The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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N O T I C E

In the Matter of Louis S. Moore

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

The Committee on Character and Fitness has now scheduled a hearing in this regard on October 24, 2012, beginning at 9:30 a.m, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

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

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

September 24, 2012

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

The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF WILLIAM G. YARBOROUGH,
PETITIONER

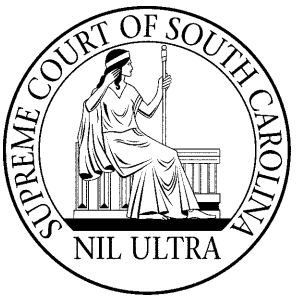
Petitioner was disbarred from the practice of law. In the Matter of Yarborough, 343 S.C. 316, 540 S.E.2d 462 (2000). Petitioner has now filed a petition seeking to be readmitted.

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

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

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
September 24, 2012



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34
September 26, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

George Tempel, Appellant/Respondent,

v.

South Carolina State Election Commission (Marci Andino, as Executive Director, and Chris Whitmire, as Director of Public Information and Training); South Carolina Republican Party (Matt Moore, as Executive Director, and Chad Connolly, as Chairman); Charleston County Republican Party (Lin Bennett, as Chairman); Charleston County Board of Elections and Voter Registration (Joseph L. Debney, as Director, and Dan Martin, as Chairman); Dorchester County Republican Party (Carroll S. Duncan, Chairman); Dorchester County Board of Elections (Joshua Dickard, as Executive Director); and Paul Thurmond, Defendants,

of whom South Carolina Republican Party (Matt Moore, as Executive Director, and Chad Connolly, as Chairman); Charleston County Republican Party (Lin Bennett, as Chairman); Charleston County Board of Elections and Voter Registration (Joseph L. Debney, as Director, and Dan Martin, as Chairman); Dorchester County Republican Party (Carroll S. Duncan, Chairman) are Respondents,

and South Carolina State Election Commission (Marci Andino, as Executive Director, and Chris Whitmire, as Director of Public Information and Training), and Paul Thurmond, are Respondents/Appellants.

Appellate Case No. 2012-212729

Appeal From Charleston County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 27172
Submitted September 17, 2012 – Filed September 20, 2012

AFFIRMED

James Emerson Smith, Jr., of Columbia, for Appellant/Respondent.

Mary Elizabeth Crum, Ariail Burnside Kirk, and Amber B. Martella, all of McNair Law Firm, of Columbia, for Respondent/Appellant South Carolina State Election Commission; Michael A. Timbes and Matthew Evert Yelverton, both of Thurmond Kirchner Timbes & Yelverton, of Charleston, and Tanya Amber Gee, of Nexsen Pruet, of Columbia, for Respondent/Appellant Paul Thurmond; Samuel W. Howell, IV, of Howell Linkous & Nettles, of Charleston, for Respondent, Charleston County Board of Elections and Voter Registration; and J. Robert Bolchoz, of Columbia and Karl Smith Bowers, Jr., and Matthew Todd Carroll, both of Womble Carlyle Sandridge & Rice, of Columbia, for Respondent South Carolina Republican Party.

CHIEF JUSTICE TOAL: Appellant/Respondent and Respondents/Appellants appeal an order of the circuit court concerning the candidacy of Respondent/Appellant Paul Thurmond for Senate District 41. The circuit court found Thurmond was not exempt from the filing requirement of section 8-13-1356(B) of the South Carolina Code. S.C. Code Ann. § 8-13-1356(B) (Supp. 2011). Thus, Thurmond was disqualified as the Republican nominee for the

District 41 seat. The judge, therefore, ordered the Republican Party to conduct a special primary election pursuant to section 7-11-55. S.C. Code Ann. § 7-11-55 (Supp. 2011). We affirm the order of the circuit court.

FACTS

On March 29, 2012, Thurmond electronically filed a Statement of Economic Interests (SEI). Thirty minutes later, he filed his Statement of Intention of Candidacy (SIC) for the Republican Party primary for Senate District 41. However, he did not file a paper copy of his SEI along with his SIC as required by section 8-13-1356(B), and interpreted by this Court in *Anderson v. South Carolina Election Commission*, 397 S.C. 551, 725 S.E.2d 704 (2012), and *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 727 S.E.2d 418 (2012). All of the other Republican contenders for the Senate District 41 seat were decertified for failing to comply with section 8-13-1356(B). However, Thurmond's name remained on the ballot, and he received over 1,700 votes. He was subsequently declared the Republican candidate for the seat.

Thurmond is a part-time prosecutor for the City of North Charleston. Thurmond admits he did not file his SEI simultaneously with his SIC for Senate Seat 41; he has never filed an SEI as a municipal prosecutor; and the SEI, which he filed electronically on March 28, 2012, was not filed in connection with his position as a municipal prosecutor.

I. EXEMPTION

Section 8-13-1356(B) requires a non-exempt candidate to file an SEI for the preceding calendar year at the same time and with the same official with whom the candidate files an SIC. *Anderson v. v. S.C. Election Comm'n*, 397 S.C. 551, 558, 725 S.E.2d 704, 707–08 (2012). This requirement does not apply to "a public official who has a current disclosure statement on file with the appropriate supervisory office pursuant to Sections 8-13-1110 or 8-13-1140." S.C. Code Ann. § 8-13-1356(A) (Supp. 2011). Public officials are required, under section 8-13-1110(B), to file an SEI with the appropriate supervisory office prior to taking office. Section 8-13-1140 requires annual updates to SEIs no later than April 15th. S.C. Code Ann. § 8-13-1140 (Supp. 2011). The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). The statutory language must be construed in light of the intended purpose of the statute.

Id. This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless. *See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation which leads to an absurd result that could not have been intended by the legislature.").

Assuming, without deciding, that a part-time municipal prosecutor is a public official who is required to file an SEI, we hold Thurmond was not exempt from the simultaneous filing requirement of section 8-13-1356(B). The logical construction of section 8-13-1356(A) requires the SEI on file to be the one filed by the public official for the office currently held by that official. Construing section 8-13-1356(A) as Thurmond requests would reward an official for not complying with the requirement of section 8-13-1110 of filing an SEI prior to taking office while also allowing the official to circumvent the simultaneous filing requirement of section 8-13-1356(B). This construction does not serve the legislative intent behind these statutes.

Thurmond admits his SEI was not filed in relation to his position as a municipal prosecutor. Therefore, his SEI was not a current SEI of a public official on file under section 8-13-1110, and he is not exempt under section 8-13-1356(A) from the requirement of filing his SEI along with his SIC.

II. SPECIAL PRIMARY

Appellant/Respondent George Tempel and Respondent/Appellant the South Carolina State Election Commission (the State Commission) contend the circuit court erred in ordering a special primary election under section 7-11-55 of the South Carolina Code. We disagree.

Section 7-11-55 provides, "If a party nominee dies, becomes disqualified after his nomination, or resigns his candidacy for a legitimate nonpolitical reason . . . and was selected through a party primary election, the vacancy must be filled in a special primary election." S.C. Code Ann. § 7-11-55 (Supp. 2011). Tempel and the State Commission argue the circuit court erroneously ordered a special primary election because Thurmond was not "disqualified." Tempel further contends section 7-11-55 is inapplicable because Thurmond was not selected by party primary. In addition, the State Commission argues Thurmond was not the "party nominee" because he was improperly certified.

a. Selection through Party Primary

Pursuant to section 7-11-10, nominations for candidates may be made by political party primary, political party convention, or by petition. S.C. Code Ann. § 7-11-10 (Supp. 2011). Although Thurmond may have been declared the Republican candidate under sections 7-11-90 and 7-17-620 because he was unopposed in the primary election, this does not alter the fact that the Republican Party used a primary election as the method for selecting its candidate for the Senate District 41 seat. *See* S.C. Code Ann. §§ 7-11-90 and 7-17-620 (1976). Accordingly, Thurmond was selected through a party primary election.

b. Party Nominee

Thurmond was certified as the party nominee for Senate Seat 41. The fact that the Republican Party in good faith, albeit erroneously, believed Thurmond was exempt from the filing requirement of section 8-13-1356(B) does not negate his status as the party nominee. We, therefore, reject the State Commission's argument that section 7-11-55 is inapplicable because Thurmond was not the party nominee.

c. Disqualified After Nomination

The central issue in the instant case is the interpretation of the term "disqualified" as used in section 7-11-55. In *South Carolina Green Party v. South Carolina State Election Commission*, 612 F.3d 752 (4th Cir. 2010), the plaintiff sought declaratory and injunctive relief against South Carolina's application of various election law statutes. In that case, the Fourth Circuit Court of Appeals noted that the term "disqualified" was not defined in the statute. However, the court relied on the statutory construction rules of this Court in interpreting the statute. *Id.* at 757–58 ("Because South Carolina law does not define the term 'disqualified' for purposes of this statute, we rely on the statutory construction rules applied by South Carolina's highest court in the interpretation of statutes." (citing *In re DNA Ex Post Facto Issues*, 561 F.3d 294, 300 (4th Cir. 2009))).

Because this Court held that words in a statute must be construed in context, and the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute, the Fourth Circuit concluded the plain language of the provision "addresse[d] the circumstances in which a 'party nominee' could be 'disqualified' from representing a 'party' after a 'nomination.'" *Id.* at 758 (citing *Hill v. York Cnty. Natural Gas Auth.*,

384 S.C. 483, 682 S.E.2d 809, 811–12 (2009) ("The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.")). Accordingly, the court held the State Election Commission's application of the "sore loser" statute[1] after the plaintiff's loss in the Democratic primary prevented him from appearing on the general election ballot as the Green Party nominee and rendered the plaintiff "disqualified" as a "party nominee" after his "nomination." *Id.* The Fourth Circuit's interpretation of "disqualified" as that term is used in section 7-11-50, is correct, and applies equally as that term is used in section 7-11-55.

The Fourth Circuit's deferential and persuasive opinion highlights the preeminent matter of concern before this Court. In *Green Party*, the Fourth Circuit addressed whether South Carolina's election statutes operated to foreclose a political party's right to associate and choose a preferred or substitute candidate, thereby frustrating the party's political participation. *See Green Party*, 612 F.3d at 756–58. The dissent's attempt to improperly extend this Court's decision in *Anderson* threatens to do just that. In our judgment, the dissent errs in conflating section 8-13-1356, the candidacy filing statute, with section 7-11-55, the party nominee replacement statute. This conflation produces the absurd result that a political party can never conduct a replacement primary in a circumstance where, as here, its candidate is disqualified after certification for a defective filing.

In *Anderson*, this Court correctly concluded that section 8-13-1356(B) of the South Carolina Code requires a candidate for office must file an SEI at the same time and with the same official with whom the candidate files an SIC. *Anderson*, 397 S.C. at 558, 725 S.E. 2d at 708. (holding the unambiguous language of section 8-13-1356 prohibits a political party from accepting an SIC which is not accompanied by an SEI). Thus, the Court held that the names of any non-exempt individuals who did not file the appropriate documents were improperly placed on the ballot, and ordered their removal from the ballot. *Id.* However, the interpretation of section 8-13-1356(B) and the responsibility of putative candidates and political

[1] S.C. Code Ann. § 7-11-10 (Supp. 2011) (no person who was defeated as a candidate for nomination in a party primary shall have his name on the general election ballot).

parties to act in conformity therewith are the sole issues decided in *Anderson*. The broader issue in this case is what South Carolina's election law regime provides to political parties, candidates, and citizens upon the disqualification or resignation of a party nominee. These issues were not addressed in *Anderson*, and thus, our opinion in that case is not controlling.

Section 7-11-55 provides that when a party nominee, selected through a primary party election, dies, resigns, or is disqualified, the vacancy must be filled through a special primary. S.C. Code Ann. § 7-11-55 (Supp. 2011). This Court's primary role in construing the section must be to ascertain and give effect to the intent of the legislature, so long as this does not lead to an absurd result. It is clear from the face of the statute that the General Assembly intended to provide a mechanism for political parties to replace nominees prior to the general election. It is equally clear that the General Assembly would not have intended for "disqualified" to be interpreted so narrowly that a political party is prevented from conducting *any* special primary to replace its nominee due to the improper certification of a nominee. The dissent's view of disqualification, based on our opinion in *Anderson*, would not only remove Thurmond from the ballot, but would prevent the Republican Party from holding *any* primary. We simply cannot infer that the General Assembly intended for the section which speaks directly to the issue of "disqualification," to include the arbitrary distinctions that the dissent suggests. Furthermore, the dissent's view would prevent Thurmond from entering the special primary, and participating as a petition candidate, two results clearly not contemplated by section 7-11-55.

Thus, we reject the argument that Thurmond's candidacy was void *ab initio* because he was never eligible to be a candidate. Instead, we hold Thurmond was disqualified from the initial primary election, held on June 12, 2012, for Senate Seat 41 because he failed to comply with the simultaneous filing requirement of section 8-13-1356(B).

CONCLUSION

Thurmond was not exempt under section 8-13-1356(A) from the simultaneous filing requirement of section 8-13-1356(B) and, therefore, was disqualified after his nomination from the initial Republican Party primary election for Senate District 41 because of his failure to comply with the filing requirement.

Accordingly, the circuit court properly ordered a special primary election to be held pursuant to section 7-11-55.

AFFIRMED.

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

JUSTICE PLEICONES: I agree with the majority that Thurmond was not exempt from the simultaneous filing requirement of S.C. Code Ann. § 8-13-1356(B) (Supp. 2011). I do not agree, however, that he was a party nominee who became disqualified after his nomination such that a special primary election was proper under S.C. Code Ann. § 7-11-55 (Supp. 2011). I would therefore reverse the circuit court's order requiring a special primary election under that statute.

1. Party Nominee

The name of any individual who did not meet the simultaneous filing requirement of § 8-13-1356(B) "must be removed" from the party primary ballot. *Anderson v. S.C. Election Comm'n*, 397 S.C. 551, 725 S.E.2d 704 (2012). An individual whose name appears on the ballot in violation of this statutory requirement may not be certified as a candidate for the general election. *Anderson*, citing S.C. Code Ann. § 8-13-1356(E) (Supp. 2011). In *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 727 S.E.2d 418 (2012), this Court held that *Anderson* applied to all political party primaries throughout the state, and that "[t]o the extent other political parties have improperly certified candidates, those parties ignore the decision of this Court at their own peril." Here, despite our clear holding in *Anderson*, reinforced by our decision in *Florence County*, the Charleston County Republican Party chose not to remove Thurmond from the ballot, and then chose to certify him in the face of our explicit warning in *Florence County*. The name of any individual who did not comply with § 8-13-1356(B) was to be removed from the primary ballot under *Anderson*. A party cannot remedy its error in allowing such an individual's name to appear by unlawfully certifying his election. *Florence County*, *supra*. Thurmond is not his party's nominee as he did not properly file as a candidate. Section 7-11-55 does not apply to this situation.

2. Disqualification

Even if Thurmond were somehow found to be a party nominee, he has not been disqualified within the meaning of § 7-11-55. While the term "disqualified" is not defined in § 7-11-55, the State Constitution sets forth the qualifications for a seat in the Senate. Pursuant to S.C. Const. art. III, § 7, a person must be a duly qualified elector in the district, twenty-five years old, and a legal resident of the district at the time of filing for office in order to be eligible for a Senate seat. That section also prohibits anyone convicted of certain enumerated crimes from serving in the Senate unless the person has been pardoned or fifteen years has passed since the completion of the sentence for the crime. In *Anderson*, this Court specifically

stated that "§ 8-13-1356 does not alter the **qualification** for one to serve as a legislator. Instead, it merely delineates filing requirements to appear on a ballot." *Anderson*, *supra* (emphasis added). Accordingly, I disagree with the majority when it holds that "Thurmond was disqualified from the initial primary election . . . because he failed to comply with the simultaneous filing requirement of § 8-13-1356(B)." In my opinion, such a holding would require the Court overrule this part of *Anderson*. A candidate who did not meet the filing requirements of § 8-13-1356 is not "disqualified" within the meaning of § 7-11-55.

As used in election law, whether an individual is qualified for office asks whether she meets the constitutional or statutory requirements for the office. *See Ravenel v. Dekle*, 265 S.C. 364, 218 S.E.2d 521 (1975) (Ravenel not qualified to serve as Governor because he did not meet constitutional residency requirement for office). Moreover, a statute cannot alter the "qualifications" for office when the Constitution has established them unless the Constitution itself authorizes such alteration. *Joint Legislative Committee for Judicial Screening v. Huff*, 320 S.C. 241, 464 S.E.2d 324 (1995). Here, there is no contention that Thurmond has become "disqualified" from holding the office of Senator after his "nomination," either because he was no longer a qualified elector, because he was less than twenty-five years old, because he had moved out of the district, or because he had committed one of the offenses listed in S.C. Const. art. III, § 7. Had Thurmond become disqualified for one of these reasons after his nomination, he most certainly would not simultaneously have been requalified to run in a special election under § 7-11-55.

The majority finds the Fourth Circuit Court of Appeals' interpretation of the term "disqualified" in § 7-11-50 persuasive. *See S.C. Green Party v. S.C. State Election Comm'n*, 612 F.3d 752 (4th Cir. 2010). In *Green Party*, the court found that § 7-11-50 addresses the circumstances in which a party nominee may be disqualified from representing a party after a nomination. While § 7-11-50 resembles § 7-11-55,[2] the statute at issue here, I disagree with the Fourth Circuit's interpretation. Section 7-11-50's first paragraph provides:

> If a party nominee who was nominated by a method other than party primary election dies, becomes disqualified after his nomination, or resigns his candidacy for a legitimate

[2] Section 7-11-50 deals with the substitution of a candidate nominated by a method other than a party primary.

> nonpolitical reason as defined in this section and sufficient time does not remain to hold a convention to fill the vacancy or to nominate a nominee to enter a special election, the respective state or county party executive committee may nominate a nominee for the office, who must be duly certified by the respective county or state chairman.

The statute next defines the "legitimate nonpolitical reason" for a candidate's resignation under the statute, before providing the substitution procedures. While the statute does define the circumstances in which a candidate who resigns can be substituted (i.e. where the resignation is for "legitimate nonpolitical reasons"), it nowhere purports to define when a party nominee becomes disqualified.

In my opinion, the Fourth Circuit incorrectly interpreted § 7-11-50 in *S.C. Green Party v. S.C. State Election Comm'n, supra*. *See Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009) (a federal court decision interpreting state law is not binding on this Court). There is no language in § 7-11-50 which "addresses the circumstances" in which a party nominee could be disqualified, nor is there any such language in § 7-11-55.

Section 7-11-55 begins:

> If a party nominee dies, becomes disqualified after his nomination, or resigns his candidacy for a legitimate nonpolitical reason as defined in Section 7-11-50 and was selected through a party primary election, the vacancy must be filled in a special primary election to be conducted as provided in this section.

The remainder of the statute is concerned with the procedures for conducting the special primary, and reiterates that a candidate resigning his candidacy must follow the procedures outlined in § 7-11-50. Section 7-11-55 does no more to "address the circumstances" in which a party nominee may be disqualified than does § 7-11-50.

Finally, the term "becomes disqualified **after his nomination**" should be construed in its plain and ordinary meaning. *Anderson, supra* (unless something in the statute requires a different interpretation, the words used in a statute must be given

their ordinary meaning). Even if we were to hold that failure to comply with § 8-13-1356(B) constituted a disqualification under § 7-11-55, it did not occur "after [Thurmond's] nomination." Instead, it existed at the time he filed as a candidate. Accordingly, it is my opinion that Thurmond's failure to comply with the requirement to appear on the ballot does not constitute a disqualification "after his nomination" which would authorize a special primary election under § 7-11-55.

Conclusion

Because Thurmond was not exempt from the SEI filing requirement of § 8-13-1356(B), he was ineligible to appear on the ballot and was improperly certified as the Republican nominee for Senate District 41. He, therefore, is not the party nominee. Further, Thurmond was not "disqualified after his nomination" by his failure to simultaneously file an SEI and an SIC. Accordingly, the circuit court erred in ordering a special primary election to be held pursuant to § 7-11-55. I therefore dissent and would reverse the order of the circuit court authorizing the Republican Party to hold a special primary election and declare the results of the special election, held on September 18, 2012, null and void.

BEATTY, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Larry Gene Moore, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 27173
Submitted March 21, 2012 – Filed September 26, 2012

REVERSED AND REMANDED

Appellate Defender Robert Dudek, South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Suzanne H. White, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Larry Gene Moore (Petitioner) contests the post-conviction relief (PCR) court's finding that he received effective assistance of counsel. Petitioner's trial counsel waived Petitioner's right to a jury trial and opted instead for a bench trial as part of the defense strategy. Petitioner asserts that he did not wish to waive this right, and as a result, he received ineffective assistance of counsel. We reverse and remand.

FACTUAL/PROCEDURAL HISTORY

On January 17, 2004, Petitioner took several items off the shelf at a Wal-Mart in Spartanburg County. A loss prevention officer observed Petitioner and followed him past the last point of payment, and onto the sidewalk immediately outside the store. The officer approached Petitioner and stated that he needed to talk to him regarding some unpaid merchandise. Petitioner reached into his pocket, presented a gun, and said "what this, are you sure?" Petitioner then fled the scene and was apprehended a short time later by police.

The Spartanburg County Grand Jury indicted Petitioner for armed robbery. Petitioner proceeded to trial where his counsel informed the court that Petitioner would prefer a bench trial.

> State: Your Honor, if it pleases the Court. Before you is [Petitioner] . . . . The indictment has been true billed by the Grand Jury. He's represented by [counsel]. It's my understanding that the defendant wishes to waive his right to a jury trial and proceed with a bench trial before the court, [sic] which the State consents.
>
> The court: [Counsel] is that correct?
>
> Counsel: Yes, Your Honor
>
> The court: You ready to go forward at this time?

State: We are your honor.

The Court: All right. Be happy to hear from you . . . from the State.

Petitioner was convicted and sentenced to fifteen years' imprisonment. Petitioner appealed his conviction and the court of appeals affirmed. This Court denied the subsequent petition for writ of certiorari. Petitioner then filed an application for PCR relief. Petitioner testified at the PCR hearing regarding his understanding of how his trial would be conducted:

Q: Okay. Before you went to your hearing in March of 2005, what was your understanding of what was gonna [sic] happen that day?

A: For the hearing or the trial?

Q: The trial.

A: I don't—well, really I—I really didn't know. I thought I would take a jury trial, but I end up with a bench trial.

Q: Let me ask you some questions about that. Before your hearing, your trial, had [counsel] discussed the idea of a jury trial with you?

A: As far as my knowledge, I wanted to take a jury trial, but he was saying something about a bench trial. But I really didn't know the difference between a bench trial and a jury trial. But I just know—only thing I know was it wasn't gonna [sic] be no jury there.

Q: Did you know ahead of time that it was going to be just a bench trial and not a jury–trial?

A: No, sir.

Q: Was it your understanding, when you walked in that day that you were gonna [sic] pick a jury?

A: That's what I was thinking.

Petitioner's trial counsel also testified regarding the waiver. Trial counsel testified that since the facts of the case were uncontested, his strategy was to contest only the legal issue of whether the facts supported a charge of armed robbery. Specifically, he noted that the asportation of the property had already occurred at the point that Petitioner used the weapon, and thus Petitioner did not use the weapon in order to force anyone to relinquish any merchandise. Petitioner merely used the weapon in the process of escape.

Q: Did you thoroughly explain to him that, by having a bench trial, he was waiving his right to a jury trial?

A: I believe that I did.

Q: Did he have any questions about that?

A: I can't recall. I know that we discussed the issues a little bit. But I can't recall any specific questions that he had.

Q: Did he seem to understand that he was, in fact, waiving his right to a jury trial?

A: I believe so.

. . . .

Q: Okay. Whose decision was it to go to trial?

A: [Petitioner's].

Q: And ultimately whose decision was it to go to trial on a bench trial?

A: [Petitioner's].

The court dismissed Petitioner's PCR claim with prejudice. The court's order stated that Petitioner made the decision to waive his right to a jury of his own accord after a *detailed* discussion with his attorney. The court also observed that the State presented testimony that trial counsel discussed the jury trial waiver *at length* with Petitioner prior to the decision to waive that right. Thus, Petitioner failed to "overcome his burden and show counsel was ineffective." Petitioner then filed a petition for writ of certiorari, and this Court granted that petition.

ISSUE PRESENTED

Did the PCR judge err in concluding that Petitioner received effective assistance of counsel?

STANDARD OF REVIEW

The burden is on the applicant in a PCR proceeding to prove the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). On certiorari in a PCR action, this Court applies an "any evidence" standard of review. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Accordingly, the Court will affirm if any evidence of probative value in the record exists to support the finding of the PCR court. *Id.* at 119, 386 S.E.2d at 626.

LAW/ANALYSIS

The United States Constitution provides that "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. 3, § 2. Attorneys have a duty to consult with their clients regarding "important decisions," including questions of overarching defense strategy." *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (citation omitted). This does not require

counsel to obtain the defendant's consent on every strategic decision, but certain decisions regarding the waiver of basic trial rights cannot be made for the defendant by surrogate. *Id.* A defendant has the "*ultimate authority*" to determine whether to "plead guilty, *waive a jury*, testify on his own behalf, or take an appeal." *Id.* (emphasis added). A defendant's waiver of the right to a jury trial must be knowing, voluntary, and intelligent. *Patton v. United States*, 281 U.S. 276, 312–13 (1930), *overruled on other grounds by Williams v. Florida*, 399 U.S. 78, 92 (1970). A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both. *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

In *Brannon v. State*, 345 S.C. 437, 548 S.E.2d 866 (2001), the defendant pled guilty to armed robbery and was sentenced to twenty-one years' imprisonment. The defendant filed a PCR claim seeking a more lenient sentence. *Id.* at 438, 548 S.E.2d at 867. The trial judge explained to the defendant that he did not have the authority to do so, and counsel indicated that the defendant wanted to withdraw his PCR application. *Id.* The subsequent written order dismissed the application with prejudice. *Id.* This Court reviewed the case in order to determine whether the PCR court erred in dismissing the case without an inquiry as to whether the withdrawal was knowing and voluntary. *Id.* at 439, 548 S.E.2d at 867.

This Court reversed and held that "[A] defendant's knowing and voluntary waiver of statutory or constitutional rights *must* be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both." *Id.* (emphasis added).

In *Spoone v. State*, 379 S.C. 138, 665 S.E.2d 605 (2008), this Court explained the appellate review of a knowing and voluntary waiver. In that case, the defendant pled guilty to murder, first degree burglary, and possession of a weapon during a violent crime. *Id.* at 139–40, 665 S.E.2d at 606. In accordance with the plea agreement, the trial court sentenced the

defendant to life in prison without the possibility of parole. *Id.* at 140, 665 S.E.2d at 606. As part of the agreement, the defendant waived his right to all appeals and PCR applications. *Id.* However, following his incarceration the defendant filed a PCR application, and alleged that the PCR court erred in dismissing that application pursuant to his plea agreement. *Id.*

This Court held that such waivers are effective only if they are made knowingly and voluntarily. *Id.* at 142, 665 S.E.2d at 607. In order to determine whether the agreement is knowing and voluntary, the Court examines the particular facts and circumstances in the case, including the background, experience, and conduct of the accused. *Id.* at 143, 665 S.E.2d at 607. In applying this framework to the defendant in that case, this Court found his waiver was made knowingly and voluntarily. *Id.* at 143–44, 665 S.E.2d at 608. Although the defendant possessed only a ninth-grade education, the text of the plea agreement was straightforward. *Id.* Moreover, the trial court specifically asked the defendant about the plea agreement in the language of the agreement, and in "plain language." *Id.* The defendant was represented by two lawyers at the trial level, and both of these lawyers signed the plea agreement along with the defendant himself. *Id.* Thus, this Court held the PCR court correctly enforced the waiver, and dismissed the defendant's PCR application. *Id.*

In the instant case, Respondent asserts that Petitioner failed to establish counsel was ineffective in part because he did not recall "telling counsel that he wished to have a jury trial or asking counsel any questions about when a jury would be selected." However, this argument exhibits a fundamental misunderstanding of what this Court's waiver jurisprudence commands. The validity of a defendant's waiver does not turn on his communication with counsel, but rather on the presence of a record supporting the validity of that waiver. Both the trial and PCR courts in this case conducted a deficient analysis of Petitioner's waiver. The Record is devoid of any evidence to support the PCR court's finding that trial counsel's discussions regarding the waiver were at "length" or "detailed." Petitioner's trial counsel could not testify that he definitely explained to Petitioner the differences between a jury trial and a bench trial. He also could not recall whether Petitioner had any

questions regarding that distinction, but was inexplicably able to testify that Petitioner definitely wanted to move forward with a bench trial. The Record reflects that there was *no* colloquy between the court and Petitioner's trial counsel or Petitioner regarding the waiver.[1] Petitioner testified at his PCR hearing that he completed only the seventh grade, and that he cannot read or write. Petitioner testified that he did not know ahead of time that he was going to have a bench trial and not a jury trial, and that he wanted a jury trial.[2]

The waiver in the instant case is not supported by a complete record. The PCR court erred in finding that Petitioner made a knowing and voluntary

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[1] We disagree with the dissent's assertion that the extremely limited exchange that took place between the trial court and trial counsel could be properly characterized as a colloquy. A "colloquy" is defined as "any formal discussion, such as an oral exchange between a judge, the prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights." *Black's Law Dictionary* 221 (8th ed. 2005). Colloquy has also been defined as a "high-level serious discussion." *Webster's Ninth New Collegiate Dictionary* 260 (9th ed. 1989); *see New World Dictionary* 280 (2d ed. 1976) (defining colloquy as a "conversation, esp. a formal discussion; conference"). The exchange which took place in the instant case does not meet even a banal definition of colloquy, and falls far short of the "high-level serious discussion" necessary to support the waiver of a defendant's constitutional right to a jury of his peers.

[2] Contrary to the dissent's analysis, trial counsel's testimony at the PCR hearing does not meet the "any evidence" standard, and does not require this Court to affirm. The PCR court found that Petitioner waived his right to a jury trial; however, the only evidence supporting that erroneous determination is trial counsel's testimony. That testimony illustrates a trial strategy, and decision-making process, incompatible with the demands of this Court's waiver jurisprudence. The bare fact that this testimony exists, does not mean that this testimony constitutes evidence of a valid waiver, even under a deferential standard of review**.**

waiver of a sacrosanct right found in both the state and federal constitutions. We reverse and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

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

JUSTICE PLEICONES: I respectfully dissent. Although I am sympathetic with the majority's desire to protect Petitioner's right to jury trial, in my view our precedents compel affirmation of the post-conviction relief (PCR) court.

The question whether a defendant knowingly and voluntarily waived his right to jury trial is determined not only from the trial record but also from the record of the PCR hearing. *See Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984) ("[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea and the record of the post-conviction relief hearing." (citation omitted)); *Roddy v. State*, 339 S.C. 29, 33, 528 S.E.2d 418, 420-21 (2000) (same). This standard applies to the waiver of fundamental rights, including the right to trial by jury. *See Brown v. State*, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994) ("An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right. . . . [Where the record is silent, r]eview of this issue is better left to a post conviction relief proceeding where the facts surrounding the trial can be fully explored." (internal citations and quotation marks omitted)); *Roddy*, 339 S.C. at 33, 528 S.E.2d at 421 (addressing voluntariness of guilty plea and noting that guilty plea involves waiver of right to jury trial); *Harres*, *supra* (voluntariness of guilty plea); *Spoone v. State*, 379 S.C. 138, 665 S.E.2d 605 (2008) (waiver of right to appeal).

Thus, the question whether Petitioner's waiver was knowing and voluntary was one for the PCR court, and its finding must be upheld if *any* evidence in the record supports it. *See Roddy*, 339 S.C. at 33-35, 528 S.E.2d at 420-21 (applying any evidence standard and reversing PCR court's grant of relief based in part on evidence from PCR hearing); *Brannon v. State*, 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001) (applying any evidence standard and remanding for PCR court to hold evidentiary hearing on issue whether withdrawal of PCR application was knowing and voluntary); *Spoone*, 379 S.C. 138, 665 S.E.2d 605 (affirming PCR court's determination that waiver of appellate rights was knowing and voluntary despite lack of specific questioning by plea court on defendant's understanding of waiver). In this

case, the PCR court found that the waiver was knowingly and voluntarily made by Petitioner, and trial counsel's testimony at the PCR hearing is evidence in the written record that supports that finding. Thus, under our standard of review, we must affirm.

Further, I disagree that there was no colloquy between the court and Petitioner or Petitioner's counsel. Such a colloquy occurred when the trial court inquired whether Petitioner wished to waive his right to trial by jury and trial counsel specifically assented.

Moreover, even if Petitioner's waiver of jury trial were invalid, he would not be entitled to relief. Prejudice is not presumed except in certain limited circumstances, and these do not include improper waiver of jury trial. *See Strickland v. Washington*, 466 U.S. 668, 691-93 (1984). Thus, Petitioner must show prejudice. This he cannot do, as no facts were in dispute at trial. Petitioner admitted the theft, and his version of the facts did not materially differ from the State's version. His theory at trial was strictly legal: that he did not use force or intimidation to steal the property but only to retain it and escape, and thus the State could not prove the elements of armed robbery.

Therefore, I would affirm the order of the PCR court.

HEARN, J., concurs.