The Supreme Court of South Carolina

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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

September 4, 2001

ADVANCE SHEET NO. 32

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Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Freddie Eugene Owens, Appellant.

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

Opinion No. 25354
Heard May 9, 2001 - Filed September 4, 2001

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Assistant Appellate Defender Katherine Carruth Link, of South Carolina Office of Appellate Defense, of Columbia; John M. Rollins, Jr., of Greer; and Karl B. Allen, of Greenville, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Tracey C. Green, of Columbia; and Solicitor Robert M. Ariail, of

Greenville, for respondent.

_____

JUSTICE BURNETT: Appellant was convicted of murder, armed robbery, use of a firearm in the commission of a violent crime, and conspiracy to commit armed robbery. He was sentenced to death for murder and imprisonment for thirty years, five years, and five years for armed robbery, use of a firearm in the commission of a violent crime, and conspiracy to commit armed robbery, respectively.

ISSUES

I. Did the trial court have subject matter jurisdiction to try appellant for murder?

II. Did the trial court err by admitting evidence of appellant's prior bad acts?

III. Did the trial court err by admitting appellant's February 16th statement because the statement did not meet the requirements of South Carolina Code Ann. § 16-3-20(B) (Supp. 2000)?

IV. Did the trial court err by admitting appellant's February 16th statement because it was obtained in violation of his Fifth Amendment right to counsel?

V. Did the trial court err by admitting appellant's February 16th statement because it was obtained in violation of his Sixth Amendment right to counsel?

VI. Did the trial court violate appellant's due process and Eighth Amendment rights, along with Rule 403, SCRE, by admitting his February 16th statement?

VII. Did the trial court err by denying appellant's motion for a new sentencing proceeding based on after-discovered evidence?

VIII. Did the trial court err by sentencing appellant for possession of a firearm during the commission of a violent crime?

BACKGROUND

The charges against appellant stem from the 4:00 a.m. November 1, 1997, armed robbery of a Speedway convenience store and fatal shooting of the store's clerk, Irene Graves. Appellant was jointly tried with co-defendant Stephen Andra Golden. During jury qualification, Golden pled guilty.

During trial, the State introduced the Speedway security video which recorded the robbery and shooting. The video reveals two individuals entered the store. One individual shot Graves.

Golden admitted he was one of the Speedway robbers and claimed appellant was his accomplice. He testified appellant shot Graves in the head after she stated she could not open the safe. No forensic evidence connected appellant to the crime scene.

Nakeo Vance testified he, Golden, appellant, and Lester Young planned to rob the Speedway and, simultaneously, a nearby Waffle House. Golden and appellant robbed the Speedway. Vance and Young went to the Waffle House but did not carry out the robbery. After the Speedway shooting and robbery, Vance testified appellant admitted he shot the store clerk.

Appellant's girlfriend testified appellant told her he had robbed a store and shot the clerk.

Detective Wood and Investigator Willis testified appellant initially gave a written statement denying involvement in the Speedway robbery and shooting. According to both witnesses, appellant later admitted he shot Graves.

Appellant maintained he was at home in bed at the time of the Speedway robbery and shooting.[1] He suggested the Sheriff's Department's investigation into the identity of Golden's accomplice was inadequate. For instance, he asserted the Sheriff's Department initially interviewed another individual who tested positive for gun powder residue, but failed to pursue this individual as a suspect. Alternatively, he suggested Vance was the accomplice. Appellant intimated witnesses who testified against him had various reasons to inculpate him in the crime. He also suggested witnesses falsely testified he made statements admitting he robbed the Speedway and shot the store clerk. Additionally, he claimed the Sheriff's Department intimidated his mother into giving a written statement in which she asserted appellant admitted shooting the clerk. Appellant's mother denied giving the statement.

I.

Appellant argues the trial court lacked subject matter jurisdiction to try him for murder because the murder indictment failed to allege malice aforethought as required by South Carolina Code Ann. § 17-19-30 (1985). We disagree.

With limited exceptions, the South Carolina Constitution requires a person be indicted by the grand jury before standing trial for a crime. S.C. Const. art. I, § 11. Accordingly, except for certain minor offenses, the circuit court does not have subject matter jurisdiction to convict a defendant of an

[1]Appellant's alibi was offered through the testimony of a Sheriff's Department detective who stated appellant told him he was at home in bed at 4:00 a.m.

offense unless (1) there has been an indictment which sufficiently states the offense (2) there has been a waiver of indictment; or (3) the charge is a lesser included charge of the crime charged in the indictment. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998).

South Carolina Code Ann. § 17-19-30 provides:

> Every indictment for murder shall be deemed and adjudged sufficient and good in law which, in addition to setting forth the time and place, together with a plain statement, divested of all useless phraseology, of the manner in which the death of the deceased was caused, charges the defendant did feloniously, wilfully and of his malice aforethought kill and murder the deceased.

(Underline added).

An indictment for murder is sufficient "if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and if an acquittal or a conviction thereon may be pleaded as a bar to any subsequent prosecution." State v. Owens, 293 S.C. 161, 165, 359 S.E.2d 275, 277 (1987); see State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987) (test of sufficiency of indictment is whether or not it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to defend). Malice aforethought is an element of the offense of murder. S.C. Code Ann. § 16-3-10 (1985) (defining murder as 'the killing of any person with malice aforethought, either express or implied.'); see Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975).

Here, the murder indictment states:

COUNT ONE - MURDER

> That [APPELLANT] did in Greenville County on or about November 1, 1997, while aiding, abetting and assisting Steven Andra Golden in the commission of an Armed Robbery, kill one Irene Graves by means of shooting her, and that the said victim died as a proximate result thereof. This is in violation of South Carolina Code of Laws § 16-03-10.

While the murder indictment does not specifically state appellant killed the victim with malice aforethought, it does state appellant killed the victim in violation of South Carolina Code Ann. § 16-3-10. This section defines murder as "the killing of any person with malice aforethought, either express or implied." Specific reference to § 16-3-10 in the body of the indictment provided appellant with notice of the elements of murder. See State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980) (where indictment referred to specific bribery code section on its face and there was lengthy discussion concerning that code section throughout the trial, defendants obviously knew for what crime they were being prosecuted); State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999) (indictment was sufficient to apprise defendant of *mens rea* element in light of the fact the statutory citations were included). While the better practice is to set forth the elements of the crime in the indictment rather than referring to the statutory section alleged to have been violated, the indictment here was sufficient as it informed appellant of the elements of murder, including malice aforethought.[2]

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[2]Appellant asserts State v. Crenshaw, supra, and State v. Beam, supra, are inapposite because the offenses in those cases were statutory while murder is a common law offense. While murder remains a common law offense, § 16-3-10 declares the common law. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989). Accordingly, appellant was informed of the elements of common law murder, including malice aforethought, by reference to the statute.

We note appellant relies on Carter v. State, supra, to support his claim that reference to the statute is insufficient to notify the defendant of the elements of the offense. In Carter, the Court determined reference to the statute on the caption of the indictment was not controlling where it conflicted with the description of the offense in the body of the indictment. Carter did not hold reference to the statute in the body of the indictment is insufficient to authorize jurisdiction.

GUILT PHASE ISSUE

II.

Appellant argues the trial judge erred by allowing the State to introduce evidence of his alleged involvement in the Prestige Cleaners and Conoco convenience store robberies on October 31 and November 1, 1997. He contends evidence of these two robberies was not admissible as part of the *res gestae*. We disagree.

Six weeks prior to trial, the trial judge heard appellant's motion *in limine* seeking to exclude evidence of two uncharged crimes: the armed robbery of Prestige Cleaners at 6:45 p.m. on October 31, 1997, and the armed robbery of a Conoco convenience store at 2:00 a.m. on November 1, 1997. The solicitor stated the Prestige Cleaners and Conoco robberies occurred less than ten hours before the Speedway robbery. The solicitor asserted:

> [the crimes] are all part of the intertwined activities of these two individuals, along with the two other individuals through the course of this day. And we believe that the proof that is going to be required to establish this crime and what led to the crime is going to involve the action of these people that took place earlier in the day.
>
> Where they were, where they had been together, how well they had to observe each other, I mean, and who was betting who [sic] that they could do what, and all the goings-on, I don't believe -

the phrase has been used - they are inextricably intertwined with everything that went before them.

The solicitor further stated:

> When I say the same individuals, there were other individuals other than these two defendants. But they were the same four individuals in all of them. They were in the same car, they're all using the same - going back to the same house, and they're all talking to each other throughout the entire day as to what they're going to do and planning their next move and going to the next place and that sort of thing.

The trial judge ruled evidence regarding the Prestige Cleaners and Conoco robberies was admissible.

During trial, without objection, Golden testified about appellant's role in the Prestige Cleaners and Conoco armed robberies. Golden explained around dinnertime on Halloween 1997, he, appellant, Vance, and Young were driving around, drinking alcohol, smoking marijuana, and deciding who they were going to rob. Initially, the four considered robbing a jewelry store but then decided to rob Prestige Cleaners. Golden and Young robbed the dry cleaners while appellant and Vance waited in the car. Golden explained they were "taking turns" committing the robberies. The four men then went to appellant's home where they split the money from the robbery and discussed robbing a Waffle House. The four went to the Waffle House but decided against robbing it because too many people were inside.

Thereafter, the men decided to rob a Conoco convenience store. Golden, Young, and appellant went into the Conoco; Vance remained outside in the car. After the robbery, the men returned again to appellant's home where they distributed the Conoco money. They discussed robbing the Speedway. Before going to the Speedway, Golden rented a motel room to create an alibi. The four men then decided Golden and appellant, the "original partners," would rob the Speedway while Young and Vance would

rob a nearby Waffle House. Golden then described robbing the Speedway with appellant.

Without objection, Vance gave similar testimony about the Prestige Cleaners and Conoco robberies. Vance testified, during the Prestige Cleaners and Conoco robberies, he waited near the car, but he decided to rob the Waffle House because the others were "getting away with [the robberies]. It looked easy" and he wanted to "be part of it."

Generally, a motion *in limine* seeks a pretrial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999). A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. Id. A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review. Id.

Appellant failed to object to the solicitor's questions concerning his involvement in the Prestige Cleaners and Conoco armed robberies. Accordingly, this issue is not preserved for consideration on appeal. Id.

In any event, the *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). This evidence of other crimes is admissible:

> when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense

> is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... '[and is thus] part of the res gestae of the crime charged.' And where evidence is admissible to provide this 'full presentation' of the offense," [t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

State v. Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)). Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime. State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997). Even if the evidence is relevant under this theory, prior to admission the trial judge should determine whether its probative value clearly outweighs any unfair prejudice. Rule 403, SCRE; State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990).

Evidence regarding the Prestige Cleaners and Conoco robberies was properly admitted under the *res gestae* theory. Evidence of the two prior robberies, committed by various combinations of the same four individuals within hours of the Speedway robbery, was necessary to place the Speedway crime in context. Evidence of the two prior robberies was critical for the jury to understand the nature and environment of the Speedway robbery - that the four men committed the Speedway robbery as part of a robbery spree. Contra State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (finding prior crime was not part of "criminal episode" for which defendant was on trial).

Moreover, the probative value of the evidence outweighed its prejudicial effect. Appellant's participation in the prior robberies with the same individuals shortly before the Speedway robbery was evidence he participated in the Speedway robbery with the same individuals. Further, Golden and Vance's testimony suggests that the success of the earlier robberies encouraged appellant to rob the Speedway.

SENTENCING PHASE ISSUES

The jury returned guilty verdicts on Monday, February 15, 1999, at approximately 8:30 p.m. The trial judge ordered the sentencing phase of trial to begin on Wednesday at 9:00 a.m.

When court reconvened on Wednesday, February 17, defense counsel notified the trial judge they had been served with a "Supplemental Notice of Aggravation" around 1:00 the previous afternoon. The notice indicated the State's intent to introduce evidence of appellant's "future dangerousness and his inability to adapt to prison as demonstrated in the incident involving the death of Christopher Lee on or about February 16, 1999 at the Greenville County Detention Center." The notice further stated, "[t]he State has previously noticed [appellant] of its intent to introduce evidence of [his] character before, during and after the crime."[3]

Defense counsel explained inmate Christopher Lee died at the Greenville County Detention Center early on the morning of February 16 and appellant gave a statement confessing to killing him. Appellant was arrested on murder charges the same day. Defense counsel argued appellant's confession should not be admitted because (1) counsel did not have sufficient opportunity to rebut the statement and (2) the statement was given without first notifying defense counsel. The solicitor stated he faxed the statement to defense counsel as soon as he received it.

The trial judge took defense counsel's objections under advisement and proceeded with the sentencing phase. The State presented evidence in aggravation and victim impact testimony.

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[3]In early January, the State provided appellant with its "Notice of Aggravation." In addition to other matters, the document indicates the State intended to introduce "characteristics of the defendant before, during and after the crime."

Thereafter, the trial judge excused the jury and the solicitor stated he intended to offer appellant's February 16th statement. Defense counsel again objected, claiming the statement was involuntary because it was made without notifying defense counsel and in violation of appellant's right against self-incrimination.

The trial judge conducted a hearing to determine the voluntariness of appellant's statement. South Carolina Law Enforcement Division (SLED) Agent Dean Brown testified he arrived at the Greenville County Detention Center the previous morning at 8:45 a.m. He was present when appellant was advised by SLED Agent Elizabeth Corley that (1) he had the right to remain silent, (2) anything he said could be used against him in court, (3) he had the right to talk to a lawyer for advice before questioning and have a lawyer present during questioning, and (4) an attorney would be appointed for him if he could not afford counsel. Brown testified appellant appeared to understand his rights and signed a form indicating he had been advised of those rights. Brown testified that at no time did appellant state he was represented by counsel and wanted counsel present.

Brown stated he knew appellant was in the twenty-four hour waiting period of a murder trial. He testified he told appellant the purpose of the investigation was to determine what happened the night before.

On cross-examination, Brown stated appellant asked who he and Corley worked for and he inquired if they knew Detective Bellew.[4] Brown testified Agent Corley told appellant that "this did not have anything to do with what [appellant] was going through at the time." Brown testified Corley did not mean appellant's statement would not be used against him in his current trial. Brown stated he did not know appellant's statement would be used against him during the current trial. According to Brown, appellant was willing to talk and freely provided information; he was not coerced or

[4]Bellew is a detective with the Greenville County Sheriff's Office.

threatened.[5]

Appellant did not offer any witnesses during the Jackson v. Denno[6] hearing.

The trial judge ruled neither appellant's Fifth nor Sixth Amendment rights were violated and concluded appellant's statement was voluntary.

Thereafter, defense counsel moved for a continuance to allow time to investigate whether there were any extenuating circumstances surrounding Lee's death. The trial judge denied the motion.

In the presence of the jury, Agent Brown testified about the investigation into Lee's death and the taking of appellant's February 16th statement.

The solicitor published appellant's statement as follows:

> At eleven p.m. on 2-15-99, myself and the other inmates in my cell block watched the news and saw that I was found guilty. I then worked out and took a shower. I went to bed and woke up whenever they came to get one of the other inmates to take him to Perry. This was around 3:00 a.m.
>
> While they were getting the guy ready to go to Perry, Christopher Lee said, 'You won't be the only one because [appellant's] coming down there with you.' I told him to 'shut the f___ up.'

---

[5]Appellant's statement began at 9:25 a.m. and concluded at 11:05 a.m.

[6]378 U.S. 368 (1964).

He told me his cousin was on the jury.[7] I asked him if he knew that they convicted me. He said quote 'f ___ you. I know because my cousin was on the jury,' unquote.

I then walked into his cell and hit him in the eye. He fell down on his back. I got on top and started hitting him mostly in the face and throat. I took a pen from his right hand with my right hand and stabbed him in his right eye. I then tried to stab him in his chest, but the pen would not go in. Then I stabbed him in his throat. I don't know if the pen went into his throat or not. He started bleeding out of his mouth.

There was a sheet tied into a snare laying on his bed. I reached and got it and put it over his head onto his neck. I wrapped it around my left hand and pulled it tight. I started hitting him in the face with my right hand. Then I started choking him with my right hand and pounding his head against the floor.

He never fought back after the first punch, he was out of it. He was still breathing and the stuff coming out of his mouth stunk so I stood up and stomped his head and body with my feet. I saw a black and blue lighter under the bunk. I grabbed it and burned him around the eye and on the left side of his hair. I rammed his head into the wall. He was still moaning and breathing. I walked out of the cell to leave him alone. I heard the crazy moaning again so I grabbed the pen off the floor where I had thrown it and went back into his cell. I got back over him and rammed the pen up his right nostril. I closed his left nostril with my left hand and started choking him with my right hand. The sheet was still around his neck. I was choking him above the sheet. Throughout all of the above he was moaning and breathing.

---

[7]The trial judge determined no member of the jury was either related to or acquainted with Lee.

> I kept checking him to see if he was dead. I would check his pulse on his wrist and I put my ear beside his neck and chest to hear if he was breathing. I wanted him to be dead at that time. I finally thought he was dead so I threw him on his bunk and covered him up. The first time I put him on the bunk he fell off. I then packed my stuff and put my mattress on the table and went to sleep.
>
> While I packed my stuff the black guy that had been on the top bunk of Christopher's cell the whole time this went on got down and put his mattress on the other table and sit [sic] down. Everyone in the cell block was awake when I left Christopher.
>
> I woke up when Hefner opened the door to bring in breakfast and I got into line. I was third in line. Sergeant McNeil walked by and I told him to cuff me. He said he would not and I told him he would if he would go into Christopher's cell. He looked into the cell and Hefner went into the cell. Sergeant McNeil told Hefner to cuff me, which he did. Sergeant McNeil then called someone on the radio.
>
> I really did it because I was wrongly convicted of murder.

Immediately after publication, the trial judge instructed the jury it could only consider the statement as evidence of appellant's character, not as evidence of a statutory aggravating circumstance. In his charge, the trial judge also instructed the jury it could only consider robbery while armed with a deadly weapon and larceny with use of a deadly weapon as aggravating circumstances.

On cross-examination, Agent Brown stated thirteen people, including appellant, were housed in the cell where Lee was killed. He further stated, according to appellant's statement, Lee arguably taunted appellant and the investigation into Lee's death was not yet completed.

The same day, February 17th, the jury returned a verdict finding the aggravating circumstance of murder while in the commission of armed robbery and recommending appellant be sentenced to death.

On Friday, February 19, 1999, The Greenville News reported a second suspect was charged in Lee's death on Thursday, February 18, 1999. According to the article, another inmate, Fred Walker, Jr., assisted appellant in killing Lee.

Defense counsel filed a Motion for a New Trial based on the after-discovered evidence of Walker's arrest and inconsistencies in the coroner's report and appellant's confession. At the motion hearing, defense counsel argued, had they been able to tell the jury a second individual had also been arrested for Lee's murder, the impact of appellant's confession would have been diluted. The trial judge denied appellant's motion for a new sentencing proceeding.

III.

Appellant argues the trial judge erred by admitting his February 16th statement because it was not within the ambit of the State's Notice of Aggravation. He further asserts his statement was inadmissible because the State's Supplemental Notice of Aggravation was not served pre-trial as required by South Carolina Code Ann. § 16-3-20(B) (Supp. 2000). We disagree.

Section 16-3-20(B) provides:

> In the sentencing proceeding, the jury . . . shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible.

(Underline added).

The purpose of § 16-3-20(B) is to ensure a capital defendant is given a fair and complete opportunity to respond to each factual allegation used by the State as a justification for a sentence of death. State v. Riddle, 291 S.C. 232, 353 S.E.2d 138 (1987). The statutory notice requirement is not limited to evidence of statutory aggravating factors; instead "[u]nder limited circumstances, the notice requirement of section 16-3-20(B) applies to evidence not specifically enumerated in the statute and introduced by the prosecution during the sentencing phase." State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996).

More than one month before trial, the State notified defense counsel in writing it intended to introduce "characteristics of the defendant before, during and after the crime" as evidence in aggravation. The trial judge admitted appellant's February 16th statement as evidence of his character. Accordingly, appellant was timely informed the State planned to introduce evidence of his character, including character evidence arising after the Speedway murder, during the sentencing proceeding.[8] The State's notice complied with § 16-3-20(B).

IV.

Appellant contends his February 16th statement was obtained in violation of his Fifth and Fourteenth Amendment protections and in violation of due process, and, therefore, was inadmissible. We disagree.

First, appellant contends the interrogation on the Lee matter violated his Fifth Amendment right to counsel which he asserts he invoked in the Speedway matter. We disagree.

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[8]For purposes of this discussion, we have assumed § 16-3-20(B) requires the State to notify a defendant it intends to introduce character evidence as evidence in aggravation during the penalty phase of a capital trial.

The Fifth Amendment to the United States Constitution guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." In order "to counteract the 'inherently compelling pressures' of custodial interrogation," the suspect may request the presence of counsel. McNeil v. Wisconsin, 501 U.S. 171, 176 (1991). "Statements elicited during custodial interrogation [are] admissible if the prosecution . . . establish[es] that the suspect 'knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Id. citing Miranda v. Arizona, 384 U.S. 436, 475 (1966).

"Once a suspect asserts the right [to counsel], not only must the current interrogation cease, but he may not be approached for further interrogation 'until counsel has been made available to him.'" McNeil v. Wisconsin, supra at 177-178 citing Edwards v. Arizona, 451 U.S. 477, 484-485 (1981). If the police reinitiate questioning in the absence of counsel, the suspect's statements are presumed involuntary and, therefore, inadmissible. Id.

Here, there is no evidence appellant declined to speak with police without the presence of counsel in the Speedway matter. In fact, the evidence offered at the guilt phase of trial indicates appellant voluntarily waived his right to counsel and spoke to the Sheriff's Department about the Speedway matter. This issue is patently without merit.

Second, appellant claims his statement was the result of police deception, rather than voluntary, because Agent Corley told him the questioning had nothing to do with the Speedway case, thereby implying any statement he gave would not be used in the penalty phase of the Speedway trial. We disagree.

The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances. State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987). 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. Id.

On appeal, this Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. State v. Wilson, 345 S.C.1, 545 S.E.2d 827 (2001). The conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion. State v. Livingston, 223 S.C. 1, 73 S.E.2d 850 (1952).

Considering the totality of the circumstances surrounding the statement, the evidence supports the trial judge's ruling that appellant's statement in the Lee matter was not induced by a promise the statement would not be used in the Speedway trial. According to the record, Agent Corley told appellant the interrogation had nothing to do with his pending murder trial. The agent's assertion did not imply appellant's statements would not be used during the Speedway trial, but rather, the current investigation was unrelated to the case for which he was on trial. Appellant could not reasonably have thought otherwise, especially since the SLED agent had informed him that anything he said could be used against him in court. Cf. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990) (polygraph examiner's statement that it would be in defendant's best interest to tell the truth was not on its face an inducement or hope of lighter punishment and resulting statement was properly determined voluntary) with State v. Peake, supra (where defendant made inculpatory statement after unequivocally being told by interrogating officers that the State would not seek the death penalty if he gave a statement, State failed to meet its burden of showing the defendant's statement was voluntary). The trial judge did not abuse his discretion in determining appellant's statement was voluntary. Similarly, because there was no misrepresentation, appellant's due process rights were not violated.

V.

Appellant contends his February 16th statement was obtained in violation of his Sixth and Fourteenth Amendment right to counsel and, therefore, inadmissible. Specifically, appellant claims the trial judge erred by

failing to exclude his statement concerning Lee's death because it was taken in violation of his asserted right to counsel for the Speedway offenses. Appellant contends Texas v. Cobb, ___ U.S. ___, 121 S.Ct. 1335, ___ L.Ed.2d ___ (2001), supports his claim that the Sixth Amendment right to counsel is "prosecution specific" in that once invoked, no evidence obtained in contravention of that invocation is admissible. We disagree.

The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages. McNeil v. Wisconsin, supra. The right attaches only "post-indictment," at least in the questioning/statement area. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996).

South Carolina follows the federal constitutional rule that the Sixth Amendment right to counsel is offense-specific; the mere fact counsel is appointed in one matter does not invoke the right to counsel in an unrelated matter. Id., *citing* McNeil v. Wisconsin, supra U.S. at 176 ("The Sixth Amendment right to counsel . . . cannot be invoked once for all future prosecutions. . . .").

In Texas v. Cobb, supra, the United States Supreme Court determined Sixth Amendment protections do not necessarily extend to offenses that are "factually related" to those offenses to which the right to counsel has already attached.[9] However, once the Sixth Amendment right to

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[9]The Supreme Court rejected the claim that its ruling would prove disastrous to suspects' constitutional rights. It noted a suspect who has counsel for charged offenses is not left without constitutional protection - a suspect must be apprised of his right against compulsory self-incrimination and to consult with an attorney before authorities can conduct custodial interrogation. Further, the Court determined "the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses." Texas v. Cobb, supra, 121 S.Ct. at 1343.

counsel has attached, it does encompass those offenses which, even if not formally charged, would be considered the same offense for double jeopardy purposes. In this sense, the Sixth Amendment is "prosecution specific;" it prohibits interrogation on charged offenses as well as uncharged offenses which, because of double jeopardy, could not be the subject of a later prosecution.

Appellant's Sixth Amendment right to counsel in the Speedway matter was not compromised by his interrogation concerning the Lee matter. Because the Sixth Amendment right to counsel is offense-specific, the attachment of appellant's right to counsel in the Speedway matter, did not invoke the right to counsel in the Lee matter. McNeil v. Wisconsin, supra; State v. George, supra.[10]

Moreover, contrary to appellant's argument, Texas v. Cobb, supra, does not prohibit the admission of evidence - obtained as the result of an uncounseled interrogation for an unrelated offense where the right to counsel has yet to attach - in a trial where the Sixth Amendment right has attached. Instead, once the Sixth Amendment attaches it prohibits uncounseled interrogation and the admission of any evidence obtained as a result of the interrogation, both for the crime for which it has attached and for a crime which would be considered the same offense if charged.

Here, the Speedway and Lee crimes were completely unrelated and could not possibly be considered the same offense.[11] Accordingly,

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[10]At the time he was questioned by the SLED agents on the Lee matter, the Sixth Amendment had not attached for the Lee offense as adversarial judicial proceedings had not begun against appellant for Lee's murder. See Hoffa v. United States, 385 U.S. 293 (1966) (Sixth Amendment does not attach simply because investigation focuses on defendant).

[11]See Blockburger v. United States, 284 U.S. 299, 304 (1932) ("[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses

investigators properly questioned appellant about Lee's death without violating his right to counsel in the Speedway matter. Appellant's statement obtained as a result of the questioning was properly admitted in appellant's trial for the Speedway crimes without violating appellant's Sixth Amendment right to counsel. We conclude the trial judge did not err by refusing to exclude appellant's February 16th statement on Sixth Amendment grounds.

VI.

A.

Appellant argues his due process rights[12] were violated by the admission of his February 16th statement because he did not have sufficient opportunity to investigate the reliability and accuracy of the document. He asserts the trial judge should have either (1) excluded the statement due to lack of notice or (2) continued the sentencing proceeding to allow defense counsel the opportunity to explain or rebut information regarding Lee's death.

1.

The record indicates the solicitor provided defense counsel with a copy of appellant's statement two hours after the statement was taken.[13]

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or only one, is whether each provision requires proof of a fact which the other does not.").

[12]U.S. Const. amend XIV; S.C. Const. art. I, § 3.

[13]The State asserts appellant was not entitled to notice it intended to admit his statement. See Gray v. Netherland, 518 U.S. 152 (1996) (in denying petition for habeas corpus, Supreme Court recognized prior case law did not hold due process requires advance notice of the specific evidence of unadjudicated conduct the prosecution intends to introduce during penalty phase of capital trial). In light of our disposition on this matter, we need not

This notification was timely.

2.

Due process prohibits a defendant from being sentenced to death "on the basis of information which he had no opportunity to deny or explain." Gardner v. Florida, 430 U.S. 349, 362 (1977).

> The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Due process does not mandate any particular form of procedure. Instead, due process is a flexible concept, and the requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur.

South Carolina Dep't of Social Services v. Holden, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995) citing S.C.N.B. v. Central Carolina Livestock Market, 289 S.C. 309, 345 S.E.2d 485 (1986) (internal citations omitted). Granting a continuance is one measure the court may use to protect an accused's due process rights. State-Record Co., Inc., v. State of South Carolina, 332 S.C. 346, 504 S.E.2d 592 (1998).

The grant or denial of a motion for a continuance is within the sound discretion of the trial judge whose ruling will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant. State v. Babb, 299 S.C. 451, 385 S.E.2d 827 (1989).

> When a motion for a continuance is based upon the contention that counsel for the defendant has not had time to prepare his case its denial by the trial court has rarely been disturbed on

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determine whether appellant was entitled to notice under due process precepts.

> appeal. It is axiomatic that determination of such motions must depend upon the particular facts and circumstances of each case.

State v. Motley, 251 S.C. 568, 572, 164 S.E.2d 569, 570 (1968).

Although aware of appellant's February 16th statement, defense counsel had little, if any, meaningful opportunity to investigate the circumstances surrounding Lee's death. Because of the capital nature of the proceeding and given the timing of appellant's statement, we find due process necessitated a brief, perhaps twenty-four hour, continuance to allow defense counsel the opportunity to interview the inmates and personnel at the detention center. Further, without a fair opportunity to counter the statement, appellant's graphic rendition of the brutal details of Lee's death was highly prejudicial. Although reversals of the refusal to grant a continuance are as "rare as the proverbial hens' teeth,"[14] under the most unusual circumstances presented here, this is one of those rare cases. Accordingly, we remand for a new sentencing proceeding.

B.

Appellant argues the admission of his February 16th statement violated the Eighth Amendment because it permitted the jury to consider inaccurate information (a second person was also charged with Lee's murder), thereby rendering his death sentence unreliable. In light of our ruling above, we need not address this issue.

C.

Appellant argues the probative value of his February 16th statement was outweighed by its prejudicial effect and, therefore, the statement was inadmissible. We disagree.

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[14]See State v. Brooks, 235 S.C. 344, 111 S.E.2d 686 (1959).

The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender. State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000); see Woodson v. North Carolina, 428 U.S. 280 (1976) (in capital cases, the Eighth Amendment requires consideration of the character and record of the individual offender as a constitutionally indispensable part of the process of inflicting the penalty of death). In the penalty phase, the admission of evidence the defendant committed a similar crime is proper as it indicates his individual characteristics. State v. George, supra (trial court properly admitted defendant's statement regarding unrelated robbery and killing as character evidence in penalty phase); State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988) (confessions to seventy armed robberies and another murder were properly admitted in penalty phase as evidence of other crimes relevant to the defendant's character).

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119 (2000).

Appellant's statement was relevant evidence of his character, an issue under consideration during the penalty phase of trial. While clearly prejudicial, appellant's statement does not suggest a decision on an improper basis. Admission of appellant's statement did not violate Rule 403, SCRE.

VII.

Appellant argues the trial judge abused his discretion by denying his motion for a new sentencing hearing based on the after-discovered evidence that Fred Walker, Jr., was also charged with Lee's death. Because this matter is remanded for a new sentencing proceeding, it is unnecessary to rule on this issue.

VIII.

Appellant contends the trial judge erred in sentencing him for possession of a firearm in the commission of a violent offense because South Carolina Code Ann. § 16-23-490(A) prohibits such a sentence where the death penalty is imposed. We agree.

Section 16-23-490(A) (Supp. 2000) states:

> If a person is in possession of a firearm or visibly displays what appears to be a firearm . . . during the commission of a violent crime and is convicted of committing . . . a violent crime . . . , he must be imprisoned five years, in addition to the punishment for the principal crime. This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.

(Underline added).

Section 16-23-490(A) expressly provides the mandatory five year sentence for possession of a firearm during the commission of a violent crime shall not be imposed when the defendant is sentenced to death or to life without parole for the violent crime. Appellant was sentenced to death. Accordingly, we vacate the five year sentence for possession of a firearm during the commission of a violent crime. If, on resentencing, appellant receives a sentence other than death or life without the possibility of parole, he shall also be sentenced to five years imprisonment for possession of a firearm during the commission of a violent crime. See S.C. Code Ann. § 16-3-20 (Supp. 2000) (establishing circumstances under which mandatory minimum term of imprisonment of thirty years is available sentence).

CONCLUSION

Appellant's convictions are affirmed. Appellant's sentence for possession of a firearm during the commission of a violent crime is vacated.

This matter is remanded to the circuit court for a new sentencing proceeding.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

TOAL, C.J., MOORE and WALLER, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the majority's decision, but write separately because I would omit the substantive analysis of the constitutional issues in Parts IV and V relating to the February 16th statement. We are agreed that appellant's due process rights were violated when the trial judge denied his request for a continuance to investigate the circumstances surrounding the making of the statement. I would therefore refrain from addressing the constitutional issues on the incomplete record now before us. Compare In the Matter of McCracken, Op. No. 25323 (S.C. Sup. Ct. filed July 23, 2001) (Shearouse Adv. Sh. No. 26 p.58)(Court's firm policy not to address constitutional issues unless necessary to decide appeal).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Horry County School District, Appellant,

v.

Horry County and the City of Myrtle Beach, Respondents.

Appeal From Horry County
Howard P. King, Circuit Court Judge

Opinion No. 25355
Heard January 11, 2001 - Filed September 4, 2001

AFFIRMED

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Law Firm, of Myrtle Beach; Thomas A. Hutcheson, of Sinkler & Boyd, of Charleston; and B. Eric Shytle, of Sinkler & Boyd, of Columbia, for respondents.

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Terry E. Richardson, Jr. of Ness, Motley, Loadholt, Richardson & Poole, of Barnwell, for amicus curiae Barnwell School District 45.

Roy D. Bates, of Columbia, for amicus curiae Municipal Association of South Carolina.

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Richard M. Gergel and W. Allen Nickles III, of Gergel, Nickles & Solomon, of Columbia; and Dwight F. Patterson, Jr., of Perrin, Perrin, Mann & Patterson, of Spartanburg, for amici curiae South Carolina School Boards Association, South Carolina Association of School Administrators, South Carolina Education Association, Palmetto State Teachers Association, South Carolina Association for Rural Education, South Carolina Alliance of Black School Educators, South Carolina Association of School Psychologists, and South Carolina League of Women Voters.

JUSTICE BURNETT: This is an appeal from an order of the

circuit court granting summary judgment to respondents Horry County and the City of Myrtle Beach (collectively "the county"). The Horry County School District brought suit challenging the constitutionality of S.C. Code Ann. §§ 4-1-170 and -175 (Supp. 2000) and Horry County Council Ordinances Nos. 171-99, 174-99, and 57-00. The trial court granted summary judgment to the county. We affirm.

FACTS

This controversy arose when Horry County initiated creation of a multi-county business park (MCBP) in conjunction with contiguous Marion, Georgetown, and Dillon Counties. The MCBP consists of twenty-seven separate tracts of land covering 3,889.23 acres situated wholly within Horry County and partially within the limits of the City of Myrtle Beach.

The Horry County School District is coterminous with Horry County and the City of Myrtle Beach is located entirely within the county and the school district. The school district has authority to levy *ad valorem* taxes. The Horry County Board of Education prepares an annual budget and determines the necessary millage for the operation of schools for the succeeding year. The county auditor sets the millage for the school district's debt service. The Myrtle Beach City Council and the Horry County Council also establish annual budgets and determine annually the millage necessary for their respective operations. The Horry County Council plays no role in setting, levying, or approving the budget or millage of the school district.

For the 1999-2000 fiscal year, the county levied 56 mills in unincorporated areas of the county and 40.9 mills in incorporated areas, the city levied 61 mills, and the school district levied 91 mills for school operations and 22 mills for debt service, for a total of 113 mills for school purposes. Thus, based on the 1999-2000 millage rates and disregarding the effect of the MCBP, the school district would receive 67% of all property tax revenues in unincorporated areas and approximately 53% of the revenues in Myrtle Beach.

As discussed *infra*, property within the MCBP is constitutionally exempt from *ad valorem* taxation, but the owners must nevertheless pay an amount equivalent to the taxes that would otherwise have been due. The agreement creating the MCBP at issue in this case allocates the revenue derived from property situated within the MCBP without regard to the millage imposed by the various taxing entities. Specifically, the agreement allocates 50% of MCBP revenue to the school district.

DISCUSSION

The school district presents several issues, however, in essence, the sole issue on appeal is whether the county has complete discretionary authority to allocate the revenue from the fee in lieu of taxes paid by the MCBP. This issue poses two sub-issues: (1) did the trial court correctly construe the MCBP statutes to give the county this discretion? and (2) are the statutes as construed constitutional? We conclude the trial court correctly construed the statutes and the statutes are constitutional.

I. Statutory Construction

The district argues the trial court erred in construing § 4-1-170 (Supp. 2000) as granting the county discretion over the allocation of revenue from MCBPs. We disagree.

In 1988, the voters of this state were asked to approve an amendment to the South Carolina Constitution authorizing the creation of MCBPs. The ballot question read as follows:

> Shall Section 13 of Article VIII of the Constitution of this State be amended so as to provide that counties, subject to the General Assembly first providing by law for bonded indebtedness and school fiscal ability considerations, may jointly develop an industrial or business park with other counties within the geographical boundaries of one or more of the

> member counties where the area comprising the parks and all property having a situs therein is exempt from all ad valorem taxation because the owners or lessees of any property situated in the park must pay an amount equivalent to the property taxes or other in-lieu-of payments that would have been due and payable except for the above exemption?

Jt. Res. No. 690 (S.C. 1988). The proposed amendment was billed as a means to help rural counties. See Amendment Benefits Rural Counties, The State, Oct. 18, 1988, at Metro 1. The voters approved the ballot question and the following amendment was added to the Constitution:

> Counties may jointly develop an industrial or business park with other counties within the geographical boundaries of one or more of the member counties. *The area comprising the parks and all property having a situs therein is exempt from all ad valorem taxation. The owners or lessees of any property situated in the park shall pay an amount equivalent to the property taxes or other in-lieu-of payments that would have been due and payable except for the exemption herein provided.* The participating counties shall reduce the agreement to develop and share expenses and revenues of the park to a written instrument which is binding on all participating counties. Included within expenses are the costs to provide public services such as sewage, water, fire, and police protection. Notwithstanding the above provisions of this subsection, before a group of member counties may establish an industrial or business park as authorized herein, *the General Assembly must first provide by law for the manner in which the value of the property in the park will be considered for purposes of bonded indebtedness of*

> *political subdivisions and school districts and for purposes of computing the index of taxpaying ability* pursuant to any provision of law which measures the relative fiscal capacity of a school district to support its schools based on the assessed valuation of taxable property in the district as compared to the assessed valuation of the taxable property in all school districts of this State.

S.C. Const. Art. VIII, § 13(D) (emphasis added). Thus, before any MCBPs could be created, the General Assembly was required to enact legislation specifying how the value of park property would be considered relative to specific areas of school funding (bonded indebtedness and the index of taxpaying ability[1]).

In accordance with the requirements of the constitutional amendment, the legislature enacted S.C. Code Ann. § 4-1-170 (Supp. 2000), which provides:

> By written agreement, counties may develop jointly an industrial or business park with other counties within the geographical boundaries of one or more of the member counties as provided in Section 13 of Article VIII of the Constitution of this State. The written agreement entered into by the participating counties must include provisions which:
>
> (1) address sharing expenses of the park;
> (2) specify by percentage the revenue to

[1]The index of taxpaying ability measures a local school district's fiscal capacity relative to all other school districts in the state and distributes state education funds accordingly. See S.C. Code Ann. § 59-20-20(3) (Supp. 2000).

> be allocated to each county;
> (3) specify the manner in which revenue must be distributed to each of the taxing entities within each of the participating counties.
>
> For the purpose of bonded indebtedness limitation and *for the purpose of computing the index of taxpaying ability* pursuant to Section 59-20-20(3), *allocation of the assessed value of property within the park* to the participating counties and to each of the taxing entities within the participating counties *must be identical to the allocation of revenue* ***received and retained*** by each of the counties and by each of the taxing entities within the participating counties. . . .

§ 4-1-170 (emphasis added). Thus, as far as the Index of Taxpaying Ability is concerned, a school district will not be penalized for the value of MCBP property in its district if it does not actually receive funds from that property.

Statutes governing fees in lieu of taxes also address the allocation of revenue from MCBPs[2]:

> For a project ***not*** located in an industrial development park as defined in § 4-1-170, distribution of the fee in lieu of taxes on the project must be made *in the same manner and proportion that the millage levied for*

[2]We reject the district's argument that the "amount equivalent to property taxes" constitutionally required of MCBPs is somehow not a fee in lieu of taxes, especially since the fee in lieu statutes specifically reference § 4-1-170. The fact that special rules apply to fees owed on property in MCBPs does not mean they are not "fees in lieu of taxes."

> *school and other purposes would be distributed if the property were taxable*.

§ 4-29-67(L)(1) (Supp. 1999) (emphasis added). Conversely, "for a project located in an industrial development park as defined in § 4-1-170, distribution of the fee in lieu of taxes on the project must be made *in the manner provided for by the agreement* establishing the industrial development park." § 4-29-67(L)(2).[3]

Under the terms of the agreement creating the MCBP at issue in this case, 1% of the revenue from the MCBP would be allocated to and divided equally among Marion, Georgetown, and Dillon Counties. The remaining 99% would be allocated to Horry County. Within Horry County, the agreement provides for allocation of revenue as follows:

> 50% to the Horry County School District
> 25% to the Horry County General Fund
> 24% to the retirement of debt instruments . . .
> intended to finance the acquisition by Horry County
> of Qualifying Public Infrastructure . . . in the Park.

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[3]See also the Fee in Lieu of Tax Simplification Act, enacted in 1997:

(A) For a project not located in a multicounty park, distribution of the fee payments on the project must be made in the same manner and proportion that the millage levied for school and other purposes would be distributed if the property were taxable.

(B) For a project located in a multicounty park, distribution of the fee payments on the project must be made in the same manner provided for by the agreement between or among counties establishing the multicounty park.

S.C. Code Ann. § 12-44-80 (1999). Also, S.C. Code Ann. § 4-12-30(K)(1) & (2) contains almost identical provisions to those in § 4-29-67(L)(1) & (2).

Thus, the school district receives a smaller portion of the revenues from the MCBP fee in lieu of taxes under the agreement than it would receive if the property contained in the MCBP were subject to *ad valorem* taxes. The district argues these statutes should not be construed to allow this result.

This Court cannot construe a statute without regard to its plain and ordinary meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993). "A statute must receive such construction as will make all of its parts harmonize with each other and render them consistent with its general scope and object." Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996).

Reading these statutes together, there is clearly no requirement that revenue from the fee in lieu of taxes from an MCBP be distributed in the same proportion that it would be if the property were taxable. First, Article VIII, § 13(D) and § 4-1-170 exempt property in MCBPs from *ad valorem* taxation and permit the county to enter agreements specifying how MCBP revenue will be distributed. Second, § 4-1-170(2) specifically allocates that revenue to the county, not to any another taxing entity. Third, while § 4-1-170 clearly contemplates some allocation to the other taxing entities within the county,[4] neither § 4-1-170 nor the fee in lieu statutes require the county to distribute to the district a proportion of MCBP funds identical to the district's millage, as required for other fee in lieu revenue. Fourth, § 4-1-170 contemplates that a school district might not receive the funding from MCBPs that it would from taxable property by specifying that the index of taxpaying ability will be calculated based on funds "received and retained"

[4]Section 4-1-170(3) provides the agreement must "specify the manner in which revenue must be distributed *to each of the taxing entities* within each of the participating counties." We read this language as requiring some allocation to each of the taxing entities within the county.

by the school district.[5] If the legislature had intended to require counties to distribute MCBP revenue in the same proportion as if the property were taxable, it could have said so in plain terms *exactly as it did concerning tax exempt non-MCBP property*. Compare § 4-29-67(L)(1) with § 4-29-67(L)(2); See also 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).

Although we conclude the circuit court properly interpreted the statutes at issue here, we note an inadequacy in the agreement itself. This issue is not before us. We address it only to advise the parties of our concern. Section 4-1-170(3) requires the agreement creating the MCBP to "specify the manner in which revenue must be distributed to each of the taxing entities within each of the participating counties." The agreement here allocates 50% of MCBP revenue to the Horry County School District with no basis for determining what proportion goes to debt service and what proportion to school operations. Nor does the agreement provide a basis for determining whether the auditor, who sets debt millage, or the school board, which sets operational millage, would make the allocation. This deficiency in the agreement does not invalidate the MCBP statutes, but may require the amendment of the agreement.

II. Constitutional Challenge

The district makes numerous arguments challenging the constitutionality of §§ 4-1-170 and -175 as construed. The district does not ask us to invalidate the statutes; rather, it asks us to construe the statutes in such a way as to render them constitutional. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94, (1996). We address only those arguments we believe have merit.

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[5]As will be discussed infra, part II, the Education Finance Act also addresses this issue with similar language. See S.C. Code Ann. § 59-20-20(3) (Supp. 2000).

A. Article VIII, § 14

The district argues that §§ 4-1-170 and -175 as construed are unconstitutional because Article VIII, § 14 of the South Carolina Constitution prohibits the County Council from using an MCBP agreement to interfere with the state system of financing public education. We find no constitutional violation.

Article VIII, § 14 provides that provisions enacted by local governments shall not set aside general law provisions applicable to "(3) bonded indebtedness of governmental units; . . . and (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity." S.C. Const. Art. VIII, § 14. Public education is a state function. See Moye v. Caughman, 265 S.C. 140, 143, 217 S.E.2d 36, 37 (1975) (public education is not the duty of the counties, but of the General Assembly).

The district argues §§ 4-1-170 and -175, as construed by the circuit court, allow the county to "set aside" many provisions of state law governing school district operational finances, bonded debt, and educational standards. Specifically, the district argues the statutes unconstitutionally allow the county to interfere with the schools' general obligation debt and manipulate the index of taxpaying ability by decreasing the taxable property in the district.

Although Article VIII, § 14 specifically speaks only to local ordinances that "set aside" general laws, this Court has also invoked Article VIII, § 14 to invalidate state statutes which impermissibly delegate to counties functions requiring statewide uniformity. See, e.g., Davis v. County of Greenville, 322 S.C. 73, 76, 470 S.E.2d 94, 96 (1996) ("Article VIII, § 14 limits the powers local governments *may be granted*.") (emphasis added); Robinson v. Richland County Council, 293 S.C. 27, 30, 358 S.E.2d 392, 395 (1987) ("[Article VIII, § 14] precludes the legislature from delegating to counties the responsibility for enacting legislation relating to the subjects encompassed by that section."). Relying on Article VIII, § 14, we have held

unconstitutional statutes which gave counties improper authority over certain state functions. See, e.g., Douglas v. McLeod, 277 S.C. 76, 282 S.E.2d 604 (1981) (invalidating state statute delegating to counties power to set magistrates' salaries); Brashier v. South Carolina Dep't of Transp., 327 S.C. 179, 490 S.E.2d 8 (1997), overruled in part on other grounds, I'On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (invalidating a statute which gave counties discretion to approve or disapprove the construction of toll roads).

The legislature has wide discretion in determining how to go about accomplishing its duty to "provide for the maintenance and support of a system of free public schools." See Richland County v. Campbell, 294 S.C. 346, 349, 364 S.E.2d 470, 471-72 (1988); S.C. Const. art. XI, § 3. In Richland County v. Campbell, this Court upheld the constitutionality of shared funding of public schools by local and state revenues as set forth in the Education Finance Act, S.C. Code Ann. §§ 59-20-10 through -80 (1990 & Supp. 2000).

The Education Finance Act specifically contemplates that schools might receive less money from fees in lieu of taxes than from taxable property:

> For purposes of disbursing EFA funding and for purposes of the index of taxpaying ability, the value of a fee in lieu of taxes shall be computed by the Department of Revenue by basing the computation on the net fee received and retained by the school district. The value thus computed shall not be inflated by any portion of the fee shared with or used by any other local taxing authority.

S.C. Code Ann. § 59-20-20(3) (Supp. 2000). Thus, the district's taxpaying ability will be calculated based on revenue it actually receives from fees in lieu of taxes. In other words, the district will not be penalized by the existence of high-value but non-taxable MCBP property in the district. The

MCBP legislation contains similar provisions:

> [F]or the purpose of computing the index of taxpaying ability pursuant to Section 59-20-20(3), allocation of the assessed value of property within the park to the participating counties and to each of the taxing entities within the participating counties must be identical to the allocation of revenue received and retained by each of the counties and by each of the taxing entities within the participating counties. . . .

§ 4-1-170. We conclude, in this facial challenge, the MCBP statutes are consistent with the Education Finance Act. However, because we read § 4-1-170 to require some allocation to the other taxing entities within the county (see footnote 4), we note the potential for a county to abuse the discretion granted under the statute.

The district also argues §§ 4-1-170 and -175 are unconstitutional as interpreted because they permit the county to interfere with the district's general obligation debt. As discussed above, we agree the agreement is inadequate in failing to allocate funds between debt and operations. However, the problem is with the agreement, and not the statutes.

B. Article X, §§ 5 and 6

Finally, the district argues §§ 4-1-170 & -175 as interpreted violate Article X, §§ 5 and 6 of the South Carolina Constitution because they permit the county to take revenue generated by school tax millage and use it for non-school purposes. We disagree.

Article X, § 5 provides in part that "[a]ny tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied." Article X, § 6 provides in part that "[p]roperty tax levies shall be uniform in respect to persons and property within the jurisdiction of the body imposing such taxes." The trial court correctly ruled

these provisions inapplicable because MCBPs are constitutionally exempt from *ad valorem* taxation. See Quirk v. Campbell, 302 S.C. 148, 151, 394 S.E.2d 320, 322 (1990) ("Respondents contend that § 4-29-67 does not violate Article X because the property which is the subject of the negotiated fee is exempt from *ad valorem* taxation under Article X, § 3(a). We agree."); see also Elliott v. McNair, 250 S.C. 75, 93, 156 S.E.2d 421, 431 (1967) ("Article X, Section 4, has been literally followed here inasmuch as the property is not subject to *ad valorem* taxes.").

In support of its position, the district cites the following passage from Powell v. Chapman, 260 S.C. 516, 520, 197 S.E.2d 287, 289 (1973):

> The essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, enacted pursuant to legislative authority, in the exercise of the taxing power, the contribution being of a proportional character, payable in money, and imposed, levied, and collected for the purpose of raising revenue, to be used for public or governmental purposes. The question of whether a particular contribution, charge, or burden is to be regarded as a tax depends on its real nature and not on its designation.

(citation omitted). This Court went on to determine that the fee at issue in Powell was a "tax equivalent" and the subject property therefore "taxable property" for purposes of determining the bonded indebtedness which a school district could incur under the constitutional limitation. Id. at 522, 197 S.E.2d at 290. This holding was subsequently endorsed by the legislature. See S.C. Code Ann. § 4-12-30(L) (Supp. 2000).

Powell is inapplicable to the issue here. Establishing that a fee is a "tax equivalent" for purposes of the bonded indebtedness limitation in no way requires the conclusion that revenue from the fee must be distributed in the same proportion as if it were a tax when the statute does not otherwise

support such a conclusion.

III. Policy Considerations

Although economic development is surely a worthy legislative goal, the prior discussion indicates many of the problems inherent in the MCBP scheme as it presently exists. We take this opportunity to give a brief overview of some of the practical ramifications of these statutes.

The MCBP scheme allows the county to determine unilaterally what percentage of revenue derived from the fee in lieu to allocate to schools. Certainly nothing in the ballot question authorizing the constitutional amendment alerted voters that this result was possible. On the contrary, voters were assured by public officials that school funding would not be affected. See Amendment Benefits Rural Counties, The State, Oct. 18, 1988, at Metro 1 ("'It's important that voters understand that they are not exempting taxes,' Ed Burgess of the State Development Board said. 'All of the taxing entities will get their share. A contract will guarantee payment.'").

The MCBP concept also allows the county to unilaterally remove unlimited property from the school district's jurisdiction, while continuing to rely on the school district's millage in determining the fee in lieu. If the county under-funds the school district and the school district raises its millage to make up the lost revenue, the MCBP's fee in lieu increases concomitantly, resulting in increased revenue for the county – without the accountability of raising taxes.

Furthermore, any reduction in funding from park revenues reduces the county's expected local effort and increases the district's eligibility for state funds. We can scarcely believe the General Assembly intended, in authorizing the creation of MCBPs, to allow wealthy counties – like Horry County – to spuriously impoverish themselves at the expense of truly poor school districts. Nevertheless, the statute permits this result.

The school district and many *amici curiae* have argued

passionately against the policies effected by the statutes at issue here. We sympathize with the schools' plight; however, this Court does not sit as a super-legislature. Granting the relief the district requests would involve re-writing § 4-1-170, under the guise of statutory construction, to require revenue from MCBP fees to be allocated in the same proportions as if the property were subject to *ad valorem* taxes.[6] Such action is the sole prerogative of the Legislature.

AFFIRMED.

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

[6]The Preservation of Schools Tax Base Act, introduced in the last legislative session, would have provided that "all revenue generated or determined by local school district tax millage must be preserved for use by school districts for school purposes." S. 1232, H. 4741 (2000).

JUSTICE PLEICONES: I concur in the majority's decision to uphold the circuit court's construction of the statutes and to uphold their constitutionality. Further, I share the concerns expressed regarding the policy implications of these statutes. I write separately, however, because I do not agree with the majority that a county is required to distribute any of the fee in lieu to the school district, nor that the allocation decision is subject to an abuse of discretion standard.

I can find no requirement in S.C. Code Ann. § 4-1-170 (Supp. 2000), nor in any other of the relevant statutes that the county apply any particular formula in distributing the fee in lieu. In my view, the statutes permit the county to allocate 0% to a taxing entity in the county, including the affected school district, and therein lies the most troubling policy concern. As the majority recognizes, the remedy lies with the Legislature and not with this Court.

I therefore respectfully dissent from that part of the majority opinion which may be read to require an allocation to a school district, subject to an abuse of discretion standard. I concur in the remainder of the decision.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Clyde Elliott, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Colleton County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 25356
Heard June 21, 2000 - Filed September 4, 2001

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for petitioner.

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

JUSTICE BURNETT: We granted certiorari to review a decision of the Court of Appeals holding assault and battery of a high and aggravated nature (ABHAN) is not a lesser included offense of assault with intent to commit criminal sexual conduct (ACSC) in the third degree. State v. Elliott, 335 S.C. 512, 517 S.E.2d 713 (Ct. App. 1999). We reverse.

FACTS

Respondent was indicted for ACSC, first degree. Prior to trial, the indictment was amended to ACSC, third degree. The trial court instructed the jury on ACSC third and ABHAN, as a lesser included offense of ACSC third. The jury found respondent guilty of ABHAN. Respondent appealed, arguing the trial court was without subject matter jurisdiction to convict and sentence him for ABHAN because ABHAN is not a lesser included offense of ACSC third. The Court of Appeals agreed and reversed. Id.

ISSUE

Is ABHAN a lesser included offense of ACSC?

DISCUSSION

The test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense. Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998). The Court of Appeals reasoned that because battery is not an element of ACSC third, all the elements of ABHAN were not contained in ACSC third; thus ABHAN could not be a lesser included offense of ACSC third. Elliott, 335 S.C. at 514, 517 S.E.2d at 714.

A person is guilty of criminal sexual conduct when he commits a sexual battery, with the degree of CSC dependent upon the circumstances surrounding the act. See S.C. Code Ann. §§ 16-3-652 through -654 (1985 & Supp. 2000). "Sexual battery" does not mean any battery of a sexual nature. Rather, it is statutorily defined to include only certain specific acts, which can be loosely described as involving penetration of some sort. S.C. Code Ann. § 16-3-651(h) (1985) ("'Sexual battery' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes."). Assault is "an unlawful attempt or offer to commit a violent injury upon another person, coupled with the present ability to complete the attempt or offer by a battery." State v. Mims, 286 S.C. 553, 554, 335 S.E.2d 237, 237 (1985). Assault differs from battery in that assault does not involve a touching of the victim. Id.; see also State v. Murphy, 322 S.C. 321, 325, 471 S.E.2d 739, 741 (Ct. App. 1996). Although most attempted sexual batteries will involve a touching,[1] a person may be convicted of ACSC by proof of an assault with or without a battery.

Given that battery is not a necessary element of ACSC, it follows

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[1]See, e.g., State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990) (assault with intent to commit criminal sexual conduct occurred when the defendant grabbed the victim, forced her into the woods, and ripped her clothes in an effort to commit a sexual battery); State v. Fulp, 310 S.C. 278, 423 S.E.2d 149 (Ct. App. 1992) (the evidence supported a verdict of second degree assault with intent to commit criminal sexual conduct, even though the defendant did not verbally threaten the victim, where, after pulling her from the balcony railing over which she was trying to escape, the defendant grabbed her breasts with both hands and began fumbling with the clothing that covered her stomach; thus, the defendant's actions supported an inference that he threatened to use high and aggravated force on the victim to commit a sexual battery).

that ABHAN, which of course requires battery as an element, does not satisfy the elements test. Nevertheless, we have consistently incorporated ABHAN into the CSC framework as a lesser included offense of ACSC. The predecessor to ACSC was assault with intent to ravish (AIR). See State v. Stewart, 283 S.C. 104, 109, 320 S.E.2d 447, 451 (1984). ABHAN was considered a lesser included offense of AIR. State v. Funchess, 267 S.C. 427, 429, 229 S.E.2d 331, 331 (1976). Subsequent to the enactment of the CSC statutes, we have continued to treat ABHAN as a lesser included offense of ACSC.[2] See State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990) (ABHAN is a lesser included offense of ACSC first); State v. Morris, 289 S.C. 294, 345 S.E.2d 977 (1986) (ABHAN properly submitted to jury as lesser included offense of assault with intent to commit sexual battery). Indeed, in State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986), we expressly held ABHAN is a lesser included offense of ACSC.

To the extent that the elements of ABHAN and ACSC do not meet the elements test, we recognize this situation presents an anomaly in the law, akin to manslaughter and murder. The common law does not always fit into the neat categories we might prefer. Nevertheless, we find compelling reasons not to abandon our longstanding inclusion of ABHAN as a lesser included offense of attempted sexual battery crimes.

CONCLUSION

We adhere to our prior position that ABHAN is a lesser included offense of ACSC. We recognize this holding deviates from the strict elements test, yet decline to overrule our many cases leading to this result. Despite the existence of a few anomalies, we reiterate our commitment to the

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[2]Furthermore, the legislature, in enacting the CSC statutes, is presumed to know the common law and could have provided that ABHAN not be treated as a lesser offense of ACSC, as it was of AIR. See State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997) (the legislature is presumed to be aware of the common law).

elements test. We will continue to consider offenses on a case-by-case basis, beginning with the elements test.

REVERSED.

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

JUSTICE PLEICONES: I respectfully dissent, and would affirm the decision of the Court of Appeals as modified. In my opinion, fairness to the bench and bar requires that we adopt a lesser included offense test that applies to all cases and not utilize an *ad hoc* approach. The majority holds that the first step in any greater-lesser analysis is the application of the "elements test," and that where that test fails to yield the desired result, we may conclude that the offense should be considered a lesser as an "anomaly." In my view, this rule does not provide for the stability and predictability necessary in the criminal law.

As explained below, I would take this opportunity to restate the law of lesser included offenses.

Since this case involves the relationship between greater and lesser offenses, I begin by noting that the issue can arise[3] in any of four situations:

(1) whether a statutory offense is the lesser of another statutory offense;
(2) whether a statutory offense is the lesser of a common law offense;
(3) whether a common law offense is the lesser of a statutory crime; or,
(4) whether a common law offense is the lesser of a common law crime.

Where any of the first three scenarios are involved, the determinative question is whether the offenses can meet the "elements test." In the fourth situation, the critical issue is the historical relationship of the two offenses.

In this dissent, I will first review the distinctions between common law

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[3]No such question will be presented where the legislature has specifically provided that one offense is the lesser included of another offense. See State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000).

offenses and statutory crimes.[4] I will next examine the evolution of the law of rape and sexual battery in South Carolina, and then explain why I agree with the Court of Appeals that assault and battery of a high and aggravated nature (ABHAN) is not a lesser included offense of assault with intent to commit criminal sexual conduct (AWCSC).

A. THE TWO TESTS FOR LESSER INCLUDED OFFENSES

An indictment confers jurisdiction upon the circuit court,[5] and gives the defendant notice of the charges against him.[6] The language of the indictment determines the crime charged.[7] A defendant may be convicted of the crime charged in the indictment, or of any lesser included offense. Campbell v. State, 342 S.C. 100, 535 S.E.2d 928 (2000). This Court has repeatedly stated that the test for determining whether one crime is a lesser included of another is whether the greater of the two offenses includes all the elements of the lesser. E.g., Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000); Murdock v. State, 308 S.C. 143, 417 S.E.2d 543 (1992).

I would hold that this "elements test" is to be applied where the lesser included issue involves the relationship between:

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[4]I disagree with the majority that the situation presented here is "akin to murder and manslaughter" or that it can be explained away as a common law anomaly.

[5]S.C. Const. art. I, §11; S.C. Code Ann. §17-19-10 (1985); see, e.g., State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987).

[6]S.C. Code Ann. §17-19-20 (1985); see, e.g., State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987), *subsequent history omitted*.

[7]See, e.g., State v. Banks, 84 S.C. 543, 66 S.E. 999 (1910)(where allegations of indictment are appropriate to two offenses but only one is sufficiently stated, only sufficient charge may be upheld).

(a) multiple statutory offenses;
(b) a greater statutory and lesser common law offense; and
(c) a greater common law and lesser statutory offense.

A different test applies when the indictment charges a common law offense, and the question is whether that charge includes any lesser included common law crimes. In deciding this issue, reference must be had to the common law development of the crime and its historical lesser included offenses, and not to the "elements test."

At common law, an indictment for the greater offense includes within it all the lesser grades of that crime. 31 C.J. *Indictments and Informations* §482 (1923); State v. Gaffney, 24 S.C. Law (1 Rice) 431 (1839). Thus, it is not necessary that the greater common law offense include all the elements of its lesser grades. In fact, it often does not.

For example, murder is defined as the unlawful killing of a human being with malice aforethought, and includes the lesser offense of manslaughter, the unlawful killing of a person without malice. E.g., State v. Gaffney, supra; compare S.C. Code Ann. §16-3-10 (1985) (defining murder) with §16-3-50 (Supp. 1999)(defining manslaughter). When the grades of common law homicide[8] are defined this way, murder and manslaughter satisfy the "elements test" described above.

Manslaughter, however, is further divided under South Carolina common law into two grades. The greater, voluntary manslaughter, is the

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[8]The recognition of these lesser grades of homicide, and their accompanying lesser punishments, developed as the common law recognized that some killings were more heinous than others: "The distinction between murder and manslaughter . . . is not merely an arbitrary rule, but is founded on a thorough knowledge of the human heart, and framed in compassion to the passions and frailties which belong to and are inseparable from our natures." State v. Ferguson, 20 S.C. Law (2 Hill) 619, 621-622 (1835).

unlawful killing of another without malice in sudden heat of passion upon a sufficient legal provocation.[9] The lesser, involuntary manslaughter, is the unintentional killing of another without malice while acting in a criminally negligent manner.[10] The lack of malice in manslaughter is thus defined in two different ways in order to reflect differing degrees of culpability, and therefore it is inaccurate to assert that voluntary manslaughter includes all the elements of involuntary manslaughter. It is similarly inaccurate to state that common law murder includes all the elements of its lesser included offenses of manslaughter.

I would therefore hold that the question whether a greater common law charge includes a lesser common law offense is determined by reference to the historical common law development of those offenses, and not by reference to a pure "elements test."

B. CLASSIFICATION OF OFFENSE AS COMMON LAW OR STATUTORY

I acknowledge that it is not always clear whether a violation of the criminal law in South Carolina is a statutory offense or a common law crime. For example, §16-3-10 defines murder and S.C. Code Ann. §16-3-20 (Supp. 1999) provides for its punishment. Despite these statutes, murder remains a common law offense in this State. See, e.g., Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989)("There is no distinction between statutory and common-law murder: the statute is merely declaratory of the common law."). In addition to the codification of the common law forms of homicide, the legislature has created several **statutory** forms of homicide. See, e.g., S.C. Code Ann. §§16-3-40 (1985)(killing by stabbing or thrusting); 16-3-85 (Supp. 1999)(homicide by child abuse). These **statutory** homicides are not lesser included offenses of a **common law** murder charge because they cannot meet the "elements test" applied when the greater-lesser question

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[9]See, e.g., State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000).

[10]See S.C. Code Ann. §16-3-60 (Supp. 1999).

involves a common law/statutory combination. See State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986), *subsequent history omitted* (killing by stabbing or thrusting is not a lesser included offense of murder since it requires proof of an element not required for murder).

C. APPLICATION TO THE FACTS OF THIS CASE

1. Issue presented

Respondent was convicted of assault and battery of a high and aggravated nature (ABHAN) under an indictment charging him with a violation of S.C. Code Ann. §16-3-656 (1985). This statute provides that an assault with intent to commit criminal sexual conduct (AWCSC) is punishable in the same manner and to the same extent as the completed offense. The indictment alleged that, if completed, the offense would have constituted third degree criminal sexual conduct[11] under S.C. Code Ann. §16-3-654(1)(a)(1985) because it charged that respondent attempted to have sexual intercourse with the victim using force.

In order to determine whether to apply the "same elements" analysis or a common law approach to the lesser included issue presented here, the first determination is whether ABHAN and AWCSC are statutory or common law crimes. It is clear that ABHAN is a common law offense. State v. Hill, 254 S.C. 321, 175 S.E.2d 227 (1970). The question then becomes whether AWCSC is a statutory or common law offense.

2. State's position

The State relies upon statements made in previous decisions to support

[11] At trial, respondent's indictment was amended from a charge of first degree AWCSC to third degree. No reason for this amendment appears in the record.

its contention that ABHAN is a lesser included offense of AWCSC. It relies upon this syllogism:

(1) common law rape included the lesser offense of assault with intent to rape (or ravish)[12] (AWIR); and,
(2) since ABHAN is a lesser included offense of AWIR;[13] and,
(3) since this Court has equated AWIR and AWCSC;[14]
(4) therefore, ABHAN is a lesser offense of AWCSC.

In order to expose the flaw in this analysis, it is necessary to review the law of rape and sexual assault in this State. I would explicitly overrule several cases which, I conclude, were wrongly decided.

3. History of sexual offenses

South Carolina defined common law rape as the "unlawful carnal knowledge[15] of a woman forcibly and without her consent, or unlawful carnal knowledge of a female child under the age of fourteen."[16] State v. Wilson, 162 S.C. 413, 161 S.E. 104 (1931). While other sexual acts were codified as criminal offenses,[17] rape could be committed only by a male upon a female

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[12]The terms "rape" and "ravish" are interchangable.

[13]State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976).

[14]State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984).

[15]Carnal knowledge was defined as "penetration of the female genital organ by the male genital organ." E.g., State v. Worthy, 239 S.C. 449, 123 S.E.2d 835 (1962); State v. Miller, 211 S.C. 306, 45 S.E.2d 23 (1947).

[16]The 1895 constitution fixed the age of consent at fourteen. S.C. Const. art. III, §33 (1895).

[17]See, e.g., incest, now codified at S.C. Code Ann. §16-15-20 (1985); adultery or fornication at §16-15-60 (1985); buggery at §16-15-120 (1985).

victim. Assault with intent to rape or ravish (AWIR) was similarly limited to a female victim. State v. Tuckness, 257 S.C. 295, 185 S.E.2d 607 (1971).

When the legislature enacted the comprehensive criminal sexual battery act in 1977,[18] it repealed only those statutes dealing with rape,[19] leaving undisturbed the statutes criminalizing other sexual acts.[20] In enacting this comprehensive sexual battery legislation, the General Assembly replaced the narrow common law rape concepts with much broader terms. For example, under the act, the aggressor in a sexual battery need no longer be male, nor the victim female. Compare S.C. Code Ann. §16-3-651(a)(defining "Actor") with §16-3-651(i)(defining "Victim"). Further the term "sexual battery" includes numerous acts not constituting "carnal knowledge." S.C. Code Ann. §16-3-651(h)(1985). In addition, the legislature chose to divide the offense of sexual battery into three degrees, which are generally differentiated by the amount of force involved or the special vulnerability of the victim. S.C. Code Ann. §§16-3-652 to -655 (1985 and Supp. 1999).

Despite comments in some of our previous opinions, it is incorrect to equate common law rape with the statutory offense of criminal sexual conduct (CSC). While all rapes are sexual batteries, not all sexual batteries are rapes. I would therefore overrule State v. Middleton, 295 S.C. 318, 368 S.E.2d 457 (1988), *subsequent history omitted*, and State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), *subsequent history omitted*, to the extent they hold the terms rape and CSC are interchangeable.

As noted above, the common law recognized an offense known as "assault with intent to rape [or ravish]" (AWIR). AWIR was defined as an

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[18]1977 Act No. 157, now codified at S.C. Code Ann. §§16-3-651 to 16-3-659.1 (1985 and Supp. 1999).

[19]1977 Act No. 157,§ 12; State v. Kirkland, 282 S.C. 14, 317 S.E.2d 444 (1984).

[20]See statutes in footnote 15, supra.

overt act done with the intent to rape. State v. Wilson, supra; see also State v. Tuckness, supra. Three cases state that ABHAN is a lesser included offense of AWIR. State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328 (1977), State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976), and Coardes v. State, 262 S.C. 493, 206 S.E.2d 264 (1974). Coardes v. State and State v. Vaughn cite no authority in support of this proposition, and State v. Funchess cites only State v. Shea, 226 S.C. 501, 85 S.E.2d 858 (1955). In fact, the defendant in State v. Shea had been indicted in **separate counts** for ABHAN and AWIR.[21] Since the two offenses were contained in separate counts of the indictment, there was no need for the Shea court to engage in a greater-lesser analysis. I would now overrule Coardes v. State, State v. Funchess, and State v. Vaughn to the extent they hold that ABHAN is a lesser included offense of AWIR because there is no authority for these holdings.

4. ABHAN is not a lesser included of AWCSC

Even if ABHAN were a true lesser included offense of AWIR, AWIR was repealed and replaced by AWCSC in the 1977 sexual battery act. State v. Kirkland, supra; State v. Stewart, supra. Since AWCSC criminalizes an assault with intent to commit any degree of CSC, and since CSC encompasses numerous acts not within the definition of the terms "rape" or "ravish," it is inaccurate to equate the common law crime of AWIR with the statutory offense of AWCSC. Accordingly, I would overrule State v. Stewart, supra, which holds the terms are interchangeable. Further, I would hold that AWCSC is a statutory offense, not simply the codification of a common law crime.

Since respondent was convicted of a **common law** offense (ABHAN)

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[21]This was a common practice. See, e.g., State v. Tuckness, supra; State v. Collins, 228 S.C. 537, 91 S.E.2d 259 (1956); State v. Dalby, 86 S.C. 367, 68 S.E. 633 (1910); compare State v. Rich, 269 S.C. 701, 239 S.E.2d 731 (1977) (indictment for assault **and battery** with intent to ravish); State v. Johnson, 84 S.C. 45, 65 S.E. 1023 (1909) (same).

under an indictment charging him with the **statutory** offense of third degree AWCSC, I would apply the "same elements" test to determine whether ABHAN is a lesser included offense of AWCSC.

The elements of the statutory offense of AWCSC are determined by the statute's language.[22] State v. Hill, supra. The Court of Appeals held, and I agree, that ABHAN cannot be a lesser included offense of AWCSC because ABHAN includes the element of battery which is not an element of AWCSC.

The dispositive fact in this case is that respondent was charged with an assault. An assault is distinguished from a battery in that an assault involves no unlawful touching of the victim, while a battery necessarily involves such physical contact. State v. Mims, 286 S.C. 553, 335 S.E.2d 237 (1985). For this reason, I agree with the Court of Appeals that a charge of AWCSC in **any** degree under §16-3-656 cannot include as a lesser offense a crime that includes, as does ABHAN, battery as one of its elements. State v. Elliot, supra; State v. Clarkson, 337 S.C. 518, 523 S.E.2d 817 (Ct. App. 1999); State v. Ervin, 333 S.C. 351, 510 S.E.2d 220 (Ct. App. 1998); see also State v. Murphy, 322 S.C. 321, 471 S.E.2d 739 (Ct. App. 1996)(**assault** of a high and aggravated nature is a lesser included offense of AWCSC 1st with a minor). Accordingly, I would overrule our earlier decisions which hold that ABHAN is a lesser included offense of AWCSC. State v. Morris, 289 S.C. 294, 345 S.E.2d 977 (1986); State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986).

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[22]I acknowledge that particularly in the CSC area, where the legislature has defined alternate methods of committing each degree of the offense, application of the "same elements" test will result in the inclusion of different lesser included offenses depending on the form of the crime charged. For example, the Court recently clarified that third degree CSC under S.C. Code Ann. §16-3-654(1)(b) is not a lesser included offense of first degree CSC under §16-3-652. State v. McFadden, supra at footnote 1.

5. Conclusion

In suggesting that we should reconsider and overrule these decisions, I recognize that the courts have implicitly (and sometimes explicitly, as does the majority here; see also State v. Drafts, supra, and State v. Murphy, supra) read the word "assault" in §16-3-656 as "attempt." While certain types of attempts may be subsumed by other crimes,[23] the terms are not synonymous. Further, where an attempt crime[24] exists, it is properly considered a lesser included offense of the completed offense,[25] so long as the completed offense is a felony.[26]

I would affirm the Court of Appeals' decision vacating respondent's conviction. Where the State is unsure which of several offenses the defendant may have committed, and where it is unclear whether these offenses are lesser included offenses under the tests I suggest that we adopt, the State is free to seek multiple indictments or a multi-count indictment in which each offense is alleged as a separate charge.

For the reasons given above, I respectfully dissent.

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[23]We recently declined to recognize the crime of attempted murder, finding the conduct it would punish already covered by assault and battery with intent to kill and assault with intent to kill. State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000).

[24]Generally, "A person who commits the common law offense of attempt, upon conviction, must be punished as for the principal offense." S.C. Code Ann. §16-1-80 (Supp. 1999) but see, e.g., S.C. Code Ann. §44-53-420 (1985)(certain drug attempt offenses punished as half the completed offense).

[25]State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1987).

[26]State v. Redman, 121 S.C. 139, 113 S.E. 467 (1922).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Susan M. Jenkins, Respondent,

Opinion No. 25357
Heard July 17, 2001 - Filed September 4, 2001

INDEFINITE SUSPENSION

Attorney General Charles M. Condon and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Susan M. Jenkins, pro se.

PER CURIAM: In this attorney disciplinary matter, the Commission on Lawyer Conduct filed formal charges against respondent. She did not respond by way of answer or motion to the charges. Neither respondent nor anyone on her behalf appeared at the hearing before the subpanel of the Commission on Lawyer Conduct. The full panel adopted the subpanel's report finding respondent committed various acts of misconduct

and recommending an eighteen month suspension from the practice of law.[1]

FACTS[2]

In June 1995, respondent was indicted for possession of crack cocaine.[3] After she failed to cooperate with the drug court program, her case was set for trial. She failed to appear for roll calls in August and December 1998. A bench warrant was issued for her arrest and, as of August 3, 2000, the date of filing of the formal charges, the bench warrant remained outstanding.[4]

Respondent closed her law practice and is living at an unknown location.

The South Carolina Bar suspended respondent on February 14, 1996, for non-payment of 1996 license fees. The South Carolina Bar suspended respondent on May 6, 1996, for failing to comply with continuing legal education requirements.

Thereafter, respondent failed to appear for a Rule to Show Cause hearing before this Court. She was found in contempt and suspended from the practice of law for failing to appear to explain her non-payment of bar

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[1]In addition, the full panel adopted the subpanel's recommendation respondent pay the costs of the disciplinary proceeding

[2]These facts are taken from the formal charges filed against respondent.

[3]These factual allegations are taken from the formal charges and the subpanel's report.

[4]At oral argument before this Court, the Office of Disciplinary Counsel informed the Court that the indictment against respondent had been recently nol prosed.

license fees. Respondent has not petitioned the Court for permission to resume practicing law.

DISCUSSION

The authority to discipline attorneys and the manner in which discipline is given rests entirely with the Supreme Court. In re Yarborough, 337 S.C. 245, 524 S.E.2d 100 (1999).

Respondent's failure to respond to the formal charges against her constitutes an admission of the factual allegations. Rule 24(a), RLDE, Rule 413, SCACR. Further, because she failed to appear at the hearing before the subpanel, she is deemed to have admitted the factual allegations which were to be the subject of the hearing. Rule 24(b), RLDE, Rule 413, SCACR.

Respondent's admitted conduct involves twice failing to appear for roll call, thereby resulting in issuance of a bench warrant for her arrest, failing to pay bar license fees, failing to comply with CLE requirements, failing to respond to the disciplinary authorities, and failing to appear as ordered by this Court and, subsequently, being found in contempt.

The Panel concluded respondent's misconduct violated the following provisions of Rule 7(a), Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: (1) violating the Rules of Professional Conduct, Rule 407, SCACR; (2) engaging in conduct tending to pollute the administration of justice or to bring the legal profession into disrepute or conduct demonstrating an unfitness to practice law; (3) violating the oath of office taken upon admission to practice law in this State; and (4) violating a valid order issued by a Court of this State. We concur.

The Panel further found respondent's misconduct violated the Rules of Professional Conduct, Rule 407, SCACR, as follows: (1) Rule 8.1(b) by failing to respond to a demand for information from a disciplinary authority; (2) Rule 8.4(a) by violating the Rules of Professional Conduct; (3) Rule 8.4(b) committing a criminal act which reflects adversely on the

lawyer's honesty, trustworthiness, or fitness in other respects; (4) Rule 8.4(c) by engaging in conduct involving moral turpitude; (5) Rule 8.4(d) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and (6) Rule 8.4(e) by engaging in conduct that is prejudicial to the administration of justice. We agree respondent's misconduct violated Rules 8.1(b) and 8.4(a)(c)(d) and (e).

We note, however, the Panel's determination respondent violated Rule 8.4(b), committing a criminal act, is not supported by the record. Respondent has not been convicted of a criminal offense. Moreover, although she is deemed to have admitted the allegations in the formal charges and the allegations which were the subject of the disciplinary hearing, the allegations simply assert she was "indicted . . . for possession of crack cocaine." Accordingly, respondent admitted she was indicted; she did not admit she possessed crack cocaine. The Panel erred in finding respondent committed a criminal act by clear and convincing evidence. In re Friday, 263 S.C. 156, 208 S.E.2d 535 (1974) (misconduct must be proven by clear and convincing evidence).

Because respondent has admitted misconduct, the sole issue before the Court is the appropriate sanction. Matter of Thornton, 327 S.C. 193, 489 S.E.2d 198 (1997). In the past, the Court has imposed a range of discipline for somewhat similar misconduct. In re Hall, 341 S.C. 98, 533 S.E.2d 588 (2000) (neglect of legal matters, practicing law while under suspension, and failure to respond to disciplinary authority warranted disbarment); In re Brown, 337 S.C. 56, 522 S.E.2d 814 (1999) (convictions for civil and criminal contempt - which included violating valid court order - warranted 18 month suspension); In re Murphy, 336 S.C. 196, 519 S.E.2d 791 (1999) (willful violation of valid court orders while serving as estate's co-personal representative, misrepresentations to probate court, and misappropriation of estate funds, warranted nine-month suspension). Under the circumstances of this case, we deem an indefinite suspension from the practice of law the appropriate sanction.

Accordingly, respondent is indefinitely suspended from the

practice of law. Respondent shall also pay the costs of the disciplinary proceeding.[5] Within fifteen days of the date of this opinion, respondent shall surrender her certificate of admission and file an affidavit with the Clerk of this Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR (duties following disbarment or suspension).

INDEFINITE SUSPENSION.

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

[5]The stated costs are $233.45.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Leo Zabinski and John Brainard, Appellants,

v.

Bright Acres Associates, a South Carolina General Partnership, Henry Massey, and the Estate of John Leutwiler, deceased, individually, and as General Partners, Respondents,

and

Estate of John Leutwiler, Third-Party Plaintiff,

v.

John Martin Brainard, Michael Forsyth Brainard, Joanne Foye Brainard, Melanie Brainard, David McLeod Brainard, Allison Christie Brainard, LOM Development, LLC, Wachovia Mortgage Co., HRM, Inc., and Edward Bullard,

Third-PartyDefendants,

and

Bright Acres Associates,
a South Carolina
Partnership — Fourth-Party Plaintiff,

v.

J. Ray Westmoreland, — Fourth-Party Defendant.

Appeal From Beaufort County
Thomas Kemmerlin, Jr., Master-in-Equity

Opinion No. 25358
Heard June 19, 2001 - Filed September 4, 2001

AFFIRMED IN PART; REVERSED IN PART; AND ARBITRATION COMPELLED.

A. Parker Barnes, Jr., of Beaufort, for appellants Leo Zabinski and John Brainard.

Terry A. Finger, of Finger, Taylor & Andrews, of Hilton Head, for respondents Henry Massey

and Bright Acres Associates.

J. Ray Westmoreland, of Hilton Head, for respondent Estate of John Leutwiler.

Susan Taylor Wall, and Mary Legare Hughes, both of Nexsen, Pruet, Jacobs, Pollard & Robinson, LLC, of Charleston, for third-party defendant Bullard.

CHIEF JUSTICE TOAL: In this partnership dispute, three partners appeal from an Order denying arbitration.

FACTUAL/PROCEDURAL BACKGROUND

Bright Acres Associates ("Bright Acres") was a partnership consisting of the following four equal partners: John Leutwiler ("Leutwiler"), Henry Massey ("Massey"), John Brainard ("Brainard"), and Leo Zabinski ("Zabinski"). The partnership was created in 1980 in order to buy, renovate, and sell thirty apartments and approximately twenty-six acres of land on Hilton Head Island. J. Ray Westmoreland ("Westmoreland"), attorney for Leutwiler's estate ("Respondent"), prepared the partnership agreement, which expressly provided for arbitration of all controversies or claims arising out of the partnership agreement. However, the face of the partnership agreement was not stamped to that effect as required by the South Carolina Arbitration Act, S.C. Code Ann. § 15-48-10(a) (Supp. 2000).

On October 20, 1998, after Leutwiler's death, Massey expressly agreed to purchase Leutwiler's 25% interest in the partnership. Westmoreland prepared the purchase agreement. Massey failed to make all payments required by the written purchase agreement. Massey and Respondent disagreed as to what percentage, if any, Massey acquired in Leutwiler's original 25% of the partnership. Because of this dispute, Massey and Westmoreland disagreed as to the amount of distributions that were to be made to each partner once the partnership dissolved.

On September 8, 1998, Zabinski and Brainard ("Appellants") commenced a pro se action seeking arbitration of the distribution and other partnership disputes. After Respondent moved to make Appellants' original Complaint more definite and certain, Appellants retained Attorney James M. Herring ("Herring") who amended the original Complaint on March 19, 1999. Herring moved to compel arbitration.

On April 21, 1999, Respondent answered the Amended Complaint, opposing arbitration on the ground the partnership agreement Westmoreland prepared failed to prominently display on its face that it was subject to arbitration. Furthermore, Respondent alleged: (1) the controversies were not subject to arbitration; (2) Massey and his attorney were using their position to deprive Respondent of his partnership interest: (3) the remaining partners failed to provide partnership information; (4) Leutwiler was prevented from exercising any management duties in the partnership; (5) remaining partners failed to account for various funds and assets of the partnership; and (6) remaining partners threatened to withhold partnership benefits unless Leutwiler agreed to a settlement with Massey in regards to the case then on appeal with this Court. Respondent also sought damages against Appellants, Massey, and Massey's attorney.

On June 22, 1999, Respondent moved to have a receiver appointed. On August 12, 1999, Respondent filed and served a Motion to Compel the Return of Funds and Deposit. No sworn testimony was filed in support of these motions.

On August 13, 1999, Judge Kemmerlin held a status conference on the case. Appellants asked the trial court not to rule on any motion other than the motion for arbitration without a hearing. On August 25, 1999, Judge Kemmerlin denied arbitration and issued a temporary restraining order ("TRO"), restraining the partnership from disbursing any more funds and suggesting that the trial court may appoint a receiver in the future.

On September 3, 1999, Appellants moved to alter or amend the trial court's order, and the trial court refused. On March 13, 2000, Judge Kemmerlin recused himself. On March 14, 2000, Appellants served a Notice of Appeal. The following issues are before this Court on appeal:

I. Is Respondent equitably estopped from asserting Appellants are not entitled to arbitration, where Respondent's attorney prepared the partnership agreement and is now asserting the agreement fails to comply with the South Carolina Arbitration Act, S.C. Code Ann. § 15-48-10(a) (Supp. 2000)?

II. Did the trial court err in failing to order arbitration because the partnership was engaged in interstate commerce sufficient to invoke the Federal Arbitration Act ("FAA")?

III. Did the trial court err in issuing the TRO without providing proper notice to Appellants?

IV. Did the trial court err in issuing the TRO without any sworn testimony in support thereof?

V. Were Appellants prejudiced because they had no opportunity to demonstrate the allegations contained in the unsworn Motion for the Return of Funds and Deposit were false?

LAW/ANALYSIS

I. Equitable Estoppel

Appellants argue Respondent is equitably estopped from opposing arbitration because Respondent's attorney, Westmoreland, prepared the partnership agreement with the defective arbitration clause. We disagree.

On December 22, 1980, Westmoreland prepared the partnership agreement for Bright Acres. The partnership agreement provided for arbitration

of all claims and controversies arising from the agreement. Paragraph fourteen of the partnership agreement states:

> If any controversy or claim arising out of this partnership agreement cannot be settled by the partners, the controversy shall be settled by arbitration in accordance with the rules of the American Arbitration Association then in effect, and judgment on the award may be entered in any court having jurisdiction.

Westmoreland failed to stamp the first page of the partnership agreement with the language required by the South Carolina Arbitration Act, S.C. Code Ann. § 15-48-10(a) (Supp. 2000). Section 15-48-10(a) provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. *Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.*

(emphasis added).

We have strictly construed the notice requirement of section 15-48-10(a). In *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996), we held the terms of section 15-48-10(a) are clear, and those terms must be applied according to their literal meaning. *Id.* at 457, 476 S.E.2d at 151. The notice provision in the *Soil Remediation* contract did not meet the statutory requirement because it was laser-printed and written in all capital letters on the first page of the contract. *Id.* The notice provision must by typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract. No other variation is acceptable. *See also Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 434 S.E.2d 281 (1993) (holding formal requirements of section

15-48-10(a) must be met before the dispute can be subject to arbitration); *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) (affirming trial court's finding that section 15-48-10(a) had not been satisfied because the contract did not contain on its first page any mention of arbitration); *Circle S. Enters., Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 343 S.E.2d 45 n.1 (Ct. App. 1986) (finding a provision of a contract requiring arbitration is not enforceable under state law because notice the contract is subject to arbitration does not appear on its first page as required by section 15-48-10(a)).

Appellants assert Respondent should be equitably estopped from opposing arbitration in this case because Westmoreland prepared the partnership agreement with the defective notice of arbitration. Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 287 n.2 (2000). Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position. *Mayes v. Paxton*, 313 S.C. 109, 437 S.E.2d 66 (1993). "Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other." *Evins v. Richland County Historic Pres. Comm'n*, 341 S.C. 15, 15, 532 S.E.2d 876, 878 (2000).

According to Appellants, "The equitable estoppel is based upon the undisputed facts that both the party [sic] opposing arbitration previously consented in writing to such, and that party's attorney who drafted the arbitration clause now asserts after 19 years of silence that the document he drafted is defective. Equitable estoppel prohibits Respondent from taking that position because if [the partnership agreement] is defective, it is the fault of the Respondent who is now asserting it is defective."

Equitable estoppel does not apply to this case. First, Appellants' main problem is with Westmoreland's conduct, not with the conduct of Leutwiler or

his estate. Second, Appellants present no evidence of false representation or concealment by Leutwiler. Third, the knowledge of all parties was equal and nothing was done by one to mislead the other at the time the partners entered into the partnership agreement. Finally, Appellants do not allege they have detrimentally changed their position in reliance on Leutwiler's conduct. Although Westmoreland's conduct may be problematic, Leutwiler did not induce the other partners into entering a partnership agreement with a defective notice of arbitration.

II. Arbitration

Appellants argue the trial court erred in failing to order arbitration because the partnership was engaged in interstate commerce sufficient to invoke the FAA, and the FAA does not contain a notice requirement similar to section 15-48-10(a). We agree. Although the arbitration provision does not meet the technical requirements of section 15-48-10(a), the inquiry does not end there. Inextricably linked with the question of the applicability of section 15-48-10(a), is the impact of the FAA on this dispute.

A. FAA

Beginning in the mid-1980's, the United States Supreme Court, interpreting the FAA, essentially "federalized" the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause.[1] The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements.[2] The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements. *Allied-Bruce*

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[1]U.S. Const. art.1, § 8, cl.3.

[2]*See* Alan S. Kaplinsky & Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should be Considered by a Consumer Lender*, 1113 PRACTICING LAW INST./CORPORATE LAW & PRACTICE COURSE HANDBOOK SERIES 655 (1999).

Terminix Co. v. Dobson, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

The FAA, section 2, provides that a "written provision in any maritime transaction or *a contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 273, 115 S. Ct. at 839 (quoting 9 U.S.C. § 2 (1988)) (emphasis added). The United States Supreme Court has interpreted the words "involving commerce" broadly. According the Supreme Court in *Dobson*, the words "involving commerce" are the functional equivalent of "affecting commerce," which typically indicates Congress' intent to exercise its commerce power in full. *Id.* at 274, 115 S. Ct. at 839. The Supreme Court utilizes a "commerce in fact" test to determine if the transaction involves interstate commerce for the FAA to apply. *Id.; see also Towles v. United Healthcare Corp.,* 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). In other words, the transaction must turn out, in fact, to have involved interstate commerce. *See, e.g., Roberson v. Money Tree of Alabama, Inc.*, 954 F. Supp. 1519 (M.D. Ala. 1997) (finding transaction involved interstate commerce for purposes of the FAA where loan was negotiated in Alabama, loan was signed in Alabama, Money Tree was a Georgia Corporation, loans were approved and shipped from Georgia, and loan proceeds were wired from Georgia).

Despite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration. *Volt Info. Scis. Inc. v. Board of Trs.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). In *Volt*, the United States Supreme Court found a California statute was not pre-empted by the FAA where the parties agreed their arbitration agreement would be governed by California law. *Id.* According to the United States Supreme Court, the FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. *Id.* at 478, 109 S. Ct. at 1255. "[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.*

(citations omitted).

Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 n.2 (2001). If the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is consistent with the goals of the FAA, even if the result is that arbitration is stayed where the FAA would otherwise permit it to go forward. *Volt*, 489 U.S. at 479, 109 S. Ct. at 1256. *See also Ford v. Nylcare Health Plans*, 141 F.3d 243 (5th Cir. 1998) (finding that parties may designate state law to govern the scope of an arbitration clause in an agreement otherwise covered by the FAA). According to the Supreme Court in *Volt*,

> [I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.

Volt, 489 U.S. at 479, 109 S. Ct. at 1256. (citations omitted).

While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate. *See Volt, supra; Munoz, supra* n.2. *Volt* involved an arbitration agreement that incorporated state procedural rules, one of which called for arbitration to be stayed pending the resolution of a related judicial proceeding. The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996). Generic choice of law provisions cannot

be used to incorporate into an arbitration agreement a state law which would be preempted by the FAA. But, as in *Volt*, state procedural rules that do not undermine the enforceability of an otherwise valid contract to arbitrate may be deemed to have been incorporated into a contract through choice of law provisions.[3]

In *Casarotto*, the United States Supreme Court held the FAA preempted a Montana statute which conditioned the enforceability of an arbitration clause on compliance with special notice requirements. Interpreting a Montana statute similar to section 15-48-10(a), the United States Supreme Court found that courts may invalidate arbitration provisions on general contract defenses, such as fraud, duress, and unconscionability, but courts may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. *Id.* According to the United States Supreme Court:

> By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements subject to the Act.

Id. at 687, 116 S. Ct. at 1653.

Relying on *Casarotto*, this Court in *Soil Remediation* held that because section 15-48-10(a) singles out arbitration agreements, it directly conflicts with section 2 of the FAA. Therefore, the FAA preempts section 15-48-10(a). *Soil*

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[3]Michael A. Hanzman, *Arbitration Agreements: Analyzing Threshold Choice of Law and Arbitrability Questions: An Often Overlooked Task*, 70 FLA. B.J. 14 (Dec. 1996).

Remediation, 323 S.C. at 459, 476 S.E.2d at 152. In *Munoz, supra,* we recently stated the result in *Soil Remediation* hinged on the fact that application of state law would have rendered the arbitration agreement completely unenforceable under section 15-48-10(a). *Munoz*, 343 S.C. at 539, 542 S.E.2d at 363 n.2. "State law was therefore preempted *to the extent it would have invalidated the arbitration agreement.* The parties to a contract are otherwise free to agree that our state Arbitration Act will apply and this agreement shall be enforceable even if interstate commerce is involved." *Id.* (emphasis in original).

Under the facts of the instant case, we find the FAA controls and compel arbitration. On its facts, the instant arbitration agreement is not enforceable under South Carolina law. Thus, a partner could opt out of his agreement to arbitrate by citing the lack of a notice provision under state law. Even though the partnership agreement contains an express provision which provides that the "partnership agreement shall be governed by, and construed and enforced in accordance with the laws of the State of South Carolina," this Court's holding in *Soil Remediation* prevents the partners from "opting out" of the FAA. Furthermore, this Court in *Osteen, supra,* held a governing law clause, similar to the one in the instant case, indicates the parties' intention to have the validity and construction of the contract determined by the arbitrators according to the *substantive* law identified in the agreement. In other words, despite the inclusion of a governing law provision in an arbitration agreement, such a provision does not necessarily require the application of state, rather than federal, arbitration law. *Id.* at 426, 434 S.E.2d at 284.

We also find the partnership was engaged in interstate commerce as contemplated by the FAA. To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts. *Towles v. United Healthcare Corp*., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). Appellants attempt to establish interstate commerce through several affidavits. Both the United States Supreme Court and this Court have relied on affidavits when determining whether a transaction involves interstate commerce. *Circle S., supra*.

In Zabinski's affidavit, he asserts the partnership was involved in interstate commerce because: (1) the land was purchased from a Minnesota based group of investors; (2) Bright Acres financed the purchase through a mortgage with C&S Bank of Georgia and a second mortgage from Minnesota investors; (3) Bright Acres used several out-of-state sub-contractors and materials from other states; (4) the condominiums were advertised across state lines; (5) Bright Acres sold the second mortgage to First Oxford of Philadelphia, Pennsylvania; (6) extensive soil tests were conducted by a Georgia firm; (7) a land sale was financed by a Chicago bank which took a mortgage on the property; (8) Bright Acres attempted to enter into a sales contract with a Pennsylvania developer for a proposed golf course; and (9) Leutwiler spent his remaining years as a partner in Georgia. Zabinski's affidavit was disputed by affidavits given by Ann L. Stiber and Brian J. Leutwiler, which maintain there has never been partnership activities or business that directly relates to interstate commerce.

The heart of the transaction in this case is the sale and development of real property on Hilton Head Island. Bright Acres is a South Carolina partnership with its principal place of business on Hilton Head Island. The only property owned by the partnership is located on Hilton Head Island. The development of land within South Carolina' borders is the quintessential example of a purely intrastate activity. However, the transaction involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors. *See generally Munoz*, *supra* (finding interstate commerce in an installment contract case where builder was domiciled in South Carolina but assigned rights to a Delaware Creditor, agreement was prepared in Minnesota, and proceeds were disbursed from Minnesota); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977) (holding construction contract involved interstate contract where materials, equipment, and supplies were produced and manufactured out-of- state); *Circle S., supra* (finding construction contract involved interstate commerce where equipment, materials, and subcontractors were furnished from out-of-state). *See also Roberson*, *supra* (Alabama district courts find transactions between lenders and borrowers are ones "involving commerce"within meaning of the FAA).

Because of the FAA's expansive view of interstate commerce, we find the FAA covers the partnership agreement in the present case. Thus, the FAA provisions trump conflicting requirements of South Carolina law, and arbitration is required.

C. Matters Subject to Arbitration

The four partners agreed in their partnership agreement that "any controversy or claim arising out of the partnership agreement" would be settled by arbitration if it could not be settled by the partnership. In their Motion to Compel Arbitration, Appellants moved the trial court to compel arbitration of any and all claims, controversies, or challenges Respondent has to the past, present, and future management plans of the partnership. Appellants also request review of all partnership actions taken in the last three years, approval of a business plan concept for the effective management of the partnership's remaining assets, payment of all appropriate expenses, and distribution of assets or proceeds to the partners. Essentially, Appellants are seeking to compel arbitration in order to wind up the partnership and to resolve all outstanding claims involving the partnership. We must, therefore, determine which claims are arbitrable.

The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise. *AT&T Techs., Inc. v. Communications Workers of America,* 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) (citations omitted); 4 Am. Jur. 2d *Alternative Dispute Resolution* § 123 (1995). However, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. *AT&T Techs.,* 475 U.S. at 649, 106 S. Ct. at 1419.

The policy of the United States and South Carolina is to favor arbitration of disputes. *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000). Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Episcopal Hous., supra*; *Towles, supra*. Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is

restricted by the terms of the agreement. *Simmons v. Lucas & Stubbs Assocs., Ltd.*, 283 S.C. 326, 322 S.E.2d 467 (Ct. App. 1984).

To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. *Hinson v. Jusco Co.*, 868 F. Supp. 145 (D.S.C. 1994); *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 437 S.E.2d 22 (1993). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Towles, supra.* Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. *Great W. Coal*, 312 S.C. at 564, 437 S.E.2d at 25. A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. *Tritech, supra.*

The arbitration agreement in the instant cases states that "any controversy or claim arising out of the partnership agreement" should be settled by arbitration if it cannot be settled by the partnership. Therefore, any claim pursuant to the partnership agreement is arbitrable. Further, any tort claims between the partners that relate to the partnership agreement are arbitrable.[4]

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[4]Other jurisdictions provide a test to determine whether a tort claim falls within the scope of an agreement to arbitrate. According to these courts, the focus should be on the factual allegations contained in the petition rather than on the legal causes of actions asserted. The test is based on a determination of whether the particular tort claim is so interwoven with the contract that it could not stand alone. If the tort and contract claims are so interwoven, both are arbitrable. On the other hand, if the tort claim is completely independent of the contract and could be maintained without reference to the contract, the tort claim is not arbitrable. *See generally Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576 (Tex. Ct. App. 1999); *PromoFone, Inc. v. PCC Mgmt.*, 637 N.Y.S.2d 405 (N.Y. App. Div. 1996) (holding appellant was compelled to

Finally, the winding up of the partnership is covered by the arbitration agreement because it concerns issues that are the direct result of the partnership agreement.

A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained. *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001). Despite South Carolina's presumption in favor or arbitration, we find the remaining third party claims are not subject to arbitration because a significant relationship does not exist between the following claims and the partnership agreement: (1) any attorney malpractice action against Westomoreland; (2) any attorney malpractice action against Massey's attorney, Bullard; and (3) any action between Massey and Leutwiler concerning the purchase agreement entered into by Massey to buy Leutwiler's interest in the partnership.

The facts underlying the attorney malpractice claims are not encompassed by the arbitration agreement. Appellants' malpractice claim against Westmoreland concerns his failure to stamp the partnership agreement with the language mandated in section 15-48-10(a), and his many alleged conflicts of interest involving the partnership. Appellants' malpractice claims against Bullard concern his alleged loyalty to Massey over his loyalty to the partnership. These malpractice claims concern the partnership only indirectly, and cannot be considered claims "arising out of the partnership agreement." Furthermore, the winding up of the partnership will involve a totally different set of facts than the facts surrounding the attorney malpractice claims.

Finally, the action between Leutwiler and Massey involves a dispute over the purchase agreement, which is completely unrelated to the partnership

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arbitrate with a nonsignatory when issues in overall dispute were inextricably interwoven with claims against nonsignatory, and nonsignatory was closely related to signatories and was alleged to have engaged in the same improper conduct).

agreement. Leutwiler alleges Massey failed to make all payments required by a written purchase agreement. Massey and Leutwiler's estate disagree as to what percent, if any, Massey acquired in Leutwiler's original 25% of the partnership. The facts involved in this controversy are completely independent of any dispute arising out of the partnership agreement and are not arbitrable.

In 1995, we issued a memorandum opinion which decided the controversy between Leutwiler and Massey. *Leutwiler v. Massey*, 95-MO-223 (filed July 19, 1995). For the sake of judicial economy and to prevent further litigation between the parties, we will state the effect of our 1995 opinion upon the determination of the respective percentages owned by Leutwiler and Massey in the partnership. In 1995, we found that upon default Massey would be entitled to a pro rata share of the partnership interest based on the payments he made pursuant to the purchase agreement. Once Massey defaulted, he was not compelled to make further payments. Massey is entitled to have the principal payments applied to the purchase of a pro rata share of Leutwiler's total partnership interest, with that share passing to Massey, and Leutwiler retaining the portion of the partnership not paid for by Massey. Based on the purchase agreement and the amount of payments made by Massey, we find Massey owns a 36.45% interest in the partnership and Leutwiler owns a 13.55% interest in the partnership.[5]

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[5]These percentages are reflected in Massey's memorandum in support of his motion to determine his percentage interest in Bright Acres. Massey's memorandum is a correct calculation of the effect of our 1995 opinion. The percentages are based on the partnership agreement and the following calculations.

The partnership agreement stated Leutwiler agreed to sell his interest to Massey under the following terms: (1) Massy paid $110,000 for Leutwiler's partnership interest; (2) Massey paid an initial cash payment of $20,000; (3) Massey paid $2,000 per month with no interest; and (4) Massey paid $1,064.70 per month for 114 months with an interest rate of 10%, of which $78,000 was to be principal and $43,375.80 was to be interest. The purchase agreement

contained a provision permitting Massey to cease making payments at any time and receive a pro rata share of the Leutwiler interest.

On October 20, 1993, Massey paid $17,207.93 to the Clerk of Court. This amount represented a judgment of $16,841.10 with the difference being for post-judgment interest and the Sheriff's collection fee. The sum deposited represented 13 payments of $1,064.70 and $3,000 in attorneys fees. On September 15, 1994, this sum deposited was reduced by one payment of $1,064.70 pursuant to an order by the trial judge. Accordingly, Massy has paid toward the principal as follows: (1) $20,000 initial cash payment; (2) $12,000 – 6 payments of $2000 with no interest; and (3) $13,017.37 – 28 payments of $1,064.70 at 10% interest. The total paid in principal was $45,017.37.

The percentage of Leutwiler's interest purchased by Massey is computed as follows: $\frac{\$45,017.37}{\$110,000}$ = .40925 x .25 = 10.23%

The percentage of Leutwiler's interest retained by Leutwiler is computed as follows: $\frac{\$64,982.63}{\$110,000}$ = .59075 x .25 = 14.77%

Therefore, Massey has a 35.23% interest and Leutwiler has a 14.77% interest.

However, the partnership agreement provided that upon the failure of a partner to satisfy a call for capital, the partner paying such sum should be entitled to an adjustment in ownership interest from the share held by the delinquent partner. Leutwiler failed to make additional capital payments and his share was paid by Massey. The total of all additional paid in capital is $36,371.66 of which Leutwiler should have paid 14.77% or $5,372.09. The percentage adjustment is computed as follows:

$\frac{\text{Massey's payment}}{\$5,372.09}$ = .08266 x .1477 = .0122

III. TRO

Appellants argue the trial court erred in issuing a TRO without providing proper notice. We agree.

According to Appellants, on August 12, 1999, they received a faxed copy of Respondent's Motion to Compel the Return of Funds and Deposit which provided no notice of a hearing on the motion. A status conference was held the following day at which time Appellants' attorney timely objected to the trial court ruling on any matter except arbitration, and requested the trial court not rule on any other motions without an opportunity to be heard. In his August 25, 1999, Order, Judge Kemmerlin issued a TRO, restraining the partnership from making further distributions to the partners and from paying attorney's fees until further order of the trial court. According to Appellants, their interests were prejudiced because they were not provided ten days notice. *See Dedes v. Strickland*, 307 S.C. 152, 414 S.E.2d 132 (1992); Rule 6(d), SCRCP.

Pursuant to Rule 65(b), SCRCP, a trial judge can issue a temporary restraining order without providing notice where "it clearly appears from specific facts shown by affidavit or by verified complaint that immediate or irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon."[6]

Leutwiler's share $64,988

Thus, Massey's share = .3523 + .0122 = 36.45%
and Leutwiler's share = .1477 – .0122 = 13.55%

[6]Judge Kemmerlin's TRO did not meet all of the following requirements of Rule 65(b), SCRCP:

> "Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall be served, together

The granting of temporary injunctive relief is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 531 S.E.2d 518 (2000). An abuse of discretion occurs where the trial court is controlled by an error of law or where the trial court's order is based on factual conclusions without evidentiary support. *Id.* The sole purpose of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 199 S.E.2d 60 (1973).

The Respondent asserted the partnership and other partners were "gutting the Partnership and making distributions improperly to themselves." Judge Kemmerlin expressed concern that if he did not restrain the partners, they may expend the remaining funds. Judge Kemmerlin had the following allegations before him when he issued the ex parte TRO: (1) Appellants allegedly paid all expenses and distributed all assets without waiting for the appointment of an arbitrator; (2) breach of fiduciary duty by Appellants; (3) partnership assets and information were being improperly withheld from Respondent; (4) Appellants refused to produce partnership records for examination by Respondent; (5) Appellants refused to obey a subpoena; (6) attorney conflict of interest; and (7) Appellants improperly distributed partnership assets.

While Judge Kemmerlin had several allegations before him, the factual basis for the TRO was not fully developed. Therefore, a hearing on the matter

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> with a summons and complaint in the event no summons and complaint have previously been served in the action, . . . shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period."

was imperative. However, Rule 65(b), SCRCP states that an ex parte TRO will expire in ten days. Because more than ten days has elapsed, the TRO has expired as a matter of law and the remaining issues involving the TRO are moot.

IV. Motion for the Return of Funds and Deposit

Appellants argue they were prejudiced because they did not have an opportunity to demonstrate the allegations in the Motion for the Return of Funds and Deposit were false. We disagree.

On August 12, 1999, Respondent moved for the return and deposit of all funds distributed to the various partners by Massey. Respondent also moved for the appointment of a receiver. In their briefs, Appellants argue the merits of Respondent's Motion for the Return of Funds and Deposit. Specifically, Appellants contest grounds 4 through 9, and argue they were prejudiced because they were not allowed to submit affidavits contesting these grounds.

Judge Kemmerlin's August 25, 1999, Order was a ruling on a number of motions, but it was not a ruling on the Motion to Compel Return of Funds and Deposit. He references the Motion and its allegations in his August 25, 1999, Order. However, he does not specifically rule on the merits of these allegations. He simply uses the allegations as a basis to issue a TRO. Judge Kemmerlin then directs the parties to appear before him on September 9, 1999, to show cause why the TRO should not become an injunction *pendente lite*, and to discuss the appointment of a receiver. Presumably, the parties would argue the merits of the Motion at the September 9, 1999, hearing. However, Judge Kemmerlin recused himself before the September 9, 1999, hearing. The merits of the Motion were never heard and a receiver was never appointed.

Appellants were not prejudiced because a trial judge never ruled upon the allegations presented in the Motion.[7] The only way Appellants could be

[7]Respondent alleges Appellants were not prejudiced because all the partnership assets have been distributed. Additionally, Respondent maintains

prejudiced is by Judge Kemmerlin's issuance of a TRO. We find no prejudice because, as we stated above, the TRO has expired.

CONCLUSION

Based on the foregoing, we hereby compel arbitration of the following issues: (1) the winding up of the partnership; (2) the partnership's selection of a managing partner; (3) any claim concerning the sale of a remaining piece of property located on Hilton Head Island, South Carolina; (4) any claim concerning the proceeds from the September 4, 1998 property sale together with all incidental issues involving the terms, conditions, and consequences of that sale and post-sale management and application of the funds to be received by the partnership in due course along with the partnership's plans for how to manage the asset if the purchaser's obligations are not timely met; and (5) any remaining claims concerning the management of the partnership. The arbitrator will distribute the remaining assets to the partners in the percentages outlined in this opinion. Therefore, we **AFFIRM** the trial court's Order denying arbitration of the attorney malpractice claims, and **REVERSE** the trial court's Order denying arbitration of the remaining claims concerning the partnership.

AFFIRMED IN PART; REVERSED IN PART; AND ARBITRATION COMPELLED.

MOORE, WALLER, PLEICONES, JJ., and Acting Justice J. Ernest Kinard, Jr., concur.

Appellants consented to a continuation of the TRO.

The Supreme Court of South Carolina

In the Matter of A.
Shedrick Jolly, III, Respondent.

O R D E R

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to the relief sought by Disciplinary Counsel.

IT IS ORDERED that respondent's license to practice law in this State is suspended until further order of the Court.

IT IS FURTHER ORDERED that Matthew A. Henderson, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Henderson shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the

interests of respondent's clients. Mr. Henderson may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Matthew A. Henderson, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Matthew A. Henderson, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Henderson's office.

s/Jean H. Toal C.J.

Columbia, South Carolina

August 30, 2001