The Supreme Court of South Carolina

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N O T I C E

In the Matter of Todd Anthony Strich

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on August 27, 2015, beginning at 9:30 a.m, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

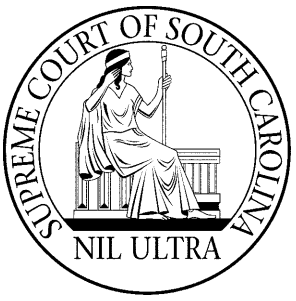
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Albert V. Smith, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

July 24, 2015

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 29
July 29, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Christopher Broadnax, Respondent.

Appellate Case No. 2013-000615

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27545
Heard February 4, 2015 – Refiled July 29, 2015

REVERSED IN PART AND AFFIRMED IN PART

Attorney General Alan McCrory Wilson, Chief Deputy Assistant Attorney General Julie Kate Kenney and Assistant Attorney General Mary Shannon Williams, all of Columbia, for Petitioner.

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The State of South Carolina appeals the court of

appeals' decision reversing Christopher Broadnax's (Respondent) convictions for armed robbery and kidnapping, and remanding for a new trial. We reverse in part and affirm in part the decision of the court of appeals.

FACTUAL/PROCEDURAL HISTORY

At 5:30 p.m. on May 24, 2009, a masked gunman entered Church's Chicken on Two Notch Road in Columbia. He held one of the employees at gunpoint while the employee emptied the cash registers. Three other employees locked themselves in the kitchen. The gunman was wearing a striped shirt, had a distinctive "lazy eye," and carried a clear plastic bag.

After the employee filled the bag with money from the registers, the gunman calmly exited the store, climbed into a "gray Dodge old model truck" driven by an accomplice, and left the scene. One of the employees chased the gunman outside and saw him riding in the passenger seat of the gray truck as the driver pulled out of the parking lot onto Two Notch Road.

Police responded to the scene within approximately three minutes, and based on the employees' descriptions of the getaway vehicle, stopped the driver a short distance from the Church's Chicken on Two Notch Road.[1] When officers approached the vehicle, they found Respondent crouched down on the floorboard of the passenger side. Officers immediately noticed that Respondent had a "lazy eye." The police officers found a gun and a bag full of money (matching the employees' descriptions) jammed under the truck's passenger seat, adjacent to Respondent. Further, one of the employees identified Respondent as the gunman in a "show-up" identification, and testified that he recognized Respondent's distinctive facial features, build, and clothing.[2]

Respondent was charged with one count of armed robbery and four counts of kidnapping.

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[1] A testifying officer stated that the truck was distinctive because it was in poor condition and "had a number of dents and pings and so forth."

[2] Several of the employees also made in-court identifications of Respondent as the perpetrator of the crimes. Furthermore, Respondent's accomplice testified against him at trial.

After the State rested, Respondent indicated that he would testify in his own defense. Consequently, the State moved to admit Respondent's prior criminal record for purposes of impeachment. The trial court heard arguments and conducted an inquiry into which of Respondent's prior convictions should be admitted. Pursuant to Rule 609(a)(2), SCRE, and the court of appeals' opinion in *State v. Al–Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003), the trial court admitted three of Respondent's four prior armed robbery convictions.[3]

During his testimony, Respondent denied any involvement in the robbery. However, Respondent's counsel elicited testimony regarding Respondent's prior convictions for armed robbery.[4] The State likewise questioned Respondent about his prior convictions.

The trial judge then instructed the jury:

> You've heard evidence that the defendant was convicted of a crime other than the one for which the defendant is now on trial. This evidence may be considered by you if you can conclude it is true only in deciding whether the defendant's testimony is believable and for no other purpose. You must not consider the defendant's prior record as any evidence of the defendant's guilt of the charge that we are trying here today.

The jury found Respondent guilty of armed robbery and four counts of kidnapping, and the trial judge sentenced Respondent to a mandatory minimum sentence of life imprisonment without the possibility of parole based on Respondent's prior armed robbery convictions.

On appeal to the court of appeals, Respondent argued, *inter alia*, that the trial court erred in admitting his prior armed robbery conviction for impeachment purposes. *See State v. Broadnax*, 401 S.C. 238, 241, 736 S.E.2d 688, 689 (Ct.

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[3] The trial court also admitted Respondent's prior convictions for transaction card theft, grand larceny, and petit larceny.

[4] The trial court permitted Respondent's counsel to elicit the prior conviction testimony during his direct examination without waiving his objection to the admission of that testimony.

App. 2013). The court of appeals reversed and remanded the case to the trial court for a new trial. *Id.* Specifically, the court of appeals found: (1) Respondent's prior armed robbery convictions, without more, did not constitute crimes of dishonesty, and therefore, the trial court should have conducted a balancing test prior to admitting testimony regarding Respondent's prior armed robbery convictions; and (2) such error was not harmless beyond a reasonable doubt. *Id.* at 244–48, 736 S.E.2d at 691–93.

ISSUES PRESENTED

I. Whether the court of appeals erred in finding that Respondent's prior armed robbery convictions were not crimes of dishonesty, and were therefore inadmissible under Rule 609(a)(2), SCRE?

II. Whether the court of appeals erred in refusing to find any error in the admission of Respondent's prior criminal record harmless beyond a reasonable doubt?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citation omitted); *see also State v. Kelly*, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." (citation omitted)). "An abuse of discretion occurs where the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (citation omitted).

LAW/ANALYSIS

I. Prior Armed Robbery Convictions

The State argues that the court of appeals erred in reversing the trial court because armed robbery is a "crime of dishonesty or false statement" such that it is

automatically admissible under Rule 609(a)(2), SCRE. We disagree.

Rule 609(a), SCRE, provides:

> For the purpose of attacking the credibility of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

In *State v. Al-Amin*, the court of appeals considered the question of whether the appellant was entitled to a new trial after the trial court admitted his prior armed robbery conviction without first weighing the probative value and prejudicial effects of the admission. 353 S.C. at 408–09, 414, 578 S.E.2d at 34, 37. Noting that "[t]here is disagreement among federal circuit courts and state courts construing Rule 609(a)(2) as to which crimes are included," the court of appeals explained that "[t]he disagreement revolves around whether convictions for theft crimes, such as larceny, robbery, and shoplifting, should be admitted under the rule as involving dishonesty or false statement." *Id.* at 415, 578 S.E.2d at 37. The court of appeals acknowledged that a majority of federal courts has adopted a narrow approach to the question, but declined to follow federal precedent, instead adopting an expansive approach to determining what constitutes a "crime of dishonesty or false statement." *Id.* at 416, 578 S.E.2d at 38. The court of appeals reasoned:

> "An essential element of robbery is that the perpetrator of the offense steals the goods and chattels of another or, in the case of an attempt to commit robbery, intends to steal the goods or chattels of the person assaulted. If this element is not present, the crime is not robbery or an attempted robbery. Stealing is defined in law as larceny. Larceny

> involves dishonesty. The fact that the perpetrator of the crime manifests or declares his dishonesty by brazenly committing the crime does not make him an honest person."

Id. at 421, 578 S.E.2d at 40–41 (quoting *State v. Goad*, 692 S.W.2d 32, 37 (Tenn. Crim. App. 1985)). Thus, the court of appeals concluded, "It is the larcenous element of taking property of another which makes the action dishonest. Larceny is a lesser-included offense of armed robbery." *Id.* at 425, 578 S.E.2d at 43 (citations omitted). The court of appeals, citing several dictionary definitions, found further,

> To restrict the application of Rule 609(a)(2) only to those offenses which evidence an element of affirmative misstatement or misrepresentation of fact would be to ignore the plain meaning of the word "dishonesty." "Dishonesty" is, by definition, a "'disposition to lie, cheat, or **steal.**'" "To be dishonest means to deceive, defraud or **steal.**" "'In common human experience[,] acts of deceit, fraud, cheating, or **stealing** . . . are universally regarded as conduct which reflects adversely on a man's honesty and integrity.'"

Id. (internal citations omitted).

More recently, however, we decided *State v. Bryant*, in which we held that the trial court erroneously admitted the petitioner's prior firearms convictions under Rule 609 without weighing the probative value and prejudicial effects of their admission because the firearms offenses were not crimes involving dishonesty. 369 S.C. 511, 517, 633 S.E.2d 152, 155–56 (2006). In so holding, we stated:

> Violations of narcotics laws are generally not probative of truthfulness. *See State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001) (citing *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000)). ***Furthermore, a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness.*** *United States v. Smith*, 181 F. Supp. 2d 904 (N.D. Ill. 2002).[5] Likewise, firearms violations also are not generally probative

[5] In *Smith*, the court stated:

> [E]vidence that any witness has been convicted of a crime involving

> of truthfulness. Accordingly, Petitioner's prior firearms convictions do not involve dishonesty and their probative value should have been weighed against their prejudicial effect prior to their admission pursuant to Rule 609(a)(1).

Id. (emphasis added).

Here, the State argues that because *Bryant* involved convictions for firearms offenses, and not explicitly a prior armed robbery conviction, the above language is merely dicta. Therefore, the State relies on earlier precedents from our courts—namely *Al-Amin*—and points to other states' precedents to support its argument that armed robbery is a crime of dishonesty, such that no balancing test is required.

We take this opportunity to overrule *Al-Amin*, and reaffirm the rule as formulated in *Bryant* that armed robbery is not a crime of dishonesty or false statement for purposes of impeachment under Rule 609(a)(2). While many states have adopted a broader interpretation of the Rule, we find the analysis to be more nuanced than that undertaken by the *Al-Amin* court.[6] Under *Al-Amin*'s and the

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> dishonesty or false statement is admissible without regard to its prejudicial effect. Fed. R. Evid. 609(a)(2). Smith's forgery conviction is admissible under Rule 609(a)(2). However, his convictions for robbery, burglary, theft, and drug possession convictions are not, as the government has not shown that any of them involved false statements or acts of deceit beyond the basic crime itself, and as to the theft convictions has not shown that it involved items of significant value.

181 F. Supp. 2d at 909 (internal citations omitted).

[6] *See* Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. Crim. L. & Criminology 1087, 1119 (2000) ("The problem with [a broad reading of the term 'crime of dishonesty'] . . . is that it blurs the moral distinction between stealing and lying. A person who steals is certainly dishonest; she rejects the idea of making an honest living; she cheats; she takes something to which she is not entitled; she disobeys the rules. But there is no particular reason to think that she is deceitful. Indeed, what little empirical evidence there is indicates that a prior conviction for larceny

concurrence's rationale, the exception contained in Rule 609(a)(2), which permits the automatic admission of certain prior convictions, swallows the rule contained in Rule 609(a)(1), in which discretion regarding the admission of prior convictions rests with the trial judge. We think this interpretation is contrary to the intent of the Rule.

Thus, we hold that for impeachment purposes, crimes of "dishonesty or false statement" are crimes in the nature of *crimen falsi* "that bear upon a witness's propensity to testify truthfully." *Adams v. State*, 644 S.E.2d 426, 431–32 (Ga. Ct. App. 2007) (footnote omitted) (surveying federal and state treatment of the issue, and adopting the more narrow federal definition); *see also United States v. Smith*, 551 F.2d 348, 362–63 (D.C. Cir. 1976) ("[I]n its broadest sense, the term *'crimen falsi*' has encompassed only those crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth." (emphasis added)). Armed robbery, therefore, is not per se probative of truthfulness.

The Federal Rules of Evidence specifically identify *crimena falsi* in Rule 609(a)(2), FRE, as crimes which by their very nature permit the impeachment of a witness convicted of a crime of "dishonesty or false statement." Green, *supra* note 6, at 1090. In fact,

> [t]he original Conference Report makes the link between Rule 609(a)(2) and the *crimena falsi* explicit, defining the phrase "crimes involving dishonesty or false statement" as "crimes such as perjury, subornation of perjury, false statements, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully."

Id. at 1090–91 (emphasis added) (footnote omitted) (quoting H.R. Conf. Rep. No. 93-1037, at 9 (1975)). While the State emphasizes that South Carolina did not adopt this explanatory language when it adopted Federal Rule 609, the notion of *crimen falsi* in the evidentiary context is long-established in the common law of South Carolina. *See, e.g.*, *State v. Peterson*, 35 S.C. 279, 282, 14 S.E. 617, 618

(stealing by stealth) says little or nothing about a witness'[s] propensity to lie." (footnote omitted)).

(1892) ("The old, well-settled rule was that one who had been convicted of a crime belonging to the class known as the '*crimen falsi*' was said to be infamous, and incompetent to testify."). Thus, the State's argument is unavailing. *Cf. Williams v. Condon*, 347 S.C. 227, 247, 553 S.E.2d 496, 507 (Ct. App. 2001) ("A strong presumption . . . exists that the General Assembly does not intend to supplant common law principles when enacting legislation." (citations omitted)).[7]

Here, the trial judge felt constrained by *Al-Amin* to forgo a balancing test, even though he noted that *Al-Amin* was a "significant departure" from what he understood the law to be, especially because the State sought to admit *three* prior convictions identical to the one for which Respondent was currently on trial. We agree with the trial judge that the prejudicial effect of admitting prior convictions for the exact same offense is often very high. *See State v. Scriven*, 339 S.C. 333, 343–44, 529 S.E.2d 71, 76–77 (Ct. App. 2000) (stating that because the prior convictions were "similar or identical to charged offenses, . . . the likelihood of a high degree of prejudice to the accused [was] inescapable"). For this reason, a rule that places discretion with the trial judge is even more desirable, and unlike the concurrence, we think the trial judge is the best arbiter of whether a very prejudicial piece of evidence should be admitted in this situation—unless of course the prior crime specifically relates to a defendant's penchant to tell the truth on the witness stand. Importantly, our holding today does not preclude the admission of prior convictions for armed robbery; rather, it merely enables a trial judge to conduct a balancing test pursuant to Rule 609(a)(1) when the State seeks prior convictions for armed robbery to impeach a criminal defendant's testimony.

Ultimately, the Rule is designed to help the jury discern the truth. It is not a tool for the State to bolster its case against the criminal defendant for the mere fact

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[7] While the concurrence criticizes our reliance on the federal interpretation of the Rules, we note that we routinely look to the federal interpretation of the Rules of Evidence to guide us in our interpretation of our own Rules of Evidence. *See, e.g., Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 594, 748 S.E.2d 781, 786 (2013) ("Because our appellate courts have not definitively addressed Rule 60(b)(5), we have looked to the federal courts' interpretation as our rule is similar to the federal rule."); *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 474 n.10, 674 S.E.2d 154, 162 n.10 (2009) ("The language of Rule 26(c), SCRCP, mirrors that of federal Rule 26(c). Because there is no South Carolina precedent construing this rule, federal interpretation of Rule 26(c) is persuasive authority." (citation omitted)).

that the defendant has engaged in prior criminal activity. The balance we strike today cuts to the heart of our system's conceptions of fair trial and fair play.

Thus, we affirm the court of appeals' finding that armed robbery is not a crime of "dishonesty or false statement," rendering it admissible pursuant to Rule 609(a)(2), SCRE.

II. Harmless Error

Next, the State argues that any error in admitting the prior armed robbery convictions was harmless beyond a reasonable doubt. We agree.

While we agree with the court of appeals that in many instances, the admission of identical prior convictions for impeachment purposes enhances its prejudicial nature, it does not conclusively render the error so prejudicial that it is not subject to a harmless error analysis. Rather,

> [w]hether the improper introduction of this evidence is harmless requires us to look at the other evidence admitted at trial to determine whether the defendant's "guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached."

State v. Brooks, 341 S.C. 57, 62–63, 533 S.E.2d 325, 328 (2000) (quoting *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993)).

Here, the other evidence implicating Respondent in these crimes was overwhelming. Respondent was positively identified by several employees who recalled Respondent's distinctive facial features and clothing. Furthermore, one of the employees watched as Respondent's accomplice drove him away from the scene in a dented gray truck, which the police stopped a only a short distance away within minutes after the employees reported the robbery. Inside the getaway vehicle, police found Respondent crouching in the floorboard area, sitting adjacent to a gun and a bag of money matching the employees' descriptions.

Therefore, in spite of the error in admitting Respondent's prior convictions for armed robbery, we find such error was harmless beyond a reasonable doubt, and we reverse the part of the court of appeals' decision finding otherwise. *See, e.g.*, *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) ("'Harmless

beyond a reasonable doubt' means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt.").[8]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals is

REVERSED IN PART AND AFFIRMED IN PART.

KITTREDGE and BEATTY, JJ., concur. HEARN, J., concurring in a separate opinion in which PLEICONES, J., concurs.

[8] The State also contends that the court of appeals erred in refusing to remand the case to the trial court, and in conducting the Rule 609(a)(1) balancing test itself. Our harmless error analysis renders the remand issue moot.

JUSTICE HEARN: I concur in the result reached by the majority. However, I would reverse the court of appeals' opinion and hold the trial court did not err in admitting Broadnax's prior convictions because armed robbery is a crime involving dishonesty under Rule 609(a)(2) of the South Carolina Rules of Evidence.

I appreciate the majority's discussion of the similar federal rule and its accompanying legislative history. As the majority correctly asserts, the federal rule has been interpreted to limit the application of Rule 609(a)(2), FRE to those prior convictions of crimes whose central elements involve *crimen falsi*. *See United States v. Smith,* 551 F.2d 348, 362–63 (D.C. Cir. 1976) ("[I]n its broadest sense, the term 'crimen falsi' has encompassed only those crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth.").

However, the majority's analysis ignores that neither our rule nor its commentary, both of which were promulgated by this Court, contain any reference to *crimen falsi*. *Cf.* Rule 609 note ("Subsection (a) does change the law in South Carolina."). Further, I disagree with the majority that the common law somehow contains and thus preserves the concept that *crimen falsi* is the operative standard. Curiously, the sole case the majority cites to support this proposition, *State v. Peterson*, 35 S.C. 279, 14 S.E. 617 (1892), affirmed the trial court's admission of a prior conviction for the exact crime at issue today: robbery. *Id.* at 281, 14 S.E. at 618.

Accordingly, this Court's interpretation of Rule 609(a)(2), SCRE must be limited to its plain language. The Rule states:

> For the purpose of attacking the credibility of a witness,
>
> **(1)** evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

> **(2)** evidence that any witness has been convicted of a crime shall be admitted if it *involved dishonesty* or false statement, regardless of the punishment.

Rule 609(a), SCRE (emphasis added). As our court of appeals succinctly noted in *State v. Al–Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003), the operative word for this analysis is "dishonesty." As elucidated by that court:

> To restrict the application of Rule 609(a)(2) only to those offenses which evidence an element of affirmative misstatement or misrepresentation of fact would be to ignore the plain meaning of the word "dishonesty." "Dishonesty" is, by definition, a "'disposition to lie, cheat, or **steal.**'" "To be dishonest means to deceive, defraud or **steal.**" "'In common human experience[,] acts of deceit, fraud, cheating, or **stealing** . . . are universally regarded as conduct which reflects adversely on a man's honesty and integrity.'"

Id. at 425, 578 S.E.2d at 43 (internal citations omitted). Restricting our analysis—as we must—to the plain language of 609(a)(2), SCRE there is no doubt armed robbery constitutes a crime involving dishonesty. Stealing, even more so when done at gunpoint, is essentially the type of behavior reflecting adversely on one's character for truthfulness envisioned by Rule 609(a)(2).

Holding that armed robbery is a crime of dishonesty pursuant to Rule 609(a)(2) would avoid the perverse result the majority creates, where shoplifting is a crime of dishonesty pursuant to *State v. Johnson*, 334 S.C. 78, 87, 512 S.E.2d 795, 800 (1999), but armed robbery is not.[9] Further, it

[9] I do not believe the result in this case is dictated by stare decisis. As the majority points out, the Court's decision in *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155–56 (2006), dealt only with the question of whether prior firearm convictions involve dishonesty. Thus, the Court was not required to reach the same issue that is before us today. *See generally State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991) (Sanders, C.J.) ("[A]ppellate courts in this

comports with the outcome a majority of states have reached on the same issue. *See* Jane M. Draper, Annotation, *What Constitutes Crime Involving "Dishonesty or False Statement" Under Rule 609(a)(2) of Uniform Rules of Evidence or Similar State Rule—Crimes Involving Violence or Potential for Violence*, 83 A.L.R. 277 (2000) (compiling decisions from other jurisdictions); *see, e.g.*, *Alexander v. State*, 611 P.2d 469, 476 n.18 (Alaska 1980) ("It is the larceny element of robbery which makes such a conviction admissible as impeachment of a witness.").

Accordingly, I would hold the trial court did not err by allowing in evidence of Broadnax's prior convictions pursuant to 609(a)(2) because armed robbery is a crime involving dishonesty, and would reverse the contrary decision of the court of appeals.

PLEICONES, J., concurs.

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state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Fred W. Auman, III, Respondent.

Appellate Case No. 2015-001442

Opinion No. 27549
Submitted July 9, 2015 – Filed July 23, 2015

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, Esquire, of Bogan Law Firm and John S. Nichols, Esquire, of Bluestein Nichols Thompson & Delgado, LLC, both of 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 (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment. Respondent requests the disbarment be made retroactive to February 26, 2015, the date he was suspended and transferred to incapacity inactive status.[1] We accept the Agreement and disbar respondent from the practice of law in this state, with conditions that will be set forth more fully below. The disbarment shall be retroactive to the date respondent was placed on interim suspension and transferred to incapacity inactive status. The facts, as set forth in the Agreement, are as follows.

[1] *See In re Auman*, 411 S.C. 464, 769 S.E.2d (2015).

Facts

On February 12, 2013, a trust account check in the amount of $2,500 issued by respondent was presented to the bank. The check was paid by the bank despite there being insufficient funds in the account, resulting in an overdraft of $1,453.75. The lack of sufficient funds was caused by respondent's overpayment on a settlement he disbursed in October 2012.

On October 10, 2012, respondent deposited into his trust account a settlement of $25,000 obtained on behalf of a personal injury client. On October 12, 2012, respondent issued a check payable to his law firm's operating account in the amount of $4,000 for his portion of the fees. Respondent failed to inform his bookkeeper he issued the fee check.

On October 17, 2012, the client came to the office to sign the disbursement statement and receive her funds. Because the staff was unaware respondent had already written his own fee check, a second fee check was deposited into the law firm's operating account. Despite the overpayment of funds disbursed on behalf of the client, the trust account was not overdrawn until February 2013. The reason for the delay was that a check disbursed to a third party on behalf of the client was not negotiated until February. The delay created a "float" that kept the balance in the trust account above zero until the check was presented.

Respondent acknowledges his failure to obtain the client's consent to the disbursement of funds on his behalf prior to negotiating his fee check violated Rule 1.5(c), RPC, Rule 407, SCACR.[2] He further acknowledges his failure to discover the overpayment of funds on behalf of the client resulted from his lack of adequate management of his trust account and his failure to conduct required monthly reconciliations.

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[2] Rule 1.5(c) states: "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses the client will be expected to pay. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."

Indeed, during the course of its investigation, ODC's review of respondent's financial records revealed the following violations of Rule 1.15(c), RPC, and Rule 417, SCACR:

1. Respondent did not conduct monthly three-part reconciliations of his trust account. The two-part reconciliations that his staff did produce showed a negative journal balance month after month, but respondent took no action to determine the cause or rectify the problem.

2. Respondent did not maintain complete copies of records of trust account deposits or cancelled trust account checks.

3. Respondent did not maintain complete client ledgers.

Between December 2010 and March 2013, respondent made approximately forty withdrawals from his trust account, by checks payable to his law firm and electronic funds transfers to his law firm operating account, that were not earned fees. Respondent used the funds improperly removed from the trust account for office expenses, advanced costs for clients, payroll, and taxes. The total amount removed by respondent from the trust account for these improper purposes was approximately $270,250. At the time of his interim suspension, respondent should have had approximately $225,367.96 in trust for thirty-five clients. In addition, respondent had issued checks totaling approximately $39,085.87 that had not yet cleared the trust account. The balance in respondent's trust account at the time totaled approximately $53,649.30.

Law

Respondent's admits the misappropriation of funds from his trust account violated the following Rules of Professional Conduct: Rule 1.15(d)("Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall

promptly render a full accounting regarding such property."); Rule 1.15(g)("A lawyer shall not use or pledge any entrusted property to obtain credit or other personal benefit for the lawyer or any person other than the legal or beneficial owner of that property."); Rule 8.4(b)(It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.); and Rule 8.4(d)(It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.). Respondent also admits the allegations constitute grounds for discipline under Rule 7(a)(1), RLDE (It shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct.). Finally, respondent admits his conduct violates Rule 417, SCACR (financial recordkeeping).

Conclusion

In addition to consenting to disbarment, respondent has agreed to the following conditions:

1. Within two years of the date of the Court's opinion imposing a sanction, respondent will pay restitution in full to a list of clients in the Agreement pursuant to a payment plan approved by the Commission on Lawyer Conduct, or provide proof satisfactory to the Commission that the amount specified as owed to an affected individual or entity has otherwise been satisfied.[3] This restitution totals $241,399.61.

2. Within three years of the date of the Court's opinion imposing a sanction, respondent will pay the costs incurred in the investigation of this matter by ODC, pursuant to a payment plan approved by the

[3] The Agreement notes the Receiver currently holds some funds in trust. In addition, there are claims pending with the Lawyers' Fund for Client Protection. The Agreement states respondent's restitution obligation to any listed individual or entity will be reduced by the Commission proportionate to any funds paid to that individual or entity from either of these two sources.

Commission on Lawyer Conduct.[4]

3. Within three years of the date of the Court's opinion imposing a sanction, respondent will reimburse the Lawyers' Fund for Client Protection for all claims paid to clients on respondent's behalf, pursuant to a payment plan approved by the Commission on Lawyer Conduct.[5]

Finally, respondent has agreed that in addition to the requirements of Rule 30, RLDE, he will not be eligible for readmission until he completes the Bar's Legal Ethics and Practice Program's Law Office Management School and Trust Account School.

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactive to February 26, 2015. He shall also comply with the conditions set forth in the preceding paragraphs. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, and HEARN, JJ., concur. KITTREDGE, J., not participating.

[4] The Agreement notes this obligation is separate and apart from any obligation to reimburse the Commission for the Receiver's expenses. The Agreement states respondent's obligation to pay for the Receiver will be determined by the Court at the time of the termination of the Receiver's appointment.

[5] The Agreement notes this obligation is separate and apart from any obligation to reimburse the Lawyers' Fund for Client Protection for the Receiver's expenses. The Agreement states that if the Court orders the Lawyers' Fund to pay Receiver expenses, respondent's obligation to reimburse the Lawyers' Fund will be determined by the Court at the time of the termination of the Receiver's appointment.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Sara Jayne Rogers, Respondent.

Appellate Case No. 2015-001444

Opinion No. 27550
Submitted July 9, 2015 – Filed July 23, 2015

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Sara Jayne Rogers, Respondent, Pro Se.

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 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment. We accept the Agreement and disbar respondent from the practice of law in this state, with conditions that will be set forth more fully below. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent negotiated a plea agreement on behalf of a client which required the client to pay restitution, prosecution costs, and other fines and fees. Sufficient funds had to be deposited into respondent's trust account before the client could

plead guilty. The client provided respondent with a total of $157,500, in addition to respondent's fee. The client pled guilty and after all items were paid, $22,795 of the client's funds remained in respondent's trust account. Respondent did not return the funds to the client and made no further payments on the client's behalf, but failed to keep the client's remaining funds safe. The balance in respondent's trust account fell below $22,795 within three weeks and below $100 within a year. Respondent wrote to ODC before a complaint was filed, describing the matter as a fee dispute. However, by that time, respondent had admitted to the client that she did not have the balance of his money. The client filed a claim with the Lawyers' Fund for Client Protection and received an award of $22,795.

During the investigation of the matter, ODC subpoenaed respondent for her trust account records. In response, respondent provided a partial bank statement and copies of a few checks related to the client's case. Respondent did not provide any other trust account records despite repeated requests. Respondent did not keep a receipt and disbursement journal or client ledgers for her trust account and did not maintain a running balance. She never attempted to reconcile the account. Indeed, respondent did not have the knowledge and skills necessary to keep and balance a simple checkbook and made no effort to learn how to properly protect the funds entrusted to her care.

A review of the records provided by respondent's bank revealed that during a period of approximately two years, respondent deposited approximately $7,800 in unidentified funds into her trust account. During that same period of time, she disbursed more than $26,000 in funds without specifically identifying the client or matter involved, including nearly $25,000 in checks made payable to her. Respondent also issued checks to herself for fees and to others for costs in cases for which the records show no identifiable deposit. Respondent further made two cash withdrawals from her trust account totaling $901.27 and paid her CLE reporting fee and late fee with a trust account check.

By failing to return the client's funds to him and failing to keep those funds and other funds entrusted to her safe, respondent violated Rule 1.15, RPC (safekeeping property). She also violated Rule 1.15 and Rule 417, SCACR (financial recordkeeping), by failing to create and maintain the records required by Rule 417. Finally, by initially describing the matter to ODC as a fee dispute, respondent knowingly made a false statement of material fact in violation of Rule 8.1(b), RPC (a lawyer, in connection with a disciplinary matter, shall not fail to disclose a fact

necessary to correct a misapprehension known by the lawyer to have arisen in the matter) and Rule 417.

Matter II

Respondent accepted two checks, totaling $5,000, from a client for future fees and expenses. Respondent cashed the checks rather than deposit them into her trust account as the fee agreement indicated would occur. Despite not having funds for the client in her trust account, respondent issued several checks to herself and others from the account, noting the payments were related to the client's case. The client terminated respondent because she was not communicating with him and the case was not making progress. Respondent did not surrender the file to the client until 52 days after the client's new attorney requested it. When the client finally received the file, he learned for the first time that a temporary hearing had been scheduled and continued at least six times in his case. Respondent also failed to provide the client an accounting of his funds despite numerous requests and failed to honor her repeated promises for a refund. Respondent, on several occasions, claimed she had mailed a refund check when she had not done so. The Lawyers' Fund for Client Protection approved a $5,000 award for the client. Respondent failed to respond to the Notice of Investigation into the client's complaint.

Respondent failed to keep the client informed about the status of his case in violation of Rule 1.4, RPC (communication with the client). Respondent violated Rule 1.15, RPC, by failing to deposit the client's funds into respondent's trust account, making disbursements from the trust account when the client had no funds on deposit, and failing to provide an accounting of the client's funds upon request. Respondent violated Rule 1.16(d), RPC (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as surrendering papers and property to which the client is entitled and refunding any advance payment of fees or expenses that has not been earned or incurred), when she failed to timely surrender the client's file and return unearned fees. By falsely claiming she had mailed refund checks, respondent violated Rule 8.4(d), RPC (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation). Finally, by failing to respond to the Notice of Investigation, respondent violated Rule 8.1(b), RPC.

Matter III

Respondent accepted a total of $6,000 to represent a client, but did not deposit any

of the funds into her trust account even though the funds were unearned upon receipt. Respondent failed to adequately explain a procedural matter to the client, leaving him confused about the status of his case. Additionally, on more than one occasion, respondent told the client she was drafting emergency motions that she never completed or filed. One of those instances occurred after respondent was placed on interim suspension. Respondent did not tell the client she was suspended. Over the next two weeks, respondent failed to respond to the client. When she ultimately responded, respondent claimed she filed the motion and should hear something soon. No motion was filed and the client thereafter learned of respondent's suspension. Respondent failed to return unearned fees to the client. The client filed a claim with the Lawyers' Fund for Client Protection and received an award of $2,251.97. Respondent failed to cooperate with ODC's investigation into the matter.

Respondent violated Rule 1.4, RPC, by failing to adequately advise the client of the status of his matter. She violated Rule 1.15, RPC, by failing to deposit unearned fees into her trust account. By offering to file a motion when she was not authorized to practice law and later advising the client the motion was filed, respondent violated Rules 5.5 (a lawyer who is not admitted to practice in this jurisdiction shall not represent that the lawyer is admitted to practice law in this jurisdiction), 8.4(d) and 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice), RPC.

Matter IV

Respondent failed to cooperate in ODC's investigation of a complaint received from another client. Although the investigation did not reveal clear and convincing evidence of misconduct, respondent violated Rule 8.1(b), RPC, by failing to cooperate.

Law

Respondent admits she has violated the provisions of the Rules of Professional Conduct set forth above, as well as Rule 417, SCACR. She further admits those violations and the allegations upon which they are based constitute grounds for discipline under Rule 7(a)(1) and (5), RLDE (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers or to engage in conduct

tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Conclusion

In addition to consenting to disbarment, respondent has agreed to, within thirty days of imposition of discipline, enter into a restitution plan with the Commission on Lawyer Conduct to fully reimburse the Lawyers' Fund for Client Protection for all disbursements made on her behalf and to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Respondent further agrees to complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School prior to seeking readmission. Finally, respondent agrees she may not seek readmission until she has fully completed the terms of her restitution plan with the Commission.

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state. She shall also comply with the conditions set forth in the preceding paragraph. Within fifteen (15) 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 of Rule 413, SCACR, and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, and HEARN, JJ., concur.
KITTREDGE, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gerald Smith, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2014-000951

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 27551
Heard June 4, 2015 – Filed July 29, 2015

AFFIRMED

Attorney General Alan M. Wilson and Senior Assistant Attorney General David A. Spencer, both of Columbia, for Petitioner.

Appellate Defender Robert M. Pachak, of Columbia, for Respondent.

JUSTICE HEARN: Gerald Smith was indicted for murder and pled guilty to voluntary manslaughter in the killing of his oxycontin supplier. He was

sentenced to twenty-four years' imprisonment after the State requested he receive the maximum punishment. In this post-conviction relief (PCR) action, Smith alleges his attorney was deficient for failing to object to the State's recommendation after the State had previously promised to remain silent during sentencing. The PCR court denied Smith's application and the court of appeals reversed. *Smith v. State*, 407 S.C. 270, 754 S.E.2d 900 (Ct. App. 2014).

We agree with the court of appeals' excellent analysis that the State's recommendation of the maximum sentence was a breach of its agreement with Smith even where the State did not get the expected benefit of its bargain, and that Smith would not have pled guilty had he known the solicitor was going to breach the agreement; therefore, plea counsel's failure to object constituted ineffective assistance of counsel. *See Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000) (holding counsel was ineffective for failing to object when the solicitor recommended the trial judge impose the maximum sentence in contravention of its agreement to stay silent); *Jordan v. State*, 297 S.C. 52, 374 S.E.2d 683 (1988) (same).

We take this opportunity to explain the proper remedy under these circumstances. In *Jordan*, the Court reversed the PCR court's denial of relief and remanded for either a new trial or resentencing. *Id.* at 52, 374 S.E.2d at 684. In *Thompson*, the Court reversed the PCR court's denial of relief, and remanded solely for resentencing. 340 S.C. at 118, 531 S.E.2d at 297. Here, presumably following the precedent of *Thompson*, the court of appeals reversed and remanded for resentencing. We now clarify the proper remedy is a new trial.[1] Although Smith's attorney was deficient for failing to object at the sentencing hearing, the underlying question is whether Smith would have entered into the plea agreement had he known the State was going to breach the agreement. *See Jordan*, 297 S.C. at 54, 374 S.E.2d at 684 (stating a defendant alleging ineffective assistance of counsel during a guilty plea must show "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial") (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Therefore, the proper remedy for counsel's ineffective assistance is invalidation of the entire agreement.

[1] We note that Smith requested only a new trial—not resentencing—during his PCR hearing.

Nevertheless, we affirm the court of appeals' decision reversing and remanding for resentencing because neither party appealed from the mandate portion of the decision. The court of appeals' unappealed remand for resentencing is thus the law of the case. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."). Therefore, we affirm the decision of the court of appeals *in toto*.

TOAL, C.J., KITTREDGE, J., and Acting Justice James E. Moore, concur.
PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent/Petitioner,

v.

Robert Palmer, Petitioner/Respondent.

Appellate Case No. 2014-000954

and

The State, Petitioner/Respondent,

v.

Julia Gorman, Respondent/Petitioner.

Appellate Case No. 2014-001008

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 27552
Heard June 17, 2015 – Filed July 29, 2015

AFFIRMED IN PART; REVERSED IN PART

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Petitioner/Respondent.

Appellate Defender Robert M. Pachak, of Columbia, for Respondent/Petitioner, Robert Palmer.

Appellate Defender Susan Barber Hackett, of Columbia, for Respondent/Petitioner, Julia Gorman.

JUSTICE PLEICONES: Petitioners Julia Gorman and Robert Palmer were tried jointly for the death of Gorman's seventeen month-old grandson (victim). Palmer and Gorman, who lived together but were not married, were each convicted of homicide by child abuse (homicide), aiding and abetting homicide by child abuse (aiding and abetting), and unlawful conduct towards a child (unlawful conduct). On direct appeal, the Court of Appeals reversed both Palmer's and Gorman's aiding and abetting convictions, and a majority affirmed both petitioners' homicide and unlawful conduct convictions. *State v. Palmer*, 408 S.C. 218, 758 S.E.2d 195 (Ct. App. 2014). Judge Pieper dissented, and would have reversed all of the petitioners' convictions on the ground "the State did not present any direct or circumstantial evidence to reasonably prove which codefendant harmed the child." We granted both petitioners' and the State's petitions for writs of certiorari to review the directed verdict issues.[1] We affirm the Court of Appeals' reversal of both aiding and abetting convictions, and affirm the decision to uphold the denial of Gorman's homicide and unlawful conduct directed verdict motions. We reverse the Court of Appeals' affirmance of Palmer's convictions for homicide and unlawful conduct finding he was entitled to a directed verdict on both charges.

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[1] While we also granted Palmer's petition to review a proffer issue, Palmer did not brief the proffer issue on certiorari and it is therefore deemed abandoned. *See* Rule 208(b)(1)(D), SCACR; *see also Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006).

FACTS

The only contested issues here are the identity of the individual who harmed the victim and whether the other individual was aware of the abuse. Since this matter involves directed verdict questions, we begin with a review of the evidence in the light most favorable to the State. *E.g. State v. Buckmon*, 347 S.C. 316, 555 S.E.2d 402 (2001). In our review we rely solely on evidence from the State's case-in-chief in order to avoid any of the directed verdict issues that can arise when jointly tried codefendants blame each other in their defense cases. *See State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013) (waiver rule bars consideration of codefendant's testimony in reviewing denial of mid-trial directed verdict motion). Here, Gorman testified in her own defense and stated that Palmer was alone with the victim during the time when the fatal injury must have been inflicted. We do not rely on her trial testimony because it cannot be used against Palmer, and because no evidence adduced in the defense cases are necessary to a determination whether Gorman's directed verdict motions were properly denied.

The evidence shows Gorman's eighteen year-old daughter Cesalee traveled by bus to South Carolina with her child, the victim, in late June 2008. Cesalee and her mother had a difficult relationship and had long been estranged. On July 2, Cesalee flew back to her home in Arizona, leaving the victim in the petitioners' care. While there was overwhelming evidence that Gorman agreed to keep the victim while Cesalee packed her family's belongings for a move to the East Coast, Gorman told several people after the victim's injuries that Cesalee had abandoned the victim to her.

On July 1, the victim was taken to the doctor's office by Cesalee and Gorman, suffering from ant bites and allergies. He was prescribed a cream for the bites and a liquid antihistamine (Xyzal) for his allergies. The prescribed dosage for the Xyzal, which has a sedative effect, was 0.5 teaspoon per day. An appointment was set for July 8 so that he could receive immunizations. On July 7, after Cesalee had returned to Arizona, Gorman took the victim to the emergency room reporting he was suffering from projectile vomiting. The victim was observed, given a Pedialyte popsicle, and released.

When Gorman brought the victim back to the family practitioner on July 8, the office was aware of the emergency room visit the night before. The family practitioner examined the victim, determined he had recovered from the bites, the

allergies, and the nausea, and administered the vaccinations. She testified that she had examined the victim's head as part of the check-up and had no concerns, and also that while the victim was small for his age he was not malnourished. The doctor also testified she had no concerns about child abuse when she saw the victim in July.

Gorman repeatedly told medical personnel the victim was lethargic, and Palmer's statements also indicated the victim was not an energetic toddler. There was evidence from which a jury could find the victim's lethargy after July 1, when he was prescribed the sedating Xyzal, was attributable to Gorman's overdosing. At the emergency room visit on July 7, Gorman told medical personnel the victim was being given 1.5 teaspoons of Xyzal per day rather than the 0.5 teaspoons he had been prescribed. After the victim was fatally injured on July 14, Gorman told an emergency room (ER) nurse that the victim had been on Xyzal, and that she had been administering a dose of 2.5 teaspoons, five times the prescribed amount. In this statement, Gorman said the last dose had been given at 9:00 pm on July 11. On the other hand, while en route to the hospital on the 14th, Gorman told the EMT she had given the victim Xyzal on the 14th. The family doctor testified that when she saw the victim on July 8, he was no longer in need of this antihistamine.

On July 14, Gorman went to work, arriving at about 6:00 am, leaving Palmer alone with the sleeping victim. There was evidence that the victim was tired all day, and somewhat whiney. He ate breakfast and lunch, but according to Palmer, having been awakened at about 9:30 am, the victim did not fall asleep again until about 3-3:30 pm. Gorman arrived home around 4:00 pm. Gorman stated she went straight into the victim's room to check on him as she normally did when she first got home, and saw him sleeping soundly and breathing normally. Later she and Palmer checked on him from the doorway. Palmer agreed that they had checked on the sleeping victim from the doorway after Gorman arrived home, and that no one checked on him again until after they had eaten dinner around 6:00 pm. Both petitioners maintained that after dinner Gorman returned to the bedroom alone, and she told officers she found the victim "slack," making "really strange noises," and with saliva at his mouth. She picked him up, and brought him to Palmer. Palmer said the victim was limp but seizing intermittently, with his fists balled up. Gorman agreed the victim was fine until she alone checked on him around 6:00 pm.

Horry County Fire and Rescue were dispatched at 6:07 pm following a 9-1-1 call made by Gorman, and arrived at the home at 6:13 pm. When they arrived, Palmer was holding the victim who was actively seizing and whose "pretty grave" condition was immediately apparent. Petitioners told the responder the victim had not been sick and had been found in this condition during a nap. The responder started an I.V. and gave oxygen, noting the victim was making unusual breathing sounds. EMS paramedics took over at 6:20 pm when the first responder brought the victim to their ambulance as it arrived. The victim was still seizing and 'posturing,' an involuntary movement where the limbs extend and retract that only occurs in intracranial injury cases. He also exhibited a "right side gaze," with his eyes pointing towards the injured side of the brain. His pupils were dilated but responded sluggishly and the seizures stopped as Valium was administered.

The EMS medic testified Gorman rode in the front of the ambulance to the hospital. Gorman said the victim had not been sick recently and had not fallen, but that she had given him a dose of Xyzal that day. Gorman told her about the ant bites and stated the victim had been whiney and lethargic since then. She also made a statement which the medic paraphrased as "She's raised several children in her lifetime and never seen such a bad one." When the ambulance arrived at the hospital at about 7:00 pm, the victim was still posturing, his right-side gaze had not changed, his pupils were more dilated, he was still breathing very rapidly, and his heart rate was elevated.

The ER nurse testified that on arrival the victim was unresponsive, posturing, seizing, and had dilated pupils. Gorman responded to the nurse's questions. She said the victim had not fallen or hit his head on anything before the seizures started. She also told the ER nurse that he was on Xyzal, but she had not given him any since administering 2.5 teaspoon on July 11. The nurse observed Palmer was very concerned and wanted to talk to and touch the seizing victim, in contrast to Gorman's behavior.

The ER nurse testified that upon the victim's arrival at the Conway Hospital at 7:02 pm another nurse had scored the victim at a 5 on the Glasgow Coma Score. At 8:30 pm his score had dropped to a 3. The scale runs from 15 to 3, and anything below a 9 is "gravely concerning." The victim's breathing was labored and grunting, and the nurse testified that human life cannot be maintained at that level of effort. His heart rate never dropped below 142, when a normal rate would have been 110 to 115. The ER nurse watched as the C.A.T. scan was performed,

immediately saw the skull fractures, and some bleeding at the back of the brain, and called the ER doctor. She testified the fractures and bleeding were consistent with violent trauma, and she also observed some abnormal bruising on the victim's body. Palmer reported the victim had been dragging his foot earlier in the day. Gorman told the nurse the victim's mother was a drug addict who dropped the victim off and whose whereabouts were unknown. The victim, who was very thin, remained at the Conway Hospital from 6:58 pm until he was helicoptered to the Medical University of South Carolina (MUSC) in Charleston at 10:33 pm.

The Conway ER doctor testified the victim arrived "in extremist [sic] immediately evident" "showing signs of a severe neurological injury." The victim appeared to be breathing on his own but was posturing. He was immediately intubated to maintain breathing. The C.A.T. scan showed severe trauma to the skull and brain such that "impending death is what it [sic] was concerned." The brain had hemorrhages and edema and there was a loss of gray-white matter distinction indicating the death of brain tissue.

The victim's father arrived in Charleston from Virginia on Monday, July 15, after Gorman called him during the evening of July 14 to say the victim was being airlifted to MUSC. After this conversation, the father called to speak to the doctor at the Conway Hospital, and based on that conversation, the father filed a police report. The father called Cesalee in Arizona but neither Palmer nor Gorman had tried to reach her. Cesalee flew to Charleston, and after consulting with the doctors who told them only machines were keeping the victim alive, the parents had him baptized and then donated his organs. The victim was removed from life support on July 16.

A MUSC neuro-radiologist testified as an expert witness, having examined the medical reports and C.T. scans performed at Conway Hospital on July 14 and at MUSC on July 15. Those scans showed the victim suffered comminuted fractures,[2] severe swelling of the brain, blood around the brain, and the loss of gray-white differentiation which indicates brain tissue has died. The victim's skull fractures were the result of severe traumatic force of a type most commonly seen following an automobile accident. The victim had no chance for a meaningful recovery. The bleeding was acute and the fractures showed no signs of healing.

[2] In a comminuted fracture the bone is broken into multiple pieces.

The neuro-radiologist testified a person suffering the type of injury inflicted upon the victim would be immediately severely symptomatic, exhibiting:

(1) alteration or loss of consciousness;

(2) alteration in breathing;

(3) likely seizures;

(4) inability to walk, move, or eat;

(5) possible foaming at the mouth; and

(6) no purposeful movement.

The expert testified the severity of the fractures were of a type caused either by an automobile accident, by having been dropped from a two-story building, or from intentionally applied force. While she could not give an exact time, the onset of symptoms would have been very soon after the injury, if not immediate.

The forensic pathologist autopsied the victim's body on July 19, 2008. She found the head injuries were caused either by a single hit or compression, or possibly by one hit on each side of the victim's head. She testified the injury occurred between July 11 and July 14.[3]

Finally, a MUSC doctor who serves as director of the Violence Intervention and Prevention Division in the pediatric department testified. She observed the victim on July 15, finding him very thin, on a respirator, and totally unconscious with fixed and dilated pupils. In addition to the skull fractures, she found a number of unexplained/atypical bruises on the victim: one on his upper right thigh close to his buttocks; one close to his waist; and one on the inside of his leg. The bruises could have been inflicted contemporaneously with the head injuries. The head injuries had to have been inflicted on July 14, and it would have taken less than a minute to fracture the victim's skull. Finally, this doctor opined that the injury must have been inflicted on the 14th as the victim would have died very soon after if not

[3] The State amended the indictments before trial to specify the fatal injury occurred on July 14.

placed on a respirator. She estimated the injuries were inflicted within three hours of his arrival at the Conway Hospital ER at 6:58 pm on July 14.

ISSUE

> Whether the Court of Appeals erred in failing to reverse petitioners' convictions for homicide by child abuse and unlawful conduct towards a child, and in reversing the petitioners' convictions for aiding and abetting homicide by child abuse?

ANALYSIS

In this case we are primarily concerned with whether the State presented any evidence of identity to support the submission of the three charges to the jury. Since the issues all involve a directed verdict, we review the evidence in the light most favorable to the State. *State v. Buckmon*, *supra*. We begin with the homicide by child abuse charges.

A. Homicide by Child Abuse.

The application of the directed verdict standard in a circumstantial evidence case where one of two persons must have killed a child is set forth in *State v. Hepburn*, 406 S.C. 416, 753 S.E.2d 402 (2013):

> Homicide by child abuse cases are difficult to prove because often the only witnesses are the perpetrators of the crime. What separates this case from a case like *Smith*[4] is that every piece of the State's evidence establishes (1) Appellant was asleep at the time the victim sustained her injuries, (2) Appellant was only awoken after Lewis retrieved the unresponsive victim from her crib, and (3) the victim appeared to be acting normally until after Appellant put the victim to sleep and went to sleep herself. As in *Smith*, medical testimony adduced at trial indicated that the victim would not have appeared "normal" within a short period of time after her injuries were inflicted due to the nature

[4] *State v. Smith*, 359 S.C. 481, 597 S.E.2d 888 (Ct. App. 2004).

> and extent of her neurological injuries. However, there is no evidence that Appellant herself was aware of the victim's injuries, let alone caused them. Thus, we find this case distinguishable from *Smith*.

In *Smith*, the mother and her boyfriend were jointly tried for the death of the mother's young daughter. Both defendants were convicted of homicide by child abuse and aiding and abetting that offense. On appeal, the boyfriend argued he was entitled to a directed verdict on both counts as the evidence showed, at most, his mere presence at the crime scene. The Court of Appeals disagreed, finding the evidence showed the two defendants were together with the child for the entire period during which the child was shaken with sufficient force to kill her, and suffered more than one blow to the head inflicted with sufficient force to fracture her skull. Further, the evidence showed that her impairment would have been obvious. In addition, there was "evidence of a probable cover-up."

Here, the State's evidence narrowed the window of opportunity during which the fatal injury must have been inflicted to between 4:00 pm and 6:05 pm on Sunday, July 14. The State's evidence placed both petitioners at the home during this period. Just as the only evidence in *Hepburn* was that the appellant was asleep at all critical times, the only evidence here was that the child was sleeping and breathing normally until Gorman found him in distress shortly after 6:00 pm. Further, the present cases are distinguishable from *Smith* in that petitioners were not together at all relevant times, and unlike *Smith*, where the only evidence was the child's injuries would have been immediately apparent, here there was evidence that a layperson might not be able to distinguish between a sleeping child and an unconscious one. Finally, unlike *Smith*, the State presented no "evidence of a probable cover-up."

We hold there is sufficient evidence to uphold the Court of Appeals' ruling that the motion for a directed verdict on homicide by child abuse charge was properly denied as to Gorman, but hold there is no evidence to support the denial of Palmer's motion. The State's evidence places Gorman alone with the victim at 4:00 pm when she first returned home and again at 6:00 pm when the victim was found in grave distress. The medical evidence would support a finding that Gorman inflicted the fatal blow when she first returned home and that when she and Palmer checked on the child from the doorway at 4:15 pm, the victim's injuries may not have been apparent to a layperson. Alternatively, there was evidence that the

blow(s) must have been inflicted immediately preceding the expression of symptoms, which is evidence from which a jury could conclude that Gorman injured the child when she went alone to check on him at 6:00 pm. Further, Gorman admitted mistreating the victim by shaking, spanking, and overdosing him, and numerous witnesses testified to her unusual affect and statements following the child's injury.

There was sufficient circumstantial evidence that Gorman committed homicide by child abuse, but there is no evidence in the case-in-chief that Palmer was alone with the victim after around 3:30 pm, when the victim fell asleep. Thus, as in *Hepburn*, the State produced no evidence that Palmer "was aware of the victim's injuries, let alone caused them." *Hepburn*, 406 S.C. at 442, 753 S.E.2d at 416.

B. Unlawful Conduct Towards a Child.

The Court of Appeals upheld the trial court's denial of both petitioners' motions for directed verdicts on the charges of unlawful conduct towards a child in violation of S.C. Code Ann. § 63-5-70 (2010).[5] This statute provides:

> (A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
>
> > (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
> >
> > (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
> >
> > (3) willfully abandon the child.

We find there is no evidence in this record that Palmer either harmed the victim or was aware Gorman was harming him. In fact, the State does not contest Palmer's entitlement to a directed verdict on this charge in its respondent's brief on

[5] At the time of the petitioners' indictment this statute was codified as § 20-7-50.

certiorari. On the other hand, Gorman told at least two people that she was continuing to give the victim Xyzal, which has a sedative effect, after it was no longer medically indicated, and in amounts three to five times the recommended dosage. This alone is some evidence she placed the victim at an unreasonable risk of harm. Further, she admitted lacking patience, smacking the victim on his hands and his diapered behind, and shaking him, but not hard. From this evidence, a jury could find Gorman acted maliciously in causing bodily harm, as reflected in the unusual bruises found on the victim's body on July 14.

We affirm the Court of Appeals' decision to affirm the trial court's denial of Gorman's directed verdict motion on the charge of unlawful conduct towards a child, but reverse its decision as to Palmer's motion.

C. Aiding and Abetting Homicide by Child Abuse.

The Court of Appeals reversed both petitioners' convictions for aiding and abetting homicide by child abuse, stating simply "we find the State presented no direct evidence and insubstantial circumstantial evidence that either Palmer or Gorman knowingly undertook any action to aid or abet that abuse." *State v. Palmer*, 408 S.C. at 234, 758 S.E.2d at 205. The State contends the Court of Appeals erred in reversing these convictions. We disagree.

A person aids and abets homicide by child abuse under S.C. Code Ann. § 16-3-85(A)(2) (2003) when he "knowingly aids and abets another person to commit child abuse or neglect [which] results in the death of a child under the age of eleven." The State would have the Court speculate, despite the absence of any evidence, that both petitioners actually entered the victim's bedroom around 4:30 pm where one abused him in the presence of the other, who thus aided and abetted the perpetrator by failing to seek medical help for an hour and a half. *Compare Smith*, *supra*. There is no evidence other than rank speculation that such an incident occurred. Moreover, while "omission which causes harm" can constitute aiding and abetting child abuse or neglect (§ 16-3-85(B)(1)), there is no evidence that more prompt treatment would have mitigated the victim's injuries and thus we do not perceive potential liability for the non-abuser even if he or she were aware of the abuse. For this reason, even were there evidence that Palmer had hurt the victim during the day while alone, there is no evidence that any delay in seeking medical attention by Gorman caused the victim harm beyond that inflicted by the perpetrator. Finally, *State v. Lewis*, 403 S.C. 345, 743 S.E.2d 124 (Ct. App. 2013)

cert. dismissed as improvidently granted 411 S.C. 647, 770 S.E.2d 398 (2015), establishes that neither knowledge of another's intent to commit a crime nor failure to act to stop abuse are sufficient to deny a directed verdict on a charge of aiding and abetting homicide by child abuse. *Lewis*, 403 S.C. at 356, 743 S.E.2d at 129-130.

We therefore affirm the Court of Appeals' decision to reverse the trial court's denial of each petitioner's motion for a directed verdict on the charge of aiding and abetting homicide by child abuse.

CONCLUSION

We affirm the Court of Appeals' ruling on the aiding and abetting homicide by child abuse convictions. We affirm the Court of Appeals' decision to the extent it upholds the denial of Gorman's directed verdict motions on the charges of homicide by child abuse and unlawful conduct towards a child, but reverse its decisions as to Palmer. For these reasons, the decision of the Court of Appeals is

AFFIRMED IN PART; REVERSED IN PART.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Amber Johnson, Petitioner,

v.

Stanley E. Alexander, Mario S. Inglese and Mario S. Inglese, PC, of whom Stanley E. Alexander is the Respondent.

v.

Mario S. Inglese and Mario S. Inglese, PC, Third Party Plaintiffs,

v.

Charles Feeley, Third Party Defendant.

Appellate Case No. 2014-001167

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
The Honorable J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27553
Heard June 2, 2015 – Filed July 29, 2015

REVERSED AND REMANDED

Mary Leigh Arnold, of Mary Leigh Arnold, PA, of Mt. Pleasant; Justin S. Kahn and Wes B. Allison, both of Kahn Law Firm, LLP, of Charleston, for Petitioner.

Joel W. Collins, Jr., of Collins & Lacy, PC, of Columbia, and Robert F. Goings, of Goings Law Firm, LLC, of Columbia, for Respondent.

JUSTICE HEARN: In this attorney malpractice case, Amber Johnson alleges her closing attorney, Stanley Alexander, breached his duty of care by failing to discover the house Johnson purchased had been sold at a tax sale the previous year. The trial court granted partial summary judgment in favor of Johnson as to Alexander's liability. On appeal, the court of appeals held Alexander could not be held liable as a matter of law simply because the attorney he hired to perform the title work may have been negligent. Instead, the court determined the relevant inquiry was "whether Alexander acted with reasonable care in relying on [another attorney's] title search"; accordingly, it reversed and remanded. *Johnson v. Alexander*, 408 S.C. 58, 64, 757 S.E.2d 553, 556 (Ct. App. 2014). We disagree and find the trial court properly granted summary judgment as to liability. We therefore remand to the trial court for a hearing on damages.

FACTUAL/PROCEDURAL BACKGROUND

Alexander acted as Johnson's closing attorney when she purchased a home in North Charleston on September 14, 2006. The title examination for the home had been performed by attorney Charles Feeley at the request of Johnson's previous attorney, Mario Inglese. Alexander purchased the title work from Inglese and relied on this title exam in concluding there were no back taxes owed on the property. Thereafter, Johnson learned the house had been sold at a tax sale and she did not have title to the property. In fact, the property had been sold October 3, 2005, almost a year prior to Johnson's purchase. Because of the title issue, the mortgage payments on the home ceased and the property eventually went to foreclosure.

Johnson brought this cause of action for malpractice, breach of fiduciary duty, and breach of contract against Alexander and Inglese. Specifically, Johnson alleged the attorneys owed her a duty to perform a complete title exam on the

property to ensure she received good and clear title.

Johnson moved for partial summary judgment as to Alexander's liability. At the hearing, Johnson submitted the affidavit of Mary Scarborough, the Delinquent Tax Collector for Charleston County. She attested that she "had direct and personal knowledge that information regarding delinquent taxes for real properties located in Charleston County, South Carolina, was readily and publicly available in July, August and September of 2006" in the Office of the Register Mesné Conveyance for Charleston County via a mainframe database. Furthermore, she stated that the Delinquent Tax data for Charleston County real properties has been publicly available on a mainframe database since 1997, when she helped design the system currently in use.

Alexander presented an affidavit from Feeley stating that although he could not remember the specific details of this title exam, he conducted all his examinations the same. Feeley further detailed his process at length, explaining his reliance on the Charleston County Online Tax Systems and his practice of searching back ten years of tax payments. He indicated his notes showed he found no back taxes due or owing. Feeley also attested that a prior tax sale would not have been disclosed in the chain of title for this property or made publically available in the RMC office at the time of the title examination and closing in 2006 because the tax sale deed was not recorded until December 12, 2006.

The circuit court granted Johnson's motion as to Alexander's liability. The court relied heavily on Alexander's pleadings and admissions in his deposition that as a closing attorney he had a responsibility to ensure marketable title. Additionally, the court found Alexander had proximately caused Johnson's damages, but left the determination of the amount for a later hearing.

On appeal, the court of appeals reversed and remanded, holding the circuit court incorrectly focused "its inquiry on whether an attorney conducting a title search on this property should have discovered the delinquent taxes from 2003 and 2004 and the tax sale from 2005." *Johnson*, 408 S.C. at 62, 757 S.E.2d at 555. Instead, the court of appeals held the proper question was "whether Alexander acted reasonably under the existing circumstances in relying on the title search performed by Feeley." *Id.* at 63, 757 S.E.2d at 555. Finding there was a genuine issue of material fact as to whether Alexander acted reasonably, the court of appeals reversed the grant of summary judgment and remanded for trial. *Id.* at 64,

757 S.E.2d at 556. This Court granted certiorari to review the opinion of the court of appeals.

ISSUE PRESENTED

Did the court of appeals err in reversing the circuit court's grant of summary judgment and remanding the case for trial?

STANDARD OF REVIEW

When reviewing a grant of summary judgment, this Court applies the same standard as the circuit court pursuant to Rule 56(c), SCRCP. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the Court views the evidence and all reasonable inferences that may be drawn in the light most favorable to the non-moving party. *Evening Post Pub. Co. v. Berkeley Cnty. Sch. Dist.*, 392 S.C. 76, 81–82, 708 S.E.2d 745, 748 (2011). To withstand a summary judgment motion in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

LAW/ANALYSIS

Johnson argues the court of appeals erred in reversing the circuit court's grant of summary judgment because it misapprehended the proper standard of care. Specifically, Johnson argues the court of appeals erred in holding the requisite inquiry is whether an attorney reasonably relied on another attorney's work where that work is outsourced. Johnson contends that an attorney should be liable for negligence arising from tasks he chose to delegate unless he has expressly limited the scope of his representation. We agree.

In a claim for legal malpractice, the plaintiff must prove: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010). An attorney is required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the

profession. *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000).

In determining the scope of Alexander's duty, we accept his consistent characterization of this responsibility—ensuring Johnson received good title. In her complaint, Johnson alleged "[d]efendants had professional duties to ensure that Plaintiff was receiving good and clear title to the subject property free of any encumbrances, liens, or clouds on title before conducting the closing and if there was a problem after the closing, to correct said deficiencies and/or advise Plaintiff how to correct said deficiencies." In Alexander's answer he *admitted* those allegations. Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions. *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) ("[T]he general rule[is] that the parties to an action are judicially concluded and bound by such unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible."). Additionally, during Alexander's deposition, he plainly conceded he owed a duty to Johnson to have clear title:

> Q. Alright. And you were hired, or you were her attorney for this closing? Right?
>
> A. Correct.
>
> Q. And you had responsibility to make sure that she got good and marketable title? Correct?
>
> A. Correct.
>
> Q. And that's one of the responsibilities of a lawyer handling the closing, representing the purchaser? Right?
>
> A. Correct.

Alexander cannot now assert his duty was anything other than what he has admitted—that he ensure good and clear title.

However, even absent Alexander's admissions, we find the court of appeals erroneously equated delegation of a task with delegation of liability. Certainly, Feeley's negligence is the issue here, but that does not displace Alexander's ultimate responsibility. While an attorney may delegate certain tasks to other attorneys or staff, it does not follow that the attorney's professional decision to do so can change his liability to his client absent that client's clear, counseled consent. *See* Rule 1.8(h), RPC, RULE 407, SCACR ("A lawyer shall not. . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement."). Thus, Alexander owed Johnson a duty and absent her agreement otherwise, he was liable for that responsibility regardless of how he chose to have it carried out.[1]

We therefore agree with Johnson that an attorney is liable for negligence in tasks he delegates absent some express limitation of his representation. Stated another way, without an express limitation in representation, attorneys cannot delegate liability for tasks that are undertaken in carrying out the duty owed the client. *See* 7A C.J.S. Attorney & Client § 289 ("Since an attorney has, in general, no authority to employ another attorney to attend to the matters in which the first attorney has been retained, it follows that, if the first attorney does entrust to another the performance or prosecution of matters entrusted to him or her, the first

[1] Alexander separately alleges that because Johnson knew he did not personally perform the title examination, its accuracy was not within the scope of his representation of her. We find this contention unpersuasive. Pursuant to Rule 1.2(c), of the Rules of Professional Conduct, Rule 407, SCACR, "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." In determining whether an attorney obtained informed consent, comment 6 to Rule 1.0 of the Rules of Professional Conduct, Rule 407, SCACR, clarifes that "A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid." Even assuming Johnson knew Alexander purchased the title work from another attorney, this does not alleviate Alexander's responsibility to ensure good title. It would only indicate she is aware he has delegated a task.

attorney becomes liable to the client for any negligence or wrongdoing on the part of the other attorney."). A holding to the contrary would effectively allow an attorney to independently limit the scope of his representation through the manner in which he performs his duties instead of being bound by what the client understands his responsibilities to be.

Applying this standard to the facts, we find the grant of summary judgment was proper because there is no genuine issue of material fact as to liability. The circuit court relied on Scarborough's affidavit in concluding Johnson "proved to the Court what the public records reflected at the time of closing—taxes for the Property were delinquent for the tax years 2003 and 2004 and the Property had been sold on October 5, 2005 at a tax sale." Although Alexander submitted an affidavit by Feeley stating he would have discovered the information if it was public, we agree with the circuit court's ultimate conclusion that there was no issue of fact. Feeley admitted he did not remember the specifics of that transaction and provided no documentation supporting his assertion that he performed a ten year search and found no notice of the sale.

Furthermore, we find the circuit court properly held there was no genuine issue of material fact as to proximate cause. Because of Alexander's failure to discover the tax sale, Johnson did not receive marketable title—or any title—to the property she purchased. She was therefore unable to sell or rent the property. Alexander's arguments that the property foreclosure was due to Johnson's own negligence in failing to pay the mortgage will certainly be considered during the hearing on damages; however, that allegation does not alter the fact that Johnson's purchase of the property that had already been sold was a direct result of his failure to ensure she received good title.

CONCLUSION

Based on the foregoing, we reverse the opinion of the court of appeals and hold an attorney is liable for negligence in tasks he chooses to delegate absent an express limitation of his representation. Finding Alexander breached his duty and damages resulted, we reinstate the grant of partial summary judgment as to Alexander's liability and remand for a determination of damages.

TOAL, C.J., PLEICONES, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Norman J. Hayes, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-209506

ON WRIT OF CERTIORARI

Appeal From Lexington County
L. Casey Manning, Plea Judge
G. Thomas Cooper, Probation Revocation Judge
Edward W. Miller, Post-Conviction Relief Judge

Opinion No. 5335
Heard May 4, 2015 – Filed July 29, 2015

REVERSED

Appellate Defender Laura Ruth Baer, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Daniel Francis Gourley, II, both of Columbia, for Respondent.

SHORT, J.: Norman J. Hayes (Petitioner) appeals from the denial and dismissal of his application for post-conviction relief (PCR), arguing his sentence exceeded the maximum authorized by law because sentencing credit for time served was not properly applied by the South Carolina Department of Corrections (the Department). We reverse.

I. BACKGROUND

In 2004, Petitioner pled guilty to possession of crack cocaine and criminal conspiracy. The trial judge sentenced Petitioner to five years' imprisonment, suspended to time served and three years' probation; ordered Petitioner to pay $225; and credited Petitioner with 240 days of time served.

Petitioner was subsequently charged with various probation violations, and on July 30, 2010, the probation revocation judge revoked his probation and reinstated his five-year suspended sentences. On rehearing, the probation revocation judge reduced the reinstated sentences to three years and terminated probation, noting Petitioner had previously served 240 days; thus, he would receive credit for the 240 days served. On September 27, 2011, Petitioner filed his application for PCR, alleging he was being unlawfully detained because the Department did not apply the 240 days to his reduced sentence.

Michael Stobbe, the branch chief of release and records management for the Department, testified at the PCR hearing. Stobbe stated Petitioner served 240 days of pretrial detention, and when his probation was revoked, the Department subtracted 240 days from five years, "which gave him a total sentence of four years and 125 days and an incarcerative sentence of four years and 125 days." When asked whether the Department gave Petitioner credit for time served on the three-year sentence, the following colloquy occurred:

> A: Yes, sir, the 240 days was applied to his total sentence. In other words, five years minus the 240 days, which would give him a total sentence of [four] years and 125 days.
>
> Q: Was it applied to the three-year sentence that was modified on February 4th?

A: Yes, sir. The 240 days was applied to the remainder of the original five-year sentence.

Q: But it wasn't credited toward the three years that he was actually serving; is that right?

A: Well, you have a total sentence and an incarcerative sentence. Two hundred forty days, with a command of the English language, couldn't be reduced -- could not reduce the three years. So the 240 days reduced his total sentence from five years to four years and 125 days. The 240 days was not subtracted from the three years, no, sir.

Q: But it was subtracted from the five years that he was no longer serving?

A: No. As far as I know, on the Form 9 on both February 4, 2011, and July 30, 2010, the remainder of the original sentence on the Form 9 was never marked out. So he is still held responsible for the total sentence of five years minus the 240 days. That's what his parole date is based on.

Stobbe testified, "[T]he 240 days has got to come off the five years. It can't be subtracted from three years."

The Form 9 was created by the South Carolina Department of Probation, Parole and Pardon Services. The Form 9 includes a charging section, listing the probation conditions the Petitioner is alleged to have violated and the probation revocation judge's findings on the allegations. The second section was prefaced, "Therefore, IT IS ORDERED that:" and followed by numerous sentencing choices. In this case, the judge ordered "the suspended sentence be revoked and the [Petitioner] be required to serve _3_ . . . years, the remainder of the original sentence, and/or pay $ XX TERMINATE PROBATION." The sentence entitled "Additional Conditions ordered by the Court" included the judge's statement, "CONVERT FINE TO CIVIL JUDGMENT." The third section of the Form 9 included two sentences,

which the judge checked as applying in this case.[1] First, "[t]he defendant is given credit for pre-revocation hearing detention time on current probation violation . . . ." Second, "[t]he defendant has previously served 240 days on this sentence." In parentheses beneath the second sentence, the form reads, "split sentence time and/or prior partial revocation time."

In response to the PCR court's questions, Stobbe admitted if the Form 9 had stated "three years" and "the remainder of the original sentence" language was crossed out, the Department would consider Petitioner's sentence would be three years. Stobbe further stated if "Credit for 240 days time served" had been written in the portion of the Form 9 providing, "Additional Conditions ordered by the Court," the Department would have given Petitioner the credit for 240 days on the three-year sentence. Finally, Stobbe stated if the probation revocation court had omitted the sentence, "The defendant previously served 240 days on this sentence," it "would have sort of put us into the investigative mode" to determine if Petitioner was entitled to time served on his three-year sentence.

Petitioner testified that when he began serving the revoked portion of his sentence, his projected release date was March 2013. He stated when his sentence was reduced to three years, his projected release date became April 2012, including good time credit. Petitioner further stated his projected release date at the time of the PCR hearing was February 18, 2012, which also included earned work credits.

In its order dismissing Petitioner's application, the PCR court noted Petitioner's original sentence was a split sentence,[2] the "time served" was Petitioner's pre-sentence detention of 240 days, and "he was given credit for that time by being released directly from sentencing to probation." The PCR court found the probation revocation judge "simply noted that [Petitioner] had previously served 240 days on this sentence, but [the probation court] did not, and should not, have awarded double credit for the 240 days . . . ." The PCR court further found when a court imposes a split sentence, "time served prior to trial should not be used to calculate the amount of time a probationer must serve on a reinstated sentence,

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[1] A third sentence relating to electronic monitoring was also included in this section.

[2] "[A] 'true split sentence[]' occurs when the judge sentences the defendant to incarceration but suspends a portion of the term." *Franklin v. State*, 545 So.2d 851, 852 (Fla. 1989).

because the pretrial detention time was already awarded to satisfy the time served portion of the split sentence." The court found the Form 9 does not change the fact that Petitioner had already received credit for his time served and the only sentence is the one imposed by the original sentencing judge.[3] The PCR court dismissed Petitioner's application, and this petition for a writ of certiorari followed.

III. STANDARD OF REVIEW

In an action for PCR, an appellate court reviews questions of law *de novo*, and it will reverse the PCR court's decision when it is controlled by an error of law. *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013).

IV. LAW/ANALYSIS

Petitioner argues the PCR court erred in dismissing his application because the plain language of the statute explaining how prison time should be calculated requires pretrial detention credit to be awarded to a partially revoked sentence. He argues the Department misapplied the statute, and notes if the Department applied the statute in the same way to a full revocation, the result would be a longer sentence than authorized by law. We agree.

The PCR statute allows an inmate to file an application for PCR when he claims his sentence has expired and he is being unlawfully held in custody. S.C. Code Ann. § 17-27-20(5) (2014). Because Petitioner is no longer incarcerated, this issue is moot. However, "an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001). The issue here is capable of repetition but evading review; therefore, we address the merits. *See Nelson v. Ozmint*, 390 S.C. 432, 433-34, 702 S.E.2d 369, 370 (2010) (addressing moot issue of the Department's calculation of the prisoner's sentence as not including good time credits or earned work credits because it was an issue that was capable of repetition, yet it would usually evade review).

[3] The PCR court took judicial notice that the Form 9 had been modified in recent years, but the section governing split sentences had remained the same for over ten years.

Section 24-13-40 of the South Carolina Code (Supp. 2014) provides the following:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when . . . (b) the commencement of the service of the sentence follows the revocation of probation, . . . the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

The requirement that a prisoner receive credit for time served is mandatory. *State v. Boggs*, 388 S.C. 314, 316, 696 S.E.2d 597, 598 (Ct. App. 2010). In *Boggs*, the sentencing judge indicated he did not want to give the defendant credit for time served and did not check off the box on the sentencing sheet indicating credit for time served. *Id.* at 316, 696 S.E.2d at 598. The judge acknowledged the defendant was entitled to credit but stated on the record that "when I don't check it off" the Department would not give the defendant the credit, concluding, "I am just telling you how it works in the real world." *Id.* at 315-16, 696 S.E.2d at 598. This court reversed the sentencing judge, finding the statutory credit for time served was mandatory and "[a] judge's disappointment in the maximum sentence he can impose is not one of the exceptions to the mandatory language" in the statute. *Id.* at 316, 696 S.E.2d at 598.

Thus, a prisoner will receive credit for time served unless either (1) they were an escapee or (2) the prisoner was already serving a sentence on a different offense.

S.C. Code Ann. § 24-13-40 (Supp. 2014). Furthermore, section 24-21-460 of the South Carolina Code provides a court may "revoke the probation or suspension of [a] sentence" and has the discretion "to require the defendant to serve all or a portion only of the sentence imposed." S.C. Code Ann. § 24-21-460 (2007).

"Where the terms of a statute are clear, the court must apply those terms according to their literal meaning." *Allen v. State*, 339 S.C. 393, 395, 529 S.E.2d 541, 542 (2000). "The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand its scope." *Id.*

We find the PCR court erred as a matter of law when it determined a probationer who receives a split sentence should not receive credit for time served prior to trial against a reinstated sentence "because the pretrial detention time was already awarded to satisfy the time served portion of the split sentence." This finding contradicts section 24-13-40, which states the following: "[W]hen . . . (b) the commencement of the service of the sentence follows the revocation of probation, . . . the computation of the time served shall be reckoned from the date of the commencement of the service of the sentence. In every case . . . full credit . . . shall be given for time served prior to trial and sentencing." § 24-13-40. The statute does not make a distinction for split sentences; thus, under the plain language of the statute, we find the pre-trial detention time should apply against a probation revocation whenever a probationer receives a split sentence.

V. CONCLUSION

Based on the foregoing reasons, the decision of the PCR court is

REVERSED.

LOCKEMY and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Phillip Flexon, M.D., Respondent,

v.

PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center, Coastal Carolina Medical Center, Inc., Lifepoint Hospitals, Inc., and Tenet Healthsystems, Inc.,

Of Which Lifepoint Hospitals, Inc., is the Appellant.

Appellate Case No. 2013-002498

Appeal From Jasper County
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 5336
Heard June 10, 2015 – Filed July 29, 2015

AFFIRMED

Trudy Hartzog Robertson and Joseph Timothy Belton, both of Moore & Van Allen, PLLC, of Charleston, for Appellant.

William B. Harvey, III, of Harvey & Battey, PA, of Beaufort, for Respondent.

GEATHERS, J.: In this breach of contract action, Appellant Lifepoint Hospitals, Inc. (Lifepoint) seeks review of the circuit court's denial of its motion to compel arbitration. Lifepoint argues the circuit court incorrectly applied the law-of-the-case doctrine to the motion to compel. Lifepoint also argues the circuit court incorrectly applied the "commerce in fact" test to determine whether the physician

services performed by Respondent Phillip Flexon, M.D. affected interstate commerce and, thus, triggered the Federal Arbitration Act (FAA). We affirm.

FACTS/PROCEDURAL HISTORY

In the fall of 2006, Lifepoint and Flexon negotiated for Flexon's employment with PHC-Jasper, Inc., d/b/a Coastal Carolina Medical Center (PHC), in Hardeeville, South Carolina. Lifepoint owned Province Healthcare Company, which owned PHC. At the time, Flexon had a medical practice in Savannah, Georgia and was on the staff of Memorial University Medical Center (Memorial) in Savannah. However, Flexon was living in Hardeeville and desired to practice medicine there. Therefore, on December 18, 2006, Flexon and PHC executed a contract for Flexon to begin employment with PHC on March 15, 2007, for a five-year term (Agreement). Flexon's medical practice was to be located at 1010 Medical Center Drive in Hardeeville and "such other practice sites in Beaufort and Jasper Counties . . . reasonably designated by [PHC] from time to time." The Agreement prohibited any "transfer, assignment or other modification affecting the terms or conditions of the [Agreement]" unless "extenuating circumstances [were] shown to exist."

The Agreement contained the following provisions regarding litigation and arbitration:

> 13.4 **Governing Law and Venue.** This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of South Carolina. *Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within the State of South Carolina*, and the parties expressly waive the right to bring any legal action or claims in any other courts. The parties hereto hereby [sic] consent to venue in any state or federal court within the State of South Carolina having jurisdiction over the County for all purposes in connection with any action or proceeding commenced between the parties hereto in connection with or arising from this Agreement.
>
> 13.5 **Arbitration.** *Except as to the provisions contained in Articles VIII and IX* [Disclosure of Information and Covenant Not to Compete], the exclusive jurisdiction of

> which shall rest with a court of competent jurisdiction in the state where the hospital is located[,] *any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration* in the County, in accordance with the rules and procedures of alternative dispute resolution and arbitration . . . , and judgment upon any award rendered may be entered in any court having jurisdiction thereof.

(emphases added).

After Flexon began employment with PHC, he remained on the staff at Memorial and continued to see patients coming from Georgia. On or about June 30, 2007, Province Healthcare Company, Lifepoint's wholly owned subsidiary, sold PHC to Tenet Healthsystems, Inc. (Tenet). Tenet then presented Flexon with an "Amendment to and Assignment of Physician Employment Agreement" purporting to assign the Agreement to Tenet. Flexon refused to execute this document.[1]

On or about August 17, 2007, PHC changed its name to Coastal Carolina Medical Center, Inc. (Coastal). Approximately one year later, Flexon sent a formal notice of termination for cause to Coastal (formerly PHC). In May 2009, Coastal sent Flexon a letter demanding over $725,000 for amounts Coastal claimed it was owed pursuant to various provisions of the Agreement. Coastal also demanded that Flexon immediately cease working for Memorial.

On May 26, 2009, Flexon filed this breach of contract action against Coastal (a twice-removed subsidiary of Lifepoint), Lifepoint, and Tenet, alleging that prior to entering into the Agreement, Lifepoint failed to disclose it was in negotiations with Tenet for Tenet's purchase of PHC's (now Coastal's) assets. The Complaint stated Flexon's performance of the Agreement required him to close his practice in Savannah, "where he had privileges at surgical hospitals." The Complaint also alleged that during the negotiation of the Agreement, Lifepoint represented that PHC would purchase certain equipment needed by Flexon in the operating room

[1] Ironically, when Flexon was negotiating the Agreement with Lifepoint's CEO in 2006, Flexon mentioned he was glad he wasn't working for Tenet: "[W]e had multiple conversations about how awful Tenet was. That -- the Hilton Head [h]ospital, their problems, and that I -- that I was glad that I wasn't working for them."

and would recruit and hire an audiologist to be part of Flexon's practice but PHC later refused to honor these representations.

On October 23, 2009, Coastal filed a motion to compel arbitration, asserting the Agreement contained a valid and enforceable arbitration provision. During the motions hearing, Coastal stipulated that the arbitration provision in the Agreement violated the notice requirements of the South Carolina Arbitration Act but argued the FAA applied to the arbitration provision and, thus, required arbitration of the parties' claims. To support its argument that the Agreement evidenced a transaction involving interstate commerce, triggering the FAA,[2] Coastal referenced the Complaint's allegations that (1) Flexon had to "discontinue, close, and leave an established practice in Savannah, Georgia, where he had privileges at surgical hospitals" in order to sign the Agreement and (2) Lifepoint knew that Flexon "would have to close and terminate an established practice in Savannah in order to fulfill his obligations under the [Agreement]."

Additionally, Coastal referred to three of Flexon's interrogatory responses:

> [I]n an answer to an interrogatory that we filed, he said that many Savannah doctors stopped referring patients to Dr. Flexon after a [stock] purchase agreement occurred between our clients. I think the implication here is that he was getting business across state lines, and was relying on that business in order to have a successful practice.
>
> On Interrogatory Four, which was a particularized statement of damages, he mentions that he lost six weeks of his salary while he had to move his practice from Savannah to Coastal, and then move it back again once he quit.
>
> Interrogatory Nine, which was about availability of equipment in the E.R., which is one of the complaints Dr. Flexon had against my client. He said that availability of

[2] *See Towles v. United HealthCare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 843 (Ct. App. 1999) ("For the FAA to apply, an agreement must 'evidenc[e] a transaction involving commerce,' specifically interstate commerce." (alteration by court) (quoting 9 U.S.C.A. § 2)).

> equipment became so unreliable, [Flexon] began taking his complicated cases to Memorial. . . . So, while he was working for our client, he was sending his complicated cases and performing those surgeries that were being billed by our hospital, performing that surgery in Savannah.

Subsequently, Lifepoint's counsel briefly spoke in support of Coastal's motion to compel:

> [COUNSEL]: Judge, if I may; I'm not presenting argument. This is not our motion today, but we pled this as an affirmative defense as well, that this matter should be submitted to arbitration. I think it goes to arbitration and it should. We support this motion. It goes as to all parties. If I have to separately move, I can do that, but ---

whereupon counsel was cut off by the presiding judge (the first circuit court judge). The following colloquy then transpired:

> THE COURT: I think you ought to do that, because obviously [Flexon] isn't on notice of that. I understand that's your position, but all I can deal with is this motion today. But I understand that. I think you need to file your own motion. And I realize you pled it.
>
> [COUNSEL]: Yes, sir.
>
> THE COURT: But he wasn't prepared to argue, except as against this motion today. It might be an identical argument, but ---
>
> [COUNSEL]: I think that likely it is. So I will make it.

On June 17, 2010, Lifepoint filed its own motion to compel arbitration. Subsequently, the first circuit court judge issued an order denying Coastal's motion. The first circuit court judge based his decision on two grounds: "There is no language in the [Agreement that] mentions, conditions, requires, affects or involves interstate commerce. . . . Further, . . . the parties to [the Agreement] specifically agreed to litigate any dispute arising from, under or pursuant to [the

Agreement] in the courts of South Carolina."[3] Coastal appealed the first circuit court judge's order to this court, which affirmed the order. *Flexon v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012) (*Flexon I*). This court concluded the Agreement and surrounding facts did not implicate interstate commerce and, therefore, the FAA did not apply to the Agreement. 399 S.C. at 89, 731 S.E.2d at 4. After the case was remitted, Lifepoint withdrew its motion to compel arbitration without prejudice and took Flexon's deposition.

During his deposition, Flexon admitted his performance under the Agreement involved providing medical services in both South Carolina and Georgia. When asked about problems resulting from trying to transport a practice from Georgia to South Carolina, Flexon stated, "[T]he practice wasn't transported. The practice always existed in both states before and after. It really did. I mean, it was -- you know, it -- by -- by accident there's a river and a state line, but the practice always involved both states." Flexon also stated that he had "plenty of patients coming from Georgia." Moreover, Flexon indicated that Lifepoint's CEO, Eric Deaton, insisted Flexon remain on Memorial's staff. Therefore, Flexon often had to do rounds at both Coastal and Memorial.

Lifepoint then filed with the circuit court its renewed motion to compel arbitration, attaching the above-referenced excerpts from Flexon's deposition. Several weeks later, Coastal filed a motion for relief from judgment pursuant to Rule 60(b), SCRCP, seeking relief from the circuit court's previous order denying arbitration due to "newly discovered evidence," i.e., Flexon's deposition testimony. The presiding judge (the second circuit court judge) conducted a hearing on both motions and later issued an order denying them.

In his order, the second circuit court judge stated,

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[3] Coastal did not appeal this second ground, i.e., the parties agreed to litigate any dispute "arising from, under or pursuant to [the Agreement] in the courts of South Carolina." Rather, Coastal merely addressed this issue in its Reply Brief, asserting that the provision in question "concern[ed] only those portions of the Agreement carved out of the Arbitration provision" in Article XIII, i.e. "*Except as to the provisions contained in Articles VIII and IX, the exclusive jurisdiction of which shall rest with a court of competent jurisdiction in the state where the hospital is located*, any controversy or claim arising out of or related to this Agreement, or any breach thereof, shall be settled by arbitration . . . ." (emphasis added).

> As acknowledged by [Coastal] in its appeal, the parties knew that [Flexon] was receiving referrals and other patients from the Savannah area while he was working [for Coastal]. With these facts before it, the South Carolina Court of Appeals ruled that "We agree with the trial court's finding that the Agreement and the surrounding facts did not implicate interstate commerce."

The second circuit court judge further found that the "facts and testimony from [Flexon's] deposition argued by [Lifepoint and Coastal] are not substantially different than those before the court in the prior rulings."

The second circuit court judge concluded that if Lifepoint and Coastal believed Flexon's deposition "was necessary for a full review of this issue, they could have sought to present that contention to the lower and appellate courts when this issue was before them." He also concluded that this court's decision on the FAA's applicability to the Agreement was the law of the case. Lifepoint filed a motion to alter or amend this order, which the second circuit court judge denied. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in concluding that Lifepoint failed to preserve its right to independently seek arbitration?

2. Did the circuit court err in concluding that the decision of this court in *Flexon I* was the law of the case?[4]

3. Did the circuit court err in failing to apply, or applying incorrectly, the "commerce in fact" test to determine whether Flexon's services affected interstate commerce and, thus, triggered the FAA?

STANDARD OF REVIEW

"This court reviews questions of law de novo." *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012). "In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court." *Id.*

[4] We are combining Lifepoint's Issues II and IV from its brief.

Furthermore, "[t]he question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "The determination of whether a claim is subject to arbitration is subject to *de novo* review." *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.*

LAW/ANALYSIS

I. Preservation of Right to Seek Arbitration

Lifepoint interprets the second circuit court judge's order as implying Lifepoint failed to preserve its right to independently seek arbitration. In response, Lifepoint argues (1) several consent orders in this case have preserved Lifepoint's right to seek arbitration independent of Coastal's motion and allowed Lifepoint to engage in written discovery and depositions without waiving its right to arbitration[5] and

[5] The first "Consent Scheduling Order of the Parties" was not executed until June 16, 2010, *after* the hearing on Coastal's motion to compel arbitration. This order includes a provision stating,

> The parties and this [c]ourt recognize that Defendant has moved to compel arbitration, and that this consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendants [sic] asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden.

Lifepoint executed its own motion to compel arbitration on the same day the parties executed the consent order but did not file the motion until the following day.

The "Amended Consent Scheduling Order," dated September 18, 2012, is similar:

> The parties and this [c]ourt recognize that one of the Defendants may move to compel arbitration, and that this

(2) it has prosecuted its arbitration motion pursuant to the directive of the first circuit court judge.

We acknowledge the order now on appeal includes language implying Lifepoint waived its right to arbitration by engaging in discovery without reservation or limitation. However, this language was not the basis for the denial of Lifepoint's motion to compel arbitration. Rather, the second circuit court judge based his conclusion that this court's opinion in *Flexon I* was the law of the case on two grounds: (1) the facts presented in the hearing on Lifepoint's motion were not substantially different from the facts presented in the hearing on Coastal's motion and (2) Lifepoint effectively abandoned its opportunity to present Flexon's deposition testimony by failing to depose him prior to the hearing on Coastal's motion. We will address these two grounds, as well as the first circuit court judge's directive for Lifepoint to file its own motion, in the following section of this opinion.

II. Law of the Case

Lifepoint asserts the second circuit court judge erred in concluding this court's opinion in *Flexon I* was the law of the case. Lifepoint argues Flexon's deposition testimony showed facts substantially different from the facts presented to the first circuit court judge. While we agree the facts were substantially different, the deposition testimony should have been presented to the first circuit court judge. Therefore, the second circuit court judge did not commit reversible error in concluding that *Flexon I* was the law of the case.

"Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*,

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> consent order in no way constitutes a waiver of Defendant's asserted right to compel arbitration. The parties agree that the conduct of written discovery or depositions will not be evidence of a waiver of Defendant's asserted right to arbitration. The Plaintiff also agrees that engaging in discovery pursuant to this order does not constitute prejudice or undue burden.

The comparable provisions in the "Second Amended Consent Scheduling Order" and "Third Amended Consent Scheduling Order" are identical to this provision.

381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (citing 5 C.J.S. *Appeal & Error* § 991 (2007)). In other words, "[t]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997); *see In re Grossinger's Assocs.*, 184 B.R. 429, 434 (Bankr. S.D.N.Y. 1995) ("Closely related to the doctrines of claim and issue preclusion is the doctrine of law of the case, which holds that a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation." (quotation marks omitted)). While the doctrine has been referenced as discretionary,[6] it is recognized that principles "of authority . . . do inhere in the 'mandate rule' that binds a lower court on remand to the law of the case established on appeal." 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002).

"The law of the case applies both to those issues explicitly decided and to those issues [that] were necessarily decided in the former [appeal]." *Ross*, 328 S.C. at 62, 492 S.E.2d at 68; *see In re Grossinger's Assocs.*, 184 B.R. at 434 ("The doctrine applies to all issues decided expressly or by necessary implication."). However, "[t]he prior adjudication does not preclude consideration on a subsequent appeal of questions expressly left open or reserved by the court." 5 C.J.S. *Appeal and Error* § 994 (2007); *see also Searles' Adm'r v. Gordon's Adm'r*, 157 S.E. 759, 761 (Va. 1931) ("Every decision of [the appellate] court, whether it be upon an interlocutory or a final decree, is in its nature final, except, possibly, where [the] court disposes of only a part of the case at one term, and reserves it for further and final action at another.").

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[6] *See S. Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922) ("The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and res adjudicata. One directs discretion: the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission."); *Slowinski v. Valley Nat'l Bank*, 624 A.2d 85, 89 (N.J. Super. App. Div. 1993) ("Law of the case . . . operates as a discretionary rule of practice and not one of law." (quotation marks omitted)); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002) ("So long as the same case remains alive, there is power to alter or revoke earlier rulings."); 5 C.J.S. *Appeal and Error* § 991 (2007) ("The doctrine is discretionary rather than mandatory. Nonetheless, it should be disregarded only upon a showing of good cause for failure timely to request reconsideration of the original appellate decision, and only as a matter of grace rather than right." (footnotes omitted)).

The policy behind the law of the case is to "promote[] the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (quotation marks omitted). "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950). "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment." *In re Grossinger's Assocs.*, 184 B.R. at 434.

> The "law of the case" rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members," and that *it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof.*
>
> While the "law of the case" doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless *the evidence on a subsequent trial was substantially different*, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.[7]

[7] Lifepoint does not argue that this court's opinion in *Flexon I* was clearly erroneous or that the law has changed. It merely argues that the facts this time around are substantially different.

White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967) (emphases added) (footnotes omitted).

The South Carolina Supreme Court has also recognized that the doctrine does not apply when the evidence is substantially different on a second appeal. In *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957), the court stated that the doctrine

> has no application where the facts relating to the question decided are *substantially different* on a second appeal. In order to escape the application of the doctrine, however, there must be a material change in the evidence. Additional evidence cumulative in nature will not take the case out of the rule and constitute a material change where *evidence of the same class and character* was considered on the former appeal.

(emphases added). Further,

> [o]pposing forces tug at the theory that new evidence can justify departure from the law of the case. It is easy to understand that new evidence can undermine the foundations of an initial decision. *The needs for stability and procedural efficiency, however, counsel that a persuasive justification should be required to support consideration of the new evidence*. Reconciliation of these competing forces calls for discretion, and the exercise of discretion has not yielded any basis for easy generalization. . . .
>
> . . . . *Evidence that could have been presented earlier commonly is not considered, in keeping with the general rules that discourage slovenly or ill-considered approaches to the first trial*. Beyond these relatively easy points, some decisions set a high threshold for considering new evidence, invoking the "manifest injustice" standard discussed below or even the standard for vacating a judgment. And other decisions invoke the mandate principle by ruling that new evidence cannot be

> considered if it bears on an issue that was not left open by an appellate decision remanding for further proceedings on other issues.

18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002) (emphases added) (footnotes omitted); *see Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1005 (8th Cir. 2010) ("It is not clear that any of the defendants' evidence was truly 'new' in the sense that it could not have reasonably been developed and presented in earlier stages of this litigation."); *Smith Int'l, Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1579 (Fed. Cir. 1985) (holding the district court did not abuse its discretion in applying the "newly discovered" evidence standard of Rule 60(b)(2), FRCP, in determining the appellant had not shown the existence of "substantially different" evidence that justified an exception to the law-of-the-case doctrine); *id.* ("The law-of-the-case doctrine is designed to provide finality to judicial decisions. It thus serves the same objective as the 'newly discovered' requirement in Rule 60(b)(2)." (citation and quotation marks omitted)); *id.* ("In this case, [the appellant] is seeking to reopen factual issues finally laid to rest by the Ninth Circuit in 1982 on the basis of *evidence it could have discovered with due diligence* at least by the time of trial of this case in 1977. The district court was fully justified in rejecting this attempt." (emphasis added)).

Here, the second circuit court judge ruled Flexon's deposition testimony was not "substantially different" than the evidence before the first circuit court judge. Nevertheless, Lifepoint argues the interrogatory responses presented as evidence before the first circuit court judge did not show that Flexon was "importing [Georgia] patients into South Carolina or that he performed medical services in Georgia as an obligation under the terms of the Agreement," whereas the deposition testimony presented to the second circuit court judge showed that Flexon's *performance of the Agreement* involved both South Carolina and Georgia. Specifically, Lifepoint points to Flexon's interrogatory response, presented to the first circuit court judge, indicating that after the hospital's sale to Tenet, "many Savannah doctors stopped referring patients to [Flexon] because of Tenet's horrible reputation." Lifepoint notes this statement "is limited to doctor referrals rather than any factual representation about the state residency of any *patients* actually referred."

Similarly, Lifepoint highlights Flexon's interrogatory response indicating Coastal's provision of equipment was so unreliable that Flexon started taking his complicated cases to Memorial. Lifepoint contends this statement "does not

evidence that [Flexon] *was actually obligated under the terms of the Agreement* to maintain medical staff privileges at Memorial or perform medical services for patients at Memorial," whereas Flexon's deposition testimony provides, for the first time, evidence that his performance of the Agreement involved more than one state.

For these reasons, we agree with Lifepoint that the deposition testimony presented to the second circuit court judge shows facts that are substantially different from the facts presented to the first circuit court judge. In his deposition, Flexon stated that Lifepoint's CEO insisted Flexon remain on Memorial's staff. Therefore, Flexon often had to do rounds at both Coastal and Memorial. Unlike the facts presented to the first circuit court judge, these facts show that Flexon's *performance of the Agreement* required Flexon to provide medical services in two states. Further, the medium of a deposition was more conducive to a complete presentation of the facts than the interrogatory responses; hence, these two types of evidence were not necessarily "of the same class and character." *Nelson*, 231 S.C. at 357, 98 S.E.2d at 800.

Nevertheless, the facts gleaned from Flexon's deposition testimony should have been developed before, and raised in, the hearing on Coastal's motion to compel. *See Yankton Sioux Tribe*, 606 F.3d at 1005 ("It is not clear that any of the defendants' evidence was truly 'new' in the sense that it could not have reasonably been developed and presented in earlier stages of this litigation."); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4478 (2d ed. 2002) ("Evidence that could have been presented earlier commonly is not considered, in keeping with the general rules that discourage slovenly or ill-considered approaches to the first trial."). Therefore, the second circuit court judge properly held that *Flexon I* was the law of the case.

Additionally, the second circuit court judge properly concluded that Lifepoint's failure to timely depose Flexon "cannot now be grounds for reargument of issues about which the parties spent two years litigating in the Court of Appeals." *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 387, 759 S.E.2d 727, 736 (2014) ("Parties may waive their right to enforce an arbitration clause."); *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 257, 743 S.E.2d 868, 872 (Ct. App. 2013) ("There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." (quotation marks omitted)); *Dean*, 408 S.C. at 388, 759 S.E.2d at 736 (holding a party seeking to prove a waiver of a right to arbitrate carries a heavy burden and must show prejudice through an undue burden caused by delay in demanding arbitration).

Prior to the hearing on Coastal's motion to compel, Lifepoint could have (1) taken Flexon's deposition for the limited purpose of establishing the arbitrability of Flexon's claims and (2) presented its own motion to compel arbitration or joined in Coastal's motion. Alternatively, Lifepoint could have requested this court to hold Coastal's appeal in abeyance until Lifepoint's motion to compel could be heard. Instead, the other parties' time and resources were devoted to obtaining a ruling from this court concerning the arbitrability of this dispute.

We acknowledge the first circuit court judge's directive to Lifepoint to file its own motion to compel arbitration. However, by that time, Lifepoint had already abandoned any opportunity to file its own motion to compel arbitration or join in Coastal's motion. Lifepoint had kept silent for over seven months after Coastal first filed its motion to compel arbitration and over one year after Flexon filed the complaint. *Cf. Dean*, 408 S.C. at 388, 759 S.E.2d at 736 ("We find that Appellants did not delay in filing their demand for arbitration. . . . [A]fter Respondent filed her formal complaint, Appellants moved to compel arbitration at their first opportunity. Further, even were we to find that Appellants should have filed the motion to compel arbitration immediately after Respondent filed the [Notice of Intent to file a medical malpractice suit against Appellants], rather than after Respondent filed the complaint, Respondent has shown no prejudice or undue burden to her from the four month delay.").

Lifepoint does not argue it was prevented from either joining in Coastal's motion to compel or taking Flexon's deposition prior to the hearing on Coastal's motion. Further, while Lifepoint's interests in pursuing arbitration were aligned with Coastal's interests, this did not excuse Lifepoint from taking the steps necessary to protect its own interests in a timely manner. Therefore, whether the result is based on the law-of-the-case doctrine or on waiver, fundamental fairness requires Lifepoint to be bound by this court's opinion in *Flexon I*.

Based on the foregoing, Lifepoint has failed to convince this court that the second circuit court judge erred in denying the motion to compel arbitration. *See Duckett by Duckett v. Payne*, 279 S.C. 94, 96, 302 S.E.2d 342, 343 (1983) ("[T]he appellant carries the burden of convincing this [c]ourt that the trial court erred."). Therefore, we need not reach the question of the FAA's applicability to this case. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address the remaining issues on appeal when resolution of a prior issue is dispositive).

CONCLUSION

Accordingly, we affirm the circuit court's order.

AFFIRMED.

THOMAS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ruben Ramirez, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-208626

ON WRIT OF CERTIORARI

Appeal From Greenville County
Edward W. Miller, Plea Court Judge
G. Edward Welmaker, Post-Conviction Relief Judge

Opinion No. 5337
Heard June 10, 2015 – Filed July 29, 2015

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Karen Christine Ratigan, both of Columbia, for Respondent.

KONDUROS, J.: In this post-conviction relief (PCR) action, Ruben Ramirez contends the PCR court erred in dismissing his application for PCR and finding plea counsel was not ineffective for failing to obtain an independent competency evaluation before allowing Ramirez to plead guilty but mentally ill (GBMI)[1] to assault and battery with intent to kill (ABWIK), kidnapping, first-degree criminal sexual conduct (CSC) with a minor, first-degree burglary, and committing a lewd act upon a child.[2] We are constrained by our standard of review to affirm the PCR court's order of dismissal.

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[1] *See* S.C. Code Ann. § 17-24-20(A) (2014) ("A defendant is [GBMI] if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong . . . , but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.").

[2] The PCR court also found "a belated appeal from [Ramirez's] guilty plea [was] warranted." In Ramirez's petition for a writ of certiorari, he argued the PCR court properly granted his request for a belated direct appeal. However, after this court granted Ramirez's petition, Ramirez did not brief his argument that he was entitled to a belated direct appeal or address any direct appeal issues. Therefore, Ramirez abandoned his arguments relating to the belated direct appeal. *See* Rule 243(i)(1), SCACR ("When the [PCR court] has affirmatively found that the right to a direct appeal was not knowingly and intelligently waived, the petition shall contain a question raising this issue along with all other [PCR] issues petitioner seeks to have reviewed."); *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." (internal quotation marks omitted)).

Moreover, even if Ramirez had not abandoned his direct appeal arguments, we conclude he was not entitled to a belated direct appeal. The only ground Ramirez raised during the PCR hearing addressed whether plea counsel was ineffective for failing to have Ramirez's competency reevaluated. Although Ramirez asserted he was not advised of his right to a direct appeal in his PCR application, he presented no testimony or evidence in support of this allegation at the PCR hearing. The PCR court's order dismissing Ramirez's PCR application did not rule on the direct appeal issue and Ramirez's motion to reconsider did not raise it. Accordingly, even if Ramirez had briefed his direct appeal arguments, the PCR court erred because no evidence supports its conclusion that Ramirez was entitled to a belated direct

FACTS/PROCEDURAL HISTORY

On November 3, 2008, Ramirez pled GBMI to ABWIK, kidnapping, first-degree CSC with a minor, first-degree burglary, and committing a lewd act upon a child. At the guilty plea hearing, Ramirez informed the plea court he was eighteen years old, had completed the eighth grade, and could read and write. He claimed he had never been treated for mental illness or emotional problems. Ramirez stated he was in court because he was "charged with serious charges and [he knew he was] looking [at] up to life and these are serious charges and they are nothing to play with."

Plea counsel requested the plea court allow Ramirez to plead GBMI because a psychological report indicated Ramirez understood what he did was wrong but was unable to control his behavior. The State informed the plea court Ramirez underwent a competency evaluation that established he was competent to stand trial. The State introduced the competency evaluation, which was conducted when Ramirez was sixteen years old by Dr. Mayank Dalal (the Dalal evaluation).

According to the Dalal evaluation, Ramirez denied a history of inpatient or outpatient psychiatric treatment. Ramirez reported he attended regular eighth-grade classes and admitted he had been suspended from school eight times. Ramirez claimed he usually received grades of Cs or Ds in school. However, according to the Dalal evaluation, Department of Juvenile Justice (DJJ) school records revealed Ramirez received grades of 92 in language arts, 95 in math, 80 in social studies, 93 in science, and 95 in health. Ramirez denied a history of major medical or psychological problems. Dr. Dalal noted Ramirez had some speech difficulties, which he attributed to a language barrier. Dr. Dalal reported Ramirez "was oriented for time, place, person, and situation" and his thought process was logical and "goal directed." Dr. Dalal found Ramirez's "fund of knowledge was normal," his "abstraction ability was average," his "memory was within normal limits," his "attention and concentration were normal," and he "did not appear to be a danger to himself and/or others."

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appeal. *See Lee v. State*, 396 S.C. 314, 319, 721 S.E.2d 442, 445 (Ct. App. 2011) ("Any evidence of probative value in the [appendix] is sufficient to uphold the PCR court's ruling.").

Dr. Dalal reported Ramirez was able to adequately read his rights and state the charges against him but he had difficulty with words like "solicitor," "evaluation," and "competency." Ramirez told Dr. Dalal his charges were "serious because that's about raping." In his report, Dr. Dalal opined Ramirez knew he could ask his attorney if he had any questions; however, he noted Ramirez could not remember his attorney's name. When informed of his attorney's name, Ramirez was able to retain and recall the name during the evaluation. Dr. Dalal reported Ramirez knew the roles of a solicitor, judge, and jury and he was able to communicate the meaning of "guilty plea, not guilty plea, and a plea bargain." According to the evaluation, Ramirez could "state the importance of evidence, witness[es], and appropriate courtroom behavior." Dr. Dalal determined Ramirez understood the charges against him, had the ability to assist in his own defense, and was competent to stand trial. Dr. Dalal concluded Ramirez's diagnostic impressions[3] were:

AXIS I: No Diagnosis
AXIS II: No Diagnosis
AXIS III: No Diagnosis

The Dalal evaluation did not include Ramirez's intelligence quotient (IQ) score.

Ramirez introduced a report from psychological evaluations conducted by Dr. Stephen Gedo (the Gedo report). Dr. Gedo conducted the evaluations over the course of five days when Ramirez was seventeen years old. Dr. Gedo obtained most of Ramirez's historical information "from collateral sources . . . due to [his] intellectual limitations."[4] Ramirez told Dr. Gedo, "My mind is not right—I forget things after about [thirty] minutes, that's why punishment does not usually work with me." According to the Gedo report, "[Ramirez] was reportedly mentally

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[3] "There are five axes included in the DSM-IV multiaxial classification." *Diagnostic and Statistical Manual of Mental Disorders* 27 (4th ed. 1994). Axis I includes clinical disorders and other conditions that may be a focus of clinical attention, Axis II includes personality disorders and mental retardation, Axis III includes general medical conditions, Axis IV includes psychological and environmental problems, and Axis V includes a global assessment of functioning (GAF) rating. *Id.*

[4] In addition to psychological testing, Dr. Gedo reviewed Ramirez's medical records and interviewed several of his family members.

retarded from birth. He reportedly did not begin speaking until age seven, and had consistent problems in school, being placed in special education classes, and being passed along even though he failed grades." Dr. Gedo noted Ramirez was diagnosed with attention deficit hyperactivity disorder (ADHD) when he was nine years old.

According to the Gedo report, Ramirez's "[t]hought patterns were concrete, simplistic, and often vague. He appeared to become confused easily, and his attention [appeared] to wander at times." Dr. Gedo reported Ramirez "was clearly cognitively limited across the entire range of cognitive functioning," and his "[judgment] and insight appeared poor." Dr. Gedo noted that although Ramirez "appeared to have no difficulty comprehending English, or responding appropriately to verbal or written questions," he had "difficulty understanding some words, such as 'conscience,' 'intercourse,' and 'ideal.'" Dr. Gedo reported Ramirez "readily asked for explanations" when he misunderstood a word.

Dr. Gedo's intellectual testing on Ramirez revealed Ramirez's IQ score was between 31 and 44, which "[fell] within the [Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)] category of Severe Mental Retardation." According to the report, personality testing on Ramirez revealed his "most problematic areas [were] . . . related to intellectual functioning." Dr. Gedo noted, "Those who respond[ed] similarly often have cognitive limitations and difficulty with achievement, with interventions which may include retention in grade, and/or placement in special education courses. Inadequate language skills[] and limited reading comprehension are suggested." Dr. Gedo concluded Ramirez's intellectual functioning was the equivalent of a four- to seven-year-old child.

Dr. Gedo further concluded Ramirez conveyed the impression of an adolescent who had been "intellectually impaired[] and developmentally delayed throughout most, if not all, of his life," and he noted Ramirez had "a diagnosable psychological condition of significance, ADHD." Dr. Gedo determined Ramirez was "likely to be highly malleable; that is, to be strongly influenced by those around him, and treatment which addresses the ADHD pharmacologically, as well as teaches coping/social skills would be important in assisting him to adapt effectively to societal standards, and to have better interactions with his peers." Finally, Dr. Gedo concluded Ramirez's diagnostic impressions were:

AXIS I: [ADHD], Combined Type.

	R/0 Adjustment Disorder with Mixed Disturbance of Emotions & Conduct.
AXIS II:	Severe Mental Retardation.
AXIS III:	None known.
AXIS IV:	Problems related to social environment[,] educational problems, problems with access to health care services.
AXIS V:	Present Level: 35[5] Highest in Past Year: 35

The Gedo report did not include a finding regarding Ramirez's competency to stand trial.

After the parties introduced the Dalal evaluation and Gedo report, the plea court found Ramirez suffered from "a mental illness," which included diagnoses of ADHD, "[judgment] disorder with mixed emotion of disturbance and conduct," and "severe mental retardation." As a result, the plea court allowed Ramirez to enter pleas of GBMI to his charges. However, before sentencing, the plea court noted Ramirez's "[IQ] level [was] as low as any [it had] ever seen." Nonetheless, the plea court sentenced Ramirez to concurrent sentences of twenty years' imprisonment for ABWIK, kidnapping, first-degree CSC with a minor, and first-degree burglary. The plea court sentenced Ramirez to a consecutive sentence of fifteen years' imprisonment, suspended upon five years' probation and mental

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[5] The GAF rating is scored on a scale of 0 to 100, and a rating of between 31 and 40 suggests:

> Some impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing school).

Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed. 1994). A subject's GAF rating can vary depending on treatment and other factors. *Id.* at 32-33.

health counseling, for committing a lewd act upon a child. Ramirez did not file a direct appeal.

Ramirez filed an application for PCR on November 2, 2009, and his PCR hearing was held on May 9, 2011. At the beginning of the PCR hearing, PCR counsel noted Ramirez was proceeding "solely on the psychological ground." PCR counsel introduced the Dalal evaluation and the Gedo report into evidence, and the only witness he called to testify was plea counsel.[6] Plea counsel admitted he obtained the Gedo report because he had trouble communicating with Ramirez and had an indication "something wasn't right with him." Plea counsel stated Ramirez "was very naive," and he did not believe Ramirez "quite understood the gravity of the . . . offenses that he had committed." Plea counsel explained he did not believe Ramirez "understood everything that was going on."

Plea counsel acknowledged the Dalal evaluation determined Ramirez was competent to stand trial. Plea counsel agreed he paid close attention to the Dalal evaluation because Ramirez was having trouble comprehending "what was going on around him." Plea counsel explained he hired Dr. Gedo to perform a psychological evaluation on Ramirez because he did not understand various aspects of the Dalal evaluation. Plea counsel testified Dr. Gedo met with Ramirez five times and each visit lasted between three and four hours. Plea counsel noted Dr. Dalal met with Ramirez on one occasion for about one and a half hours.

Plea counsel testified that in preparing for Ramirez's case, he reviewed a Highlands County, Florida, School Board Assessment[7] that indicated Ramirez "performed better than approximately [1%] of his peers." Plea counsel testified that after he received the Gedo report, he consulted the DSM-IV and determined an IQ score of 70 is "the level for mental retardation," and an IQ score between 35 and 40 is the level of "severe mental retardation." Plea counsel admitted that despite the results of the Gedo report, he did not seek an independent competency evaluation for Ramirez; however, he admitted it would have been "prudent" to reevaluate Ramirez's competency.

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[6] Ramirez did not testify at the PCR hearing.

[7] Ramirez was born in Florida but moved to South Carolina in 2006. The Highlands County School Board Assessment was not offered into evidence at the PCR hearing.

On cross-examination, plea counsel stated Dr. Gedo never suggested Ramirez should be reevaluated for competency to stand trial. Plea counsel asserted Ramirez "was never tough to communicate with"; however, plea counsel believed Ramirez "was a child . . . . I still saw him as a little boy." He stated he explained to Ramirez what they would be doing in court on the day of his pleas and at the time, Ramirez appeared to understand. However, plea counsel stated he questioned whether Ramirez understood what they were doing in court on the day of his pleas.

Plea counsel testified that after he obtained the Gedo report, he determined Ramirez's inculpatory statement to police could not be suppressed, so he pursued GBMI pleas. He asserted that if Dr. Gedo had indicated an additional competency evaluation was necessary, he would have pursued one. Plea counsel testified that on the day Ramirez pled guilty, he was comfortable with Ramirez's decision to enter GBMI pleas.

After Ramirez rested his case, the State argued he failed to establish he was prejudiced by plea counsel's performance because he did not present expert testimony or other evidence demonstrating an independent competency evaluation would have found him incompetent to stand trial. In response, PCR counsel requested the PCR court hold the record open and order Ramirez to undergo a new competency evaluation. PCR counsel admitted the competency evaluation could have been conducted prior to the PCR hearing; however, he noted competency evaluations are costly and Ramirez's family was "of meager financial background." PCR counsel stated he needed to review Ramirez's DJJ records to determine if an independent competency evaluation was necessary before petitioning the PCR court to order Ramirez to undergo such an evaluation. The PCR court determined "the record [was] sufficiently complete to make a decision on [the] issue as to whether or not [plea counsel] met the *Strickland*[8] guidelines," and it took the matter under advisement.

On May 23, 2011, while Ramirez's PCR application was still under advisement, he filed a motion to hold the record open to allow him to undergo an independent competency evaluation. Ramirez claimed the new competency evaluation was scheduled for eight days later—on May 31, 2011.

[8]*Strickland v. Washington*, 466 U.S. 668 (1984).

On August 1, 2011, the PCR court issued an order dismissing Ramirez's PCR application. In the order, the PCR court also denied Ramirez's motion to hold the record open, concluding Ramirez's competency was the sole issue Ramirez presented during the PCR hearing and his opportunity to introduce an independent competency evaluation was during the hearing. Regarding Ramirez's PCR application, the PCR court determined plea counsel "provided credible testimony about his decision-making process," and it noted Ramirez had "ample time" to obtain an independent competency evaluation before the PCR hearing. The PCR court concluded, "Plea counsel sought an independent psychological evaluation, did not have trouble communicating with his client, and made the strategic choice to pursue a plea of [GBMI] when . . . plea counsel determined there was no basis to suppress [Ramirez's] statement to police." The PCR court further concluded, "[A]s neither expert testimony nor a second competency evaluation were presented at the PCR hearing, discussion about the potential impact of such an evaluation is purely speculative."

Ramirez filed a Rule 59(e), SCRCP, motion requesting the PCR court reconsider its denial of his motion to hold the record open and its dismissal of his PCR application and to consider the competency evaluation of Dr. Thomas Martin (the Martin evaluation), conducted twenty-two days after the PCR hearing. Ramirez attached the Martin evaluation to the Rule 59(e) motion. According to the Martin evaluation, Dr. Martin consulted the following sources of information: police reports; Ramirez's 2007 handwritten statement to police; the Dalal evaluation; Highlands County, Florida, School District (the School District) records; the School District's psychological records and reports; the Gedo report; Ramirez's pediatric medical records; and a two-and-a-half-hour psychiatric interview with Ramirez. According to the Martin evaluation, in 1998, the School District determined Ramirez had an IQ of 57. Additionally, Dr. Martin noted the School District found:

> Ramirez's social adaptive behavior was . . . markedly deficient . . . . He demonstrated poor communication skills, poor daily living skills, and poor social skills in follow-up adaptive behavior assessments. Overall, [Ramirez] was found to have a low adaptive level that only confounded his low intellectual ability. Based on his multiple intellectual, language[,] and social

> deficiencies, [Ramirez] was placed in the school district's special education program.

According to the Martin evaluation, Ramirez was "simple-minded, intellectually and socially deficient, easily confused[,] . . . highly suggestible with facts and history," and "easily manipulated into agreement." Dr. Martin determined Ramirez "behaved child-like and immature for his age" and "appeared to have a very low level of intellectual functioning." According to the Martin evaluation, "A basic cognitive examination revealed deficits in [Ramirez's] memory, insight[,] and judgment. He was highly suggestible, easily influenced into acknowledging erroneous data, and appeared to react and give answers to please the Examiner." Dr. Martin determined Ramirez's diagnostic impressions were:

AXIS I:	ADHD, by history
AXIS II:	Mental Retardation, Full Scale [IQ]: 31-57, with significant documented deficiencies in adaptive social behavior.
AXIS III:	No Major Medical Illness
AXIS IV:	Psychosocial Stressors: Incarceration, legal issues, and separation from his family.
AXIS V:	[GAF rating:] 45[9]

Dr. Martin concluded Ramirez suffered from "severe mental retardation with coexistent maladaptive social and language skills" and was incompetent to stand trial. Dr. Martin noted Ramirez could recite the charges once levied against him and vocalize "a vague and inconsistent impression of the purpose of a PCR action." However, Dr. Martin found:

> [Ramirez] seem[ed] to have developed a blind trust for [PCR counsel], and vocalized his plan to follow his advice at all times, without question. He also attempted to describe the basic roles of the [p]rosecutor and the

[9] A GAF rating of between 41 and 50 suggests: "Serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." *Diagnostic and Statistical Manual of Mental Disorders* 34 (4th ed. 1994).

> [j]udge as it applies to his current situation. [Ramirez] was not consistent or always accurate with his reported understanding of his legal case. He was able to concretely [c]ite several pertinent facts related to his case and how they might be part of his PCR, but there was no true evidence or indication that he possesse[d] rational or abstract understanding or applicative ability that is also necessary to formulate a viable court presentation.

Dr. Martin concluded Ramirez's presentation "was consistent with documented findings in [his] early school records and [the Gedo report]. In light of his history and current presentation, it remains unclear . . . how [Ramirez] was ever found 'competent to stand trial,' to viably assist his attorney, and offer a guilty plea in 2008."

The PCR court denied Ramirez's motion to reconsider but sua sponte granted him a belated direct appeal. Ramirez filed a petition for a writ of certiorari from the PCR court's order. This court granted certiorari.

STANDARD OF REVIEW

On certiorari, we will affirm if any evidence of probative value supports the PCR court's findings and reverse only when an error of law controls the PCR court's decision. *Sigmon v. State*, 403 S.C. 120, 128, 742 S.E.2d 394, 398 (2013). This court gives great deference to the PCR court's determinations of credibility. *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 146 (2014).

LAW/ANALYSIS

I. Ineffective Assistance of Counsel

Ramirez argues the PCR court erred in dismissing his PCR application because plea counsel was ineffective for failing to obtain an independent competency evaluation before the plea hearing. We disagree.

Trial counsel must provide "reasonably effective assistance" under "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Reviewing courts presume trial counsel was effective. *Id.* at 690. Thus, to receive

relief, a PCR applicant must first show trial counsel's performance was deficient based on a standard of "reasonableness under prevailing professional norms." *Id.* at 688. Second, an applicant must show trial counsel's deficient performance prejudiced his defense by depriving him "of a fair trial . . . whose result is reliable." *Id.* at 687. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

A guilty plea defendant is also entitled to the effective assistance of plea counsel. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *Hyman v. State*, 397 S.C. 35, 43, 723 S.E.2d 375, 379 (2012). The two-prong *Strickland* analysis applies to PCR claims alleging plea counsel was ineffective. *Hill*, 474 U.S. at 58. "In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered." *Taylor v. State*, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013). To show prejudice, a guilty plea defendant must establish there is a reasonable probability that, but for plea counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 58-60; *Hyman*, 397 S.C. at 43, 723 S.E.2d at 379. The prejudice prong "focuses on whether [plea] counsel's constitutionally ineffective performance affected the outcome of the plea process." *Taylor*, 404 S.C. at 360, 745 S.E.2d at 102 (internal quotation marks omitted). "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." *Bennett v. State*, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006).

"Counsel must articulate a *valid* reason for employing a certain strategy to avoid a finding of ineffectiveness." *Vail v. State*, 402 S.C. 77, 88, 738 S.E.2d 503, 509 (Ct. App. 2013) (internal quotation marks omitted). "Where counsel articulates a strategy, it is measured under an objective standard of reasonableness." *Id.* (internal quotation marks omitted).

"Due process prohibits the conviction of an incompetent defendant, and this right may not be waived by a guilty plea." *Matthews v. State*, 358 S.C. 456, 458, 596 S.E.2d 49, 50 (2004). "The test of competency to enter a plea is the same as required to stand trial." *Jeter v. State*, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992). "The accused must have sufficient capability to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him." *Id.* "To show prejudice within the context of [plea] counsel's failure to fully investigate [a PCR applicant's] mental capacity, the [applicant] need only show a reasonable probability that he

was either insane at the time [the crime was committed] or incompetent at the time of the plea." *Lee v. State*, 396 S.C. 314, 320, 721 S.E.2d 442, 445-46 (Ct. App. 2011) (fourth alteration by court) (internal quotation marks omitted). "[T]he [applicant] bears the burden of proof and is required to show by a preponderance of the evidence he was incompetent at the time of his plea." *Jeter*, 308 S.C. at 232, 417 S.E.2d at 596.

In *Jeter*, the applicant argued his plea counsel was ineffective for failing to request a competency examination that could have established he was incompetent to stand trial. 308 S.C at 233, 417 S.E.2d at 596. Our supreme court found "[t]he evidence addressed at the PCR hearing was insufficient to show deficient performance on the part of [plea] counsel," noting plea counsel testified he and the applicant discussed the applicant's case and his options on several occasions before the applicant's plea. *Id.* The applicant's family, who testified at the PCR hearing, never raised concerns about the applicant's competency to plea counsel. *Id.* As a result, our supreme court found plea counsel reasonably relied on his own perceptions, particularly because he was familiar with the applicant from previous representation. *Id.* The court concluded plea counsel's failure to request a psychiatric evaluation was not outside the range of reasonable professional assistance when nothing suggested the applicant suffered from mental illness. *Id.*

In *Matthews*, a psychiatrist testified at the applicant's PCR hearing, and in describing the applicant's mental condition, the psychiatrist referred to the applicant's quick, nonsensical responses to questions. 358 S.C. at 459, 596 S.E.2d at 51. When the psychiatrist "asked [the applicant] where he was, he gave the quick, basic response of 'here.' When asked if he was in a prison, cafeteria, or zoo, [the applicant] responded, 'zoo.' When asked what his name was, [the applicant] responded, 'me.'"[10] *Id.* at 459-60, 596 S.E.2d at 51. Our supreme court found the psychiatrist's testimony "clearly established by a preponderance of the evidence that [the applicant] was incompetent at the time he entered his guilty plea." *Id.* at 460, 596 S.E.2d at 51. As a result, the court concluded the "[applicant's plea] counsel was deficient for failing to request a *Blair*[11] hearing so that the [plea] court could examine [the applicant's] fitness to stand trial." *Id.* Our supreme court vacated the applicant's guilty plea and granted him a new trial, noting, "[Plea]

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[10] The applicant's plea counsel informed the plea court the applicant had an IQ of 60. *Matthews*, 358 S.C. at 459 n.2, 596 S.E.2d at 51 n.2.

[11] *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

counsel's failure to request a *Blair* hearing prejudiced [the applicant] under the *Jeter* standard because there was, at minimum, a 'reasonable probability' that [the applicant] was incompetent at the time of his guilty plea." *Id.*

In *Lee*, the applicant pled guilty to multiple charges in violation of his probation; however, before a probation revocation hearing could be held, the applicant was found incompetent to stand trial.[12] 396 S.C. at 316, 721 S.E.2d at 443-44. Subsequently, at the applicant's PCR hearing, the psychiatrist who conducted the applicant's competency evaluation testified the applicant's incompetence was caused by mental retardation. *Id.* at 317, 721 S.E.2d at 444. The psychiatrist further testified the applicant "had a basic understanding of his charges and to some degree the criminal process." *Id.* at 321, 721 S.E.2d at 446. The applicant's plea counsel testified the applicant appeared to understand their conversation about pleading guilty and the applicant never informed her of his mental health treatment. *Id.* at 318, 721 S.E.2d at 445. The PCR court found the applicant "failed to prove he was incompetent on the day of his guilty plea." *Id.* at 319, 721 S.E.2d at 445. On appeal, this court concluded it was "constrained to affirm the PCR court's decision" under the standard of review because "[s]ome evidence in the record support[ed] the PCR court's findings." *Id.* at 321-22, 721 S.E.2d at 446-47. This court noted the psychiatrist's testimony that the applicant's "mental status dated back to when he was in school and he had a documented history of mental retardation was sufficient to show a reasonable probability that he was incompetent at the time of the plea." *Id.* at 322, 721 S.E.2d at 447. However, this court determined the applicant failed to show his plea counsel was deficient because plea counsel "had no indication of [the applicant's] mental status." *Id.*

A. Deficient Performance

The PCR court concluded Ramirez did not prove plea counsel was deficient because plea counsel "provided credible testimony about his decision-making process," "sought an independent psychological evaluation, did not have trouble

[12] The applicant's competency evaluation revealed he had an IQ of 61, completed high school, and obtained a driver's license. *Id.* at 316, 721 S.E.2d at 444. The evaluation also revealed the applicant had once been hospitalized for behavioral problems, received mental health services, was diagnosed with mild mental retardation and disruptive behavior disorder, and had a history of setting fires and engaging in cruelty to animals. *Id.* at 316-17, 721 S.E.2d at 444.

communicating with [Ramirez], and made the strategic choice to pursue a plea of [GBMI] when . . . plea counsel determined there was no basis to suppress [Ramirez's] statement to police." We find the evidence in the appendix does not support the PCR court's findings on this issue.

In *Jeter* and *Lee*, our appellate courts determined the applicants' attorneys were not deficient for failing to obtain competency evaluations for their clients because the attorneys had no indication of the applicants' mental limitations. In contrast, here, plea counsel was aware of Ramirez's mental deficiencies. The PCR court partially based its conclusion on the fact that plea counsel testified he "did not have trouble communicating with [Ramirez]." However, plea counsel testified he had trouble communicating with Ramirez and had an indication "something wasn't right with him." Additionally, plea counsel described Ramirez as "very naive" and childlike, and plea counsel believed Ramirez did not "[understand] everything that was going on." Plea counsel consistently acknowledged he was aware of Ramirez's mental limitations, which is why he hired Dr. Gedo to perform a psychological evaluation. Plea counsel specifically admitted that after he received the Gedo report, he reviewed the DSM-IV and learned Ramirez's IQ score of 31 to 44 meant Ramirez was "severely mentally retarded." Plea counsel also acknowledged Dr. Gedo found Ramirez did not begin speaking until age seven and presently had the intellectual functioning of a four- to seven-year-old child. Furthermore, plea counsel acknowledged he reviewed Ramirez's School District report indicating Ramirez "performed better" than only 1% of his peers. Therefore, unlike *Jeter* and *Lee*, here, plea counsel was aware of Ramirez's mental limitations before the plea hearing. As a result, the PCR court's finding plea counsel was not deficient because he "did not have trouble communicating with [Ramirez]" is unsupported by the evidence. At minimum, plea counsel's review of the Gedo report should have led him to seek an independent competency evaluation.

Moreover, we find the PCR court erred in determining plea counsel's decision not to obtain an independent competency evaluation so he could pursue pleas of GBMI was a valid strategy. Plea counsel's strategy was not objectively reasonable because if Ramirez was incompetent at the time of his pleas, he could not have been convicted of his crimes. *See Vail*, 402 S.C. at 88, 738 S.E.2d at 509 ("Where counsel articulates a strategy, it is measured under an objective standard of reasonableness." (internal quotation marks omitted)); *Matthews*, 358 S.C. at 458, 596 S.E.2d at 50 ("Due process *prohibits the conviction of an incompetent defendant*, and this right may not be waived by a guilty plea." (emphasis added)).

As a result, by pursuing pleas of GBMI in lieu of obtaining an independent competency evaluation, plea counsel departed from professional norms, resulting in deficient performance. *See Strickland*, 466 U.S. at 688 (explaining to prove deficient performance, an applicant must show counsel departed from professional norms).

B. Prejudice

The PCR court concluded Ramirez did not prove he was prejudiced by plea counsel's allegedly deficient performance because he did not establish there was a reasonable probability he was incompetent at the time of his guilty pleas. In reaching this conclusion, the PCR court relied upon the Dalal evaluation, "the [Gedo report's] description of [Ramirez's] understanding of the events leading up to his charges[,] and plea counsel's testimony regarding [Ramirez's] ability to communicate and understand the proceedings." The PCR court also noted "any discussion about the potential impact" of an independent evaluation was "purely speculative" because Ramirez did not introduce an independent competency evaluation or expert testimony at the PCR hearing. Although we acknowledge Ramirez failed to challenge the Dalal evaluation by introducing an independent competency evaluation at the PCR hearing, we are troubled by many aspects of the Dalal evaluation in light of the Gedo report and plea counsel's testimony.

For example, the Dalal evaluation relied on Ramirez's self-reporting[13] to determine he was in regular eighth grade classes; had normal memory,[14] attention, and concentration; and achieved As and Bs in his DJJ classes. The evaluation also did not include Ramirez's IQ score. Conversely, the Gedo report relied on psychological testing, Ramirez's medical records, and interviews with Ramirez's family members in determining Ramirez was mentally retarded from birth and did not begin speaking until age seven; was previously diagnosed with ADHD; was placed in special education classes, which he passed even though he made failing grades; was "limited across the entire range of cognitive functioning"; had an IQ between 31 and 44, which fell within the category of "severe mental retardation";

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[13] Dr. Dalal did not consult the School District records, medical records, or family members to determine the validity of Ramirez's statements. Additionally, Dr. Dalal did not indicate whether he conducted any psychological testing on Ramirez in concluding Ramirez was competent.

[14] Dr. Dalal also reported Ramirez could not remember plea counsel's name.

had the intellectual functioning of a four- to seven-year-old child; and was "likely to be highly malleable" and "strongly influenced by those around him."[15] Furthermore, plea counsel admitted he hired Dr. Gedo because he believed Ramirez "acted like a child," did not understand the gravity of the offenses he committed, and did not "[understand] everything that was going on." Plea counsel also testified a School District report found Ramirez "performed better" than only 1% of his peers.

Based on the disparate findings of the Dalal evaluation and Gedo report, combined with plea counsel's testimony, we believe there was at least a reasonable probability Ramirez was incompetent at the time of his pleas. *See Lee*, 396 S.C. at 322, 721 S.E.2d at 447 (explaining a psychiatrist's testimony that an applicant's "mental status dated back to when he was in school and he had a documented history of mental retardation was sufficient to show a reasonable probability that he was incompetent at the time of the plea"); *id.* at 316-17, 721 S.E.2d at 444 (noting an applicant's competency evaluation found him incompetent when he had an IQ of 61, had been diagnosed with mild mental retardation and disruptive behavior disorder, had completed high school, had obtained a driver's license, had once been hospitalized for behavioral problems, and had a history of setting fires and engaging in cruelty to animals).

However, although we may have decided this issue differently, we are constrained by our standard of review to affirm the PCR court's finding Ramirez did not prove he was prejudiced by plea counsel's performance. We find evidence of probative value (the Dalal evaluation) supports the PCR court's finding, and further, PCR counsel failed to introduce an independent competency evaluation during the PCR hearing. *See id.* at 320, 721 S.E.2d at 446 ("Any evidence of probative value to support the PCR court's factual findings is sufficient to uphold those findings on appeal."); *Black's Law Dictionary* 1397 (10th ed. 2014) (defining "probative value" as "[t]he degree to which one fact tends to make probable another posited fact"); *see also Walker*, 407 S.C. at 405, 756 S.E.2d at 146 (providing this court gives great deference to the PCR court's determinations of credibility).

II. Newly-Discovered Evidence

[15] We find Dr. Gedo's assertion Ramirez is "likely to be highly malleable" and "strongly influenced by those around him" particularly concerning because those traits could have affected Ramirez's self-reporting during the Dalal evaluation.

Ramirez argues the PCR court erred in denying his Rule 59(e) motion because the Martin evaluation was newly-discovered evidence he was incompetent when he entered his GBMI pleas.

As a threshold matter, we find Ramirez's argument the Martin evaluation was newly-discovered evidence was not preserved for this court's consideration. Based on our review of the record, Ramirez first made this argument in his petition for a writ of certiorari. Therefore, this argument is not properly before the court. *See Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010) (concluding an issue that was neither raised to nor ruled upon by the PCR court was not preserved for appellate review).

Even if Ramirez raised this argument to the PCR court, he conceded at the PCR hearing the Martin evaluation would not be newly-discovered evidence. An element of "newly-discovered" evidence is that the evidence could not have been discovered before trial. *See Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (explaining "[t]o obtain a new trial based on after discovered evidence, the [PCR applicant] must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) *could not have been discovered before trial*; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching" (first alteration by court) (emphasis added)). PCR counsel conceded the competency evaluation could have been obtained before the PCR hearing, but because competency evaluations are expensive and Ramirez's family is of meager financial means, he wanted to review DJJ records before obtaining an independent competency evaluation. Therefore, even if Ramirez had raised this issue to the PCR court, he is barred from arguing the Martin evaluation constituted newly-discovered evidence based on his concessions in the PCR court. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 45-46, 691 S.E.2d 135, 147 (2010) (holding an issue is not preserved for appeal when it is conceded at trial).

CONCLUSION

We are constrained by our standard of review to affirm the PCR court's order dismissing Ramirez's PCR application because some evidence of probative value supports the PCR court's findings. However, we are deeply troubled that a man with severe mental retardation, an IQ between 31 and 57, and the intellectual

functioning of a four- to seven-year-old child was allowed to plead guilty and that a series of missteps by counsel at every level deprived Ramirez of effective review by this court.[16] Based on the foregoing, the PCR court's order of dismissal is

AFFIRMED.

THOMAS, J., concurs.

GEATHERS, J., dissents in a separate opinion.

GEATHERS, J., dissenting:

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[16] At oral argument, the State conceded PCR counsel "showed up to court [without] the requisite tools to meet his burden of proof" and indicated Ramirez had other avenues of relief. Specifically, the State asserted Ramirez could file a writ of habeas corpus in the Supreme Court of South Carolina, and it also referenced the United States Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). In that case, the Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 1320. Additionally, our supreme court has held that in rare circumstances, "when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice," a PCR applicant may be entitled to file a successive PCR application. *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991). We note plea counsel failed to obtain an independent competency evaluation before the plea hearing, PCR counsel failed to obtain an independent competency evaluation before the PCR hearing, and appellate counsel abandoned one issue and argued one issue that was unpreserved.

I respectfully dissent. In my opinion, the PCR court erred as a matter of law when it denied PCR.

"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992). "This right cannot be waived by a guilty plea. The test of competency to enter a plea is the same as required to stand trial." *Jeter v. State*, 308 S.C. 230, 232, 417 S.E.2d 594, 595-96 (1992) (citation omitted). "This Court has held that to be competent to stand trial or continue trial, a defendant must have a rational, as well as factual, understanding of the proceedings against him and the ability to consult with his lawyer with a reasonable degree of rational understanding." *Hall v. Catoe*, 360 S.C. 353, 359, 601 S.E.2d 335, 338 (2004) (quotation marks omitted).

Here, even without the Martin evaluation,[17] the record before the PCR court demonstrated Ramirez lacked a rational and factual understanding of the proceedings against him and, thus, was not competent to stand trial. As the majority opinion explains, the Gedo report provided that Ramirez was born mentally retarded, his thought patterns were simplistic and vague, he was easily confused, his attention wandered at times, he was "clearly cognitively limited across the entire range of cognitive functioning," and his "[j]udgement and insight appeared poor." Additionally, Dr. Gedo opined Ramirez had difficulty understanding words, and intellectual testing revealed Ramirez's IQ score was between 31 and 44, which indicates severe mental retardation in the DSM-IV.[18]

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[17] Shortly after the PCR hearing, PCR counsel sought to admit the Martin evaluation. After a lengthy review of police reports; Ramirez's statement to police; the Dalal evaluation and Gedo report; school records; psychological records and reports; pediatric medical records; and a psychiatric interview with Ramirez, Dr. Martin opined Ramirez was incompetent to stand trial at the time he entered the guilty plea. Dr. Martin stated, "In light of his history and current presentation, it remains unclear . . . how [Ramirez] was ever found 'competent to stand trial,' to viably assist his attorney, and offer a guilty plea in 2008."

[18] The DSM-IV is a manual of the standard classifications of mental disorders that mental health professionals use to make a mental health diagnosis. I further note that "severe mental retardation" is the term used in the DSM-IV, the DSM edition used by Dr. Gedo in the Gedo report. However, the fifth edition of the DSM has

Importantly, Dr. Gedo concluded Ramirez's intellectual functioning was equivalent to the functioning of a four to seven-year-old child, and the plea court noted Ramirez's IQ was "as low as any [the court had] ever seen."

Furthermore, as the majority explains, several aspects of the Dalal evaluation, which were primarily relied on to determine competency, are concerning as Dr. Dalal relied heavily on Ramirez's self-reporting; did not consult school records, medical records, or family members; did not indicate whether any psychological testing was completed; and did not include Ramirez's IQ score. By contrast, in the Gedo report, Dr. Gedo relied on psychological testing, Ramirez's medical records, and interviews with Ramirez's family members in reaching the conclusion that Ramirez's intellectual functioning was stunted and he had the mental capacity of a four to seven-year-old child.

Moreover, plea counsel admitted Ramirez appeared to lack a reasonable degree of rational understanding. *See Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) (stating counsel has a duty to investigate his client's mental status when he has reason to believe an investigation is warranted "because, where such a condition exists, the defendant's attorney is the sole hope that it will be brought to the attention of the court"). In contrast to the defendants in *Jeter* and *Lee*,[19] concrete evidence in the record demonstrates plea counsel did not think Ramirez operated as an adult with independent thought processes and functioning. Plea counsel clearly questioned Ramirez's competency and questioned whether Ramirez understood what they were doing in court on the day of his pleas. He saw Ramirez as "very naïve" and as a "child," and admitted it would have been "prudent" to reevaluate Ramirez's competency. Further, plea counsel readily acknowledged he was aware of Ramirez's mental limitations and that after he received the Gedo report, he reviewed the DSM-IV and learned an IQ score of 31 to 44 meant Ramirez was severely mentally retarded. Plea counsel also admitted he reviewed Ramirez's school district report indicating Ramirez "performed better" than only 1% of his peers.

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replaced the term "mental retardation" with "intellectual disability (intellectual developmental disorder)."

[19] *Lee v. State*, 396 S.C. 314, 721 S.E.2d 442 (Ct. App. 2011).

Therefore, I would reverse. *Cf. Carnes v. State*, 275 S.C. 353, 354-55, 271 S.E.2d 121, 121-22 (1980) (reversing the PCR court's grant of PCR based on a finding that the defendant was mentally incompetent to enter a plea of guilty and holding the record reflected the defendant was competent to enter his guilty plea; "We recognize our scope of review in post-conviction issues, however we are controlled here by *State v. Lambert*, 266 S.C. 574, 225 S.E.2d 340 (1976), which holds the test for mental competency to plead guilty is no more stringent than [the] test for competency to stand trial. It is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." (quotation marks omitted)). Unlike *Carnes*, the *Lambert* test is not met in the case sub judice. The record demonstrates Ramirez did not have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or a rational and factual understanding of the proceedings against him. Moreover, as the majority noted, Ramirez has received inadequate representation throughout every stage of his legal proceedings. In my view, to affirm the PCR court's decision simply perpetuates the injustice.