Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

M E D I A R E L E A S E

February 9, 2007

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of his/her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

The Commission will not accept applications after **12:00 noon on Monday, March 12, 2007.**

A vacancy will exist in the office currently held by the Honorable E. C. Burnett, III, Associate Justice of the Supreme Court, Seat 5, upon Justice Burnett's retirement on or before September 1, 2007. The successor will fill the unexpired term of that office, which will expire on July 31, 2010.

A vacancy will exist in the office currently held by the Honorable H. Samuel Stilwell, Judge of the Court of Appeals, Seat 7, upon Judge Stilwell's retirement on or before December 31, 2007. The successor will fill the unexpired term of that office, which will expire on June 30, 2008, and the subsequent full term which will expire on June 30, 2014.

A vacancy will exist in the office currently held by the Honorable Paula H. Thomas, Judge of the Circuit Court, Fifteenth Judicial Circuit, Seat 2. The successor will fill the unexpired term of that office, which will expire on June 30, 2009.

A vacancy will exist in the office currently held by the Honorable Curtis L. Coltrane, Master-in-Equity for Beaufort County, upon his resignation on or before March 16, 2007. The successor will fill the unexpired term of that office, which will expire on June 6, 2009.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

* * *

The Supreme Court of South Carolina

In the Matter of Gordon S. Vincent, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 16, 1983, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, dated December 27, 2006, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Gordon Swanger Vincent shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

February 14, 2007

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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

N O T I C E

IN THE MATTER OF DAVID B. GREENE, PETITIONER

On December 4, 2006, Petitioner was definitely suspended from the practice of law for nine months. In the Matter of Greene, 371 S.C. 207, 638 S.E.2d 677 (2006). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than April 16, 2006.

Columbia, South Carolina

February 14, 2007

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 6

February 20, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Derrick Turner, Appellant.

Appeal from York County
Lee S. Alford, Circuit Court Judge

Opinion No. 26261
Heard January 18, 2007 – Filed February 12, 2007

AFFIRMED

Jerry M. Screen, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and Thomas E. Pope, of Rock Hill, for Respondent.

PER CURIAM: Appellant was convicted of trafficking in marijuana and received a five year sentence and was ordered to pay a $5,000 fine. On appeal he contends the trial court erred in refusing to suppress a tape

recording made while he and his codefendant were in the backseat of a police car following their arrests. We affirm.[1]

FACTS

Appellant and his codefendant (Smith) were arrested as they delivered marijuana to Carter, who in turn sold it to informant McCorey. Following their arrests at the scene, appellant and Smith were read their *Miranda* rights, handcuffed, and then placed in a patrol car. The officer activated the audio/video recording equipment located in the vehicle. The tape of appellant's and Smith's incriminating conversation which followed was introduced at trial over appellant's objection.

ISSUE

> Whether the trial court erred in denying appellant's motion to suppress the statement made in the back of the police car?

ANALYSIS

Appellant contends the tape should have been suppressed because it was obtained in violation of *Miranda* and in violation of appellant's Fourth Amendment rights. We disagree.

The circuit judge held that *Miranda* was not implicated by the taping of appellant and Smith while in the police vehicle because, while they were undoubtedly in police custody at the time of the recording, there was no interrogation. We agree. There is simply no evidence of actual interrogation, nor of the "functional equivalent" of interrogation, at the time of appellant and Smith's conversation. E.g. State v. Owens, 293 S.C. 161, 359 S.E.2d 275 (1987).

[1] We affirm the trial court's denial of appellant's directed verdict motion pursuant to Rule 220(b)(1), SCACR, and the following authority: State v. McCluney, 361 S.C. 607, 606 S.E.2d 485 (2004).

Furthermore, an individual does not have a reasonable expectation of privacy while being held in a police vehicle and thus there was no Fourth Amendment violation here. See U.S. v. Clark, 22 F.3d 799 (8th Cir. 1994); U.S. v. McKinnon, 985 F.2d 525 (11th Cir.) *cert. denied* 510 U.S. 843 (1993); People v. Todd, 26 Cal. App. 3d 15, 102 Cal. Rptr. 539 (1972); State v. Smith, 641 S.E.2d 849 (Fla. 1994); State v. Timley, 975 P.2d 264 (Kan. App. 1998); State v. Hussey, 469 So.2d 346 (La. App. 2d Cir. 1985); People v. Marland, 355 N.W. 2d 378 (Mich. App. 1984); State v. Wischnofske, 878 P.2d 1130 (Or. App. 1994); State v. Ramirez, 535 N.W.2d 847 (S.D. 1995).

The trial court did not err in denying appellant's motion to suppress. Appellant's conviction and sentence are therefore

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John A. Hardin and Martha Hardin Curran, as Trustees of Marital Trust 2 under the will of Martha S. Hardin, Deceased, Respondents,

v.

The South Carolina Department of Transportation, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
Paul E. Short, Jr., Circuit Court Judge

REVERSED

Linda C. McDonald and Beacham O. Brooker, Jr., both of Columbia, and Robert L. Widener, of McNair Law Firm, of Columbia, for Petitioner.

David A. White, of Robinson, Bradshaw & Hinson, of Rock Hill, for Respondents.

Andrew F. Lindemann, of Davidson Morrison & Lindemann, of Columbia, and Danny C. Crowe, of Turner Padget Graham & Laney, of Columbia, for Amicus Curiae Municipal Association of South Carolina.

Richard D. Bybee, of Smith Bundy Bybee & Barnett, of Mt. Pleasant, for Amicus Curiae South Carolina Landowners Association.

Robert E. Lyon, Jr., and M. Clifton Scott, both of the South Carolina Association of Counties, of Columbia, for Amicus Curiae South Carolina Association of Counties.

AND

Elisha B. Tallent, d/b/a Elisha's California Hair, Respondent

v.

The South Carolina Department of Transportation, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Charles B. Simmons, Jr., Circuit Court Judge

Opinion No. 26262
Hardin heard April 5, 2006, Tallent heard May 2, 2004
Filed February 12, 2007

REVERSED

Linda C. McDonald and Beacham O. Brooker, Jr., both of Columbia, and Robert L. Widener, of McNair Law Firm, of Columbia, for Petitioner.

Robert Clyde Childs, III, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: These cases deal with the issue of whether and to what degree realignments and closures of public roads constitute "takings" within the meaning of Article I, § 13 of the South Carolina Constitution and the Fifth Amendment to the United States Constitution. Lower courts separately determined that the property owners in both *Hardin* and *Tallent* suffered takings as a result of actions of the South Carolina Department of Transportation (SCDOT). We reverse.

FACTUAL /PROCEDURAL BACKGROUND

In light of our disposition of these two appeals, we engage in only a brief review of the facts.

A. *Hardin*

Dave Lyle Boulevard is a high-speed, divided, controlled-access highway connecting the City of Rock Hill to Interstate Highway 77. No private driveway has direct access to the highway. Instead, private driveways exit onto side roads which have intermittent access to the highway. The highway has a number of turn lanes in the median which allow traffic to cross the median and access the many intersecting surface streets.

The plaintiffs own two properties that are located on the north side of Dave Lyle Boulevard. The properties sit on either side of the highway's

intersection with Garrison Road. For several years, this intersection contained a break in the median which runs down Dave Lyle Boulevard. This break allowed vehicles at the intersection to access both Garrison Road and the highway in either direction. In 1998, the City of Rock Hill requested that SCDOT construct a new intersection approximately 1,000 feet east of the existing intersection to accommodate an industrial park and a technical college. SCDOT advised that creating a new intersection would require that the Garrison/Dave Lyle intersection be closed due to the limitations of cross streets on the highway. After a public hearing, SCDOT consented to the construction of the new intersection. As a result, SCDOT closed the break in the median at the Garrison/Dave Lyle intersection. This prevented vehicle traffic from making any left turns at the Garrison/Dave Lyle intersection.

In 2001, the plaintiffs filed an inverse condemnation action against SCDOT alleging that depriving the traffic leaving their properties the ability to cross Dave Lyle Boulevard constituted a taking for which the plaintiffs were owed compensation. The trial court ruled that the plaintiffs suffered a compensable taking, and the court of appeals affirmed. *See Hardin v. South Carolina Dep't of Transp.*, 359 S.C. 244, 597 S.E.2d 814 (Ct. App. 2004).

B. *Tallent*

In this case, the plaintiff purchased a tract of property located on Old Easley Bridge Road near Greenville. The plaintiff opened and operated a hair salon and tanning studio on the property. At the time she purchased the property, the property had access to Highway 123 via Old Easley Bridge Road. As the roads were then aligned, Old Easley Bridge Road split off Highway 123 as a tangent and gradually curved to intersect White Horse Road, which runs perpendicular to Highway 123.

Sometime after the plaintiff purchased the property, SCDOT began construction of a controlled-access "diamond" interchange at the intersection of Highway 123 and White Horse Road. This re-configuration involved closing access points between Old Easley Bridge Road and White Horse Road. Specifically, SCDOT closed Old Easley Bridge Road to through traffic, removed a traffic light, and made several cosmetic changes along the

road. These changes altered the character of Old Easley Bridge Road from a through-connecting surface street to a road ending in a cul-de-sac.

As in *Hardin*, the plaintiff brought an inverse condemnation action against SCDOT. Using the fact that the road re-configuration situated her property on a cul-de-sac and limited her access to Highway 123 by requiring her to navigate a series of secondary roads running through low income neighborhoods, the plaintiff alleged SCDOT had "taken" her property. The plaintiff alleged the road re-configuration decreased her property value and resulted in her business being less accessible to the public (and thus less valuable). The trial court ruled that the plaintiff suffered a compensable taking, and the court of appeals affirmed. *See Tallent v. South Carolina Dep't of Transp.*, 363 S.C. 160, 609 S.E.2d 544 (Ct. App. 2005).

LAW/ANALYSIS

As we have previously held, a plaintiff's right to recovery in an inverse condemnation case is premised upon the ability to show that he or she has suffered a taking. *Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 80 (2005). Although it has been recognized that the existence of property interests are often determined by reference to sources such as state law, *see Georgia v. Randolph*, 547 U.S. __, 126 S.Ct. 1515, 1540 (2006) (Scalia, J., dissenting), South Carolina courts have embraced federal takings jurisprudence as providing the rubric under which we analyze whether an interference with someone's property interests amounts to a constitutional taking. *Byrd*, 365 S.C. at 656 n.6, 620 S.E.2d at 79 n.6 (citing *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 306, 534 S.E.2d 270, 275 (2000)).

Both Article I, § 13 of the South Carolina Constitution and the Fifth Amendment to the United States Constitution provide that private property shall not be taken for public use without the payment of "just compensation."[1] Although the takings clause was once understood to apply

[1] The Fifth Amendment's takings clause applies to the actions of state governments through the due process clause of the Fourteenth Amendment to

only to a direct appropriation of property or the functional equivalent of an ouster of possession, it is now universally accepted that regulations which control or limit the use of property can "take" the property in the constitutional sense. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (reviewing nineteenth century takings jurisprudence); *see also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 n.2 (1978); *and Byrd* 365 S.C. at 656, 620 S.E.2d at 79.

Although no set formula exists for determining whether property has been "taken" by the government, the relevant jurisprudence does provide significant guideposts. Determining whether government action effects a taking requires a court to examine the character of the government's action and the extent to which this action interferes with the owner's rights in the property as a whole. *Penn Central*, 438 U.S. at 130-31. Stated more specifically, these "ad hoc, factual inquiries" involve examining the character of the government's action, the economic impact of the action, and the degree to which the action interferes with the owner's investment-backed expectations. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (quoting *Penn Central*, 438 U.S. at 124); *Byrd*, 365 S.C. at 658-59, 620 S.E.2d at 80 (quoting the same). Generally, the physical occupation of private property by the government results in a taking regardless of the public interest the government's action serves. *See Loretto*, 458 U.S. at 426-28; *see also Lucas*, 505 U.S. at 1015. Additionally, the enforcement of a government regulation will usually effect a taking when the regulation denies all economically beneficial or productive use of land. *Lucas*, 505 U.S. at 1015.

In the instant cases, it is instructive to begin by classifying the nature of the government's actions which the property owners allege give rise to takings. Neither *Hardin* nor *Tallent* involves the enactment of any regulation which directly regulates any use of the owners' properties. Thus, in order to have "taken" any part of these properties, SCDOT must have physically appropriated some aspect of them. Determining this question requires that

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the United States Constitution. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897).

we analyze what property interests exist with reference to the public road system and a property owner's access thereto.

In some jurisdictions, a property owner merely has an easement for the purpose of accessing the public road system. Therefore, as long as a property owner has access to the public road system, his easement is intact. For this reason, any road re-configuration that does not cut off an owner's access to the public road system effects no taking upon him.

In South Carolina, however, a property owner has more rights. As we have held, a property owner in South Carolina has an easement for access to and from any public road that abuts his property, regardless of whether he has access to and from an additional public road. *South Carolina State Hwy. Dep't v. Allison,* 346 S.C. 389, 393, 143 S.E.2d 800, 802 (1965). Thus, for example, in South Carolina, an owner of a corner lot has an easement for access to and from both roads that abut his property. Of course, an owner in South Carolina also has an easement for access to and from the public road system. This principle provides that an owner whose property does not abut any public road will not be denied access to the public road system.

In finding that takings occurred in these cases, the court of appeals relied on this Court's opinion in *City of Rock Hill v. Cothran*, 209 S.C. 357, 40 S.E.2d 239 (1946). In that case, the City of Rock Hill closed a portion of a street which rendered the remaining part of the street a cul-de-sac. *Id*. at 361-62, 40 S.E.2d at 240-41. The property owner of a corner lot which fronted both the cul-de-sac and another street brought an action against the city for a taking, and the trial court ruled in the city's favor. *Id*. at 365, 40 S.E.2d at 242. This Court reversed, stating:

> The right of a landowner to recover damages because of the vacation of a street depends on the location of his land with reference to the street vacated, or the part of the street vacated, and the effect of such vacation on his rights as an abutting owner. It is well settled that an owner is not entitled to recover damages unless he has sustained an injury different in kind and not merely in degree from that suffered by the public at large. If it appears

> that there is a special injury, the owner may recover damages notwithstanding his property does not abut, as in this case, on the part of the street vacated, because this amounts to a 'taking.'
>
> ***
>
> In the absence of special injury, no recovery will be allowed. The test is, not whether the property abuts, but whether there is a special injury, and the first practical question which presents itself is whether one whose property does not abut immediately on the part of the street vacated – the part vacated being in the same block between his property and the next connecting cross street – is so specially injured as to be entitled to recover compensation on the ground that his access is cut off in one direction, but not in the opposite direction.

Id. at 368-69, 40 S.E.2d at 243-44.

Cothran is representative of a line of cases which provide that the closing of a portion of a road abutting a piece of private property necessarily constitutes some degree of a taking of that property. *E.g., Gray v. South Carolina Dep't of Transp.*, 311 S.C. 144, 427 S.E.2d 899 (Ct. App. 1992). A critical examination of the property interests at work in these cases, however, yields no plausible explanation for this rule. When only a portion of a public road abutting a landowner's property is closed, leaving the property in a cul-de-sac, no taking has occurred. As long as the owner has access to and from the remainder of the road that continues to abut his property, his easement with respect to that road remains intact. Further, as long as a landowner still has access to the public road system, this easement is unaffected.[2] This

[2] Returning to the corner lot example, the natural extension of this analysis is that if the government were to entirely close one of the roads that abutted the owner's property, there would be no taking. This is exactly correct. The existence of the road was the condition that created the easement, not the other way around. So long as a landowner has access to the public road

reasoning is in line with the notion that a landowner has no right to access abutting roads in more than one direction. *See* 73 A.L.R.2d 689, 691-698.

This Court came very close to expressing this analysis in another similar case. In *South Carolina Dep't of Transp. v. Carodale Assoc.*, this Court stated:

> A landowner has no vested right in the continuance of a public highway; the abandonment of a highway, without its being closed, is *damnum absque injuria*. Likewise, the State is under no duty to maintain a minimum level of traffic flow. Nonetheless, the vacation of a street or the creation of a cul de sac with the concomitant diversion of traffic and loss of frontage has been held a "taking" of property.
>
> Closing a street inherently produces a diversion of traffic and loss of frontage on a viable traffic artery. However, these repercussions are not compensable elements of damage. Succinctly, the restriction of ingress or egress to and from one's property is the right which must be compensated if infringed when a highway is closed by condemnation.
>
> The landowner has no property right in the continuation or maintenance of the flow of traffic past its property. Traffic on the highway, to which they have access, is subject to the same police power regulations as every other member of the traveling public. Re-routing and diversion of traffic are police power regulations.

268 S.C. 556, 561, 235 S.E.2d 127, 128-29 (1977) (emphasis in original, internal citations omitted).

Though it does not expressly provide so, *Carodale* implicitly recognizes that road closings and re-alignments are actions of a far different

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system, his easement by necessity is intact. The easement for access to the (now closed) abutting road has not been taken, it has been extinguished.

character than government conduct which affects an owner's rights in his or her property in a constitutionally significant sense. Stated in doctrinal terms, modern takings principles instruct that road closings and realignments which do not "take" land or an easement from a property owner do not give rise to compensable takings because these actions do not directly interfere with an owner's rights in the property as a whole.[3]

This Court's prior decisions holding that the closing of a road constituted a taking actually imply that a property owner possesses more than an easement; they imply possession of a property interest in the existence of a particular public road. That cannot be correct. *See Tuggle v. Tribble*, 6 S.W.2d 312, 314 (Ark. 1928) (not passing on the takings issue, but finding that a landowner can have no vested interest in the existence of an abutting road); *cf. Carodale*, 268 S.C. at 561, 235 S.E.2d at 128-29 (stating that a landowner has no vested rights in the continuance of a public highway and in the continuation of maintenance of traffic flow past his property). Thus, to the extent the rationale for these holdings was that the government had caused the owner to lose a property right, this reasoning collapses on itself.

As this analysis indicates, the focus of our inquiry must be on a landowner's actual property interests; that is, his easements. We therefore overrule the "special injury" analysis contained in our jurisprudence in this area and specify that our focus in these cases is on how any road re-configuration affects a property owner's easements. An easement is either taken or it is not. That is the "injury different in kind and not merely in degree" with which we are concerned. Under *Cothran*'s legal standard, an owner might prevail in a takings claim despite the fact that all of his relevant property interests – his easements for access – have not been disturbed. Not only was the result in *Cothran* incorrect, its pronouncement of the law must be abandoned.[4]

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[3] The dissent attempts to take us to task for "ignoring well-established precedent" in reaching our decision. Of course, we do not ignore precedent as the dissent suggests; we expressly overrule it.

[4] The contrary rule the dissent advances is curious on its own terms. As a primary matter, neither landowner in this case has been deprived of ingress or

Because the plaintiffs in *Hardin* continue to have access to and from Dave Lyle Boulevard and the public road system, their property rights have not been disturbed. The ability to turn only one way onto the boulevard is irrelevant. We therefore reverse the court of appeals' decision and hold that there has been no taking in this case.

Similarly, no aspect of the *Tallent* plaintiff's property has been physically taken by SCDOT. Accordingly, we reverse the court of appeals' decision and hold that there has been no taking in this case.

CONCLUSION

For the foregoing reasons, we reverse the court of appeals' decisions in these cases.

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

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egress to his or her property, nor have these landowners been injured in their ability to enter or exit their property. Instead, these cases involve alterations to the road system which have not disturbed the landowners' easements of access. Government action can effect no taking unless it has deprived an owner of a property interest. To the degree that the dissent's analysis focuses on particular uses to which landowners put their property and the change of a property's use-driven value following alterations in the public road system, the dissent suggests that a significant economic impairment of a landowner's expectations may give rise to a taking. This analysis puts the cart before the horse and overlooks the critical factor in these cases which is the character of the government's action. No property rights of these owners have been taken or directly interfered with. To find a taking in either of these cases would be to stretch reason beyond reality.

JUSTICE WALLER, concurring in part, and dissenting in part: I concur in part and dissent in part.

Although I concur in result with the majority's holding that Hardin has not suffered a compensable taking, I disagree with the rationale underlying its decision. Further, I disagree with the majority's conclusion that Tallent has not suffered a compensable taking.

In my view, the majority ignores well-established precedent and then, without direct citation of authority, holds that "modern takings principles instruct that road closings and realignments which do not "take" land. . . do not give rise to compensable takings because these actions do not directly interfere with an owner's rights in the property as a whole." To the contrary, it has long been the law of this state that an actual physical taking of property is not necessary to entitle one to compensation. Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871 (1943), overruled on other grounds McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985) (to deprive one of the ordinary beneficial use and enjoyment of property is, in law, equivalent to the taking of it, and is as much a "taking" as though the property itself were actually appropriated).

As this Court noted in South Carolina State Highway Dep't v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965), "an obstruction that **materially injures or deprives the abutting property owner of ingress or egress to and from his property is a 'taking'** of the property, for which recovery may be had. The fact that other means of access to the property are available affects merely the amount of damages, and not the right of recovery."

I agree with the majority that City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946) was wrongly decided upon its facts and should therefore be limited. In Cothran, the plaintiff's property did not directly abut the closed portion of the road, such that there was no direct denial of ingress or egress. Cothran was not deprived of one of the immediate means of access to his property. Accordingly, under the facts of Cothran, the plaintiff suffered, at best, a diversion of traffic flow which, as the majority points out,

this Court has recognized is not compensable. Carodale (landowner has no property right in the continuation or maintenance of the flow of traffic past its property).[5]

However, in my view, the fact that a diversion in traffic flow is not compensable does not mean that closure of a road which **materially deprives the abutting property owner of ingress or egress to and from his property** is not a compensable taking. See 46 Am.Jur. Proof of Facts 3d 493 §17 (2004) (courts have often noted important distinction between a limitation of access, which may be compensable, and a change in traffic flow, which is not compensable).

On the facts of the Hardin case, I agree with the majority that there has been no taking. Hardin's property does not directly abut the median which was closed by the Department of Transportation, and he was not materially deprived of ingress or egress to and from his property. Accordingly, I concur in result only with Hardin.

I dissent from the majority opinion's holding in Tallent. In Tallent's[6] case, as a result of SDCOT's closure of access points between Old Easley Bridge Road and Highway 123, Old Easley Bridge Road was rendered a cul de sac at one end, the end used by Tallent and her customers to access her salon. Tallent's only remaining access to Highway 123 was by means of a series of secondary roads running through a low-income neighborhood. Due to the closure, the value of the residential properties increased, while the value of Tallent's commercial property decreased.

Courts have generally held, consistent with South Carolina law, that a landowner on a partially closed road, whose land is on the opened portion,

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[5] It has been noted that although a loss of traffic, loss of business, and circuity of travel are not themselves compensable, they are factors to be considered in determining the reasonableness of the remaining access to and from an abutting roadway. Cady v. N.D. Dep't of Transp., 472 N.W.2d 467 (N.D. 1991).

[6] Tallent's beauty shop was located on Old Easley Bridge Road.

cannot claim damages if he still has reasonable access to the general system of roads. There is an exception to this rule, however, if the road closing leaves the landowner in a cul de sac. Mill Creek Properties v. City of Columbia, 944 So.2d 67 (Ms. 2006), *citing* Miss. State Highway Comm'n v. Fleming, 248 Miss. 187, 157 So.2d 792 (1963); Kick's Liquour Store, Inc. v. City of Minneapolis, 587 N.W.2d 57 (Ct. App. Minn. 1998) (holding that creation of a cul de sac may be compensable if losses of access to and from existing roads "substantially impairs [the landowner's] right to reasonably convenient and suitable access to the main thoroughfare"). See also DuPuy v. City of Waco, 396 S.W.2d 103, 110 (Tex. 1965) (where construction of viaduct left property owner in cul-de-sac, he was deprived of reasonable access, even though he could still physically get to public roads from his property); Boehm v. Backes, 493 N.W. 2d 671 (N.D. 1992) (Highway Department's construction of overpass that converted street in front of auto repair business into cul-de-sac by closing off direct access to street from nearby highway was a taking; access to business after permanent closure forced use of indirect route of additional four large blocks, through residential neighborhood, distance comparable to six regular city blocks, and this physical interference specially affected property).

Here, the road on which Tallent's business is located has essentially been rendered a cul de sac. In my view, therefore, if Tallent has suffered a special injury, she has a compensable taking.[7]

As noted by the Court of Appeals in this case, "The expert appraiser . . . testified that [Tallent's] business losses differed from those in the area because the other entities were 'destination' businesses, such that people will seek them out regardless of the lack of immediate access from Highway 123. . . . [W]hile the surrounding residential area benefited from the actions of SCDOT, the value of Tallent's commercial property had been adversely affected. The realtor . . . testified that there had been no interest in the

[7] As this Court recognized in Sease v. Spartanburg, 242 S.C. 520, 131 S.E.2d 683 (1963), the test of whether a landowner is entitled to recover damages for the vacation of a street is the existence of special injury amounting to a taking.

property due to the current lack of access to Highway 123." Tallent, 363 S.C. at 168, 609 S.E.2d at 547. Moreover, the Master indicated that several of Tallent's patrons testified they had difficulty reaching the property since the closure, and were reluctant to do so for safety reasons in driving through the low income neighborhood.

I would affirm the Court of Appeals' holding that Tallent suffered a compensable taking.

MOORE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Gecy, Respondent,

v.

Tammy Bagwell, Appellant.

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 26263
Heard December 6, 2006 – Filed February 20, 2007

REVERSED

Keith D. Munson, of Womble Carlyle Sandridge & Rice, and Timothy Edward Hurley, both of Greenville, for Appellant.

James Theodore Gentry, of Wyche Burgess Freeman & Parham, of Greenville, for Respondent.

Samuel Darryl Harms, of Greenville, for Amicus Curiae Greenville County Republican Party.

PER CURIAM: Appellant Tammy Bagwell, candidate for Simpsonville City Council, contested the results of the municipal election which resulted in respondent, Robert Gecy, being declared winner. The Simpsonville Election Commission ("Commission") invalidated the results and ordered a new

election. The circuit court overturned the ruling of the Commission and reinstated Gecy as winner of the Simpsonville City Council seat. We reverse.

FACTS

On November 8, 2005, the city of Simpsonville held an election to fill three seats on its city council. The two candidates on the ballot for the Ward IV race were appellant, Tammy Bagwell, and respondent, Robert Gecy. This was an at-large race, meaning all residents of Simpsonville were eligible to vote for the city council representative from Ward IV.

After a hearing to determine the validity of provisional ballots and after a mandatory recount pursuant to S.C. Code Ann. § 7-17-280 (1976), the final vote tally was 430-427 in favor of Gecy, with one write-in vote for another individual. The Commission certified the result and declared Gecy the winner of the election.

On November 10, 2005, Bagwell filed a timely protest of the election pursuant to S.C. Code Ann. § 5-15-130 (2004). As required by statute, the Commission held a hearing two days later to determine the issues raised by Bagwell's protest.

The Commission decided that at least two illegal votes had been cast,[1] and these votes rendered doubtful the result of the election. One of the illegal votes was cast by a voter who moved from her residence in one precinct to a residence in another precinct, and the other illegal vote came from a Simpsonville resident who voted in a precinct where his old business was located. Both voters failed to change their addresses or notify election workers and voted in their old precinct. The two illegal votes were subtracted from Gecy's total, leaving him with a total of 428 votes,

[1] The Commission found two specific examples of illegal votes but inferred that other unnamed voters had voted illegally due to the short time available for investigation. The circuit court reversed this ruling, and this issue has not been appealed.

preventing him from garnering a majority of the total votes cast.[2] The Commission then ordered a new election.

Gecy appealed the Commission's ruling to the circuit court. The circuit court overturned the Commission and reinstated the popular election result. The circuit court held that in the narrow context of a post-election challenge, the casting of votes in the wrong precinct did not affect the overall tally. The court also found Bagwell's notice of protest was legally insufficient for failing to state specific facts to apprise Gecy of the basis for the challenge.

Bagwell appeals the order of the circuit court reversing the Commission and seeks a new election for the contested seat.

ISSUES

1. Did the circuit court err in overturning the Commission's ruling that at least two illegal votes were cast, putting the result of the election into doubt and necessitating a new election?

2. Did the circuit court err in overturning the Commission's finding that Bagwell's protest pleading was legally sufficient?

STANDARD OF REVIEW

In municipal election cases, we review the judgment of the circuit court upholding or overturning the decision of a municipal election commission to correct errors of law. The review does not extend to findings of fact unless those findings are wholly unsupported by the evidence. Taylor v. Town of Atlantic Beach Election Comm'n, 363 S.C. 8, 609 S.E.2d 500 (2005).

[2] *See* Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 382, 537 S.E.2d 543, 547 (2000) ("In determining whether an irregularity in the conduct of an election is sufficient to render the result doubtful, the rule deducible from the decisions is that all illegally cast ballots shall be deducted from the total number counted for the declared winning candidate…").

ANALYSIS

Bagwell argues that the votes cast in the wrong precinct were illegal, and as a result, a new election should have been held. We agree.

In this case, two voters cast a ballot in a precinct where they previously were registered, but they no longer had a valid address in that precinct at the time of the election. Both parties agree that these two votes were not properly cast, and the question becomes whether these illegal votes should be thrown out, which would require a new election.

The election process is exclusively controlled by statute. S.C. Const. Art. II, § 10. We have recognized that perfect compliance with the election statutes is unlikely, and this Court will not nullify an election based on minor violations of technical requirements. George v. Mun. Election Comm'n of City of Charleston, 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999).

As a general rule, statutory provisions are mandatory in two instances: when the statute expressly declares that a particular act is essential to the validity of an election or when enforcement is sought before an election in a direct proceeding. George, 335 S.C. at 186, 516 S.E.2d at 208. However, the Court may deem such provisions to be mandatory after an election, and thus non-compliance may nullify the results, when the provisions substantially affect the determination of the results, an essential element of the election, or the fundamental integrity of the election. Id. at 187. Where there is a total disregard of the statute, the violation cannot be treated as an irregularity, but it must be held and adjudicated to be cause for declaring the election void and illegal. Id. The Court will not sanction practices which circumvent the plain purposes of the law and open the door to fraud. May v. Wilson, 199 S.C. 354, 19 S.E.2d 467 (1942).

The use of precincts in our election process is a fundamental part of our statutory scheme. *See* S.C. Code Ann. § 7-5-110 (1976) ("No person shall be allowed to vote at any election unless he shall be registered as herein required.") and S.C. Code Ann. § 7-5-120(A)(3) (Supp. 2005) (providing, as

a qualification for registration, that the prospective voter must be a resident of both the county and the precinct in which he intends to vote); S.C. Code Ann. § 7-5-155(a)(3)(iii) (Supp. 2005) (requiring registration board to reject any voter application from which the board cannot determine the proper precinct to be assigned); S.C. Code Ann. § 7-7-940 (Supp. 2005) (voter moving to new precinct must notify the registration board in his new county so that he may be informed of his new, correct precinct); S.C. Code Ann. § 7-5-440 (Supp. 2005) (outlining specific procedures for voting by an elector who has moved to a new precinct but has not notified the county registration board); S.C. Code Ann. § 7-7-920 (1976) (in municipal elections when the councilmen are elected by an at-large vote, the electors shall vote at the voting place in the precinct within which they reside); and S.C. Code Ann. § 7-13-810 (Supp. 2005) (election protest may be based on evidence of voters who voted in a precinct other than the one in which they are entitled by law to vote).

The disregard of the election statutes requiring electors to be residents of the precincts in which they vote, as well as failing to follow the procedure outlined in S.C. Code Ann. § 7-5-440 for those voters who have moved to a new precinct, constitutes more than a mere irregularity or illegality. The precinct system is an essential element of our voting process, and the failure of the two voters to adhere to the statutory requirements for registration and voting requires their votes to be rejected. Because the rejection of these two votes results in Gecy no longer carrying a majority of the total votes cast, a new election must be held.

The second issue involves Bagwell's notice of protest. The circuit court determined Bagwell's notice of protest to be insufficient and found that her protest should have been dismissed. Bagwell argues that the notice of protest was sufficient under S.C. Code Ann. § 5-15-130 (2004). We agree.

Bagwell's notice of protest contained eight separate allegations. Bagwell argues that the third ground for the protest adequately alleged the irregularities surrounding the two illegal votes. That allegation asserted, "Persons who had not provided accurate information for the voter rolls were nonetheless allowed to cast full ballots."

Section 5-15-130 requires the notice of protest to include a "concise statement of the grounds" for the election contest. We have explained that the notice "should briefly state facts or a combination of facts sufficient to apprise the contestee of the cause for which his election is contested, it being insufficient to allege generally the fraud was committed, or to allege mere conclusions of the pleader." Butler v. Town of Edgefield, 328 S.C. 238, 245-246, 493 S.E.2d 838, 842 (1997) (quoting 26 Am.Jur.2d *Elections* § 434 (1996)); *see also* State ex rel. Davis v. State Bd. of Canvassers, 86 S.C. 451, 458-459, 68 S.E. 676, 679 (1910) ("while…technical precision in pleading should not be required [for election contests], still reason and justice require that the grounds relied upon should be stated plainly and clearly that the contestee may prepare to meet them without unnecessary labor or expense.") (cited in Butler, *supra*).

In our opinion, the circuit court incorrectly determined that Bagwell's notice of protest failed to meet the statutory requirement. The notice of protest contained a concise statement of the grounds for Bagwell's challenge as required by § 5-15-130. Unlike Butler, there was no general allegation of fraud, and the notice of protest was sufficient to notify Gecy of the nature of the challenge.

Gecy provides two additional arguments, raised before the lower court but not ruled upon by the circuit judge, that he claims are sufficient to affirm the circuit court's decision. We only address one of Gecy's arguments. *See* I'On, L.L.C., v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (it is within appellate court's discretion whether to address any additional sustaining grounds).

Gecy contends that S.C. Code Ann. § 7-13-810, which allows for post-election challenges based on after-discovered evidence, requires the protesting party to exercise due diligence in obtaining information that could have been acquired prior to the election. Gecy argues that because Bagwell could have determined before the election that the two illegal voters no longer lived in the precinct where they were registered, her protest fails because it was not based on after-discovered evidence. We disagree.

Although this Court has defined after-discovered evidence in other contexts, the applicable election statute clearly provides:

> A candidate may protest an election in which he is a candidate pursuant to 7-17-30 when the protest is based in whole or in part on evidence discovered after the election. This evidence may include, but is not limited to, after-discovered evidence of voters who have voted in a precinct or for a district office other than the one in which they are entitled by law to vote.

S.C. Code Ann. § 7-13-810.[3] In addition, we have previously determined that evidence presented by a challenging candidate that "voters included on the voter registration list were not in fact city residents qualifies as after-discovered evidence under this section." Dukes v. Redmond, 357 S.C. 454, 457, 593 S.E.2d 606, 608 (2004).

In this case, evidence of the two voters who cast their ballots in a precinct where they no longer resided qualifies as after-discovered evidence allowed by § 7-13-810. Even though Gecy correctly points out that Bagwell could have discovered the evidence on which she bases her challenge before the election, we decline to require a candidate to review all registration books and match each registered voter with his current address before the election. The amended version of § 7-13-810 and Dukes specifically permit the same type of after-discovered evidence that was used by Bagwell.

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[3] This section was added in 1996 after our decision in Hill v. South Carolina Election Comm'n, 304 S.C. 150, 403 S.E.2d 309 (1991); *see also* Greene v. South Carolina Election Comm'n, 314 S.C. 449, 445 S.E.2d 451 (1994). In Hill, we held that discrepancies between the district where a voter actually resided and the voter's district designation on the voter registration list could have been discovered prior to the election and could not be used for a post-election challenge. The amended version of the statute allows for after-discovered evidence that was prohibited by Hill.

CONCLUSION

We reverse the circuit court's decision to reinstate Gecy as the winner of the Simpsonville City Council seat. The two illegal votes cannot be counted, and a new election is required.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Clarendon County Magistrate
Willie L. Bethune, Respondent.

Opinion No. 26264
Submitted January 30, 2007 – Filed February 20, 2007

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Assistant Deputy Attorney General Robert E. Bogan, both of Columbia, for Office of Disciplinary Counsel.

John C. Land, III, of Manning, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RJDE, Rule 502, SCACR. After entering into the agreement, respondent resigned his magisterial position. We accept the agreement and impose a public reprimand, the most severe sanction we are able to impose under the circumstances. See In the Matter of Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996) (a public reprimand is the most severe sanction the Court can impose when a judge no longer

holds judicial office).[1] The facts as set forth in the agreement are as follows.

FACTS

Since 1985, respondent was a part-time Clarendon County Magistrate. On October 1, 2006, a female motorist was incarcerated by the Summerton Police Department for traffic and driver's license offenses. Respondent presided over her bond hearing that evening.

The motorist alleges that, during the bond hearing, respondent asked whether her bra straps were clear or whether the whole bra was clear. She alleges he further commented that they weren't used to having "fine women" there that often, remarked that her eyes were pretty, and made a remark suggesting that she should show the police officer her navel. The motorist's allegations are supported by a police officer who was in court.

Initially, respondent reported to ODC that he had no recollection of making the comments. Upon further reflection, however, respondent recalled that the motorist was not wearing an orange jumpsuit like the other prisoners but, instead, a cut-off tank top, which was causing some degree of distraction and/or disruption, so he instructed her to be seated. Respondent reports that any comments he may have made to the motorist were made in that context only.

Respondent reported that, at some point, the motorist asked the police where her car had been towed. Police attempted to telephone the towing company owner for the motorist, but were unable to make contact. The motorist then asked respondent if he could help her to regain possession of her car. Respondent informed ODC that he then made telephone contact with the towing company owner and, at the motorist's request, arranged to drive to pick up her car.

[1] Respondent's request for oral argument is denied.

The motorist alleges respondent made sexual advances toward her while they were in the car together and offered to have the charges against her dismissed in exchange for sexual favors. Respondent denies these allegations.

Respondent reports that, while he and the motorist were together in his car, the motorist engaged him in conversation about procedural matters relating to her pending charges and invited him to touch her in a sexual way. Respondent reports he declined the invitation, but did talk with the motorist about court procedure and, in the course of the conversation, revealed to her that another Clarendon County Magistrate, whom respondent named, would preside over her trial. According to respondent, the motorist asked what the other magistrate looked like, whether he was married, and then said she would have sex with this magistrate if he would drop the charges. The motorist gave respondent her telephone number and asked him to relay it and her offer to the other magistrate. Respondent told the motorist he would call the other magistrate. Respondent also gave the motorist his business card from another line of work with his cell phone number hand-written on the back.

It is not disputed that respondent telephoned the other magistrate concerning the motorist. Respondent informed ODC that he told the other magistrate "a young lady wants to speak to you" and then gave the magistrate the motorist's telephone number.

The other magistrate's recollection is that respondent telephoned after 10:00 p.m. After initial pleasantries and general conversation, respondent stated he was calling to see if the magistrate would "help somebody" who had traffic tickets pending in Summerton where the magistrate had just become interim municipal judge in addition to his duties as magistrate. The magistrate indicated it was his impression that the motorist respondent wanted to help had some relationship with respondent such as a friend, relative, or possible fellow church member. The magistrate recalled being given the motorist's name and telephone number and being asked to telephone the motorist.

It is not disputed respondent called the motorist at 10:03 p.m. on October 4, 2006, to let her know he had spoken with the other magistrate about the tickets. Respondent left a voice message identifying himself and stating "I spoke with [the other magistrate]. He's gonna give you a call. Everything is on.…" When the other magistrate called the motorist, she advised him that she had made a complaint against respondent and they should have no further contact.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge should maintain high standards of conduct and should personally observe those standards); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 2B (judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment); Canon 3 (judge shall perform the duties of judicial office impartially and diligently); Canon 3(B)(4) (judge shall be dignified and courteous to litigants); Canon 4 (judge shall conduct extra-judicial activities to minimize risk of conflict with judicial obligations); and Canon 4(A) (judge shall conduct extra-judicial activities so they do not cast reasonable doubt on judge's capacity to act impartially as judge). Respondent further admits his misconduct constitutes grounds for discipline pursuant to Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct) and Rule 7(a)(9) (it shall be ground for discipline for judge to violate the judge's Oath of Office), of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand.[2] Accordingly, respondent is hereby reprimanded for his misconduct. Further, we hereby prohibit and enjoin respondent from holding any judicial office within the unified judicial system in South Carolina.

PUBLIC REPRIMAND.

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

[2] As previously noted, a public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. See In re Gravely, supra.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Will Roger Helton, Respondent.

Opinion No. 26265
January 23, 2007 – Filed February 20, 2007

INDEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, of Columbia, for the Office of Disciplinary Counsel.

Desa Ballard, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to an indefinite sanction from the practice of law. We accept the agreement and indefinitely suspend respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent was admitted to the practice of law in South Carolina in 1995. From sometime in 2002 through approximately May 2005, respondent employed several non-lawyer assistants who engaged in the preparation for and closing of residential real estate transactions. It is estimated that respondent and/or his firm closed on average approximately 15 to 20 real estate transactions per month with the number of closings increasing over the period of time.

ODC conducted a review of 125 sample files closed by respondent's firm for a seven month period towards the end of the above-referenced period of time. As a result of that review, ODC concluded that, of the 125 files, approximately 112 were closed by non-lawyer assistants, twelve were closed by respondent, and one was closed by another lawyer.

During the seven month period, respondent personally handled those real estate closings which took place outside of his law office and his non-lawyer assistants (with a possible few minor exceptions) handled the closings which took place in the law office without the presence, assistance, or supervision of respondent or any other licensed attorney (with a possible few minor exceptions). The closings by the non-lawyer assistants were handled without any meaningful supervision by respondent or any other attorney licensed in this state with the non-lawyer assistants preparing the legal documents (deeds, mortgages, and HUD-1 Settlement Statements) and the title insurance commitments and policies. During the seven month period neither respondent nor any other licensed attorney reviewed the closing documents or title abstracts prior to, at, or subsequent to the closing of the transactions and no licensed lawyer was present at the closings. After the closings, the non-lawyer assistants would disburse the proceeds and record the documents without supervision of respondent or any licensed attorney. In most all of the cases, the non-lawyer assistants would sign respondent's name with his knowledge and consent as a witness on deeds, mortgages and other closing documents, as settlement agent on the HUD-1 Settlement Statements, and as agent

for the title insurance company on commitments, final title insurance policies, and other title insurance documents. In most cases, respondent had not witnessed the execution of the documents and was out of the office during the executions.

From 2002 through May 2005, after conducting the closings outside of his law office, respondent most often, but not always, brought the executed documents back to his office and had an assistant witness the deeds, mortgages, and other closing documents even though the assistant had not been present during the document's execution. Thereafter, with respondent's knowledge and consent, a notary public employed by respondent notarized the documents signed by the "witness" even though the "witness" had not been present when the documents were executed.

Around July 2005, respondent began the process of winding down his law practice and he ceased conducting real estate transactions. Respondent acknowledges that the winding down of his practice resulted in communication problems and delays in closing files, especially those related to the complainant's company. ODC believes these issues have been or are being resolved with assistance from the staff of respondent's former title insurance company. Respondent has now closed his law office and is not actively engaged in the practice of law.

Respondent represents that his real estate practice grew steadily and substantially between 2002 through May 2005. During this period, respondent moved his law office. Due to unexpected difficulties with the move, the efficiency of his practice was greatly disrupted. The move, along with increasing demands on respondent's schedule, required respondent to attend to non-real estate aspects of his practice and to conduct an increasing number of closings outside his law office, thereby causing respondent to increasingly rely on his non-lawyer assistants to handle the real estate closings conducted at his office as described above. Respondent asserts that the number of closings handled contrary to prescribed procedures were the greatest towards the end of his practice.

LAW

Respondent admits that he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); Rule 4.1(a) (in representing a client, lawyer shall not make false statement of material fact to a third person); Rule 5.3 (lawyer shall make reasonable efforts to ensure non-lawyer's conduct is compatible with professional obligations of lawyer); Rule 5.5 (lawyer shall not assist another in the unauthorized practice of law); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(6) (lawyer shall not violate the oath of office taken upon admission).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. Within fifteen days of the date of this opinion, respondent shall surrender his certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kristine L. Esgar, Respondent.

Opinion No. 26266
Submitted January 23, 2007 – Filed February 20, 2007

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Kristine L. Esgar, pro se, of Columbia.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to either a public reprimand or definite suspension not to exceed sixty (60) days. See Rule 7(b), RLDE, Rule 413, SCACR. Respondent requests that any definite suspension be made retroactive to the date of her interim suspension.[1] We accept the Agreement and definitely suspend respondent from the practice of law

[1] Respondent was placed on interim suspension on October 20, 2006. In the Matter of Esgar, 371 S.C. 4, 636 S.E.2d 861 (2006).

in this state for a sixty (60) day period, retroactive to date of her interim suspension. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent represented Complainant's husband in connection with injuries he sustained in an automobile collision in 2000. In 2004, respondent received a settlement of the policy limits available to Complainant's husband and a $2,000,000 confession of judgment against the at-fault party. Complainant's husband died shortly after the settlement funds were disbursed.

Respondent withheld a portion of the insurance money proceeds due to a lien asserted by a settlement funding company that had loaned money to Complainant and her husband prior to the settlement. Since 2004, respondent engaged in regular communication with the settlement funding company in an attempt to reduce or eliminate the amount owed from the funds collected. Respondent admits she should have communicated in writing with Complainant regarding the status of her negotiations with the settlement funding company when it became clear from her telephone calls that she did not understand the settlement funding company's claim.

In her response to Complainant's grievance, respondent requested additional time to supplement her response with documents from her client file which was in storage. Additional time was allowed, giving respondent until March 8, 2006. On February 28, 2006, respondent contacted ODC by telephone and requested an additional extension to March 30, 2006, which was granted. Respondent represents she mailed documents to supplement her response; however, ODC has no record of receiving them. On April 6, 2006, when no documents were received, ODC sent respondent a reminder letter requesting a response no later than April 14, 2006. Receiving nothing further from respondent, the Investigative Panel authorized full investigation on April 28, 2006.

ODC attempted service of the notice of full investigation on three addresses for respondent, one on record with the South Carolina Bar, one in the local telephone book, and one obtained by an investigator with the Office of the Attorney General. All three were returned undeliverable.

ODC attempted service of a notice to appear and subpoena on respondent by certified mail and personal service. These attempts were unsuccessful. The appearance date was rescheduled and a new notice was issued. The new notice was delivered to SLED with a request that respondent be served personally. SLED was able to identify and confirm a new current address for respondent. Seven attempts were made to deliver the documents to respondent. The SLED agent also left messages on respondent's cell phone; the messages were not returned.

During the time that the disciplinary investigation was pending, respondent was experiencing difficulty in getting her mail and her telephone messages. Respondent acknowledges that she should have taken appropriate steps to address those difficulties with the post office and with her cell phone service or should have made arrangements for other means of communication with her clients and ODC.

LAW

Respondent admits that she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (lawyer shall keep client reasonably informed about status of a matter); Rule 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); and Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct). Respondent further admits her misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(3) (it shall be ground for discipline

for lawyer to knowingly fail to respond to lawful demand from disciplinary authority).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a sixty (60) day period, retroactive to the date of respondent's interim suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR. Finally, within sixty (60) days of the date of her reinstatement by the Court, respondent shall pay the costs incurred by ODC in its investigation and prosecution of this matter.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles Christopher Grant,
Claimant, Petitioner,

v.

Grant Textiles, Employer and
US Fire Insurance Company,
Carrier, Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Spartanburg County
Donald W. Beatty, Circuit Court Judge

Opinion No. 26267
Heard November 14, 2006 – Filed February 20, 2007

REVERSED

Richard H. Rhodes, and Ray E. Thompson, Jr., both of Burts, Turner, Rhodes & Thompson, of Spartanburg, for petitioner.

Stephen L. Brown, Jeffrey J. Wiseman, and

Robert P. Gruber, all of Young Clement Rivers, LLP, of Charleston, for respondents.

JUSTICE MOORE: This is a workers' compensation case. Petitioner (Claimant) was injured in an accident while walking along a highway. The single commissioner found Claimant's injury was compensable because it arose out of and in the course of his employment. The full commission reversed. The circuit court then reversed the full commission. In a 2-1 decision, the Court of Appeals reversed the circuit court and reinstated the full commission's decision to deny compensation. Grant v. Grant Textiles, 361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004). We reverse.

FACTS

Claimant was vice-president and in charge of sales at Grant Textiles, a family-owned business. Grant Textiles sold machinery parts and equipment to textile mills. In December 2000, after making a delivery in Greenwood, Claimant traveled in a company-owned pick-up truck to Clinton to meet his father, the CEO of Grant Textiles. He and his father planned to meet customers who were interested in purchasing textile bobbins. Claimant intended to drop off bobbin samples, return to his office, and then go to his home in Cowpens. He was meeting his father and the customers at the Clinton House and Meeting Plantation, which was described as a corporate hunting preserve. Claimant individually owned the Clinton House. Grant Textiles had a corporate membership and often entertained clients there.

Around 5:30 p.m., Claimant neared the entrance of the Clinton House when he had to swerve onto the shoulder of Highway 56 in order to avoid hitting an object, apparently an animal, which was lying on the highway. Claimant turned into the entrance driveway of the Clinton House where he stopped his car, but left it running. He was met on the driveway by the day-to-day operator of the Clinton House, Randy Bickley. Bickley argued with Claimant for a few minutes and tried to assure Claimant he would take care of the debris in the roadway because Claimant needed to meet his father.

However, Claimant insisted on helping remove the debris.

Claimant and Bickley proceeded down the highway toward the debris when a pick-up truck crossed into the left lane of traffic to pass another car and struck Claimant who was walking in the shoulder of the highway. Claimant was injured on his right side and had to have extensive surgery on his right arm.

Claimant testified he wanted to remove the debris because it was a hazard to anyone traveling on the highway, to his customers who would be arriving at Clinton House that evening, to himself, and to his father. Claimant testified that removing road debris was not part of his regular job duties, but he maintained he did not have a defined set of duties. He conceded that Grant Textiles had no obligation to remove debris from the roadway in front of the Clinton House and that his only purpose for going to the Clinton House that night was to deliver bobbin samples to a customer.

The single commissioner found the injury compensable because Claimant was injured during his regular work hours while on his way to meet customers in a company-owned truck. Further, the commissioner found that Claimant wanted to remove the debris because he was concerned with the safety of his co-worker father, his potential customers, and the public at-large. Finally, the commissioner found Claimant's attempt to remove the debris was not a substantial deviation from his employment.

The full commission reversed and stated these findings of fact: (1) the accident did not arise out of Claimant's employment because the causative element of his accident had no connection with his employment; and (2) that Claimant's job duties were in no way related to road maintenance. In making its legal conclusion, the full commission determined Claimant's accident did not arise out of and in the course of his employment. The circuit court reversed and determined there was no dispute regarding the facts in this case and that the full commission erred in its application of the law.

The Court of Appeals disagreed and reinstated the full commission's order denying compensation. The court noted that, as the sole finder of fact,

the full commission found that Claimant's injuries did not arise out of his employment with Grant Textiles because the cause of the accident had no relation to his employment duties. The court concluded that the claim is not compensable because the factual findings made by the full commission are supported by substantial evidence. Chief Judge Hearn dissented and stated that, because there were no material facts in dispute, the question of whether the accident is compensable is a question of law. Judge Hearn stated she would have found that Claimant's injury arose out of and in the course of his employment.

ISSUE

Did the Court of Appeals err by finding Claimant's accident did not arise out of and in the course of his employment?

DISCUSSION

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Although we may not substitute our judgment for that of the full commission as to the weight of the evidence on questions of fact, we may reverse where the decision is affected by an error of law. Rodriguez v. Romero, 363 S.C. 80, 610 S.E.2d 488 (2005). Review is limited to deciding whether the commission's decision is unsupported by substantial evidence or is controlled by some error of law. *Id.*

To be compensable, an injury by accident must be one "arising out of and in the course of employment." S.C. Code Ann. § 42-1-160 (Supp. 2005). The two parts of the phrase "arising out of and in the course of employment" are not synonymous. Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 508 S.E.2d 21 (1998). Both parts must exist simultaneously before any court will allow recovery. *Id.* "Arising out of" refers to the injury's origin and cause, whereas "in the course of" refers to the injury's time, place, and circumstances. *Id.* For an injury to "arise out of" employment, the injury

must be proximately caused by the employment. Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 140 S.E.2d 173 (1965). The injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Id.*

There are circumstances when injuries arising out of acts outside the scope of an employee's regular duties may be compensable. Osteen v. Greenville County Sch. Dist., *supra*. These circumstances have been applied to: (1) acts benefiting co-employees; (2) acts benefiting customers or strangers; (3) acts benefiting the claimant; and (4) acts benefiting the employer privately. *Id.* An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby furthered, is within the course of employment. Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975) (grocery store employee who was injured while chasing two purse-snatchers was found to have suffered a compensable injury).

There were no disputed material facts in this case. Where there are no disputed facts, the question of whether an accident is compensable is a question of law. Douglas v. Spartan Mills, *supra*. The full commission erred by finding that the accident did not have a causal connection with Claimant's employment. The accident would not have happened but for Claimant's business trip to the Clinton House to meet his employer's customers. Because removing road hazards was not part of Claimant's job duties, he could have ignored the hazard in the road; however, he chose to remove the hazard to benefit himself, his co-worker father, and his customers. As found in Howell, Claimant's act, while outside his regular duties, was undertaken in good faith to advance his employer's interest and, therefore, was within the course of his employment. Therefore, the full commission's conclusion that the accident did not arise out of and in the course of Claimant's employment is incorrect.

The majority opinion of the Court of Appeals upheld the full commission solely on the basis that the factual findings made by the full commission were supported by substantial evidence. However, as noted above, the appellate court may reverse the full commission when the decision

is affected by an error of law as it was here. While the appellate courts are required to be deferential to the full commission regarding questions of fact, this deference does not prevent the courts from overturning the full commission's decision when it is legally incorrect as it is here.

Furthermore, in this instance, we also reverse the full commission for its issuance of a conclusory order. The Administrative Procedures Act (APA) sets out the requirements for a final order in an agency adjudication of a contested case as follows:

> . . . A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. . . .

S.C. Code Ann. § 1-23-350 (2005) (emphasis added).

In Able Communications, Inc. v. South Carolina Pub. Serv. Comm'n, 290 S.C. 409, 351 S.E.2d 151 (1986), we held that an order by the public service commission stating that a telephone carrier's services were "fair and reasonable," with no other findings of fact, violated § 1-23-350. We alluded to the purpose of § 1-23-350, stating, "It is impossible for an appellate court to review the order for error, since the reasons underlying the decision are left to speculation." *Id.* at 411, 351 S.E.2d at 152. We vacated the public service commission's order and remanded the matter to the public service commission for compliance with § 1-23-350.

The logic of Able Communications applies with equal force in the instant case. Specifically, in its reversal of the single commissioner's decision, the full commission's findings of fact stated that (1) the accident "did not arise out of [Claimant's] employment . . . because the causative element of the Claimant's accident had no causal connection with his employment at Grant Textiles," and (2) "Claimant's ordinary job duties at Grant Textiles did not require him to remove debris from the roads, and the discharge of his job duties and responsibilities were in no way related to road

maintenance skills." Because the full commission's order was founded on the statutory language of the Workers' Compensation Act, the APA required the full commission to clearly set forth the underlying facts upon which it relied to support its conclusion. *See* § 1-23-350. By simply repeating the statute's language, with little else, the full commission's decision failed to comply with this requirement.

Because the full commission's order did not meet the requirements of § 1-23-350 and because the full commission's order contained an error of law, the decision of the Court of Appeals is
REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Marion Alexander Lindsey, Appellant.

Appeal from Spartanburg County
John C. Few, Circuit Court Judge

Opinion No. 26268
Heard January 17, 2007 – Filed February 20, 2007

AFFIRMED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek and Appellate Defender Aileen P. Clare, both of South Carolina Commission on Indigent Defense, of Columbia; and Karen Michelle Quimby, of The Brannon Law Firm, of Spartanburg, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for respondent.

JUSTICE MOORE: Appellant killed his estranged wife, Ruby Nell Lindsey (Victim), on September 18, 2002, in the parking lot of the Inman City Police Department. The jury found a statutory aggravator pursuant to S.C. Code Ann. § 16-3-(C)(a)(3) (2003) and appellant was sentenced to death. We affirm.

FACTS

Celeste Nesbitt, a close friend of Victim, was the State's witness-in-chief. On the day of the murder, Celeste gave Victim a ride home from work at about 8:00 p.m. In the car were Celeste's two young daughters, four-year-old Keysha and ten-year-old Kiera, who were in the back seat with Victim—Keysha in a car seat behind the front passenger seat, Kiera in the middle, and Victim behind the driver's seat. Celeste was driving and Celeste's mother was in the front passenger seat. The car was a Mercury sedan with dark tinted rear windows.

Victim was separated from appellant at the time and was staying with her mother. As they neared Victim's mother's house, they saw appellant in his girlfriend's car. Celeste pulled into the yard and turned the car around so appellant was facing them in a head-on direction. Celeste rolled down her window and greeted him. Appellant asked her if she had seen Victim. Because Celeste knew appellant had threatened to kill Victim, she lied and answered that she had not seen her in three days.

Celeste's youngest daughter, Keysha, leaned forward in her car seat and greeted appellant. Appellant then asked who else was in the back seat. Celeste told him Kiera, her older daughter, was lying on the back seat asleep. Because the windows were tinted, appellant asked Celeste to roll down the window so he could see. Celeste answered that the window was broken. When appellant said he would get out to look, Celeste sped off.

Celeste drove to the police department without stopping while Victim dialed 911. When they arrived, Celeste jumped out of the car and urged Victim to get out. Victim was still in the back seat when appellant pulled into the parking lot and ran toward the back of Celeste's car. Celeste saw

him pull out a gun and shoot into the car through the rear windshield. She dove for cover as she heard additional shots.

Officer Godfrey was in the police department parking lot when the dispatcher informed him there was a "rolling domestic," meaning a domestic dispute involving a vehicle. He saw the two cars pull into the parking lot, and saw appellant jump out and fire two rounds into Celeste's car. Officer Godfrey took cover and saw two more flashes from a gun. Appellant came around the front of the car and pointed his gun at Officer Godfrey who then fired four rounds at appellant. Appellant was wounded and fell to the ground.

Victim died at the scene. Four bullets from appellant's gun were recovered: three from Victim's head and one from the trunk of Celeste's car.[1] The bullet recovered from the trunk had traveled through the back seat of the car into the trunk. The car had two bullet holes in the rear driver's side window and two in the rear windshield.

Other evidence indicated that during their marriage, appellant struck Victim several times in front of witnesses. In December 2001, he beat her in a restaurant parking lot and left the scene before the responding officer could arrest him. On September 17, 2002, the night before the murder, appellant was arrested on a warrant for criminal domestic violence arising from this incident. He was released on a $1,000 bond; one of the conditions of bond was that he have no contact with Victim.

ISSUES

1. Was Juror K improperly disqualified?

2. Should the trial judge have dismissed Juror M for misconduct during the jury's view of the car?

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[1]Five shell casings were found but the fifth bullet was not recovered. A paramedic testified for the defense that when he arrived on the scene to transport appellant to the hospital, appellant said he had shot himself in the head.

3. Should a directed verdict have been granted on the aggravating circumstance?

4. Is the death sentence in this case disproportional to other death penalty cases?

DISCUSSION

1. Juror disqualification

Appellant claims the trial judge erred in excusing Juror K who was disqualified because of his views regarding the death penalty.

During initial questioning by the court, Juror K was asked if he could impose the death penalty. He answered, "I don't know. I really don't know if I could or not." During subsequent voir dire by defense counsel, the juror gave the following responses.

> Q: . . . . There are going to be some allegations of domestic abuse in this case. Would that affect your ability to give either side a fair trial?
>
> A: No, sir.
>
> Q: Would that affect your ability – in the penalty phase, would that influence your decision as to whether or not life or death would be appropriate?
>
> A: I don't know, sir.
>
> Q: In other words, and I don't want to put words in your mouth, but as I understand what you are saying is you will be able to listen to both sides in the penalty phase and render what you feel to be the most appropriate penalty whether it be life or whether it be death?

A: Right.

Q: You will be able if you felt death was appropriate, you would be able to impose the death penalty?

A: Yes.

Upon questioning by the solicitor, however, Juror K equivocated.

Q: . . . . I noticed in your questions to *(sic)* the Judge, you were hesitant about the death penalty. You just did not know about it?

A: Right.

Q: You know life without parole is an option. He would never get out if he gets life without parole. With death being an option to you, would you ever give death in a case?

A: Most of the time I feel it is a better punishment to be in prison for life. I believe that death is not as big of a punishment as going to prison for life and having to stay in prison for the rest of your life.

Q: You feel life without parole would be a better sentence?

A: Yes, for something that is – I believe that is worse than the death penalty.

Q: So that would be the better option to you between the two?

A: Yeah.

Q: Would that be the option you would give the most cases or all cases?

A: I am not positive. I don't know for sure.

Q: You don't know what you would do?

A: Right, exactly.

Q: Your belief is that life without parole is a more serious punishment than the death penalty?

A: Yes.

Q: That would be the option you would choose?

A: Not necessarily but most likely.

Q: Most likely you would do that?

A: Yes.

Q: So substantially that will be your view concerning the case no matter what the facts would be, that would be your view?

A: Yes.

Defense counsel then re-examined the juror.

Q: . . . just so that everybody understands. You feel when given the choice between which would be worse, life in prison without parole or death, you feel that life is a worse punishment?

Q: I believe so, yes.

A: However, just so that I understand, if you felt death was appropriate in a case, you could give it?

Q: Yes, I could.

The solicitor then followed up with one last question:

Q: If I understood when we were talking or whatever, you wouldn't basically look at the facts of the case, you would

look at life without parole being the worse punishment of the two based on your beliefs, is that right, sir?

A: Yes.

The trial judge found that the belief that life in prison was worse than death would substantially impair the juror's ability to follow the law as instructed. He further noted that when asked about giving the death penalty, Juror K "took a very big deep [breath] and exhaled as if he were very uncertain as to whether or not he could do that." The judge concluded "from watching him" and considering his inconsistent responses, that Juror K should be excused.

A prospective juror may be excluded for cause when his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Sapp, 366 S.C. 283, 621 S.E.2d 883 (2005) (*citing* Wainwright v. Witt, 469 U.S. 412, 424 (1985)); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); S.C. Code Ann. § 16-3-20(E) (2003) (juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire voir dire. Sapp, *supra*. The determination whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. *Id.* A juror's disqualification will not be disturbed on appeal if there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. *Id.*; State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990). Deference must be paid to the trial court who sees and hears the juror. Wainwright, *supra*.

Juror K's equivocal views regarding the death penalty, his responses favoring a life sentence despite the facts of the case, and his noted hesitation when asked if he could vote for death, are a reasonable basis for the trial judge's conclusion that Juror K's views would substantially impair his ability

to act as an impartial juror. Considering the voir dire as a whole, we find the trial judge did not abuse his discretion in excusing this juror.

2. Jury view

During the sentencing phase, over appellant's objection, the trial judge granted the State's request for a jury view of Celeste's car.[2] After the viewing, defense counsel stated an objection that he saw Juror M

> using his arm as a dowel or a measurement. He measured both the front driver's seat and the back seat of the automobile I'm assuming to get an idea of the position of the people. . . . What he did was he stuck his arm from the door jam to determine the length from the door jam to the middle of the head rest in the front. He did the same thing in the back. He stuck it, he put his arm, he was attempting to use the length of his arm to estimate distance is what it appeared to me."

The solicitor, on the other hand, stated that he thought the juror was simply testing the tint of the car window.

Appellant moved to have Juror M removed and an alternate juror seated. The trial judge found Juror M had done nothing improper and denied the motion. Appellant contends Juror M should have been dismissed because he conducted his own experiment.

A jury may be allowed to view the scene or pieces of evidence but it is improper for the jury to conduct its own experimentation. Stone v. City of Florence, 203 S.C. 527, 28 S.E.2d 409 (1943). The issue is what constitutes "experimentation" such that it rises to the level of juror misconduct. Jurors will not be presumed guilty of misconduct and acts that are merely incidental to an assessment of the evidence are not improper. *Id.; see also* State v. Buckhalter, 153 S.C. 487, 151 S.E.64 (1930) (not improper experimentation

[2]Appellant objected that seeing the car would be unfairly prejudicial because instead of focusing on the "spatial relationships" in the car, the jury would be affected by the fact that Victim had been killed there.

in trial for possessing contraband to allow jury to take liquor into jury room to smell or taste it). However, an attempted re-enactment of the facts at issue will render a juror's conduct improper. *See, e.g.,* State v. Ballew, 83 S.C. 82, 63 S.E. 688 (1909)(jurors attempted to throw a hatchet against the wall of a jail cell to re-enact the prosecutor's description of the crime); Baroody v. Anderson, 195 S.C. 422, 11 S.E.2d 860 (1940) (jury asked the sheriff to drive his car around the curve where the wreck occurred at 35 mph in order to observe it approaching).

We find the trial judge did not abuse his discretion in refusing to dismiss Juror M. *See* State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (within trial judge's discretion to substitute alternate juror). First, it is not clear the juror was actually "taking measurements," as appellant claims, and we will not presume a juror engaged in misconduct. There was no attempted re-enactment of the crime, rather Juror M's actions were merely incidental to an assessment of the evidence. Moreover, photographs in evidence show the car's back seat, where the bullet hole was, where the child's car seat was, and where Victim was sitting. There is no real dispute regarding the measurements of the back seat such that any "measurements" by Juror M would have carried undue weight in jury deliberations.

3. Directed verdict on aggravating circumstance

Appellant moved for a directed verdict on the statutory aggravator provided in § 16-3-20(C)(a)(3) which states:

> That the offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

Appellant contends that because he shot Victim at close range and no other person was endangered, this aggravator should not apply as a matter of law.

The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it. State v. Locklair, 341

S.C. 352, 535 S.E.2d 420 (2000). Here, the police department parking lot is clearly a public place and a gun is a weapon hazardous to more than one person. *Id.* (shooting in church parking lot). Further, appellant knew there were other occupants in the car with Victim when he shot multiple times into the confined space of the car's interior—conduct a reasonable person would know presents a great risk of harm to more than one person. Appellant also pointed his gun at Officer Godfrey in the parking lot. This evidence supports the submission of the statutory aggravator to the jury.

4. Proportionality review

Appellant contends the imposition of death in his case is disproportionate to other death penalty cases because his case involves only a single victim and resulted from a domestic dispute. *See* S.C. Code Ann. § 16-3-25 (2003) (proportionality review).

We find no support for appellant's attempt to reduce this crime to simply "a domestic dispute." Appellant's culpability is not lessened by the fact that the victim was his wife. There is no evidence of any immediate dispute leading up to the murder,[3] much less any provocation on Victim's part. In fact, appellant intentionally violated a court order forbidding contact with Victim.

Further, as discussed above, the evidence supports the submission of the aggravating factor in this case. The legislature has determined that a unanimous verdict on only one aggravating factor is sufficient to support the death penalty. There have been numerous capital cases where the jury found only a single aggravator and death was imposed. *See,e.g.*, State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) (killing police officer); State v. Rogers, 338 S.C. 435, 527 S.E.2d 101 (2000) (killing child under age of eleven); State v. Huggins, 336 S.C. 200, 519 S.E.2d 574 (1999) (armed robbery); Ray v. State, 330 S.C. 184, 498 S.E.2d 640 (1998) (kidnapping); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990) (prior murder conviction). We find appellant's disproportionality argument without merit.

[3]Appellant's mother testified generally in the sentencing phase that appellant was upset he was not allowed to see his children.

We have reviewed the record and conclude the imposition of death in this case was not the result of passion, prejudice, or any other arbitrary factor, nor is it excessive or disproportionate to the penalty imposed in other cases. The judgment of the circuit court is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Mental Health, Plaintiff/Petitioner,

v.

Henry Dargan McMaster, Attorney General of South Carolina, and The State Budget and Control Board, Defendants/Respondents.

IN THE ORIGINAL JURISDICTION

Opinion No. 26269
Heard September 20, 2006 – Filed February 20, 2007

Mark W. Binkley, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert D. Cook, Senior Assistant Attorney General Havird Jones, Jr., all of Columbia, for Respondent Henry Dargan McMaster, and Edwin E. Evans, Esquire, David K. Avant, and M. Richbourg Roberson, all of Columbia, for Respondent State Budget and Control Board.

Robert W. Hayes, Jr., of Columbia, for Amicus Curiae, National Alliance on Mental Illness.

PER CURIAM: We accepted this matter in our original jurisdiction to issue a declaratory judgment as to whether or not certain property owned by the Department of Mental Health (DMH), referred to as the "Bull Street Property," is held in a charitable trust and, if so, whether and under what conditions it may be sold. We hold the property is subject to a charitable trust but may be sold in accordance with our discussion below.

FACTS

The State Lunatic Asylum was created in 1821.[1] The Act creating the Asylum implemented a board of seven trustees to be elected by the Legislature, "who shall superintend the public institutions herby intended to be established." 1821 Acts No. 2269. The following year, the General Assembly passed Act. No. 2286 of 1822 entitled, "An Act to vest the title of the lot upon which the lunatic asylum stands, in the trustees and visiters of said asylum."

"Bull Street," as it has become known, is made up of 185.6 acres, excepting approximately 4.5 acres which contain the Mills Building and surrounding grounds. The Mills Building was the initial site of the asylum. The property was originally 14 separate tracts of land, and was acquired by the DMH and its predecessors in a series of transactions occurring between the 1820's and 1905. The record contains deeds evidencing 12 of these transactions; the remaining 2 parcels were acquired prior to the 1860's, and no deeds are available.

Several of the deeds contain restrictive language requiring the property to be used "for the use and purposes of the State Hospital for the Insane." The initial two parcels, conveying a total of 31.5 acres, were conveyed to "The Regents of the Lunatic Asylum of South Carolina, its successors and assigns forever." The third parcel, comprising 50 acres, was conveyed to "The Regents of the Lunatic Asylum of South Carolina, their successors in office, for their only proper use, benefit, and behoof, forever." Parcels 6, 7,

[1] The preamble to the Act recognized, ". . . the benevolent purposes of society require, on the part of the State, a public institution for the reception and cure of lunatics, for the instruction of the deaf and dumb, and for the maintenance of the poor and destitute of either class."

8, 9 and 10 all grant property to the Regents of the State Hospital "and their successors and assigns forever for the use and purposes of the said State Hospital." Each of the parcels was sold to the Board of Regents for a stated consideration, ranging from $5.00 (Parcel 15, .59 acres) to $24,500.00 (Parcel 8, 108.45 acres). Throughout the years, numerous properties owned by the State Hospital were sold to various entities, the proceeds generally going to the DMH.[2] Most of these sales were authorized by the General Assembly and or the Budget and Control Board.

In 2004, as part of the Appropriations Act, the General Assembly passed Proviso 73.18 to "establish a comprehensive central property and office management facility process to plan for the needs of state government agencies and to achieve maximum efficiency and economy in the use of state owned or state leased real property." Pursuant to the proviso, the Budget and Control Board was directed to identify all state owned properties and title to all such properties, excepting those the Board determined were subject to reverter clauses or other restraints upon transfer of title. The proviso further states that, "[u]pon a determination by the Board that a property should be sold, the agency is required to sell the property and remit the proceeds as directed herein."

In the 2005 Appropriations Act, the General Assembly enacted Proviso 63.40, which was vetoed by the Governor, but overridden by the Legislature. Proviso 63.40 provides, in pertinent part:

> Up to 50% of the proceeds, net of selling expenses, from the sale of surplus real properties shall be retained by the Budget and Control Board and used for the deferred maintenance of state-owned buildings. The remaining 50% of the net proceeds shall be returned to the agency that the property is owned by, under the control of, or assigned to and shall be used by that agency for non-recurring purposes.

[2] No issue is before this Court concerning prior sales of Bull Street properties. However, we note that our opinion today in no way affects or invalidates any prior sales, to which there has never been an objection.

After inquiries as to whether some of the State Hospital properties could be sold for development, the Attorney General requested the Executive Director of the Budget and Control Board (Board) for his advice and conclusions as to whether there were any prohibitions or limitations on the sale of the Bull Street property, and whether it was encumbered by a charitable trust. The Board responded as follows:

> The current thinking among experts practicing in the mental health field is that large complexes like the Bull Street site which isolate patients and separate them from their communities is not the best situation for the treatment and successful re-integration of patients into the general population. The thinking is that the Bull Street tract is not specifically needed to house mental health facilities and that it would be more efficient and economical for the State and Department of Mental Health to sell this property, relocate facilities, and reinvest the proceeds that would be derived. . . .

The Board noted the property upon which the Mills Building is situated was not included in any plans by the State to sell the property and would remain in State ownership. The Board concluded the property was not encumbered by a charitable trust, such that it believed the General Assembly could authorize a sale of the property. The Board concluded, however, that it would defer to the Attorney General's opinion on the matter.[3]

In response, the Attorney General issued an opinion on December 9, 2005, concluding as follows:

> [A] court would most likely conclude that the Department of Mental Health, as successor to the State Lunatic Asylum and South Carolina State Hospital for the Insane, is a 'public charity' and that the Bull Street property is thus impressed with a charitable trust. Accordingly, we recommend that prior to any sale, the Department

[3] Pursuant to S.C. Code Ann. § 1-7-130 (1976), the Attorney General is charged with the protection of public charities and is required to enforce the due application of funds given or appropriated to such charities.

> of Mental Health seek court approval of such sale, consistent with the basic principle that a court of equity must approve, by way of equitable deviation, any such transfer.

The Attorney General stated that as an alternative, the Legislature could protect the charitable trust by requiring the proceeds from any sale to be devoted exclusively to the Department of Mental Health.

In light of the Attorney General's opinion, the DMH filed a petition for original jurisdiction as to whether the Bull Street property is encumbered by a charitable trust and, if so, whether and under what conditions the property may be sold. We agree with the Attorney General's opinion that the property is subject to a charitable trust. However, given the change in circumstances in the care and treatment of mental health patients, we hold the doctrine of equitable deviation may be employed to allow a sale of the property with disbursement of the proceeds to be placed in trust for the benefit of DMH.

ISSUES

1. Is the Bull Street property held subject to a charitable trust for the benefit of the Department of Mental Health?

2. If Bull Street is subject to a charitable trust, under what circumstances may the property be sold, and to whom are the proceeds disbursed?

1. CHARITABLE TRUST

This Court has recognized the benevolent purposes of the state hospital. See Crouch v. Benet, 198 S.C. 185, 17 S.E.2d 320, 323 (1941) (holding that South Carolina was a pioneer of the southern states in the care of the insane which has been supported, maintained, and "pursuant to Acts of the Legislature and by means of appropriations for this most worthy, humane and beneficent purpose as a State Institution." Moreover, institutions for the insane are constitutionally provided for and subject to regulation by the General Assembly. Article 12, § 1, CONST 1895.

A charitable trust is defined as:

> [A] fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with property for a charitable purpose. Restatement (2nd) Trusts § 348 (1959). . . . The settlor must manifest an intention to create a charitable trust. It is not necessary that any particular words or conduct be manifest to create a trust, and it is possible to create a trust without using the words "trust" or "trustee."

Scott on Trusts §§ 24--25 (2d Ed. 1956); Restatement (2nd) Trusts § 24. Conversely, the mere fact these words are used, or other similar words, does not necessarily indicate an intention to create a trust.

In the 1922 case of Harter v. Johnson, 122 S.C. 96, 115 S.E. 217 (1922), the Court was called upon to interpret the will of a deceased physician who had, by his will, bequeathed "[a]ll the residue of my estate, real and personal and mixed, . . . I give and devise, for the purpose of establishing, building and equipping a public hospital in the town of Fairfax, for the treatment of white and colored patients." This Court, in addressing the issue of whether a charitable trust had been created, stated:

> Trusts for public charitable purposes, being for objects of permanent interest and benefit to the public, and perhaps being perpetual in their duration, are upheld under circumstances under which private trusts would fail. . . .
>
> No formality in the use of language is necessary in order to create a public charitable trust. The courts look to the purpose for which the gift was made, rather than to the particular words used to designate that purpose. And while a gift cannot be sustained as a charity unless made upon a trust, either express or implied, that it shall be devoted to uses which the law recognizes as charitable, the omission from a bequest of the words in trust is not material,

> where the intention is clearly manifested that the whole property shall be applied by the legatee for the benefit of other persons than himself. . . .
>
> [it] is said: 'The founding and maintenance of hospitals and asylums of various kinds, and homes for destitute and friendless children, and the aged and infirm, constitute charitable uses or trusts, and bequests, devises, or other gifts for such purposes will be upheld in equity with a strong hand. Trusts for such purposes may be established and carried into effect, when, if not of a charitable nature, they could not be supported.

115 S.E.2d at 221-222. The Court has similarly found the existence of a charitable trust in cases in which it has not been expressly stated. See Watson v. Wall, 229 S.C. 500, 93 S.E.2d 918 (1956) (testamentary provision wherein testator directed that any surplus left after application of funds to specific purposes might be used to aid poor and indigent to obtain medical care and hospitalization in judgment of testator's executor or executors was not so indefinite or general as to be ineffectual to create a charitable trust); Porcher v. Cappelmann, 187 S.C. 491, 198 S.E. 8, 9 (1938) (valid charitable trust created where testatrix bequeathed residuary estate to a named trustee, "to be used and expended in such manner as he may deem wise in assistance in the City of Columbia, S. C., to crippled children, in the provision of medical and surgical attention to such children, purchase of medicines, braces or other appliances or any other article to assist and benefit said children, said work for crippled children to be conducted in the City of Columbia, S. C.").

Further, as noted by the Attorney General, properties conveyed to a public charity are also impressed with a charitable trust. See Wellesley College v. Attorney General, 313 Mass. 722, 49 N.E.2d 220 (1943); In Re Los Angeles County Pioneer Society, 257 P.2d 1, 9 (Ca. 1953) ("In cases where . . . property is conveyed without restriction to a charitable corporation . . . the charitable intent of the donor is ascertained by reference to the charitable purposes of the donee."); In re Harrington's Estate, 36 N.W.2d 577, 582 (Neb. 1949) (a gift or bequest by name, without further restriction or limitation as to use, to a corporation conducted solely for charitable

purposes, will be deemed to have been made for the objects and purposes for which the corporation was organized); Brown v. St. Luke's Hosp. Assn., 274 P.2d 740 (Colo. 1929) (St. Luke's Hospital came into being as, and continued to remain, a charitable institution such that all property held or acquired by it was impressed with a trust for the charitable uses and purposes).

We find the Arizona Supreme Court's opinion in Goddard v. Coerver, 412 P.2d 259 (Ariz. 1966), directly on point. Like this case, Goddard involved land purchased for a state insane asylum. In September 1885, the Board of Supervisors of Maricopa County, Arizona, purchased 160 acres of land for $3500.00 On October 8, 1885, this same 160 acres was conveyed by the Board of Supervisors to the Board of Directors of the Insane Asylum of Arizona. The deed conveyed the property to the Directors "for the use and benefit of the Territory of Arizona And for said Asylum." 412 P.2d at 261. The deed went on to state, "for the use and benefit of the Territory . . . , and for said asylum in accordance with the provisions of the said acts of said Legislature." Id. at 262. (Emphasis supplied). However, the deed also purported to vest title in the directors, their assigns and successors, in fee simple absolute. Id. In 1965, the Asylum Board expressed an interest in selling 62 acres of the property to Maricopa County as a site for a new Maricopa County General Hospital. At the time, the property was being put to agricultural purposes in support of the asylum. The Arizona Supreme Court held the property had been conveyed to the Board of Directors in the form of a charitable trust.[4]

As in Goddard, the property here was conveyed for the charitable purposes of the State Hospital for the Insane. It was conveyed to the Board of Regents of the Hospital, and the General Assembly enacted enabling legislation specifically for the benevolent purpose of establishing a hospital for the insane. The General Assembly also deemed fit that title to the property vest in the Board of Regents, and has routinely authorized the appropriation of funds for its charitable purposes. We find that the deeds and

[4] In addition, the Court concluded that the unused portion of these lands could, consistent with the principles of equitable deviation, be approved by the court for reconveyance by the Hospital's board of directors to the county for construction of a general hospital. The equitable deviation issue will be addressed below.

the legislative acts giving rise to the State Hospital clearly evidence the creation of a charitable trust. Accordingly, we find the property is held in trust for the DMH.

2. SALE OF PROPERTY

Property subject to a charitable trust may not be terminated or altered by the General Assembly, but rather, must be approved by the court. Smith v. Moore, 225 F. Supp. 434 (D. E. Va. 1963) (legislature cannot terminate a charitable trust, nor seek to control its disposition under doctrine of *cy pres*; however this does not mean that Legislature cannot properly reserve to the judicial branch the power to do so); see also Second Ecclesiastical Society of Hartford v. Attorney General, 48 A.2d 266 (Conn. 1946) (supervision of charitable trusts is an inherent judicial function and is not a matter for the legislature. As a court of equity, the court possesses the authority to carry out the intent of the donor of a charitable trust).

This Court has previously applied the doctrine of equitable deviation, which "permits deviation from a term of the trust if, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust. Under these circumstances a court may direct or permit a trustee to accomplish acts that are unauthorized or even forbidden by the terms of the trust." Epworth Children's Home v. Beasley, 365 S.C. 157, 169, 616 S.E.2d 710, 716-717 (2005), citing Colin McK. Grant Home v. Medlock, 292 S.C. 466, 473, 349 S.E.2d 655, 659 (Ct.App.1986) (allowing trustees to deviate from original terms of charitable trust by selling six homes built in Charleston to serve needy, elderly, white Presbyterians and investing proceeds of sale with income distributed as housing subsidy to elderly, needy Presbyterians of all races).

Considerable flexibility will always be allowed in the details of the execution of a trust, so as to adapt it to the changed conditions. Mars v. Gibert, 93 S.C. 455, 466, 77 S.E. 131, 135 (1913) (refusing to allow trustees of John de la Howe School to deviate from original terms of charitable trust contained in 1797 will by devoting funds to college scholarships instead of

early education, but explaining trustees could establish a school at a different location, which could work in conjunction with public school system to teach agricultural and mechanical arts); All Saints Parish, Waccamaw v. Protestant Episcopal Church, 358 S.C. 209, 227, 595 S.E.2d 253, 263 (Ct.App.2004).

It is undisputed that the Bull Street property is no longer necessary to house mentally ill patients. Accordingly, we find the doctrine of equitable deviation should be utilized to allow the property to be sold. However, we hold that the proceeds from any sale of the property must remain in trust for the benefit of DMH for the care and treatment of the mentally ill.

DECLARATORY JUDGMENT ISSUED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Furtick, Appellant

v.

South Carolina Department of Corrections, Respondent.

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

Opinion No. 26270
Submitted January 18, 2007 – Filed February 20, 2007

REVERSED

James Furtick, *pro se*, of Bennettsville, for Appellant.

Barton J. Vincent, Deputy General Counsel, of Columbia, for Respondent.

JUSTICE WALLER: This is a direct appeal from the circuit court's order affirming the Administrative Law Judge's (ALJ) dismissal of appellant James Furtick's prison grievance matter. We reverse.

FACTS

In 2001, when Furtick was an inmate at Lee Correctional Institution, the Department of Corrections (DOC) reprimanded him for possessing contraband.[1] As a result of the reprimand, Furtick did not earn his good time credit for the month of the infraction. Furtick also contends that his earned work credit level was reduced, resulting in a loss of approximately 43 days per year. Thus, Furtick alleges that because of the contraband conviction, his predicted max-out date changed from March 5, 2010 to September 29, 2010.

Furtick appealed the denial of his grievance to the ALJ Division (ALJD), and the DOC moved to dismiss the action based on a lack of subject matter jurisdiction. Finding that Furtick's reprimand did not "inevitably affect the duration" of his sentence, the ALJ dismissed the matter. The ALJ stated that although an inmate has a liberty interest in **earned** good time credits, he has no liberty interest in good time credits which "he is unable to earn or fails to earn as a result of a rule violation."

Furtick appealed to the circuit court. The circuit court found there was "no loss of a protected liberty interest" because Furtick "only received a reprimand," and therefore affirmed the ALJ's decision that there was no jurisdiction over the claim. The circuit court also stated that Furtick "did not lose any good time credits; therefore this appeal does not implicate a liberty interest."

ISSUE

Did the circuit court err in finding the ALJD lacked jurisdiction over Furtick's claim?

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[1] According to Furtick, DOC guards entered his cell and seized numerous items of property, including his typewriter, various office supplies, and bleach. It appears the possession of contraband rule infraction was based on the bleach.

DISCUSSION

Furtick argues that the circuit court erred by finding that: (1) the ALJD lacked subject matter jurisdiction; and (2) there was no loss of a protected liberty interest. We agree.

In Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), this Court held that inmates could pursue appellate review in the ALJD of certain grievance decisions made by the DOC. The ALJD obtains subject matter jurisdiction over an inmate's claim when the claim "implicates a state-created liberty interest." Sullivan v. S.C. Dep't of Corrections, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003), cert. denied, 540 U.S. 1153 (2004).

The State of South Carolina clearly has created a liberty interest in good-time credits. See S.C. Code Ann. § 24-13-210 (Supp. 2006) (entitled "Credit given convicts for good behavior"). Significantly, the inmate in Al-Shabazz challenged the DOC's punishment in the form of reduction of **accrued** good time credits. The Court found that the inmate had a "protected liberty interest due to the **potential loss** of sentence-related credits" and, therefore, he was entitled to review by the ALJD. Al-Shabazz, 338 S.C. at 382, 527 S.E.2d at 757 (emphasis added).

The instant case is indistinguishable from the claim at issue in Al-Shabazz. Although the allegations here involve the loss of sentence-related credits which had not yet been earned, we find a protected liberty interest was nevertheless implicated. See Sullivan, supra. Moreover, it seems clear that Furtick's sanction clearly affected the duration of his incarceration because the direct result of the reprimand was, at the very least, the loss of good-time credits for the month of June 2001. Thus, the ALJ's finding that Furtick's reprimand did not "inevitably affect the duration" of his sentence, and the circuit court's subsequent finding that Furtick did not lose any good time credits, are erroneous.

In sum, pursuant to Al-Shabazz and its progeny, the ALJD has subject matter jurisdiction over Furtick's claim. Accordingly, the circuit court erred in affirming the ALJ's dismissal.

CONCLUSION

We reverse and remand to the ALJD to hold a hearing[2] on the denial of Furtick's grievance claim.

REVERSED.

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

[2] In Slezak v. S.C. Dep't of Corrections, 361 S.C. 327, 331, 605 S.E.2d 506, 508 (2004), cert. denied, 544 U.S. 1033 (2005), we stated that: "[w]hile the ALJD has jurisdiction over all inmate grievance appeals that have been properly filed, … the Division is not required to hold a hearing in every matter. Summary dismissal may be appropriate where the inmate's grievance does not implicate a state-created liberty or property interest." However, because this matter clearly implicates a loss of sentence-related credits, Furtick is entitled to an ALJD hearing.