The Supreme Court of South Carolina

O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of magistrates and municipal judges who have not complied with the continuing legal education requirements of Rule 510, SCACR. These judges are hereby suspended from their judicial offices, without pay, until further Order of this Court.

s/Jean H. Toal C.J.
For the Court

Columbia, South Carolina

August 26, 2004

The Honorable Myron Anderson
Judge, Denmark Municipal Court

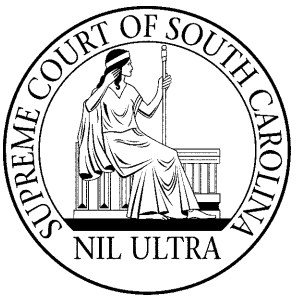
The Honorable C. Gregory Brown
Judge, Kiawah Island Municipal Court

The Honorable W. A. Edwins
Judge, Kingstree Municipal Court

The Honorable Luke B. Hart
Judge, Whitmire Municipal Court

The Honorable William W. Hartman
Judge, Ridge Spring Municipal Court

The Honorable Joyce E. Lawton
Judge, Columbia Municipal Court



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34

August 30, 2004

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

Page

None

UNPUBLISHED OPINIONS

2004-UP-451-The State v. Marcus Fashaw
(Chesterfield, Judge Paul M. Burch)

2004-UP-452-The State v. Robert Lynn Darnell
(Pickens, Judge John C. Few)

2004-UP-453-The State v. Lashone Tremel Bailey
(York, Judge John C. Hayes, III)

2004-UP-454-The State v. Douglas Francis King
(Greenville, Judge John W. Kittredge)

2004-UP-455-The State v. Curtis Coleman
(Aiken, Judge James R. Barber)

2004-UP-456-The State v. Dean C. Grayson
(Richland, Judge James C. Williams, Jr.)

2004-UP-457-The State v. Tymon Wells
(York, Judge John C. Hayes, III)

2004-UP-458-The State v. Delvinche Keon Williams
(York, Judge John C. Hayes, III)

PETITIONS FOR REHEARING

3806-State v. Mathis	Pending
3810-Bowers v. SCDOT	Denied 8/23/04
3821-Venture Engineering v. Tishman	Denied 8/24/04
3825-Messer v. Messer	Denied 8/26/04
3832-Carter v. USC	Pending
3836-State v. Gillian	Pending
3847-Sponar v. SCDPS	Pending
3849-Clear Channel Outdoor v. City of Myrtle Beach	Pending

3850-S.C. Uninsured Employer's v. House	Pending
3851-Shapemasters Golf v. Shapemasters	Pending
3852-Holroyd v. Requa	Pending
3853-McClain v. Pactiv Corp. et al.	Pending
3854-State v. Rogers	Pending
3855-State v. Slater	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2004-UP-346-State v. Brinson	Pending
2004-UP-397-Foster v. Greenville Memorial	Pending
2004-UP-407-Small v. Piper	Pending
2004-UP-415-State v. Beck	Pending
2004-UP-421-CMI Contracting v. Little River	Pending
2004-UP-427-State v. Rogers	Pending
2004-UP-430-Johnson v. S.C. Dep't of Probation	Denied 8/24/04
2004-UP-435-Saxon v. SCDOT	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3602-State v. Al-Amin	Pending
3635-State v. Davis	Pending
3653-State v. Baum	Pending
3656-State v. Gill	Pending
3661-Neely v. Thomasson	Pending

3667-Overcash v. SCE&G	Granted 8/23/04
3676-Avant v. Willowglen Academy	Pending
3678-Coon v. Coon	Pending
3679-The Vestry v. Orkin Exterminating	Pending
3680-Townsend v. Townsend	Pending
3681-Yates v. Yates	Pending
3683-Cox v. BellSouth	Pending
3684-State v. Sanders	Pending
3686-Slack v. James	Pending
3690-State v. Bryant	Pending
3691-Perry v. Heirs of Charles Gadsden	Pending
3693-Evening Post v. City of N. Charleston	Pending
3703-Sims v. Hall	Pending
3706-Thornton v. Trident Medical	Pending
3707-Williamsburg Rural v. Williamsburg Cty.	Pending
3708-State v. Blalock	Pending
3709-Kirkman v. First Union	Pending
3710-Barnes v. Cohen Dry Wall	Pending
3711-G & P Trucking v. Parks Auto Sales	Pending
3712-United Services Auto Ass'n v. Litchfield	Pending
3714-State v. Burgess	Pending

3716-Smith v. Doe	Pending
3718-McDowell v. Travelers Property	Pending
3717-Palmetto Homes v. Bradley et al.	Pending
3719-Schmidt v. Courtney (Kemper Sports)	Pending
3720-Quigley et al. v. Rider et al.	Pending
3721-State v. Abdullah	Pending
3722-Hinton v. SCDPPPS	Pending
3728-State v. Rayfield	Pending
3729-Vogt v. Murraywood Swim	Pending
3730-State v. Anderson	Pending
3733-Smith v. Rucker	Pending
3737-West et al. v. Newberry Electric	Pending
3739-Trivelas v. SCDOT	Pending
3740-Tillotson v. Keith Smith Builders	Pending
3743-Kennedy v. Griffin	Pending
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending
3747-RIM Associates v. Blackwell	Pending
3749-Goldston v. State Farm	Pending
3750-Martin v. Companion Health	Pending
3751-State v. Barnett	Pending

3753-Deloitte & Touche, LLP v. Unisys Corp.	Pending
3755-Hatfield v. Van Epps	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3758-Walsh v. Woods	Pending
3759-QZO, Inc. v. Moyer	Pending
3762-Jeter v. SCDOT	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Pending
3766-Craig v. Craig	Granted 8/23/04
3767-Hunt v. S.C. Forestry Comm.	Pending
3772-State v. Douglas	Pending
3775-Gordon v. Drews	Pending
3776-Boyd v. Southern Bell	Pending
3777-State v. Childers	Pending
3778-Hunting v. Elders	Pending
3779-Home Port v. Moore	Pending
3784-State v. Miller	Pending
3787-State v. Horton	Pending
3789-Upchurch v. Upchurch	Pending
3790-State v. Reese	Pending
3794-State v. Pipkin	Pending
3795-State v. Hill	Pending

3800-Ex parte Beard: Watkins v. Newsome	Pending
3802-Roberson v. Roberson	Pending
3809-State v. Belviso	Pending
2003-UP-060-State v. Goins	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-360-Market at Shaw v. Hoge	Denied 8/19/04
2003-UP-444-State v. Roberts	Pending
2003-UP-462-State v. Green	Pending
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-475-In the matter of Newsome	Pending
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-488-Mellon Mortgage v. Kershner	Pending
2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-515-State v. Glenn	Pending
2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending
2003-UP-533-Buist v. Huggins et al.	Pending

2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-565-Lancaster v. Benn	Pending
2003-UP-566-Lancaster v. Benn	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending
2003-UP-638-Dawsey v. New South Inc.	Pending
2003-UP-640-State v. Brown #1	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-662-Zimmerman v. Marsh	Pending
2003-UP-669-State v. Owens	Pending
2003-UP-672-Addy v. Attorney General	Pending
2003-UP-678-SCDSS v. Jones	Pending
2003-UP-688-Johnston v. SCDLLR	Pending
2003-UP-689-Burrows v. Poston's Auto Service	Pending
2003-UP-703-Beaufort County v. Town of Port Royal	Pending

2003-UP-705-State v. Floyd	Pending
2003-UP-706-Brown v. Taylor	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-715-Antia-Obong v. Tivener	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-718-Sellers v. C.D. Walters	Pending
2003-UP-719-SCDSS v. Holden	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Pending
2003-UP-735-Svetlik Construction v. Zimmerman	Pending
2003-UP-736-State v. Ward	Pending
2003-UP-751-Samuel v. Brown	Pending
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending
2003-UP-757-State v. Johnson	Pending
2003-UP-758-Ward v. Ward	Pending
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Pending
2004-UP-001-Shuman v. Charleston Lincoln Mercury	Pending
2004-UP-011-Baird Pacific West v. Blue Water	Pending
2004-UP-012-Meredith v. Stoudemayer et al.	Pending
2004-UP-019-Real Estate Unlimited v. Rainbow Living	Pending
2004-UP-029-City of Myrtle Beach v. SCDOT	Pending
2004-UP-038-State v. Toney	Pending

2004-UP-050-Lindsey v. Spartan Roofing	Pending
2004-UP-055-Spartanburg Cty. v. Lancaster	Pending
2004-UP-061-SCDHEC v. Paris Mt.(Hiller)	Pending
2004-UP-098-Smoak v. McCullough	Pending
2004-UP-100-Westbury v. Dorchester Co. et al.	Pending
2004-UP-110-Page v. Page	Pending
2004-UP-119-Williams v. Pioneer Machinery	Pending
2004-UP-142-State v. Morman	Pending
2004-UP-147-KCI Management v. Post	Pending
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Pending
2004-UP-153-Walters v.Walters	Pending
2004-UP-200-Krenn v. State Farm	Pending
2004-UP-215-State v. Jones	Pending
2004-UP-216-Arthurs v. Brown	Pending
2004-UP-221-Grate v. Bone	Pending
2004-UP-229-State v. Scott	Pending
2004-UP-237-In the interest of B., Justin	Pending
2004-UP-238-Loadholt v. Cribb et al.	Pending
2004-UP-241-Richie v. Ingle	Pending
2004-UP-247-Carolina Power v. Lynches River Electric	Pending

2004-UP-251-State v. Davis	Pending
2004-UP-256-State v. Settles	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-289-E. Hathaway Const. v. Eli	Pending
2004-UP-306-State v. Lopez	Pending
2004-UP-319-Bennett v. State of S. C. et al.	Pending
2004-UP-336-Clayton v. Lands Inn, Inc.	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Interest of Michael H., a minor under the age of seventeen years,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
Richard W. Chewning, III, Family Court Judge

Opinion No. 25529
Heard July 23, 2002 – Filed September 16, 2002
Reheard December 3, 2002 – Refiled August 30, 2004

AFFIRMED AS MODIFIED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General Melody J. Brown, all of Columbia, for Petitioner.

Tara D. Shurling, of Columbia, for Respondent.

J. David Flowers, of Greenville, and Gregg E. Meyers, of Charleston, both for the South Carolina Victim's Assistance Network, Amicus Curiae.

JUSTICE BURNETT: The State petitioned for review of the Court of Appeals' decision reversing Michael H.'s ("Respondent") juvenile conviction for criminal sexual conduct ("CSC") with a minor. We issued an opinion in this case in September 2002. In the Interest of: Michael H., a minor under the age of seventeen years, Op. No. 25529 (S.C. Sup. Ct. filed September 16, 2002). Subsequently, we granted the State's petition for rehearing and a motion by the South Carolina Victim's Assistance Network to file an amicus brief. After rehearing this case, we withdraw our previous opinion and substitute this opinion.

FACTUAL / PROCEDURAL BACKGROUND

Respondent was charged, by juvenile petition filed in Lexington County family court, with CSC in the first degree, kidnapping, and CSC with a minor. Respondent is the complainant's uncle, although he is only eight years older than the complainant. At the time of the alleged assault, Respondent was twelve or thirteen years old and the complainant was four or five years old. Due to premature birth and complications, Respondent is developmentally impaired and exhibits a maturity level below others his age.[1] The complainant often spent time at Respondent's house (the home of complainant's paternal grandmother) where Respondent, his younger brother, and complainant played together and also took baths and showers together when complainant spent the night.[2] It was during one of these showers that the complainant claimed Respondent "raped" him.

---

[1] Respondent's verbal IQ is 84 (just below average), but his performance IQ lags behind at 70, indicating he has a learning disability. His counselor stated he did not learn like other kids and experienced delays in gross motor development as he grew up.

[2] Respondent's mother (victim's grandmother) testified the door to the bathroom always remained open when the boys were bathing, and she checked in on them frequently, remaining in earshot continuously during their baths and showers.

The allegation arose in March 1999, in response to a story on the local news about a man arrested for indecent exposure. The complainant's mother testified the complainant saw the report and asked her why the man had "robbed" the children. The mother responded that the man had not "robbed" the children but had "raped" the children, and then explained to her son what rape was. The complainant's mother testified she told her son that rape of a boy "would be if someone was to touch him in an area that was covered by his swimsuit or his underwear, if someone was to touch his penis or play with his penis, or someone may try and stick [his] penis or something into his behind." Upon hearing this explanation, the complainant's mother said her son's expression changed, and he told her, "well, [Respondent's] done that to me before."

Complainant's mother then testified she asked her son when and where this happened, and he responded it had happened a while ago when he was in the shower with Respondent. Complainant's mother called her mother-in-law, Respondent's mother, to inform her of her son's accusation. Respondent spoke with complainant's mother, and denied ever having done anything like that to the complainant.

The complainant's mother filed a report with the police and took complainant to the Lexington County Children's Center where a rape protocol was performed and counseling began. The doctor performing the rape protocol found no evidence of sexual assault but testified this was not unusual with anal rape after significant time had passed. Complainant's counselor, Dr. Lake, a clinical psychologist, testified she believed Respondent had sexually assaulted victim.[3]

---

[3] Respondent's counselor, John Higgins, certified as an expert in the field of sex offender risk assessment, testified he had counseled Respondent in twenty sessions during which Respondent had consistently denied sexual contact with the victim. Mr. Higgins testified, based on his extensive experience with sex offenders, that he did not believe Respondent had any sexual contact with the victim. He explained that Respondent did not fit the profile for a sex offender and

Continued…

During cross-examination of Dr. Lake, Respondent's counsel discovered he had not received notes from the complainant's last four sessions with Dr. Lake. Respondent asked the judge for time to review them and then completed his cross-examination. In these last four sessions, complainant reported he had been hearing voices in his head for some time. Complainant told Dr. Lake he began hearing the voices of two men on his fourth birthday, and they continued until a month or so before trial. Complainant told Dr. Lake the voices told him to say mean things to his friends and to hurt them, and that the voices told him he should have raped Respondent like Respondent had raped him.

Dr. Lake thought the voices might be auditory hallucinations and suggested to complainant's mother that he see a physician or a psychiatrist for diagnosis or treatment. Dr. Lake's notes reflected, however, that the voices stopped shortly before trial. Dr. Lake attributed this change to medication complainant began taking for attention-deficit and hyperactivity. The complainant never saw a physician or a psychiatrist about the voices.

Prior to the hearing, Respondent filed a motion to have complainant submit to a psychological evaluation. Apparently that motion was denied. Following Dr. Lake's testimony, Respondent moved again to have complainant submit to a psychological evaluation based on the revelation that complainant had been hearing voices during the period of time he alleged the assault occurred. That motion was denied. Respondent's counsel also moved to have the complainant's testimony stricken as incompetent, based on the report of hearing voices. That motion was denied as well.

---

in fact was naïve about sex and the sexual function of his own body parts. Further, Mr. Higgins testified that Respondent had admitted other serious wrongdoing, such as calling in a bomb threat and stealing earrings, but had consistently denied any sexual contact with the victim.

At trial, complainant testified Respondent raped him, explaining, in his own words, that Respondent "stuck his penis up my butt." Respondent also testified at trial and denied he had sexually assaulted the complainant in any way.

The trial judge granted Respondent's motion for directed verdict on the first degree CSC and kidnapping charges based on insufficient evidence but found Respondent guilty of CSC with a minor and ordered him committed to the Department of Juvenile Justice ("DJJ") until his twenty-first birthday. Respondent appealed and the Court of Appeals reversed and remanded for a new trial. In the Interest of Michael H., Op. No. 02-UP-050 (S.C. Ct. App. filed January 18, 2002).

The State then filed a Petition for Rehearing and Suggestion for Rehearing En Banc. In response, Respondent filed a Petition for Appeal Bond or in the Alternative for Writ of Supersedeas. The Court of Appeals denied the Petition for Rehearing but granted Respondent's Petition for Appeal Bond.

Subsequently, the State petitioned this Court for a stay of the Court of Appeals' order granting bond and for supersedeas. Justice Moore denied the petition on behalf of the Court on the ground that the Court of Appeals' order was not appealable. On the same day, the family court set the conditions of the bond.

We granted the State's petition for a writ of certiorari to address the following issues:

I. Did the Court of Appeals err in holding that the family court judge abused his discretion in failing to order the victim to submit to a psychological examination?

II. Did the Court of Appeals act beyond its jurisdiction when it granted Respondent's Appeal Bond?

LAW/ANALYSIS

I. Psychological Examination

The State argues the Court of Appeals erred in holding that the family court judge abused his discretion in failing to order the child victim to submit to a psychological examination. We disagree.

As a preliminary matter, the State argues that this issue is not preserved for review. The State asserts trial counsel's complaint was grounded in perceived discovery violations concerning the notes of Dr. Lake that had not been turned over to him. We disagree. Important information regarding the mental health of the child victim was uncovered in Respondent's cross-examination of Dr. Lake. At the close of the State's case, Respondent moved for a psychological evaluation based on this evidence. Obtaining the psychological evaluation, not pursuing the discovery violation, was the primary objective of Respondent's motion. "Now we'd move, for one, to have this child go through a psychological evaluation prior to continuing with this case because, based upon testimony we've heard and what we've been given today, it's highly likely that some voice told [victim] to say [Respondent] did this."

An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). In other words, the trial court must be given an opportunity to resolve the issue before it is presented to the appellate court. Toal, Vafai, & Muckenfuss, Appellate Practice in South Carolina, at 66 (S.C. Bar 1999). In this case, Respondent's counsel raised the issue before trial, and then again during trial, at which point the trial judge denied the motion to have the victim submit to a psychological examination.

Whether a court has the authority to order a victim in a sexual assault prosecution to submit to a psychological examination is an issue of first impression in South Carolina. There is a split of

authority in other jurisdictions as to whether a court has the power to order a victim to submit to a psychological examination and then, if so, under what circumstances.

Some jurisdictions give the trial judge discretion to order a victim to submit to a psychological evaluation when the defendant can show a compelling need for such an evaluation. The trial court's denial or grant of the defendant's request is then reversed only if the trial judge abused his discretion. Pickens v. State, 675 P.2d 665 (Alaska App. 1984); Koerschner v. State, 13 P.3d 451 (Nev. 2000); State v. Michaels, 642 A.2d 1372 (N. J. 1994); Forbes v. State, 559 S.W.2d 318 (Tenn. 1977); State v. Delaney, 417 S.E.2d 903 (W. Va. 1992).[4] In Delaney, the West Virginia Supreme Court adopted factors for the trial judge to consider in determining whether defendant had demonstrated a compelling need. The factors are intended to assist the trial judge in weighing the defendant's need for the examination against the victim's right to privacy and include the following:

> (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged

[4] The precise test developed by each different court to determine when a psychological examination of a victim is warranted varies from case to case. The New Jersey court, for example, discussed the various ways a child's testimony could become "tainted" by interview tactics and adult influence, and held that the defendant bears the initial burden of showing *some* evidence that the victim's statements were the product of suggestive or coercive interview techniques. Michaels, 642 A.2d 1372. If the defendant meets that burden, a pretrial "taint" hearing is held in which the defendant can offer testimony of experts to counter the state's experts' testimony. Id.

criminal act; and (6) the evidence already available for the defendant's use.

Delaney, 417 S.E.2d at 907. In Delaney, the trial judge denied the defendant's request for a psychological examination of the victims (three young girls). The supreme court affirmed because the defendant failed to present "any reason, compelling or otherwise, to justify the examination." Id.

Other courts have taken the position that compelling a victim to submit to a psychological examination violates the public policy designed to protect the victim's right to privacy and to prevent further trauma to the victim. People v. Espinoza, 95 Cal. App. 4th 1287 (Cal. App. 2002);[5] State v. Horn, 446 S.E.2d 52 (N.C. 1994); State v. Looney, 240 S.E.2d 612 (N.C. 1978). The North Carolina Supreme Court considered many of the same factors as the Delaney court, including the conflicting interests of the defendant and victim, before concluding that "'the possible benefits to an innocent defendant, flowing from such a court ordered examination of the witness, are *outweighed* by the resulting invasion of the witness' right to privacy and the danger to the public interest from discouraging victims of crime to report such offenses.'" Horn, 446 S.E.2d at 452 (quoting

[5] The California Supreme Court wrote the seminal case granting trial judges discretion to order psychological evaluations of a victim upon a defendant's showing of compelling need in sexual assault cases. Ballard v. Superior Court, 410 P.2d 838 (Cal. 1966). California courts adhered to this rule until 1980 when the legislature prohibited psychiatric examinations of complaining witnesses in sex crime cases. Cal. Pen. Code Ann. § 1112 (2002). The opinions cited in support of a trial court's discretion to order psychiatric examinations of sexual assault victims based on showing of compelling need are not based on the California case law.

Looney, 240 S.E.2d at 627) (emphasis added).[6] The court commented further, "in balancing the rights of the victim and the defendant, . . . 'zealous concern for the accused is not justification for a grueling and harassing trial of the victim.'" Id.

Although the North Carolina Supreme Court raises valid concerns in Horn, a trial judge is vested with discretion to order a *child* complainant to submit to an independent psychological evaluation, and the proper exercise of this discretion, upon a showing of compelling need, sufficiently protects victims from unnecessary or traumatizing invasions of their privacy. The guidelines for evaluating the existence of compelling need, which were delineated by the West Virginia Supreme Court in Delaney, supra, safeguard child complainants from unnecessary intrusions into their privacy, while also protecting a defendant's right to confront his accuser. We adopt these guidelines, recognizing the serious and significant competing interests presented in this case and similar cases involving child victims. In such cases, a trial judge is, and must be, vested with broad discretion in the conduct of trial. The judge is required to weigh competing interests to ensure the truth of a matter is brought to light and justice to all parties before the court is served. An absolute bar to the exercise of judicial discretion to consider an order for a psychological evaluation of child complainants ignores the necessary balance which must be sought between a complainant's privacy rights and a defendant's right to a fair trial.

We disagree with the Horn reasoning supporting the North Carolina Supreme Court's opinion absolutely barring trial judges from

---

[6] In Looney, the North Carolina court held that the trial judge has no discretionary power to require a victim to undergo psychiatric examination before being permitted to testify. The Looney court found that to do so would be "a drastic invasion of the witness' own right of privacy" and "in and of itself, humiliating and potentially damaging to the reputation of the victim." 240 S.E.2d at 626.

exercising their discretion in determining whether a psychological evaluation of a child sexual assault complainant is appropriate.

In Horn, the North Carolina Supreme Court recites three primary concerns in support of its decision to absolutely bar trial judges from exercising judicial discretion in determining whether a psychological evaluation of a child sexual assault complainant is appropriate. First, the court suggests the negative impact of forcing a complainant to submit to a psychological evaluation is *always* a concern that outweighs *any* potential benefits to a defendant. Horn, 446 S.E.2d at 626 ("the possible benefits to an innocent defendant, flowing from such a court ordered examination of the witness, are outweighed by the resulting invasion of the witness' right to privacy… .") (citing Looney, supra). This is a sweeping generalization. Where the complainant and the perpetrator are often the only two witnesses to a sexual assault, fundamental fairness dictates a defendant be entitled to request a psychological evaluation of a child witness where there is *compelling* reason to question the complainant's psychological status. A child complainant who is incompetent to testify may not have the capacity to give an accurate account of the facts. Cases involving child victims present special concerns that weigh in favor of allowing judicial discretion to order psychological evaluations.[7]

Second, Horn suggests the invasion of an individual victim's privacy by a psychological examination, and the danger such a practice would further discourage already hesitant victims from reporting sex crimes, weighs against a trial judge exercising judicial discretion to order psychological evaluations in such cases. Horn, 240

[7] Jeffrey P. Bloom, Post-Schumpert Era Independent Interviews and Psychological Evaluations of Child Witnesses, July/Aug. S.C. Law. 40 (July/Aug. 1998) (arguing the State has an evidentiary advantage that amounts to a violation of due process when the State is allowed an opportunity to evaluate a child witness, but the defense is not).

S.E.2d at 627 ("the possible benefits to an innocent defendant…are outweighed by…discouraging victims of crime to report such offenses and other potential witnesses from disclosing their knowledge of them") (citing Looney, supra). The North Carolina Supreme Court's reasoning is unconvincing for two reasons. First, the Delaney factors set forth strict guidelines for the trial judge to consider in determining whether compelling need exists. These factors weigh in favor of complainants and thereby suggest judges would rarely order psychological evaluations. Therefore, it is unlikely the rare occasions where judges do order psychological evaluations would strongly discourage victims from reporting sex crimes. Second, it is highly unlikely the victim of a sex crime truly considers well in advance of trial whether to *report* a sex crime because the court may possibly order a psychological evaluation. This is especially true when the complainant is a child. It is highly improbable a child complainant would be so cognizant of the judicial process as to even consider the possibility of a judicially ordered psychological evaluation.

Finally, the North Carolina Supreme Court further supports its absolute bar on judicial discretion by suggesting the defendant's right to a fair trial is sufficiently protected by the trial judge allowing the defendant to submit evidence rebutting the complainant's mentally deficient status. Horn, 446 S.E.2d at 54. This assertion provides scant support for denying trial judges' discretion to consider ordering psychological evaluations of complainants. In particular, cross-examination of a complainant who is incompetent to testify, a condition that could be established through a psychological evaluation, would be wholly ineffective in protecting a defendant's right to a fair trial. A complainant who is incompetent to testify may not fully understand or convey the implications of his or her psychological condition on cross examination.

We recognize the recent trend of protecting the rights of victims as articulated by South Carolina's General Assembly.[8] We are completely in accord with these protections afforded victims of crime. However, a victim's rights will not be compromised where *compelling need* is the standard for ordering psychological evaluations of child complainants. Therefore, no public policy of this State is violated by the proper exercise of judicial discretion to consider the need of such evaluations to meet the ends of justice.

Turning to the present case, Respondent's counsel offered the questionable mental health of the *child* victim as the primary reason he sought a psychiatric evaluation of the victim. Specifically, Respondent's counsel cited the child victim's admission of hearing

---

[8] S.C. Const. art. I, § 24, provides that victims have the right to be free of intimidation, harassment, or abuse throughout the criminal and juvenile justice process. The proper exercise of judicial discretion based on compelling need could hardly be considered intimidation, harassment, or abuse in our justice system.

S.C. Code Ann. § 16-3-657 (2003), provides that the testimony of a victim in a criminal sexual conduct prosecution need not be corroborated. This provision fully supports the exercise of judicial discretion in considering psychological evaluations. Where one can be convicted on uncorroborated testimony, it is imperative that his accuser be competent to testify.

S.C. Code Ann. § 16-3-659.1 (2003), bars evidence of a victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct under most circumstances. While the statute clearly reflects the General Assembly's intent to protect victims of sexual assault, the proper exercise of judicial discretion in considering and ordering a psychological evaluation of a complainant, as prescribed by Delaney, does not contradict this protective provision.

voices in his head that told him to say and do mean things to his friends as justification for compelling the victim to undergo a psychiatric examination. Examined in light of the Delaney factors, the victim's very young age (four at the time of the alleged assault and six at trial), the fact that the victim was undergoing counseling, and spoke freely of the incident (indicating he would not be further traumatized by another examination), and the fact the victim's counselor testified victim was hearing voices during the year when victim alleged the assault occurred, the judge would have been within his discretion to order the victim to submit to an independent psychological examination.

Considering these circumstances, particularly the evidence regarding the victim's possible auditory hallucinations, we affirm the Court of Appeals' order reversing Respondent's adjudication and remanding for a new trial. We modify the order by limiting the trial judge's discretion to order a psychological examination to cases in which a child is the complaining victim. Upon remand, the court should consider any motion by Respondent for a psychological examination of the child victim in light of the Court's resolution of this novel issue, applying the analysis we set forth in this case.

II. Appeal Bond

The State argues the Court of Appeals acted beyond its jurisdiction in granting Respondent's motion for bond pending his appeal. We disagree.

South Carolina Code Ann. § 14-8-200(a) (Supp. 2003) states that the Court of Appeals shall have the same authority to grant petitions for bail as this Court would have in a similar case. Under South Carolina Code Ann. § 18-1-90 (1985), bail shall be allowed to the defendant in all cases in which the appeal is from the trial, conviction, or sentence for a criminal offense.

Rule 221(b), South Carolina Appellate Court Rules ("SCACR"), provides that the Court of Appeals retains jurisdiction until this Court grants or denies a petition for certiorari.

> Where a petition for rehearing has been denied, the Court of Appeals shall not send the remittitur to the lower court until the time to petition for a writ of certiorari under Rule 226(c) has expired. If a petition for writ of certiorari is filed, the Court of Appeals shall not send the remittitur until notified that the petition has been denied. If the writ is granted by the Supreme Court, the Court of Appeals shall not send the remittitur.

Rule 221(b), SCACR (2002).

The State filed a Petition for Rehearing on February 4, 2002, before the expiration of the fifteen days allotted in Rule 221(a), SCACR. On February 7, the Respondent filed a Petition for Appeal Bond pending the outcome of the State's appeal from the Court of Appeals' decision. The Court of Appeals denied the State's Petition for Rehearing on February 21, 2002, and granted Respondent's Petition for Appeal Bond on the same day. The Court of Appeals had not returned the remittitur when it granted the Respondent's Petition for Appeal Bond, and this Court had not granted certiorari over the case yet. Therefore, we find the Court of Appeals retained jurisdiction over Respondent's case and acted within its authority when it granted Respondent's petition.

Additionally, the State argues the Court of Appeals abused its discretion in admitting Respondent to bail by failing to consider what guidelines would be necessary to attempt to prevent Respondent from violating bond. We disagree.

The factors to be considered in admitting a person to bail pending appeal include the probability of reversal, the nature of the crime, the possibility of escape, and the character and circumstances of

the appellant. Nichols v. Patterson, 202 S.C. 352, 25 S.E.2d 155 (1943). The Court of Appeals set the amount of Respondent's bond ($1,000) and then remanded the matter to the family court of Lexington County for that court to set the conditions of his bond. The family court set numerous restrictive conditions on Respondent's bond, including prohibiting Respondent from having unsupervised contact with children younger than twelve, and requiring him to take his prescribed medications, attend school, be under the supervision of his mother, school officials, or other responsible adult *at all times*, and to abide by a 6:00 p.m. curfew. In our opinion, the conditions set by the family court demonstrate that the guidelines for bail were considered before Respondent was released on bail.

CONCLUSION

For the foregoing reasons, we affirm as modified the Court of Appeals' decision reversing Respondent's adjudication and granting Respondent a new trial. In addition, we affirm the Court of Appeals' decision denying the State's request to declare the appeal bond issued by the Court of Appeals null and void.

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

CHIEF JUSTICE TOAL: I respectfully dissent because I believe that the special rule adopted by the majority—giving trial judges the discretionary authority to order child victims in sexual abuse cases to undergo psychological evaluations—undermines existing trial procedures used to evaluate witness credibility and contravenes the recent statewide movement to protect the rights of the sexually abused. Therefore, I believe that under no circumstances should a trial judge have the authority to order child victims of sexual abuse to undergo psychological evaluations. Accordingly, I would reverse the portion of the court of appeals' decision holding that the family court judge abused his discretion in failing to order the child victim to submit to a psychological evaluation.

Of the various tests applied around the country to determine whether it is within the trial judge's discretion to order child victims to submit to a psychological examination in sexual abuse cases, the majority has chosen to adopt the factors used by the West Virginia Supreme Court in *State v. Delaney*, 417 S.E.2d 903 (W. Va. 1992). These factors, as follow, are intended to guide the trial judge in determining whether to order a psychological examination:

> (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use.

Delaney, 417 S.E.2d at 907.

I do not support the adoption of these factors; rather, I agree with North Carolina Supreme Court's analysis in *State v. Horn*, which led to the conclusion that "a trial judge does not have the authority to order a victim to submit to psychological examination, even when the victim's mental status is an element of the crime charged." 446 S.E.2d 52, 54

(N.C. 1994). In *Horn*, the court considered many of the same factors as the *Delaney* court but reasoned that "'the possible benefits to an innocent defendant, flowing from such a court ordered examination of the witness, are *outweighed* by the resulting invasion of the witness' right to privacy and the danger to the public interest from discouraging victims of crime to report such offenses.'" *Id.* at 53 (quoting *State v. Looney*, 240 S.E.2d 612, 627 (N.C. 1978)) (emphasis added).[9] On balance, the court found that "'zealous concern for the accused is not justification for a grueling and harassing trial of the victim.'" *Id.*

I agree with the North Carolina court and find support for my view in practical and policy considerations. First, the invasion into an individual victim's privacy by such an examination and the danger that such a practice would discourage already hesitant victims from reporting sex crimes, adequately support, in my view, a decision forbidding trial judges from having the authority to order psychological examinations in these cases.

Second, the trial process already contemplates the challenges associated with witness credibility and overall fairness, and both trial judges and attorneys already have several alternatives at their disposal to ensure that defendants receive a fair trial. Most importantly, perhaps, is the trial judge's power to admit or deny the admission of evidence already gathered concerning the witness's mental health status. Or as a last resort, the trial judge may dismiss the case if the defendant's right to a fair trial has been imperiled.

---

[9] In *Looney*, the North Carolina court held that the trial judge has no discretionary power to require a victim to undergo psychiatric examination before being permitted to testify. To require victims to undergo such evaluations, the court reasoned, would be "a drastic invasion of the witness' own right of privacy" and "in and of itself, humiliating and potentially damaging to the reputation of the victim." 240 S.E.2d at 626.

Third, a defendant's right to a fair trial is sufficiently protected through the right to cross-examine both the testifying victim and all other witnesses presented by the State. A well-prepared cross-examination has the potential to thoroughly undermine a witness's credibility. Alternatively, the defense may call other witnesses to attack the victim's credibility. Finally, the defense may present its own expert witnesses to rebut evidence concerning the victim's mental health status.

Fourth, as a practical matter, the majority's decision has the unanticipated consequence of creating a "trial within a trial." In other words, if a judge determines—after weighing the *Delaney* factors as advocated by the majority—that an examination should be ordered, the "primary trial," the trial against the alleged abuser, is effectively put on hold while the "secondary trial," the examination of the victim to ascertain the victim's mental status, is conducted. In this "secondary trial," victims assume the role of the accused in the primary case. This additional process turns our notion of the adversarial process on its head by temporarily relieving the State of its constitutional burden of proof—to prove the defendant guilty beyond a reasonable doubt—and creating, instead, a hearing on the victim's mental capacity.

Fifth, the General Assembly and people of South Carolina have actively sought, in recent years, to protect the rights of victims, particularly victims of sexual assault. *See* Victims' Bill of Rights, S.C. Const. art. I, § 24 (providing that victims have the right to be free from intimidation, harassment, or abuse throughout the criminal and juvenile justice process); S.C. Code Ann. § 16-3-657 (Supp. 2002) (providing that the testimony of a victim in a criminal sexual conduct prosecution need not be corroborated); S.C. Code Ann. § 16-3-659.1 (Supp. 2002) (barring evidence of victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct in prosecutions for criminal sexual conduct under most circumstances). Each of these provisions illustrates the concerted movement toward protection of the victim in criminal sexual conduct cases. I believe that the majority's decision undermines these efforts and the intentions supporting these policy decisions.

Sixth, the adoption of the *Delaney* factors represents a radical change in the criminal trial procedure in this state. Evaluating witness credibility is an important function reserved for judges and juries. Allowing judges to order victim evaluations in sexual abuse cases undermines the role of judges and juries and vests a great deal of power in the psychologists who perform the evaluations.

Finally, that the ordering of psychological evaluations will be a rare occurrence, as the majority posits, is of little consolation to the victims who are forced to undergo such evaluations. Moreover, I respectfully find the majority's argument that child victims, in particular, will not be dissuaded from reporting abuse since they are too young to contemplate the hurdles ahead, unpersuasive. To the contrary, a child victim's inability to understand the adversarial process further justifies my position on this issue, a position that I believe is consistent with the protective nature of victims' rights legislation in South Carolina.

In conclusion, I do not support the majority's decision giving trial judges discretion to order a criminal sexual conduct victim to submit to a psychological examination. Given that our legal system is already designed to ensure fairness for all those who enter the courtroom and that the special rule adopted today runs afoul of public policy in this state, I would REVERSE the portion of the court of appeals' decision holding that the family court judge abused his discretion in refusing to order a psychological evaluation of the victim. I agree, however, with the majority's decision on the appeal bond issue.

MOORE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Herman Henry "Bud"
Von Dohlen, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Berkeley County
Richard E. Fields, Trial Judge
L. Henry McKellar, Post-Conviction Relief Judge

Opinion No. 25861
Heard June 9, 2004 - Filed August 30, 2004

REVERSED

Teresa L. Norris, of the Center for Capital Litigation, of Columbia; Jeffrey P. Bloom, of Columbia; and Acting Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy

Attorney General Donald J. Zelenka, all of Columbia, for Respondent.

JUSTICE BURNETT: We granted the petition for a writ of certiorari from Herman Henry "Bud" Von Dohlen (Petitioner) to consider whether the post-conviction relief (PCR) judge erred in denying Petitioner's request for a new sentencing proceeding. We reverse and grant Petitioner a new sentencing proceeding.

FACTUAL AND PROCEDURAL HISTORY

Petitioner, then age 35, averred in a signed confession to law enforcement investigators that he walked from the Berkeley County pawnshop he managed to a nearby dry cleaning shop to ask for change the morning of May 28, 1990. He stated shop employee Margaret McLean (Victim) refused to give him change and told him his brother, who recently had been murdered, deserved to die.

Petitioner returned to the pawnshop, loaded a rifle, and walked back to the shop. He stated he intended only to scare Victim for her alleged cruel and thoughtless comments. He forced Victim to disrobe to make the crime appear to be a rape. He stated the rifle discharged accidentally when Victim ran and caused a bar bolting the back door to strike Victim and the gun. Petitioner then shot Victim in the back of the head and decided to steal money from the store in order to make it appear to be a robbery.

The jury convicted Petitioner of murder and armed robbery, and recommended a sentence of death based on the aggravating circumstance of armed robbery. See S.C. Code Ann. §§ 16-3-20(A) and 16-3-20(C)(a)(1)(d) (Supp. 1991). The trial judge sentenced Petitioner to death for murder on the jury's recommendation and twenty-five years for armed robbery. The convictions and sentences were affirmed on direct appeal. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996).

Petitioner filed a PCR application in 1997 and later amended it. The PCR judge denied the application after a hearing in 1999. We granted a writ of certiorari to consider two questions raised by Petitioner:

> I. Does any evidence of probative value support the PCR judge's ruling that Petitioner's trial attorneys were not ineffective in failing to adequately prepare and present evidence during the penalty phase of the trial that Petitioner suffered from a major mental illness at the time of the murder?
>
> II. Does any evidence of probative value support the PCR judge's ruling that Petitioner's trial attorneys were not ineffective in failing to object to the prosecutor's closing argument during the penalty phase of the trial that jurors should put themselves in Victim's shoes?

DISCUSSION

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In order to prove counsel was ineffective, the applicant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Strickland, 466 U.S. at 687-694, 104 S.Ct. at 2064-2068, 80 L.Ed.2d at 693-698; Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). Thus, an applicant must show both error and prejudice to be granted relief in

a PCR proceeding. Strickland, *supra*; Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999).

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An appellate court may affirm the PCR court's decision when its findings are supported by any evidence of probative value in the record. Cherry, *supra*. However, an appellate court will not affirm the decision when it is not supported by any probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

I. EXPERT TESTIMONY ABOUT PETITIONER'S MAJOR MENTAL ILLNESS

During the penalty phase of the trial, witnesses testified Petitioner had been a good husband, married for seventeen years; a good father, with four children ages two through fourteen; and a dependable, likeable employee of grocery stores and pawnshops. Petitioner grew up in a very poor family and had been physically abused and emotionally neglected as a child. He had no prior criminal record. The violent murder was completely unexpected and out of character for a man who had never displayed violent tendencies.

Witnesses testified Petitioner's personality and demeanor underwent a dramatic change when – about two weeks before Victim's murder – Petitioner's brother was murdered by the brother's father-in-law. Petitioner became withdrawn, irritable, and depressed. He began abusing alcohol and Valium, an anti-anxiety medication.

At trial during the penalty phase, Dr. Michael Lampkin, a psychiatrist, testified Petitioner at the time of the murder suffered from "adjustment reaction with mixed features of emotions and conduct," as well as pathological intoxication from the abuse of alcohol and Valium. Adjustment reaction is a disorder in which a person's expression of grief exceeds what is normally expected. It is generally easily treatable and lasts no longer than three months. On cross-examination, Lampkin

testified Petitioner did not have a chronic mental illness and did not dispute the solicitor's assertion that adjustment reaction disorder was "pretty small potatoes" in the spectrum of mental illnesses.

In the penalty phase closing arguments, the solicitor argued Petitioner did not suffer from any mental or emotional disturbance and that the murder was committed in "cold premeditation." The solicitor contended, "His brother Bill dying, a less than perfect childhood, vagaries, ups and downs of life that we all suffer. His own witness, Dr. Lampkin, said adjustment reaction as he called it, the stress. Divorce could bring it on, business problems can bring it on. These are things every person goes through. He could provide not one bit of excuse."

At the PCR hearing, Lampkin testified that if he had been provided with additional medical and psychiatric records that existed and were available before the trial, he would have diagnosed Petitioner as suffering at the time of the murder from "major depressive episodes with severe symptoms of anxiety and possible prepsychotic features," plus alcohol and Valium abuse.

Dr. Lampkin identified six items that changed his opinion: (1) the MMPI test[1] administered to Petitioner in 1990 while at the William S. Hall Psychiatric Institute, a state hospital; (2) Petitioner's complete medical record from his four months at the Hall Institute, including nurses' notes with numerous references to Petitioner's depressed state, impaired memory, isolation, and hopelessness; (3) the medical records of Petitioner's father indicating he suffered from chronic depression and thus providing a genetic basis for Petitioner's chronic depression; (4) the medical records of Petitioner's brother, John, who attempted suicide shortly before Petitioner's trial, providing additional proof of a genetic predisposition for mental disorders; (5) an

[1] The MMPI is the Minnesota Multiphasic Inventory, a psychological test used for more than fifty years.

MCMI test[2] administered to Petitioner in 1990 by Dr. Harold Morgan at the Hall Institute, revealing elevated scores for anxiety, depression, and delusional disorders; and (6) Petitioner's records prepared in 1990 by Dr. Don Hinnant, a psychologist, which revealed symptoms of major depression. All the records were potentially available to Petitioner's attorneys and expert witnesses before his trial in 1991.

Louisa Storen, a social worker who testified at trial about Petitioner's background and family, testified at the PCR hearing she asked Lampkin to review Petitioner's case shortly before trial to ensure she had not overlooked important issues. Storen provided a mostly oral summary of Petitioner's medical records and background to Lampkin. Storen did not expect Lampkin to testify at trial and, in a meeting lasting no more than thirty minutes, "what I remember was talking very fast, telegraphically trying to give him a bunch of information in a short period of time before he saw [Petitioner]."

At the PCR hearing, Dr. John DeWitt, a forensic psychiatrist, testified he treated Petitioner for 3½ years beginning in August 1991, examining Petitioner fifty-two times. Petitioner suffered from a major mental illness at the time of Victim's murder – severe depression with psychotic and suicidal tendencies. Petitioner's mental condition in May 1990 was far more serious than the usually short-lived adjustment reaction disorder with which he was diagnosed.

Further, DeWitt testified Petitioner's severe depression was a condition to which he was predisposed by a family history of mental illness and alcohol or drug abuse, as well as a physically abusive childhood. The condition likely began in earnest when Petitioner was diagnosed with cancer in the 1980s. It was exacerbated by the suicide of his father in 1981, the murder of his brother two weeks before Victim's murder, and Petitioner's attempts at self-medication with alcohol and Valium. Severe depression can cause unpredictable,

[2] The MCMI is the Millon Clinical Multiaxial Inventory report, a standard psychological test.

irrational, and chaotic behavior in people who never have exhibited such behavior, with personality and lifestyle changes so drastic it is "almost as if they had a brain transplant." Petitioner suffered a mental or emotional disturbance at the time of Victim's murder, and due to his altered mental state "[the murder] was not a volitional thing but out of his conscious awareness or control."

Petitioner contends his trial attorneys were ineffective in failing to adequately prepare and present evidence in the penalty phase of the trial that he suffered from severe, chronic depression, a major mental illness, at the time of the murder. The attorneys failed to provide to Lampkin medical records and relevant information that existed before trial. If they had done so, Lampkin would have reached the proper diagnosis and been able to correctly explain to jurors Petitioner's mental state and inability to control his actions on the date of the murder. There is a reasonable probability this information could prompt the jury to recommend a sentence of life in prison rather than death. Petitioner relies in part on Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

The State contends the PCR judge correctly denied relief to Petitioner because his trial attorneys' investigation and preparation of evidence on Petitioner's mental state were sufficient to meet the Strickland standard. The State asserts Petitioner's attorneys presented extensive evidence of his mental and psychological state, distinguishing this case from Wiggins, supra.

We conclude Petitioner's case is sufficiently analogous to Wiggins to rely on it in reaching our decision, although counsel in Petitioner's case was more diligent than counsel in Wiggins in presenting an accurate picture of Petitioner's mental state. In Wiggins, the United States Supreme Court found the defendant's attorneys in a capital case were ineffective in failing to expand their investigation of the defendant's background beyond cursory reports in order to present compelling mitigating evidence on the defendant's behalf during the penalty phase of the trial. An adequate investigation would have revealed crucial facts about the defendant's "severe privation and abuse

in the first six years of his life while in the custody of his alcoholic, absentee mother," the "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care," the time he spent homeless, and his diminished mental capacity. Wiggins, 539 U.S. at ___, 123 S.Ct. at 2542, 156 L.Ed.2d at 493.

While Strickland does not require counsel investigate every conceivable line of mitigating evidence or require the submission of such evidence in every case, "strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment support the limitations on investigation. . . . A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances." Wiggins, 539 U.S. at ___, 123 S.Ct. at 2541, 156 L.Ed.2d at 492 (quoting Strickland, supra). The Supreme Court held the defendant had proven prejudice because there is a reasonable probability at least one juror would have struck a different balance and returned with a different sentence had the jury been confronted with the considerable mitigating evidence. Id. at ___, 123 S.Ct. at 2543, 156 L.Ed.2d at 495; see also Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (defendant's attorneys were ineffective in failing to investigate and present substantial mitigating evidence during penalty phase of capital case, including description of abuse and neglect during defendant's early childhood and testimony he was borderline mentally retarded; counsel's error prejudiced defendant because omitted evidence might have influenced jury's appraisal of defendant's moral culpability).

Petitioner has proved error and prejudice under the Strickland standard. Petitioner has demonstrated his attorneys erred in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder. While the attorneys exerted some effort, according to the testimony of Lampkin and DeWitt at the PCR hearing, it was insufficient. The absence of crucial medical records and related information which existed at the time of Petitioner's trial prevented Lampkin from conveying an accurate diagnosis and explanation of Petitioner's mental condition to the sentencing jury.

Furthermore, Petitioner has shown prejudice. There is a reasonable probability the outcome of the trial might have been different had the jury heard the available information about Petitioner's mental condition as it existed at the time of the murder. The PCR judge's decision is not supported by evidence of probative value.

II. SOLICITOR'S CLOSING ARGUMENT

The black tennis shoes Victim wore on the day of the murder were entered into evidence and identified by two witnesses. The solicitor mentioned Victim's shoes four times during his closing argument in the guilt phase of the trial.[3]

During closing arguments in the penalty phase, the solicitor expanded on the same theme and explicitly urged jurors to "put yourself in Margaret's shoes, size six." At the PCR hearing, Petitioner's sister testified the solicitor cried while holding up one of Victim's shoes during his closing argument in the penalty phase, telling jurors "to put themselves in her shoes." One of Petitioner's trial attorneys testified he did not recall that particular statement or the solicitor crying, but he may have been distracted and failed to notice it. Petitioner's attorneys did not identify any strategic reason for not objecting to the arguments.

Petitioner contends his trial attorneys were constitutionally ineffective in failing to object to the solicitor's argument that jurors should "put yourself in Margaret's shoes, size six." The solicitor's statements constitute a prohibited form of argument sometimes described as a "golden rule argument," in which jurors are urged to

---

[3] "This Defendant forces her at this gun point to take off her shirt, her underwear, her pants and her shoes." "You'll have Margaret's shoes back there" in the jury room. "Her shoes taken off of her, a small size seven shoes – small woman, and this Defendant had her where he wanted her. . . ." "You can hear her through her shoes."

place themselves in the position of a party, a victim, or a victim's family member and decide the case from that perspective. Petitioner asserts the effect of such an argument is potentially to cause jurors to decide a case based on passion and prejudice instead of a reasoned, impartial consideration of evidence presented to them.

The State asserts the PCR judge correctly denied relief because a golden rule argument is permissible during the penalty phase of a capital case in light of Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). The State contends Payne allows the jury to consider victim impact evidence; therefore, it is proper to allow the prosecutor during the penalty phase to invite jurors to place themselves in the victim's position, provided the invitation is grounded in the circumstances of the crime.[4] The State contends Petitioner has failed to show that statement was sufficiently prejudicial to warrant relief.

A review of a solicitor's closing argument is based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990). A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); Copeland, 321 S.C. at 324, 468 S.E.2d at 624.

---

[4] Petitioner in his reply brief correctly notes Payne was decided June 27, 1991, one month after Petitioner's trial. Victim impact arguments were improper at the time of Petitioner's trial, and the solicitor could not have been relying on Payne in making his arguments. Petitioner does not dispute that Payne's holdings apply in his case.

In State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965), the defendant faced the death penalty for rape. The solicitor argued in closing:

> How would you like to see him coming in your bedroom or your daughter's bedroom with this butcher knife? . . . I don't know whether you have got daughters or not, I believe one or two of you are not married. But everybody has got a mother. Not everybody, but most everybody has got a sister, daughters. Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them, what would you do? . . . How, if this young lady was your sister, how would you feel? How, if she was your wife, how would you feel? How, if she was your daughter, God only knows, how would you feel? Gentlemen, she is all of that to somebody. She is a daughter, she is a sister, she is a wife. And but for the grace of God that could be your sister, your daughter or your wife. . . . But when you get back there and consider giving him mercy like they are going to ask you for, think about your wife, think about your daughters, think about your sister or your mother, being in the same position as this young lady, with a knife at her throat and a brute on top of her.

Id. at 504, 144 S.E.2d at 482.

We found the argument improper and reversed the conviction and death sentence. Although we did not describe it as a golden rule argument, we explained that

> [a]n argument of this nature addressed to the jury tends to completely destroy and nullify all sense of impartiality in a case of this kind. Its logical effect is to arouse passion and prejudice. Jurors are sworn to be governed by the evidence and it is their duty to regard the facts of a case

> impersonally. We have no idea that the able Solicitor intended to arouse prejudice or passion. But statements of this character are well calculated to bring about this result.

White, 246 S.C. at 506, 144 S.E.2d at 482 (quoting State v. Gilstrap, 205 S.C. 412, 32 S.E.2d 163 (1944), where the Court condemned an argument in a death penalty case in which the solicitor urged jurors to "[p]lace yourself in the position that this girl was your own daughter, and go in and vote as though it were your own daughter who had been raped," but upheld the conviction given the overwhelming evidence of the defendant's guilt).

Other courts, including our own Court of Appeals, uniformly have condemned and prohibited golden rule arguments in criminal and civil settings. State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (reversing conviction and remanding for new trial in sexual assault/robbery case where solicitor used "you" or a form of "you" some forty-five times, asking the jury to put themselves in place of the victim); Forrestal v. Magendantz, 848 F.2d 303, 309 (1st Cir. 1988) (stating golden rule argument is universally condemned and listing factors to determine whether it is reversible error); U.S. v. Teslim, 869 F.2d 316, 328 (7th Cir. 1989) (holding it is improper for prosecutor to urge jurors to place themselves in party's shoes); State v. McHenry, 78 P.3d 403, 410 (Kan. 2003) (golden rule arguments are not allowed because they encourage jury to depart from neutrality and decide case on improper basis of personal interest and bias); Caudill v. Commonwealth, 120 S.W.3d 635, 675 (Ky. 2003) (prohibited golden rule argument is one in which prosecutor asks jurors to imagine themselves or someone they care about in position of crime victim); Garron v. State, 528 So.2d 353, 358-360 (Fla. 1988) (prosecutor's golden rule arguments during penalty phase of capital case, taken as a whole, demonstrated classic case of attorney who has overstepped bounds of zealous advocacy and entered into forbidden zone of prosecutorial misconduct, requiring new trial); State v. Carlson, 559 N.W.2d 802, 811-812 (N.D. 1997) (golden rule argument is improper and should be avoided in civil and criminal actions, but brief comment in prosecutor's rebuttal argument did not constitute reversible error);

Hayes v. State, 512 S.E.2d 294, 297 (Ga. App. 1999) (an improper golden rule argument asks jurors to consider case, not objectively as fair and impartial jurors, but rather from biased, subjective standpoint of litigant or victim).

We reject the State's assertion that a golden rule argument, grounded in the facts of a particular case, is permissible in light of Payne. In that case, the United States Supreme Court held that states may allow the admission of victim impact evidence in capital cases without violating the Eighth Amendment, provided such evidence is not so unduly prejudicial that it renders the trial fundamentally unfair and violates due process under the Fourteenth Amendment. "A State may legitimately conclude that evidence *about the victim* and *about the impact of the murder on the victim's family* is relevant to the jury's decision as to whether or not the death penalty should be imposed." Payne, 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736 (emphasis added). Thus, it was proper in a brutal murder case for the grandmother of a child victim to testify the child missed his murdered mother, and it was proper for the prosecutor to discuss the continuing effect of the crime on the child victim and his family during the penalty phase of the trial.

However, consideration of victim impact evidence does not open the door to golden rule arguments urging the jury to subjectively analyze a case solely or primarily from the victim's viewpoint. Payne allows a prosecutor to call upon jurors to consider *objectively* a victim's uniqueness as an individual and impact of the crime on the victim's family. The Payne Court did not approve the use of golden rule arguments in a capital case.

The State's reliance on a North Carolina line of cases is similarly misplaced. Those cases prohibit arguments in which jurors are urged to put themselves in the victim's position, but allow a prosecutor to use evidence admitted at trial to describe vividly a victim's waning moments of life to the jury during the penalty phase of a capital case. E.g. State v. Miller, 588 S.E.2d 857, 867 (N.C. 2003); State v. Anthony, 555 S.E.2d 557, 591-593 (N.C. 2001). Furthermore,

the California Supreme Court in People v. Haskett, 640 P.2d 776 (1982), cited by the State, did not endorse golden rule arguments. "[I]rrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed," although the "prosecution's invitation to the jurors to project themselves into the role of the surviving victim in this case was insufficiently inflammatory to justify reversal." Id. at 790.

Petitioner has shown error under the Strickland standard. His attorney erred in failing to object to the solicitor's explicit call for jurors to "put yourself in Margaret's shoes, size six." The argument indisputably asks jurors to abandon their impartiality and view the evidence and potential sentence from Victim's viewpoint. As we recognized in White, 246 S.C. at 506, 144 S.E.2d at 482, jurors should decide whether to recommend a death sentence based on an impartial, rational, and careful evaluation of all the facts and circumstances about the crime, the victim, and the defendant as presented at trial. Jurors must not strive – or be urged to strive – to analyze the evidence and potential sentence solely or primarily through the eyes of the victim.

It is difficult to determine the precise impact of the solicitor's argument on the jury's deliberation of the sentence, but the potential impact must be carefully and thoroughly evaluated in a capital case. See White, 246 S.C. at 507, 144 S.E.2d at 483 ("[i]n view of the absolute discretion of the jury with regard to the issue of mercy, it is impossible to determine whether the argument actually had a prejudicial effect upon the verdict"); State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000) ("We note the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all.").

Our studied review of the record leads us to conclude that, while Petitioner has shown error, evidence of probative value supports the PCR judge's ruling that Petitioner failed to demonstrate prejudice

under the facts of this case. Petitioner has not shown there is a reasonable probability that, but for counsel's error, the result of the trial's penalty phase would have been different. The solicitor's single comment, although improper, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Cf. State v. Gaskins, 284 S.C. 105, 119, 326 S.E.2d 132, 141 (1985) (solicitor's comment during closing argument in capital case that certain evidence was undisputed because of defendant's failure to testify was harmless error beyond a reasonable doubt in context of entire record and in light of overwhelming evidence of guilt), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Nonetheless, we strongly disapprove of such arguments because their only possible use is to improperly arouse the passions and prejudices of jurors, urging them to abandon their sworn role as fair and impartial arbiters of the facts and view the evidence from an improper perspective.

CONCLUSION

We reverse the PCR judge's ruling on Question I because Petitioner has shown error and prejudice stemming from his attorneys' failure to adequately prepare and present expert testimony during the trial's penalty phase about Petitioner's alleged major mental illness as it existed at the time of the murder. We affirm the PCR judge's ruling on Question II because, while Petitioner has shown trial counsel erred in failing to object to the solicitor's improper closing argument, he has not shown the single comment prejudiced him. We remand this case to circuit court for a new sentencing proceeding.

REVERSED.

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

JUSTICE WALLER: I concur with the majority opinion's analysis of Issue 1. I also concur with the majority to the extent it holds the solicitor's closing argument, asking the jurors to place themselves in the victim's shoes, was improper. I disagree, however, with the majority's conclusion that Von Dohlen was not prejudiced by the solicitor's argument.

The majority cites State v. White, 246 S.C. 502, 507, 144 S.E.2d 481, 483 (1965), for the proposition that "[i]n view of the absolute discretion of the jury with regard to the issue of mercy, **it is impossible to determine whether the argument actually had a prejudicial effect upon the verdict."** (emphasis added).

Given that this is a capital trial in which the jury may recommend a sentence of life for any reason or no reason, I would hold Von Dohlen was prejudiced by the solicitor's improper golden rule comment. Accordingly, I would reverse this issue as well.

MOORE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stewart Belton, Respondent-Petitioner

v.

Cincinnati Insurance Company, Petitioner-Respondent.

ON WRIT OF CERTIORARI

Appeal From Lexington County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 25862
Heard April 6, 2004 - Filed August 30, 2004

REVERSED

Frank A. Barton, of Reeve and Barton, L.L.C., of West Columbia, and H. Wayne Floyd, of Wayne Floyd Law Office, of West Columbia, for Respondent-Petitioner.

Robert D. Moseley and Mark M. Trapp, both of Leatherwood, Walker, Todd & Mann, P.C., of Greenville, and S. Jahue Moore, of Moore, Taylor & Thomas, P.A., of West Columbia, for Petitioner-Respondent.

CHIEF JUSTICE TOAL: This cross-appeal arises from a breach of contract and bad faith refusal to pay claim brought by Stewart Belton (Belton) against Cincinnati Insurance Company (Cincinnati). The trial court granted Cincinnati summary judgment, holding Belton did not have an insurable interest in the destroyed property. The court of appeals reversed. *Belton v. Cincinnati Ins. Co.*, 353 S.C. 363, 577 S.E.2d 487 (Ct. App. 2003). We reverse.

FACTUAL/PROCEDURAL BACKGROUND

In October 1997, Belton and Charleston attorney Grady Query (Query) entered into a contract entitled "Lease Option to Buy," transferring possession of a commercial building and eleven and a half acres of land to Belton. The contract included (1) a lease provision directing Belton to pay Query monthly payments of $1,200; (2) a purchase provision allocating 80 percent of Belton's monthly payments toward Belton's purchase of the property; (3) a provision establishing that the closing date would occur on or before November 1, 2002; and (4) a provision creating a five percent penalty for late monthly payments. The contract did not provide, however, a provision that Belton would forfeit the equity in the property upon nonpayment of the monthly payments.

Shortly after the contract was signed, Belton fell behind on his payments. In early 1998, Query wrote Belton two letters terminating the agreement and demanding that Belton vacate the premises. When Belton refused to vacate the premises, Query filed a rule to vacate or show cause. In April 1998, Belton declared bankruptcy and received protection from an automatic stay, allowing him to remain in possession of the property.

In August 1998, Belton applied to insure the building with Cincinnati.[1] Two days later, Belton applied for insurance with General Star Insurance Company. Belton testified that he applied for insurance with General Star because he was unsure whether Cincinnati would insure the building.

[1] Cincinnati eventually accepted Belton's application and insured the building for $250,000.

Approximately a week after applying for insurance with both Cincinnati and General Star, the building was destroyed by fire. Therefore, at the time that the building was destroyed, both policies were in effect, and Belton sought coverage under both policies.

When Belton filed a claim with Cincinnati, Cincinnati denied coverage, alleging Belton lacked an insurable interest.[2] During Cincinnati's investigation of Belton's claim, Cincinnati hired the Warren Group to conduct a fire analysis, which concluded that the fire was set intentionally. Belton testified that he was on vacation with his family when the fire occurred. Belton brought suit.[3]

During a deposition, counsel for Cincinnati asked Belton if he had ever taken a polygraph test concerning the destroyed building. Belton answered that he had taken the test, but he claimed that the results of the test were protected by the attorney-client privilege and refused to provide the results. Cincinnati filed a motion to compel, and, in turn, Belton filed a motion to invoke the attorney-client privilege. Although, the trial judge granted Cincinnati's motion to compel, Belton never testified about the polygraph results because the trial court granted summary judgment before Belton could be questioned again.

Belton also refused to respond to Cincinnati's request to admit, arguing that the documents referenced in the request were not properly served in accordance with Rule 56(a), SCRCP. Cincinnati filed a motion to compel, which the trial court granted, finding that the request properly incorporated documents by reference already in Belton's possession. Nevertheless, before the trial court ruled on the motion, the issue was held moot because Belton complied with the request before the motion could be granted.

---

[2] Cincinnati also alleged in its answer-counterclaim that Belton was involved in the intentional burning of the building, precluding him from coverage. Belton was in fact indicted for insurance fraud but was never convicted.

[3] Belton initiated a suit against both Cincinnati and General Star but eventually dismissed the action against General Star without prejudice.

At trial, the judge granted Cincinnati's motion for summary judgment. Belton timely appealed and the court of appeals reversed, holding that "a party holding an option to purchase has an insurable interest" and remanding questions of fact concerning (1) whether Belton's option survived Query's attempts to terminate the agreement, and (2) the amount or extent of Belton's insurable interest in the underlying property.

Petitioner-Respondent Cincinnati presents the following issue for review:

I. Did the court of appeals err in reversing the trial court, finding that Belton had an insurable interest in the property insured?

Respondent-Petitioner Belton brings the following issues for review:

II. Did the trial judge err in ruling that the results of Belton's polygraph test were not protected under the attorney-client privilege?

III. Did the trial judge err in granting Cincinnati's motion to compel?

LAW/ANALYSIS

Standard of Review

The trial court must grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Conner v. City of Forest Acres*, 348 S.C. 454, 462, 560 S.E.2d 606, 610 (2002). When determining whether triable issues of fact exist, all evidence and inferences drawn from the evidence must

be viewed in the light most favorable to the non-moving party. *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

Insurable Interest

Cincinnati argues that the court of appeals erred in finding that a question of fact existed as to whether Belton had an insurable interest in the destroyed property. We agree. Although we do not discount the possibility that an option to purchase land may create an insurable interest, we find that Belton had no insurable interest in the destroyed property because he did not have equity in the property.

Equity and Insurable Interest

The central issue of this case is whether Belton had an insurable interest in the underlying property at the time he contracted for insurance with Cincinnati. Belton argues his option to purchase the property gave him an insurable interest. To accept this argument, we must find that Belton's option survived Query's termination of the agreement.[4] Nevertheless, regardless of whether Belton's option was enforceable, we hold that Belton did not have an insurable interest in the underlying property because he did not have any equity in the underlying property when he contracted for insurance with Cincinnati. Further, we reserve the question of whether an option to purchase real property creates an insurable interest for a later date.

Our holding that a party cannot have an insurable interest in an option to purchase land if that party does not have equity in that land is consistent with our jurisprudence concerning insurable interest. Although, our courts have not used the word "equity", we have certainly equated a party's insurable interest in property with a party's personal stakes in that property. In *Benton & Rhodes, Inc., v. Boden*, the court of appeals held that "[t]o have an insurable interest in property, one must derive a benefit from its existence or suffer a loss from its destruction." 310 S.C. 400, 403, 426 S.E.2d 823, 825 (Ct. App. 1993). The next year, the court of appeals held that an insured may

[4] The parties do not dispute that the agreement was terminated upon Belton's default and Query's attempts to have him evicted.

not recover insurance proceeds in excess of his interest in the property. *Singletary v. Aetna Cas. & Sur. Co*., 316 S.C. 199, 202, 447 S.E.2d 869, 870 (Ct. App. 1994). Therefore, our holding that an option cannot create an insurable interest where its holder has no equity in the underlying property is consistent with our prior rulings.

After reviewing the record, it is clear that Belton's equity in the underlying property is *de minimis* at best. It is unclear how many monthly payments, if any, Belton made to Query. But when Query sought relief from the bankruptcy court, he filed a statement indicating that Belton's total arrearage was $7,810. According to the terms of the contract, Belton was to pay a $50 down payment and then $1,200 a month, with 80% of the monthly payment going toward the purchase of the building. Therefore, 80% of the Belton's monthly payments made to Query arguably constitute equity. Nonetheless, Belton has failed to provide any evidence that the equity he accumulated in the property was not diminished and ultimately depleted because of his arrearages.

In addition, as plaintiff, Belton had the burden to set forth specific facts, which included providing evidence that he had equity in the property at the time he contracted for insurance and at the time of loss. The non-moving party may not rest on the mere allegations of his pleading to withstand summary judgment but "must set forth specific facts showing that there is a genuine issue for trial." SCRCP 56(e); *Bravis v. Dunbar*, 316 S.C. 263, 449 S.E.2d 495 (Ct. App. 1994). Because Belton has failed to provide such evidence, we hold that summary judgment was proper. We may not draw an inference that Belton had an insurable interest without sufficient evidence to support such a conclusion.

CONCLUSION

We hold that because Belton has failed to show that he had any equity in the destroyed property, he did not have an insurable interest in the property. If Belton had provided evidence that the equity he acquired through monthly payments was in excess of his arrearages, plus interest accrued upon nonpayment, he may have established that he held an insurable

interest. Nevertheless, we need not make that determination at this time. Further, because Belton did not have an insurable interest in the underlying property, we need not address Belton's issues concerning the polygraph evidence and the request to admit. Therefore, we reverse the court of appeals' ruling, and uphold the trial court's order granting summary judgment for Cincinnati and denying Belton coverage under his policy with Cincinnati.

REVERSED.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice John W. Kittredge, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Robert Brown, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Florence County
L. Casey Manning, Circuit Court Judge

Opinion No. 25863
Heard May 13, 2004 - Filed August 30, 2004

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and Solicitor E.L. Clements, III, of Florence, for Petitioner.

Tara S. Taggart, of the South Carolina Office of Appellate Defense, of Columbia, for Respondent.

JUSTICE BURNETT: We granted the petition for a writ of certiorari by the State to consider the Court of Appeals' unpublished decision in State v. Brown, Op. No. 2003-UP-274 (S.C. Ct. App. filed April 15, 2003). We affirm.

FACTUAL AND PROCEDURAL HISTORY

Robert Brown (Respondent) was convicted by a jury of three counts of criminal sexual conduct (CSC) in the first degree with a minor under the age of eleven, four counts of CSC in the second degree with a minor between the ages of eleven and fourteen, three counts of committing a lewd act on a minor, one count of assault with intent to commit second-degree CSC with a minor, ten counts of incest, and three counts of CSC in the first degree. He was sentenced to the maximum term of imprisonment on each conviction, with all sentences to be served consecutively for a total sentence of 410 years.

Respondent physically and sexually abused his daughters, who were adults at the time of the trial, repeatedly over a period of years. They testified Respondent regularly beat them with a strap fashioned from a discarded tire if they disobeyed him, refused to have sex with him, or revealed or attempted to reveal the sexual abuse. Respondent also often beat their mother, who died in 1986. They testified their fear and shame prevented them from revealing the sexual abuse to their mother or anyone else. One daughter was impregnated by Respondent and gave birth to his son at age eleven, she revealed the abuse to her mother at the age of fourteen. Another daughter revealed the abuse to a school guidance counselor at the age of thirteen. Respondent beat both girls for doing so and the sexual abuse continued unabated.

The Court of Appeals affirmed all sentences, except the three counts of first degree CSC, which were reversed due to a lack of evidence on a material element of the offense. Respondent's remaining sentences totaling 320 years are not affected by the reversals.

ISSUE

Did the Court of Appeals, after reversing the first-degree CSC convictions due to lack of evidence on one element of the offense, err in not remanding the case for entry of judgment and sentencing on the lesser included offense of second-degree CSC?

STANDARD OF REVIEW

When a motion for a directed verdict of acquittal is made in a criminal case, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984). The accused is entitled to a directed verdict when the evidence merely raises a suspicion of guilt. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984); State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (Ct. App. 1995). The accused also is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001); State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Gore, 318 S.C. 157, 456 S.E.2d 419 (Ct. App. 1995). However, if the State presents any evidence which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt can be fairly and logically deduced, the case must go to the jury. On appeal from the denial of a motion for directed verdict, this Court must view the evidence in a light most favorable to the State. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); Schrock, 283 S.C. at 132, 322 S.E.2d at 452.

DISCUSSION

The indictment alleged Respondent violated S.C. Code Ann. § 16-3-652(1)(a) (2003) by committing first-degree CSC against an eighteen-year-old daughter between December 1 and 30, 1987 (Count 19); against a sixteen-year-old daughter on or about February 1, 1984 (Count 24); and against the same daughter when she was nineteen years old between December 25 and 30, 1986 (Count 25).

Respondent timely moved for a directed verdict of acquittal on the three counts of first-degree CSC, arguing the State had failed to present any evidence he committed the acts through the use of aggravated force. The trial judge denied the motions, reasoning the presence of aggravated force was an issue of fact for the jury.

A divided Court of Appeals reversed. The majority concluded the trial judge erred in failing to grant a directed verdict because the State did not present any evidence aggravated force accompanied any sexual acts occurring on the dates specified in the indictments. The majority declined to remand the case for entry of judgment and sentencing on the lesser included offense of second-degree CSC pursuant to State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002). Assuming the evidence was sufficient to sustain a conviction for second-degree CSC, the majority found Muldrow distinguishable because both the greater and lesser offenses (armed robbery and strong arm robbery) in Muldrow were submitted to the jury. In the present case, the State elected to proceed only on the distinct criminal offense of first-degree CSC.

Section 16-3-652(1)(a), under which Respondent was indicted and convicted, provides: "A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven: (a) The actor uses aggravated force to accomplish the

sexual battery."[1] '"Aggravated force' means that the actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon." S.C. Code Ann. § 16-3-651(c) (2003). A conviction of first-degree CSC carries a maximum penalty of thirty years. Section 16-3-652(2).

"A person is guilty of criminal sexual conduct in the second degree if the actor uses aggravated coercion to accomplish the sexual battery." S.C. Code Ann. § 16-3-653 (2003). '"Aggravated coercion' means that the actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person." S.C. Code Ann. § 16-3-651(b) (2003). A conviction of second-degree CSC carries a maximum penalty of twenty years. Section 16-3-653(2). Second-degree CSC is a lesser included offense of first-degree CSC. State v. Summers, 276 S.C. 11, 274 S.E.2d 427 (1981), overruled on other grounds by State v. McFadden, 342 S.C. 629, 539 S.E.2d 387 (2000).

To convict a defendant of first-degree CSC, the State must present evidence the defendant committed a sexual battery and *actually used* aggravated force at the time of the assault, i.e., the defendant overcame the victim through the use of physical force, physical violence of a high and aggravated nature, or the threat of the use of a deadly weapon. The evidence must show the actual use of aggravated

---

[1] A defendant also may be convicted of first-degree CSC under Section 16-3-652(1)(b) when the victim of the sexual battery also is the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act. This subsection was not contained in the indictment or charged to the jury and is not at issue in this case.

force occurred near in time and place to the assault, such that the effect of the aggravated force caused the victim to submit to the assault. State v. Lindsey, 355 S.C. 15, 20-22, 583 S.E.2d 740, 742-743 (2003) (affirming denial of defendant's directed verdict motion on charge of first-degree CSC where record contained evidence defendant physically forced victim to submit to assault by confining her in automobile, grabbing her hands, getting on top of her, and holding her down as she kicked, pushed and fought to get him off of her); State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990) (affirming attempted first-degree CSC conviction where State presented evidence that defendant grabbed victim, forced her into woods, and ripped her clothes off in effort to commit sexual battery); State v. Green, 327 S.C. 581, 491 S.E.2d 263 (Ct. App. 1997) (reversing denial of defendant's directed verdict motion on charge of first-degree CSC where record contained no evidence defendant used physical force, physical violence, or threatened use of deadly weapon while sexually assaulting his minor daughter by shaving her pubic hair and performing oral sex on her).

The presence of an aggravating circumstance necessary to sustain a prosecution for assault and battery of a high and aggravated nature (ABHAN) is not sufficient to sustain a conviction for first-degree CSC. Lindsey, 355 S.C. at 21, 583 S.E.2d at 742; Green, 327 S.C. at 585-586, 491 S.E.2d 264-265. Such aggravating circumstances include the infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in the sexes, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. E.g. State v. Foxworth, 269 S.C. 496, 238 S.E.2d 172 (1977).[2] "[A] sexual battery constitutes first-degree CSC under Section 16-3-652(1)(a) only if it was accomplished through the use of force *and* the force

[2] The Court has recognized that ABHAN may occur even without any real use of force toward the victim, providing further support for the conclusion that such a circumstance is insufficient to support a conviction for first-degree CSC. State v. Primus, 349 S.C. 576, 581 n.4, 564 S.E.2d 103, 106 n.4 (2002).

constitutes aggravated force." Lindsey, 355 S.C. at 21, 583 S.E.2d at 743 (quoting Green, supra) (emphasis in original).

In contrast, the *threat* of the use of force or violence of a high and aggravated nature, either during the assault or in the future, may constitute aggravated coercion and is sufficient to sustain a conviction of second-degree CSC under Section 16-3-653. It is true that criminal sexual conduct, regardless of which form it takes under the statutory scheme, is inherently a crime of violence. See State v. Green, 443 S.E.2d 14, 30 (N.C. 1994) (recognizing inherently violent nature of rape). Nevertheless, degrees of violence exist in such crimes, as recognized in Lindsey, supra, and Green, 327 S.C. 581, 491 S.E.2d 263. The definitions of aggravated force and aggravated coercion, along with the different maximum penalties, reveal the Legislature intended to draw a distinction between the *actual use* of force or violence during an assault and the *threat* of force or violence during or after an assault, with the former resulting in a conviction of greater degree and a harsher maximum penalty. See e.g. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (it is well established that court's primary function in interpreting a statute is to ascertain the intention of the legislature, and when the terms of statute are clear and unambiguous, court must apply them according to their literal meaning).

The record in the present case contains testimony from each daughter about the physical beatings at various times for disobedience, refusing to have sex with Respondent, or revealing or attempting to reveal the sexual abuse. The Court of Appeals correctly concluded, however, that the record contains no evidence Respondent used any aggravated force while sexually assaulting his daughters on the dates specified in the indictment. For example, the daughter did not testify that Respondent beat her or brandished a deadly weapon at or about the time he sexually assaulted her between December 1 and 30, 1987. Thus, the Court of Appeals properly reversed Respondent's convictions for first-degree CSC.

It is a fundamental concept of criminal law that the State must prove beyond a reasonable doubt all the elements of the offense charged against the defendant. When the State fails to present sufficient proof of all the elements, a conviction must be reversed and a judgment for the defendant must be rendered under the principles of Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).[3] See also State v. Gregorie, 339 S.C. 2, 528 S.E.2d 77 (2000) (relying on Burks to find that second trial in magistrate's court after circuit court, which on appeal overturned motorist's speeding conviction due to insufficient evidence, would violate motorist's double jeopardy rights).

The Burks Court distinguished between a reversal based on insufficient evidence and one based on errors in the trial proceedings. The Double Jeopardy Clause does not preclude the State from retrying a defendant whose conviction is set aside because of an error in the proceedings such as incorrect receipt of evidence, erroneous jury instructions, or prosecutorial misconduct. Burks, 437 U.S. at 13-15, 148-2149; Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994).

While Respondent's convictions were properly reversed the question remains whether Respondent's case should be remanded for sentencing on three counts of the lesser included offense of second-degree CSC. In Muldrow, 348 S.C. 264, 559 S.E.2d 847, we found evidence on the element of a deadly weapon legally insufficient to

---

[3] The double jeopardy prohibition of the Fifth Amendment to the United States Constitution, which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Article I, § 12 of the South Carolina Constitution similarly provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy of life or liberty. . . ."

sustain a conviction for armed robbery.[4] However, we remanded the case for sentencing on the lesser included offense of strong arm robbery, which also had been charged to the jury. "Where the conviction is insufficient to sustain a conviction on the greater offense, but is legally sufficient to support a conviction on the lesser, the Court on appeal may direct the entry of judgment on the lesser offense." Id. at 269-270, 559 S.E.2d at 850; see also Mathis v. State, 355 S.C. 87, 93 n.5, 584 S.E.2d 366, 369 n.5 (2003) (where conviction for first-degree burglary was vacated due to lack of subject matter jurisdiction, Court rejected State's argument that case should be remanded for entry of judgment against defendant on lesser included offense of second degree burglary because that offense was not submitted to jury).

Muldrow marked the first time we remanded a case for entry of judgment and sentencing on a lesser included offense after reversing a conviction for lack of evidence. For ease of use, we will refer to this option as a "sentencing remand."

Numerous state and federal courts have approved of the practice of a sentencing remand in appropriate circumstances, although not all have addressed the issue raised in the present case. E.g. Muldrow, 348 S.C. at 269-270, 559 S.E.2d at 850; Austin v. United States, 382 F.2d 129, 140-142 (D.C. Cir. 1967), overruled on other grounds by United States v. Foster, 783 F.2d 1082 (1986); State v. Haynie, 867 P.2d 416 (N.M. 1994); State v. Dunn, 850 P.2d 1201, 1209-1211 (Utah 1993) (all expressing majority view and listing cases); James A. Shellenberger & James A. Strazella, The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies, 79 Marquette L.R. 1, 183-189 (Fall 1995) (discussing modification of criminal judgment by appellate courts, sources of power for this rule including constitutions, statutes, rules, or court's inherent authority, and listing cases).

---

[4] We held the words "Give me all your cash or I'll shoot you" on a written note did not equal the "representation of a deadly weapon" as required by the armed robbery statute.

Some courts have concluded a sentencing remand may be appropriate regardless of whether the lesser included offense was charged to the jury. United States v. Hunt, 129 F.3d 739, 745-746 (5th Cir. 1997) (concluding that although the fact jury was not instructed on lesser included offense goes to the prejudice prong of the analysis, such an instruction is not a condition precedent to a sentencing remand); State v. Briggs, 787 A.2d 479, 486-487 (R.I. 2001) (approving sentencing remand where, although jury was not instructed on lesser offense, defendant's trial testimony constituted evidence meeting all elements of lesser included offense of larceny); State v. Farrad, 753 A.2d 648, 659 (N.J. 2000) (reversing case for new trial but noting that "guilty verdict may be molded to convict on a lesser-included offense even if the jury was not instructed on that offense if (1) defendant has been given his day in court, (2) all the elements of the lesser included offense are contained in the more serious offense and (3) defendant's guilt of the lesser included offense is implicit in, and part of, the jury verdict") (internal quotes omitted); Shields v. State, 722 So.2d 584 (Miss. 1998) (reviewing cases on both sides of the issue and, in a divided opinion, holding that a sentencing remand may be proper even though the lesser included offense was not charged to the jury; majority concluded the result was appropriate because record contained evidence sufficient to support a conviction on the lesser offense); People v. Patterson, 532 P.2d 342 (Colo. 1975) (sentencing remand may be proper even though lesser included offense was not charged to jury; court reasoned defendant has been given his day in court and his guilt of lesser included offense is implicit and part of jury's verdict on greater offense); State v. Villa, 82 P.3d 46, 53-55 (N.M. App. 2003) (following Shields, supra, to hold that sentencing remand may be proper even though lesser included offense was not charged to jury), cert. granted December 2, 2003.

Other courts will not approve a sentencing remand unless the lesser included offense was submitted to the jury. United States v. Dinkane, 17 F.3d 1192, 1198 (9th Cir. 1994) (remanding for sentencing on lesser included offense of unarmed bank robbery where evidence was insufficient to support conviction on armed bank robbery; lesser

included offense must be submitted to jury as condition precedent to sentencing remand); Ex parte Roberts, 662 So.2d 229, 232 (Ala. 1995) ("It is well established that if an appellate court holds the evidence insufficient to support a jury's guilty verdict on a greater offense, but finds the evidence sufficient to support a conviction on a lesser included offense, it may enter a judgment on that lesser included offense, provided that the jury was charged on the lesser included offense"); State v. Myers, 461 N.W.2d 777, 778 (Wis. 1990) (in case of first impression, court held "that the court of appeals may not direct the circuit court to enter a judgment of conviction of a lesser included offense when a jury verdict of guilty of the greater offense is reversed for insufficient evidence and the jury was not instructed on the lesser included offense"); State v. Scielzo, 460 A.2d 951, 958 (Conn. 1983) (finding sentencing remand was proper where jury was instructed on the various degrees of larceny, and although evidence was insufficient to sustain conviction for second-degree larceny, it was sufficient to sustain conviction for fourth-degree larceny); Collier v. State, 999 S.W.2d 779, 782 (Tex. Crim. App. 1999) (following Myers, supra, and holding in case of first impression that appellate court may reform judgment to conviction of lesser included offense only if (1) court finds the evidence is insufficient to support conviction of charged offense but sufficient to support conviction on lesser included offense and (2) either the jury was instructed on lesser included offense or one of parties asked for but was denied such an instruction).

As noted by the majority in Shields, 722 So.2d at 586, any constitutional infirmity in the sentencing remand rule apparently has been resolved in dicta by the United States Supreme Court in Rutledge v. United States, 517 U.S. 292, 305-306, 116 S.Ct. 1241, 1250, 134 L.Ed.2d 419 (1996). The Rutledge Court generally approved of the practice followed by federal appellate courts in which the court may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense. Neither the Rutledge Court nor the Supreme Court cases it cited have addressed the specific issue raised in the present case.

We conclude the view espoused by the dissenting justices in Shields, supra, and other cases expressing a similar view, offer an approach to sentencing remands that is more consistent with the concepts of due process and the role of appellate courts as developed in South Carolina. As provided in Muldrow and Mathis, we will consider a sentencing remand only when the lesser included offense has been properly charged to the jury. We reach this conclusion for several reasons.

First, an appellate court does not sit as a factfinder in a criminal case and should avoid resolving cases in a manner which appears to place the appellate court in the jury box. An appellate court reviews the evidence only to determine whether it was sufficient to submit a charge to the jury, or whether a directed verdict of acquittal should have been granted due its insufficiency. E.g. Morgan, 282 S.C. 409, 319 S.E.2d 335; Schrock, 283 S.C. 129, 322 S.E.2d 450.

Second, and in a related vein, this view preserves the important distinction between an appellate determination the record contains sufficient evidence to support a guilty verdict and a jury determination the State proved its case beyond a reasonable doubt. Shields, 722 So.2d at 588 (Sullivan, J., dissenting); Myers, 461 N.W.2d at 782 (recognizing and enforcing this "crucial distinction").

Moreover, the United States Supreme Court recently has re-emphasized the "constitutional protections of surpassing importance" contained in the Fourteenth Amendment's due process clause and the Sixth Amendment right to a jury trial, which "indisputably entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 476-477, 120 S.Ct. 2348, 2356, 147 L.Ed.2d 435 (2000) (holding that, other than the fact of a prior conviction, any fact that increases penalty for a crime beyond the prescribed statutory maximum must be submitted to jury and proved beyond a reasonable doubt) (internal quotes omitted); In re Winship, 397 U.S. 358, 361-62, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368, 373-74 (1970) (due process requires the

government to prove every element of a charged offense beyond a reasonable doubt); see also Blakely v. Washington, ___ U.S. ___, 124 S.Ct. 2531 (2004) (majority of sharply divided Court, applying Apprendi, held that sentencing judge may not impose a longer "exceptional" sentence under state sentencing guidelines scheme by making a judicial determination that defendant who was pleading guilty to kidnapping offense acted with "deliberate cruelty"; defendant has right under Sixth Amendment to require prosecution to prove facts supporting such a finding to a jury beyond a reasonable doubt); Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (applying Apprendi to hold that Sixth Amendment right to a jury trial precludes a procedure in which a sentencing judge, sitting without a jury, is allowed to find an aggravating circumstance necessary for imposition of the death penalty, and overruling inconsistent precedent).[5]

[5] We recognize the vigorous debate, as expressed in Apprendi, Ring, and Blakely, between those justices who believe "our people's traditional belief in right of trial by jury is in perilous decline" due to the "accelerating propensity of both state and federal legislatures to adopt 'sentencing factors' determined by judges that increase the punishment beyond what is authorized by the jury's verdict," Ring, 536 U.S. at 611-612, 122 S.Ct. at 2445, 153 L.Ed.2d at 578 (Scalia, J., concurring), and those who believe Apprendi and its progeny portend "disastrous" practical consequences for state and federal sentencing guideline schemes developed during the past two decades through the collective experience and wisdom of the judicial, legislative, and executive branches of government. Blakely, ___ U.S. at ___, 124 S.Ct. at 2543-2561 (O'Connor, Kennedy, and Breyer, JJ., dissenting separately). The present view of the majority of the Supreme Court regarding the crucial role of the jury in determining facts relating to elements of the crime and facts which may result in increased punishment, other than the fact of a prior conviction, undoubtedly lends support to our resolution of this case.

Third, when a lesser included offense is submitted the jury, a jury which returns a verdict of guilty on the greater offense necessarily weighed evidence relating to the lesser offense in order to reach a verdict on the greater offense. In such cases, "it can be said with some degree of certainty that a [sentencing remand] is but effecting the will of the fact finder within the limitations imposed by law; and, that the appellate court is simply passing on the 'sufficiency' of the implied verdict. When, however, no instruction at all has been offered on the lesser offense, second guessing the jury becomes far more speculative." Shields, 722 So.2d at 588 (Sullivan, J., dissenting); Myers, 461 N.W.2d at 780-782 (explaining that a verdict in which the jury was instructed only on the greater offense, and the conviction is reversed on appeal due to insufficient evidence, is too unreliable to remand the case for sentencing on a lesser included offense).

Fourth, when the jury could have explicitly returned a verdict on the lesser offense, the defendant is well aware of his potential liability for the lesser offense and usually will not be prejudiced by the modification of the judgment from the greater to the lesser offense. Scielzo, 460 A.2d at 958.

Fifth, adopting a practice of remanding for sentencing on a lesser included offense when that offense has not been submitted to the jury may prompt the State to avoid requesting or agreeing to submit a lesser included offense to the jury. As recognized by the United States Supreme Court, one reason a defendant is entitled to an instruction on a lesser included offense when supported by the evidence is to prevent a jury – when the defendant plainly is guilty of some offense – from finding the defendant guilty of the greater offense because the only alternative is to let him walk free. Keeble v. United States, 412 U.S. 205, 212-213, 93 S.Ct. 1993, 1997-1998, 36 L.Ed.2d 844, 850 (1973).

Sixth, the State would obtain an unfair and improper strategic advantage if it successfully prevents the jury from considering a lesser included offense by adopting an "all or nothing" approach at trial, but then on appeal, perhaps recognizing the evidence will not support a conviction on the greater offense, is allowed to abandon its

trial position and essentially concede the lesser included offense should have been submitted to the jury. Shields, 722 So.2d at 588 (Sullivan, J., dissenting) (prosecutor will carefully consider objecting to submission of lesser included offense when facing possibility of a retrial should the withholding of the instruction prove error on appeal).

Seventh, the trial court's ruling on which offenses will be submitted to the jury affects how both parties prepare and present their opening statements, case in chief, and closing arguments. The defendant may well have foregone a particular defense or strategy due to the trial court's rejection of a lesser included offense. Allowing the State to freely switch horses in midstream may result in unfair prejudice to the defendant. See Myers, 461 N.W.2d at 780-782 (recognizing parties formulate their trial strategies based on offenses charged to jury and concluding it would be unfair and improper to allow state to change its strategy on appeal in effort for appellate court to "rescue it from a trial strategy that went awry").

In sum, we clarify Muldrow as follows: When a conviction is reversed due to insufficient evidence, we will consider remanding a case for sentencing on a lesser included offense only when (1) the evidence adduced at trial fails to support one or more elements of the crime of which appellant was convicted; (2) the jury was explicitly instructed it could find the defendant guilty of the lesser included offense and was properly instructed on the elements of that offense; (3) the record on appeal contains sufficient evidence supporting each element of the lesser included offense; (4) the State seeks a sentencing remand on appeal; (5) the defendant will not be unduly or unfairly prejudiced; and (6) the Court is convinced justice will be served by such a result after carefully considering the record as well as the interests and concerns of both the defendant and the victim of the crime. When a conviction is reversed due to insufficient evidence and this analysis indicates a sentencing remand is inappropriate, double jeopardy will bar retrial on the charge.

CONCLUSION

We affirm the Court of Appeals' rejection of the State's request for a sentencing remand on the three first-degree CSC convictions because the lesser included offense of second-degree CSC was not submitted to the jury. As Respondent's first-degree convictions were reversed due to a lack of evidence on a material element of the offense, retrial of Respondent on those three charges is barred by principles of double jeopardy.

AFFIRMED.

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