). Like the majority, I will only discuss the effect of the amendment on § 9-1-10(17). My opinion, however, applies equally to § 9-11-10(14). I note the definition of "average final compensation" now appears at § 9-11-10(7) (Supp. 2000).

Even though the statute did not refer to accrued unused annual leave, the South Carolina Retirement System credited retiring employees with all accrued unused annual leave when calculating the average final compensation for retirement benefits. There was no limit on the amount of accrued annual leave for which an employee could receive credit.[21]

In 1978, the General Assembly amended § 9-1-10(17), to provide, in relevant part, as follows:

> (17) "Average final compensation" with respect to those members retiring on or after July 1, 1970, shall mean the average annual earnable compensation of a member during the three consecutive fiscal years of his creditable service producing the highest such average**; an amount up to and including forty-five days termination pay for unused annual leave may be added to the pay period immediately prior to retirement and included in the average as applicable**. . . .[22]

See Act No. 408, 1978 Acts 1295.

The 1978 amendment altered the definition of "average final compensation" by limiting the creditable accrued unused annual leave to forty-five days. In addition, it included the annual leave credit in a retiree's average final compensation only if the pay period immediately prior to retirement was within the employee's three highest consecutive fiscal years. As a result of the 1978 amendment, employees generally retired on the last day of their last fiscal year to ensure receipt of credit for any accrued unused annual leave in their average final compensation. The number of employees who retired at the end of the fiscal year produced administrative difficulties for the Retirement System.

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[21]The Retirement System followed this policy since its inception in 1945.

[22]The bold type indicates the changes relevant to this discussion.

In 1986, the General Assembly again amended the definition of "average final compensation." The 1986 amendment provides:

> (17) "Average final compensation" with respect to those members retiring on or after July 1, 1986, means the average annual earnable compensation of a member during the twelve consecutive quarters of his creditable service on which regular contributions as a member were made to the System producing the highest such average; **a quarter means a period January through March, April through June, July through September, or October through December.** An amount up to and including forty-five days' termination pay for unused annual leave **at retirement** may be added to the **average final compensation**. . . .[23]

The parties agree the 1986 amendment changed the definition of average final compensation by using the average earnable compensation during the twelve highest consecutive quarters, rather than the three highest consecutive years, in calculating average final compensation. This amendment allowed employees to retire at the end of a quarter without losing credit for accrued unused annual leave, instead of at the end of the fiscal year. The amendment alleviated the Retirement System's burden of servicing the bulk of employees who retired at the end of the fiscal year.

The parties disagree, however, as to whether the 1986 amendment also changed the method of including accrued unused annual leave in the average final compensation. The Retirement System asserts the amendment did not change the method. According to the Retirement System, pursuant to the 1986 amendment, the value of any unused annual leave is added to the highest consecutive twelve quarters before averaging to determine the average final compensation. Employees, on the other hand, claim the 1986 amendment provides that the value of any unused annual leave is added to

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[23]The bold type indicates the changes relevant to this discussion.

the average final compensation after the average is taken. I agree with Employees.

"[W]here a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself." Charleston County Parents for Public Schools, Inc. v. Moseley, ___ S.C. ___, ___, 541 S.E.2d 533, 536 (2001). "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995).

In my opinion, § 9-1-10(17) is unambiguous. The statute clearly states the value of up to forty-five days unused annual leave "may be **added to the average** final compensation." (Emphasis added). This language clearly provides that annual leave value is added to the average final compensation, not included in the average. Because § 9-1-10(17) is clear on its face, there is no reason for the court to apply the rules of statutory construction and "the court has no right to look for or impose another meaning." Id.

In any event, even if the language of the1986 amendment is considered ambiguous, by construing the statute as providing that the value of unused annual leave is included in the average final compensation, it is my opinion the majority misapprehends the legislature's intent. I hold this view for several reasons.

First, a comparison of the language in § 9-1-10(17) before and after the 1986 amendment supports the conclusion that the General Assembly intended to change the method for incorporating unused annual leave in retirement benefits. The 1978 statute specifically provides that unused annual leave may be "added to the pay period immediately prior to retirement and **included in the average**. . .". (Emphasis added). The 1986 amendment, instead, states the unused annual leave may be "**added to the average final compensation** . . .". (Emphasis added). These obvious textual differences support the conclusion the General Assembly intended to change the method

of crediting employees' unused annual leave in the average final compensation. See Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 135 S.E.2d 841 (1964) (it will be presumed in adopting an amendment to a statute that the Legislature intended to make some change in the existing law). If the General Assembly did not intend to change the method of crediting employees with unused annual leave, it could have simply modified the language of the 1978 statute and stated "an amount up to and including forty-five days termination pay for unused annual leave may be added to the highest annual earnable compensation and included in the average." The majority's interpretation of the 1986 amendment renders the significant change to the definition of average final compensation a nullity. See State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964) (in seeking intention of legislature, Court must presume General Assembly intended by its action to accomplish something and not to do a futile thing).

Second, contrary to the majority's assertion, this Court has never considered the *extent* of legislative history and debate on a proposed statutory amendment as a factor in interpreting an ambiguous statute.[24] However, if the extent of legislative history and debate were a factor, then the limited amount of floor debate on § 9-1-10 suggests there was little, if any, controversy surrounding its enactment.

Third, this Court has never held that the title of a bill is a factor used in determining *legislative intent* behind a statutory enactment.[25] Accordingly,

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[24]The majority suggests the Court relied on the lack of legislative history as a factor in interpreting a statute in Robertson v. State, 276 S.C. 356, 278 S.E.2d 770 (1981). In Robertson, the Court did not hold the extent of legislative debate is a method of statutory construction. Instead, it stated the legislative history behind the amended statute did not reveal the General Assembly's purpose for the amendment.

[25]Contrary to the majority's claim, Whetstone v. South Carolina Dept' of Highways and Public Transp., 272 S.C. 324, 252 S.E.2d 35 (1979), does not hold the title of a bill is used to interpret the meaning of an ambiguous statute.

the fact that the title to the 1986 Appropriations Act does not mention an increase in retirement benefits does not assist the Court in construing the 1986 amendment.

Instead, South Carolina Constitution Article III, § 17 requires that the title of a legislative act serve as notice of its general subject.[26] The purpose of this constitutional provision is to prevent the General Assembly from being misled into the passage of bills containing provisions not indicated in their titles and to apprize the citizens of the subject of proposed legislation, thereby giving them an opportunity to be heard. Hercules, Inc. v. South Carolina Tax Comm'n, 274 S.C. 137, 262 S.E.2d 45 (1980); Colonial Life & Accident Ins. Co. v. South Carolina Tax Comm'n, 233 S.C. 129, 103 S.E.2d 908 (1958), superseded on other grounds I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). The Court has repeatedly held that "[t]he title of an act need not be a complete index of its contents. The constitutional mandate is satisfied where the title states the general subject, and the provisions in the body of the act are germane thereto and provide the means, methods, or instrumentalities for the accomplishment of the general purpose." Hercules, Inc. v. South Carolina Tax Comm'n, supra, 274 S.C. at 141, 262 S.E.2d at 47; see also Colonial Life & Accident Ins. Co. v. South Carolina Tax Comm'n, supra; McCollum v. Snipes, 213 S.C. 254, 49 S.E.2d 12 (1948).

Here, the title of the 1986 Appropriations Act provides:

> TO AMEND SECTIONS 9-1-10 AND 9-11-10 OF THE 1976 CODE, RELATING TO THE SOUTH CAROLINA

In Whetstone, the Court simply held that the title of the bill supported its previous interpretation of a statute. The Court did not use the title of the bill to determine legislative intent.

[26]"Every Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." S.C. Const. art. III, § 17.

RETIREMENT SYSTEM AND THE SOUTH CAROLINA POLICE OFFICERS' RETIREMENT SYSTEM, SO AS TO CHANGE THE DEFINITION OF AVERAGE FINAL COMPENSATION FROM AVERAGE ANNUAL EARNABLE COMPENSATION OF A MEMBER DURING THREE CONSECUTIVE FISCAL YEARS TO TWELVE CONSECUTIVE QUARTERS.

The title of the 1986 Appropriations Act refers to amending § 9-1-10 so as to change the definition of average final compensation. Since the title covers the general subject, the definition of average final compensation contained in § 9-1-10, the statute complies with article III, § 17, and is constitutionally sufficient.

Fourth, the Court has never used the lack of a fiscal impact statement as a factor in statutory interpretation. Moreover, South Carolina Code Ann. § 2-7-72 (Supp. 2000) requires the principal author of a bill to submit an estimated fiscal impact statement whenever a bill or resolution necessitating the expenditure of funds is introduced in the General Assembly.[27] As the majority opinion correctly notes, testimony from the principal author of the 1986 amendment is inadmissible evidence of legislative intent. Similarly, the failure of the principal author to submit a fiscal impact statement is not evidence of the General Assembly's intent in amending a statute.

Finally, like the majority, I am also concerned about the fiscal impact of the 1986 amendment on the financial stability of the Retirement System and the State's creditworthiness. However, I question whether adoption of the Employees' interpretation leaves the Retirement System in the dire financial condition predicted by the Retirement System.

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[27]Thereafter, if the legislative committee's estimate is substantially different from the original estimate, the committee must attach its statement of the bill's estimated fiscal impact.

As I read the trial record, the Retirement System's actuary testified the Employees' interpretation of § 9-1-10(17) produces a $1.177 billion unfunded liability if all current retirees and all current active State employees are included in the estimate. This number assumes that all current State employees will remain employed by the State until their retirement, a fact that is highly unlikely. Applying the Employees' interpretation of § 9-1-10(17) solely to current retirees, however, produces a liability of approximately one-fourth the actuary's estimate.

I would hold the language of the 1986 amendment plainly requires that unused annual leave of up to forty-five days may be added to the average produced by the retiree's twelve highest consecutive quarters. Accordingly, I respectfully dissent from Part I of the majority opinion.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Kerr, Sr., Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

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

Opinion No. 25295
Heard March 21, 2001 - Filed May 29, 2001

AFFIRMED IN RESULT

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General G. Robert DeLoach, III, Assistant Attorney General Patricia D. Breen, and Assistant Attorney General Matthew M. McGuire, all of Columbia, for petitioner/respondent.

Assistant Appellate Defender Tara Taggart, of the South Carolina Office of Appellate Defense, of Columbia, and Joseph F. Kent, of Mt. Pleasant, for

respondent/petitioner.

JUSTICE WALLER: We granted the parties' cross-petitions for certiorari to review the post-conviction relief court's order granting relief to respondent/petitioner James Kerr, Sr. We affirm in result.

FACTS

Kerr was indicted in January 1988 for trafficking in cocaine. After a bench trial in February 1988, he was convicted and sentenced to 25 years imprisonment and a $50,000 fine. This Court affirmed his conviction. Kerr v. State, 299 S.C. 108, 382 S.E.2d 895 (1989).

Kerr was released on parole in September 1993. It is undisputed[1] that Kerr successfully resumed his place in the community, returned to work, and fully complied with the conditions of his parole. Nonetheless, on July 13, 1995, Kerr was arrested and reincarcerated after reporting to his parole officer. He was given no reason for his arrest[2] and was not appointed legal counsel. On July 19, 1995, Kerr was brought before a single member of the Parole Board who informed him the Board had made a mistake paroling him in 1993 because the Board decided Kerr was parole ineligible under the trafficking statute. Kerr's parole was thereby terminated, without any written explanation.

In August 1995, Kerr filed an application for post-conviction relief (PCR). The PCR action initially was dismissed, but it was restored to the docket, and a hearing was held in September 1998. At the hearing, Kerr argued that: (1) he was denied procedural due process, and (2) he was parole eligible

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[1]The facts in this matter were stipulated to by the parties, and the PCR court made its factual findings based on the stipulation.

[2]The arrest warrant simply states that Kerr's offense was a violation of the statute under which he was convicted and that the "decision to parole needs to be reviewed by the Board."

under the trafficking statute. In April 1999, the PCR court granted Kerr relief and reinstated his parole.

In granting relief, the PCR court found that Kerr's substantive due process rights had been violated. The PCR court wholly relied on a federal case with strikingly similar facts. See Hawkins v. Freeman, 166 F.3d 267 (4th Cir. 1999) (Hawkins I). However, the Hawkins I decision, handed down in January 1999, was subsequently vacated. In November 1999, on rehearing en banc, the Fourth Circuit found no substantive due process violation. Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999) (Hawkins II).[3]

ISSUES

1. Did the PCR court have jurisdiction to hear this action and reinstate Kerr's parole?

2. Was Kerr parole eligible under S.C. Code Ann. § 44-53-370(e)(2)(c) (1985)?

DISCUSSION

1. Jurisdiction of PCR Court

We first address the threshold issue of whether the PCR court had jurisdiction to consider Kerr's case and reinstate his parole.

In Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), this Court held that "aside from two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence as authorized by Section 17-27-20(a)." Id. at 367, 527 S.E.2d at 749 (emphasis in

[3]In June 1999, this Court granted Kerr's petition for bail pending appellate review.

original). One of the exceptions is when a PCR applicant claims that his parole has been "unlawfully revoked." See S.C. Code Ann. § 17-27-20(a)(5) (1985). In Al-Shabazz, we described this exception as one which authorizes a PCR action when "the applicant asserts he should not have been returned to prison to serve the remainder of a valid sentence." 338 S.C. at 368, 527 S.E.2d at 749.

The State argues that the PCR court did not have jurisdiction over this case because it involves issues regarding Kerr's eligibility for parole. We disagree.

Kerr claims that his parole was unlawfully terminated. Because Kerr "asserts he should not have been returned to prison," this action falls squarely within the exception of section 17-27-20(a)(5). Al-Shabazz, 338 S.C. at 368, 527 S.E.2d at 749. At oral argument, the State maintained that because this action involves the termination of parole, rather than the revocation of parole, section 17-27-20(a)(5) does not apply. We decline to interpret the PCR statute this strictly. This exception in the PCR statute covers an applicant's claim that he has been unlawfully returned to prison. It matters not whether the action is called a revocation, a rescission, or a termination.

Accordingly, we hold Kerr's claims are cognizable under the PCR statute.

2. Parole Eligibility Under S.C. Code Ann. § 44-53-370(e)(2)(c) (1985)

Kerr argues he is parole eligible, and therefore, he was properly paroled in 1993. Kerr maintains the Parole Board wrongly determined in 1995 that, pursuant to the statute under which he was convicted, he is parole ineligible. We agree.

Kerr was convicted of trafficking in cocaine. He was sentenced

under section 44-53-370(e)(2)(c), which, at the time,[4] provided that where the quantity of cocaine involved is 100 grams or more, but less than 200 grams, the defendant shall be sentenced to "a mandatory term of imprisonment of twenty-five years, no part of which may be suspended, and a fine of fifty thousand dollars." S.C. Code Ann. § 44-53-370(e)(2)(c) (1985) (emphasis added). Regarding parole eligibility, an unenumerated paragraph at the end of section 44-53-370(e) stated as follows:

> Any person convicted and sentenced under this subsection to a mandatory minimum term of imprisonment of twenty-five years is not eligible for parole. . . .

(Emphasis added).

Kerr argues that he was not sentenced to a "mandatory minimum term" of 25 years, but instead was sentenced to a "mandatory term" of 25 years. He contends that this difference renders him parole eligible.

Section 44-53-370(e) prescribes sentences for drug trafficking based on the quantity of drugs involved. Several different subsections authorize at least a 25-year sentence; however, some provide for a "mandatory term of imprisonment" of 25 years,[5] while others provide for a "mandatory minimum

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[4]Since 1988, this statute has been amended eight times. Because Kerr committed his crime in late 1987, and was convicted and sentenced in February 1988, the version applicable to Kerr's case is S.C. Code Ann. § 44-53-370(e)(2)(c) (1985).

[5]See § 44-53-370(e)(1)(b) (sentence for trafficking in 100 pounds or more, but less than 2,000 pounds, of marijuana); § 44-53-370(e)(1)(c) (sentence for trafficking in 2,000 pounds or more, but less than 10,000 pounds, of marijuana); § 44-53-370(e)(2)(d) (sentence for trafficking in 200 grams or more, but less than 400 grams, of cocaine); § 44-53-370(e)(3)(b) (trafficking in 14 grams or more of morphine, opium, salt, isomer, or heroin); § 44-53-370(e)(4)(b) (trafficking in 150 grams but less than 1,500 grams of methaqualone); § 44-53-

term of imprisonment" of 25 years.[6] Despite the various ways that section 44-53-370(e) mandated a term of imprisonment of at least 25 years, the unenumerated paragraph detailing parole eligibility simply stated that someone sentenced to a "mandatory minimum term of imprisonment of twenty-five years" was not eligible for parole.

This unenumerated paragraph was amended in 1988[7] to read as follows:

> Any person convicted and sentenced under Section 44-53-370(e) to a mandatory minimum term of imprisonment of twenty-five years or a mandatory term of twenty-five years or more is not eligible for parole. . . .

§ 44-53-370(e) (Supp. 1988) (emphasis on added terms).[8]

370(e)(4)(c) (trafficking in 1,500 grams but less than 15 kilograms of methaqualone).

[6]See § 44-53-370(e)(1)(d) (trafficking in 10,000 pounds or more of marijuana); § 44-53-370(e)(2)(e) (trafficking in 400 grams or more of cocaine); § 44-53-370(e)(4)(d) (trafficking in 15 kilograms or more of methaqualone). Specifically, these sections all state the sentence should be "a term of imprisonment of not less than twenty-five years nor more than thirty years with a mandatory minimum term of imprisonment of twenty-five years."

[7]The amendment was effective July 1, 1988, over four months after Kerr's conviction and sentencing. 1988 S.C. Acts No. 565.

[8]In its current form, the parole ineligibility paragraph is even more specific:

> A person convicted and sentenced under this subsection to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a

The primary rule of statutory construction is that the Court must ascertain the intention of the legislature. E.g., State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning, without resort to subtle or forced construction to limit or expand the statute's operation. Id. Furthermore, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. Id.

Construing this penal statute strictly against the State as we must, we find that a "mandatory term" of imprisonment is not the equivalent to a "mandatory minimum term" of imprisonment. Indeed, when the precise subsection under which Kerr was convicted was challenged on constitutional grounds, this Court indicated that a "mandatory term" is distinguishable from a "mandatory minimum term" of imprisonment. See State v. De La Cruz, 302 S.C. 13, 16 n.4, 393 S.E.2d 184, 186 n.4 (1990).[9]

Furthermore, we note the Legislature's subsequent amendments which added material terms to this unenumerated paragraph signal that a "departure from the original law was intended." See North River Ins. Co. v. Gibson, 244 S.C. 393, 398, 137 S.E.2d 264, 266 (1964) (where the Court

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> mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole . . . .

§ 44-53-370(e) (Supp. 2000).

[9]In De La Cruz, the appellant argued that the mandatory sentence found in section 44-53-370(e)(2)(c) "impermissibly intrudes into inherent judicial powers in that all judicial discretion in sentencing is removed." De La Cruz, 302 S.C. at 15, 393 S.E.2d at 185-86. Noting the Congressional trend toward less discretion in sentencing, the Court held that the Legislature had the ability to limit judicial discretion by imposing the mandatory sentence under section 44-53-370(e)(2)(c). In doing so, the De La Cruz Court in dicta distinguished a case which involved a mandatory minimum sentence.

recognized "the rule of construction that the adoption of an amendment which materially changes the terminology of a statute . . . raises a presumption that a departure from the original law was intended."). We specifically find that the 1988 amendment which added "mandatory term" of imprisonment of 25 years to the parole ineligibility portion of section 44-53-370(e) effected a substantive change to the law.

Thus, Kerr was, in fact, parole eligible under S.C. Code Ann. § 44-53-370(e)(2)(c) (1985), and the Parole Board erroneously determined in 1995 that it had made a mistake by paroling Kerr in 1993. Kerr has established his parole was unlawfully terminated, and clearly, he is entitled to PCR. See S.C. Code Ann. § 17-27-20(a)(5) (1985). Accordingly, we affirm, in result, the PCR court's decision to grant Kerr relief and reinstate his parole.[10]

CONCLUSION

Because Kerr alleged that his parole was unlawfully rescinded and he should not have been returned to prison, the PCR court had jurisdiction over his claim. S.C. Code Ann. § 17-27-20(a)(5) (1985). In addition, we hold that Kerr was parole eligible under S.C. Code Ann. § 44-53-370(e)(2)(c) (1985), and the Parole Board erred by reincarcerating him. Therefore, he is entitled to the relief ordered by the PCR court – reinstatement of parole.

AFFIRMED IN RESULT.

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[10]Because this issue is dispositive, we decline to address Kerr's procedural due process argument. Regarding the State's argument that the PCR court's decision should be reversed because the federal decision upon which the PCR court relied has been vacated, we note that the Hawkins case dealt with the issue of whether the reincarceration of an erroneously paroled inmate violated substantive due process. Because we hold that Kerr was not erroneously paroled, the substantive due process analysis is no longer relevant to the case at bar.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Mark A. Ellis, Appellant.

Appeal From Georgetown County
Paul M. Burch, Circuit Court Judge

Opinion No. 25296
Heard February 20, 2001 - Filed May 29, 2001

REVERSED AND REMANDED

Assistant Appellate Defender Robert M. Dudek, of 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 Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor J. Gregory Hembree, of

Conway, for respondent.

JUSTICE PLEICONES: Appellant was convicted of murder and received a life sentence without the possibility of parole (LWOP). On appeal, he raises an evidentiary issue and a sentencing issue. We find no merit to the sentencing claim, but reverse and remand for a new trial because of an error in allowing a non-expert to give an opinion.

Facts

The victim was found in the street, near his bicycle and a knife. Appellant admitted shooting the victim three times, but contended he was acting in self-defense. He testified the victim dropped the bicycle and approached appellant in a menacing fashion holding the knife. Appellant verbally warned the victim to stop, but testified he instinctively shot when the victim jumped towards him, while holding the knife in a threatening position. The State sought to counter appellant's self-defense claim by showing that the victim was shot while riding the bike.

Issues/Analysis

A. "Expert" Testimony

Appellant contends the trial court erred in permitting a police officer to testify that, in his opinion, the victim was astride the bike when shot. He contends the officer was not qualified as an expert in "crime scene reconstruction," and that therefore he was not qualified to offer opinion testimony in that area. We agree, and find that the admission of this testimony, and the solicitor's emphasis on this "scientific" conclusion, unduly prejudiced appellant's self-defense claim.

Sergeant Walters was qualified as an expert in crime scene processing

and fingerprint identification. As such, he was qualified to testify, as he did, to measurements taken at the scene, to the recovery of shell casings, and to the identification of blood stains. He exceeded the scope of his expertise when he was permitted, over appellant's objection, to impart to the jury his conclusion, drawn from these measurements and observations, regarding the location of the victim and the position of his body vis-a-vis the bicycle at the time of the shooting. In effect, Sergeant Walters was allowed to give his opinion on the ultimate issue: Whether appellant was acting in self-defense when he shot and killed the victim. This was error. See Rule 704, SCRE; State v. Wilkins, 305 S.C. 272, 407 S.E.2d 610 (Ct. App. 1991) (opinion may be offered on ultimate issue only where witness is otherwise qualified).

In our opinion, the error in allowing Sergeant Walters to give his opinion on the position of the victim cannot be deemed harmless in light of appellant's assertion that he was acting in self-defense. While the State was free to argue that the evidence supported an inference that the victim was astride the bicycle when shot, and while the jury could certainly have concluded that he was, Sergeant Walters was not qualified to give such an "expert" opinion. An officer's improper opinion which goes to the heart of the case is not harmless. Fordham v. State, 325 S.E.2d 755 (Ga. 1985); compare State v. Hogan, 2000 Tenn. Crim. App. Lexis 393 (2000) (officer's testimony about the manner in which the shooting occurred and the position of the victim's body exceeded permissible scope of lay witness testimony).

The error in allowing Sergeant Walters to testify to matters beyond the scope of his expertise was compounded by the solicitor's closing argument. In his argument, the solicitor repeatedly referred to the "scientific" testimony of Sergeant Walters, "an expert qualified by the judge." The trial court's imprimatur of Sergeant Walters as an 'expert' was exploited by the solicitor to the prejudice of appellant and his defense. See State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) (defendant prejudiced where solicitor stressed improperly admitted evidence in closing argument).

We find appellant has established reversible error in the admission of Sergeant Walters' "expert opinion" reconstructing the position of the

victim's body when he was shot. The effect of this error, compounded by the solicitor's repeated references to this "scientific evidence," was to impermissibly undermine appellant's self-defense claim. This error entitles appellant to a new trial. State v .King, supra.

B. Sentencing

The State gave notice that it was seeking to have appellant sentenced to life without the possibility of parole (LWOP) under the recidivist statute, S.C. Code Ann. §17-25-45 (Supp. 2000). Apart from the recidivist statute, appellant was subject to a LWOP sentence under the murder punishment statute, which gives the trial judge the discretion to impose a LWOP sentence upon any person convicted of murder. S.C. Code Ann. §16-3-20 (A)(Supp. 2000). We agree that appellant was not eligible for sentencing under the recidivist statute.

Appellant's prior record consisted of two offenses:

(1) a 1988 juvenile adjudication of delinquency based upon a finding that he had committed voluntary manslaughter[1]; and

(2) a conviction for second-degree nonviolent burglary.

Under §17-25-45(C), voluntary manslaughter and murder are "most serious offenses." Pursuant to §17-25-45(G), the solicitor is required to seek a mandatory LWOP sentence for a defendant with a prior conviction for a "most serious offense" who is charged with a second such offense. Upon conviction, the judge is required to impose a LWOP sentence for the second offense. §17-25-45(A).

Appellant objected to the applicability of the recidivist statute, arguing that a prior juvenile adjudication was not a conviction for purposes of the

[1]Appellant was about thirteen years old at the time of this offense.

statute. We agree. The statute itself defines conviction as "any conviction, guilty plea, or plea of nolo contendere." § 17-25-45 (C)(3). Since this criminal statute must be given a strict construction in favor of the defendant, and since juvenile adjudications are not among the list of qualifying events, appellant's voluntary manslaughter adjudication cannot be used to invoke the mandatory LWOP provisions of the recidivist statute. Cf. Brown v. State, ___ S.C. ___, 540 S.E.2d 846 (2001) (where criminal statute specifically lists covered locations, those not mentioned are excluded applying maxim *expressio unius est exclusio alterius*). Further, the Children's Code specifically provides "[n]o adjudication by the [family] court of the status of a child is a conviction." S.C. Code Ann. §20-7-7805 (C) (Supp. 2000).

Conclusion

Because an unqualified witness was permitted to offer an expert opinion on the ultimate issue in this case, appellant's sentence and conviction are

REVERSED AND REMANDED.

TOAL, C.J., MOORE, WALLER, JJ., concur. BURNETT, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE BURNETT (**concurring in part and dissenting in part):** I agree with the Court's conclusion on the sentencing issue in Part B of the majority opinion. However, I respectfully dissent from the majority's holding in Part A.

Sergeant Walters was qualified as an expert in crime scene processing. He testified there was a bullet hole in the left pedal of the victim's bicycle. He also testified that the bullet holes in the victim's right pants leg and the ace bandage worn on that leg did not line up with the two superficial wounds in that leg unless the victim's leg had been bent when he was shot. Over appellant's objection, Sergeant Walters testified that the leg wounds, the holes in the pants and the ace bandage, and the bullet hole in the left pedal were consistent with the victim having been shot while on the bicycle.

The majority concludes Sergeant Walters was not qualified to offer his opinion on the victim's position at the time he was shot, and the admission of this testimony prejudiced appellant's self defense claim. I disagree.

First, I disagree with the majority's conclusion this testimony exceeded the scope of Sergeant Walters' expertise. Walters was qualified as an expert in "crime scene processing," which he defined as "analyzing [evidence] to see where it fits in relationship to the crime that's being investigated." Recognizing that bullet holes in the victim's clothing and leg brace would only line up with the leg in a bent position was a relatively simple task within the purview of Sergeant Walters' expertise. In my opinion, the trial court did not abuse its discretion in admitting the testimony. See State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (admission of expert testimony is within trial court's discretion).

Second, assuming for the sake of argument that the testimony did exceed the scope of Walters' expertise, I do not believe the trial court abused its discretion in admitting it. It does not take an expert to observe the way bullet holes in a victim's body can be aligned with bullet holes in his

clothing. On the contrary, the conclusions to be drawn from such observations are a matter of common sense. In State v. Sullivan, 43 S.C. 205, 21 S.E. 4 (1895), this Court held it was error for the trial court to refuse to allow a medical expert to state his opinion as to how the victim was standing when shot. The Court noted that any person would be competent to express such an opinion: "It was not 'expert testimony' in the strict sense of the term, but a statement of a conclusion of fact, such as men who use their senses constantly draw from what they see and hear in the daily concerns of life." Id. at 209, 21 S.E. at 6 (quoting Hopt v. Utah, 120 U.S. 430 (1887)). In my opinion, Walters should have been allowed to render his opinion on the victim's position regardless of his status as an expert.[2]

Third, even if the testimony was improper, any error was harmless beyond a reasonable doubt. In addition to the testimony the majority finds improperly admitted, Walters testified without objection that the chest wound trajectory was consistent with the victim having been seated on the bicycle when shot and that the location of the body and bloodstains at the scene were consistent with the victim having fallen backwards off the bicycle after being shot. This evidence, along with evidence of a bullet hole in the left bicycle pedal, was all consistent with the victim having been shot while astride the bicycle. There is no reversible error when the objected-to testimony is merely cumulative to other evidence. State v. Gilchrist, 342 S.C. 369, 373, 536 S.E.2d 868, 870 (2000) (no reversible error where improperly admitted evidence is merely cumulative).

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[2]See Rule 701, SCRE (non-expert may give opinions "which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."). In my opinion, Sergeant Walters' opinion was rationally based on his perceptions, was helpful to a clear understanding of his testimony, as well as helpful to the determination of a fact in issue, and did not require special knowledge, skill, experience or training. Cf. Sullivan, supra.

Finally, I wish to address the majority's interpretation of Rule 704, SCRE, concerning opinions on the ultimate issue. The majority cites Rule 704 and State v. Wilkins, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991)[3] for the proposition that an opinion may be offered on the ultimate issue only where the witness is otherwise qualified. However, Rule 704 makes no mention of the witness' qualification. Rule 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Nothing in the text of Rule 704 restricts its application to experts.[4] On the contrary, the rule plainly applies to any opinion testimony and states that there is nothing inherently objectionable about opinion testimony on the ultimate issue. If, as I believe, Sergeant Walters' opinion was properly admitted either as expert or lay testimony, then the fact that his opinion embraced the ultimate issue in the case did not make it objectionable.

I would affirm appellant's murder conviction.

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[3]Wilkins was based on former Rule 24(c), SCRCrimP (deleted effective September 3, 1995).

[4]Contrast this with former Rule 43(m)(3), SCRCP (deleted effective September 3, 1995), which only applied to expert testimony.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Larry G. Harvin, Appellant.

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

Opinion No. 25297
Heard April 25, 2001 - Filed May 29, 2001

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, 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 Donald J. Zelenka, Assistant Attorney General Jeffrey A. Jacobs, all of Columbia; and Solicitor David P. Schwacke, of North Charleston, for respondent.

JUSTICE MOORE: Appellant was convicted of murder and armed robbery and sentenced to life imprisonment plus a concurrent term of thirty years. We affirm.

FACTS

The victim, Bertha Joan Wilson, was shot and killed while she was working the cash register at a Citgo station in Charleston. Her body was found in a storage room around 4:00 a.m. on October 19, 1996. Two cash register trays were on the floor and the store safe was open. A total of $331 was later found to be missing.

Around the time of the victim's murder, appellant spoke with his mother, Mrs. Wilson,[1] who lived in Rochester, New York. He told her he wanted to leave South Carolina because someone was trying to kill him. Mrs. Wilson sent appellant a bus ticket and he arrived in Rochester in early November 1996.

While appellant was living with her and her husband, Mrs. Wilson overheard appellant tell her husband he shot someone in Charleston. Mrs. Wilson gave this information to the Charleston Police Department. Detective Michael Gordon then contacted the Rochester City Police Department and asked that they be on the lookout for appellant who was no longer living at the Wilson residence.

At 9:00 a.m. on April 21, 1997, appellant voluntarily arrived at the Rochester Police Department with Mr. and Mrs. Wilson. Mr. Wilson had told appellant the police were going to question him about the Charleston homicide. At the station, police arrested appellant on outstanding bench warrants for drug and petty larceny charges pending in Greece, New York, a

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[1]No relation to the victim.

suburb of Rochester.

At Detective Gordon's request, Rochester police spoke briefly with appellant about the Charleston murder after obtaining a waiver of his Miranda rights. Appellant denied being in Charleston at the time of the murder. Appellant was then asked and consented to take a polygraph test. He was again given Miranda warnings before the polygraph test was administered. The polygraph indicated deception.[2]

After receiving the results of the polygraph, Detective Gordon flew to Rochester, arriving later that evening. Detective Gordon questioned appellant along with two Rochester police officers. Appellant admitted his involvement in the robbery of the Citgo and identified his accomplice, Lanard Vanderhorst, in a photo line-up.

Appellant's statement indicates he and Vanderhorst went to the Citgo station together. Vanderhorst asked appellant to go into the store to see if anyone was in there, which appellant did. Appellant came out of the store and reported to Vanderhorst that the only person in the store was the cashier. Vanderhorst told appellant to wait outside while he went into the store. Vanderhorst was in the store a few minutes when appellant heard a single gun shot. Appellant ran away. He told police he did not receive any money from the robbery and he did not know Vanderhorst was going to rob the station until he heard the shot.

Appellant's statement was admitted at trial and a witness placed appellant at the scene of the murder.

ISSUE

Does New York state law apply to suppress appellant's statement?

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[2]No evidence regarding the polygraph was admitted at trial.

DISCUSSION

Appellant moved to suppress his statement because he had counsel on the pending New York charges for which he was detained[3] and, under New York state law, police could not question him regarding the unrelated murder charge without the presence of counsel. The trial judge applied a conflict of laws analysis and denied the motion to suppress under South Carolina state law. Appellant contends this was error.

The State concedes that under New York state law, appellant's statement would be subject to suppression under People v. Rogers, 397 N.E.2d 709 (N.Y. 1979), which provides that a defendant represented by counsel on the charge on which he is held in custody cannot be questioned on any matter, even an unrelated one.[4] South Carolina, on the other hand,

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[3]New York counsel was appointed for appellant on December 31, 1996, shortly after his arrest on the New York drug and petty larceny charges. Bench warrants were issued on these charges when appellant failed to appear at a subsequent hearing on February 3, 1997.

[4]It is not clear to us that the rule enunciated in Rogers would result in suppression in this case. Although New York's highest court has recently reiterated the rule in Rogers, *see* People v. Burdo, 690 N.E.2d 854 (N.Y. 1997), it has also refused to apply Rogers on facts similar to those here. *See* People v. Bing, 558 N.E.2d 1011 (N.Y. 1990) (distinguishing Rogers and holding that where no Fifth Amendment right to counsel was invoked, defendants in custody on bench warrants for other charges could be questioned on unrelated charges even though right to counsel had attached on custodial charges); *see also* Burdo, *supra* (Wesley, J. dissenting) (Rogers rule applies only where defendant has invoked Fifth Amendment right to counsel on custodial charges). Further, Burdo may be distinguishable because there the police had actual knowledge that the defendant was represented by counsel. Here, police denied they knew appellant had counsel on the pending New York charges. In any event, since the State has conceded New York law requires suppression in this case, we assume it does.

follows the federal constitutional rule that the Sixth Amendment right to counsel is offense-specific; the mere fact counsel was appointed in one matter does not invoke the right to counsel in an unrelated matter. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), *citing* McNeil v. Wisconsin, 501 U.S. 171 (1991); *see also* Texas v. Cobb, ___U.S. ___, 121 S.Ct. 1335, ___ L.Ed.2d ___ (2001) (reaffirming narrow application of rule in McNeil). We hold that South Carolina law, and not New York law, determines the suppression issue in this case.

Most courts facing "conflict of laws" situations in the context of suppression issues analyze whether suppression under the particular facts of the case would further the purpose of the exclusionary rule. *See* Pooley v. State, 705 P.2d 1293 (Alaska Ct. App. 1985); People v. Blair, 602 P.2d 738 (Cal. 1979); People v. Porter, 742 P.2d 922 (Colo. 1987); State v. Bridges, 925 P.2d 357 (Hawai'i 1996); State v. Grissom, 840 P.2d 1142 (Kansas 1992); People v. Benson, 454 N.Y.S.2d 155 (App. Div. 1982).[5] The main purpose of the exclusionary rule is deterrence of police misconduct. State v. Sachs, 264 S.C. 541, 565, 216 S.E.2d 501, 514 (1975) ("Exclusion should be applied only where deterrence is clearly subserved."). Accordingly, the question here is whether suppressing appellant's statement would deter police misconduct.

In this case, South Carolina police participated in an out-of-state interrogation that would have been illegal under the laws of New York but not the laws of South Carolina. South Carolina officers procured the help of New York officers in conducting the interrogation and justifiably relied on them for knowledge of the laws of that state. The officers questioning

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[5]Although some courts have applied a conflicts of law analysis similar to that used in civil cases to determine whether the law of the forum or the law of the situs applies, this approach has been widely criticized as an oversimplified analysis in the criminal context. *See* State v. Bridges, *supra*, for extensive discussion; *see also* John Bernard Corr, *Criminal Procedure and the Conflict of Laws*, 73 GEORGETOWN L.J. 1217 (1985).

appellant had no actual knowledge he was represented by counsel on other charges and there is no evidence officers knowingly conducted the interrogation in violation of New York law. We find suppression in this case would not effectively deter misconduct by South Carolina police officers.

Further, our State interest in deterring the conduct of out-of-state police officers, who should have known the law of their own state and acted in accordance therewith, seems minimal at best. Suppression in South Carolina would most likely not have a significant impact on police conduct in New York. *See* People v. Porter, 742 P.2d at 925 (observing that "the slight increment in deterrence achieved by suppressing the evidence in another jurisdiction" is not likely to have any effect on deterring police from future misconduct). Under a deterrence analysis, we find no error in the trial judge's refusal to suppress appellant's statement.

Finally, we reject appellant's suggestion that principles of "comity" dictate a different result in this case. The spirit of comity does not require that a nonresident be allowed a remedy which State law denies to our own citizens. Peterson v. Peterson, 333 S.C. 538, 544, 510 S.E.2d 426, 429 (Ct. App. 1998). Accordingly, we decline to invoke New York state law to suppress appellant's statement.[6]

Appellant's remaining issue is without merit and we dispose of it under Rule 220(b), SCACR. *See* State v. Portee, 122 S.C. 298, 115 S.E. 238 (1922) (charge on malice implied from use of a deadly weapon was not a charge on the facts because charge indicated it was for jury to decide whether a deadly weapon had in fact been used).

AFFIRMED.

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[6]We note that New York concurs with us in this regard since that state has refused to apply another state's law in determining whether a defendant's statement should have been suppressed. *See* People v. Benson, 454 N.Y.S.2d 155 (1982).

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Sammie Louis Stokes, Appellant.

Appeal From Orangeburg County
Paul M. Burch, Circuit Court Judge

Opinion No. 25298
Heard April 4, 2001 - Filed May 29, 2001

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, of 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 Donald J. Zelenka, Assistant Attorney General Tracey C. Green, all of Columbia, and Solicitor Walter M. Bailey, Jr., of Summerville, for respondent.

JUSTICE WALLER: Sammie Louis Stokes was convicted of murder, kidnapping, first degree criminal sexual conduct (CSC), and criminal conspiracy. He was respectively sentenced to death, thirty years, and 5 years.[1] This appeal consolidates his direct appeal with the mandatory review provisions of S.C. Code Ann. §16-3-25 (1985). We affirm the convictions and sentences.

FACTS

Stokes was hired by Patti Syphrette to kill her daughter-in-law, 21-year-old Connie Snipes, for $2000.00. On May 22, 1998, Syphrette called Stokes and told him Connie "got to go and tonight." At 9:30pm that evening, Syphrette and Snipes picked up Stokes at a pawn shop, and the three of them went to Branchville and picked up Norris Martin.[2] The four of them then drove down a dirt road in Branchville and stopped. Syphrette remained in the car while Stokes, Martin and Snipes walked into the woods. When they got into the woods, Stokes told Snipes, "Baby, I'm sorry, but it's you that Pattie wants dead. . ."

According to Norris Martin, Stokes forced Snipes to have sex with Martin at gunpoint. After Martin was finished, Stokes had sex with Snipes. While doing so, Stokes grabbed her breast and stabbed her in the chest, cutting both her nipples. Stokes then rolled her over and began having anal sex with her. When Stokes was finished, he and Martin each shot the victim one time in the

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[1] Pursuant to S.C. Code Ann. § 16-3-910 (Supp. 2000), no sentence was imposed for the kidnapping charge as Stokes was sentenced for murder.

[2] Allegedly, Snipes accompanied the others on the premise that they were going to Branchville to kill a man named Doug Ferguson, whom Syphrette and Stokes had tied up in the woods.

head,[3] and then dragged her body into the woods. Stokes then took Martin's knife and scalped her, throwing her hair into the woods. According to Martin, Stokes then cut Snipes' vagina out.[4]

Snipes' body was found by a farmer on May 27th, and Martin's wallet was found in the field near it. Martin was interviewed by police the following morning, after which police went to the Orangeburg home of Pattie Syphrette's husband Poncho; by the time police arrived at the home on May 28, 1998, Stokes and Syphrette had already murdered Doug Ferguson by wrapping duct tape around his body and head, suffocating him.[5]

Stokes was tried and convicted of murder, kidnapping, first degree criminal sexual conduct, and criminal conspiracy.

ISSUES

1. Did the trial court err in redacting portions of Stokes' statement to police which indicated Snipes had willingly gone to Branchville in order to kill Doug Ferguson?

2. Did the trial court err in limiting Stokes' discussion of religion in his closing statement to the jury?

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[3] Martin testified that Stokes placed the gun into his (Martin's) hand and then pulled the trigger.

[4] According to the pathologist, Snipes' injuries were consistent with having been scalped, had the nipple area cut from each breast, and having had the vaginal area cut out.

[5] Stokes pleaded guilty to Ferguson's murder in a separate proceeding and was sentenced to life.

1. REDACTED STATEMENT

Stokes wrote a lengthy letter to police in which he gave a detailed account of his participation in both the Snipes and Ferguson murders. Prior to trial, Stokes agreed on the record that he intended to "keep out everything as it relates to Doug Ferguson" from the guilt phase.

At trial, the solicitor moved to redact portions of Stokes' letter which indicated Snipes had been misled into believing they were all going to Branchville that evening for the purpose of killing Doug Ferguson. Counsel for Stokes maintained this portion of Stokes' letter should not be redacted, claiming it demonstrated Snipes had voluntarily accompanied Stokes and Syphrette to Branchville and had willingly gone into the woods with Stokes, thereby rebutting the State's claim of kidnapping. He also argued this portion of the statement was admissible under Rule 106, SCRE. We find the statement was properly redacted.

Stokes sought to admit the following portions of his letter to police:

> She [Syphrette] said Connie thinks we are going to kill Doug and she thinks we already got him tied up in Branchville somewhere. She [Syphrette] said I wish that were true so we could do all both of them. She said Connie can't stand Doug and wants to be there to help us and besides she wants to meet you anyway, I know you've been talking to her on the phone when Roy calls and I wasn't home. . . .
>
> While riding to Branchville, Connie said Doug ain't shit and I'd love to see him get his. She said I had plans tonight but this is better. . . .
>
> That's when Connie said well where is he at.

The unredacted portion of the letter continues, "I said 'Baby, I'm sorry but it's you that Pattie wants dead.'"

Contrary to Stokes' assertion, the redacted portions do not reflect that Snipes voluntarily rode to her death but, rather, serve only to demonstrate that she was, in fact, tricked into going into the woods. As such, the fact that she was "inveigled" or "decoyed"[6] into going to Branchville negates, in legal contemplation, the voluntariness of her participation.[7]

Addressing analogous situations under the federal kidnapping statute, several courts have reached similar conclusions. As noted by the Fourth Circuit Court of Appeals in United States v. Hughes, 716 F.2d 234, 239 (4th Cir. 1983), "nothing in the policy of the . . . kidnapping statute justifies rewarding the kidnapper simply because he is ingenious enough to conceal his true motive from his victim until he is able to transport her . . . [to another location]." See also United States v. Atkinson, 916 F.Supp. 959 (D.S.D. 1996) (victim's voluntary presence may nonetheless amount to inveigling); United States v. Boone, 959 F.2d 1550 (11th Cir. 1992) (where kidnapper accompanies inveigled victim, victim is kept from acting in entirely voluntary manner by acts, presence, and intent of inveigling kidnapper, he is ensnared within net that kidnapper's deception has prevented him from seeing, and in such a case victim's act of accompanying kidnapper is not voluntary and does not amount to legally valid consent); United States v. Hoog, 504 F.2d 45, 51 (8th Cir.1974) (kidnapping victim who accepted a ride from someone who misled her into believing that she

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[6] S.C.Code Ann. § 16-3-910 (1976) defines kidnapping as the unlawful seizure, confinement, **inveigling**, **decoying**, kidnapping, abducting or carrying away of any other person by any means whatsoever without authority of law. The definition of "decoy" is "to lure successfully." NEW WEBSTER'S DICTIONARY AND THESAURUS 250 (1993). Inveigling has also been defined as "enticing, cajoling, or tempting the victim, usually through some deceitful means such as false promises." United States v. Macklin, 671 F.2d 60, 66 (2d Cir.1982).

[7] Stokes' argument is akin to suggesting that a child molester who lures his child victim into his car with candy may be found not guilty of kidnapping, simply because the child "voluntarily" accompanied him in the hopes of receiving candy. We find such a position untenable.

would be taken to her desired destination was "inveigled" or "decoyed" within the meaning of the federal kidnapping statute).[8]

Here, the undisputed evidence of record is that Snipes was successfully lured into the woods for the alleged purpose of murdering Doug Ferguson when, in fact, the sole purpose of Stokes, Syphrette and Martin was to murder Snipes. Accordingly, rather than negating the charge of kidnapping, the redacted portions of the statement simply bolster the State's claim that Snipes did not "voluntarily" accompany her assailants but, rather, was inveigled into the woods by them. Cf. Ray v. State, 330 S.C. 184, 498 S.E.2d 640 (1998) (inveigling victim into truck under false pretense that she was being taken to the hospital constituted kidnapping). We find the statement was properly redacted.

Moreover, even assuming *arguendo*, as Stokes claims, that the redacted portions of his statement were relevant to demonstrate the victim voluntarily accompanied them on the night of her murder, any error in the redaction is harmless. Both Stokes' letter and the testimony of Norris Martin amply demonstrate that Connie Snipes voluntarily went with Stokes and Syphrette to Branchville, and that she willingly walked into the woods with Martin and Stokes. Accordingly, the jury was well aware that she had accompanied them voluntarily, and Stokes has failed to demonstrate any prejudice from the redaction. State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1999)(in order for this Court to reverse a case based on the erroneous exclusion of evidence, prejudice must be shown); State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990).[9]

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[8] Accord State v. Plath, 281 S.C. 1, 17, 313 S.E.2d 619, 628 (1984)(finding jury could have found victim was inveigled and decoyed to her death)

[9] To the extent Stokes sought admission of the redacted portions in order to demonstrate the victim's bad character, i.e., that she was willing to go along to participate in a murder, we find the evidence was properly excluded. State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) (no error in refusing to admit evidence of victim's bad character where it did not tend to make more or less probable any issue at guilt phase of trial).

Finally, the redacted portions were not admissible under Rule 106, SCRE, which provides:

> When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part of any other writing or recorded statement **which ought in fairness to be considered contemporaneously** with it. (Emphasis supplied).

"Only that portion of the remainder of a statement which explains or clarifies the previously admitted portion should be introduced." State v. Taylor, 333 S.C. 159, 171, 508 S.E.2d 870, 876 (1998). See also State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001).

Here, the redacted excerpts do not explain or clarify the previously admitted portions but, rather, would only have confused the jury as to the identity of Doug Ferguson. Accordingly, the redacted statements need not, in fairness to Stokes, have been admitted pursuant to Rule 106, SCRE. Gay, supra.

The trial court properly redacted the statement.

2. REFERENCES TO GOD

At sentencing, Stokes elected to exercise his statutory right to make a closing statement to the jury.[10] While addressing the jury, Stokes stated:

> In my statement I never denied my involvement but the statement I gave was truthful and I do have a conscience, that's one of the main reasons why I gave the statement. You know, I been in trouble before but nothing like this before so I felt I had to set the

[10] Pursuant to S.C. Code Ann. § 16-3-20(B) (1976), "[t]he State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed."

> record straight. But I give one statement and I give a honest one, I didn't [sic] four or five, I give one. And I'm deeply sorry that any of it ever happened and I'm also sorry for the role that I played in it.
>
> You know, I prayed and prayed and prayed and have asked God to forgive me—

At this point, the solicitor asked to approach the bench and Stokes continued, "But I'm asking for forgiveness." After a bench conference, Stokes continued,

> Well, I would just like to say that I will forever be sorry for the role that I played in it and most of all I truly feel for the family and if I could turn back the hand of time none of this would have occurred and I wouldn't be standing before ya'll now pleading for my life. And once again, I truly would like to say that I'm sorry and wish that you could find it in your heart to forgive me for the role that I played in this.
>
> I would like to discuss how - - - but I can't get into that because they say I can't get into it so I would like to say that I am truly sorry, I really am.

Counsel for Stokes then gave his closing in which he referred to Stokes' letter to police, which stated, "I will say this much, God is going to bless them and help them make it through this. Without a doubt, God is going to punish me for my part and there's no excuse because we all have choices in life. . . ."

Stokes now asserts the trial court impermissibly limited the scope of his allocution under S.C. Code § 16-3-20(B) such that his death sentence should be reversed.[11] We disagree.

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[11] As the State points out, the statutory right of closing argument and the right of allocution are distinguishable. Technically, "allocution" refers to the

Stokes did assert before the jury that he had prayed and prayed and asked God to forgive him. Since Stokes made the point he intended to make, there is no reversible error. State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997) (capital defendant was not prejudiced by sustained objection to his religious argument where record indicates he made argument); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (no prejudice resultant from trial court's ruling where witness is able to make point before the jury); State v. McDowell, 266 S.C. 508, 224 S.E.2d 889 (1976) (trial court's limitation of argument to jury did not deprive defendant's ability to make point). Accordingly, Stokes failed to demonstrate prejudice from the trial court's ruling.[12]

CONCLUSION

Stokes' convictions and sentences are affirmed. Imposition of the death penalty in this case was not the result of passion, prejudice, or any other

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common law practice of the court "formally inquir[ing] of the defendant whether he had anything to say why sentence and judgment should not be pronounced." State v. Phillips, 215 S.C. 314, 54 S.E.2d 901 (1949); State v. Trezevant, 20 S.C. 363, (1884); see also BLACK'S LAW DICTIONARY 40 (5th Ed. 1979) (defining "allocution" as "formality of court's inquiry of prisoner as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction). See also Bassett v. Commonwealth, 284 S.E.2d 844 (Va. 1981) (Allocution is the defendant's right to speak on his own behalf after the fact finder determines guilt but before the judge pronounces sentence. Defendant's closing argument is not allocution, but is his opportunity to present arguments in mitigation before the fact finder deliberates).

[12] We have consistently held there is no fundamental unfairness when the trial judge precludes the solicitor and the defense from arguing about God or religion. State v. Shafer, 340 S.C. 291, 531 S.E.2d 524, cert granted in part, Shafer v. South Carolina 121 S.Ct. 30 (2000); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, cert. denied 522 U.S. 853, 118 S.Ct. 146, 139 L.Ed.2d 92 (1997).

arbitrary factor, and the evidence supports the aggravating circumstances. The death sentence is not excessive or disproportionate to the penalty imposed in similar cases. S.C.Code Ann. § 16-3-25(C) (1985); State v. Terry, 339 S.C. 352, 529 S.E.2d 274, cert. denied 148 L.Ed.2d 137 (2000); State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, cert. denied 148 L.Ed2d 62 (2000); State v. Southerland, 316 S.C. 377, 447 S.E.2d 862, (1994), cert. denied 513 U.S. 1166 (1995); State v. Charping, 333 S.C. 124, 508 S.E.2d 851, cert. denied 527 U.S. 1007 (1999).

AFFIRMED.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice John C. Few, concur.

The Supreme Court of South Carolina

Henry Martin, Jr., Petitioner,

v.

South Carolina Department of Corrections, Respondent.

O R D E R

Petitioner is currently incarcerated at the Lee Correctional Institution. Petitioner filed a civil suit against the Department of Corrections (DOC) for the medical care that he received after he injured his leg. The trial court granted summary judgment to the DOC. The Court of Appeals affirmed. Martin v. South Carolina Department of Corrections, 2000-UP-656 (S.C. Ct. App. filed October 31, 2000). Petitioner then attempted to file a petition for a writ of certiorari. However, petitioner did not enclose the required $100 filing fee. See Rule 226(c), SCACR (a $100 filing fee is required for a petition for a writ of certiorari to the Court of Appeals).

Instead, he enclosed two checks totaling $24.41. The Clerk of Court returned the checks as insufficient to cover the filing fee.

Petitioner states that the Clerk was without authority in returning the partial filing fee. He argues that the Clerk must accept partial payment pursuant to S.C. Code Ann. §§ 24-27-100 and 24-27-150 (Supp. 2000), and that the Court of Appeals relies on these sections to allow partial payment. Section 24-27-100 states that:

> Unless another provision of law permits the filing of civil actions without the payment of filing fees by indigent persons, if a prisoner brings a civil action or proceeding, the court, upon the filing of the action, shall order the prisoner to pay as a partial payment of any filing fees required by law a first-time payment of twenty percent of the preceding six months' income from the prisoner's trust account administered by the Department of Corrections and thereafter monthly payments of ten percent of the preceding month's income for this account.

(Emphasis added). Section 24-27-150 describes how to implement the payment plan if the balance of the prisoner's trust account is insufficient to cover the filing fee.

Upon examination of sections 24-27-100 and 24-27-150, it is clear that the institution of a payment plan in order to finance filing fees is

intended only for use at the trial court level. The plain language of section 24-27-100 states that the payment plan was enacted for the purpose of assisting indigent prisoners when they "bring a civil action or proceeding." By definition, civil actions or proceedings are brought at the trial court level. In contrast, filing an appeal or petition for a writ of certiorari does not constitute "bringing a civil action" but simply seeks review of a civil action that has been concluded in the trial court. Accordingly, the payment plan laid out in sections 24-27-100 and 24-27-150 is not applicable to filing fees incurred at either the Supreme Court or the Court of Appeals.

IT IS SO ORDERED.

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
May 23, 2001

The Supreme Court of South Carolina

RE: Rule 608, SCACR

O R D E R

By notice dated January 23, 2001, this Court proposed several amendments to Rule 608, SCACR, and requested public comment regarding whether changes should be made to the rule. In response, numerous comments were received. These comments have been highly beneficial and informative.

After considering the comments, Rule 608 is hereby amended to read as shown in the attachment to this order. Except for the exemptions contained in subsection (d) of the rule, which are effective immediately, the rule shall become effective September 1, 2001. The first appointment year under the amended rule shall run from September 1, 2001, until June 30, 2002. Thereafter, the appointment year shall run from July 1 to June 30 as provided by subsection (b)(2) of the amended rule.

The rule currently in effect shall apply to all appointments made before September 1, 2001. The current appointment lists shall be used until that time.

The South Carolina Bar shall promptly contact each active member of the Bar for the information necessary to prepare the lists to be used for the appointment year beginning September 1, 2001. The lists shall be distributed to the clerks of court no later than August 1, 2001. If a member fails to respond to the South Carolina Bar's request for information, the Bar shall treat the member as being eligible for appointment and shall place the member's name on either the civil or criminal appointment list in such county as it shall deem to be appropriate.

The exemptions contained in the attached rule shall be effective immediately. If a member whose status changes from being non-exempt to being exempt as a result of the amended rule receives an appointment between the date of this order and September 1, 2001, the member shall make a motion to be relieved under Rule 608(f)(4), and that motion shall be granted if the Chief Judge for Administrative Purposes for the court involved determines the member is exempt.

For appointments made prior to the date of this order, a member who becomes exempt as a result of this amended rule may be relieved from the appointment on motion to the Chief Judge for Administrative Purposes. The decision to relieve a member from such a prior appointment shall rest in the discretion of the judge.

IT IS SO ORDERED.

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
May 29, 2001

[Note: The What's New Page on the Judicial Department Website contains a summary of the major changes which have been made to Rule 608, SCACR, along with a copy of the rule showing the changes which have been made to the current rule. The address is http://www.judicial.state.sc.us/whatsnew/index.html]

Rule 608
Appointment of Lawyers for Indigents

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

(b) Terminology. The following terminology is used in this rule:

(1) Active Member: Any active member of the South Carolina Bar as defined by the Bylaws of the Bar. For the purpose of this rule, a person holding a limited certificate to practice law in South Carolina shall not be considered an active member.

(2) Appointment Year: The period from July 1 to June 30.

(3) Supreme Court: The Supreme Court of South Carolina.

(4) Larger Counties: Aiken, Beaufort, Charleston, Florence, Greenville, Greenwood, Horry, Lexington, Richland, Spartanburg and York.

(5) Counties Needing Assistance: Any county not listed above.

(6) Indigent: any person who is financially unable to employ counsel. In making a determination whether a person is indigent, all factors concerning the person's financial condition should be considered including income, debts, assets and family situation. A presumption that the person is indigent shall be created if the person's net family income is less than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register. Net income shall mean gross income minus deductions required by law.

(7) Death Penalty Case: this includes any criminal case in which the

solicitor has given notice of the intent to seek the death penalty and any post-conviction relief action challenging a proceeding in which a death sentence was imposed.

(8) Family Member: a spouse, child, grandchild, parent, grandparent or other person with which the member maintains a close familial relationship.

(c) Lists.

(1) For each appointment year, the South Carolina Bar shall prepare two lists for each county:

(A) **Criminal List.** A list of all active members who have been certified by the Supreme Court to serve as lead counsel in death penalty cases (see Rule 421, SCACR) who are eligible for appointment in the county, and all other active members who normally represent at least three (3) clients before the court of general sessions during a calendar year and are eligible for appointment in the county. The list shall indicate which members are death penalty certified as lead counsel, the date on which each member was admitted to practice law in South Carolina, and whether the member has completed or is exempt from the trial experiences required by Rule 403, SCACR. This list shall be used to appoint counsel for indigents in all criminal cases to include juvenile delinquency matters and post-conviction relief matters.

(B) **Civil List.** A list of all other active members eligible for appointment in the county. This list shall indicate the date on which each member was admitted to practice law in South Carolina, and whether the member has completed or is exempt from the trial experiences required by Rule 403, SCACR. This list shall be used for the appointment of counsel for indigents in all cases other than those specified in (A) above.

These lists shall be arranged alphabetically and shall be provided to the county clerk of court at least thirty (30) days prior to the beginning of the

appointment year.

(2) Active members shall, at the time of payment of annual license fees to the South Carolina Bar, designate the county in which they primarily practice in South Carolina or, if they do not practice law in South Carolina, the county in which they reside in South Carolina; whether they are certified by the Supreme Court to serve as lead counsel in a death penalty case; and, if admitted after March 1, 1979, whether they have completed the trial experiences required by Rule 403, SCACR. If the member is not death penalty certified as a lead counsel, the member shall indicate whether the member's name should be placed in the criminal or civil list based on the criteria given in (1) above.

(3) Active members shall notify the South Carolina Bar within thirty (30) days of any county changes. The Bar shall transfer the names of those members to the appropriate list and notify the appropriate clerks of courts.

(4) If a member ceases to be an active member, the Bar shall delete that member's name from the list and notify the appropriate clerk of court.

(5) If a member becomes certified to serve as lead counsel in a death penalty case, the member shall, within thirty (30) days of the date of the certification, notify the South Carolina Bar. If not already on the criminal list, the Bar shall transfer the member's name to the criminal list. The Bar shall notify the appropriate clerk of court of the certification and any transfer.

(6) If a member would, due to conflicts of interest, be prevented from accepting cases in the county to be designated in (c)(2), the member will designate a county other than those listed in (b)(4) in which the conflicts will not arise.

(d) Active Members Who Are Exempt From Appointment.

(1) The following active members shall be exempt from appointment:

(A) Members who are prohibited by federal or state law from taking such appointments. While not intended to be an exclusive list, this includes:

(i) Law Clerks and Staff Attorneys for the Judicial Department under Canon 5(D), Rule 506, SCACR.

(ii) Public Defenders who are prohibited by their Board from engaging in any private practice of law under S.C. Code Ann. § 17-3-60(e).

(iii) Appellate Defenders who are prohibited from engaging in the private practice of law by S.C. Code Ann. §§ 17-4-40 and -50.

(B) Members who are solicitors or assistant solicitors for a judicial circuit if those members do not engage in the private practice of law.

(C) Members who are employed by the Office of the South Carolina Attorney General or by the United States Attorney if those members do not engage in the private practice of law.

(D) Members who are employed by any court of this state or by any Federal Court if those members do not engage in the private practice of law.

(E) Members who are employed by the South Carolina Administrative Law Division or by any Federal Administrative Law Judge if those members do not engage in the private practice of law.

(F) Members who are engaged in providing legal assistance supported in whole or in part by the Legal Services Corporation established under 42 U.S.C. § 2996a if those members do not engage in the private practice of law outside that program.

(G) Members who have been admitted to practice law in this State or another jurisdiction for thirty (30) years or have attained sixty-two (62) years of age. A member who will satisfy this criteria by the end of the appointment year is exempt from appointment for the entire appointment year.

(H) Members who have neither an office nor a principal residence in this State, and who do not engage in the private practice of law in this State.

(I) Members who are full time employees of the United States to include members employed by the armed forces of the United States. To be exempt, these members may not engage in the private practice of law in this State.

(J) Members who are full time employees of the State of South Carolina, or a political subdivision of the State, to include counties, school districts, municipalities and public service districts. To be exempt, these members may not engage in the private practice of law in this State.

(K) Members who are full time care givers for a family member and do not derive any income from the practice of law in this State.

(L) Members who have been designated by the Governor's Office as having volunteered to represent guardians ad litem from the South Carolina Guardian Ad Litem Program in Department of Social Services cases. The Governor's Office may designate up to two members in each county and these members will be expected to provide representation in all such cases unless there is a conflict or other good cause for not providing the representation.

(2) For the purpose of determining if a member is exempt, members shall not be considered to have engaged in the private practice of law by volunteering for an appointment under section (h)(1), by representing an indigent as part of the pro bono program of the South Carolina Bar, or by

providing legal services for themselves or a family member as long as the services are provided without compensation.

(3) Active members shall claim an exemption at the time they file with the Bar under section (c)(2) above. The claim for exemption must be accompanied by sufficient information to confirm that the lawyer is in fact eligible for exemption. The Bar shall determine if the member is exempt or non-exempt.

(4) If an active member is non-exempt and becomes exempt, or is exempt and becomes non-exempt, the member shall notify the Bar of this change in status within thirty (30) days of the change. Any member claiming to have become exempt shall provide the Bar with sufficient information to confirm that the member is in fact eligible for exemption. The Bar shall add to, or delete from, the appropriate list the name of the member and notify the appropriate clerks of court of any additions or deletions.

(5) A member who is denied an exemption by the Bar may seek review of that determination by filing a petition with the Supreme Court within ten (10) days of receiving notice of the Bar's determination. The petition shall comply with the requirements of Rule 224, SCACR, including the filing fee required by that rule.

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

(f) Appointments and Relief from Appointments.

(1) **Lead Counsel in Death Penalty Cases.** The appointment of a lead counsel to represent an indigent defendant in a death penalty case shall be made from the list of members specified in (c)(1)(A) above who have been death penalty certified as lead counsel by the Supreme Court; provided, however, that lawyers who are not certified may be appointed as lead counsel in a post-conviction relief action for a death-sentenced inmate if they have previously represented a death-sentenced inmate in a state or federal post-conviction relief proceeding as provided by S.C. Code Ann. § 17-27-160.

(2) **Other Criminal Cases.** The appointment of counsel in all other criminal cases, to include juvenile delinquency matters and post-conviction relief matters, shall be made from the criminal list specified in (c)(1)(A) above. A member who is death penalty certified may be appointed to a non-death penalty case.

(3) **All Other Cases.** The appointment of members as counsel or GALs in all other cases shall be made from the civil list specified in (c)(1)(B). In counties having more than fifty (50) names on the civil list, the Chief Judges for Administrative Purposes for the court of common pleas and the family court may, after consultation with the clerk of court and the local bar association, further divide the civil list into sublists to be used for particular categories of cases. In a county in which this is done, the county is not entitled to assistance from a Larger County as provided in (10) below until all of the members on the civil list have had eight (8) appointments.

(4) Appointments shall begin with the name of the member whose name would follow that of the last person appointed alphabetically on the list for the preceding year and shall thereafter proceed alphabetically down the list. While appointments should generally be made to the member whose name next appears on this list, the clerk of court or a judge may deviate from this alphabetical method of appointment if there is reason to do so. A reason for doing so may include, but is not limited to, the necessity to obtain a lawyer with sufficient experience to serve as second counsel in a capital case, when a reason for disqualification is known at the time the appointment is

being made, or when a deviation is necessary to insure that counsel is competent to handle the matter. Once the end of the list is reached, appointments will be made from the beginning of the list.

(5) Once appointments have been made, the clerk of court shall promptly mark the names of those members who have received appointments, and shall promptly provide those members with a copy of the order of appointment. The list shall indicate the total number of appointments the member has received during the appointment year.

(6) A member who receives an appointment as lead or second counsel in a death penalty case shall be exempt from being appointed to another death penalty case until six (6) months after the date of sentencing or, if the matter does not result in a sentence, the date when the case ends. When a member is appointed as lead or second counsel in a death penalty case, the clerk shall mark the list to reflect the period of exemption. Although a member may be temporarily exempt from further death penalty appointments, nothing shall prevent the member from volunteering for an appointment under (h)(1) below.

(7) A member who receives an appointment as an attorney to protect under Rule 31, Rules for Lawyer Disciplinary Enforcement, contained in Rule 413, SCACR, or receives an assignment to investigate a matter as an attorney to assist disciplinary counsel under Rule 5(c), Rules for Lawyer Disciplinary Enforcement, shall receive credit for the appointment under this rule. The Office of Disciplinary Counsel shall notify the appropriate clerk of court of the appointment, and the clerk shall mark the list to reflect the appointment. If the member is relieved of this appointment before it is substantially completed, the Supreme Court or the Office of Disciplinary Counsel shall notify the clerk so that the credit may be withdrawn.

(8) If a member is unable to serve for any reason, the member shall, within five (5) days of the date of the receipt of the order of appointment, file a motion to be relieved with the clerk of court. A member who becomes aware of a reason for being relieved after the expiration of the five (5) day

period shall promptly file a motion to be relieved with the clerk of court. The Chief Judge for Administrative Purposes of the court before which the matter is pending shall then consider the request to be relieved and may relieve the member if the judge finds good cause to do so. If relieved, the member shall not receive credit for the appointment unless the order relieving the member affirmatively finds that the member has substantially performed the responsibilities of the appointment prior to being relieved.

(9) A member will not receive more than one (1) appointment in any calendar month. Once all of the members on a list have received one (1) appointment in a calendar month, the county clerk of court will contact the clerk in the Larger County identified in (10) below. The clerk from the Larger County will provide the next names available for appointment from the list in that county and note that those members have received appointments from a County Needing Assistance. The clerk will provide sufficient names to cover the pending appointments for the remainder of the month. This limitation of one (1) appointment per calendar month shall not apply to the members on the civil list in any county which elects to divide its civil list as provided by (f)(3) above.

(10) A member will be subject to no more than eight (8) appointments each appointment year. After each member on the list has received eight (8) appointments, the county clerk of court will contact the clerk in the Larger County identified at the end of this section. The clerk from the Larger County will provide the next names available for appointment from the list in that county and note that those members have received appointments from a County Needing Assistance. The clerk will provide sufficient names to cover the pending appointments. After members in the Larger County have received eight (8) appointments, the next closest Larger County will then provide names for appointments.

Larger County
To Provide

Assistance	**County Needing Assistance**
Greenville	Anderson, Laurens, Oconee, Pickens
Greenwood	Abbeville
Richland	Calhoun, Fairfield, Kershaw, Lancaster, Lee, Newberry, Orangeburg, Sumter, Chesterfield
Beaufort	Allendale, Colleton, Hampton, Jasper
Charleston	Berkeley, Dorchester, Georgetown
Spartanburg	Cherokee, Union
Florence	Clarendon, Darlington, Williamsburg
York	Chester
Horry	Dillon, Marion, Marlboro
Lexington	Edgefield, McCormick, Saluda
Aiken	Bamberg, Barnwell

(g) Minimizing Appointments.

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

statute, Rule 17, SCRCP, other court rule or the case law of this State, circuit and family court judges should cautiously exercise their discretionary authority to appoint a GAL under Rule 17, SCRCP.

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

(3) When available, the circuit and family courts should consider using non-lawyers as GALs. The family court in each county is expected to encourage and support the South Carolina Guardian Ad Litem Program, S.C. Code Ann. §§ 20-7-121 to -129. Effective use of this program will further reduce the burden placed on lawyers while insuring that competent GALs are provided for children in abuse and neglect cases.

(h) Volunteers and Substitute Counsel.

(1) Nothing in this rule shall prohibit a circuit or family court judge from appointing an active member, senior member or any other category of member of the South Carolina Bar who may lawfully provide the representation if the member volunteers to represent an indigent. A lawyer who volunteers for an appointment shall not receive credit for an appointment under this rule and a lawyer may volunteer for an appointment at any time regardless of whether the lawyer has completed the maximum number of appointments provided by (f)(10) above.

(2) Nothing in this rule shall prevent an appointed lawyer from obtaining a substitute counsel to take the appointment as long as the substitute counsel is eligible to take the appointment and the substitution is approved by the circuit or family court. If the substitution is approved, only the member who originally received the appointment shall receive credit for the appointment.

(i) Records. Any records maintained by the South Carolina Bar, the

circuit court, the family court or a clerk of court relating to appointments under this rule shall be made available for review by any active member upon written request of that member.

The Supreme Court of South Carolina

RE: Rule 602, SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, the last two paragraphs of Rule 602(b), SCACR, are replaced with the following:

> Upon examination of a completed Affidavit of Indigency (Form II), the officer designated to make a determination of indigency shall determine if the accused is indigent. If that officer is unable to make this determination, the final determination whether the accused is indigent shall be made by a judge of the court in which the matter is to be heard.
>
> For purposes of this rule, a person is indigent if that person is financially unable to employ counsel. In making a determination whether a person is indigent, all factors concerning the person's financial condition should be considered including income, debts, assets and family situation. A presumption that the person is indigent shall be created if the person's net family income is less than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register. Net income shall mean gross income minus deductions required by law.

This amendment shall be effective September 1, 2001.

IT IS SO ORDERED.

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
May 29,2001

The Supreme Court of South Carolina

RE: Rule 421, SCACR

O R D E R

Pursuant to Article V, §4, of the South Carolina Constitution, the South Carolina Appellate Court Rules are amended by adding the following rule:

RULE 421
CERTIFICATION OF ATTORNEYS
IN DEATH PENALTY CASES

(a) Classes of Certified Attorneys. There shall be two classes of attorneys certified to handle death penalty cases: lead counsel and second counsel.

(b) Lead Counsel. Lead counsel shall have at least five years experience as a licensed attorney and at least three years experience in the actual trial of felony cases. The application for certification to act as lead counsel shall be on a form designated by the Supreme Court.

(c) Second Counsel. Second counsel shall have at least three years experience as a licensed attorney. Second counsel is not required to be

further certified to be eligible for appointment.

This rule shall be effective September 1, 2001, and shall supersede this Court's order dated September 10, 1993, relating to the same subject matter.

IT IS SO ORDERED.

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
May 29, 2001

The Supreme Court of South Carolina

O R D E R

By Orders dated January 26, 2001, the attached amendments to the South Carolina Appellate Court Rules, the South Carolina Rules of Civil Procedure, the Circuit Court Alternative Dispute Resolution Rules, and the Family Court Mediation Rules were submitted to the Chairmen of the House and Senate Judiciary Committees. The amendments have not been disapproved by the General Assembly in the manner provided by Article V, § 4A, of the South Carolina Constitution. Accordingly, the amendments shall become effective on September 1, 2001.

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
May 29, 2001

AMENDMENTS TO THE
SOUTH CAROLINA APPELLATE COURT RULES

(1) The last sentence of Rule 222(e), SCACR, is amended by replacing the phrase "Rule 226(i)" with Rule 226(j).

(2) The second sentence of Rule 226(j)(2), SCACR, is amended to read: "Additionally, the party may, to the extent the party actually incurred these costs, recover: (1) the filing fee paid under Rule 226(c); (2) the cost of printing the Appendix under Rule 226(e); and (3) the cost of printing the party's brief(s) under Rule 226(i)."

(3) Rule 238 (f), SCACR, is amended by deleting the phrase "Clerk of the Supreme Court" and replacing it with "clerk of the appellate court."

(4) Rule 239(c)(1), SCACR, is amended by adding the following:

(a) Rules of Professional Conduct, Rule ___, RPC, Rule 407, SCACR.

(b) Rules for Lawyer Disciplinary Enforcement, Rule ___, RLDE, Rule 413, SCACR.

(c) Code of Judicial Conduct, Rule ___, CJC, Rule 501, SCACR.

(d) Rules for Judicial Disciplinary Enforcement, Rule ____, RJDE, Rule 502, SCACR.

(5) Rule 239(c)(6), SCACR, is amended to read:

(6) South Carolina Rules of Magistrates Court, Rule ___, SCRMC.

AMENDMENTS TO THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE

(1) Rule 5(b)(2), SCRCP is amended to read:

(b)(2) Service on Sunday. Civil process may be served on Sundays, provided that no person may be served going to or from or attending a regularly or specially scheduled church or religious service on Sunday.

(2) The following is added after the Note to Rule 5(b)(2), SCRCP.

Note to 2001 Amendment

Rule 5(b)(2) is rewritten to reflect the enactment of S.C. Code Ann. § 15-9-17, 2000 S.C. Acts No. 360, which allows for the service of process on Sundays with the stated exceptions.

(3) Rule 29, SCRCP, is amended to read:

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) to the extent allowed by Rule 6(b), modify the procedures provided by these rules for other methods of discovery.

(4) The following Note is added to Rule 29, SCRCP:

Note to 2001 Amendment

The 2001 amendment eliminates the requirement of court approval for requests for extensions regarding discovery procedure where the parties agree to the extension in writing. Extensions are limited by Rule 6(b) which allows the parties to stipulate to only one extension and for the original time provided.

(5) The second sentence of the second paragraph of Rule 36(a), SCRCP, is amended to read:

> The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as stipulated in writing by the parties pursuant to Rules 29 and 6(b), the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him.

(6) The following Note is added to Rule 36(a), SCRCP.

Note to 2001 Amendment

> The second sentence of the second paragraph of Rule 36(a) is amended to reflect the change in Rule 29 allowing the parties, under certain circumstances, to stipulate to extensions.

(7) The third sentence of Rule 30(j)(8), SCRCP, is amended to read:

> If the documents have not been so provided or identified, then counsel and the witness may have a reasonable amount of time to privately discuss the documents before the witness answers questions concerning the document.

(8) The following Note is added to Rule 30, SCRCP.

Note to 2001 Amendment

> Rule 30(j) is amended to clarify that any consultation between lawyer and client permitted by Rule 30 will be private.

(9) Rule 40, SCRCP, is amended as follows:

(a) Rule 40(d) and (e)(1) are amended to read:

(**d) Transfer to Jury Roster Within Six to Nine Months of Filing.**

(1) Agreement or Objection. No earlier than 180 days after the date the case was filed, any party may file and serve upon all other parties a Request to Transfer that case from the General Docket to the Jury Trial Roster. Within 10 days of the service of the Request to Transfer all other parties shall file and serve either an Agreement to Transfer, or, an Objection to the Request to Transfer. Absent a timely filing indicating a position, the same shall be waived. If all parties have agreed to the transfer, the requesting party shall notify the clerk in writing of the agreement and the clerk shall place the case on the Jury Trial Roster, and it may be called for trial as provided in paragraph (b). If any party files an Objection to Transfer, the case may not be transferred to the Jury Trial Roster within 9 months of filing of the complaint except by agreement or as provided in (d)(2) below.

(2) Objection Shall State Proposed Date of Transfer. Any party who objects to the transfer to the Jury Trial Roster shall also state in its Objection to Transfer whether it will consent to the transfer of the case to the Jury Trial Roster within 9 months of the date of the filing of the complaint, and the date on which it will consent to the transfer. Absent a timely filing indicating a position, the same shall be waived. If all non-moving parties specify a date within 9 months of the filing of the action on which the case may be transferred, the requesting party shall notify the clerk in writing of the agreement to transfer the case to the Jury Trial Roster on the latest date specified by any party that is less than 9 months after filing.

(e) Transfer to Jury Roster Nine Months to Twelve Months After Filing.

(1) Request and Response. No earlier than 9 months after the case was filed, any party in any case on the General Docket may file or re-file and serve upon all other parties a Request to Transfer to the Jury Trial Roster. Within 10 days of the service of the Request to Transfer all non-moving parties shall file and serve either an Agreement to Transfer on the date requested, or a Request for a Scheduling Order as provided in (e)(2) below. No other response is permitted. Absent a timely filing indicating a position, the same

shall be waived. If all counsel of record have agreed to the transfer, the moving party shall notify the clerk in writing of the agreement, and the clerk shall place the case on the Jury Trial Roster and it may be called for trial as provided in (b).

(b) Rule 40(f) is amended to read:

(f) Automatic Transfer. The clerk shall review the General Docket and shall transfer to the Jury Trial Roster all cases which have remained on the General Docket for 12 months and in which the court has not entered a Scheduling Order setting the date when the case is to be transferred to the Jury Trial Roster or in which there is no pending motion for a Scheduling Order in the file. The clerk shall notify counsel of record of the transfer, but publication of the Jury Trial Roster also shall be deemed notice of the automatic transfer.

(c) Rule 40(k) is amended to read:

(k) Alternate Method of Transfer to Jury Roster. Notwithstanding any other provision of this rule, any party may file and serve on all other parties a Request to Transfer that case from the General Docket to the Jury Trial Roster no earlier than 120 days after the case was filed. The Request must certify that the party is ready to go to trial and must indicate any outstanding pre-trial matters. Within 10 days after service of the Request to Transfer, any party may file a Response to the Request. If the Response opposes the transfer, it shall indicate in what respect the case is not ready for trial. Once the time to file Responses has expired, the clerk shall promptly set the Request for Transfer for a hearing before the Chief Judge for Administrative Purposes. The hearing shall be given priority as provided by subdivision (h) of this rule. After a hearing, the Chief Judge may, as a matter of discretion, transfer the case to the Jury Trial Roster.

(10) The following Note is added to Rule 40, SCRCP.

Note to 2001 Amendments

Rule 40(d), (e)(1), (f), and (k) are amended to shorten the time period before cases move to the Jury Trial Roster.

(11) Rule 53(d), SCRCP, is amended to read:

(d) Compensation of Special Referees. The compensation of the special referee shall be paid by the parties in such amount as shall be set by the special referee, subject to review by the circuit court upon objection by any party within ten (10) days of receipt of the order.

(12) The following Note is added to Rule 53, SCRCP.

Note to 2001 Amendment

Rule 53(d) is amended to provide that fees for special referees are set by the special referee subject to review by the circuit court if a party timely objects.

(13) Rule 71.1(c), SCRCP, is amended by adding the following sentence:

The caption in all post-conviction relief actions shall read: *Full Name and Prison number (if any) of Applicant v. State of South Carolina.*

(14) Rule 71.1(g), SCRCP, is deleted and Rule 71.1(f), SCRCP, is amended to read:

(f) Appellate Review; Continuing Representation. A final decision entered under the Act shall be reviewed according to the procedure specified by Rule 227, SCACR. If an applicant represented by counsel desires to appeal, counsel shall serve and file a Notice of Appeal as required by Rule 227, SCACR, and shall continue to represent the applicant on appeal unless automatically relieved under Rule 602, SCACR, or allowed to withdraw under Rule 235, SCACR. If the applicant is indigent, counsel shall assist the applicant in obtaining representation by the Office of Appellate Defense.

(15) The following Note is added to Rule 71.1, SCRCP.

Note to 2001 Amendments

These amendments consolidate former Rule 71.1(f) and (g) and change the method of appointment of counsel for indigents on appeal to

conform to Rule 602, SCACR.

AMENDMENTS TO THE CIRCUIT COURT ALTERNATIVE DISPUTE RESOLUTION RULES AND THE FAMILY COURT MEDIATION RULES

(1) Rule 7(d) of the Circuit Court Alternative Dispute Resolution Rules is amended to read as follows:

(d) Judgment Entered on Award. If the case is not terminated by agreement of the parties, and no party files a demand for trial *de novo* under Rule 7(c), the prevailing party shall submit to the Chief Judge for Administrative Purposes a proposed order directing the entry of judgment on the award which, when entered, shall have the same effect as a Consent Judgment in the action and may be enforced accordingly.

(2) Rule 10(a)(1) of the Family Court Mediation Rules is amended to read:

(1) Be admitted to practice law in this State for at least three (3) years and be a member in good standing of the South Carolina Bar.

(3) Rule 10(a)(2) of the Family Court Mediation Rules is amended to read:

(2) Be admitted to practice law in the highest court of another state or the District of Columbia for at least three (3) years and meet the following qualifications:

(4) Rule 10(a)(3) of the Family Court Mediation Rules is amended to read:

(3) Be a licensed psychologist, licensed master social worker, licensed independent social worker, licensed professional counselor, licensed associate counselor, licensed marital and family therapist or a licensed physician specializing in psychiatry for at least three (3) years under Tile 40 of the 1976 Code of Laws, as amended.

(5) Rule 10(b) of the Family Court Mediation Rules is amended to read:

(b) Have completed a minimum of forty (40) hours in a family court mediation training program approved by the Supreme Court or its designee, or any other training program attended prior to the promulgation of these rules or

attended in other states and approved by the Supreme Court or its designee;

(6) Rule 10(e) of the Family Court Mediation Rules is amended to read:

(e) Has not within the last five (5) years been disbarred or suspended from the practice of law or a profession set forth in Rule 10(a)(3), been denied admission to a Bar or denied a professional license for character or ethical reasons or been publically reprimanded or publically disciplined for professional conduct.