OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

August 6, 2001

ADVANCE SHEET NO. 28

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

3353 - Green v. Cottrell	Pending
3354 - Murphy v. Owens-Corning	Pending
3355 - The State v. Leroy Wilkes	Pending
3356 - Kenney’s Metal v. Palmieri	Pending
3357 - The State v. Richmond Truesdale, Jr.	Pending
3358 - S. C. Coastal Cons. V. SCDHEC	Pending
3360 - Beaufort Realty v. Beaufort County	Pending
3361 - The State v. Tommy Lee James	Pending
3362 - Johnson v. Arabi	Pending
3363 - Watts v. Metro Security Agency	Pending
3364 - SCDSS v. Mrs. H. and Mr. H.	Pending
3365 - State v. Laterrance Ramone Dunlap	Pending
3366 - Crafton v. Brown	Pending
3367 - State v. James Henderson, III	Pending
3369 - State v. Don L. Hughes	Pending
3370 - Bailey v. Segars	Pending
3371 - State v. Curtis Gibbs	Pending
2001-UP-016 - Stanley v. Kirkpatrick	Pending
2001-UP-123 - SC Farm Bureau v. Cynthia Rabon	Pending
2001-UP-160 - The State v. Elijah Price, Jr.	Pending
2001-UP-199 - Summerford v. Collins Properties	Denied
2001-UP-212 - Singletary v. La-Z-Boy	Pending

2001-UP-235 - State v. Robert McCrorey, III and Robert Dimitry McCrorey	Pending
2001-UP-238 - State v. Michael Preston	Denied
2001-UP-248 - Thomason v. Barrett	(2) Pending
2001-UP-282 - Holland v. Gunn	Pending
2001-UP-292 - Frazello v. Bankhead	Pending
2001-UP-300 - Robert L. Mathis, Jr. v. The State	Pending
2001-UP-304 - Jack McIntyre v. The State	Pending
2001-UP-307 - State of SC v. Joseph McQuatters	Pending
2001-UP-315 - Joytime v. Orr	(2) Pending
2001-UP-321 - The State v. Randall Scott Foster	Pending
2001-UP-322 - Edisto Island v. Gregory	Pending
2001-UP-323 - Goodwin v. Johnson	Pending
2001-UP-324 - The State v. John Williams, III	Pending
2001-UP-325 - Hessenthater v. Tri-County SisterCare	Pending
2001-UP-328 - S&R Services v. Thompson	Pending
2001-UP-335 - The State v. Andchine Vance	Pending
2001-UP-337 - The State v. Leonard Carter	Pending
2001-UP-338 - Ladd v. Rainey	Pending
2001-UP-344 - NBSC v. Renaissance	Pending
2001-UP-350 - SCDSS v. Maddox	Pending
2001-UP-355 - The State v. Gavin Jones	Pending
2001-UP-358 - McCleskey v. McCleskey	Pending

2001-UP-360 - Davis v. Davis Pending

2001-UP-363 - King v. Island Club Apartments Pending

2001-UP-364 - Clark v. Greenville County Pending

2001-UP-365 - Gaither v. Blue Cross Blue Shield Pending

2001-UP-371 - SCDHEC v. Paris Mountain Utilities Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3069 - State v. Edward M. Clarkson Pending

3231 - Hawkins v. Bruno Yacht Sales Pending

3248 - Rogers v. Norfolk Southern Pending

3254 - Carolina First v. Whittle Pending

3267 - Jeffords v. Lesesne Pending

3270 - Boddie-Noell v. 42 Magnolia Partnership Pending

3271 - Gaskins v. Southern Farm Bureau Pending

3273 - Duke Power v. Laurens Elec. Coop Pending

3274 - Pressley v. Lancaster County Pending

3276 - State v. Florence Evans Pending

3280 - Pee v. AVM, Inc. Pending

3284 - Bale v. SCDOT Pending

3289 - Olson v. Faculty House (2) Pending

3292 - Davis v. O-C Law Enforcement Comm. Pending

3293 - Wiedemann v. Town of Hilton Head Pending

3294 - State v. Nathaniel Williams Pending

3297 - Silvester .v Spring Valley Country Club		Pending
3298 - Lockridge v. Santens of America, Inc.		Pending
3299 - SC Properties & Casualty Guaranty Assn. v. Yensen	(2)	Pending
3300 - Ferguson v. Charleston/Lincoln		Pending
3301 - Horry County v. The Insurance Reserve		Pending
3307 - Curcio v. Caterpillar		Pending
3310 - Dawkins & Chishold v. Fields, et al.		Pending
3311 - SC Farm Bureau v. Wilson		Pending
3312 - Eady v. Oliver		Pending
3314 - State v. Minyard Lee Woody		Pending
3315 - State v. Ronald L. Woodruff		Pending
3319 - Breeden v. TCW, Inc.	(2)	Pending
3321 - Andrade v. SCE&G		Pending
3324 - Schurlknight v. City of N. Charleston		Pending
3325 - The Father v. SCDSS		Pending
3327 - The State v. John Peake		Pending
3329 - S. C. Dept. of Consumer Affairs v. Rent-A-Center		Pending
3330 - Richard Bowen v. Ann Bowen		Pending
3331 - Wade Jenkins v. Janna Jenkins		Pending
3332 - SC Farm Bureau Mutual Ins. Co. v. Kelly		Pending
3335 - Joye v. Yon		Pending
3337 - Brunson v. SLED		Pending
2000-UP-601 - Johnson v. Williams		Pending

2000-UP-607 - State v. Lawrence Barron Pending

2000-UP-656 - Martin v. SCDC Pending

2000-UP-677 - Chamberlain, et al. v. TIC Pending

2000-UP-783 - State v. Clayton Benjamin Pending

2001-UP-015 - Milton v. A-1 Financial Services Pending

2001-UP-019 - Baker v. Baker (2) Pending

2001-UP-022 - Thomas v. Peacock Pending

2001-UP-038 - Gary v. American Fiber Pending

2001-UP-049 - Johnson v. Palmetto Eye Pending

2001-UP-050 - Robinson v. Venture Capital Pending

2001-UP-054 - State v. Ae Khingratsaiphon Pending

2001-UP-058 - State v. Brian Keith Nesbitt Pending

2001-UP-069 - SCDSS v. Taylor Pending

2001-UP-076 - McDowell v. McDowell Pending

2001-UP-078 - State v. James Mercer Pending

2001-UP-091 - Boulevard Dev. V. City of Myrtle Beach Pending

2001-UP-092 - State v. Robert Dean Whitt Pending

2001-UP-114 - McAbee v. McAbee Pending

2001-UP-122 - State v. Robert Brooks Johnston Pending

2001-UP-124 - State v. Darren S. Simmons (2) Pending

2001-UP-125 - Spade v. Berdish Pending

2001-UP-126 - Ewing v. Mundy Pending

2001-UP-156 - Employer’s Insurance of Wausau v. Whitaker’s Inc., of Sumter Pending

2001-UP-161 - Meetze v. Forsthoefel	Pending
2001-UP-167 - Keels v. Richland County	Pending
2001-UP-186 - The State v. Coy L. Thompson	Pending
2001-UP-193 - Cabaniss v. Pizza Hut of America, Inc.	Pending
2001-UP-199 - Summerford v. Collins Properties	Pending
2001-UP-200 - Cooper v. Parsons	Pending
2001-UP-201 - Pittman v. MasTec, Inc.	Pending
2001-UP-238 - State v. Michael Preston	Pending
2001-UP-239 - State v. Billy Ray Jackson	Pending
2001-UP-249 - Hinkle v. National Casualty	Pending
2001-UP-261 - San Souci Association v. Miller	Pending
2001-UP-269 - Wheeler v. Revco	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stardancer Casino, Inc., Respondent,

v.

Robert M. Stewart, Sr., in his official capacity as Chief of the State Law Enforcement Division, Charles M. Condon, in his official capacity as Attorney General for the State of South Carolina, David P. Schwacke, in his official capacity as Solicitor for the Ninth Judicial Circuit, J. Al Cannon, Jr., in his official capacity as Sheriff for Charleston County, Gregory Hembree, in his official capacity as Solicitor for the Fifteenth Judicial Circuit, and Paul S. Goward, in his official capacity as Chief of the Horry County Police Department, Defendants,

of whom

Robert M. Stewart, Sr.,

in his official capacity as Chief of the State Law Enforcement Division, Charles M. Condon, in his official capacity as Attorney General for the State of South Carolina, Gregory Hembree, in his official capacity as Solicitor for the Fifteenth Judicial Circuit, and Paul S. Goward, in his official capacity as Chief of the Horry County Police Department are Appellants.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 25335
Heard January 23, 2001 - Filed July 30, 2001

AFFIRMED

Attorney General Charles M. Condon, Assistant Deputy Attorney General Robert D. Cook, Senior Assistant Attorney General Nathan Kaminski, Jr., Assistant Attorney General Christie Newman Barrett,

of Columbia, for appellants Robert M. Stewart, Charles M. Condon, and Gregory Hembree; and Sheryl S. Schelin and Janet Carter, of Conway, for appellant Paul S. Goward.

Saunders M. Bridges, Jr., of Florence, for respondent.

JUSTICE PLEICONES: This is an appeal from a circuit court order declaring that respondent's operation of a gambling "day cruise to nowhere" (day cruise) is not in violation of any of nine existing state criminal statutes.[1] We affirm.

Facts

Respondent brought this declaratory judgment action to determine whether any of its activities are unlawful, and to obtain a permanent injunction against appellants (the State).[2] From a circuit court order declaring respondent's actions not unlawful but denying the injunction, the State appeals.

Respondent's day cruises begin and end at an Horry County port, and make no intervening stops. The United States flag vessel is equipped with gambling devices, including slot machines, blackjack tables, a roulette table, craps tables, and poker tables. Once the ship is beyond South Carolina's three mile territorial waters, gambling is permitted. Before the vessel reenters the territorial waters, the equipment is secured and unavailable for use. The equipment remains on the vessel at all times.

---

[1]S.C. Code Ann. §§16-19-10; 16-19-20; 16-19-30; 16-19-40; 16-19-50; 16-19-120; 16-19-130; 12-21-2710; and 12-21-2712.

[2]The four appellants have been sued in their official capacities as state and county law enforcement officers and prosecutors. We will refer to them collectively as "The State."

At least one other cruise line operates "day cruises" out of Charleston County. No prosecution has been made or threatened against the cruise line(s) operating out of Charleston, while respondent has been threatened with criminal prosecution and seizure of its gambling devices.

The issue in this case is whether respondent's operations violate any **existing** state criminal statute.

Federal Law

In order to explain our decision, we find it necessary to briefly review federal law in this area. Prior to 1992, federal law prohibited gambling on any United States flag ship. See 18 U.S.C §1081 (2000)[3]; 15 U.S.C. §1175(a).[4] The effect of these federal statutes was to put U.S. flag vessels at a competitive disadvantage in the passenger cruise industry, since the statutes did not prevent foreign flag vessels from offering gambling once the ship was beyond state territorial waters. See Casino Ventures v. Stewart, 183 F.3d 307 (4th Cir. 1999), *cert. denied* ,2000 U.S. Lexis 153 (Jan. 10, 2000); United States v. One Big Six Wheel, 987 F.Supp. 169 (E.D.N.Y. 1997).

In 1992, Congress amended §1175 of the Johnson Act and created several exceptions to its general prohibition on the use or possession of any gambling device on a U.S. flag vessel. 15 U.S.C. §1175(b). Pursuant to the amendment, the possession or transport of a gambling device within state territorial waters is not a violation of §1175(a) if the device remains on board the vessel and is used only outside those territorial waters. §1175(b)(1). Although the effect of this subsection was to permit the operation of "day cruises," another section provided states with a method for having "day cruises" remain a **federal** offense. §1175(b)(2)(A). Thus, "day cruises" such as that operated by respondent may be subject to **federal** criminal prosecution under §1175(a) if they begin and end in a state that "has enacted a statute the terms of which prohibit that use . . . ." Id.

---

[3]Part of the Gambling Ship Act, 18 U.S.C. §§1081-1084.

[4]Part of the Johnson Act, 15 U.S.C. §§1171-1178.

As noted above, the issue in this case is whether respondent's operations violate any existing state criminal statute. The amendments to the Johnson Act do not preempt state laws prohibiting gambling and gambling devices, Casino Ventures, supra, and thus the Act has no direct bearing on the issues before the Court. However, while federal litigation pertaining to the meaning of the 1992 amendments was pending, the General Assembly amended several of the relevant state statutes. As explained below, the legislature's expression of intent in amending these statutes is relevant to the issue we decide today.

State Statutes

This declaratory judgment action determined the applicability to respondent's activities of nine criminal statutes. The circuit court held four of the statutes were inapplicable to respondent's operations, and the State concedes that the three lottery statutes[5] and the bookmaking statute[6] are not implicated here. Two of the challenged statutes[7] provide for the seizure and destruction of *unlawful* gambling and gaming devices. Since we agree with the circuit court that respondent's possession and use of the devices on board its vessel are not unlawful under our substantive state statutes, we need not discuss these two seizure statutes.

We will explain below why respondent's operations do not violate the remaining statutes, S.C. Code Ann. §§16-19-40; 16-19-50; and §12-21-2710.

§16-19-40

Section 16-19-40 provides:

---

[5]S.C. Code Ann. §§16-19-10; -20; and -30 (1985 and Supp. 2000).

[6]S.C. Code Ann. §16-19-130 (1985).

[7]S.C. Code Ann. §12-21-2712 (Supp. 2000) and §16-19-120 (1985).

[From and after July 1, 2000,[8] this section reads as follows:]

> **If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open place** at (a) any game with cards or dice, (b) any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank (f) any other table or bank of the same or the like kind under any denomination whatsoever or (g) any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes, except the games of billiards, bowls, backgammon, chess, draughts, or whist when there is no betting on any such game of billiards, bowls, backgammon, chess, draughts, or whist or shall bet on the sides or hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days or fined not over one hundred dollars, **and every person so keeping such tavern, inn, retail store, public place, or house used as a place for gaming or such other house shall**, upon being convicted thereof, upon indictment, be imprisoned for a period not exceeding twelve months and forfeit a sum not exceeding two thousand dollars, for each and every offense.
> (emphasis added).

Section 16-19-40 has two clauses; the first prohibits the playing of games in certain locations and the second provides for punishment of the person "keeping" that location. Since it is a criminal statute, it must be construed strictly against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991) (strict construction of §§16-19-40 and -60). Ironically, the current statute does not cover respondent's

[8]The amendment added subsection (g).

video poker machines. The 1999 amendment added clause (g), which prohibits gambling on a machine **licensed** pursuant to §12-21-2720. Video poker machines can no longer be licensed, and consequently are not covered by this statute.[9] State v. Blackmon, supra. At most, then, §16-19-40 may apply to respondent's gaming tables. For the reasons given below, however, we conclude that it does not.

We first consider the portion of the statute that criminalizes the playing of certain games. The statute lists numerous specific locations at which the playing of games are prohibited. Since the list of prohibited locations does not include any term such as 'vessel,' ' ship,' or 'boat,' we hold that the "playing" clause does not apply to respondent's operations. See Brown v. State, ___ S.C. ___, 540 S.E.2d 846 (2001) (where criminal statute very specifically lists locations covered, those not mentioned are excluded, applying maxim *expressio unius est exclusio alterius*).

Further, because a 'vessel or float' is not a prohibited location under the "playing" clause of §16-19-40, but is a named location under the bookmaking statute, §16-19-130, and because both statutes are part of the anti-gambling criminal statutes, we hold that the circuit court properly concluded this portion of the statute was inapplicable to respondent's operations. See, e.g., Great Games, Inc. v. South Carolina Dep't of Revenue, 339 S.C.79, 529 S.E.2d 6 (2000) (statutes which are part of the same legislative scheme should be construed together).

The portion of §16-19-40 criminalizing the "keeping" of a gaming location uses slightly different language and arguably could be read to cover respondent's gaming table activities. While the "playing clause" lists

---

[9]Of course, possession or use of these machines, whether licensed or not, is absolutely prohibited under §12-21-2710. State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000). As explained later in this opinion, this statute does not apply to the machines located on respondent's ship.

specific locations, the "keeping clause" punishes "every person so keeping **such** tavern, inn, retail store, **public place**, or house used as a place for gaming . . . . " (emphasis added) Respondent's vessel is a public place, and therefore seemingly covered under the literal language of this clause. Reading the statute as a whole, however, we conclude this 'public place' language is a reference back to the locations listed in the "playing" part of the statute**.** The "keeping" clause does not literally track the language of the "playing" clause, but does refer to "keeping **such**" a location. To read the "keeping" clause otherwise would result in "playing" being a criminal act in more and different locations than would "keeping." This, in turn, would lead to the absurd result that the person running the game could not be prosecuted if, for example, he was operating in a private street, field, or open wood while a person playing there would be prosecuted. The absurdity of this result is heightened by the fact the General Assembly has chosen to punish a "keeper" more harshly than a "player." See Broadhurst v. City of Myrtle Beach Elec. Comm'n, 342 S.C. 373, 537 S.E.2d 543 (2000) (no matter how plain statutory language is, it will be construed to avoid absurd result). Respondent's vessel is not a "public place" within the meaning of §16-19-40.

We affirm the circuit court's conclusion that respondent's operations do not violate §16-19-40.

§16-19-50 and §12-21-2710

These two code sections criminalize actions of a "person who shall set up, keep, or use [games used for gambling purposes]" (§16-19-50) and make it unlawful "to keep on your premises" any devices used for gambling (§12-21-2710). In determining the applicability of these two statutes, we look at the General Assembly's expression of its legislative intent, as reflected in 1999 Act No. 125.

As noted above, in 1999 the Fourth Circuit held the Johnson Act did not preempt existing state gambling statutes. Casino Ventures, supra. This appellate decision reversed a district court opinion which had held that under

the 1992 amendments to the Johnson Act, a state could only ban "day cruises" by enacting a statute which "opted out" of the Act by prohibiting the repair or use of gambling equipment on voyages. Casino Ventures v. Stewart, 23 F. Supp. 2d 647 (D.S.C. 1998).

While the appeal from that district court decision was pending before the Fourth Circuit, the General Assembly enacted comprehensive video poker legislation which, among other things, amended §16-19-50 and §12-21-2710.[10] 1999 Act No. 125. Act No. 125 contains an intent clause[11] which states in part:

> The General Assembly by enactment of this act has no intent to enact any provision allowed by 15 U.S.C. 1175, commonly referred to as the Johnson Act, or to create any state enactment authorized by the Johnson Act.

The intent of the legislature is determined in light of "the overall climate in which the legislation was amended." State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994). At the time the legislature enacted Act No. 125, a federal district court had ruled "day cruises," like those operated by respondent, were permissible unless and until the legislature "opted out" of the Johnson Act. While this ruling was later found to be erroneous by the Fourth Circuit, we agree with the circuit court that "in light of the overall climate" then existing, this intent clause in Act No. 125 must be read to evince a legislative intent **not** to make the cruises unlawful.

The State offers no alternative construction of this intent clause, but instead argues "[w]hatever may have prompted the insertion of [this intent

---

[10]This act also amended §16-19-40 and §12-21-2712. Section 12-21-2712 is a "seize and destroy" statute which applies only if the devices are otherwise unlawful. As explained earlier, §16-19-40 by its own terms does not apply to gaming tables located on respondent's vessel.

[11]Section 22(B).

language in Act No. 125], the Fourth Circuit's subsequent decision made its purpose clear." We do not agree that subsequent action by a separate entity can either alter or elucidate legislative intent.

In light of this language in the act amending §§12-21-2710 and 16-19-50, we conclude the legislature did not intend them to prohibit "day cruises." Our conclusion that the General Assembly does not intend that any current statute be construed to ban "day cruises" is reinforced by its subsequent rejection of legislation which would have enacted new gaming statutes explicitly criminalizing them in 1999 and 2000. See House Bill 3002 (1999); Senate Bill 0002 (2000).

Accordingly, we affirm the circuit court's conclusion that neither of these two "possession" statutes apply to respondent's conduct. As explained below, §12-21-2710 is also inapplicable for a separate reason.

§12-21-2710

Section 12-21-2710 makes it a misdemeanor for a person to keep a slot machine or video gambling machine "on his premises." Mere possession, even of an inoperable machine, is a violation of this statute. State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000). On its face, then, respondent is in violation of this statute. This section is part of the Video Game Machines Act, pursuant to which the Department of Revenue has promulgated regulations which define "premises" as:

> A single place or premises must be a fixed location. It does not include moving property such as a boat or train, unless such property is permanently affixed to a specific location.
> 27 S.C. Regs. 117-190 (Supp. 2000).

Since this regulatory definition was submitted to, and acquiesced in, by the General Assembly, it is entitled "most respectful consideration," Faile v. South Carolina Employment Sec. Comm'n, 267 S.C. 536, 230 S.E.2d 219

(1976), and "should be given great weight." Stone Mfg. Co. v. South Carolina Employment Sec. Comm'n, 219 S.C. 239, 64 S.E.2d 644 (1951). While we are not bound to accept this definition, Stone Mfg. Co., supra, giving this regulation the deference it is due, we hold that there is no cogent reason to overturn it. Faile, supra. Accordingly, respondent is not in violation of §12-21-2710 because it is not storing gaming equipment on a "premises" within the meaning of that statute.

Conclusion

We affirm the circuit court's ruling that respondent is not in violation of any state criminal statute. As noted above, the applicability of the three lottery statutes (§§16-19-10; -20; -30) and the bookmaking statute (§16-19-130) are not at issue here. Further, §16-19-40 is inapplicable because respondent's vessel is not a prohibited location nor a public place as described therein, and §12-21-2710 does not apply since the vessel is not a proscribed "premise." In light of the intent clause of 1999 Act No. 125, we agree with the circuit court that the legislature did not intend that either §12-21-2710 or § 16-19-50 apply to "day cruise" operations. Further, we conclude that the General Assembly's rejection of statutes which would explicitly criminalize day cruises is evidence of its understanding that none of our existing statutes apply to such operations. Since the devices are not unlawful, they are not subject to seizure under either §12-21-2712 or §16-19-120.

Respondent is not subject to criminal prosecution under any **existing** criminal statute, and therefore we need not address its "selective enforcement" argument. Further, we emphasize that the General Assembly is free to enact legislation which effectively bans or makes a state crime "day cruise" operations such as that operated by respondent.

For the reasons given above, the order of the circuit court is

AFFIRMED.

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

JUSTICE BURNETT: I respectfully dissent from the majority's conclusion respondent is not subject to criminal prosecution under any existing state statute. Respondent admits it possesses slot machines, blackjack tables, roulette tables, craps tables, and poker tables. In my opinion, possession of these items within the territorial waters of the State of South Carolina subjects respondent to the criminal laws of this state.

S.C. Code Ann. § 16-19-50 (Supp. 2000) makes it unlawful to

> set up, keep, or use any (a) gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (b) roley-poley table, (c) table to play at rouge et noir, (d) faro bank (e) any other gaming table or bank of the like kind or of any other kind for the purpose of gaming. . . .

Violators of this section are subject to fines and possible imprisonment. Id.; see also S.C. Code Ann. § 16-19-100 (1985).

S.C. Code Ann. § 12-21-2710 (Supp. 2000) makes it unlawful for any person

> to *keep on his premises* or operate or permit to be kept on his premises or operated *within this State* any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or

> other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

(emphasis added). Respondent's gambling devices which are prohibited by § 12-21-2710 are subject to seizure, and, if a magistrate determines they violate § 12-21-2710 after a hearing, destruction. S.C. Code Ann. § 12-21-2712; State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000).

Nowhere do these statutes provide exceptions for gambling devices or tables located on boats. Yet despite the plain language of these statutes, the majority concludes the General Assembly did not intend them to apply to the gambling devices aboard vessels such as respondent's. The majority bases this conclusion on the "intent" clause contained in Act 125, which stated in part:

> The General Assembly by enactment of this act has no intent to enact any provision allowed by 15 U.S.C. 1175, commonly referred to as the Johnson Act, or to create any state enactment authorized by the Johnson Act.

The majority acknowledges the Fourth Circuit Court of Appeals has explicitly held the Johnson Act does not preempt state gambling laws: "That federal enactment does not even apply to South Carolina's territorial waters – it leaves regulation of those waters to the state." Casino Ventures v. Stewart,

183 F.3d 307, 312 (4th Cir. 1999), rev'g 23 F. Supp. 2d 647 (D.S.C. 1998), cert. denied 528 U.S. 1077 (2000). In fact, as the majority correctly explains, the Fourth Circuit held that any state enactment pursuant to the Johnson Act would determine whether gambling day cruises violate **federal** law, not state law. Thus, under Casino Ventures, the legislature's intent statement in Act 125 has *no impact on state law whatsoever*. Nevertheless, the majority concludes that, because the Fourth Circuit's opinion in Casino Ventures was not filed until four days after Act 125 was signed into law,[12] the General Assembly must have intended to exempt gambling day cruises from the general prohibition on possession of gambling tables or devices. In essence, the majority would have us infer this startling intent, in clear contravention of the plain language of these statutes, solely on the basis of an earlier erroneous construction of federal law by the District Court of South Carolina.

South Carolina's authority over gambling activity extends to the State's territorial waters. See Casino Ventures, 183 F.3d at 308. The criminal statutes of this state unequivocally make it unlawful to keep gambling tables or devices in this state. See §§ 16-19-50 and 12-21-2710. We have held mere possession of gambling devices in this state – operational or inoperational, in storage or in use – violates state law. State v. 192 Coin-Operated Video Game Machines, supra. If the General Assembly had intended to exempt vessels conducting day cruises from this prohibition, it would have done so in plain terms. See Tilley v. Pacesetter, 333 S.C. 33, 508 S.E.2d 16 (1998) (if legislature had intended certain result in statute it would have said so). The majority's ruling exempts casino day cruises from the general criminal laws of this state, without any clear expression of legislative intent to do so.

The majority also concludes § 12-21-2710 is inapplicable for an additional reason. Although the majority acknowledges respondent is in violation of the statute on its face, it nevertheless finds the statute

---

[12]Act 125 was signed into law on July 2, 1999. Casino Ventures was filed on July 6, 1999.

inapplicable because, according to the majority, the word "premises" in § 12-21-2710 does not include a boat. In support of this reading, the majority quotes the following language of 27 S.C. Regs. 117-190:

> A single place or premises must be a fixed location. It does not include moving property such as a boat or a train, unless such property is permanently affixed to a specific location.

This regulation is both inapplicable and defunct. The regulation, by its own terms, defines "single place or premises" in the now-repealed statute which limited the number of machines which may be located in a "single place or premises." Id.; see S.C. Code Ann. § 12-21-2804 (repealed, effective July 1, 2000) (limiting number of video poker machines which could be licensed in a "single place or premises."). The regulation's definition of "single place or premises" under a now-defunct statute is in no way applicable to the definition of the word "premises" in § 12-21-2710. On the contrary, in the absence of a statutory definition, the word "premises" should receive its plain and ordinary meaning. As the majority acknowledges, § 12-21-2710, on its face, criminalizes respondent's possession of gambling devices within the State of South Carolina.

I would reverse the order of the circuit court and hold boats located within South Carolina and its territorial waters are subject to the same laws concerning gambling as any other premises in this state. Furthermore, I would decline to address respondent's selective enforcement argument since the record reflects no enforcement of these statutes has taken place as of this time.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Jefferson M. Long, Jr, Respondent.

Opinion No. 25336
Heard June 20, 2001 - Filed July 30, 2001

DEFINITE SUSPENSION

Russell B. Long, of Myrtle Beach, for respondent.

Attorney General Charles M. Condon and Assistant Attorney General Tracey C. Green, both of Columbia, for the Office of Disciplinary Counsel.

PER CURIAM: In this attorney disciplinary proceeding, the sub-panel and the full panel recommended an indefinite suspension. We impose a two-year definite suspension.

FACTS

The Commission on Lawyer Conduct filed formal charges against respondent, Jefferson M. Long, Jr., regarding two client matters and his guilty plea in federal court. Respondent was placed on interim suspension on July 22,

1999. In re Long, 335 S.C. 584, 518 S.E.2d 264 (1999). Respondent did not answer the formal charges and was not present at the hearing. However, in a letter to the Court dated December 5, 2000, he acknowledged the pending disciplinary charges and admitted the infractions alleged against him. In the letter, respondent sought to tender his resignation from the practice of law.

Criminal Conviction

Respondent pled guilty to one count of violating Section 1001 of Title 18 of the United States Code by knowingly and willfully making a false statement of a material fact in a matter within the jurisdiction of a department or agency of the United States. Respondent's plea arose out the federal sting operation "Operation Lost Trust."

Client A Matter

Respondent was retained to represent Client A in a criminal matter. Despite Client A's requests, respondent failed to perfect an appeal as required by Rule 602, SCACR, and In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991).[1] Client A also repeatedly requested his file; however, respondent delayed for an unreasonable amount of time before releasing the file. Respondent failed to properly communicate with Client A regarding his conviction and appeal.

Client B Matter

Respondent was retained to represent Client B in a criminal matter. Despite Client B's requests, respondent failed to perfect an appeal as required by Rule 602, SCACR, and In re Anonymous Member of the Bar, 303 S.C. 306,

[1]In the case of In re Anonymous, the issue was whether an attorney, retained for purposes of a criminal trial only, must assist his client in perfecting an appeal. The Court held that where the client desires an appeal, the attorney must serve and file the Notice of Appeal to protect the client's right to appeal.

400 S.E.2d 483 (1991). Respondent incorrectly advised Client B that he had no grounds for appeal and failed to properly communicate with Client B regarding his conviction and appeal.

DISCUSSION

The authority to discipline attorneys and the manner in which the discipline is given rests entirely with the Supreme Court. E.g., In re Yarborough, 337 S.C. 245, 524 S.E.2d 100 (1999). Because respondent failed to answer the formal charges against him, this failure constitutes an admission of the factual allegations. See Rule 24(a), RLDE, Rule 413, SCACR. Consequently, we need only determine the appropriate sanction for respondent. See In re Rast, 337 S.C. 588, 524 S.E.2d 619 (1999); In re Thornton, 327 S.C. 193, 489 S.E.2d 198 (1997).

Respondent violated several Rules of Professional Conduct by: (1) failing to provide competent representation; (2) failing to abide by a client's decisions regarding the scope of representation; (3) failing to diligently represent a client; (4) failing to properly communicate with a client; (5) failing to safekeep a client's property; (6) improperly terminating representation of a client; (7) failing to properly serve as an advisor to a client; and (8) violating the rules of professional conduct; (9) committing a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; (10) engaging in conduct involving moral turpitude; (11) engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and (12) engaging in conduct prejudicial to the administration of justice. See Rules 1.1,1.2, 1.3, 1.4, 1.15, 1.16, 2.1, & 8.4, RPC, Rule 407, SCACR.

Additionally, respondent violated the Rules for Lawyer Disciplinary Enforcement by: (1) violating the Rules of Professional Conduct; (2) failing to respond to a lawful demand from a disciplinary authority; (3) being convicted of a serious crime; (4) engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law; and (5) violating the oath of office taken upon admission to practice law in this state. See Rule 7(a), RLDE, Rule

413, SCACR.

In other disciplinary cases involving criminal convictions stemming from "Operation Lost Trust" we have imposed both a definite and an indefinite suspension. See In re Ferguson, 314 S.C. 278, 443 S.E.2d 905 (1994) (indefinite suspension); In re Limehouse, 307 S.C. 278, 414 S.E.2d 783 (1992) (indefinite suspension); In re Crow, 308 S.C. 128, 417 S.E.2d 534 (1992) (six-month definite suspension). We find that respondent's criminal conviction relating to "Operation Lost Trust" and his misconduct in the two client matters warrant the sanction of a two-year definite suspension.

Accordingly, respondent is definitely suspended from the practice of law for two years, retroactive to the date of his interim suspension. We will reconsider respondent's letter of resignation at the end of the definite suspension. Furthermore, we order respondent to pay the costs of these disciplinary proceedings to the Commission on Lawyer Conduct within 30 days of the date of this opinion. Respondent shall file an affidavit with the Clerk of Court, within 15 days of the date of this opinion, 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

The State, Respondent,

v.

Michael Paul Saltz, Appellant.

Appeal From Richland County
James Carlyle Williams, Jr., Circuit Court Judge

Opinion No. 25337
Heard June 7, 2001 - Filed August 6, 2001

REVERSED

Jack B. Swerling, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Solicitor Warren B. Giese, all of Columbia, for respondent.

JUSTICE BURNETT: Michael Saltz (appellant) appeals his

conviction for murder. We reverse.

FACTS

Appellant was convicted of the murder of twelve-year-old Joseph Barefoot. Joseph disappeared on Sunday, May 25, 1997. As part of an extensive search for the missing boy, fliers were distributed throughout the community. The fliers described Joseph and indicated he was last seen in a white Chevy truck with a white male, aged fifteen to nineteen, named Mikey. It was inaccurate to state Joseph was "last seen" in the described truck. Two different witnesses described speaking to Joseph on Sunday afternoon, when he was out riding his bicycle. However, investigators later confirmed that seventeen-year-old Michael Saltz had given Joseph and his friend Charlie Mengedoht a ride in his white Chevy truck on Saturday, the day prior to Joseph's disappearance.

Because of his description on the missing person flier, appellant was the brunt of considerable teasing during the summer of 1997, while Joseph remained missing. Appellant reportedly "bragged" about killing Joseph to a number of his teenage friends, in what he describes in his brief to this Court as an "irrational[] and self-destructiv[e]" reaction "to being cast as prime suspect in a highly publicized case." There was testimony appellant said he "did it" "to get everybody off his back."

On September 16, 1997, Joseph's skeletal remains were discovered in a heavily wooded area behind the golf course near Starling Goodson Road. Within days of the discovery of Joseph's remains, three of appellant's friends – Sydney Johnston, Selina Welch, and Todd Ledford – all provided sworn statements to police implicating appellant. Appellant was brought in for questioning and eventually confessed to the murder. Appellant's seven consecutive statements are highly contradictory,[1] and the final statement, in which he incriminates only himself, is factually

[1]The contents of the statements and the circumstances surrounding their making are discussed *infra* in part IV.

improbable. However, some details included in appellant's statements are consistent with evidence discovered at the crime scene. Most significantly, appellant stated he tied Joseph to a tree with a black nylon cord. A black nylon cord was found tied around a tree where Joseph's bones were found.

ISSUES

I. Did the trial court erroneously rule on the admission of prior consistent statements?

A. Statement of Sydney Johnston

B. Statement of Tina Ashford

II. Did the trial court erroneously admit irrelevant evidence?

A. Appellant's school attendance record

B. Witness's feelings

III. Did the trial court err in limiting appellant's cross-examination of a witness for credibility and bias?

IV. Did the trial court err in admitting appellant's statements as voluntary?

V. Did the trial court err in denying appellant's motion for a directed verdict?

DISCUSSION

I. Prior consistent statements

Appellant argues the trial court twice erred in ruling on the admissibility of prior consistent statements of witnesses. In the first instance, appellant asserts the trial court erroneously permitted hearsay to bolster a prosecution witness's testimony. In the second instance, appellant asserts the

trial court erroneously refused to admit testimony concerning a prior consistent statement of a defense witness. We agree the court erred in both instances.

The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995).

Prior consistent statements of a witness are not inadmissible hearsay if

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.

Rule 801(d)(1)(B), SCRE. Thus, in order for a prior consistent statement to be admissible pursuant to this rule, the following elements must be present:

> (1) the declarant must testify and be subject to cross-examination,
> (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive,
> (3) the statement must be consistent with the declarant's testimony, and
> (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the

alleged improper influence or motive.

A. Sydney Johnston/Jan Kopel

Appellant first argues the trial court erred in permitting Jan Kopel to testify concerning a prior consistent statement made by Sydney Johnston.

Sydney testified that appellant stated, "I killed Joseph Barefoot." On cross-examination, defense counsel questioned Sydney as follows:

> Defense Counsel: Do you recall telling me that the first thing he said was, "I really didn't do it"? Do you recall?
> Witness: No, I didn't say that.
> Defense Counsel: You don't recall saying that?
> Witness: No, I don't.
> Defense Counsel: Do you recall telling me that when he finally said, "I did it," you used the word "sarcastically"? Do you recall that?
> Witness: Yes. And my version of "sarcastically" is kind of bragging, kind of, I don't want to say vain because that's – but it's bragging.
> Defense Counsel: Okay, but you don't recall saying that the first thing he said was, "I really didn't do"? [sic].
> Witness: Right.
> Defense Counsel: You don't recall that part?
> Witness: No.
> . . . .
> Defense Counsel: Well, do you recall saying to me at that time with everyone else present, not using the words that he said, "I killed him," but he said, "Yeah, I did it," as opposed to, "I killed him"? Do you recall making that statement?
> Witness: Yes, I do, to you. And the more that I've

> been able to go back and look over everything, it was a "Yeah, I killed him" thing.

Over appellant's objection, the trial court permitted Kopel to testify concerning the following conversation, which took place between Kopel and Sydney the day after Joseph's remains were found:

> She [Sydney] said that – they call him "JoJo" Barefoot or this child, "JoJo," had been found and that someone named Mikey had told her a while back – she didn't say exactly when – but he had killed this child that was missing. And she didn't know about anybody being missing or no bones had been found or body had been found or anything. And so she just kind of didn't know whether to believe him or not and was feeling guilty because she felt like maybe if she had come forward sooner that they may have found him.

Appellant argued to the trial court, and now argues on appeal, that Kopel's testimony was improperly permitted to bolster Sydney's testimony. Appellant argues that Rule 801(d)(1)(B), SCRE, is inapplicable in this instance because he very deliberately did *not* suggest that Sydney had recently fabricated her testimony or was acting under an improper influence or motive. On the contrary, appellant asserts, his cross-examination was very carefully restricted to whether or not Sydney's trial testimony was consistent with a statement she had made to defense counsel and his investigator shortly before trial. The trial court ruled that defense counsel's cross-examination placed Sydney's credibility before the jury, and thus Rule 801 permitted the State to offer a prior consistent statement. Thus, the precise issue here is whether questioning the witness concerning a prior *in*consistent statement invokes Rule 801(d)(1)(B). We conclude it does not.

Under the common law in South Carolina, proof of a prior consistent statement was admissible to rehabilitate a witness who had been

impeached with a prior inconsistent statement. See, e.g., Burns v. Clayton, 237 S.C. 316, 336-37, 117 S.E.2d 300, 310 (1960) ("Where the credit of a witness has been impeached by proof or imputation that he has made declarations inconsistent with what he has sworn to, an exception to the hearsay rule permits proof of his declarations, consistent with what he has sworn to, made on other occasions prior to the existence of his relation to the cause."). The State relies on these pre-SCRE cases. Rule 801(d)(1)(B) changed this rule. The plain language of Rule 801(d)(1)(B) only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence. Although questioning a witness about a prior inconsistent statement does call the witness's credibility into question, that is not the same as charging the witness with "recent fabrication" or "improper influence or motive." Cf. Tome v. United States, 513 U.S. 150, 157 (1995) ("Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited. . . . The rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told."). Appellant questioned the accuracy of the witness's memory; he did *not* charge her with recent fabrication or improper influence or motive. The State should not have been permitted to introduce hearsay testimony of Sydney's prior consistent statement because appellant's cross-examination of Sydney did not imply recent fabrication or improper influence or motive. The trial court's admission of the testimony pursuant to former evidentiary rules constituted an error of law amounting to an abuse of discretion.

Moreover, the error was not harmless. Erroneously admitted corroboration testimony is not harmless merely because it is cumulative. On the contrary, "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994). Here, Sydney's testimony was weak and not

particularly credible,[2] and the improper corroboration could not have been harmless.

B. Tina Ashford/Buddy Hancock

Appellant next argues the trial court erred in refusing to allow Buddy Hancock to testify concerning a prior consistent statement made by Tina Ashford, a defense witness. This issue involves a different aspect of Rule 801(d)(1)(B), SCRE.

Charlie Mengedoht testified for the prosecution. On cross-examination, appellant was permitted to attempt to impeach Charlie by asking him about a statement he had allegedly made to Tina Ashford implicating himself in Joseph's death:

> Defense Counsel: Did you make a statement at that time that you and others put a bag over Joseph's head, beat him and kicked him. He cried and whimpered and tried to crawl away but could not, and that you left the body in the woods behind the golf course behind Starling Goodson Road and that you went back several times to view the body?
> Witness: No, I don't recall saying that.

The statement did not qualify as admissible evidence of third party guilt; thus, the questions were permitted for impeachment purposes only, and the jury was so instructed. On re-direct, Charlie testified that Tina was appellant's girlfriend, but had once been his (Charlie's) friend.

During the defense case, Tina testified that in the summer of

---

[2]On direct examination, when asked what appellant said, Sydney first answered, "I don't remember," and then later said, "I do remember what he said. It was – he said, 'I killed Joseph Barefoot.'"

1997, Charlie told her he and unidentified accomplices killed Joseph as described above. This testimony was consistent with an affidavit Tina had signed on February 23, 1999. On cross-examination, Tina admitted appellant was her boyfriend of four months. However, she testified she did not know appellant in the summer of 1997. The solicitor asked Tina:

> So thirteen days before the jury is going to be deciding Michael Saltz's, whether he's guilty or innocent of this crime, thirteen days prior to that jury being selected you go into your boyfriend that you love's lawyer's office and sign an affidavit indicating somebody else might have been involved in this incident that happened two years ago?

When asked why she did not contact the police right away, Tina testified that she told her father about Charlie's statement, and her father contacted the police.

The defense then called Buddy Hancock, Tina's father. After a discussion of Rule 801(d), the State additionally objected to Hancock testifying because he had been present in the courtroom during his daughter's testimony. The trial court permitted the defense to proffer Hancock's testimony prior to the court ruling on its admissibility. Hancock testified in camera that Tina came to him in the summer of 1997 and told him what Charlie allegedly told her concerning Joseph's death. However, when asked whether he contacted the police concerning the statement, Hancock testified:

> Witness: I told [the police] the little boy, what I heard all around lower Richland there, the little boy was run away from home and he was out in the woods and he was going down to Food Lion, was out in the woods behind Food Lion, going in the Food Lion getting food, sneaking food out of there, going back in the woods.
> Defense Counsel: Did you tell them anything about

> Charlie Mengedoht?
> Witness: I told them Charles was – Charles was – at the time, what I hear around there, Charles was taking him food because he was hiding him out.

The trial court refused to permit Hancock to testify before the jury, but did not state a reason.

This line of questioning is precisely what Rule 801(d)(1)(B) was designed to address. The Solicitor's questions charged the witness with both recent fabrication (coming forward thirteen days before trial) and improper motive (her romantic relationship with defendant). Thus, Rule 801(d)(1)(B) permits appellant to offer evidence of a prior consistent statement made before the alleged fabrication or improper motive arose. The issue here is thus whether the trial court could, in its discretion, nevertheless exclude corroborating testimony for other reasons. Although the judge did not give a reason for his ruling, the State offers two reasons why it was within the court's discretion to disallow the testimony. We may affirm for any reason appearing in the record. Rule 220(c), SCACR.

First, the State asserts Hancock's testimony was tainted by his "*apparent* violation" of the sequestration order (emphasis added). The decision whether to waive a sequestration order for witnesses present during the trial rests in the sound discretion of the trial judge. State v. Cabbagestalk, 281 S.C. 35, 314 S.E.2d 10 (1984). Although it may have been within the trial court's discretion to disallow Hancock's testimony if Hancock had violated the sequestration order, the record is insufficient to support such a finding. Second, the State asserts Hancock's testimony could "possibly lead to unfair prejudice, confusing of the issues [sic]" under Rule 403, SCRE. We do not see any basis for excluding Hancock's testimony under Rule 403. Appellant should have been allowed to answer the State's charge of recent fabrication and improper motive. Since we have already ruled appellant is entitled to a new trial, we need not conduct a harmless error analysis.

II. Irrelevant evidence

Appellant argues the trial court erred in admitting irrelevant evidence on two occasions, each of which will be discussed in turn.

Only relevant evidence is admissible. Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one. State v. Kelly, Op. No. 25226 (S.C. Sup. Ct. filed Jan. 8, 2001) (Shearouse Adv. Sh. No. 1 at p.13, 17). The trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion. Id.

A. Appellant's attendance record

Appellant argues the trial court abused its discretion in admitting his school attendance record. We agree.

Over appellant's objection, the court allowed the records custodian of Richland County School District One to testify that appellant was absent from school without an excuse on Thursday, May 29, 1997. The fact appellant was absent from school on Thursday, May 29, 1997 did not tend to make "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See Rule 401, SCRE. Joseph was last seen on Sunday, May 25, 1997. His body was found on September 16, 1997. The State asserts the evidence was relevant, although admittedly of "little probative value," because it "reveal[ed] that [appellant's] whereabouts on

that date were [as] unknown as [Joseph's]." However, the State presented no evidence Thursday, May 29, 1997 had any consequence to this case. On the contrary, introduction of this irrelevant evidence encouraged the jury to speculate that Thursday, May 29, 1997 must be significant to the case in some way unknown to them. Moreover, admission of this irrelevant evidence served to portray appellant as a delinquent. Even if the evidence were marginally relevant, it unfairly prejudiced appellant, confused the issues, and misled the jury, and therefore should have been excluded.

B. Testimony of Shasta Mengedoht

Appellant argues the trial court abused its discretion in admitting irrelevant testimony of Shasta Mengedoht concerning her feelings. We agree.

Mengedoht was close friends with Jackie Barefoot, Joseph's mother, and she was also the mother of Charlie Mengedoht, Joseph's friend. She testified for the prosecution. Defense witnesses had testified that Joseph was seen playing in the Mengedohts' yard after the time of his disappearance. In reply, the State called Mengedoht. The following colloquy took place:

> Solicitor: Are you aware that there has been inferences made that Joseph Barefoot was at your house in June and July of 1997?
> Witness: I was only made aware of that last night.
> Solicitor: How does that make you feel?
> Defense Counsel: Objection, Your Honor.
> The Court: Overruled.
> Witness: Well, it's really sad. You know, Jackie and I, we've watched a lot of sunsets together. And every time –
> Defense Counsel: Your Honor, I think this is not relevant.
> The Court: Wait a minute. Sir?

Defense Counsel: This is not relevant, Your Honor.
Solicitor: He's making the inference, Your Honor.
The Court: Yes, sir. I'm going to allow her to testify.
Defense Counsel: I mean, I understand that – the bottom line is that how that makes her feel is not relevant to any issue in this case. It doesn't affect credibility. It doesn't affect any issue in this case.
The Court: Your objection is overruled. You may answer the question.

Witness: As I was saying, we had watched a lot of sunsets together, and each time I would say, "God, I hope Joe can see this too," and find some kind of comfort and know that we would not give up and that we loved him. It's just sad that we have to sit here now. And I was –

Defense Counsel: Objection, Your Honor.
The Court: All right, thank you ma'am. That's enough.

The trial court abused its discretion in allowing this testimony over appellant's repeated objections. The witness's thoughts and feelings did not make the existence of any fact of consequence to the case more or less probable. On the contrary, the testimony only served "to arouse the sympathy or prejudice of the jury." Cf. State v. Langley, 334 S.C. 633, 647, 515 S.E.2d 98, 100 (1999) (a photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts).

Additionally, we address the State's contention that this error is unpreserved because appellant did not move to strike the testimony. The

requirement that a party move to strike objectionable testimony applies when an objection has been *sustained*. See State v. Wingo, 304 S.C. 173, 177-78, 403 S.E.2d 322, 325 (Ct. App. 1991) (a motion to strike is necessary where a question is answered before an objection thereto has been interposed, even though the objection is sustained) (citing 88 C.J.S. Trial § 133, at 268 (1955)). Here, the trial court never sustained any of appellant's objections. Therefore, no additional action was required of appellant to preserve this issue for appellate review.

III. Cross-examination

Appellant argues the trial court erred in limiting his cross-examination of Shasta Mengedoht for credibility and bias and that such limitation violated his constitutional right to confront the witnesses against him. We disagree.

As discussed above, Mengedoht was Charlie's mother and Jackie Barefoot's friend. Appellant sought to cross-examine Mengedoht concerning her respective loyalties to her son and her friend, as follows:

> Q: I understand Jackie Barefoot is your friend. Correct?
> A. Yes, she is.
> Q. And I understand you're extremely loyal to her?
> A. Yes, I am.
> Q. And Charlie is your son?
> A. Yes.
> Q. And, ma'am, if you had to make a choice and there was no middle ground –
>
> > Solicitor: Objection to this. I know where he's going. I object. We need to approach the bench.

The jury was excused and the following bench conference took place:

> The Court: All right, sir. What is the question you

want to ask?
Defense Counsel: Very simple, Your Honor. I want to be allowed to ask the witness that if she had to make a choice between being loyal to her friend and protecting her son, what would it be? That's all. It's a credibility question. It doesn't go to third party guilt. I [sic] not arguing third party guilt, Judge.
The Court: No, sir. She hasn't testified about her son at all. She was called back in reply testimony to rebut your testimony that the victim was playing football in her yard three weeks after he was missing. And I'm not going to let you go back now and start bringing in something else about her son being accused of this crime. That's totally irrelevant.
Defense Counsel: He's not being accused, Your Honor. What was irrelevant was her testimony about how it made her feel to listen to the other testimony. I was not asking her about her son being accused. I've never accused him, Your Honor. The witnesses place him –
The Court: Your objection is overruled [sic]. Sit down.

The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. State v. Aleksey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000). This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. Id.; see also State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981) (a trial court's ruling concerning the scope of cross-examination of a witness to test his credibility should not be disturbed on appeal absent a manifest abuse of discretion). On the contrary, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or

only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

In Van Arsdall, the United States Supreme Court held "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in *otherwise appropriate* cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose the jury to the facts from which jurors . . . could appropriately draw inferences relating to reliability of the witness.'" Id. at 680 (emphasis added) (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)). However, this Court has cautioned the bench that "before a criminal defendant can be prohibited from engaging in [such cross-examination] . . ., the record must clearly show that the cross-examination is somehow inappropriate." State v. Graham, 314 S.C. 383, 385-86, 444 S.E.2d 525, 527 (1994).

The first question, therefore, is whether the proposed cross-examination was inappropriate. A witness may be impeached with evidence of "[b]ias, prejudice or any motive to misrepresent." Rule 608(c), SCRE. We recently held this rule "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'" State v. Jones, Op. No. 25242 (S.C. Sup. Ct. filed Jan. 24, 2001) (Shearouse Adv. Sh. No.4, at p.48) (quoting State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976)). "On cross-examination, any *fact* may be elicited which tends to show interest, bias, or partiality of the witness." State v. Starnes, 340 S.C. 312, 325, 531 S.E.2d 907, 914-15 (2000) (emphasis added) (also quoting Brewington, 267 S.C. at 101, 226 S.E.2d at 250). Although evidence of Mengedoht's relationship to Charlie would unquestionably be admissible to show Mengedoht's possible bias, the jury was already fully aware Mengedoht was Charlie's mother. Appellant sought to ask Mengedoht what she would do "if she had to make a choice between being loyal to her friend *and* ***protecting*** *her son*." This question did not seek to elicit a **fact** tending to show bias. Starnes, 340 S.C. at 325, 531 S.E.2d at 914-15; cf.

State v. Fossick, 333 S.C. 66, 508 S.E.2d 32 (1998) (*evidence* which is inadmissible to prove third-party guilt may still be admissible for impeachment purposes) (emphasis added). We believe the question was inappropriate and the trial court properly exercised its discretion in disallowing it.

IV. Voluntariness of statements

Appellant argues the trial court abused its discretion by admitting statements he gave to the police. We disagree.

Several officers were involved in bringing appellant to the station and questioning appellant while there. The three officers primarily involved were Investigator Jones, Sergeant Williamson, and Major Wilson. Jones had spoken with appellant on three occasions while investigating Joseph's disappearance. After Joseph's remains were found on September 16, 1997, police began investigating the crime as a homicide. Investigators became aware of some statements appellant had allegedly made to others concerning his role in Joseph's death. On September 18, officers made a "traffic stop" of appellant to see if he would voluntarily come to the police station for questioning. Jones testified that probably two police cars were involved in the stop. Appellant's two passengers testified the truck was surrounded by up to five police cars. Jones asked appellant if he would come to the station. Appellant answered, "No problem," and rode to police headquarters in an unmarked patrol car.

At the station, appellant was advised of his rights and signed a waiver. Appellant eventually admitted to police he had bragged to his friends about killing Joseph, but denied any actual involvement in or knowledge of Joseph's death. The officers were convinced appellant was being untruthful. At this point, Williamson thought perhaps others were involved and appellant was holding back out of fear. Williamson testified he pled with appellant to tell the truth. He told appellant the only way they could help him was for him to tell the truth.

Ultimately, appellant made a series of incriminating statements. In the first statement, appellant told the officers he had bragged about killing Joseph but he did not really do it. Next he told them he had overheard some boys at school, whom he could not identify, talking about killing Joseph. Third, appellant told police he had overheard some people at school say they had killed Joseph. They told appellant where Joseph's body was located. Appellant stated he went to see the body and it was decomposing and the bones were sticking out. Again, appellant was unable or unwilling to identify the speakers.

Between appellant's third and fourth statements, appellant asked Wilson about the different degrees of murder and the penalties for each. Wilson explained that South Carolina does not have degrees of murder, and then explained to appellant the differences among murder, manslaughter, and involuntary manslaughter.

Appellant then changed his story dramatically. In his fourth version, appellant told officers Todd Ledford and Joseph had argued. Joseph rode off on his bicycle and Todd and two other boys chased him, caught him, hog-tied him, and carried him into the woods. After a few minutes, Todd and the other two boys returned to the truck without Joseph and they drove off. Next, appellant told the officers everything in the previous story was true except for the fact that he went into the woods with Todd and the other boys along with Joseph. He stated that Joseph was hog-tied with his feet and hands tied behind him. When they got into the woods, the other boys started hitting and kicking Joseph. Appellant denied hitting Joseph. He said Joseph was crying and whimpering and he felt bad because he could have stopped them, and could have taken Joseph home, but instead he left him there. Appellant also described Joseph's bicycle.

At this point, appellant took a bathroom break. In the bathroom, he asked Williamson, "What if someone else is involved?" Williamson reported appellant's question to Wilson. Wilson told appellant sometimes when people confess to a crime, they implicate others in order to get back at someone they think told on them. Wilson told appellant he should tell the

truth about whether Todd was there, because it would make appellant look worse if he lied about Todd's involvement. Appellant then stated that Todd was not there; he was just mad at Todd for telling on him. Appellant again asked, "What if someone else is involved?" but did not name any other participants.

In his sixth story, appellant said events happened as he had described in versions four and five, except Todd was not there, just appellant and two other boys whom appellant refused to name. Wilson then asked what had happened to Joseph's pants.[3] Appellant reacted physically to the question, became defensive, and then recanted his previous stories and denied all knowledge of Joseph's death.

Concerned that he had put appellant on the defensive by asking about Joseph's pants, Wilson asked Williamson to take over questioning appellant. Williamson took appellant to the canteen for a snack and then asked for a written statement. Appellant then gave his final statement to police, which Williamson recorded and appellant signed and swore to. In this statement, appellant incriminated himself only. He stated he saw Joseph two or three weeks after Joseph was reported missing. Joseph was bad-mouthing appellant so appellant knocked him out. Appellant then carried Joseph to a tree, tied Joseph to it with black nylon cord, and left him there.

The first six statements were recorded in the officers' notes, but not tape recorded or signed by appellant. Wilson corroborated Williamson's testimony regarding the substance of the statements. The officers testified at no time did appellant express a desire to cut off questioning or seek the advice of counsel.

After he had given his written statement, appellant was permitted to meet with his parents and call his girlfriend that evening. The next

---

[3]Joseph's shoes, socks, and shirt were found at the scene, but no pants or underwear were found.

morning, after spending the night in jail, Williamson advised appellant of his rights again and began to speak with him further to determine whether others were involved in the crime. Appellant stated everything in his written statement, in which he incriminated only himself, was true. Appellant then asked if his lawyer had arrived. This was the first time appellant mentioned a lawyer. Williamson immediately terminated the interview.

In response to cross-examination, Jones denied that appellant asked him for permission to call his father. Williamson stated appellant asked for his parents during the time they were together, but he did not permit appellant to call them. However, Williamson did try to contact appellant's father around 5:30 that afternoon to let him know where appellant was. Williamson denied telling appellant his mother was under investigation, denied threatening appellant with a "first-degree murder" charge if he did not give a statement, denied promising appellant probation or boys camp in exchange for a statement, and denied promising appellant he could go home if he gave a statement. Wilson, who was present from about 6:00 p.m. on, similarly denied telling appellant his mother was under investigation.

The entire interrogation, including breaks, lasted between six and seven hours.[4] Appellant was given Miranda warnings three times during the interrogation: upon arrival at the police station, before a polygraph was administered, and again prior to signing his written statement. He was advised of his rights a fourth time the following morning and given an opportunity to change his statement again. Appellant asserts his statements should have been excluded from evidence as the involuntary result of his will being overborne by his interrogators.

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966). Dickerson v. United

[4]Appellant signed the first Miranda form just after 3:00 p.m. and gave his final statement around 9:30 p.m.

States, 530 U.S. 428 (2000). If a defendant was advised of his Miranda rights, but nevertheless chose to make a statement, the "burden is on the State to prove by a *preponderance of the evidence* that his rights were voluntarily waived." State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988) (emphasis in original). The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982). If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process. Schneckloth, 412 U.S. at 225. A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise. State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987). The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998). When reviewing a trial court's ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence. See State v. Wilson, Op. No. 25284 (S.C. Sup. Ct. filed April 23, 2001) (Shearouse Adv. Sh. No.15 at p.19, 22).

The trial court here found appellant's statements were freely and voluntarily given, that appellant was accorded all the procedural safeguards required by Miranda, and that appellant knowingly and intelligently waived his rights. We conclude the trial court correctly ruled the statements admissible. There is no evidence in the record whatsoever of any improper conduct on the part of the investigating officers nor of any deficiency on appellant's part which would call his waiver of rights into question. Although some of appellant's attorney's questions of the officers on cross-examination suggested improper coercion (*e.g.*, did they tell appellant his mother was under investigation, did they promise probation or boys camp in exchange for a statement), the officers denied making any such statements.

Appellant did not testify at the Jackson v. Denno[5] hearing and his attorney's questions do not constitute evidence. There is therefore no evidence in the record to contradict the officers' version of events, nor can we infer any such evidence.

In the absence of any evidence of police misconduct or diminished capacity, appellant would have this Court hold prolonged questioning of a seventeen-year-old makes any statements obtained involuntary. Although appellant's youth and the length of questioning are certainly important factors for the trial court to consider in determining whether appellant's statement was voluntary (see Schneckloth, 412 U.S. at 225), the trial court correctly ruled the statements voluntary under the totality of the circumstances.

V. Directed Verdict

Appellant argues the trial court erred in denying his motion for a directed verdict because there is no evidence Joseph was murdered. We disagree.

Before a defendant in a criminal case can be required to present a defense, the State must present some proof of the *corpus delicti* of the crime. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916). In a murder case, the *corpus delicti* consists of two elements: the death of a human being, and the criminal act of another in causing that death. State v. Martin, 47 S. C. 67, 25 S. E. 113 (1896). An extrajudicial confession standing alone cannot constitute proof that a murder has taken place. The State must produce proof of the *corpus delicti* from a source other than the out-of-court confession of a defendant. State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987). The *corpus delicti* of murder may be established by circumstantial evidence when it is the best evidence obtainable. Id. Furthermore, circumstantial evidence may be sufficient to establish the *corpus delicti* of murder even though the

[5]378 U.S. 368 (1964).

cause of death can not be determined. Brown v. State, 307 S.C. 465, 467-68, 415 S.E.2d 811, 812 (1992). In Owens, the body of the victim was never found. Nevertheless, we held circumstantial evidence of the victim's personal habits and relationships raised an inference that the victim's sudden disappearance was the result of death by a criminal act and was thus sufficient to establish the *corpus delicti*.

The trial court ruled there was sufficient circumstantial evidence to establish the *corpus delicti*, including Joseph's good health, the rule in his house that he must be home by dark or call immediately, testimony the wooded area where Joseph's body was found was too thick to ride a bicycle, testimony from Joseph's best friend that they never played in that area, and testimony from an officer that it is very unusual for a twelve-year-old boy to be missing for any length of time. Appellant argues these facts are equally consistent with death by accident or sudden illness. However, when ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992). Furthermore, in reviewing the denial of a directed verdict motion, an appellate court must review the evidence in the light most favorable to the State. State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997). Considering the evidence in the light most favorable to the State, we conclude the trial court properly denied appellant's motion for a directed verdict. There is more than adequate circumstantial evidence to prove Joseph did not die a natural death.

CONCLUSION

For the foregoing reasons, we **REVERSE**.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ui Sun Hudson, Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Charleston County
Charles W. Whetstone, Jr., Circuit Court Judge

Opinion No. 25338
Heard June 19, 2001 - Filed August 6, 2001

DISMISSED AS
IMPROVIDENTLY GRANTED

John D. Elliott, Assistant Appellate Defender Robert M. Pachak, of the South Carolina Office of Appellate Defense, both of Columbia, and D. Ashley Pennington, of North Charleston, for petitioner.

Attorney General Charles M. Condon, Chief Deputy

Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, all of Columbia, and Solicitor David Price Schwacke, of North Charleston, for respondent.

Lesly A. Bowers, of Columbia, for amicus curiae Protection and Advocacy for People with Disabilities, Inc.

PER CURIAM: This Court granted the petition for a writ of certiorari to review the Court of Appeals' opinion in State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). After careful consideration, we now dismiss certiorari as improvidently granted.

DISMISSED.

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.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Phil Heilker, d/b/a Mama's Used Furniture and Mama's Discount Furniture Depot,

Respondent,

v.

Zoning Board of Appeals for the City of Beaufort,

Appellant.

Appeal From Beaufort County
Thomas Kemmerlin, Jr., Special Circuit Judge

Opinion No. 3374
Heard June 6, 2001 - Filed July 23, 2001

REVERSED

William B. Harvey, III, of Harvey & Battey, of Beaufort, for appellant.

C. Scott Graber, of Graber & Baldwin, of Beaufort, for respondent.

ANDERSON, J.: This appeal involves the application of a

local zoning ordinance. The Zoning Board of Appeals for the City of Beaufort ("the Zoning Board") ordered Phil Heilker to cease the outside display of indoor furniture at his retail stores. The Circuit Court reversed, finding Heilker's displays were protected, nonconforming "uses" of his property. We reverse.

FACTS/PROCEDURAL BACKGROUND

Heilker owns two discount furniture stores in the city of Beaufort. He has operated Mama's Used Furniture for approximately ten years and Mama's Discount Furniture Depot for approximately three years. During these times, Heilker has displayed furniture — mattresses, bunk beds, sofas, chairs, and couches — immediately outside his businesses.

The city of Beaufort adopted Ordinance O-61-99 (the "Ordinance"). The Ordinance amended the language of the city's zoning code relating to the city's "Highway Corridor Overlay Zoning" scheme. The stated purpose for this "Highway Corridor" district is:

> [T]o protect and promote the appearance, character, and economic value of development in the City of Beaufort adjacent to major roads …. [T]o encourage and better articulate positive visual experiences along the City's major roads and to assure respect for the character, integrity, and quality of the built and natural environments of the City …. [T]o enhance the quality of development and to promote traffic and pedestrian safety …. [T]o protect and enhance the City's unique aesthetic character and encourage development which is harmonious with the natural and man-made assets of the Lowcountry.

Id. at § 5-6201.

The Ordinance, inter alia, created new restrictions on the outdoor display of certain types of merchandise in the "Highway Corridor" district:

> Only merchandise typically used and stored outdoors may be displayed outdoors. Such merchandise shall include automobiles,

> trucks, boats, trailers, outdoor landscape structures (garden sheds, arbors, gazebos, etc.), plant materials, agricultural products, lawn maintenance equipment, and outdoor furniture.

Id. at § 5-6209(f)(1).

Heilker's stores are located within the "Highway Corridor" district. Libby Anderson, the City of Beaufort's Planning Director, informed Heilker by letter that "[a]mong other things, Ordinance O-61-99 bans the outdoor display of merchandise that is not typically used and stored outdoors." Anderson told Heilker that he could only display furniture in compliance with the Ordinance.

Heilker appealed Anderson's order to the Zoning Board. At a subsequent hearing, Heilker claimed his displays were a "nonconforming use" integral in advertising his stores. The City countered, arguing Heilker's display of furniture was merely a "practice" rather than a "use."

By letter, the Zoning Board stated to Heilker that "[b]ased on the evidence and extensive arguments presented [at the hearing], the Board unanimously voted to deny the appeal and uphold the application of Ordinance O-61-99 …." The Zoning Board determined, inter alia, that the "outdoor display of merchandise is a **practice** associated with a land use (in this case retail sales) and **is not a land use in itself** and so is not subject to the nonconforming uses section of the Zoning Ordinance." (emphasis added).

Heilker appealed the Zoning Board's decision to the Circuit Court. In his appeal, Heilker characterized the above-statement as a conclusion of law.

The Circuit Court judge reversed the Zoning Board's decision. The court concluded: "[T]he outdoor display of furniture in front of those two (2) businesses known as Mama's Used Furniture and Mama's Discount Furniture Depot (in the City of Beaufort) is a protected, vested, nonconforming use of these premises." The Zoning Board appeals.

STANDARD OF REVIEW

Section 6-29-840 defines the scope of review of a zoning board decision by a Circuit Court judge:

> At the next term of the circuit court or in chambers, upon ten days' notice to the parties, the presiding judge of the circuit court of the county shall proceed to hear and pass upon the appeal on the certified record of the board proceedings. **The findings of fact by the board of appeals shall be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence**. In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing. **In determining the questions presented by the appeal, the court shall determine only whether the decision of the board is correct as a matter of law**. In the event that the decision of the board is reversed by the circuit court, the board is charged with the costs, and the costs must be paid by the governing authority which established the board of appeals.

(emphasis added).

In Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000), this Court analyzed § 6-29-840 as it relates to the appellate review of a zoning board decision:

> In 1994, the Legislature enacted a new statutory scheme for local planning and zoning entities embodied in Title 6, Chapter 29, which replaced the existing scheme found in portions of Title 6, Chapter 7, and elsewhere. Act No. 355, § 2, 1994 S.C. Acts 4036, amended by Act No. 15, § 1, 1999 S.C. Acts 37. The new scheme imposed a standard of review whereby "[t]he findings of fact by the [zoning] board of appeals shall be treated in the same manner as a finding of fact by a jury ...." S.C. Code Ann. § 6-29-840 (Supp. 1999). Local zoning programs could adopt the new standard

promulgated by § 6-29-840 any time prior to December 31, 1999, after which time its adoption became mandatory. See Act No. 355 ("On or after December 31, 1999, all local planning programs must be in conformity with the provisions of this act. Until December 31, 1999, this act is cumulative and may be implemented at any time."). Section 6-29-840 differs textually from it predecessor, which treated "[t]he findings of fact by the [zoning] board of appeals [as] final and conclusive on ... appeal." S.C. Code Ann. § 6-7-780 (1977) (repealed 1999).

> We have repeatedly held that the old statute, § 6-7-780, imposed an "any evidence" standard of review. "The factual findings of the [b]oard (of zoning appeals) must be affirmed ... if they are supported by **any evidence** ...." Stanton v. Town of Pawleys Island, 317 S.C. 498, 502, 455 S.E.2d 171, 172 (1995) (emphasis added); accord Fairfield Ocean Ridge, Inc. v. Town of Edisto Beach, 294 S.C. 475, 366 S.E.2d 15 (Ct. App. 1988); Bailey v. Rutledge, 291 S.C. 512, 354 S.E.2d 408 (Ct. App. 1987). The new statute, § 6-27-840, is also very deferential to a board's findings of fact as it equates them to a jury's findings. "[T]he factual findings of the jury will not be disturbed unless a review of the record discloses that there is **no evidence** which reasonably supports the jury's findings." Sterling Dev. Co. v. Collins, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992) (emphasis added) (citing Townes Assoc's, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976)). The distinction, if any, between an "any evidence" and a "no evidence" standard is of little importance to the instant action as our decision, like that of the circuit court, is controlled by an issue of law.

Id. at 487-88, 536 S.E.2d at 895-96 (emphasis added).

LAW/ANALYSIS

I. Definition of "Use"

At issue is whether Heilker's outdoor display of indoor furniture is a nonconforming "use" or a "practice" associated with the operation of his businesses. To resolve this dispute, we must define the term "use" as it applies in the context of zoning. No reported case in South Carolina jurisprudence provides a definition; thus, this Court must look to the law of other jurisdictions for assistance.

As it is conventionally applied, the term "use" is "[t]he purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." Town of Kingstown v. Albert, 767 A.2d 659 (R.I. 2001) (quoting R.I. Gen. Laws. § 45-24-31(60)); accord Smith v. Zoning Hearing Bd. of Huntingdon Borough, 734 A.2d 55 (Pa. Commw. Ct.), appeal denied by Pa. Supreme Court, 747 A.2d 904 (1999), (applying the zoning board's definition of "use": "The term 'use' is defined … as the specific purpose for which land or a building is designed, arranged, intended or for which it is or may be occupied or maintained."); Beugnot v. Coweta County, 500 S.E.2d 28, 30 (Ga. Ct. App. 1998) (recognizing the definition of the term "use" created by county ordinance: "The purpose or purposes for which land ... is designed, arranged or intended, or to (for) which said land ... is occupied, maintained or leased."); Kam v. Noh, 770 P.2d 414, 416 (Haw. 1989) (concluding the term "use" was synonymous with the term "purpose" in examining a zoning statute); Croxton v. Board of County Comm'rs of Natrona County, 644 P.2d 780, 783-84 (Wyo. 1982) (employing the county commission's definition of "use" in its analysis: "The purpose or activity for which the land or structure thereon is designated, arranged, or intended, or for which it is occupied, utilized, or maintained.").

Case law exists that incorporates the definition of "use" found above and supports the assertion that the outdoor display of merchandise is an **activity** or **practice** **separate and distinct** from a retail establishment's "use" of its property. In City of Columbus Board of Zoning Appeals v. Big Blue, 605

N.E.2d 188 (Ind. Ct. App. 1992), a city sought to enjoin a retail store located in the city's "C-1 Neighborhood Shopping District" from continuing its outdoor display of garden supplies. The city contended the store's practice violated the planned unit development site plan ("PUD") and the ordinance under which the PUD was adopted. The ordinance, in part, read: "The commercial uses included in the plan are limited to those permitted in the C-1 Neighborhood Shopping District." Id. at 191. The ordinance outlined a number of "uses permitted and specified" for a C-1 Neighborhood Shopping District. Id. The only "use" relevant to the parties' dispute was "retail store." Id.

The Indiana Court of Appeals found the PUD was completely silent concerning outside sales and storage. Regarding the ordinance, the court determined it did not reveal any restriction on outside displays by owners of retail stores. Notwithstanding these findings, the city argued "because the ordinance did not specifically permit outside displays, such **use** was therefore prohibited." Id. at 191 (emphasis added).

The court disagreed with the city. Relying upon Harbour Town Associates v. City of Noblesville, 540 N.E.2d 1283, 1285 (Ind. Ct. App. 1989), which defined the term "use," as employed in the context of zoning, as "a word of art denoting 'the purpose for which the building is designed, arranged or intended, or for which it is occupied or maintained,'" the Big Blue Court found: "**We cannot agree with City's inference that the term 'use' in this case should be expanded to regulate the manner in which Big Blue advertises merchandise as it operates its retail store.**" Id. (emphasis added).

Applying the definition of "use" as found within the above-cited authorities, it is apparent the Circuit Court erred in its reversal of the Zoning Board's determination. The "use" for which Heilker purchased and occupied his Beaufort properties is the retail sale of furniture. His outdoor display of furniture — a form of advertisement — is merely an activity or practice incidental to this "use."

This Court recognizes the term "use" has amorphous meanings in the realm of zoning. Municipal Elec. Auth. of Ga. v. 2100 Riveredge Assocs., 348

S.E.2d 890 (Ga. Ct. App. 1986). In addition to the interpretation that "use" describes the actual purpose of a property, the word is also sometimes employed to refer to the types of activities, practices, and operations conducted in connection with the property's purpose. See Recovery House VI v. City of Eugene, 965 P.2d 488, 512 n.2 (Or. Ct. App. 1998) ("We … note … that the word "use" has two different meanings, depending on the context. It sometimes refers to the actual activity that is conducted on or proposed for … property, and sometimes to types of activities and operations that are or are not permissible in an area under zoning regulations."). We decline to integrate the latter meaning into our analysis.

Our examination of the cases that define "use" as referring to the types of activities, practices, and operations conducted in connection with the property's purpose reveal that numerous courts have relied strictly upon a dictionary or cases citing dictionaries when formulating their definitions. See, e.g., Phoenix City Council v. Canyon Ford, Inc., 473 P.2d 797, 801 (Ariz. Ct. App. 1970) (defining "use" as "the act of employing anything, or state of being employed; application; employment" by quoting State ex rel. Mar-Well, Inc. v. Dodge, 177 N.E.2d 515 (1960), which in turn quoted Webster's New International Dictionary).

Dictionaries can be helpful tools during the initial stages of legal research. However, we are reluctant to rely upon either a dictionary or cases that have relied upon a dictionary for a definitive answer as to the definition of "use" when extensive case law exists that provides an accurate and reliable definition for the term. Our disinclination to adopt a dictionary definition is based, in part, upon persuasive commentary found in the literature.

In their recent law review article,[1] Samuel A. Thumma & Jeffrey L. Kirchmeier critique the efficacy of turning to common-usage and law dictionaries as the principal authority for defining legal terms:

---

[1] The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries, 47 Buff. L. Rev. 227 (1999).

Regarding common-usage dictionaries, Thumma and Kirchmeier state:

> [**A court cannot] definitively rely on [common-usage] dictionaries as an end point in defining a word**. A descriptive dictionary sets forth definitions showing what a word may mean generally, not what a word does mean in context. Accordingly, although a descriptive dictionary may set forth possible alternative definitions for a term, it cannot provide the definitive definition for what that term actually means in a specific context. Differing definitions for a word in different dictionaries and alternative definitions of a word in the same dictionary would further confound an attempt to use a descriptive dictionary as an end point in defining a word.

47 Buff. L. Rev. at 293 (emphasis added).

The authors additionally caution against a reliance upon a law dictionary as the ultimate source for defining key terms:

> **Definitive reliance** on law dictionaries to define terms suffers from defects similar to such reliance on general usage dictionaries. In addition, many terms in a law dictionary are legal terms and, frequently, terms of art. Thus, the definitions provided in a law dictionary are either: (1) based on case law or usage (such as statutory terms) or (2) created anew by the dictionary's editorial board. If based on case law or usage, the best source for a definition is the decision or usage in context. **Prior decisions and usage, defining the term in context, should be far more instructive than the definitions in a law dictionary, which are general paraphrases that lack any context**. And if, rather than being based on case law or usage, the law dictionary definition was created anew, **one might ask whether that definition should be afforded any weight at all**.

. . . .

> [A]lthough perhaps a good resource for law students and lawyers unfamiliar with a term in the abstract, **law dictionaries are not particularly helpful to [a court] in determining the precise meaning of a term in context**.

Id. at 294 (footnotes omitted) (emphasis added).

II. Zoning Board Determination Regarding Whether a Particular Activity or Purpose is a "Use" is a Finding of Fact

In Stanton v. Town of Pawleys Island, 317 S.C. 498, 455 S.E.2d 171 (1995), a homeowner sought a building permit to repair the ground level of his oceanfront home, which was destroyed by Hurricane Hugo. The building inspector, applying the town's "Flood Damage Prevention Ordinance," denied the homeowner's request. This ordinance, enacted after the home's original erection, prohibited the construction of any ground level living quarters in the area where the home was situated. The town's zoning codes, however, permitted the rebuilding of nonconforming "uses," provided the structure requiring reconstruction was not more than 50% percent destroyed. The lower level in Stanton was completely destroyed; nevertheless, reviewed as a whole, the homeowner's entire structure was more than 50% intact.

The building inspector found the lower level, in and of itself, constituted a "**separate use**" from the rest of the house. Id. at 501, 455 S.E.2d at 172 (emphasis added). Therefore, although the entire house was not destroyed by more than 50%, the complete destruction of the lower level rendered it ineligible for reconstruction. The homeowner appealed to the town's zoning board, which upheld the permit denial. The Circuit Court affirmed.

The dispute reached the Supreme Court. Whether the town zoning board erred in concluding the homeowner's lower level was a separate "use" was the main issue before the Court. The Court articulated its standard of review:

> **The factual findings of the Board must be affirmed by the Circuit Court if they are supported by any evidence and not influenced by an error of law**.

Id. at 502, 455 S.E.2d at 172 (citation omitted) (emphasis added).

This Court reads Stanton to mean that in South Carolina, a zoning board determination regarding whether a particular activity or purpose constitutes a "use" of property is a finding of fact.

The Stanton Court reversed the town's zoning board, finding that the building inspector erred as a matter of law by severing the ground level from the entire structure during his evaluation. Conversely, in the instant case, we do not conclude there was error in the Zoning Board's findings. The outdoor display of indoor furniture is not a "use" of property. It is a practice or activity that is a corollary of Heilker's advertising campaign.

Because the outdoor display of indoor furniture is not a "use," it cannot be a nonconforming "use"; thus, Heilker does not possess the vested right to continue this activity in violation of the Ordinance.

CONCLUSION

In zoning matters, this Court is obligated to apply the extremely narrow standard of review outlined in Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000). The local zoning boards, and not the courts, are the primary entities responsible for the planning and development of our communities.

A "use" in the zoning context is "the purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." A determination by a zoning board that a particular purpose or activity does or does not constitute a "use" is a finding of fact.

In the case sub judice, we rule the Circuit Court erred in supplanting the

Zoning Board's finding of fact that Heilker's outdoor display of indoor merchandise was not a nonconforming "use."

For the foregoing reasons, the decision of the Circuit Court is

REVERSED.[2]

HUFF J., concurs.

SHULER, J., dissents in a separate opinion.

[2] In light of this disposition, we need not address the Zoning Board's alternative sustaining grounds. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) (ruling appellate court need not review remaining issues when disposition of prior issues is dispositive).

SHULER, J., dissenting: I respectfully dissent. In my view, whether Heilker's placement of "indoor" furniture on the outside of his business constitutes a nonconforming "use" is a question of law for this Court. Furthermore, I would find Heilker's business practice is a nonconforming use and affirm.

As an initial matter, I agree we must defer to a zoning board's factual findings if there is any evidence in the record to support them. See Vulcan, 342 S.C. at 488, 536 S.E.2d at 896 (describing deferential standard of review to equate zoning board's findings of fact with those of a jury, i.e., that such findings "will not be disturbed unless a review of the record discloses that there is *no evidence* which reasonably supports the [Board's] findings") (quoting Sterling Dev. Co. v. Collins, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992)). However, as the majority acknowledges, it is the duty of the reviewing court to decide if a zoning board's decision is legally sound. See § 6-29-840 ("In determining the questions presented by the appeal, the court shall determine only whether the decision of the [zoning] board is correct as a matter of law."); City of Myrtle Beach v. Juel P. Corp., 337 S.C. 157, 172, 522 S.E.2d 153, 161 (Ct. App. 1999) ("[T]he determination of whether [zoning] ordinances deprive a citizen of constitutional rights is a judicial function and not legislative. And where an ordinance is clearly violative of constitutional rights, it is the duty of the court to so hold.") (quoting Conway v. City of Greenville, 254 S.C. 96, 101, 173 S.E.2d 648, 650 (1970)), *rev'd on other grounds*, 344 S.C. 43, 543 S.E.2d 538 (2001); Historic Charleston Found. v. Krawcheck, 313 S.C. 500, 505-06, 443 S.E.2d 401, 405 (Ct. App. 1994) ("[W]e will not reverse . . . unless the [zoning] [b]oard's findings of fact have no evidentiary support *or the [b]oard commits an error of law*.") (emphasis added).

In my opinion, whether a landowner's activities on his property constitute a nonconforming use is a question of law for the courts, because it requires an interpretation of the ordinance at issue. See Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) (finding determination of council's intent in drafting ordinance was not a finding of fact because "[t]he determination of legislative intent is a matter of law"; supreme court therefore concluded the board's "determination that a park is not a municipal use under the Isle of Palms zoning ordinance" was

reviewable); see also Stanton, 317 S.C. at 502, 455 S.E.2d at 173 (reversing the circuit court's affirmance of a zoning board determination that the lower level of appellant's house "does not constitute a separate nonconforming use from the single structure of the entire house"); F.B.R. Investors v. County of Charleston, 303 S.C. 524, 402 S.E.2d 189 (Ct. App. 1991) (upon analyzing facts, court determined trial court erred in finding F.B.R. had established a nonconforming use and therefore a vested right to continue it).[3]

---

[3] Other states have held similarly. See City of Columbus Bd. of Zoning Appeals v. Big Blue, 605 N.E.2d 188, 191 (Ind. Ct. App. 1992) ("Construction of a zoning ordinance is a question of law. Since there are no factual disputes in this case, our sole task in reviewing the trial court's decisions is to determine whether any of the zoning regulations relied upon by the City are applicable to Big Blue's operation and act to prohibit the outside displays [of merchandise].") (internal citations omitted); Christy's Realty Ltd. Partnership v. Town of Kittery, 663 A.2d 59, 62 (Me. 1995) ("Whether a proposed use falls within a given category contained in a zoning ordinance is a question of law."); Graham v. Itasca County Planning Comm'n, 601 N.W.2d 461, 467 (Minn. Ct. App. 1999) ("The application of an ordinance to established facts is a question of law for the court."); Hannigan v. City of Concord, 738 A.2d 1262, 1266 (N.H. 1999) ("The interpretation of a zoning ordinance and the determination of whether a particular use is an accessory use are questions of law for this court to decide."); Davis v. Town of Stallings Bd. of Adjustment, 541 S.E.2d 183, 186-87 (N.C. Ct. App. 2000) (finding whether a video store fell within an ordinance's definition of "adult bookstore" was a question of law); McMahon v. Kingston Township Bd. of Supervisors, 771 A.2d 96, 99-100 (Pa. Commw. Ct. 2001) ("Whether a ["cellular monopole"] falls within a ["semipublic use" as] specified in a zoning ordinance is a question of law and subject to review on that basis. [Since] [t]he issue is one of statutory construction, it is this Court's function to determine the intent of the legislative body which enacted the ordinance."); Sabatine v. Zoning Hearing Bd. of Washington Township, 651 A.2d 649, 652-53 (Pa. Commw. Ct. 1994) ("The question of whether a proposed [flea market] use falls within a given category [of warehouse and wholesale trade] specified in an ordinance is a question of law."); County of Sawyer Zoning Bd. v. State Dep't of Workforce Dev., 605 N.W.2d 627, 630 (Wis. Ct. App. 1999) ("Once the facts are

The majority relies on Vulcan Materials and Stanton v. Town of Pawleys Island for the proposition that a determination of use is a question of fact. In my view, these cases do not support this contention.

Without question, both Vulcan and Stanton correctly set forth the standard of review to be used in zoning cases. Interestingly, however, in Vulcan this Court affirmed the circuit court's *reversal* of the Greenville County zoning board's decision denying Vulcan a "nonconforming use" certificate to continue mining its land in the face of rezoning restrictions. The County's decision was based on the testimony of Peter Nokimos, the Greenville County Zoning Administrator, who claimed he denied Vulcan's certificate application "because he found no indication of any *mining* or occupancy at the site." See Vulcan, 342 S.C. at 486, 536 S.E.2d at 895 (emphasis added). In affirming the lower court, this Court rejected the zoning board's determination of what constituted "mining," finding Vulcan in fact "mined" its site "as a matter of law." Id. at 496, 536 S.E.2d at 900. In so doing, the Court also affirmed the lower court's reversal of the zoning board's conclusion that Vulcan's activities did not constitute a protected, nonconforming use. Id. at 498, 536 S.E.2d at 901.

Similarly, in Stanton our supreme court reversed the zoning board's determination that the lower level of a beach house "constitute[d] a separate nonconforming use from the single structure of the entire house." Stanton, 317 S.C. at 502, 455 S.E.2d at 173. Thus, the court held the zoning board erred "as a matter of law." Id. at 503, 455 S.E.2d at 173. Accordingly, I believe the dispositions in these two cases lend further support to the conclusion that the determination of use is a question of law.

It is undisputed the City of Beaufort's newly amended ordinance prohibits Heilker's outdoor furniture displays. The only question, therefore, is whether his "practice" of placing indoor furniture outside is a nonconforming use under

---

established, however, the application of those facts to the statute or [ordinance] is a question of law."); Brooks v. Hartland Sportsman's Club, Inc., 531 N.W.2d 445, 449 (Wis. Ct. App. 1995) ("[The] determination [of nonconforming use] involves the application of the facts to a legal standard and, consequently, presents a question of law . . . .").

the ordinance. See, e.g., Big Blue, 605 N.E.2d at 192 ("The doctrine of nonconforming use is an affirmative defense asserted by a party who is alleged to be [in] violation of an existing zoning ordinance."). The majority affirms the Board's conclusion that Heilker's displays do not constitute a "use" of his property because they are "merely a practice associated with a land use." I cannot concur.

In upholding the Board's decision, the majority defines a "'use' in the zoning context" as "the purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." While I agree this is an acceptable definition of "use," it is certainly not the only appropriate one under the circumstances. Moreover, I would find the majority's proposed definition in fact covers Heilker's practice of displaying his wares outdoors.

Here, "use" is not defined, either in the general Beaufort zoning ordinance on nonconforming use contained in the record (§ 5-6108) or the subordinate nonconforming uses section amending the "Highway Corridor Overlay Zoning" provisions of that ordinance (§ 5-6213). Although "legislative intent must prevail if it can be reasonably discovered in the language used," when interpreting an ordinance we must give words their "plain and ordinary meaning without resorting to subtle or forced construction to limit or expand" their operation. City of Myrtle Beach v. Juel P. Corp., 344 S.C. 43, 47, 543 S.E.2d 538, 540 (2001); see Somers, 319 S.C. at 68, 459 S.E.2d at 843 ("In construing ordinances, the [undefined] terms used must be taken in their ordinary and popular meaning.").

Furthermore, "[o]rdinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose." Juel, 344 S.C. at 47, 543 S.E.2d at 540 (quoting Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953)). Because no cases in our jurisdiction define the term "use," it is necessary to look to other sources for assistance.

Fundamentally, the noun "use" means "the act of using or the state of

being used." Webster's New World College Dictionary 1574 (4th ed. 1999). Moreover, in the legal arena "use" has been defined as "[a] habitual or common practice." Black's Law Dictionary 1540-41 (7th ed. 1999); see also Black's Law Dictionary 1541 (6th ed. 1990) (defining use as "[t]hat enjoyment of property which consists in its employment, occupation, exercise or practice."). Most specifically, in the context of zoning ordinances "use" connotes "a utilization of premises so that they may be known in the neighborhood as being employed for a given purpose . . . . In this context, it has been held that '*use' means what is customarily or habitually done or the subject of a common practice*." 101A C.J.S. *Zoning and Land Planning* § 60 at 489 (1979) (emphasis added); see also 83 Am. Jur. 2d *Zoning and Planning* § 624 at 520 (1992) (stating that "nonconforming use" includes "*conduct* which is proscribed by applicable zoning restrictions") (emphasis added).

In my view, Heilker's customary habit or practice of placing his furniture on display outdoors is unquestionably a "use" as defined above.[4] It is a way of

---

[4] Other jurisdictions employ similar definitions. See United Fed. Savings Bank v. McLean, 694 F.Supp. 529, 537 (C.D. Ill. 1988) ("[T]he word 'use' of real estate is deemed by the Illinois courts to address the purpose to which the property is put (whether it concerns issues of zoning, erecting structures on the property, the type of business for which the property is employed, *or the way in which the owner or possessor benefits from the enjoyment of the property*).") (emphasis added); Phoenix City Council v. Canyon Ford, Inc., 473 P.2d 797, 801 (Ariz. Ct. App. 1970) (defining "use" as "the act of employing anything, or state of being employed" and finding it "obvious" that company's signs which were in process of being constructed were not being "used" at the time the restrictive ordinance was enacted); Boss Hotels Co. v. City of Des Moines, 141 N.W.2d 541, 544 (Iowa 1966) (where city ordinance stated buyers of property "shall be obligated to devote such real property only to the *use* specified in the urban renewal plan," but did not define the term, court held hotel's use of property would not be changed by an increase in height from three stories to eight because "use refers to the activity carried on on the premises") (emphasis added); Borough of Northvale v. Blundo, 195 A.2d 221, 223 (Bergen County Ct. 1963) ("The established concept of a 'nonconforming use' does not cover an activity simply because it takes place on the premises. It must bear a

physically using his property to advertise his business.

The majority cites City of Columbus Bd. of Zoning Appeals v. Big Blue, a case with a strikingly similar fact pattern, as support for "the assertion that the outdoor display of merchandise is an **activity** or **practice separate and distinct** from a retail establishment's 'use' of its property." I find this case not only inapposite, but also that it lends credence to the conclusion that displaying merchandise outdoors can be a "use" in the context of zoning law.

Significantly, in Big Blue the Indiana Court of Appeals did not find a retailer's outdoor display and storage of goods was not a "use" of its property. Rather, the court held that where the zoning ordinance in question did not include a prohibition on selling or storing merchandise outside in its enumerated list of permitted "Uses," it would not infer an expanded meaning of the term "to regulate the manner in which Big Blue advertises merchandise as it operates its retail store." Id. at 191. In other words, the ordinance at issue in Big Blue did

---

relationship to [l]and use."); 138 West 49th Street Corp. v. Hotel Coleman, Inc., 237 N.Y.S.2d 441, 444 (N.Y. Civ. Ct. 1963) (under "Multiple Dwelling Law," "'[u]se' is interpreted to mean not an isolated act but a practice or relation"; court stated further that "[t]he term 'use' implies the doing of something customarily or habitually or making a practice of doing a certain act"); Seckinger v. City of Atlanta, 100 S.E.2d 192, 195 (Ga. 1957) (defining "use" as it appeared in restrictive ordinance to mean "'to convert to one's service'") (quoting Webster's Int'l Dictionary 1684 (2d. ed.)); American Sign Corp. v. Fowler, 276 S.W.2d 651, 654 (Ky. Ct. App. 1955) ("Zoning has as one of its main purposes the regulation of the *use* of property. This means regulation of the purpose or object of the use, rather than the mere conditions or circumstances of the use.") (internal citation omitted); Durning v. Summerfield, 235 S.W.2d 761, 763 (Ky. Ct. App. 1951) ("'Use,' in [ordinance provision on nonconforming use] means what is customarily or habitually done or the subject of a common practice."); see generally Baltimore Heritage, Inc. v. Mayor & City Council of Baltimore, 557 A.2d 256, 259 (Md. Ct. App. 1989) ("'Use' is a very broad concept in zoning law . . . .").

not reveal "any restriction or regulation on outside displays by owners of retail stores." Id. Notably, the court went on to state that "[b]oth zoning in general and 'uses' in particular focus on how a building or parcel of land is utilized," and ultimately concluded: "In sum, City is inviting this court to read into its ordinance a provision which is not present, namely: the prohibition of outside sales and storage of merchandise. We must decline the invitation. Zoning ordinances must be construed to favor the free use of land." Id. at 191-92.

Moreover, nowhere in the Big Blue opinion does the court conclude, or even hint, that the retailer's outdoor display was "an activity or practice separate and distinct" from its "use" of the property. To the contrary, and in direct contrast to the case at bar, the Indiana court clearly and properly limited its decision on "use" to the definitional language of the ordinance at hand.[5]

In any event, I would find Heilker's displays clearly fit within the majority's "conventional" definition of "use." Even assuming "use" can only be defined as "the purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained," the record clearly reflects Heilker opened his businesses and occupied his land with the *intended purpose* of advertising his merchandise through outdoor displays. Accordingly, because I believe Heilker's placement of merchandise on outdoor display constitutes an integral part of his intended purpose for each of his properties, I address the Board's alternative reasons for denying Heilker's appeal.

The concept of nonconforming use is grounded in the rule that "one's

---

[5] I note that, with one exception, the cases cited by the majority concern ordinances which explicitly define the term "use"; hence, these cases are facially distinguishable. Furthermore, the excepted case, Kam v. Noh, 770 P.2d 414 (Haw. 1989), describes "use" as synonymous with "purpose," because other subsections of the statute in question gave the term that connotation, as did statutes construed *in pari materia*. See id. at 416 ("Where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute."). Kam, therefore, also is distinguishable.

property may be continued to be used for the same purpose it was being used at the time of the passage of a [prohibitive] zoning ordinance." Vulcan, 342 S.C. at 499, 536 S.E.2d at 902 (quoting James v. City of Greenville, 227 S.C. 565, 578, 88 S.E.2d 661, 667 (1955)). Thus, the Board's contention that the City did not intend to "grandfather" existing businesses regarding outdoor displays is irrelevant.

The purpose of grandfathering in nonconforming uses is to protect the constitutional rights of the property owner. See Friarsgate, Inc. v. Town of Irmo, 290 S.C. 266, 269, 349 S.E.2d 891, 894 (Ct. App. 1986) ("Generally, in American jurisdictions a landowner who uses his property for a lawful purpose before the enactment of zoning which subsequently prohibits that use may continue the nonconforming use . . . . Otherwise, the landowner would be deprived of a constitutionally protected right. The right to continue a prior nonconforming use is often stated in terms of the owner having acquired a "vested right" to continue the prior use."); Vulcan, 342 S.C. at 499, 536 S.E.2d at 902 ("[T]he substantial value of property lies in its use. If the right of use [is] denied, the value of the property is annihilated, and ownership is rendered a barren right.") (quoting James v. City of Greenville, 227 S.C. 565, 579, 88 S.E.2d 661, 668 (1955)). Thus, if it is determined that a nonconforming use existed at the time of the new ordinance, the use may continue in the absence of evidence that it is detrimental to the public welfare. See Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 578, 524 S.E.2d 404, 409-10 (1999) ("A landowner acquires a vested right to continue a nonconforming use already in existence at the time of a zoning ordinance absent a showing the continuance of the use constitutes a detriment to the public health, safety, or welfare."); Vulcan, 342 S.C. at 499, 536 S.E.2d at 902 ("[O]ne's property may be continued to be used for the same purpose it was being used at the time of the passage of a [prohibitive] zoning ordinance.") (quoting James, 227 S.C. at 578, 88 S.E.2d at 667).

Admittedly, a zoning board may regulate or proscribe changes in a nonconforming use. See Krawcheck, 313 S.C. at 505, 443 S.E.2d at 404. Indeed, the Board has done so here. See City of Beaufort Zoning Ordinance § 5-6108(d) ("A nonconforming building, structure, or land use shall not be changed to another nonconforming use."). Not every shift in activity, however,

constitutes a change in use. See City of Jewell Junction v. Cunningham, 439 N.W.2d 183, 186 (Iowa 1989) ("[N]ot every change in particulars or details in the method of a nonconforming use or in equipment, object or processes, in connection therewith constitutes an unauthorized change in the use."). Rather, to justify finding a particular use has changed to another nonconforming use, it is generally held that the change must be substantial. See id. ("[C]onsiderable latitude will be allowed a landowner in making changes in the original nonconforming use if the changes are not substantial . . . ."); Turbat Creek Pres., LLC v. Town of Kennebunkport, 753 A.2d 489, 492 (Me. 2000) ("To qualify for 'nonconforming' or 'grandfathered' status, it must be shown that the use existed prior to the enactment of the zoning provisions prohibiting it and that the use was 'actual and substantial.'") (citation omitted); Inst. for Evaluation & Planning, Inc. v. Bd. of Adjustment, 637 A.2d 235, 238 (N.J. Super. Ct. Law Div. 1993) ("The proposed use may continue so long as the continuance is 'substantially the same kind of use as that to which the premises were devoted at the time of the passage of the zoning ordinance.'") (citation omitted); see also Waukesha County v. Pewaukee Marina, Inc., 522 N.W.2d 536, 540 (Wis. Ct. App. 1994) ("[A] mere increase in the volume, intensity or frequency of a nonconforming use is not sufficient to invalidate it.).

Several states have adopted some version of the following three-part test to aid in determining the substantialness of a change in nonconforming use: whether the modified use (1) reflects the nature and purpose of the use prevailing when the restrictive ordinance took effect; (2) is merely a different manner of utilization rather than a use different in quality, character, nature or kind; and (3) has a substantially different effect on the neighborhood. See, e.g., Turbat, 753 A.2d at 492; Derby Refining Co. v. City of Chelsea, 555 N.E.2d 534 (Mass. 1990); Conforti v. City of Manchester, 677 A.2d 147 (N.H. 1996). As one court noted:

> The law does not require it to be shown that each garage is used today to store exactly the same items or kinds of items which were stored prior to [the effective date of the zoning restriction]. Nor does it require that the light industry or repair work which occurs on the premises be precisely identical to what occurred before

> . . . . What is required to be shown is that the overall use of the property for the rental of facilities for storage and light industrial purposes has not been significantly altered since [that time].

Zoning Bd. of Adjustment of the City of Philadelphia v. Libros, 482 A.2d 1181, 1183-84 (Pa. Commw. Ct. 1984).

Applying these authorities, I do not believe Heilker's daily permutations in his outdoor display constitute a change from one nonconforming use to another. Although by Heilker's own admission the merchandise on display varies frequently, his *use* of the property for advertising purposes does not. See Baker v. Town of Sullivan's Island, 279 S.C. 581, 585, 310 S.E.2d 433, 436 (Ct. App. 1983) (holding conversion of apartments to condominiums did not violate Town's zoning ordinance forbidding change from one nonconforming use to another because conversion would not change the property's use, i.e., "[a]fter conversion, the property would still be used for residential purposes as it was before"); see also Motel 6 Operating Ltd. Partnership v. City of Flagstaff, 991 P.2d 272, 275 (Ariz. Ct. App. 1999) (holding alterations updating sign to reflect current company logos and tenants "do not trigger the loss of nonconforming use rights"); DiBlasi v. Zoning Bd. of Appeals of the Town of Litchfield, 624 A.2d 372, 376 (Conn. 1993) (finding shift in use from a "business office" to a "medical office" was not sufficiently different in character to constitute a "change in use"); Cunningham, 439 N.W.2d at 186 ("If a grocer or other merchant is storing and selling merchandise of one type, [the] status as a nonconforming use should not be lost if he changes to another type of merchandise so long as the impact of the business on the neighborhood remains the same."); Derby Refining, 555 N.E.2d at 540 (in finding change from storage of gasoline, kerosene and aviation fuel to storage of liquid asphalt did not constitute a prohibited change from one nonconforming use to another, court stated the uses were "nearly identical in nature" and "the fact that the product being delivered, stored, and distributed has changed from one petroleum product to another . . . does not mandate a conclusion that a change in the nature or purpose of the use has occurred"); Kramer v. Town of Montclair, 109 A.2d 292, 293 (N.J. Super. Ct. App. Div. 1954) (fact that property once used for storing one-and-a-half-ton trucks now stored six-ton tractor trailer trucks was

"insignificant" change such that prior nonconforming use was not destroyed); Stewart v. Pedigo, 206 N.E.2d 429, 431 (Ohio Ct. App. 1965) (finding change from "display of motor-driven garden and lawn tools to that of motor-driven vehicles for transportation" was not a "substantial change" in nonconforming use, because although the "purpose and policy of zoning is to effect the gradual elimination of nonconforming uses," zoning restrictions should not operate "to prohibit all changes of nonconforming use"); Hendgen v. Clackamas County, 836 P.2d 1369, 1370 (Or. Ct. App. 1992) (holding no change in nonconforming use status despite rental of storage buildings to a different business storing different items because "[t]he common nucleus of both activities [is] storage"); Libros, 482 A.2d at 1184 (current use of premises qualified as pre-existing, non-conforming use where, although items stored in garages were newer and perhaps different, the use of the garages for personal storage had remained constant).

The Board's additional reason for denying Heilker's appeal, that existing nonconformities must be brought into compliance, to the degree practicable, "if any portion of the building, site design, or lighting is changed, expanded, or altered," also lacks merit. It is without question, and the Board concedes, that neither the "building" nor "lighting" provisions of the ordinance are implicated by Heilker's activities. Thus, the only conceivable basis for finding the above language controlling is that Heilker's rearrangement of furniture constitutes a change in "site design." I would reject this contention.

Section 5-6205 of the overlay zoning amendment defines site design as "the process of arranging buildings, parking, open spaces, and other improvements such as landscaping, walkways, and roads on the land. Site design is an art concerned with shaping functional and enjoyable outdoor spaces while working carefully with the existing landscape and community character." In my opinion, this definition may not be broadened to encompass Heilker's arrangement of furniture outside his store. The only possible construction would require a determination that his practice fell within the ambit of "arranging . . . open spaces." To me, however, the arrangement of open space referenced in the amended ordinance means *where* one places "open space" in relation to buildings, sidewalks, parking, roads and other landscape features. Indeed, if Heilker's rotating displays of furniture are included in this definition, then the "space" referred to is no longer "open."

Finally, I disagree with the Board's conclusion that, because Heilker's outdoor display of furniture changes often, "conformance to the ordinance can be effected with relative ease." In so finding, the Board actually begs the question by failing to recognize that compliance would effectively destroy Heilker's use of the property. Moreover, this assertion is simply not supported by the record evidence.

The City, in its own brief, states the following:

> A use of land may be continued as a nonconforming use, in spite of prohibitory zoning legislation, only if it is a "substantial" one. The nature and extent of use which will be regarded as substantial was described as one involving improvements *or businesses built up over the years, the destruction of which would cause the property owner serious financial harm.*

Final Brief of Appellant at 11 (quoting Anderson, American Law of Zoning, § 6.20 (1986)) (emphasis added). The record is replete with uncontradicted evidence that Heilker opened his businesses using an outdoor advertising concept and continued to build them over a period of years on that basis. Because direct testimony in the record reflects that anywhere from 25 to 35% of his sales are a consequence of this form of advertising, there is no question Heilker would suffer "serious financial harm" if forced to discontinue his displays. Thus, I would hold this factual finding by the Board is without evidentiary support.

For the foregoing reasons, I would affirm the circuit court's decision finding Heilker's nonconforming use can continue.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Otis Williams,

Appellant.

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

Opinion No. 3375
Heard May 7, 2001 - Filed July 30, 2001

AFFIRMED IN PART
AND REMANDED

Assistant Appellate Defender Katherine Carruth Link, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for respondent.

HUFF, J.: Appellant, Otis Williams, was convicted of possession of marijuana and possession of contraband by a prisoner of the State. The trial judge sentenced him to one year on the simple possession charge, concurrent with ten years on the possession of contraband charge, both sentences to run consecutive to the sentence he was currently serving. Williams appeals. We affirm in part, and remand for a subject matter jurisdiction hearing.

ISSUES

1. Whether the trial court erred in denying appellant's motion for directed verdict on both charges, where the State failed to produce evidence of appellant's possession of the marijuana.

2. Whether the trial court had subject matter jurisdiction to convict and sentence appellant for possession of contraband by a prisoner of the State.

FACTUAL/PROCEDURAL BACKGROUND

Williams, an inmate at Ridgeland Correctional Institution, shared a cell with inmate Foster. The cells house a maximum of two people, and each inmate has an assigned wall locker. The lockers are assigned according to the assigned bunk of the inmate. The only time the assigned bunks, and consequently the assigned lockers, are changed is in situations such as where an inmate has a medical problem preventing him from using the upper bunk. The inmates are the only ones that have a key to their locker.

On September 14, 1998, following a tip from a confidential informant, officers entered Williams' and Foster's cell and announced they were going to conduct a search. The officers asked Williams to step outside the cell while they strip searched inmate Foster. After completing the strip search, one of the officers motioned for Williams to come back into the cell to be strip searched. At that time, Williams ran into a bathroom. By the time the officers caught up with him, they found Williams kneeling in front of the

toilet with one hand inside the toilet and another hand flushing the toilet. He spit up something, apparently trying to get rid of something he had in his mouth. He never indicated to the officers that he was sick.

The officers handcuffed Williams, placed him in a holding cell, and then continued the search of his cell. Williams' key to his locker was on top of his wall locker. The officers unlocked the locker and found a bag containing a green leafy substance. Test results indicated the substance was marijuana, weighing 90.2 grams, or approximately three ounces.

Although no one identified any other items in the locker containing the marijuana as belonging to Williams, the officers consistently testified the marijuana was found in Williams' wall locker. The officers conceded it was possible the locker was not Williams'; however, they testified they were sure it was his wall locker at the time of the search, the locker in question was assigned to Williams, and Foster had identified the other locker as his. Additionally, one of the officers testified, to his knowledge, there had been no change in the assigned beds and lockers in Williams' cell.

LAW/ANALYSIS

I. Directed Verdict

Williams asserts the trial judge erred in denying his motion for directed verdict on both charges. He contends the State failed to meet its burden of proving his possession of the marijuana found in the locker. Williams argues the officers merely assumed the locker was his, but conceded it may not have been. He contends the evidence shows the key was not on his person and there was no evidence he exercised dominion and control over the locker. He asserts, at most, the State's evidence raised only a suspicion that the marijuana found in the locker was in his possession. We disagree.

In considering a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not with its

weight, and the case should be submitted to the jury if there is any direct evidence or substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly or logically deduced. State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). The lower court should not, however, refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty. State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). "In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find that the case was properly submitted to the jury." Fennell, 340 S.C. at 270, 531 S.E.2d at 514.

Conviction of possession requires proof of possession, either actual or constructive, coupled with knowledge of the drug's presence. Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession. State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981). In order to prove constructive possession, the State must show the defendant had dominion and control, or the right to exercise dominion and control, over the drug. State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976). Such possession can be established by circumstantial or direct evidence or a combination of the two. Id. "Possession requires more than mere presence. The State must show the defendant had dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it." State v. Muhammed, 338 S.C. 22, 27, 524 S.E.2d 637, 639 (Ct. App. 1999). "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." Hudson, 277 S.C. at 203, 284 S.E.2d at 775.

The trial court properly denied Williams' motion for directed verdict on the possession charges. There was testimony from the officers that the locker in question was assigned to Williams, that inmate Foster had identified the other locker in the cell as his, that there had been no change in the assigned beds and lockers in Williams' cell to their knowledge, and that

they were sure it was his wall locker at the time of the search. Additionally, Williams exhibited suspicious behavior in running to the bathroom and spitting something out of his mouth before he could be searched. The record establishes sufficient evidence Williams exercised dominion and control over the marijuana and, thus, there was sufficient evidence from which Williams' guilt could be fairly and logically deduced.

II. Subject matter jurisdiction

A. Failure to Include Certain Language in Indictment

Williams also contends his conviction and sentence for possession of contraband by a prisoner of the State is void for lack of subject matter jurisdiction. He argues the indictment for this offense is defective as it failed to allege an essential element of the offense. Specifically, he asserts the indictment failed to allege the essential element that the item in the possession of the accused has been declared by the director of the Department of Corrections to be contraband. We disagree.

As a preliminary matter, it must be noted that issues related to subject matter jurisdiction may be raised at any time. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). Thus, this issue is properly before us on appeal.

Pursuant to S.C. Code Ann. § 17-19-20 (1985), an indictment is deemed sufficient where, in addition to allegations as to time and place, as required by law, it "charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided."

> An indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to

> answer and whether he may plead an acquittal or conviction thereon. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.

Browning v. State, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995) (citations omitted). An indictment phrased substantially in the language of the statute which creates and defines the offense is ordinarily sufficient. State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 878 (1981).

The indictment, as altered,[1] charged:

> That Otis Williams did in Jasper County on or about September 14, 1998, while a prisoner under the Jurisdiction of the Department of Corrections, unlawfully possess a quantity of contraband, to wit: marijuana, in violation of Sec. 24-3-950, Code of Laws of South Carolina, (1976), as amended.

South Carolina Code Ann. § 24-3-950 (Supp. 2000) provides in pertinent part:

> . . . .It shall also be unlawful for any prisoner under the jurisdiction of the Department of Corrections to possess any matter declared to be contraband. Matters considered contraband within the meaning of this section shall be those which are determined to be such by the director and published by him in a

[1] The original, type written indictment was altered, with portions being struck through and hand written changes made. This alteration is also the subject of appeal and is addressed later in this opinion.

> conspicuous place available to visitors and inmates at each correctional institution. . . .

In the case of State v. Tabory, 262 S.C. 136, 202 S.E.2d 852 (1974), our Supreme Court addressed the sufficiency of an indictment charging the appellant under former § 55–383, the predecessor statute to § 24-3-950, which is also identical in language to § 24-3-950. There, the court noted an indictment phrased substantially in the language of the statute which creates and defines the offense is normally sufficient. However, in applying that standard, the court concluded the allegations contained in the indictment were inadequate to charge the offense under the statute where the indictment failed to state "that the items possessed by [the accused] had been 'declared by the Director (of the Department of Corrections) to be contraband,' which is a necessary element of that offense." Id. at 140, 202 S.E.2d at 854.

On the other hand, State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001), is the most recent statement of this court relative to the issues surrounding this indictment. In Hamilton, this court held that an indictment charging an inmate with possession of contraband in violation of S.C. Code Ann. § 24-3-950 was sufficient to vest the trial court with subject matter jurisdiction, even though it did not allege the item possessed by the accused had been declared contraband by the director of the Department of Corrections. This court found the indictment was sufficient where it specifically identified the contraband involved, incorporated S.C. Code § 24-3-950 by reference, and named the offense in the title of the indictment. Id. at 72. In the case before us, the indictment specifically identifies the contraband as marijuana, cites § 24-3-950 of the South Carolina Code, and includes the name of the offense in the title of the indictment. Accordingly, we find that the language of the indictment is sufficient to confer on the trial court subject matter jurisdiction in this case.

B. Alteration of Indictment

Next, Williams asserts the indictment for possession of contraband is defective because the typed indictment has been altered with handwritten changes and it is impossible to discern whether the charge for

which he was convicted was actually true billed by the grand jury. He argues the typed indictment changed the charge from a violation of S.C. Code Ann. § 24-7-155 to a violation of § 24-3-950, that the initialed changes did not appear to be that of the solicitor, grand jury foreman, or clerk of court, and that there was no way to determine if the indictment had been true billed before or after the alterations were made.[2] We agree.

Except for certain minor offenses, the circuit court does not have subject matter jurisdiction to convict a defendant unless there has been an indictment of the offense, a waiver of indictment, or unless the charge is a lesser included offense of the crime charged. State v. Elliott, 335 S.C. 512, 517 S.E.2d 713 (Ct. App. 1999); Murdock v. State, 308 S.C. 143, 417 S.E.2d 543 (1992). Absent evidence to the contrary, proceedings in a court of general jurisdiction will be presumed regular. Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). However, when faced with an irregularity in an indictment and the evidence of record is insufficient to show the action taken by the grand jury, it is proper for the appellate court to remand for an evidentiary hearing to determine whether the trial court had subject matter jurisdiction. State v. Grim, 341 S.C. 63, 533 S.E.2d 329 (2000); Anderson v. State, 338 S.C. 629, 527 S.E.2d 398 (Ct. App. 2000).

The record here is insufficient to determine when and under what circumstances the alterations were made to the type written indictment. If the alterations were made prior to the action of the grand jury, the circuit court clearly had jurisdiction to convict and sentence appellant under § 24-3-950. Because we are unable to discern the circumstances under which the

---

[2] The type written indictment was entitled "POSSESSION OF CONTRABAND BY COUNTY OR MUNICIPAL PRISONER 24-7-155" and charged, "That Otis Williams did in Jasper County on or about September 14, 1998, while a county or municipal prisoner in said county, unlawfully possess a quantity of contraband, to wit: marijuana, in violation of Sec. 24-7-155, Code of Laws of South Carolina, (1976), as amended."

alterations were made, we remand this issue to the circuit court for an evidentiary hearing on the matter.[3]

AFFIRMED IN PART AND REMANDED.

HEARN, C.J., and GOOLSBY, J., concur.

[3] Appellant does not argue, and neither of the parties has addressed the issue of whether the indictment would have been properly amended, allowing the court to retain jurisdiction, if the amendments were made subsequent to the action of the grand jury. See S.C. Code Ann. § 17-19-100 (1985); Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999); Hope v. State, 328 S.C. 78, 492 S.E.2d 76 (1997) (an indictment may be amended only if such amendment does not change the nature of the offense charged). In the event the circuit court determines the altered indictment was not true billed by the grand jury, the court is directed to entertain argument on the issue of whether the indictment was properly amended.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Appellant,

v.

Roy Johnson,

Respondent.

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

Opinion No. 3376
Heard June 5, 2001 - Filed August 6, 2001

AFFIRMED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Norman Mark Rapoport; and Solicitor Warren B. Giese, all of Columbia, for appellant.

Deputy Chief Attorney Joseph L. Savitz, III, of SC Office of Appellate Defense, of Columbia, for respondent.

CONNOR, J.: The State appeals the trial court's refusal to sentence Roy Johnson to life imprisonment without the possibility of parole pursuant to South Carolina Code section 17-25-45. We affirm.

FACTS

On September 1, 1999, a Richland County jury found Johnson guilty of armed robbery. Because Johnson had a prior armed robbery conviction resulting from a 1992 guilty plea, the State asked the trial court to sentence Johnson to life imprisonment without the possibility of parole under section 17-25-45. Defense counsel objected, arguing the State failed to give counsel written notice of its intent to seek a life sentence without parole.

The clerk's file contained a notice of the State's intention to seek a life sentence without parole. The notice was filed May 26, 1999. In addition, the assistant solicitor stated he handed a copy of the notice to Johnson that same day or the day after and included a copy of the notice in the discovery materials provided to defense counsel. In addition, the assistant solicitor stated he told defense counsel in May 1999 that the State would seek a life sentence without parole. In a memorandum submitted after the trial, the assistant solicitor alleged he permitted defense counsel "complete access" to his trial notebook, which contained a copy of the written notice filed with the clerk of court.

Defense counsel admitted "[t]here was a lot of talk by the solicitor before trial that he was going to seek life without parole; however, I was never given any notice that he was going to seek life without parole in a written form." Although defense counsel denied having received a copy of the written notice as part of the discovery material, he acknowledged he had actual notice of the State's intent to have Johnson sentenced to life imprisonment without parole.

The trial court took the matter under advisement. On September 9, 1999, the trial court sentenced Johnson to thirty years imprisonment. In declining to sentence Johnson to life imprisonment without parole, the trial court found: (1) Johnson himself had received written notice of the State's intention to seek a life sentence without parole; (2) the State filed the notice with the clerk of court on May 26, 1999; and (3) defense counsel had actual notice of the State's intent, as evidenced by the fact that he had sought a continuance on that ground.[1] The trial court, however, further noted that, although the assistant solicitor stated he personally served written notice on defense counsel in July 1999, defense counsel stated he never received it. The trial court resolved this disagreement in Johnson's favor, finding

---

[1] Before Johnson's trial was scheduled to begin, defense counsel unsuccessfully moved for a continuance on the sole basis that he needed more time to prepare because Johnson was facing the possibility of a life sentence without parole.

there were no cover letters or other documents in either the solicitor's file or the public defender's file to suggest the State gave defense counsel written notice that it would request a life sentence without parole in the event of a guilty verdict.

ANALYSIS

The State contends that, because defense counsel had actual notice of its intent to seek a life sentence in this case, the trial court erred in finding it did not give sufficient notice under the statute.

South Carolina Code section 17-25-45(A) provides in pertinent part:

> Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, 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:
>
> (1) a most serious offense; . . . .

S.C. Code Ann. § 17-25-45(A) (Supp. 2000). Paragraph (C) of the statute includes armed robbery as a "most serious offense." Id. § 17-25-45(C).

The General Assembly has made the sentencing provisions of section 17-25-45(A) mandatory. Id. § 17-25-45(G). Regarding the notice requirement, the statute provides:

> Where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten days before trial.

Id. § 17-25-45(H) (emphasis added).

The South Carolina Supreme Court has laid out the principles of statutory construction as applied to a criminal statute:

> It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the

> legislature. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.

State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991); accord Kerr v. State, Op. No. 25295 (S.C. Sup. Ct. filed May 29, 2001).

The South Carolina Constitution gives sole legislative power to the General Assembly. S.C. Const. art. III, § 1 ("The legislative power of this State shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'"). By its words in the recidivist statute, the General Assembly has mandated that the solicitor "must" notify the defendant and the defendant's counsel in writing if the solicitor intends to seek a life sentence without the possibility of parole. For this Court to dismiss the clear and unambiguous language of the statute and merely require the defendant's counsel to have actual notice of the solicitor's intent to seek life without parole would have the effect of amending the statute. In our view, actual notice under section 17-25-45(H) is insufficient unless and until the General Assembly decides otherwise and amends the statute itself.

On appeal, the State has attempted to convince this Court of the "obvious purpose" of the notice provision and the "clear intent" of the General Assembly. However, we refuse to delve beyond the clear and unambiguous words of the statute. This notice provision is clearly for the benefit of the defendant. If the General Assembly had not intended for the defendant's counsel to receive written notice, it would not have so provided.

The State also relies on the South Carolina Supreme Court's decision in State v. Washington, 338 S.C. 392, 526 S.E.2d 709 (2000), for the proposition that actual notice is sufficient under section 17-25-45(H). In Washington, when the defendant was initially indicted, he received written notice that the solicitor would seek life imprisonment without parole. Because of errors in the original indictment, the defendant was re-indicted. Upon re-indictment, the solicitor did not send a second written notice to the defendant. Id. at 398, 526 S.E.2d at 712.

The Supreme Court held the State "was not precluded from applying section 17-25-45 because, even without a second notice, Defendant had actual notice that the State would be seeking life without parole." Id. In so holding, the Supreme Court observed, "This Court has found that under such notice statutes, the law only requires actual notice." Id.

We believe there are two reasons the present case is distinguishable from Washington. First, the defendant in Washington did receive written notice of the State's intent to invoke section 17-25-45 at least once. It was only after his re-indictment that the solicitor did not send a second notice to the defendant. In the present case, the trial judge found Johnson's attorney never received written notice of the solicitor's intent to seek life imprisonment without parole as required under section 17-25-45(H). We find the difference between these two scenarios significant. Furthermore, we believe Washington was decided on the basis that the prior written notice sufficiently satisfied the statute's written notice requirement, and therefore actual notice was sufficient under the facts of that particular case.

Secondly, in support of their statement that "under such notice statutes, the law only requires actual notice," the Supreme Court cited State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), and State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995), both of which dealt with notice requirements in death penalty cases. The statute requiring notice in McWee and Young only requires that "[w]henever the solicitor seeks the death penalty he shall notify the defense attorney." S.C. Code Ann. § 16-3-26(A) (Supp. 2000). There is no mention in the statute of the manner in which the notice shall be given by the solicitor. We do not believe the Supreme Court intended to adopt a broad rule that, regardless of the circumstances of the particular case, all notice requirements in criminal statutes are satisfied by actual notice, notwithstanding the General Assembly's legislative mandate to the contrary. Therefore, we have concluded that the holding in Washington is limited to the specific facts set forth in the Supreme Court's opinion.

For these reasons, the trial judge did not err in refusing to sentence Johnson to life imprisonment without the possibility of parole because the solicitor failed to properly notify Johnson's counsel.

AFFIRMED.

HEARN, C.J. concurs and GOOLSBY, J., dissents in separate opinion.

GOOLSBY, J. (dissenting): I dissent. I would hold that defense counsel's admission that he was aware of the State's intention to seek a life sentence without parole against his client gave the trial court sufficient reason to sentence Johnson accordingly.

The legislature has made the sentencing provisions of section 17-25-45(A) mandatory.[2] It would follow that, as long as the requirements of due process are met,[3] the State's failure to provide written notice would more appropriately call for sanctioning those responsible for the procedural irregularity rather than allowing a repeat offender to avoid a statutorily required sentence.[4]

---

[2] S.C. Code Ann. § 17-25-45(G) (Supp. 2000). This subsection also states the solicitor has the discretion to invoke the sentencing provision under paragraph (B), which provides for a life sentence without parole upon conviction of a "serious offense" under certain conditions. In addition, South Carolina section 17-25-45(A) provides that a person convicted a third time of a most serious offense "must be sentenced to a term of imprisonment for life without the possibility of parole." Id. § 17-25-45(A) (emphasis added).

[3] The requirement of written notice in section 17-25-45 is a procedural safeguard beyond the requirements of due process. See Oyler v. Boles, 368 U.S. 448 (1962) (holding defendants must receive only reasonable notice and an opportunity to be heard relative to recidivist charges); State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999) (stating that, under the South Carolina Constitution, there is no duty to advise a defendant that the State is seeking an enhanced sentence under section 17-25-45); see also Massey v. State, 609 So. 2d 598 (Fla. 1992) (holding the prosecution's failure to serve notice of its intent to have the defendant sentenced as an habitual offender was harmless error in view of the stated purpose of the statutory notice requirement); cf. Tasco v. Butler, 835 F.2d 1120 (5th Cir. 1988) (remanding for a determination of whether the defendant and his attorney had received sufficient notice to prepare a defense to recidivism charges and, if not, a determination of whether the defendant suffered prejudice as a result of this procedural deficiency).

[4] Cf. State v. Culbreath, 282 S.C. 38, 318 S.E.2d 681 (1984) (holding the failure of the solicitor to act on a warrant within a certain period of time set by the South Carolina Rules of Criminal Procedure would subject the solicitor to contempt proceedings but would not invalidate the warrant or prevent subsequent prosecution).

Moreover, in State v. Washington,[5] the South Carolina Supreme Court held section 17-25-45 requires only actual notice. In that case, the State initially sent the defendant written notice that it would seek a life sentence without parole under section 17-25-45. Because of errors in the indictment, the State later re-indicted the defendant, but did not send a second notice.

The supreme court held the State "was not precluded from applying section 17-25-45 because, even without a second notice, Defendant had actual notice that the State would be seeking life without parole."[6] In so holding, the supreme court observed, "This Court has found that under such notice statutes, the law only requires actual notice."[7]

As the majority notes, the defendant in Washington had once received written notice of the State's intent to invoke section 17-25-45. Despite this factual difference, I would hold Washington is applicable to this case.

First, I think it is significant that, although the supreme court could have emphasized the fact that the requirements of section 17-25-45 had already been satisfied, it chose instead to base its holding on the fact that the defendant had actual notice of the State's intent. In other words, the basis for the supreme court's decision was not the State's earlier compliance with the statutory requirement of written notice when it initially indicted the defendant but the inference that the prior notice was sufficient to inform the defendant of the possibility

---

[5] 338 S.C. 392, 526 S.E.2d 709 (2000).

[6] Id. at 398, 526 S.E.2d at 712.

[7] Id. (emphases added). In support of this holding, the supreme court cited State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), and State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995), both of which dealt with notice requirements in death penalty cases. The majority correctly states that the statute requiring notice in these cases, in contrast to section 17-25-45, does not specify the manner in which the solicitor is to give the notice. In my view, however, the very fact that the supreme court relied on McWee and Young in deciding Washington only strengthens the argument that the focus of 17-25-45 should be on whether the necessary individuals had actual notice rather than on whether notice was given in the manner prescribed in the statute. Certainly, the prospect of a death sentence is at least as serious, if not more so, than that of a life sentence without parole. As the supreme court must have recognized, to allow more leeway in notifying a defendant of the first possibility would be a disturbing incongruity in the administration of justice.

that he could receive a sentence of life imprisonment without the possibility of parole after the second indictment was issued. In addition, as noted in footnote 4 of the opinion, "[t]here would be no duty to inform Defendant about seeking the statute's application if it were not for the statutory provision."[8]

The pivotal inquiry, then, is not whether the statutory procedures were followed, but whether the purpose of the statute has been satisfied. The reasoning used by the supreme court to support its decision in Washington indicates a trial court should avoid a "bright line" approach in deciding whether to sentence a defendant to life imprisonment without parole pursuant to section 17-25-45 when there is a dispute concerning whether the State complied with technical requirements of the statute.

Here, it is undisputed defense counsel had actual notice that the State intended to seek a sentence of life imprisonment without parole. In view of the supreme court's holding in Washington that section 17-25-45 requires only actual notice of such intent, I would hold the trial court erred in declining to sentence Johnson as the State requested. Accordingly, I would reverse Johnson's sentence and remand the case to the trial court for sentencing to life imprisonment without parole.

[8] Washington, 338 S.C. at 398 n.4, 526 S.E.2d at 712 n.4.