The Supreme Court of South Carolina

RE: Amendments to Regulations for Legal Specialization in South Carolina.

O R D E R

The Commission on Continuing Legal Education, Rule 408, SCACR, has proposed amendments to the Regulations for Legal Specialization in South Carolina. Pursuant to Art. V, § 4, of the South Carolina Constitution the following amendments are approved.

1. Regulation **IX.F. Filing Fees.** is amended by:

   (a) deleting $70.00 in the first sentence and replacing it with "in an amount specified by the Commission"; and

   (b) replacing "January 15" with "January 1" and deleting "(currently $50.00)" in the last sentence.

2. Regulation **X.A. Specialists Certified by the Court** is amended to read:

   1. Reports of Compliance. On forms prepared by the Commission, and available through its offices, each certified specialist shall, not later that January 1 of each year, file a report of compliance with the CLE requirements of the relevant specialty field. In addition to CLE requirements imposed by the specialty field, the specialist shall annually report at least 2 hours of LEPR. Any specialist who reports more than 2 hours of LEPR

credit in any calendar year may carry forward up to 2 hours of excess LEPR credit to the next calendar year.

2. Annual Certified Specialist Statement. On forms prepared by the Commission, and available through its offices, each certified specialist shall, not later than January 31 of each year, file a statement pertaining to the nature of the specialist's practice and disclosing whether, during the preceding year, the specialist has been the subject of disciplinary actions, malpractice claims (including claims settled by payments), and/or any criminal convictions, excluding minor traffic offences. Failure or refusal to file this report may result in revocation of certification.

These amendments shall become effective March 1, 2003.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

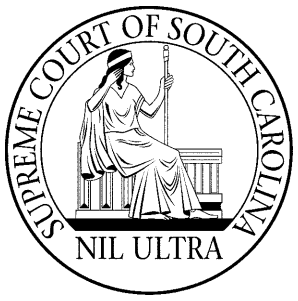
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 9, 2003



OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

FILED DURING THE WEEK ENDING

January 13, 2003

ADVANCE SHEET NO. 2

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.judicial.state.sc.us

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Franklin Benjamin, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25572
Heard May 30, 2002 - Filed January 13, 2003

AFFIRMED

Katherine Carruth Link, and the South Carolina Office of Appellate Defense, all of Columbia, for Petitioner.

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

JUSTICE PLEICONES: We granted certiorari to review a decision of the Court of Appeals holding that petitioner Benjamin was properly sentenced to life without the possibility of parole (LWOP) following an armed robbery conviction. State v. Benjamin, 341 S.C. 160, 533 S.E.2d 606 (Ct. App. 2000). We affirm.

FACTS

Benjamin and another individual robbed a Citgo convenience store. In the course of this armed robbery, a Citgo employee was shot and killed. Approximately four hours later, the two men robbed a Dodge's convenience store at gunpoint. The charges arising from the Citgo incident were tried first, and Benjamin was convicted of murder and armed robbery. He received an LWOP sentence for murder and a thirty-year sentence for the armed robbery. See State v. Benjamin, 345 S.C. 470, 549 S.E.2d 258 (2001) (affirming these convictions and sentences). Both murder and armed robbery are defined as "most serious offenses" under the "two strikes" law. S.C. Code Ann. §17-25-45(C)(1) (Supp. 2001).

Following the Citgo trial, Benjamin was tried and convicted of armed robbery of the Dodge's convenience store. South Carolina Code Ann. §17-25-45(A) (Supp. 2001) provides "Notwithstanding any other provision of law…upon a conviction for a most serious offense as defined by this section, a person must be sentenced to [LWOP] if that person has one or more prior convictions for: (1) a most serious offense . . . ."

Benjamin was sentenced to LWOP for the armed robbery of the Dodge's store over his objection that the legislature did not intend that §17-25-45(A) apply to convictions arising from a single crime spree. The Court of Appeals affirmed this sentence, and we granted certiorari to review that decision.

ISSUE

Does S.C. Code Ann. §17-25-45(A) apply so as to require an LWOP sentence for a subsequent conviction where all convictions arise from a single crime spree?

ANALYSIS

Benjamin contends that the legislature did not intend that recidivist statutes such as §17-25-45 apply to individuals who engage in a single continuous course of criminal conduct. In support of this contention, Benjamin points to an alleged ambiguity in §17-25-45(F), and to S.C. Code Ann. §17-25-50 (1985). We find no ambiguity in subsection (F), and find Benjamin's reliance on §17-25-50 misplaced.

Section 17-25-45(F) provides:

> For the purpose of determining a prior conviction under this section only, a prior conviction shall mean the defendant has been convicted of a most serious offense or a serious offense, as may be applicable, on a separate occasion, prior to the instant adjudication.

Benjamin contends this section is ambiguous because it may be read to say either (1) that the commission of the prior most serious offense must have occurred on an earlier, separate occasion, or (2) that the conviction occurred "on a separate occasion," "prior to the instant adjudication."

We agree with the Court of Appeals that the language of §17-25-45(F) is plain and unambiguous. Benjamin's first reading of the statute is simply unsupported by the statutory language. There is no reference in §17-25-45(F) to the time of the prior offense's commission; rather, the only temporal reference is to the prior conviction. In clear and unambiguous language, this subsection defines a prior conviction for purposes of §17-25-45 as a serious or most serious conviction, on a separate occasion, prior to the instant adjudication. E.g., State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991)(when statute's terms are clear and unambiguous, court must apply them literally).

At the time of the Dodge's armed robbery conviction, Benjamin had already been convicted, on a separate occasion, of the most serious offenses of murder and armed robbery that occurred at the Citgo. An LWOP sentence was, therefore, mandated by §17-25-45(A).

Benjamin argues, however, that we must construe §17-25-45 in light of §17-25-50, which provides:

> In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

Our precedents required us to consider together both original recidivist statutes, §17-25-50 and the predecessor to §17-25-45, §17-25-40. See State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980); State v. Muldrow, 259 S.C. 414, 192 S.E.2d 211 (1972). After these cases were decided, the legislature revised the statutory scheme. These pre-1982 precedents must nevertheless be considered in light of the current statutes.

When the General Assembly repealed §17-25-40[1] in 1982 and replaced it with §17-25-45, it fundamentally altered the relationship between the recidivist statutes. The 1982 act explicitly provides "Notwithstanding any other provision of law [certain defendants] shall be sentenced to life in prison." 1982 Act No. 358, §1.A. This language, specifically barring consideration of any other statute, has been retained in the current version of §17-25-45. See §17-25-45(A) and (B) (Supp. 2001). That the legislature intends that §17-25-45 be construed independent of any other statute is reinforced by the introductory language of subsections (E) and (F), both of which begin "For purposes of determining a prior conviction under this section only…." It is no longer necessary or appropriate to harmonize or reconcile §17-25-45 and §17-25-50 in light of the General Assembly's unmistakable instruction that §17-25-45 be applied without regard to any other provision of law.[2]

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[1] 1982 Act No. 358, §3.

[2] To the extent the Court of Appeals reaches a different conclusion in State v. Woody, 345 S.C. 34, 545 S.E.2d 521 (Ct. App. 2001), that decision is overruled.

CONCLUSION

Benjamin was properly sentenced, pursuant to §17-25-45(A), to LWOP for the armed robbery of the Dodge's convenience store. The decision of the Court of Appeals upholding that sentence is

AFFIRMED.

BURNETT, J., and Acting Justice George T. Gregory, Jr., concur. WALLER, J., dissenting in a separate opinion in which MOORE, A.C.J., concurs.

JUSTICE WALLER (dissenting**):** I respectfully dissent. In my view, the Legislature did not intend that individuals, such as Benjamin, who commit several crimes during a single, continuous crime spree be subjected to recidivist sentencing.[3]

A recidivist is "a habitual criminal. A criminal repeater. An incorrigible criminal. One who makes a trade of crime." Black's Law Dictionary, 1269 (6th Ed. 1990). Recidivist legislation attempts to encourage offenders to stay out of trouble and punishes those who refuse to be deterred even after a conviction. Commonwealth v. Eyster, 585 A.2d 1027, 1031 (Pa. 1991). Recidivists are persons who continue to commit criminal, antisocial behavior after incarceration for an earlier offense. Recidivist statutes aim at punishing those who have shown they are incorrigible offenders. Shannon Thorne, One Strike and You're Out: Double Counting and Dual Use Undermines the Purpose of California's Three-Strikes Law, 34 U.S.F.L.Rev. 99 (1999). The purpose of requiring separate offenses is to ensure that those offenders being sentenced under the harsh provisions of a recidivist sentencing statute have not been classified as habitual offenders because of multiple convictions arising from a single criminal enterprise; it provides the state with some certainty that the offender has participated in multiple criminal trials and, despite these opportunities to understand the gravity of his behavior and abide by the law, has continued to engage in criminal conduct. Daniel Rogers, People v. Furman and Three Strikes: Have the Traditional Goals of Recidivist Sentencing Been Sacrificed at The Altar of Public Passion?, 20 Thomas Jefferson L. Rev. 139, 156 (Spring 1998).

In my view, the recidivist statute is aimed at career criminals, those who have been previously sentenced and then commit another crime, not at persons like Benjamin whose recidivist status is premised solely upon acts occurring within a four-hour period.

Contrary to the majority's contention, section 17-25-45 cannot, in my opinion, be read in isolation, but must be read in conjunction with section 17-25-50.

[3] The majority does not dispute that all of Benjamin's convictions arose from a single crime spree.

Section 17-25-50 provides:

> In determining the number of offenses for the purpose of imposition of sentence, the court **shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense**, notwithstanding under the law they constitute separate and distinct offenses. (Emphasis supplied).

Section 17-25-45(A) provides, in part, "[n]otwithstanding any other provision of law. . . upon a conviction for a most serious offense . . ., a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has one or more prior convictions for. . . (certain specified offenses)."

This Court has recognized that the predecessor to section 17-25-45 (17-25-40) and section 17-25-50 must be construed together. See State v. Stewart, 275 S.C. 447, 452, 272 S.E.2d 628, 631, n. 2 (1980) (recognizing that section 17-25-50 must be read in conjunction with section 17-25-40, the predecessor to section 17-25-45). Accord State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999)(recognizing section 17-25-40 is the predecessor to section 17-25-45). See also State v. Muldrow, 259 S.C. 414, 192 S.E.2d 211 (1972) (statute directing trial court to treat as one offense any number of offenses committed at times so closely connected in point of time that they may be considered as one offense is applicable only for purpose of sentencing under recidivist statute).

The majority points to the "notwithstanding any other provision of law" language of section 17-25-45(A), as an indication of legislative intent that it is no longer appropriate to construe sections 17-25-50 and 17-25-45 together. I disagree. In State v. Woody, 345 S.C. 34, 545 S.E.2d 521 (2001), the Court of Appeals held sections 17-25-45(F) and 17-25-50 could be reconciled such that both apply under the recidivist statute. The Woody court found "nothing to suggest section 17-25-45(F) somehow abrogates section 17-25-50." 345 S.C. at 37, 545 S.E.2d at 522. I agree.[4]

[4] The majority overrules Woody; I would affirm Woody.

It is a well-accepted principle of statutory construction that statutes which are part of the same legislative scheme should be construed together. Stardancer Casino, Inc. v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001). Statutes must be read as a whole and sections that are part of the same general statutory scheme must be construed together and each given effect, if reasonable. Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). Furthermore, the court should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. South Carolina Coastal Council v. South Carolina State Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991). However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the legislature or would defeat the plain legislative intention. Ray Bell Constr. Co. v. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998).

As the Court did in Stewart and Muldrow, it is our duty to construe the statutes as a whole, and in Benjamin's favor. Doing so here, it is patent that Benjamin's single course of conduct should be treated as one offense. I would hold that Benjamin's four-hour crime-spree was simply not the type of recidivism the Legislature had in mind when it enacted section 17-25-45. State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 671-72 (1993)(statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers).

Moreover, to read section 17-25-45 in isolation, as the majority does here, permits the solicitor unfettered discretion to treat similarly situated defendants differently, based solely upon whether the solicitor elects to try the charges together, or separately, such that there is a "prior conviction. For example, if two defendants commit multiple offenses at one time, such as armed robbery, burglary, kidnapping, and murder, then whether each defendant is subject to a LWOP sentence depends entirely upon whether the solicitor elects to try the offenses separately, in which case there is a "prior conviction," or jointly, in which case there is not. Further, under this factual

situation, one defendant may be subjected to a LWOP sentence while another, equally culpable defendant is not. Not only could such a scenario give rise to equal protection violations, but, in my opinion, the Legislature clearly could not have intended such a result.[5]

I would hold that Benjamin is not eligible for an LWOP sentence for the robbery of Dodge's store; I would reverse the Court of Appeals' opinion.

MOORE, A.C.J., concurs.

[5] Further evidence that the Legislature could not have intended such a result is found in S.C. Code Ann. § 24-21-640 (Supp. 2001), governing circumstances warranting parole, which provides, in part, relative to granting parole to persons serving a second or subsequent conviction of a violent crime, "[p]rovided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense." In my view, it would be incongruous to require the parole board to treat offenses committed within a 24-hour period as one offense for purposes of determining parole, while simultaneously holding that such offenses constitute multiple offenses for purposes of a life without parole sentence under section 17-25-45.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Roger Coats, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenville County
Joseph J. Watson, Post-Conviction Relief Judge

Opinion No. 25573
Submitted November 21, 2002 - Filed January 13, 2003

REVERSED AND REMANDED

Harry Leslie Devoe, Jr., of New Zion, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General William Bryan Dukes, all of Columbia, for respondent.

JUSTICE MOORE: We granted this petition for a writ of certiorari to determine whether the post-conviction relief (PCR) court erred

by finding petitioner's claim was inappropriate for PCR. We reverse and remand for a hearing.

FACTS

Petitioner pled guilty to conspiracy to traffic in marijuana and was sentenced to imprisonment for seven years. A direct appeal was not filed. Thereafter, petitioner filed a PCR application, which was dismissed after a hearing. We granted his petition for a writ of certiorari.

At the hearing to determine whether petitioner was entitled to an evidentiary hearing on his PCR claim, the State moved to dismiss his application because it was filed after the statutory one-year filing period had expired. Petitioner's counsel argued that petitioner did not discover his claim until he was informed by the Department of Corrections that he was parole ineligible. While in prison, petitioner was initially treated as if he was parole eligible and had a parole hearing. Petitioner filed his PCR application immediately upon learning of his parole ineligible status. The PCR court denied the State's motion to dismiss based upon the statute of limitations.

As to the merits of the claim, petitioner alleged counsel had advised him, prior to his plea, that he would be parole eligible. The PCR court dismissed petitioner's claim regarding parole eligibility as being improper for PCR. The court found the claim should be resolved via the Department of Corrections' internal grievance system.

ISSUE

Did the PCR court err by finding petitioner's claim should be determined by the Department of Corrections under Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000)?

DISCUSSION

In Al-Shabazz, *supra*, we held that, except for two non-collateral matters specifically listed in the PCR Act,[1] PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence. We stated a claim regarding sentence-related credits or other condition of imprisonment does not fall into this category. Al-Shabazz, 338 S.C. at 367-368, 527 S.E.2d at 749. The avenue of relief for these latter claims is the Department of Corrections' internal grievance system. *Id.* at 371-373, 527 S.E.2d at 751-752.

The PCR court incorrectly concluded that petitioner's claim was an Al-Shabazz claim that can only be resolved in the Department of Corrections' internal grievance system. We find his claim is appropriate for PCR because he alleges that counsel was ineffective for improperly advising him that he would be parole eligible. His understanding about his parole eligibility may have affected the validity of the underlying plea. *See* Al-Shabazz, *supra* (PCR is a proper avenue of relief when applicant mounts collateral attack challenging validity of his conviction or sentence). An evidentiary hearing is warranted to determine if counsel was in fact ineffective. *See, e.g.,* Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002) (PCR court held evidentiary hearing to determine whether applicant was induced to plead guilty based on counsel's parole advice prior to plea; PCR court's decision denying relief because counsel did not give any advice as to parole eligibility affirmed); Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) (held applicant established attorney's advice regarding parole eligibility constituted ineffective assistance of counsel); Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983) (upheld PCR court's decision that applicant failed to prove his attorney's erroneous advice concerning parole eligibility induced his guilty plea).

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[1]The non-collateral matters that can be heard in the PCR setting are the claims that an applicant's sentence has expired and that an applicant's probation, parole, or conditional release has been unlawfully revoked. S.C. Code Ann. § 17-27-20(a)(5) (1985).

However, petitioner did not file his claim within one year after his conviction as required by S.C. Code Ann. § 17-27-45(A) (Supp. 2001).[2] It would appear that this section bars petitioner's claim; however, we conclude his claim falls within the discovery rule, which provides:

> If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45(C) (Supp. 2001).

Petitioner was allegedly informed by his counsel and was informed by the Department of Corrections that he was eligible for parole. The Department even conducted a parole hearing for petitioner in 1999. A few months later, the Department informed him he was not parole eligible. When he finally received the correct information, he learned he had a claim of ineffective assistance of counsel based on counsel's allegedly erroneous parole eligibility advice. Petitioner filed his PCR application raising that claim within one year after the date of actual discovery of the fact he was parole ineligible. Accordingly, we reverse the PCR court and remand this matter for an evidentiary hearing on the merits of petitioner's claim regarding counsel's mistaken advice that petitioner would be eligible for parole. *Cf.* Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999) (fourth PCR application, challenging guilty plea as involuntary on ground applicant did not know he was parole ineligible, not successive where applicant could not have raised claim in previous application because he previously did not know he was parole ineligible).

REVERSED AND REMANDED.

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[2]Petitioner pled guilty in March 1997, but did not file his PCR application until October 1999.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ann B. Bowen, Respondent,

v.

Richard W. Bowen, Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Beaufort County
Thomas Kemmerlin, Circuit Court Judge

Opinion No. 25574
Heard December 5, 2002 - Filed January 13, 2003

AFFIRMED

Morris D. Rosen and Donald B. Clark, of Rosen, Rosen & Hagood, LLC, of Charleston, for petitioner.

Peter L. Fuge and Jason P. Peavy, of Peter L. Fuge, P.A., of Beaufort, for respondent.

JUSTICE MOORE: We granted this writ of certiorari to determine whether the Court of Appeals properly held that the presumption

of a resulting trust should not be applied to the acquisition of land where Husband and Wife had an antenuptial agreement. Bowen v. Bowen, 345 S.C. 243, 547 S.E.2d 877 (Ct. App. 2001). We affirm.

PROCEDURAL HISTORY

Previously, respondent (Wife) brought a divorce action against petitioner (Husband). The family court upheld Husband's and Wife's antenuptial agreement and held that four jointly titled properties acquired during the marriage were non-marital properties in which Wife had a one-half interest. The Court of Appeals vacated the portion of the family court order that addressed the parties' respective interests in the properties because the family court did not have jurisdiction over non-marital property. Bowen v. Bowen, 327 S.C. 561, 490 S.E.2d 271 (Ct. App. 1997).

Wife then sought a declaratory judgment that she was the owner of an undivided one-half interest in the four properties. The matter was referred to the Beaufort County Master-in-Equity, who found for Wife. The Court of Appeals affirmed. We granted Husband's petition for a writ of certiorari.

FACTS

Husband and Wife were married in May 1985, and were granted a divorce in 1994. Prior to their marriage, they entered into an antenuptial agreement in an attempt to predetermine the financial consequences of any later separation, divorce, or death, and to preserve each party's separate property. The pertinent language from this agreement follows:

> 3. *All property* owned or income earned or accumulated by either of the parties at the time of their marriage or *which the parties may acquire*, earn or accumulate hereafter, or *during their marriage, from any source whatever shall be the separate property of the respective party* now owning, earning, accumulating or hereafter acquiring such property, free and clear of any rights, interest, claims or demands of the other . . .

> 5. . . .[E]ach party specifically waives any and all right of claim [sic] that such party may at any time have to take any share of the property of the other party *under any circumstances whatsoever, with the same force and effect as though single persons before any marriage*.

(Emphasis added).

During the marriage, four parcels of land were purchased and titled in both Husband's and Wife's names. Lot 270, Haig Point, and Lot 365, Haig Point, were conveyed by third parties to Husband and Wife "for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs or assigns." Townhouse Unit #7, Gangplank Pointe, and Lot 336, Water's Edge, were conveyed by third parties to Husband and Wife "as tenants by the entirety, with the right of survivorship."

Wife did not make any financial contribution to the purchase of the properties, nor did she pay for any expenses in relation to the properties. However, Wife and Husband together borrowed part of the purchase price for Lot 365, Haig Point.[1] Wife and Husband also signed for a line of credit that was ultimately used for the down payment on the Townhouse property.

Wife testified Husband never informed her she was holding the properties in her name for him. She also testified that, while Husband had not explicitly so stated, she believed her interest in the properties were gifts from Husband.

Husband testified he never intended to make a gift of an undivided one-half interest in the properties to Wife, but instead had the properties jointly titled as an estate planning device. He did not recall telling Wife that he intended her to hold the properties for him and they were to be his sole property or that he did not intend to give her one-half interests in the properties.

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[1]However, Wife did not contribute to the loan payments.

The Master-in-Equity found Wife was entitled to a one-half interest in the net proceeds from the four disputed properties and that she owed one-half of all expenses incurred in keeping the properties, such as taxes, insurance, and maintenance of the funds to which the properties were converted.[2] The Master found Husband had made a gift to Wife of a one-half interest in the properties. The Master found the antenuptial agreement did not alter the result because "[n]othing in the antenuptial agreement prevent[ed] [Husband] from being more generous than he contracted to be."

The Court of Appeals held that because Husband and Wife had a clear understanding of their respective rights involving property acquired by each during the marriage, via the antenuptial agreement, it was unnecessary to employ the resulting trust or gift presumptions to determine those property rights. The Court of Appeals looked to the plain language of the agreement to give effect to the intentions of Husband and Wife and held that Wife had acquired a one-half interest in the four properties. Bowen, 345 S.C. at 250-251, 547 S.E.2d at 881.

As for Husband's contention that the Master erred by finding he intended to make a gift to Wife of an interest in the disputed properties, the court held that, while there was sufficient evidence in the record to sustain such a factual finding, it was unnecessary to address that issue. *Id.* at 251, 547 S.E.2d at 881.

ISSUE

Whether the presumption of a resulting trust should be applied to the acquisition of land where Husband and Wife agreed in their antenuptial agreement to be treated as unmarried persons?

[2]All four properties have been sold.

DISCUSSION

Husband claims the court should have treated he and Wife as single persons, as their agreement required, and imposed a resulting trust on the properties in his favor.

Equity devised the theory of resulting trust to effectuate the intent of the parties in certain situations where one party pays for property, in whole or in part, that for a different reason is titled in the name of another. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248-249, 489 S.E.2d 472, 475 (1997) (citing McDowell v. South Carolina Dep't of Social Servs., 296 S.C. 89, 370 S.E.2d 878 (Ct. App. 1987)). The general rule is that when real estate is conveyed to one person and the consideration paid by another, it is presumed that the party who pays the purchase money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf. *Id.* at 249, 489 S.E.2d at 475. The presumption, however may be rebutted and the actual intention shown by parol evidence. *Id*.

But when the conveyance is taken to a spouse or child, or to any other person for whom the purchaser is under legal obligation to provide, no such presumption attaches. *Id.* On the contrary, the presumption in such a case is that the purchase was designated as a gift or advancement to the person to whom the conveyance is made. *Id.* at 249, 489 S.E.2d at 475-476 (citing Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 (1987)). This presumption, however, is one of fact and not of law and may be rebutted by parol evidence or circumstances showing a contrary intention. *Id.* at 249, 489 S.E.2d at 476 (citing Legendre v. South Carolina Tax Comm'n, 215 S.C. 514, 56 S.E.2d 336 (1949)).

As the Court of Appeals properly noted, "in situations in which there is no clear understanding between the parties as to the ownership of conveyed property," the competing legal presumptions of a resulting trust and a gift between spouses generally arise. However, in this case, Husband and Wife entered into an antenuptial agreement which provides that Husband and Wife would be treated as if they were unmarried persons in relation to property and which expressly states that all property that the parties may acquire during

the marriage from any source whatever shall be the separate property of the respective party. Because Husband and Wife had a clear understanding as to the ownership of conveyed property according to the antenuptial agreement, the presumptions are inapplicable.

The agreement restricted each spouse's right to acquire an ownership interest in the other's separate property, but it did not address a spouse's right to jointly title newly acquired property. Although Husband paid the entire purchase price for each of the properties, he chose to allow the properties to be jointly titled. If Husband had desired the four properties to be his separate property upon a divorce, pursuant to their antenuptial agreement, he should have had the properties conveyed and titled in his name alone. Under the terms of the agreement, the land, which was purchased with Husband's separate funds, would have remained his separate property had he not chosen to have the properties jointly titled. Treating the parties as "single persons before [the] marriage" as required under the antenuptial agreement, Wife acquired her interests in the properties by holding title with Husband.

CONCLUSION

We find the Court of Appeals properly affirmed the Master's findings that Wife owned an undivided one-half interest in the four properties and that Wife owed one-half of all expenses in keeping the properties.
AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lora Cunningham, a minor by Guardian Ad Litem, Linda A. Grice, Respondent,

v.

Helping Hands, Inc. and City of Aiken Department of Public Safety, Defendants,

of whom Helping Hands, Inc., is Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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

Opinion No. 25575
Heard November 6, 2002 - Filed January 13, 2003

AFFIRMED AS MODIFIED

Thomas C. Salane, of Turner, Padget, Graham & Laney, P.A., of Columbia, for petitioner.

Jefferson D. Turnipseed and Ilene Stacey King, of Turnipseed & Associates, of Columbia, for respondent.

JUSTICE MOORE: We granted certiorari to determine whether the Court of Appeals erred by reversing the trial court's decision granting Helping Hands, Inc.'s summary judgment motion. Cunningham v. Helping Hands, Inc., 346 S.C. 253, 550 S.E.2d 872 (Ct. App. 2001). We affirm as modified.

FACTS

Helping Hands is a charitable organization that operates a children's shelter in Aiken, South Carolina. At the time of her accident, respondent, Lora Cunningham (Cunningham), was a fifteen-year-old resident of Helping Hands.

On September 8, 1996, Lieutenant Frank Conoly, a Department of Public Safety officer, brought a fire truck to Helping Hands so the children could see and climb onto the fire truck. When he arrived, two staff members of Helping Hands, John Heos and Lanita Battle, brought between six and ten teenagers to view the truck. The teenagers were allowed to climb on the truck and some, including Cunningham, were allowed to sit inside the truck. After approximately thirty minutes, Conoly asked the children to "stand clear" because he had to leave. Before leaving, he walked completely around the truck to ensure that all the children were standing clear.

As Conoly began to leave, Cunningham jumped onto the passenger side running board of the truck. Prior to her action, some other teenagers had also boarded the truck. As the truck drove away, Cunningham became frightened and either jumped or slipped from the truck, and fell under the rear wheels. She stated she got on the truck, knowing Conoly would be driving away and that she should not be on the moving truck, because she wanted to ride for a short distance and then jump off.

Cunningham stated Conoly was the first person to assist her after she was injured. At the time she fell, she did not remember any of the Helping Hands staff being present, and the last time she remembered an adult, other than Conoly, being present was about ten to fifteen minutes prior to the accident. Conoly testified John Heos went inside shortly before he left.

Monica Brown, a teenager present at the time, testified that when Conoly began to leave, she told those on the truck to get off before they got hurt. She also stated that Heos knocked on the window from inside the building and told the children to get off the fire truck. At the time of the accident, Brown testified there were no staff members outside. Another teenager, Maurice Kelly, corroborated this fact. Brown testified that, previously, Battle had been outside while the children were at the fire truck. Kelly testified Heos and a female staff member periodically checked on them while they were outside with the truck.

Battle testified that when she went inside the building to use the restroom, Heos remained outside with the children. While answering a telephone call, Monica Brown ran in and said that Cunningham had been hit.

Heos testified that, initially, he, Battle, and possibly another staff member, were outside with the children; however, he did not stay outside the whole time because he had to assist a girl inside. He then watched the children from the window inside the building. He stated he did not know for sure if any staff members were outside after he went inside.

Heos testified that when Conoly began to leave he saw that two boys were hanging on the back of the truck. He jumped up to tell them to get off of the truck. From the window, he did not see Cunningham right away, but saw her hanging off the side of the truck as it made a circle.

Prior to the accident, Heos testified he had seen children hanging on moving vehicles and that he had seen Cunningham jump out in front of the moving fire truck previously that day.

At the time of Cunningham's placement at Helping Hands, Helping Hands knew that Cunningham had been evaluated for oppositional defiant

disorder[1] and had to take Prozac and Ritalin. Battle testified that a few weeks before Cunningham's accident, Cunningham had overdosed on possibly Ritalin or aspirin and had to be supervised for a week following the overdose.

Regarding the responsibilities of Helping Hands' staff, both Heos and Battle testified that they were familiar with Helping Hands' personnel manual on policy and procedure. The manual indicated that, as part of the staff's responsibilities, the staff must ensure client safety and supervise clients at all times, and that staff are expected to take breaks only when it will not interfere with the daily routine of the children, supervision, or activities of the children.

As a result of her injuries from the accident, Cunningham brought a claim of negligence against Helping Hands. Before trial, Helping Hands moved for summary judgment on the ground that Cunningham's actions were the sole cause of her injuries. The trial court granted the motion, finding that Cunningham had assumed the risk of injury. The trial court noted that because Cunningham's action arose and accrued prior to this Court's opinion in Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998),[2] the case was governed by the common law principles of assumption of risk existing prior to Davenport. The trial court found Cunningham's assumption of the risk acted as a complete bar to recovery without regard to any comparative standard of fault.

The Court of Appeals reversed the trial court's decision granting Helping Hands' motion for summary judgment because a question of fact existed as to whether Cunningham assumed the risk of her injury. The court

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[1]A clinical psychologist stated, by affidavit, that the essential feature of the disorder is a recurrent pattern of negativistic, defiant, disobedient, and hostile behavior towards authority figures.

[2]In Davenport, we held the absolute defense of assumption of risk is inconsistent with the state's comparative negligence system. We further held the Davenport ruling would apply to all causes of action accruing after November 9, 1998, the date of the opinion. Because the accident in this case occurred on September 8, 1996, the law of assumption of risk as it existed *prior* to Davenport is the applicable law.

concluded that, "[e]ven if there is evidence that Cunningham assumed the risk of her injury, that evidence is not sufficient to warrant judgment as a matter of law given Helping Hands' duty to supervise its charges."

ISSUE

Whether Helping Hands was entitled to summary judgment based upon Cunningham's assumption of the risk under pre-Davenport common law?

DISCUSSION

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002); Rule 56(c), SCRCP. In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues. *Id.*

Secondary implied assumption of risk, as exists in the instant case, arises when the plaintiff knowingly encounters a risk created by the defendant's negligence. Davenport, 333 S.C. at 82, 508 S.E.2d at 571. "It is a true defense because it is asserted only after the plaintiff establishes a *prima facie* case of negligence against the defendant. Secondary implied assumption of the risk may involve either reasonable or unreasonable conduct on the part of the plaintiff." Id.

Prior to the Davenport opinion, there were four requirements to establish the defense of assumption of risk: (1) plaintiff must have knowledge of the facts constituting a dangerous condition; (2) plaintiff must know the condition is dangerous; (3) plaintiff must appreciate the nature and extent of the danger; and (4) plaintiff must voluntarily expose himself to the danger. The doctrine is predicated on the factual situation of a defendant's acts alone creating the danger and causing the accident, with the plaintiff's

act being that of voluntarily exposing himself to such an obvious danger with appreciation thereof which resulted in the injury. Davenport, 333 S.C. at 78-79, 508 S.E.2d at 569 (citation omitted). Assumption of risk may be implied from the plaintiff's conduct. Id.

We conclude the trial court improperly granted Helping Hands' motion for summary judgment because the evidence presented did not establish the defense of assumption of risk as a matter of law. No evidence was presented to establish that Cunningham appreciated the nature and extent of the danger of riding on the side of the fire truck. The evidence also does not show that Cunningham in fact knew the condition was dangerous.[3]

Therefore, because the evidence does not clearly establish the defense of assumption of risk, the trial court erred by granting the motion for summary judgment. *See* Conner v. City of Forest Acres, *supra* (summary judgment is drastic remedy that should be cautiously invoked so litigant will not be improperly deprived of trial on disputed factual issues); Strange v. South Carolina Dep't of Highways and Pub. Transp., 307 S.C. 161, 414 S.E.2d 138 (1992) (assumption of risk is generally factual question to be determined by jury).

While the Court of Appeals reached the correct result by finding the summary judgment motion should not have been granted, we disagree with its analysis. The Court of Appeals, while finding the case was governed by the common law as it existed prior to the Davenport decision, held that the defense of assumption of risk was unavailable to Helping Hands because it had an enhanced duty to supervise and protect Cunningham at all times.

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[3]We also find that the evidence presented did not establish Helping Hands was not negligent as a matter of law. According to the Helping Hands' personnel manual, the staff is required to ensure client safety and supervise the clients *at all times*. The manual further states that the staff is not allowed to take a break if it would interfere with the supervision of the children. The staff of Helping Hands may have failed to adequately supervise Cunningham on the day of the accident. When Conoly readied to leave, allegedly no staff members were present with the children. However, this determination of negligence is a question of fact for the jury.

The Court of Appeals reached this conclusion by extending the rule set out in Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 393 S.E.2d 914 (1990). In Bramlette, this Court held that where a duty exists to prevent a patient from committing suicide, the very suicide, which the defendant has the duty to prevent, cannot constitute assumption of the risk as a matter of law. *See also* Hoeffner v. The Citadel, 311 S.C. 361, 429 S.E.2d 190 (1993) (same) (hereinafter referred to as the Bramlette rule). The Court of Appeals found the Bramlette rule to be applicable in the instant case "because Helping Hands had a duty to supervise Cunningham at all times and its breach of that duty may have caused her injury." However, we have not extended the Bramlette rule beyond the factual situation of Bramlette and Hoeffner and we decline to extend it here.

The specific duty of a health professional to prevent the suicide of a person who is known by the health professional to be suicidal is very different from a group home's general duty to supervise a child in its care. Unlike the health professionals in Bramlette and Hoeffner, Helping Hands did not have a specific duty to prevent the very act by which Cunningham was injured, nor did it have specific notice that Cunningham was likely to commit such an act. Therefore, the defense of assumption of risk may apply in this case.

In conclusion, while the Court of Appeals improperly extended the Bramlette rule, we find the court reached the right result by reversing the trial court's decision granting Helping Hands' motion for summary judgment. Therefore, we affirm the decision of the Court of Appeals as modified. Further, we vacate the portion of the Court of Appeals' opinion concerning the issue of comparative negligence.[4]

AFFIRMED AS MODIFIED.

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

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[4]The Court of Appeals unnecessarily addressed this issue by elevating the trial court's footnote on a hypothetical situation as a trial court "ruling."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kevin McLaughlin, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 25576
Submitted December 5, 2002 - Filed January 13, 2003

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General Elizabeth R. McMahon, all of Columbia, for petitioner.

Richard J. Breibart, of Breibart, McCauley & Newton, P.A., of Lexington, for respondent.

JUSTICE MOORE: We granted the State's petition for a writ of certiorari to determine whether the post-conviction relief (PCR) court erred by granting respondent relief. We reverse.

FACTS

Respondent was convicted of trafficking in cocaine, possession with intent to distribute (PWID) cocaine, and two counts of PWID cocaine within proximity of a school. He was sentenced to twenty-five years imprisonment for trafficking, fifteen years concurrent for PWID cocaine, and ten years concurrent for each count of PWID within proximity of a school. His convictions and sentences were affirmed on direct appeal. State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992).

ISSUE I

Whether the PCR court erred by finding respondent was incompetent to stand trial?

DISCUSSION

The State argues the PCR court erred by finding respondent was incompetent to stand trial due to the effects of his anti-seizure medication, Dilantin.

While respondent chose not to testify at his PCR hearing, his father (Father) and sister (Sister) testified that respondent's health problems began when he was a teenager. They testified respondent acted strangely, had migraine headaches, mood swings, and was depressed. Father did not attend the trial, but he testified that, prior to trial, respondent was acting strangely. He indicated he had spoken with respondent's counsel about respondent's problems.

Shortly before respondent was arrested, Sister stated he began taking Dilantin, which made him depressed, disoriented, confused, and caused mood swings. Sister indicated she was present with respondent before and during

the trial, and that respondent acted strangely and had mood swings. Sister testified respondent did not have any problems communicating with counsel during trial. However, she indicated respondent did not understand counsel when counsel attempted to discuss the terms of an offered plea agreement.

Nancy Culbertson, a pharmacist, testified on respondent's behalf at the PCR hearing. She testified the side effects of taking Dilantin include confusion, mood and mental changes, cognitive impairment, depression, and mental incompetency.

Culbertson indicated she had reviewed respondent's medical records from the Department of Corrections. From the review, she determined respondent exhibited various physical side effects after taking Dilantin. Culbertson testified that respondent's taking of Dilantin could have affected his ability to make rational decisions. She felt that, from reading the trial testimony, respondent could not adequately handle his day-to-day affairs. However, she testified that she could not tell whether respondent was in fact taking Dilantin at the time of trial.[1] Further, on cross-examination, Culbertson admitted she was not qualified to examine someone to determine if that person was competent to stand trial and she admitted she did not know the standard for determining whether someone is competent to stand trial.

From our review of respondent's trial testimony, respondent clearly understood the questions he was asked and responded to the questions in an appropriate manner. At no time did respondent indicate he did not understand what counsel was asking him.

Respondent's trial counsel testified that he had no trouble communicating with respondent. As a result of knowing that respondent was taking Dilantin and had been treated for seizures, counsel had him evaluated before trial by a forensic psychiatrist to determine his competency. The

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[1]The Department's records begin almost a week after respondent's trial was completed. From our review of the records, it appears from 1990 to 1996 respondent would often fail to take his medicine.

psychiatrist did not find any indications that respondent was incompetent. In an effort to provide mitigation in sentencing, counsel informed the trial court that, according to respondent's evaluation, respondent's medical conditions did not interfere with his mental state.

The PCR court found respondent incompetent at the time of trial, and stated "it is clear that [respondent], at the time of his trial was mentally impaired because of his seizure condition; his medication and its adverse effects." (Emphasis in original).

Due process prohibits the conviction of a person who is mentally incompetent. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992). The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), *cert. denied*, 525 U.S. 1077, 119 S.Ct. 816, 142 L.Ed.2d 675 (1999). The defendant bears the burden of proving his incompetence by a preponderance of the evidence. *Id.*

The evidence does not suggest that respondent was incompetent before or during his trial. As noted previously, the pharmacist was not qualified to determine competency and did not know the standard for determining competency to stand trial. The pharmacist also could not determine from the records in her possession whether respondent was even taking the medicine at the time of his trial.

Additionally, the Department of Corrections' medical records are of little probative value because they commence after the completion of respondent's trial and they do not directly relate to respondent's ability to consult with his counsel or to understand the proceedings. Further, none of the physical side effects respondent appeared to exhibit from Dilantin during his time in prison would seem to have any effect on his capacity to understand counsel or the trial proceedings.

From counsel's PCR testimony that he had no trouble communicating with respondent and from a review of respondent's trial testimony, it is clear respondent had the ability to "consult with his lawyer with a reasonable degree of rational understanding." *See* State v. Kelly, *supra*. During his trial testimony, respondent answered his counsel's questions, and those of the prosecution, clearly and appropriately.

Further, given the fact a forensic psychiatrist evaluated respondent prior to trial and found that his medical conditions did not affect his mental state, the PCR court erred by granting respondent relief on this ground. We reverse the PCR court's decision granting respondent relief on the basis he was not competent at the time of trial. *See* Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002) (Court will not uphold PCR court's findings if no probative evidence supports those findings).

ISSUE II

Whether the PCR court erred by finding counsel ineffective for failing to preserve for appeal the trial court's refusal to allow counsel to cross-examine the SLED chemist regarding his drug arrest?

DISCUSSION

At trial, the State offered the testimony of a former SLED chemist to testify that the substance found in respondent's possession was cocaine and to state the weight of that cocaine. After the State presented the chemist's qualifications, counsel voir dired the witness outside the jury's presence. He immediately began questioning the chemist regarding his arrest the Friday before the trial began.

The chemist testified he was arrested for possession of cocaine and misconduct in office. When asked specific details about his arrest, the chemist declined to answer. He also refused to answer whether he had ever analyzed drugs while under the influence of cocaine during his tenure at SLED.

Counsel requested that he be allowed to ask the chemist questions regarding his arrest in the jury's presence because the arrest affected whether the chemist was qualified to be an expert in the case. The trial court found the chemist's arrest did not affect his qualifications as a chemist, and subsequently ruled the chemist was qualified as an expert. The trial court also refused to allow counsel to cross-examine the chemist regarding his arrest. However, the court allowed counsel to ask the chemist whether he was impaired at the time of the cocaine testing and whether the test on the cocaine in respondent's case was compromised by the chemist's use of cocaine.

On cross-examination of the chemist, counsel did not ask the permitted questions. Following cross-examination, the trial court made it clear on the record that counsel had chosen not to ask the permitted questions. Counsel indicated he had proffered the questions he proposed to ask. In light of the court's ruling on that proffer, counsel stated he decided that to ask only the allowed questions would be unwise because it would isolate the testimony with respect to the test and would not have the same effect as if he were also allowed to ask questions about the chemist's arrest.

On direct appeal, respondent appealed the trial court's limitations on cross-examining the chemist. We ruled the issue was not properly preserved for review on appeal. State v. McLaughlin, *supra*.[2]

At the PCR hearing, trial counsel was questioned regarding his failure to cross-examine the chemist regarding his drug use. Counsel stated that once the trial court limited the questions he could ask of the chemist, he felt that to ask the permitted questions would not have advanced the case. Counsel thought the fact the chemist had an unrelated charge for cocaine

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[2]Because this issue was found to be unpreserved on direct appeal, respondent may raise this issue in his PCR proceeding. *See* Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999), *cert. denied*, 529 U.S. 1072, 120 S.Ct. 1685, 146 L.Ed.2d 492 (2000) (issue raised on direct appeal but disposed of on ground unpreserved may be raised in PCR proceeding).

possession would not have necessarily helped respondent, but it was something he would have liked to have explored.

The PCR court held counsel should have made a proffer and asked the permitted questions. The court stated that if the issue had been properly preserved, it would have resulted in a new trial.

To prove counsel was ineffective, a PCR applicant must show counsel's performance was deficient and the deficient performance caused prejudice to the applicant's case. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Strickland, *supra*.

We find counsel was not deficient for failing to make a proffer because counsel in fact made a proffer. We further find counsel was not deficient for failing to ask the specific questions allowed by the trial court. Counsel gave a valid reason for consciously deciding not to ask those questions. *See* Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (if counsel articulates valid reason for employing certain trial strategy, such tactics will not be deemed ineffective assistance of counsel). Counsel stated that to ask the questions regarding whether the chemist was impaired while performing the test on the cocaine or whether the test on the cocaine was compromised by the chemist's use of cocaine would not have greatly aided respondent's defense unless he could have laid the foundation for those questions by placing the chemist's arrest before the jury.

Moreover, respondent has not shown that there is a reasonable probability the result of his trial would have been different. If counsel had asked the questions before the jury,[3] it is unlikely these responses would have

[3]It is extremely unlikely the chemist would have answered the questions at all when, during the proffer, he refused to answer similar questions based on the advice of counsel.

garnered respondent a verdict of not guilty. While the responses could have affected the credibility of the chemist in the eyes of the jury, respondent has not met his burden of proving that he would have been granted a new trial on appeal, but for trial counsel's alleged deficient performance.

Accordingly, we find the PCR court erred by granting respondent relief on the ground counsel was ineffective for failing to preserve for appeal the trial court's limitations on cross-examining the chemist.

ISSUES III and IV

Whether the PCR court erred by finding counsel ineffective for failing to properly preserve for appeal issues regarding an alleged Doyle[4] violation and a juror's dismissal?

DISCUSSION

The State argues the PCR court erred by finding counsel ineffective for failing to properly preserve for appeal issues regarding an alleged Doyle violation and a juror's dismissal. We agree.

These issues were previously addressed on the merits in respondent's direct appeal. State v. McLaughlin, *supra*. We affirmed respondent's convictions on the Doyle issue by citing Anderson v. Charles, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980) (Doyle does not apply to cross-examination that merely inquires into prior inconsistent statements of accused). We affirmed his convictions on the juror dismissal issue by citing State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990) (juror competency is within discretion of trial judge); State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) (whether to grant motion for mistrial is within trial court's discretion); and State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983) (mistrial should not be granted except in cases of manifest necessity)). Accordingly,

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[4]Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (Due Process Clause of Fourteenth Amendment prohibits impeachment on basis of defendant's silence following Miranda warnings).

the merits of these issues have already been determined in respondent's direct appeal and the PCR court erred by granting respondent relief on these grounds. *Cf.* Foye v. State, *supra* (issue raised on direct appeal but disposed of on ground unpreserved may be raised in PCR proceeding).

CONCLUSION

We find the PCR court erred by granting respondent relief and, as a result, the court's decision is
REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Leonard Austin, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

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

Opinion No. 25577
Submitted November 21, 2002 - Filed January 13, 2003

VACATED AND REMANDED

Assistant Appellate Defender Tara S. Taggart, of Columbia, for Petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Attorney General William Bryan Dukes, all of Columbia, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the denial of Petitioner's application for Post-Conviction Relief (PCR). We

vacate the plea to possession of a firearm during commission of a violent crime and remand the matter to family court.

FACTS

Austin was charged with three counts of armed robbery, one count of assault and battery with intent to kill (ABIK), and one count of possession of a firearm during the commission of a violent crime. The crimes occurred on June 24, June 27,[1] and July 1, 1996, at a time when Austin was 15 years old (his date of birth is August 2, 1980). Austin had no prior adjudications.

The family court transferred jurisdiction of the offenses to general sessions court pursuant to S.C. Code Ann. § 20-7-430(5)(1985).[2] Austin pled guilty to one count of armed robbery, ABIK and possession of a firearm during commission of a violent crime. He was sentenced to twenty years for armed robbery, twenty years for ABIK, and five years, consecutive, for possession of a firearm. His application for PCR was denied; however, he was granted a belated review of his direct appeal under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). We directed the parties to brief the following issue:

> Did the Family Court have the power pursuant to S.C. Code Ann. § 20-7-430(5) (1985) to transfer the charge of possession of a weapon during the commission of a violent crime to circuit court?

DISCUSSION

Austin was fifteen years old when he committed the offenses to which he pled guilty (the June 27, 1996 offenses). At the time, S.C. Code Ann. § 20-7-430(5) provided:

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[1] The ABIK and possession of firearm occurred simultaneous with the June 27, 1996 armed robbery.

[2] Section 20-7-430 was repealed by 1996 Act No. 383, § 2, eff. July 1, 1996. It was replaced by S.C. Code Ann. § 20-7-7605 (Supp. 2001).

> If a child fourteen or fifteen years of age is charged with an offense which, if committed by an adult, would be a **Class A, B, C, or D felony** as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more, the court, after full investigation and hearing, may determine it contrary to the best interest of such child or of the public to retain jurisdiction. The court, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult. (Emphasis supplied).

Possession of a firearm during commission of a violent crime is not a Class A, B, C, or D felony; rather it is a Class F felony pursuant to S.C. Code Ann. § 16-1-90(f), which is not specifically enumerated in section 20-7-430(5). We have specifically held that only those offenses specifically enumerated in S.C. Code Ann. § 20-7-430(5) may be waived up to the court of general sessions. Johnson v. State, 312 S.C. 556, 437 S.E.2d 20 (1993). The court of general sessions does not have jurisdiction over charges which are not within the ambit of section 20-7-430(5). Id. Because the offense of possession of a firearm during commission of a violent crime may not be waived up for fourteen or fifteen year olds, the circuit court was without jurisdiction over the charge. Cf. Slocumb v. State, 337 S.C. 46, 522 S.E.2d 809 (1999) (where petitioner was thirteen at time he committed offense, general sessions court was without jurisdiction to accept his plea to CSC charge). Accordingly, Austin's plea and sentence to possession of a firearm is vacated and the matter remanded to the family court.[3]

VACATED AND REMANDED.

TOAL, C.J., BURNETT and PLEICONES, JJ., concur. MOORE, J., not participating.

[3] Austin's remaining pleas and sentences are unaffected.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex parte: Louie E. Moore, formerly doing business as Fairfield Real Estate Company, Inc.,	Respondent,
and Britt Rowe, Purchaser, and Community Federal Savings & Loan Association,	Defendants,
of whom Britt Rowe is	Petitioner,
and Community Federal Savings & Loan Association is	Respondent.
In re: Jerry W. Branham,	Plaintiff,

v.

Fairfield Real Estate Company, Inc., Theophilus L. Davis, Peggy K. Branham, Betty Portee, Abraham Khalil, The Bank of Ridgeway, and Community Federal Savings & Loan Association,	Defendants.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Fairfield County
Claude S. Coleman, Circuit Court Judge

Opinion No. 25578
Submitted December 6, 2002 - Filed January 13, 2003

REVERSED

Walter B. Todd, Jr., and J. Derrick Jackson, both of Todd Holloway & Ward, P.C., of Columbia, for Petitioner.

Leonard R. Jordan, Jr., of Berry Quackenbush & Stuart, P.A., of Columbia, for Respondent Louie E. Moore.

Robert E. Stepp, and Laura W. Robinson, both of Sowell, Gray, Stepp & Laffitte, L.L.C., of Columbia, for Respondent Community Federal Savings & Loan Association.

PER CURIAM: This case involves a dispute over the results of a mortgage foreclosure sale. Fairfield Real Estate Company, Inc. (Fairfield), of which respondent Louie E. Moore (Moore) was the president and sole shareholder, executed and delivered several promissory notes to plaintiff Jerry Branham and respondent Community Federal Savings and Loan Association (Community), secured by mortgages on Fairfield's real estate. Fairfield defaulted on these mortgages, and Branham brought the underlying foreclose action.

The foreclosure action was referred to a Special Referee who found that Community's liens had first priority and Branham had second priority. The Special Referee ordered the property sold at public auction and issued an order of foreclosure requiring the successful bidder to post a deposit of five-percent of the successful bid.

At the public auction, Moore was the highest bidder, bidding $96,000 for the property. However, Moore was unable to immediately post the five-percent deposit, and the Special Referee reopened the sale. Petitioner was the highest bidder at the second sale, bidding $84,100. Petitioner was allowed fifteen minutes to post his deposit. Petitioner posted the bond, and the sale was concluded.

Moore filed an Objection to the Confirmation of the Second Foreclosure Sale and a Motion to Confirm the Initial Sale. The Master-in-Equity denied the motions and found that the Special Referee conducting the sale acted appropriately in requiring Moore to post a deposit within minutes of the sale and that, upon Moore's failure to do so, conducting a second sale.

The Court of Appeals reversed, holding that a purchaser at a foreclosure sale has until 5:00 p.m. on the sale day to tender the deposit unless the order of the court and the notice of the sale specifically provide for a different payment time. The Court of Appeals found that the Special Referee impermissibly amended the court order and notice of sale by requiring immediate payment of the deposit and, therefore, the second sale to petitioner should be set aside. Ex parte Moore, 346 S.C. 274, 550 S.E.2d 877 (Ct. App. 2001).

We granted certiorari to review the Court of Appeals' opinion and now reverse the Court of Appeals.

The terms and conditions of a judicial sale are controlled by court order, Rule 71, SCRCP, and statute. See S.C. Code Ann.15-39-660 (1977) (requirements of the notice of sale); Rule 71(b), SCRCP (requirements for the court order); Ex parte Kellar, 185 S.C. 283, 194

S.E. 15 (1937) (the court order sets the terms of the sale). Further, although selling officers may not alter the terms of the court order, they are given wide discretion in the manner in which they conduct judicial sales. Ex parte Kellar, supra. The Court of Appeals' bright-line 5:00 p.m. rule creates a condition not imposed by statute and conflicts with established case law granting selling officers broad discretion in conducting judicial sales. Accordingly, we reverse the decision of the Court of Appeals.

The parties have notified the Court that they have reached a settlement agreement under which petitioner will receive title to the land. The parties ask the Court to accept the agreement and vacate the Court of Appeals' opinion.

In light of our holding, we deny the request to vacate the Court of Appeals' opinion. However, we grant the remainder of the parties' motion to approve the settlement agreement without prejudice to the parties' right to petition the Court for rehearing in this matter.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

German Evangelical Lutheran Church of Charleston, S.C. (Commonly Known as St. Matthew's Lutheran Church), Appellant,

v.

City of Charleston, Respondent.

Appeal From Charleston County
Clifton Newman, Circuit Court Judge

Opinion No. 25579
Heard October 9, 2002 - Filed January 13, 2003

AFFIRMED

Kerry W. Koon, of Charleston, for Appellant.

William B. Regan, Carl W. Stent, and Frances I. Cantwell, of Regan, Cantwell & Stent, all of Charleston, for Respondent.

JUSTICE WALLER: At issue in this case is whether four tax-exempt properties owned by Appellant,[1] German Evangelical Lutheran Church of Charleston (a/k/a St. Matthew's Lutheran Church), located on King Street,

[1] The properties include the church and Sunday school building, a community outreach center, a parking lot for employees, and a building the Church hopes to turn into a parking facility.

are subject to an assessment which was adopted by the Charleston City Council pursuant to the Municipal Improvement Act of 1999, S.C. Code Ann. § 5-37-10 et seq. (Supp. 2001). The circuit court ruled the Church was properly subjected to the assessment. We affirm.

FACTS

In August 1999, Charleston City Council adopted a resolution creating the King Street Streetscape Improvement District (District), the purpose of which was to raise money by assessment to property owners on King Street for improvements such as the undergrounding of utilities, planting trees, new street lights, repaving King Street, installation of granite curves with handicap accessibility and special bluestone sidewalks. Council adopted the resolution pursuant to S.C. Code Ann. § 5-37-40(B), which allows council to adopt a resolution "upon written petition signed by a majority . . . of the owners of real property within the district which is not exempt from ad valorem taxation as provided by law."[2] The ordinance adopting the resolution was ratified on Dec. 7, 1999.

The Church, being a tax-exempt property, did not participate in the petition method.[3] It was, however, given notice and appeared at two public hearings. It also filed a written objection. The resolution was ultimately adopted by City Council, and the Church was assessed a total of $5917.62 per year for a ten year period.[4] It filed this complaint challenging the assessment contending, *inter alia*, the Municipal Improvement Act evidences a Legislative intent that tax-exempt properties not be subject to assessments, and that it had been denied equal protection and due process in not being allowed to participate in the petition process. The circuit court rejected Church's claims, and upheld City's assessment.[5]

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[2] Alternatively, a majority of council may implement an improvement district without the consent of a majority of property owners. Section 5-37-40(B).

[3] There is some testimony in the record that even tax-exempt properties were sent copies of the petitions. However, counsel for the Church denied having received a copy of the petition.

[4] The assessment is based upon a formula: 50% based on the assessed value of the properties, and 50% based on linear footage. Since Church properties have no assessment value for tax purposes, the Church's assessment is generally less than that of non-tax exempt properties.

[5] The circuit court also ruled City had the authority to impose an assessment pursuant to its Home Rule powers. In light of our holding, we need not address this contention.

ISSUE

May the City of Charleston impose an assessment on Church's tax-exempt properties pursuant to the Municipal Improvement Act, S.C. Code Ann. § 5-37-10 et seq.?

DISCUSSION

The Municipal Improvement Act of 1999 (Act)[6] authorizes municipal governing bodies to establish improvement districts and create an "improvement plan" for purposes of preserving property values, preventing deterioration of urban areas, and preserving the tax base of the municipality. S.C. Code Ann. § 5-37-20. It is authorized to finance such improvement plans by the imposition of assessments in accordance with the Act, or by issuance of various sorts of bonds, or any combination thereof. S.C. Code § 5-37-30. Pursuant to section 5-37-40(A) & (B) of the Act, a municipality may create an improvement district, as follows:

> (A) If the governing body finds that:
>
> (1) improvements would be beneficial within a designated improvement district;
>
> (2) the improvements would preserve or increase property values within the district;
>
> (3) in the absence of the improvements, property values within the area would be likely to depreciate, or that the proposed improvements would be likely to encourage development in the improvement district;
>
> (4) the general welfare and tax base of the city would be maintained or likely improved by creation of an improvement district in the city; and
>
> (5) it would be fair and equitable to finance all or part of the cost of the improvements by an assessment upon the real property within the district, the governing body may establish

[6] The Act was originally enacted in 1973 and has been amended several times, most recently by 1999 Act No. 118, § 2, eff. June 30, 1999.

> the area as an improvement district and implement and finance, in whole or in part, an improvement plan in the district in accordance with the provisions of this chapter. However, owner-occupied residential property which is taxed under Section 12-43-220(c) must not be included within an improvement district unless the owner gives the governing body written permission to include the property within the improvement district.
>
> (B) If an improvement district is located in a redevelopment project area created under Title 31, Chapter 6, the improvement district being created under the provisions of this chapter must be considered to satisfy items (1) through (5) of subsection (A). The ordinance creating an improvement district may be adopted by a majority of council after a public hearing at which the plan is presented, including the proposed basis and amount of assessment, **or upon written petition signed by a majority in number of the owners of real property within the district which is not exempt from ad valorem taxation** as provided by law. However, owner-occupied residential property which is taxed under Section 12-43-220(c) must not be included within an improvement district unless the owner gives the governing body written permission to include the property within the improvement district.[7] (Emphasis supplied).

In the present case, City opted to use the emphasized method, i.e., a written petition by a majority of the owners of real property within the district which is not exempt from ad valorem taxation.

a. Legislative Intent

The Church asserts imposition of an assessment against it is contrary to the legislative intent that tax-exempt property owners not be subjected to

[7] The owner occupied exemption was added in the 1999 amendments.

charges, as evidenced by the fact that they are not included in the petition process.[8]

Initially, we note that municipalities **do** have the authority to impose assessments upon otherwise tax-exempt churches for street improvements. See City of Greenville v. Query, 166 S.C. 281, 164 S.E. 244 (1931); Wesley M. E. Church v. Columbia, 105 S. C. 303, 89 S. E. 641 (1916)(churches and similar institutions, otherwise exempted from taxation, have been denied by this court exemption from liability for street improvement assessments). See also Sutton v. Town of Fort Mill, 171 S.C. 291, 172 S.E. 119 (1933)(recognizing distinction between "taxes" and "assessments" and holding that an assessment for street paving is not a tax under the constitutional meaning). The issue remains, however, whether the Legislature intended to exempt tax-exempt properties from assessments under the Municipal Improvement Act.

Essentially, section 5-37-40(B) allows two methods to create an improvement district: it may be done by a majority of council after a public hearing at which the plan is presented, **or** it may be accomplished by written petition signed by a majority in number of the owners of non-tax exempt real property within the district. However, even when a majority petitions, it is up to the governing body to create the district by ordinance with such changes and/or modifications as it may determine. S.C. Code Ann. § 5-37-100. It is also up to the governing body to adopt a resolution describing the improvement district, and its purposes, and setting a public hearing at which interested persons may be heard. S.C. Code Ann. § 5-37-50. Thereafter, the governing body may adopt an ordinance creating the district. S.C. Code Ann. § 5-37-100.

Church argues the failure of the Legislature to include it in the petition process under subsection 5-37-40(B) indicates a legislative intent that it be exempted from assessments under the Act. We disagree. The fact that the Legislature has seen fit to specifically exempt some categories of properties

[8] Church does not argue the assessment is in fact a "tax" and has not appealed the circuit court's ruling that the assessment is a fee rather than a tax. See Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992) (generally, a tax is an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular benefit to the payer).

from assessments under the Act, and has failed to do so for tax-exempt properties, is dispositive.

S.C. Code Ann. § 5-37-20(3) specifically exempts the State House grounds from inclusion in an improvement district. Further, section 5-37-40(B) exempts owner-occupied residential property from inclusion within an improvement district unless the owner gives the governing body written permission to include the property within such district. 1999 Act No. 118, § 2. In Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000), we recently recognized:

> The canon of construction "expressio unius est exclusio alterius" or "inclusio unius est exclusio alterius" holds that "to express or include one thing implies the exclusion of another, or of the alternative." Black's Law Dictionary 602 (7th ed. 1999). . . . The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed. Norman J. Singer, Sutherland Statutory Construction § 47.23 at 227 (5th ed. 1992) (citations omitted).

Here, the General Assembly has specifically exempted both owner-occupied residences and the State House grounds from inclusion in improvement districts. Under the doctrine of "expressio unius est exclusio alterius," its failure to exclude tax-exempt properties is indicative of a legislative intent that such properties may be included in an improvement district. Accordingly, we find no clearly evinced legislative intent expressed in section 5-37-40.

Due Process/Equal Protection

The Church also asserts that depriving it of the opportunity to participate in the petition process violates due process and equal protection. We disagree.

As for its due process contention, we find no violation. Although Church did not have an opportunity to petition to be in a majority of those supporting creation of an improvement district, it was given notice of the resolution and ample opportunity to be heard, along with the opportunity to file objections and appeal any assessment. Moreover, as the circuit found, the petition process is merely the first step in the process of adopting an ordinance to create an improvement district. It does not result in creation of the district; the actual creation of the district still depends upon a favorable majority vote of City Council.[9] In fact, the ordinance here was not adopted until there had been two public hearings, at which objections were heard, and a favorable second reading of the resolution at council. We find Church was sufficiently afforded due process. Accord Stono River Env't Prot. Ass'n v. South Carolina Dep't of Health and Env'tl Control, 305 S.C. 90, 406 S.E.2d 340 (1991); Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 505 S.E.2d 598 (Ct.App.1998) (requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review).

Church also asserts it is being denied equal protection as it is being treated differently from others who are similarly situated, i.e., it is being assessed along with all other property owners, but it is not allowed to initiate creation of a district via the petition process. We disagree.

To satisfy the Equal Protection Clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis. D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 23, 482 S.E.2d 558, 562 (1997). A legislative enactment will be sustained against constitutional attack if there is "any reasonable hypothesis" to support it. Id.

Contrary to Church's contention, it is not similarly situated to other property owners; it is tax-exempt. We find the Legislature could reasonably have determined that those property owners who currently pay taxes on their

[9] See also S.C. Code §§ 5-37-50, 5-37-60, 5-37-100, 5-37-100, 5-37-110, 5-37-120, and 5-37-120 (setting forth procedures municipality must follow to enact ordinance and make assessments).

property should be afforded a greater voice in determining whether an improvement district is to be created. Given that the non-exempt property owners already bear a greater financial burden with respect to payment of taxes, we find it completely logical that they should likewise be the ones to petition for creation of a district. Indeed, it would seem anomalous to allow those tax-exempt property owners, who currently share none of the financial burdens, to petition for creation of a district resulting in an even greater financial responsibility on those who do currently pay *ad valorem* taxes.[10] Accordingly, we find no equal protection violation.

Further, under section 5-37-40, the municipality is not required to obtain a majority of **any** property owners and can adopt an ordinance by a majority of county council, and is not in any way bound by a majority petition. We fail to see in what manner exclusion of the Church from the petition process denies it of equal protection or due process.

We find the failure to include tax-exempt properties from the petition process of section 5-37-40 (B) does not indicate a Legislative intent to exempt such properties from an assessment under the Municipal Improvement Act. Further, we find a lack of participation in the petition process does not deprive Church of either equal protection or due process. Accordingly, the circuit court's ruling upholding the assessment is

AFFIRMED.

TOAL, C.J., MOORE and PLEICONES, JJ., concur. BURNETT, J., dissenting in a separate opinion.

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[10] It is undisputed that of the 309 properties in the improvement district, only 14 were tax-exempt. The City's director of economic development testified that even if all 14 of the tax-exempt organizations been against the district, it would not have altered the majority petition in favor of the district. However, if all tax-exempt properties owners were allowed to petition, it could have an impact on the required 51% majority needed under section 5-27-40(B).

JUSTICE BURNETT: I respectfully dissent. In my opinion, the General Assembly intended to exclude owners of property exempt from ad valorem taxation from assessment under the Municipal Improvement Act. Accordingly, I would reverse the trial judge's order granting summary judgment in favor of the City.

The cardinal rule of statutory construction is that the Court ascertain and effectuate the actual intent of the legislature. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 377 S.E.2d 569 (1989). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Browning v. Hartvigsen, 307 S.C. 122, 414 S.E.2d 115 (1992).

As originally enacted, the predecessor to South Carolina Code Ann. §5-37-40(B) (Supp. 2001) provided:

> . . . If the governing body shall find . . . and (v) that it would be fair and equitable to finance all or part of the cost of such improvements by an assessment upon the real property located within such district, the governing body may establish such area as an improvement district and implement and finance, in whole or in part, an improvement plan therein in accordance with the provisions of this act; *provided*, that the governing body shall, prior to the enactment of the ordinance creating the improvement district, obtain written consent for the creation of such improvement district from a majority in number of the owners of real property within the district and having an aggregate assessed value in excess of sixty-six percent of the assessed value of all real property within such improvement district.

Act No. 1207, § 4, 1974 Acts 2813(italic in original) (underline added).

Thereafter, the General Assembly amended the Municipal Improvement Act as follows:

> If the governing body finds that: . . . (v) it would be fair and equitable to finance all or part of the cost of the improvements by an assessment upon the real property within the district, the governing body may

establish the area as an improvement district and implement and finance, in whole or part, an improvement plan in the district in accordance with the provisions of this chapter. However, the governing body, prior to the enactment of the ordinance creating the improvement district, shall obtain written consent for the creation of the improvement district from a majority in number of the owners of real property within the district that is not exempt from taxation under the Internal Revenue Code and having an aggregate assessed value in excess of sixty-six percent of the assessed value of all real property within the improvement district that is not exempt from taxation under the Internal Revenue Code.

Act No. 160, § 1, 1987 S.C. Acts 1081 (underline added).

The following year, the legislature again amended the Municipal Improvement Act to permit, in relevant part, adoption of an improvement district through initiative. In part, the statute provided:

. . . The ordinance creating an improvement district may be adopted by a majority of council after a public hearing at which the plan is presented, including the proposed basis of the assessment, or upon written petition signed by a majority in number of the owners of real property within the district which is not exempt from ad valorem taxation as provided by law.

Act No. 505, § 2, 1988 S.C. Acts 4550.

In 1999, this section was again amended. It appears today as follows:

. . . The ordinance creating an improvement district may be adopted by a majority of counsel after a public hearing at which the plan is presented, including the proposed basis and amount of assessment, or upon written petition signed by a majority in number of the owners of real property within the district which is not exempt from ad valorem taxation as provided by law. However, owner-occupied residential property which is taxed under Section 12-43-220(c) must not be included within an improvement district unless the owner gives the

governing body written permission to include the property within the improvement district.

Act No. 118, 1999 S.C. Acts 1238 (codified at S.C. Code Ann. § 5-37-40 (Supp. 2001).

The legislative history of the Municipal Improvement Act indicates the General Assembly's clear intent to allow a municipality to assess the improvement fee only upon those property owners who have property which is subject to ad valorem taxation. See Wade v. Berkeley County, 348 S.C. 224, 559 S.E.2d 586 (2002) (in interpreting a statute, the Court will not ignore its clear legislative history). Until 1988, the Municipal Improvement Act required a municipality to obtain the consent of a majority of owners who had taxable real property with an assessed value in excess of sixty-six percent before establishing an improvement district. In 1988, the General Assembly deleted the majority consent requirement, but added a petition method which permitted a majority of tax-paying property owners to petition the municipality for creation of an improvement district. In 1999, the legislature added the provision which required owners of owner-occupied residential property to consent to inclusion of their property in the improvement district.

As I read the history of the Municipal Improvement Act, the General Assembly intended only those property owners who are subject to ad valorem taxation to pay the assessments for the improvement district. To hold otherwise and require churches and other charitable institutions who receive no economic benefit from the improvement district would be absurd.

Contrary to the majority's analysis, the owner-occupied provision does not evince the legislature's intent to exclude only owner-occupied residencies from the assessment. Instead, the provision indicates the General Assembly's intent to exclude only one type of property subject to ad valorem taxation - - owner-occupied residences -- from the improvement district assessment. All other owners of property subject to ad valorem taxation are subject to the assessment. Since Church is not subject to ad valorem taxation,[1] City may not assess Church for the improvement district.

[1] S.C. Const. art. X, § 3.

Finally, Section 5-37-20(3) which precludes the State House grounds from inclusion in any special improvement district does not evince the General Assembly's intent as to which property owners must pay the assessments for improvement districts.

In my opinion, the trial judge erred in granting summary judgment in City's favor. I would reverse.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Stephen M. Pstrak, Respondent.

Opinion No. 25580
Submitted December 19, 2002 - Filed January 13, 2003

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Susan M. Johnston, both of Columbia, for the Office of Disciplinary Counsel.

Stephen M. Pstrak, of Lexington, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a public reprimand or a definite suspension not to exceed eight months. We accept the agreement and find an eight month suspension from the practice of law is the appropriate sanction. The facts, as set forth in the agreement, are as follows.

Facts

In or around July 2000, respondent represented a client who had been charged with speeding. Respondent sent a letter to the Clerk of Court for the Spartanburg Central Court setting forth the following as a possible disposition of his client's charge:

> 1. Noll Pross, treating the matter as a **warning** to be more responsible in the future, seeking restitution rather than retribution, as a professional courtesy. You are prosecuting this matter in the County of Spartanburg. I am representing and advising my client and am the town prosecutor for the Town of Gilbert in Lexington County, South Carolina. Gilbert, as the county seat of Spartanburg, is a member of the Municipal Association of South Carolina. Spartanburg's Attorney, H. Spencer King and I are members of South Carolina Municipal Attorney's Association. I plan to vacation with Mayor Talley at the Municipal Association annual meeting in July. **Please allow every possible consideration for treating this matter as a warning.**

Respondent acknowledged that he is not, nor has he ever been, the town "prosecutor" for Gilbert, South Carolina. Respondent is the appointed attorney for the Town of Gilbert. He represents the Town of Gilbert in instituting and defending all actions at law and appears on behalf of the town, and any of its officers, in legal proceedings in which the town or its officers may be a party or have an interest. Respondent does not prosecute criminal cases for the town.

Respondent also acknowledged that he does not personally know H. Spencer King or Mayor Talley and that he never "vacationed" with Mayor Talley. Accordingly, respondent's representations concerning Mr. King and

Mayor Talley were misleading. Respondent sought, through these misrepresentations, to improperly influence the court, the clerk of court and/or the state trooper to base the disposition of his client's speeding ticket on respondent's acquaintances rather than make such decisions according to law.

In representing another client charged with speeding, respondent sent a letter to the Richland County Central Traffic Court, to the attention of "Clerk of Court, Presiding Judge, Officer Bryant [and] Officer Gentry," asking that his client's charge be nolle prossed as a professional courtesy and advising that he was "the city prosecutor for a city in Lexington County . . . ." In this same letter, respondent stated, "I am the Director of the South Carolina Trooper's Coalition. [My client] has made a very large donation in the past and is willing to do so again now if he is able to continue driving and flying . . . in the Air National Guard." In a subsequent letter to City Attorney Dana Thye, respondent stated, "If treating the matter as a **warning** is not agreeable, [my client] is willing to cheerfully make a contribution to the City Police Department Benevolent Society \ charity ball or similar concern as a good-faith gesture of his regret for this pending matter."

Finally, in representing a third client charged with speeding, respondent wrote the Clerk of Court for the Town of Wagener and the arresting officer and again advised that he was the town prosecutor for Gilbert, South Carolina.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 7.1(a)(a lawyer shall not make a material misrepresentation of fact about the lawyer); Rule 8.4(e)(it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(f)(a lawyer shall not state or imply an ability to influence improperly a government agency or official).

Conclusion

In our opinion, respondent's misconduct warrants an eight month suspension from the practice of law. As a condition of reinstatement, respondent shall submit the name of a lawyer who, upon approval by this Court, will serve as a mentor for respondent for one year following reinstatement. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Furtick, Respondent,

v.

South Carolina Department of Probation, Parole and Pardon Services, Appellant.

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

Opinion No. 25581
Submitted October 23, 2002 - Filed January 13, 2003

AFFIRMED

Teresa A. Knox, Tommy Evans, Jr., and J. Benjamin Aplin, of South Carolina Department of Probation, Parole, and Pardon Services, all of Columbia, for appellant

James Furtick, of Bennettsville, *pro se*.

CHIEF JUSTICE TOAL: The South Carolina Department of Probation, Parole, and Pardon Services ("DPPPS") argues that

the circuit court erred in holding that the Administrative Law Judge Division ("ALJD") has jurisdiction to review the final decision of the DPPPS in this case.

FACTUAL / PROCEDURAL BACKGROUND

Respondent, James Furtick, was indicted for burglary in the second degree and grand larceny on June 30, 1994 for crimes committed in September 1992. Respondent was convicted as charged and sentenced to fifteen years for burglary in the second degree and three years for grand larceny, to run consecutively. The Court of Appeals affirmed Respondent's conviction and sentence. *State v. Furtick*, 95-UP-338 (Ct. App. filed December 28, 1995).

Initially, the South Carolina Department of Corrections ("SCDC") projected that Respondent would be eligible for parole. Based on this projection, the DPPPS notified Respondent that a parole hearing had been scheduled. Before the scheduled hearing, however, the DPPPS notified Respondent that he was not eligible for parole on his burglary conviction because he was classified as a subsequent violent offender under S.C. Code Ann. § 24-21-640 (Supp. 1992). Section 24-21-640 provides, in relevant part,

> The board must not grant parole . . . to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60.

Section 24-21-640 was in effect both in 1992, when Respondent committed the crimes, and in 1994, when Respondent was tried and convicted. Section 16-1-60 was enacted under the 1986 Omnibus Criminal Justice Improvements Act,[1] and defines burglary in the second degree as a violent

[1] 1986 Act No. 462 § 33.

crime.[2]

The DPPPS classified Respondent as a violent offender based on a prior conviction for voluntary manslaughter.[3] Respondent objected to the DPPPS's classification of him as a "violent offender," and ultimately appealed from the DPPPS's decision to the ALJD. The ALJD dismissed Respondent's appeal on grounds that the ALJD lacked jurisdiction to review an appeal from a final decision of the DPPPS. Respondent appealed, and the circuit court reversed and remanded, finding that the ALJD does have jurisdiction to review the final decision of the DPPPS in this case.

DPPPS raises the following issue on appeal:

> Did the circuit court err in finding that the ALJD has jurisdiction to review the DPPPS's final decision that Respondent is not eligible for parole by operation of S.C. Code Ann. § 24-21-640?

LAW /ANALYSIS

Respondent argues that the ALJD has jurisdiction to hear his appeal

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[2] In addition to burglary in the second degree, section 16-1-60 defines the following offenses as violent crimes: murder, criminal sexual conduct in the first and second degree, assault and battery with intent to kill, kidnapping, *voluntary manslaughter*, armed robbery, drug trafficking, arson in the first degree, and burglary in the first degree. S.C. Code Ann. § 16-1-60 (Supp. 1991) (emphasis added).

[3] Respondent pled guilty to voluntary manslaughter in 1968, and was sentenced to 30 years. Respondent escaped from prison in 1971, was captured, and sentenced to 2 additional years for escape. In addition, Respondent was charged with housebreaking and grand larceny (committed before he was recaptured), and was sentenced to 15 additional years. In 1978, Respondent was released on parole for the remainder of the 47 years of his sentence.

from the decision made by the DPPPS that he is not parole eligible by operation of section 24-21-640. We agree.

Essentially, Respondent argues that section 16-1-60 operates as an *ex post facto* law in conjunction with section 24-21-640 because it enhances his sentence, making him ineligible for parole. This Court has defined *ex post facto* claims as non-collateral matters. *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000). In *Al-Shabazz v. State*, this Court held,

> [a]n inmate may . . . seek review of [the SCDC's] final decision in an administrative manner under the [Administrative Procedures Act ("APA")]. Placing review of these cases within the ambit of the APA will ensure that an inmate receives due process, which consists of notice, a hearing, and judicial review.

338 S.C. 354, 369, 527 S.E.2d 742, 750 (1999). This Court recognized that not all of the SCDC's decisions were subject to review by the ALJD, and specifically declined to apply certain provisions of the APA to decisions made as part of the SCDC's internal disciplinary process. *Id.* The Court distinguished internal disciplinary decisions from the denial of sentence-related credits at issue in *Al-Shabazz*, however, on grounds that denial of good time credits affected a constitutionally protected liberty interest. *Id.* at 369-70, 527 S.E.2d at 750 (citing *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d. 935 (1974)).

In *Wolff v. McDonnell,* the United States Supreme Court found that Nebraska had created a *statutory* right to good time credits, which provided that good time credits were to be forfeited only for serious misbehavior. 418 U.S. at 557, 94 S.Ct. at 2975, 41 L.Ed.2d at 951 (citing Neb. Rev. Stat. § 83-1 (Supp. 1972)). Based on Nebraska's statute, the United States Supreme Court found,

> the prisoner's interest [in good time credits] has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process clause

to ensure that the state-created right is not arbitrarily abrogated.

418 U.S. at 557, 94 S.Ct. at 2975, 41 L.Ed.2d at 951.

Like the inmate in *Wolff*, the inmate in *Al-Shabazz* protested the SCDC's reduction of good time credits he had accrued as a method of punishment. In *Al-Shabazz*, this Court found the inmate had a "protected liberty interest due to the potential loss of sentence-related credits" and, therefore, that he was entitled to review by the ALJD, and in turn, to review by the judicial branch. 338 S.C. at 382, 527 S.E.2d at 757.

In *Al-Shabazz,* the Court recognized that "[t]hese administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed and (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits, or custody status." 338 S.C. at 369, 527 S.E.2d at 750. Respondent's case arises in the latter manner. He alleges that the DPPPS erroneously determined that he is not eligible for parole.

Under *Wolff*, to determine whether Respondent is entitled to review of the DPPPS's decision, the Court must decide whether Respondent has a liberty interest in gaining access to the parole board. In our opinion, the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process. Section 24-21-620 provides for review by the Board, "regardless of whether or not any application has been made therefore, for the purposes of determining whether or not such prisoner is entitled to any of the benefits provided for in this chapter." S.C. Code Ann. § 24-21-620 (Supp. 1992).[4]

[4] Although this provision creates a liberty interest in parole eligibility, it does not create a liberty interest in parole. Section 24-21-620 also provides the procedure to follow when the Board determines not to grant parole for a *potentially eligible* inmate: "[u]pon a negative determination, the prisoner's case shall be reviewed every twelve months thereafter for the purpose of such determination."

Following DPPPS's determination that Respondent was ineligible for parole as a violent offender under section 24-21-640, Respondent then had the same right to review as the inmate in *Al-Shabazz*. In *Al-Shabazz,* the Court outlined the nature of the review available to inmates raising non-collateral issues that implicate liberty interests; those procedures apply equally to inmates affected by final decisions of the DPPPS that affect liberty interests, such as the decision in this case.

Although we believe Respondent was entitled to review of his claim by the ALJD, we will address the merits of his claim now for the sake of judicial economy. The issue Respondent raises is well-settled on the merits. As discussed, Respondent argues that he has been subjected to an *ex post facto* law because retroactively designating his 1968 manslaughter conviction a violent crime has enhanced his punishment for that crime. We disagree.

In *Phillips v. State*, under very similar factual circumstances, this Court held "[i]t is not a violation of the *ex post facto* clause for the legislature to enhance punishment for a later offense based on a prior conviction, even though the enhancement provision was not in effect at the time of the prior offense." 331 S.C. 482, 484, 504 S.E.2d 111, 112 (1998) (citing *State v. Dabney*, 301 S.C. 271, 391 S.E.2d 563 (1990)). In *Phillips,* the inmate's 1982 armed robbery conviction was used to deny him parole eligibility on his sentence for a 1987 burglary conviction even though armed robbery was not a violent crime until section 16-1-60 was enacted in 1986.[5]

Similarly, the DPPPS claims Respondent's 1968 voluntary manslaughter conviction can be used to deny him parole eligibility on the

[5] In *Phillips*, the inmate raised his *ex post facto* challenge by bringing an action for post-conviction relief ("PCR"). After *Al-Shabazz*, this avenue is no longer available. The Court held that PCR "is a proper avenue for 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)." *Al-Shabazz,* 338 S.C. at 367, 527 S.E.2d at 749. For this reason, it is especially important that Respondent receive some form of administrative review of the DPPPS's *permanent* denial of parole *eligibility*.

sentence he is currently serving for burglary in the second degree, as both were violent crimes under section 16-1-60 when Respondent committed the burglary in 1992. This Court has determined that the time that the crime was committed is the relevant time for purposes of characterizing the crime as violent or non-violent, not the time that the inmate was convicted. *See Sullivan v. State,* 331 S.C. 479, 504 S.E.2d 110 (1998); *Phillips,* 331 S.C. at 484, 504 S.E.2d at 112, footnote 2 (noting that section 16-1-60 was amended between 1993 and 1995 to provide prospective effect only, but declining to express an opinion on the impact of this language on persons *committing offenses during that period*).

Accordingly, Respondent is not eligible for parole under S.C. Code Ann. § 24-21-640 (Supp. 1992).

CONCLUSION

For the foregoing reasons, we **AFFIRM** the order of the circuit court holding that the ALJD does have jurisdiction over non-collateral challenges to final decisions of the DPPPS under the procedure outlined in *Al-Shabazz*. On the merits, we find that Respondent as a violent offender is not eligible for parole.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Matthew Edward Davis, Respondent

O R D E R

On October 28, 2002, Respondent was suspended from the practice of law for a period of sixty days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY: s/Daniel E. Shearouse
Clerk

Columbia, South Carolina

January 9, 2003

The Supreme Court of South Carolina

In the Matter of James Graham Bennett, Respondent

O R D E R

On December 23, 2002, Respondent was suspended from the practice of law for a period of eight months, retroactive to October 17, 2000. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

BY: s/Daniel E. Shearouse
Clerk

Columbia, South Carolina

January 9, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Interest of Jeremiah W., a minor under the age of seventeen years, Appellant.

Appeal From Florence County
Mary E. Buchan, Family Court Judge

Opinion No. 3588
Heard October 10, 2002 – Filed January 6, 2003

REVERSED

Assistant Appellate Defender Robert M. Dudek, of Columbia; for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Deputy Attorney General Harold M. Coombs, Jr., of Columbia; Edgar Lewis Clements, III, of Florence; for State of South Carolina.

HEARN, C.J.: Jeremiah W. appeals his convictions for breach of the peace and threatening a public official, arguing the trial court erred in failing to grant his motions for directed verdict because (1) his arrest for breach of the peace was unlawful, and (2) he was entitled to resist the arrest so that his actions and

comments following the arrest did not constitute a threat against a public official. We reverse.

FACTS

In June 2000, two uniformed police officers employed to provide off-duty security services at a Florence County apartment complex noticed Jeremiah, a fourteen year-old juvenile, walking toward the front of the complex. Officer Mickey Cooke testified that Officer Gloria Howard told him she thought Jeremiah had a trespassing warning against him. Officer Cooke then attempted to call Jeremiah over to his patrol car. He testified that Jeremiah responded by yelling profanity at him while continuing to walk. Cooke then exited his patrol car and approached Jeremiah. He stated that upon "intercepting" the juvenile, Jeremiah "turned around. . . . pulled his pants up. And he went 'What?' in my face with his arms bowed out," while in the presence of adults and children outside the apartment complex. Cooke testified that he took this as an aggressive action; however, he acknowledged that Jeremiah's hands and arms were back, not forward. At that point, Officer Cooke placed Jeremiah under arrest for being loud, boisterous, and using profanity in public, in violation of S.C. Code Ann. § 16-17-530 (1976).

Officer Cooke then handcuffed Jeremiah and placed him in the backseat of his patrol car to transport him to the detention center. Cooke, however, did not seatbelt Jeremiah in the car. Cooke testified that while en route to the detention center he attempted to question Jeremiah concerning his identity and relatives whom he could call regarding Jeremiah's arrest. Jeremiah refused to give him any information, stating, "I ain't got to do what you say." Cooke then testified that Jeremiah became irate, began yelling profane remarks, and attempted to stick his head through the plexi-glass panel separating the back and front seats of the patrol car. Officer Cooke believed Jeremiah was puckering his lips as if he intended to spit on him. Officer Cooke then "cap-stunned" the backseat, spraying Jeremiah with a chemical agent. He closed the plexi-glass window and proceeded to the detention center. He stated that Jeremiah then began to threaten him, stating he would "blow [his] 'f---ing' head off." This led to the charge of threatening a public official in violation of S.C. Code Ann. § 16-3-1040 (1976).

Officer Howard testified similarly to Officer Cooke; however, she stated that she informed Officer Cooke another security officer had stopped

Jeremiah the day before and advised her that Jeremiah was going to be placed on the "banned and barred list." She did not indicate to him, as Cooke testified, that Jeremiah was already on a list banning individuals form the property.

At trial, Jeremiah's attorney made a motion for a directed verdict at the conclusion of the State's case. The family court judge denied the motion. Jeremiah's attorney renewed the motion at the end of trial, which was also denied. The family court judge found Jeremiah guilty of both charges and committed him to the Department of Juvenile Justice for a period not to exceed his twenty-first birthday.

STANDARD OF REVIEW

In reviewing the refusal to grant a directed verdict in a criminal case, the evidence is viewed in the light most favorable to the State to determine whether there is any direct or substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which guilt may be fairly and logically deduced. State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). The court is concerned with the existence or nonexistence of evidence, not its weight. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). Furthermore, the court should not refuse to grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. Id.

LAW / ANALYSIS

Jeremiah argues the trial court should have directed a verdict of acquittal on the charge of breach of the peace because his conduct did not constitute a breach of the peace. We agree.

The offense of breach of the peace is defined as "a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence, which includes any violation of any law enacted to preserve peace and good order." State v. Poinsett, 250 S.C. 293, 297, 157 S.E.2d 570, 571, 572 (1967). However, the crux of the offense, and "[w]hether [the] conduct constitutes a breach of the peace depends on the time, place, and nearness of other persons." State v. Peer, 320 S.C. 546, 552, 466 S.E.2d 375, 378 (Ct. App. 1996). While it is not necessary that the peace actually be broken in order to sustain a conviction for the

offense of breach of the peace, there must be at least, "commission of an unlawful and unjustifiable act, tending with sufficient directness to breach the peace." Id.

Here, no actual breach of the peace occurred. While the State was not required to put up any witnesses who would specifically testify that Jeremiah's actions caused them "to become violent or think about becoming violent" in order to establish a breach of the peace, there must be some evidence that Jeremiah's actions/speech caused at least a minimal level of "nervousness, frustration, anxiety," anger, or other evidence that the peacefulness of the neighborhood had been breached. Id. at 549, 466 S.E.2d at 377 (stating residents' nervousness, anxiety and frustration which resulted in numerous calls to law enforcement in response to appellant's "booming music," was ample evidence for submission to the jury on breach of peace charge).

Here, the record reveals that the State did offer evidence of the effect of Jeremiah's conduct on the bystanders through the officers' testimony. Officer Cooke testified that when he walked over to Jeremiah there were several people outside standing on the sidewalk. He stated Jeremiah "was just in front of a bunch of people trying to make a show basically." He admitted that Jeremiah never addressed the crowd or asked them to do anything. Cooke estimated there were ten to fifteen people approximately 30 to 40 feet away. Significantly, the bystanders "came out to see what was going on. . . .[w]hen I got out of the car and started walking after him." The crowd never reacted in any way after he arrested Jeremiah. Officer Howard also estimated there were approximately ten people outside, comprised of adults and children. She testified that the crowd did not become involved in the incident between Jeremiah and Officer Cooke or react in any manner and stated "they were just watching." (emphasis added)

At most, the officers' testimony amounted to evidence of their own fear of a potential for a breach of the peace. See Texas v. Johnson, 491 U.S. 397, 408-09 (1989) (rejecting state's argument that it need only prove a potential for breach of the peace to prove a violation, and instead requiring "careful consideration of the actual circumstances surrounding such expression, asking whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'") (citation omitted). The evidence, however, reveals that this fear was unwarranted.

Nor do we believe that the evidence supports an arrest for breach of the peace as a result of Jeremiah's alleged "bowing up" at Officer Cooke. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." State v. Perkins, 306 S.C. 353, 355, 412 S.E.2d 385, 386 (1991) (citing City of Houston v. Hill, 482 U.S. 451, 462-63 (1987)). The United States Supreme Court has consistently recognized that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." Hill, 482 U.S. at 461. "The State may not punish a person for voicing an objection to a police officer where no fighting words are used." State v. Pittman, 342 S.C. 545, 548, 537 S.E.2d 563, 565 (Ct. App. 2000) (citation omitted). Fighting words are words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Perkins, 306 S.C. at 354, 412 S.E.2d at 386 (citations omitted). "As further noted by the Supreme Court, the 'fighting words' exception may require narrow application in cases involving words addressed to a police officer 'because a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen.'" Id.

Officer Cooke's testimony explaining the incident is revealing. When questioned whether it was Jeremiah's responsibility to come over when he called to him, Cooke responded: ". . . [I]t was the loud and boisterous way he said it and using profanity in public, that's against the law. . . . That's all it takes." (emphasis added). He actually informed Jeremiah that he was "under arrest for breach of peace [sic] for being loud and boisterous and using profanity in public." Officer Cooke further testified in support of his authority to arrest that Jeremiah bowed up at him when he stopped him.

Jeremiah denied using profanity towards Officer Cooke. He testified that when stopped, he turned around to face Cooke, and "pulled up my pants because I didn't have on my belt." Jeremiah admitted bowing up to Cooke in response to an alleged remark made by him; however, he described the action as one where he pulled up his pants and asked "What?" while his arms were back and his palms were facing open and out. Officer Cooke agreed that Jeremiah's arms were back, not forward.

It is well settled that the use of profanity alone does not constitute fighting words. See Pittman, 342 S.C. at 551, 537 S.E.2d at 566. Officer Cooke's

own testimony indicates that his decision to arrest Jeremiah was based on his language and the fact that he was being loud and boisterous. Cooke never stated that Jeremiah made any actual threats towards him until he arrested Jeremiah and placed him in his patrol car. Therefore, from Cooke's own testimony, it appears that Jeremiah's arrest was based on nothing other than his profane language, which does not fall within the fighting words exception to the First Amendment, and his loud and boisterous conduct. In State v. Perkins, our supreme court determined that probable cause to arrest an individual "requires more than profanity or loud and boisterous behavior directed at the officers." Pittman, 342 S.C. at 551, 537 S.E.2d at 566 (discussing Perkins, 306 S.C. 353, 412 S.E.2d 385 (1991)). Therefore, we find Jeremiah was entitled to a directed verdict on the breach of peace charge.

Having found Jeremiah was unlawfully arrested on the charge of breaching the peace, we must next consider whether Jeremiah's response to that unlawful arrest constituted a new and distinct crime, thereby justifying his charge for threatening a public official. This court recently considered this issue in State v. Burton, 349 S.C. 430, 562 S.E.2d 668 (Ct. App. 2002). In Burton, an officer unlawfully seized Burton in violation of Terry v. Ohio, 392 U.S. 1 (1968). In response, Burton fought with the officer. During the struggle, Burton removed a gun from his coat, pointed it at the officer, and pulled the trigger several times. The gun jammed, however, and Burton was subdued and arrested. After the arrest, Burton continued to struggle and shout obscenities at the officers. He also spit in an officer's direction. Id. at 433-34, 562 S.E.2d at 670. Burton was charged with two counts of assaulting an officer while resisting arrest, one count of assault with the intent to kill an officer, and one count of assault with a deadly weapon with intent to kill an officer. Id.

The State argued that despite the officer's unlawful seizure, Burton's assault and attempts to shoot the officer were new and distinct crimes justifying his arrest. Id. at 440, 562 S.E.2d at 673. The State cited State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999), for the proposition that despite the strong causal connection in fact between lawless police conduct and a defendant's response, if the defendant's response is itself a new and distinct crime, the police may arrest the defendant for that crime. Id. at 194, 519 S.E.2d at 790. This court declined to apply Nelson in Burton's case and held his behavior resulted from a "continuous flow of action and conduct having a direct nexus to the defective Terry frisk and

emanating from the initial 'police-citizen encounter.'" Id. Likewise, we believe the actions that led to Jeremiah's charge for threatening a public official were part of a continuous flow of action and conduct emanating directly from his unlawful arrest for breach of the peace. Accordingly, Jeremiah's convictions are

REVERSED.

HOWARD, J., concurs.
GOOLSBY, J., dissents in a separate opinion.

GOOLSBY, J. (dissenting): I respectfully dissent. Jeremiah W. (the juvenile) appeals his convictions for threatening a public official and breach of the peace, arguing the trial court erred in failing to grant his motions for directed verdict because (1) his arrest for breach of the peace was unlawful and (2) the illegality of his arrest permitted him to resist using deadly force, if necessary, so that his actions and comments following his arrest did not constitute a threat against a public official. I would affirm.

ANALYSIS

I. Directed Verdict on Breach of Peace Charge

The juvenile first argues the trial court should have directed a verdict of acquittal on the breach of the peace charge. He claims the underlying arrest was unlawful. I disagree.

"Breach of the peace is a common law offense which is not susceptible of exact definition."[1] Breach of the peace is a generic term "embracing a great variety of conduct destroying or menacing public order and tranquility."[2] "In general terms a breach of peace is a

[1] State v. Randolph, 239 S.C. 79, 83, 121 S.E.2d 349, 350 (1961).

[2] State v. Peer, 320 S.C. 546, 552, 466 S.E.2d 375, 379 (Ct. App. 1996).

violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence, which includes any violation of any law enacted to preserve peace and good order."[3] For a breach of the peace to occur, it is not necessary that the peace actually be broken. No more is required than that the act be unjustifiable and have the tendency with sufficient directness to break the peace.[4]

Here, an officer attempted to investigate a possible trespassing violation based on information supplied by a fellow officer.[5] When the officer attempted to communicate with him, the juvenile walked away and shouted a profane remark in the presence of private citizens. When directly confronted by the officer, the juvenile took an aggressive stance by pulling up his pants, bowing out his chest, and getting in the officer's face.

The crux of the juvenile's argument is that he had a right to be on the premises and that merely cursing in public and questioning a police officer's conduct was not unlawful. The juvenile's argument, however, ignores the evidence that approximately ten children and adults stood in a nearby public area when the juvenile yelled profane remarks at the officer. It also ignores the evidence of the juvenile's hostile and threatening demeanor when the officer approached him with information that the juvenile might be trespassing. The juvenile, then, did not merely curse the officer.[6] He acted belligerently and

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[3] State v. Poinsett, 250 S.C. 293, 297, 157 S.E.2d 570, 571 (1967).

[4] State v. Langston, 195 S.C. 190, 11 S.E.2d 1 (1940).

[5] Even though the officers were off-duty, this "did not strip [them] of [their] office." A police officer's status may be exercised whenever the public need or his duty requires it. League v. Nat. Sur. Corp., 198 S.C. 289, 17 S.E.2d 783, 785 (1941).

[6] The U.S. Supreme Court has recognized the "fighting words" exception to protected speech, meaning that the conduct must

aggressively toward the officer in a public place while others looked on.[7]

Accordingly, I would find that the State presented sufficient evidence that the juvenile committed a breach of the peace warranting the denial of his directed verdict motions.

II. Directed Verdict on the Threatening a Public Official Charge

The juvenile next argues the trial court should have directed a verdict of acquittal on the charge of threatening a public official. He contends he was entitled to use profanity and engage in other actions while in custody because he was entitled to use deadly force to resist an illegal arrest. Since I would have found that the arrest was legal, I need not reach this issue.

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constitute more than mere spoken words. See Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103 (1972).

[7] See City of Columbia v. Brown, 316 S.C. 432, 450 S.E.2d 117 (Ct. App. 1994) (holding that verbally assaulting police officers with vulgar, abusive language and racial slurs ("fighting words") constituted a breach of the peace); State v. Brahy, 22 Ariz. Ct. App. 524, 529 P.2d 236 (1974) (holding that offensive language and spitting is a breach of the peace).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

City of Newberry,

Appellant,

v.

Newberry Electric Cooperative, Inc.,

Respondent.

Appeal From Newberry County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 3589
Heard November 6, 2002 - Filed January 6, 2003

REVERSED and REMANDED

Robert T. Bockman, of Columbia; and Eugene C. Griffith, Jr., of Newberry, for appellant.

Thomas H. Pope, III, of Pope and Hudgens, of Newberry, for respondent.

SHULER, J.: The City of Newberry appeals a trial court order denying its request for an injunction barring Newberry Electric Cooperative, Inc., from providing electric service to an annexed area. On en banc rehearing, we adhere to the original decision of the three-judge panel, republished herein, and reverse and remand.

FACTS/PROCEDURAL HISTORY

In February 1974, the City of Newberry annexed approximately 21.37 acres near state Highway 219 into its corporate limits. The area had been assigned in 1971 to the Newberry Electric Cooperative exclusively by the Public Service Commission (PSC) pursuant to the Territorial Assignment Act. Prior to 1991, however, the Cooperative never provided electric service to any customers in the area.

In 1999, construction began on a Burger King located in the annexed area. During construction, the City provided temporary electric service. As the restaurant neared completion, Roger Skeen, a co-owner, requested electric service from the Cooperative. Skeen, who previously had operated a Burger King within the city limits, knew the City's electric rates were approximately 40% higher than the Cooperative's.

In August 1999, a line supervisor informed Charles Guerry, the City's Utilities Director, that the Cooperative was attempting to connect service. Guerry visited the construction site and advised the Cooperative to stop the connection because the area was inside municipal limits. The Cooperative ignored Guerry's instruction and continued to connect service by dropping a line from one of its distribution poles that had been on the site for more than forty years.

The City brought this action in November 1999 seeking an order enjoining the Cooperative from furnishing electric power to the Burger King. The Cooperative answered and counterclaimed for, inter alia, a judgment declaring it legally entitled to provide service. On November 30, 2000, the trial court held a

hearing. Relying on stipulated facts,[1] documentary evidence, and oral testimony, the court denied the City's request for an injunction and instead issued a declaratory judgment finding the Cooperative had a legal right to supply electric service to the Burger King. This appeal followed.

LAW/ANALYSIS

The material facts of this case, agreed to by written stipulation, are undisputed. As a result, this Court will review "whether the trial court properly applied the law to those facts." WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000); see Duke Power Co. v. Laurens Elec. Co-op., Inc., 344 S.C. 101, 543 S.E.2d 560 (Ct. App. 2001).

The City argues the trial court erred in finding the Cooperative could lawfully provide electric service to Burger King without the City's consent. We agree.

The Legislature enacted the Rural Electric Cooperative Act (RECA) "for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas." S.C. Code Ann. § 33-49-210 (1990). As creatures of

[1] The relevant stipulated facts include: 1) the City annexed the area in 1974, 2) the PSC assigned the area to the Cooperative prior to annexation, 3) the City population estimate at the time was 10,542, 4) the Cooperative served no customers within the area prior to Burger King, 5) the City never consented to service by the Cooperative, 6) the Cooperative moved no poles prior to beginning service, and 7) the Cooperative maintained the poles and lines used to provide service both before and after annexation.

statute, rural electric cooperatives "only have such authority as the [L]egislature has given them." Duke Power, 344 S.C. at 104, 543 S.E.2d at 562. The RECA grants cooperatives the authority to supply electric energy only in rural areas, i.e., areas with populations less than 2,500 persons. See S.C. Code Ann. § 33-49-250(1) (1990); Carolina Power & Light Co. v. Town of Pageland, 321 S.C. 538, 471 S.E.2d 137 (1996). The City of Newberry, with a population over 10,000 residents, is nonrural.

The RECA, however, also "provides two exceptions permitting a rural co-op to serve customers within a nonrural area . . . ." Duke Power, 344 S.C. at 105, 543 S.E.2d at 562; see Carolina Power, 321 S.C. at 542, 471 S.E.2d at 139 (stating § 33-49-250(1) was amended in 1963 to provide "two exceptions" to the requirement that cooperatives serve only rural areas). These exceptions, the annexation exception and the principal supplier exception, are found in the following language from the RECA:

> *[T]he act of incorporating or annexing into a city or town an area in which the cooperative is serving shall constitute the consent of the governing body of such city or town for the cooperative to continue serving all premises then being served and to serve additional premises within such area until such time as the governing body of the city or town shall direct otherwise* and such cooperative is empowered to so serve, but it shall not extend service to any premises in any other part of such city or town *unless the cooperative was the principal supplier of electricity in such city or town . . . .*

§ 33-49-250(1) (emphasis added); see Duke Power, 344 S.C. at 105, 543 S.E.2d at 562.

The purpose of the exceptions is to "prevent the ouster of co-ops from areas they have historically served due to population growth or annexation." Duke Power, 344 S.C. at 105, 543 S.E.2d at 562. The statutory language, therefore, "contemplate[s] [a] co-op's continued service" in an area to which an exception applies. Id. Neither party herein contends the Cooperative was the

principal supplier of electricity in the annexed area. Accordingly, our sole concern is the application of the annexation exception.

The trial court found Burger King had the option to choose either the City or the Cooperative as its electric service provider. The court based the finding on its interpretation of S.C. Code Ann. § 58-27-670 (Supp. 2001) because, in supplying power to the Burger King, the Cooperative merely "dropped a line" and did not use the City's "streets, alleys or other public ways."[2] Section 58-27-670 provides:

> The furnishing of electric service in any area which becomes a part of any municipality after the effective date of this section, either by annexation or incorporation, whether or not the area, or any portion of the area has been assigned pursuant to § 58-27-640, is subject to the provisions of §§ 58-27-1360 and 33-49-250, and any provisions of this article. *No poles, wires, or other facilities of electric suppliers using the streets, alleys, or other public ways within the corporate limits of a municipality may be constructed by an electric supplier unless the consent of the municipal governing body is first obtained.* Annexation may not be construed to increase, decrease, or affect any other right or responsibility a municipality, rural electric cooperative, or electrical utility may have with regard to supplying electric service in areas assigned by the Public Service Commission in accordance with Chapter 27 of Title 58.

§ 58-27-670 (emphasis added).[3]

[2] The parties agreed the Cooperative did not use the streets, alleys, or public ways of the City in providing electric service to Burger King.

[3] S.C. Code Ann. § 33-49-250 (1990) enumerates the powers of rural electric cooperatives, while S.C. Code Ann. § 58-27-1360 (Supp. 2001) permits, upon payment of just compensation, the ouster of an annexed or

The statute, therefore, declares that any electric service provider annexed or incorporated into a municipality after June 6, 1984, the date of enactment, must obtain the municipality's consent before using the "streets, alleys, or other public ways" to erect poles, wires or other business facilities. In reaching its conclusion, the trial court apparently employed reverse logic to find that the statute also inferentially permitted an annexed electric service supplier to provide new service without consent if it refrained from using the municipality's public property. This was error.

Initially, we note § 58-27-670 by its own terms is inapplicable under the facts of this case because the City annexed the area in question in 1974, a full ten years prior to the date of enactment. See City of Westminster v. Blue Ridge Elec. Coop., 295 S.C. 93, 97, 366 S.E.2d 611, 613 (Ct. App. 1988) ("[T]he Legislature intended the amended provisions of Sections 58-27-670 and 58-27-1360 to apply to areas annexed or incorporated after the effective date of the amendments (i.e. June 6, 1984)."). Moreover, our supreme court has interpreted § 58-27-670 to mean that a rural electric cooperative possessing a valid PSC territorial assignment to serve an area subsequently annexed is "permitted to *continue service* in that area to those premises being served as of the date of the annexation or incorporation," but "prohibited, without prior consent of the municipality, from *extending or expanding* service in that area by the use of any streets, alleys, public property or public ways after the date of annexation or incorporation." City of Abbeville v. Aiken Elec. Coop., 287 S.C. 361, 370-71, 338 S.E.2d 831, 836 (1985) (emphasis added).

Finally, § 58-27-670 expressly states it is subject to the terms of § 33-49-250, which clearly limit a cooperative's ability to provide service in an annexed or incorporated area without the municipality's express consent. The plain language of the annexation exception contained in § 33-49-250(1) provides that

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incorporated electric supplier whom the municipality determines is providing "inadequate, undependable, or unreasonably discriminatory" service.

the act of annexation or incorporation by a municipality constitutes its implied consent for a cooperative "to continue serving all premises then being served . . . ." Thus, if a cooperative is serving *existing* customers, it has a statutory right to continue serving them even after annexation. See § 33-49-250(1); Carolina Power, 321 S.C. at 543, 471 S.E.2d at 140 ("[T]he intent of the [L]egislature in adopting the annexation exception was to permit co-ops to continue to serve existing customers and not require ouster of a co-op due solely to a city's annexation."). The Cooperative admits it had no customers in the annexed area prior to Burger King; hence, it does not fall within the category of cooperatives afforded the City's implied consent. See § 33-49-250(1); Duke Power, 344 S.C. at 106, 543 S.E.2d at 563 (noting that where a cooperative is not serving any customers at the time of annexation a decision barring it from serving the annexed area does not result in an impermissible ouster).

Furthermore, although the annexation exception also implies consent for cooperatives to serve "additional premises," i.e., new customers, within an annexed area, the statute expressly limits a cooperative's authority to provide new or increased service by allowing it only "until such time as the governing body of the city or town shall direct otherwise . . . ." § 33-49-250(1). As the parties stipulated the City never consented to service by the Cooperative, and the record reflects the City in fact "direct[ed] otherwise" when Charles Guerry informed the Cooperative it needed to stop the installation of new service, this aspect of the annexation exception is similarly unavailing to the Cooperative.

For the foregoing reasons, we hold § 58-27-670 was an inappropriate basis for the trial court's ruling. The trial court erred in finding the Cooperative was authorized to provide electric service to the Burger King in the absence of the City's consent. Accordingly, we reverse the court's declaratory judgment in the Cooperative's favor, and remand for entry of an order enjoining the Cooperative from providing such service.

REVERSED and REMANDED.

HEARN, C.J., CURETON, GOOLSBY, CONNOR, ANDERSON, HUFF, HOWARD and STILWELL, JJ., concur.