The Supreme Court of South Carolina

In the Matter of Douglas E. Brafford, Respondent.

ORDER

Following respondent's conviction on one count of conspiracy to operate an illegal gambling organization in violation of 18 U.S.C. § 371 and one count of money laundering in violation of 18 U.S.C. §1956(a)(1)(B)(1), he was disbarred from the North Carolina State Bar by order dated January 16, 1998. In response to a letter from the Clerk of Court asking respondent to inform the Court of any reason disbarment from the practice of law in this state would not be warranted, respondent sent the Court a letter stating, among other things, that he is "insane and incompetent to stand trial now."

When in the course of a disciplinary proceeding a lawyer alleges an inability to assist in his defense due to mental incapacity, this Court must immediately transfer the lawyer to incapacity inactive status pending a determination regarding incapacity pursuant to the procedure set forth in Rule 28(b), RLDE, Rule 413, SCACR. Rule 28(d), RLDE, Rule 413, SCACR.

Accordingly, respondent is hereby transferred to incapacity inactive status and this matter is transferred to the Commission on Lawyer Conduct for a determination as to the validity of respondent's claim of incapacity. A decision regarding the imposition of reciprocal discipline will be made following receipt of the Commission's determination regarding respondent's claim of incapacity.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

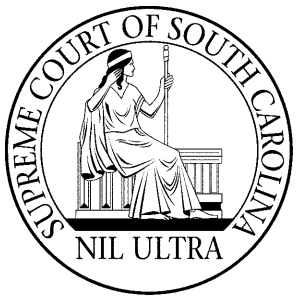
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 13, 2003



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

October 20, 2003

ADVANCE SHEET NO. 38

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

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Auto-Owners Insurance Company and Owners Insurance Company, Plaintiffs,

v.

Carl Brazell Builders, Inc., Essex Homes Southeast, Inc., Rex Thompson Builders, Inc., Marc Homebuilders, Inc., Garryle Deas, Veronica Deas, Alma E. Owens, Toni C. Yarber, Ron Thomas, Candace R. Thomas, Henry O. Jacobs Builders, Inc., James Waldon, Lela Waldon, Reginald Perry, Jeanette Perry, Theodore Cole, Susan Irwin, Mike Irwin, Webb Thompson and Diane Thompson, Defendants.

CERTIFIED QUESTIONS

The Honorable Joseph F. Anderson, Jr.
United States District Court for the District of South Carolina

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Opinion No. 25736
Heard September 23, 2003 - Filed October 20, 2003

CERTIFIED QUESTIONS ANSWERED

Grenville Delorme Morgan, Jr., and Larry A. Foster, Jr., of McAngus, Goudelock & Courie, LLC, of Columbia, for plaintiffs.

Charnell Glenn Peake, of Peake, Fowler & Associates, PA, of Columbia, for Defendant Carl Brazell Builders, Inc.; Robert C. Brown, of Brown and Brehmer, of Columbia, for Defendants Essex Homes Southeast, Inc., Rex Thompson Builders, Inc., and Marc Homebuilders, Inc.; Robert J. Thomas, of Rogers, Townsend & Thomas, PC, of Columbia, for Defendant Henry O. Jacobs Builder, Inc.; and Robert D. Dodson, of Strom Law Firm, LLC, of Columbia, for Defendants Garryle Deas, Veronica Deas, Alma E. Owens, Toni C. Yarber, Ron Thomas, Candace R. Thomas, James Waldon, Lela Waldon, Reginald Perry, Jeanette Perry, Theodore Cole, Susan Irwin, Mike Irwin, Webb Thompson, and Diane Thompson.

JUSTICE BURNETT: This matter is before the Court for the purpose of answering certified questions propounded by the United States District Court for the District of South Carolina.

FACTS

Plaintiffs Auto-Owners Insurance Company and Owners Insurance Company (Plaintiffs or Insurers) filed this action in federal court seeking a declaratory judgment against the above-captioned defendants. Specifically, Insurers sought a determination whether their commercial general liability (CGL) policies provide coverage for claims brought by co-defendants Garryle Deas, Veronica Deas, Alma E. Owens, Toni C. Yarber, Ron Thomas, Candace R. Thomas, James Waldon, Lela Waldon, Reginald Perry, Jeanette Perry, Theodore Cole, Susan Irwin, Mike Irwin, Webb Thompson, and Diane Thompson (Claimants) against co-defendants Carl

Brazell Builders, Inc., Essex Homes Southeast, Inc., Rex Thompson Builders, Inc., Marc Homebuilders, Inc., and Henry O. Jacob Builders, Inc. (Corporate Defendants or Contractors).

Underlying Litigation[1]

Before 1990, American Newland Associates began developing the Summit Development, an upscale multi-use planned residential subdivision, in Columbia, South Carolina. Ultimately, the developers subdivided the Summit and sold the sites to residential contractors, including Contractors, who then sold property to Claimants.

In August 2001, Claimants filed an amended complaint in state court against Contractors asserting claims for class certification, negligence, gross negligence, recklessness, willful/wanton conduct, negligent misrepresentation, fraudulent concealment, and violations of the South Carolina Unfair Trade Practices Act. They alleged the Summit construction site was once called "the Pontiac Precision Range" and was used by the United States Department of Defense (DOD) as a training site for aerial bombing during World War II. The DOD's assessment and evaluation of the Pontiac Precision Range disclosed the presence of potentially hazardous materials on the property. Claimants alleged that, in spite of the presence of potentially hazardous materials, the development continued and developers sold lots to residential contractors, including Contractors.

The following is specified in the Order of Certification:

> All of the plaintiffs' allegations in the underlying Amended Complaint arise out of the theory that the contractors and homebuilders, including the corporate defendants, knew of the presence of hazardous materials at the Summit property and failed to disclose information prior to each

[1] The facts are taken from the Order of Certification which refers to an amended complaint. While the parties refer to language from the Claimants' underlying state court complaints, particularly Claimants' Second Amended Complaint, our consideration is limited to the facts as stated by the District Court.

claimant's purchase of their respective homes. All of the damages claimed in the underlying case are economic in nature and some of the damages arise out of the diminution in value of the plaintiffs' respective properties caused by the potential presence of the allegedly hazardous materials.

Insurers are defending Contractors in the underlying state court litigation under a reservation of rights. They assert in the current action that the CGL policies issued to Contractors preclude coverage for the claims in the underlying litigation.

The subject CGL policies provide, in part, as follows:

SECTION I – COVERAGES UNDER COVERAGE A –BODILY INJURY AND PROPERTY DAMAGE LIABILITY.

Paragraph 1, designated **Insuring Agreement**, as follows:

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" which takes place in the "coverage territory" ; and

(2) The "bodily injury" or "property damage" occurs during the policy period.

. . .

1. **Exclusions.**

This insurance does not apply to:

a. "bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

. . .

f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(a) At or from any premises, site, or location which is or was at any time owned or occupied by, or rented or loaned to any insured;

(b) At or from any premises, site, or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:

(i) if the pollutants brought on or to the premises, site or location in connection with such

operations by such insured, contractor or subcontractor; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or in any way respond to or assess the effects of pollutants.

Subparagraphs (a) and (d)(i) do not apply to "bodily injury" or "property damage" arising out of heat, smoke or fumes from a hostile fire.

As used in this exclusion, hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

(2) Any loss, costs or expense arising out of any:

(a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of pollutants; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing from, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.

Pollutants mean any solid, liquid, gaseous, or thermal irritant or contaminate including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.

SECTION V – DEFINTIONS AS FOLLOWS:

. . .

9. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

. . .

12. "Property damage" means:

    a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

    b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

The Court accepted the following four certified questions from the United States District Court for the District of South Carolina:

I. Do the subject CGL policies obligate the plaintiffs to indemnify and defend the corporate defendants for the claims of the claimants which are economic in nature and based solely on the diminution in value of the claimants' respective properties?

II. Do the corporate defendants' actions or inactions as alleged by the claimants qualify as an "occurrence" under the terms and conditions of the subject liability policies?

III. Does the intentional act exclusion preclude coverage?

IV. Does the pollution exclusion preclude coverage?

DISCUSSION

I. Do the subject CGL policies obligate the plaintiffs to indemnify and defend the corporate defendants for the claims of the claimants which are economic in nature and based solely on the diminution in value of the claimants' respective properties?

Insurance policies are subject to the general rules of contract construction. B.L.G. Enterprises, Inc. v. First Financial Ins. Co., 334 S.C. 529, 514 S.E.2d 327 (1999). The Court must give policy language its plain, ordinary, and popular meaning. Id. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. Id. "Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the third-party's complaint." Isle of Palms Pest Control Co. v. Monticello Ins. Co., 319 S.C. 12, 16, 459 S.E.2d 318, 320 (Ct. App. 1994), aff'd 321 S.C. 310, 468 S.E.2d 304 (1996).

As noted in the Order of Certification,

> All of the plaintiffs' allegations in the underlying Amended Complaint arise out of the theory that the contractors and homebuilders, including the corporate defendants, knew of the presence of hazardous materials at the Summit property and failed to disclose that information prior to each claimant's purchase of their respective homes. All of the damages claimed in the underlying case are economic in nature and some of the damages arise out of the diminution in value of the plaintiffs' respective properties caused by the potential presence of the allegedly hazardous materials.

The CGL policies provide coverage for "property damage" caused by an "occurrence." § I (b)(1). "Property damage" is defined as either "[p]hysical injury to tangible property, including all resulting loss of use of that property" or "[l]oss of use of tangible property that is not

physically injured." § V (12). The first definition of property damage is applicable here.[2]

We find the amended complaint in the underlying action does not allege any physical injury which meets the definition of "property damage" provided in the CGL policies. According to the Order of Certification, Claimants do not allege any physical injury to their property, but solely economic damages, particularly the diminished value of their property, as a result of Contractors' knowing sale of homes located on property containing hazardous materials. Under the unambiguous language of the policies, there is no property damage and, therefore, no covered occurrence. B.L.G. Enterprises, Inc., v. First Financial Ins. Co., supra.

Our conclusion is consistent with decisions in other jurisdictions. Most courts hold the diminished value of tangible property does not constitute property damage within the meaning of CGL policies which define property damage as physical injury. Hartford Accident and Indem. Co. v. Pacific Mutual Life Ins. Co., 861 F.2d 250 (10th Cir. 1988) (recognizing that 1973 revision to standard CGL policies amending definition of property damage from "injury" to "physical injury" was intended to preclude coverage for intangible injuries such as diminution in value); State Farm Fire and Cas. Co. v. Tillerson, 777 N.E.2d 986 (Ill. App. Ct. 2002) (diminution in value is intangible damage, not physical injury, therefore, CGL policy does not provide coverage where injured parties do not allege contractor's work tortiously injured their home); L. Ray Packing Co. v. Commercial Union Ins. Co., 469 A.2d 832 (Me. 1983) (where complaint alleged price-fixing scheme resulting in loss of profits, but no physical injury to merchandise, it failed to allege property damage within CGL policy); Federated Mut. Ins. Co .v. Concrete Units, 363 N.W.2d 751 (Minn. 1985) (incorporation of defective

[2] Referring to the Claimants' Second Amended Complaint's assertion that Contractors' negligence caused "damage to the Claimants' property and interference with full use and enjoyment of their property," Contractors assert the "loss of use" definition of "property damage" applies. As recognized in Footnote 1, however, the Order of Certification only refers to the Amended Complaint which apparently does *not* contain a claim for "loss of use."

concrete into grain elevator resulting in diminution in market value of the elevator does not constitute physical injury as required by property damage definition in CGL policy); Wyoming Sawmills, Inc. v. Transp. Ins. Co., 578 P.2d 1253 (Or. 1978) (use of term "physical" to define property damage negates possibility policy intended to include consequential or intangible damage such as depreciation in value); see generally American Home Assurance Co. v. Libbey-Owens-Ford Co., 786 F.2d 22 (1st. Cir. 1986); [3] but see American States Ins. Co. v. Herman C. Kempker Constr. Co., Inc., 71 S.W.2d 232 (Mo. Ct. App. 2002). Accordingly, we answer Question I negatively.

In light of our answer to Question I, we decline to address the remaining questions propounded by the United States District Court for the District of South Carolina.

CERTIFIED QUESTIONS ANSWERED.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice G. Thomas Cooper, Jr., concurs.

[3] See also Schulmeyer v. State Farm Fire and Cas. Co., 353 S.C. 491, 579 S.E.2d 132 (2003) (provision of automobile insurance policy providing for cost of repair or replacement of vehicle does not entitle insured to diminution in value of adequately repaired vehicle).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent/Appellant,

v.

Willie Edward Gordon, Jr., a/k/a
Jr. Gordon, Appellant/Respondent.

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

Opinion No. 25737
Heard July 8, 2003 - Filed October 20, 2003

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant-Respondent.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, of Columbia, and Solicitor Thomas E. Pope, of York, for Respondent-Appellant.

JUSTICE WALLER: In February 2001, Willie Edward Gordon was convicted of trafficking in crack cocaine and sentenced to thirty years. He appeals, contending his conviction is barred by double jeopardy. The state

appeals the trial court's refusal to sentence Gordon to life imprisonment without parole (LWOP) under the Two-Strikes law. We affirm both appeals.

FACTS

In May 1997, a seven-count indictment was handed down against Gordon. On June 9-12, 1997, the state proceeded to trial solely on count five of the indictment, trafficking in crack cocaine in violation of S.C. Code Ann. § 44-53-375(c).[1] Count five of the indictment reads:

> That WILLIE E. GORDON, AKA "JR" AND **TOMMY JAMES RHINEHART** did Traffick in Crack Cocaine in York County, on or about **September 21st through September 23rd, 1996** by either: knowingly selling, delivering or distributing; or did purchase, or bring into this State; or provide financial assistance or did otherwise aid, abet, or attempt to sell, or deliver, or purchase, or bring into this State; or did possess, either actually or constructively, **twenty-eight grams or more** of crack cocaine, a Schedule II controlled substance under provisions of Section 44-53-100 et. seq., . . . such conduct not having been authorized by law and is a violation of Section 44-53-375(c)- Trafficking in Crack Cocaine. (emphasis supplied).

Notably, count five does not allege that Gordon in any way **conspired** to traffic crack. Further, although the trial court instructed the jury the statutory language of § 44-53-375(c), it did **not** give the jury a separate jury instruction concerning the law of conspiracy. The jury found Gordon guilty of trafficking, and he was sentenced to thirty years.

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[1] Section 44-53-375(C) provides, in part:

> A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of ice, crank, or crack cocaine, . . . is guilty of a felony which is known as "trafficking in ice, crank, or crack cocaine. . ."

Thereafter, in October 2000, another indictment was issued against Gordon charging him with trafficking crack cocaine, as follows:

> That on or about **September 27, 1996**, in York County, South Carolina, the Defendant, Willie Edward Gordon, Jr. AKA Jr. Gordon, did wilfully, unlawfully and knowingly sell and/or deliver and/or bring into the State of South Carolina and/or provide financial assistance and/or otherwise aid or abet and/**or conspire with Spencer L. Gordon** to sell and/or was knowingly in actual or constructive possession of **more than 10 grams but less than 28 grams** of Crack Cocaine as defined in Sections 44-53-110, 44-53-210 (b)(4) and as such did Traffick Crack Cocaine, in violation of Section 44-53-375, Code of Laws of South Carolina (1976, as amended).

(emphasis supplied).[2]

The charges from the 2000 indictment were called for trial in February 2001. Counsel for Gordon moved to dismiss the 2000 indictment, contending the charges therein were all part of "one continuing transaction," essentially one conspiracy to traffic, for which Gordon was convicted in 1997. Accordingly, he contended the subsequent prosecution was barred by double jeopardy. The trial court ruled there were two separate and distinct offenses and allowed the state to proceed on the 2000 indictment. The jury found Gordon guilty of trafficking.

In light of Gordon's 1997 trafficking conviction, the state moved for a sentence of LWOP under the Two-Strikes law, S.C. Code Ann. § 17-25-45 (Supp 2002).[3] The trial court declined to impose a LWOP sentence, finding

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[2] This indictment was substantially the same as count seven of the 1997 indictment charging Gordon with trafficking; however, at the 1997 trial, count seven was nol prossed with the right to restore.

[3] Under the Two-Strikes law, S.C. Code Ann. § 17-25-45(B), upon a conviction for a "serious offense," a person must be sentenced to LWOP if he/she has two or more convictions for a "serious" or "most serious" offense or a combination thereof. Here, Gordon had one prior "most serious" offense of armed robbery, and his 1997 trafficking in crack conviction is a "serious offense." As the current offense is also a "serious" offense, Gordon is subject to LWOP unless

the crime charged in the 1997 indictment (September 21-23, 1996), and the one charged in the 2000 indictment (September 27, 1997), were so closely connected in point of time as to come within the purview of S.C. Code Ann. § 17-25-50.[4] Accordingly, the court held Gordon was not subject to a recidivist sentence under the Two-Strikes law; he was sentenced to thirty years, concurrent to the sentence imposed for his 1997 trafficking conviction.

ISSUES

1. Did the trial court err in refusing to quash the 2000 indictment on the ground that a subsequent prosecution was barred by double jeopardy? (Gordon's appeal)

2. Did the trial court err in refusing to sentence Gordon to LWOP? (State's appeal)

1. DOUBLE JEOPARDY

Gordon asserts the conduct for which he was convicted of trafficking in 1997 was "part of a continuing course of conduct that constituted one criminal act," and was a continuing conspiracy which continued through the events alleged in the 2000 indictment, such that the 2001 prosecution was barred by double jeopardy.[5] We disagree.

The Double Jeopardy clause protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999); State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). A substantive crime and a conspiracy to commit that crime are not the "same offense" for double jeopardy purposes. United States v. Felix, 503 U.S. 378 (1992). Conspiracies and the substantive

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the current crime occurred so closely in point of time with the events leading to his 1997 conviction that the trial court properly treated it as one offense under § 17-25-50.

[4] Section 17-25-50 requires the sentencing court to "treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense."

[5] S.C. CONST. art. I, § 12; U.S. CONST. Amend V.

offenses committed in the course of those conspiracies may be charged separately. United States v. Love, 767 F.2d 1052, 1062 (4th Cir. 1985) *citing* Callanan v. United States, 364 U.S. 587 (1960); Iannelli v. United States, 420 U.S. 770 (1975).

Gordon argues his 1997 prosecution essentially involved the same conspiracy as the 2001 prosecution, such that the latter is barred by double jeopardy. We disagree. Initially, we note that the 1997 indictment charged Gordon with "**trafficking**," rather than "**conspiracy** to traffic," and there is absolutely no language whatsoever in that indictment alleging Gordon in any way conspired to traffic cocaine. Moreover, although the trial court charged the jury the language of the trafficking statute at the 1997 trial, it did not charge the jury concerning the elements necessary to establish the offense of "conspiracy."[6] We find the 1997 trial was clearly a prosecution for a single substantive offense of trafficking in cocaine, which occurred between September 21-23, 1996.

The 1997 prosecution involved events, details, and persons completely separate from the event proven at Gordon's 2001 trial. The 1997 indictment listed a very discrete period of time (Sept. 21-23, 1996), alleged a different amount of cocaine than the 2000 indictment (28 grams or more, as opposed to between 10-28 grams), and alleged Gordon had trafficked with a different individual (Tommy James Rhinehart in 1997 indictment; Spencer Gordon in the 2000 indictment). Moreover, the evidence presented at the 1997 trial clearly demonstrated the substantive offense of trafficking. At that trial, the state proved that on September 23, 1996, police were investigating Tommy Rhinehart, a suspected drug dealer. Rhinehart left his home and went down an alley toward Gordon's home, which was 50-75 yards away. When Rhinehart returned, police executed a search warrant on his home and discovered two bags of crack cocaine, and a pill bottle also containing crack. Rhinehart decided to cooperate with police and told them he had gotten the

[6] A conspiracy is a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or of achieving by criminal or unlawful means an object that is neither criminal nor unlawful. State v. Ameker, 73 S.C. 330, 53 S.E. 484 (1906). The gravamen of the offense of conspiracy is the agreement or combination. State v. Dasher, supra.

crack from Gordon. Rhinehart testified Gordon had given him two bags of crack, on Sat. Sept. 21, 1996, in the alley between their homes. Rhinehart sold that crack between Saturday and Monday, and paid Gordon $500.00 to pay for it on Monday (Sep. 23rd), at which time Gordon gave him two more bags. We find this evidence clearly demonstrates the **substantive** offense of trafficking, for which Gordon was convicted. Accordingly, we find the 1997 prosecution did not result in a conspiracy conviction, such that there is no double jeopardy violation.

Nonetheless, Gordon asserts that because the trial court charged the jury the language of the trafficking statute at his 1997 trial, to wit, that a person who "aids, abets, attempts or **conspires** to sell, manufacture, deliver, purchase, or bring [crack cocaine] into this State . . . [is guilty of trafficking]," that his 2001 prosecution was prohibited. We disagree.[7]

Gordon's basic contention is that, because the word "conspires" was included in the judge's charge covering the trafficking statute, § 44-53-375(C), his 1997 trial was essentially rendered a "conspiracy" trial. We disagree. As noted previously, Gordon was not indicted for conspiracy, and the jury was **not** charged on the law of conspiracy at the 1997 trial. Simply because the trial court instructed the jury the language of the trafficking statute did not thereby transform his trafficking trial into one for conspiracy. As noted previously, a substantive crime and a conspiracy to commit that crime are not the "same offense" for double jeopardy purposes, and a defendant may be separately indicted for both offenses. United States v. Felix, supra; see also State v. Wilson, 311 S.C. 382, 391, 429 S.E.2d 453, 458 (1993) (Toal, J. concurring, and noting that conspiracy "is a completely separate offense from the substantive offenses which are the objects of the conspiracy."). Accordingly, even if we accept Gordon's contention that he was tried for conspiracy in 2001, there is no double jeopardy violation since he was properly tried and convicted of the substantive offense of trafficking

[7] Gordon's reliance on State v. Amerson, 311 S.C. 316, 428 S.E.2d 871 (1993), is misplaced. Amerson involved a case in which the defendant was indicted for **conspiracy** to traffic marijuana. Similarly, State v. Dasher, 278 S.C. 454, 298 S.E.2d 215 (1982) was also a conspiracy case. Here, both the 1997 and 2000 indictments were for the substantive offense of trafficking rather than conspiracy to traffic.

in 1997. The circuit court properly ruled there were two separate and distinct offenses.

2. **CONTINUOUS COURSE OF CONDUCT**

Gordon asserts the trial court properly refused to impose a sentence of LWOP pursuant to the recidivist statute, S.C. Code Ann. § 17-25-45 (a/k/a the Two-Strikes law),[8] on the ground that his two trafficking offenses were committed so closely in point of time as to be treated as one offense under S.C. Code Ann. § 17-25-50.[9] The state, citing this Court's recent opinion in State v. Benjamin, 353 S.C. 441, 579 S.E.2d 289 (2003), contends a trial court may not consider § 17-25-45 in conjunction with § 17-25-50 in determining whether a recidivist sentence is warranted under the Two-Strikes law. We agree with Gordon that these statutes must be construed together. Accordingly, we overrule Benjamin and affirm the trial court's ruling that Gordon's two offenses were properly treated as one for purposes of sentencing under the Two-Strikes law.

In Benjamin, supra, a majority of this Court held that the recidivist statute must be considered independently of any other statute.[10] It found the introductory language to § 17-25-45, to the effect that "Notwithstanding any other provision of law [certain defendants] shall be sentenced to life in prison," barred consideration of § 17-25-50 in determining whether the defendant qualifies for a Two-Strikes recidivist sentence. 353 S.C. at 445, 579 S.E.2d at 291. We find this holding contrary to both the legislative intent and prior precedent of this Court.

Statutes which are part of the same legislative scheme should be construed together. Stardancer Casino, Inc. v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001). In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any

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[8] See footnote 3.

[9] See footnote 4.

[10] The majority opinion in Benjamin was joined by Justice Pleicones, Justice Burnett, and Judge Cottingham. Justice Waller and Justice Moore dissented.

reasonable construction. State v. Alls, 330 S.C. 528, 500 S.E.2d 781 (1998). Furthermore, the court should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. South Carolina Coastal Council v. South Carolina State Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991). Courts will reject the plain and ordinary meaning of statutory language when to accept it would lead to a result so absurd that it could not possibly have been intended by Legislature, or would defeat plain legislative intention; if possible we will construe a statute so as to escape an absurd result and carry the legislative intention into effect. Joseph v. State, 351 S.C. 551, 571 S.E.2d 280 (2002). Moreover, we are constrained to strictly construe penal statutes in the defendant's favor. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).

This Court has previously recognized that the predecessor to § 17-25-45 (17-25-40) and § 17-25-50 must be construed together. See State v. Stewart, 275 S.C. 447, 452, 272 S.E.2d 628, 631, n. 2 (1980) (recognizing that section 17-25-50 must be read in conjunction with section 17-25-40, the predecessor to section 17-25-45). We have also recognized that § 17-25-45 and § 17-25-50 are part of an overall, legislative scheme for recidivist sentencing. See also State v. Muldrow, 259 S.C. 414, 192 S.E.2d 211 (1972) (statute directing trial court to treat as one offense any number of offenses committed at times so closely connected in point of time that they may be considered as one offense is applicable only for purpose of sentencing under recidivist statute); Legare v. State, 333 S.C. 275, 509 S.E.2d 472 (1999) (recognizing that § 17-25-50 is part of the recidivist sentencing scheme).

The Benjamin majority ignores these precedents and holds, under the guise of statutory construction, that it is no longer appropriate or necessary to harmonize or reconcile § 17-25-45 with § 17-25-50. 353 S.C. at 445, 579 S.E.2d at 291. Under the majority's rationale, however, S.C. Code Ann. § 17-25-50 is rendered a nullity.[11] This cannot have been the intent of the

[11] The only exception would be if a defendant is tried simultaneously for numerous offenses. If, however, the state elects separate trials to prosecute a defendant for multiple crimes, such that the he or she has a qualifying "prior conviction," then the trial court is prohibited from

Legislature; if it had intended to repeal § 17-25-50, it could have plainly said so. Stardancer Casino v. Stewart, supra; Tilley v. Pacesetter, 333 S.C. 33, 508 S.E.2d 16 (1998) (if legislature had intended certain result in statute it would have said so).

Moreover, we are persuaded by the dissenting position in Benjamin, to wit:

> A recidivist is "a habitual criminal. A criminal repeater. An incorrigible criminal. One who makes a trade of crime." Black's Law Dictionary, 1269 (6th Ed.1990). Recidivist legislation attempts to encourage offenders to stay out of trouble and punishes those who refuse to be deterred even after a conviction. Commonwealth v. Eyster, 401 Pa.Super. 477, 585 A.2d 1027, 1031 (Pa.1991). Recidivists are persons who continue to commit criminal, antisocial behavior after incarceration for an earlier offense. Recidivist statutes aim at punishing those who have shown they are incorrigible offenders. Shannon Thorne, One Strike and You're Out: Double Counting and Dual Use Undermines the Purpose of California's Three-Strikes Law, 34 U.S.F.L.Rev. 99 (1999). The purpose of requiring separate offenses is to ensure that those offenders being sentenced under the harsh provisions of a recidivist sentencing statute have not been classified as habitual offenders because of multiple convictions arising from a single criminal enterprise; it provides the state with some certainty that the offender has participated in multiple criminal trials and, despite these opportunities to understand the gravity of his behavior and abide by the law, has continued to engage in criminal conduct. Daniel Rogers, People v. Furman and Three Strikes: Have the Traditional Goals of Recidivist Sentencing Been Sacrificed at The Altar of Public Passion?, 20 Thomas Jefferson L.Rev. 139, 156 (Spring 1998).

353 S.C. at 446, 579 S.E.2d at 291.

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consideration of whether the offenses were committed at points so close in time as to be one offense. We find this an absurd result, clearly not intended by the legislature.

We find the recidivist statute is aimed at career criminals, those who have been previously sentenced and then commit another crime, not at those whose recidivist status is premised solely upon acts which occur at times so closely connected in point of time that they may be considered as one offense. Accordingly, we hold § 17-25-45 and § 17-25-50 must be construed together in determining whether crimes committed at points close in time qualify for a recidivist sentence. We overrule State v. Benjamin, 353 S.C. 441, 579 S.E.2d 289 (2003), and affirm the trial court's consideration of 17-25-50 in refusing to impose a sentence of LWOP under the facts of this case.[12]

CONCLUSION

We affirm the trial court's ruling that Gordon was not placed in double jeopardy as a result of his 2001 prosecution. We also affirm the trial court's consideration of § 17-25-50 in refusing to impose a sentence of LWOP. The judgment below is

AFFIRMED.

TOAL, C.J., MOORE, J., and Acting Justice Marc H. Westbrook, concur. BURNETT, J., concurring in part and dissenting in part in a separate opinion.

[12] We note this does not mean Gordon is not subject to separate sentences for these offenses, merely that he is not subject to a recidivist LWOP sentence as a result of his second trafficking conviction. For the benefit of bench and bar, we note that our decision in this matter is to be given retroactive application. Cf. Pinckney v. Warren, 344 S.C. 382, 544 S.E.2d 620 (2001)(retroactivity may be extended when justice requires and innocent persons will not be adversely affected).

JUSTICE BURNETT (concurring in part; dissenting in part): I agree Gordon has suffered no double jeopardy violation. However, I disagree with the majority's conclusion that South Carolina Code Ann. § 17-25-45 (2003) must be read in conjunction with South Carolina Code Ann. § 17-25-50 (2003).

As fully explained by this Court a few months ago, the language of § 17-25-45, specifically the introductory phrase "[n]otwithstanding any other provision of law," demonstrates the General Assembly unequivocally intended the statute to be read independently of other provisions, including § 17-25-50. State v. Benjamin, 353 S.C. 441, 579 S.E.2d 289 (2003). The Court considered and rejected the very same arguments presented by Gordon today.

Further, the principle of stare decisis compels the majority follow State v. Benjamin, id. "Stare decisis exists to 'insure a quality of justice which results from certainty and stability'." State v. One Coin-Operated Video Game Mach., 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (internal citations omitted). Prosecutors, those charged with crimes, and the general public alike benefit from the predictability associated with the Court's decisions. Ultimately, no one benefits when the Court issues opinions which diverge from month to month. Accordingly, even when a judge dislikes the result, stare decisis behoves him to follow precedent. See State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995) (wherein Chief Justice Finney concurred with majority's holding with which he did not agree as he recognized stare decisis bound him to the result). Moreover, adhering to stare decisis where we have previously interpreted a statute does not result in rigid application of the law as the General Assembly may correct any misinterpretation on our part. State v. One Coin-Operated Video Game Mach., supra.

In my opinion, State v. Benjamin, supra, is dispositive. I would affirm Gordon's LWOP sentence.

The Supreme Court of South Carolina

RE: Rule 608, SCACR

ORDER

In promulgating Rule 608, SCACR, this Court devised a means by which the burden of court appointments would be fairly distributed among all lawyers in this State. While this system has worked well in most counties, the number of appointments in some of the less populous counties in South Carolina is greatly disproportionate to the number of lawyers in those counties. Further, in some counties, lawyers are seeking and providing a significant amount of legal services although they are not subject to appointment in those counties. Accordingly, we find it appropriate to amend Rule 608 to ensure that lawyers who seek and/or provide a significant amount of legal services in a county bear some of the burden of providing legal services to indigents in the county.

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 608(c), SCACR, is amended as follows:

(1) The last paragraph of Rule 608(c)(1) is amended to read:

These lists shall be arranged alphabetically and shall be provided to the county clerks of court at least thirty (30) days prior to the beginning of the appointment year. In compiling the lists, the South Carolina Bar shall place each lawyer's name on a list in the county designated in (c)(2)(A). The lawyer's name shall also be placed on a list in one of the counties designated in (c)(2)(B), in the discretion of the South Carolina Bar, to meet the needs of counties which require additional lawyers for appointment.

(2) Rule 608(c)(2)-(6) is amended to read:

(2) Active members shall, at the time of payment of annual license fees to the South Carolina Bar, provide the following information to the Bar:

(A) the county in which they primarily practice in South Carolina or, if they do not practice law in South Carolina, the county in which they reside in South Carolina;

(B) all counties in which they maintain an office, provide a significant amount of legal services, or disseminate advertisements via television, radio, billboards, newspapers, magazines, or telephone directories;

(C) whether they are certified by the Supreme Court to serve as lead counsel in a death penalty case;

(D) if they are not death penalty certified as lead counsel, whether their names should be placed on the criminal or civil list based on the criteria given in (1) above; and

(E) if admitted after March 1, 1979, whether they have completed the trial experiences required by Rule 403, SCACR.

(3) Active members shall notify the South Carolina Bar within

thirty (30) days of any changes in the counties in which they reside, primarily practice, maintain an office, provide a significant amount of legal services, or advertise as defined in (2)(B). The Bar shall transfer the names of those members to the appropriate list(s) and notify the appropriate clerk(s) of court.

(4) If a member ceases to be an active member, the Bar shall delete that member's name from the list(s) and notify the appropriate clerk(s) of court.

(5) If a member becomes certified to serve as lead counsel in a death penalty case, the member shall, within thirty (30) days of the date of the certification, notify the South Carolina Bar. If not already on the criminal list(s), the Bar shall transfer the member's name to the criminal list(s). The Bar shall notify the appropriate clerk(s) of court of the certification and any transfer.

(6) If a member would, due to conflicts of interest, be prevented from accepting cases in a county in which the member would be subjected to appointment under (c)(2), the member will designate a county other than those listed in (b)(4) in which the conflicts will not arise.

(3) The last sentence of Rule 608(f)(5) is amended to read:

The list shall indicate the total number of appointments the member has received in the county during the appointment year.

(4) The first sentence in Rule 608(f)(9) is amended to read:

A member will not receive more than one (1) appointment in any county during a calendar month.

(5) The first sentence of Rule 608(f)(10) is amended to read:

A member will not receive more than ten (10) appointments in a county during an appointment year.

(6) The following sentence is added to the end of Rule 608(i):

> The clerk of court in each county shall, by September 1 of each year, furnish the South Carolina Bar with a list setting forth the number of lawyers appointed to criminal cases and to civil cases and the number of lawyers transferred to, or received from, other counties pursuant to (f)(10).

These amendments shall be applicable to the appointment year beginning July 1, 2004. The information required by Rule 608(c)(2) shall be provided to the South Carolina Bar with the license fee payments due in January 2004.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 14, 2003

The Supreme Court of South Carolina

RE: Amendments to Alternative Dispute Resolution Rules

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, the following amendments are made to the Alternative Dispute Resolution Rules:

(1) Family Court Mediation Rule 11 is amended to read:

> **(a) Requirements for Training.** Approved training programs for mediators in the Family Court shall consist of a minimum of 40 hours of instruction, unless otherwise provided in this Rule. The curriculum of the programs shall at a minimum include:
>
> (1) Statutes, rules and practice concerning family and related law in South Carolina;
>
> (2) Conflict resolution, family dynamics, and mediation theory in general, as well as specific training regarding domestic violence;
>
> (3) Mediation processes and techniques, including the process and techniques of trial court mediation;
>
> (4) Standards of conduct for mediators;
>
> (5) Statutes, rules and practice governing mediation settlement conferences in South Carolina;
>
> (6) Demonstrations of mediation conferences;

(7) Simulations of mediation settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(8) Any other requirements the Supreme Court may decide are necessary for good instruction.

(b) Approval of Training. A training program must be approved by the Supreme Court or its designee before the program can be used for compliance. Approval need not be given in advance of training attendance.

Training programs completed in South Carolina or other states prior to the original effective date of these rules on March 15, 1996, may be approved by the Supreme Court or its designee if they are in substantial compliance with the standards set forth in this Rule. Applicants completing training programs in other states after the original effective date of these rules may be approved by the Supreme Court or its designee if:

(1) The program consisted of a minimum of 37 hours of instruction;

(2) The program covered all the topics enumerated in paragraph (a) of this Rule except subparagraphs (1) and/or (5) related to South Carolina law; and

(3) The applicant takes at least three (3) hours of supplemental training pre-approved by the Supreme Court or its designee covering the South Carolina law topics enumerated in paragraph (a), subparagraphs (1) and (5) of this Rule.

(c) Administrative Fees. The Supreme Court may set administrative fees which must be paid in advance of approval.

(2) Circuit Court Alternative Resolution Dispute Rule 14 is amended to read:

(a) An approved training program for mediators of the Court of Common Pleas civil actions shall consist of a minimum of 40 hours of instruction, unless otherwise provided in this Rule. The curriculum of the programs shall at a minimum include:

(1) Conflict resolution and mediation theory;

(2) Mediation processes and techniques, including the process and techniques of trial court mediation;

(3) Standards of Conduct for mediators;

(4) Statutes, rules and practice governing mediated settlement conferences in South Carolina;

(5) Demonstrations of mediated settlement conferences;

(6) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(7) Any other requirements the Supreme Court may decide are appropriate.

(b) A training program must be approved by the Supreme Court or its designee before the program can be used for compliance with Rule 13(b). Approval need not be given in advance of training attendance.

Training programs completed in South Carolina or other states prior to the original effective date of these rules on March 15, 1996, may be approved by the Supreme Court or its designee if they are in substantial compliance with the standards set forth in this Rule. Applicants completing training programs in other states after the original effective date of these rules may be approved by the Supreme Court or its designee if:

(1) The program consisted of a minimum of 37 hours of instruction;

(2) The program covered all the topics enumerated in paragraph (a) of this Rule except subparagraph (4) related to South Carolina law; and

(3) The applicant takes at least three (3) hours of supplemental training pre-approved by the Supreme Court or its designee covering the South Carolina law topics enumerated in paragraph (a), subparagraph (4) of this Rule.

(c) The Supreme Court may set administrative fees, which must be paid in advance of approval.

(3) Circuit Court Alternative Resolution Dispute Rule 15 is amended to read:

(a) An approved training program for arbitrators of the Court of Common Pleas civil actions shall consist of a minimum of 6 hours of instruction, unless otherwise provided in this Rule. The curriculum of the programs shall at a minimum include:

(1) Conflict resolution and arbitration theory;

(2) Arbitration processes and techniques, including the process and techniques of both binding and nonbinding arbitration;

(3) Standards of Conduct for arbitrators;

(4) Statutes, rules and practice governing arbitration hearings in South Carolina;

(5) Demonstrations of arbitration hearings;

(6) Simulations of arbitration hearings, involving student participation as arbitrator, attorneys and disputants, which

simulations shall be supervised, observed and evaluated by program faculty; and

(7) Any other requirements the Supreme Court may decide are appropriate.

(b) A training program must be approved by the Supreme Court or its designee before the program can be used for compliance with Rule 13(c). Approval need not be given in advance of training attendance.

Training programs completed in South Carolina or other states prior to the original effective date of these rules on March 15, 1996, may be approved by the Supreme Court or its designee if they are in substantial compliance with the standards set forth in this Rule. Applicants completing training programs in other states after the original effective date of these rules may be approved by the Supreme Court or its designee if:

(1) The program consisted of a minimum of 6 hours of instruction;

(2) The program covered all the topics enumerated in paragraph (a) of this Rule except subparagraph (4) related to South Carolina law; and

(3) The applicant takes at least three (3) hours of supplemental training pre-approved by the Supreme Court or its designee covering the South Carolina law topics enumerated in paragraph (a), subparagraph (4) of this Rule.

(c) The Supreme Court may set administrative fees, which must be paid in advance of approval.

(4) Regulations V(B)(7) and (C) of the Regulations for the Commission on Alternative Dispute Resolution are amended to read:

> 7. Recertification of neutrals shall require that the applicant submit a recertification application on or before December 31st of each year together with a recertification fee as set by the Supreme Court.[2] Failure to submit a recertification application by the referenced deadline will result in an additional late fee for recertification.
>
> C. Roster of Certified Neutrals. The Board shall maintain at the South Carolina Bar rosters of approved neutrals. The Board shall furnish the clerks of the pilot counties updated rosters of certified neutrals on a periodic basis. A neutral who has failed to submit a recertification application and fee by January 15th of each year shall be removed from the rosters.

These amendments shall be effectively immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 15, 2003

[2] By Order dated June 27, 2002, the recertification fee was set at $50 and the late fee was set at $50.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Billy Jason Keith, Appellant.

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

Opinion No. 3682
Submitted September 8, 2003 – Filed October 20, 2003

AFFIRMED

Assistant Appellate Defender Robert M. Pachak, of the Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Assistant Attorney General Deborah R. J. Shupe, all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

GOOLSBY, J.: Billy Jason Keith appeals his convictions for

possession of methamphetamine, cocaine, and ketamine arguing there was insufficient probable cause to issue the search warrant that led to the seizure of illegal drugs from his home and the trial court therefore erred in admitting the evidence obtained during the search. We affirm.[1]

FACTS

On or about July 25 or 26, 2001, Officer Marvin Brown, an investigator with the multi-jurisdictional Drug Enforcement Unit (DEU) of the Sixteenth Circuit Solicitor's Office, received information from Columbia Drug Enforcement Agency (DEA) Agent Richard Freeman that Appellant Billy Jason Keith had a large quantity of marijuana at his residence. Brown testified that he has known Freeman for several years and he is "comfortable" with him. An unidentified informant gave Freeman the information and it was specific as to Keith's name and address.

Also, during the same period of time, two additional sources informed Officers Lubben and Parrish that Keith had a quantity of drugs at his home. Brown saw the informants speaking with Lubben and Parrish, but did not know the identity or reliability of the informants. Additionally, within the month, Brown listened to a recorded telephone call a confidential informant made from the police department to Keith's house in which the informant spoke with a person believed to be Keith's mother about a marijuana transaction.

Based upon this information, Brown ordered an investigative surveillance of Keith's residence on Ebinport Road in Rock Hill, South Carolina. Officers McCarley, Lubben, and Graham conducted the surveillance directly across the street from Keith's home beginning shortly after 10:00 p.m. on July 27, 2001. During the surveillance, officers observed an unidentified individual approach Keith's residence. The officers heard a knock and saw a light go on and off, but heard no response. The individual left the residence without entering and was intercepted by the officers when he crossed the street. McCarley testified the individual told him he knew

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

Keith and that Keith's residence "was a place he could get something to speed him up." No drugs were found on the individual and his identity was not recorded. This information was communicated to Brown.

While questioning the individual, officers observed a vehicle pull away from Keith's residence. The vehicle was one Keith was known to drive. The officers immediately followed the vehicle and stopped it for having an expired tag. Keith was driving the car and Heidi Jones was located in the front passenger seat. Keith consented to a search of the car. Officers found a distinctive marijuana bud in the ashtray and a pipe containing marijuana residue in the glove box. Neither Keith nor Jones admitted ownership of the bud or pipe, and both were arrested.

The surveillance officers communicated with Officer Brown about the discovery of marijuana in the vehicle after it was seen leaving Keith's home. Brown prepared an affidavit and appeared before a magistrate to obtain a warrant to search Keith's home. Brown also presented detailed supplemental oral testimony to the magistrate under oath respecting the surveillance of Keith's residence; the observations of and interview with the unidentified individual at Keith's home; his long-term relationship with Freeman; and the reports from unidentified informants conveyed to him by Freeman, Lubben, and Parrish, as well as his own observations during the informant's telephone conversation, all as related above.

A search warrant was issued and officers immediately executed the warrant. The search of Keith's residence yielded marijuana buds similar to the marijuana found in Keith's vehicle; methamphetamine, cocaine, and ketamine residue; and two digital scales.

In a pretrial suppression hearing, Keith argued the illegal drug evidence seized from his home should have been excluded because there was insufficient probable cause to issue the search warrant. The court denied the motion to suppress, finding the totality of the circumstances sufficient to establish probable cause for the issuance of the search warrant. Specifically, the trial court concluded the surveillance, stop, and seizure of illegal drugs from Keith's car, viewed in context with the other information provided to

the magistrate in the affidavit and in oral sworn testimony was sufficiently corroborative to establish reliability and support a finding of probable cause. Keith renewed his objection to admission of the evidence at trial, and the objection was overruled.

Keith was convicted on all charges in a bench trial and was sentenced to two years incarceration and a $500 fine, suspended to $300 and five years probation for possession of methamphetamine; two years suspended to five years probation for possession of cocaine; and six months suspended to five years probation for possession of ketamine. This appeal follows.

ISSUE

Was the affidavit in support of the search warrant sufficient to support probable cause to issue a search warrant to search Keith's home for illegal drugs?

STANDARD OF REVIEW

"[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' for . . . conclud[ing] that probable cause existed."[2] "This review, like the determination by the magistrate, is governed by the 'totality of the circumstances' test."[3] On review, great deference should be given to a magistrate's determination of probable cause.[4]

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[2] State v. Weston, 329 S.C. 287, 291, 494 S.E.2d 801, 803 (1997) (citing Illinois v. Gates, 462 U.S. 213, 238-39 (1983)).

[3] State v. King, 349 S.C. 142, 148, 561 S.E.2d 640, 643 (Ct. App. 2002) (citing State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000)).

[4] Weston, 329 S.C. at 290, 494 S.E.2d at 802; State v. Driggers, 322 S.C. 506, 510, 473 S.E.2d 57, 59 (Ct. App. 1996).

LAW/ANALYSIS

On appeal, Keith argues the search warrant affidavit was insufficient to support a finding of probable cause because it contained hearsay and conclusory statements and failed to establish informant reliability. He asserts the trial court erred in refusing to suppress the evidence seized as a result of the warrant. We disagree.

"A search warrant may issue only upon a finding of probable cause."[5] "This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."[6]

The affidavit prepared by Brown provides:

> The affiant, a sworn police officer with several years narcotics investigations, has received information that a Billy Jason Keith is using and selling marijuana at & from his residence at 2401 Ebinport Rd., Rock Hill, S.C. This information was received within the past 72 hours from DEA Agent Richard Freeman of Columbia, S.C. Also, within the past 72 hours, the DEU, Officer Lubben and Parrish received information from two sources of Keith using and selling drugs from his residense [sic]. Offices [sic] have personal knowledge of Keith & his residence on Ebinport Rd. Furthermore, on this date, officers of the DEU conducting surveillance at the residence observed Keith leave the residence &

[5] State v. Tench, 353 S.C. 531, 534, 579 S.E.2d 314, 316 (2003); Weston, 329 S.C. at 290, 494 S.E.2d at 802.

[6] King, 349 S.C. at 150, 561 S.E.2d at 644.

> approached Keith after leaving & lawfully recovered marijuana from Keith's 2000 Nissan.

We find the portion of the affidavit relating to the investigative surveillance, stop, and seizure of illegal drugs from Keith's car standing alone sets forth sufficient information to support a probable cause finding in this case. In State v. Scott,[7] officers were surveilling Scott's residence when they observed Scott leaving in his vehicle. The officers immediately followed and stopped the car to serve an outstanding warrant for Scott's arrest for distribution of cocaine. A search of Scott's car yielded in excess of 20 grams of cocaine. A search warrant for Scott's home was issued upon an affidavit reflecting these facts. The affidavit also indicated law enforcement officers maintained visual contact with Scott from the time he left his residence until he was stopped. Scott asserted the affidavit supporting the search warrant failed to articulate sufficient probable cause. We determined the affidavit articulated sufficient probable cause for the search warrant, considering the totality of the circumstances outlined in the affidavit, the nature of the evidence sought, and the type of offense involved.[8]

Similarly, we find the information contained in Brown's affidavit relating the stop and seizure of illegal drugs from Keith's car provided a sufficient basis for the determination of probable cause under the totality of the circumstances, and it is not necessary to consider Keith's argument concerning lack of informant reliability.[9] The affidavit outlined the investigative surveillance of Keith's home, the officers' observation of Keith's vehicle as it left the residence, the lawful stop, and discovery of marijuana. It also appears from a reading of the affidavit that, as in Scott, the officers maintained visual contact with Keith from the time he left his residence until he was stopped.

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[7] 303 S.C. 360, 400 S.E.2d 784 (Ct. App. 1991).

[8] Id. at 362, 400 S.E.2d at 786.

[9] See Rule 220(c), SCACR (stating this court may affirm the trial court on any ground appearing in the record).

In view the totality of the circumstances and considering the nature of the evidence sought, the type of offense involved, and experience of the officer involved, we find the magistrate made a practical, common-sense determination that a fair probability existed that evidence of a crime would be found in Keith's home.[10] We find a common sense and logical interpretation of the affidavit accompanying the search warrant in this case and the deference, which must be accorded the magistrate, overcomes any asserted deficiency.[11]

CONCLUSION

Based upon the totality of the circumstances, we conclude the search warrant was properly issued and the trial court correctly admitted the evidence obtained as a result of the search.

AFFIRMED.

HUFF and BEATTY, JJ., concur.

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[10] See State v. Dupree, 319 S.C. 454, 459, 462 S.E.2d 279, 282 (1995) ("The 'experience of a police officer is a factor to be considered in the determination of probable cause.'" (quoting United States v. Fisher, 702 F.2d 372, 378 (2d Cir. 1983))); see also Scott, 303 S.C. at 362, 400 S.E.2d at 786 ("In the case of drug dealers, evidence is likely to be found where the dealers live." (quoting United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986))).

[11] State v. Livingston, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Virginia Cox, Employee,
Claimant, Respondent,

v.

BellSouth Telecommunications,
Employer, and Self-Insurers, Appellants.

Appeal From Greenville County
Henry F. Floyd, Circuit Court Judge

Opinion No. 3683
Heard September 9, 2003 – Filed October 20, 2003

AFFIRMED and REMANDED

Stephen L. Brown and F. Drake Rogers, both of Charleston, for Appellants.

Linda B. McKenzie, of Greenville, for Respondent.

HUFF, J.: The South Carolina Workers' Compensation Commission denied Virginia Cox's request for partial lump sum payment of her lifetime benefits awarded for a brain injury, holding such a lump sum payment is prohibited by statute. The circuit court reversed. Cox's employer, BellSouth Telecommunication's, appeals. We affirm the circuit court ruling that partial lump sum payments are permitted and remand for further proceedings.

FACTS

Cox was attacked by an unknown assailant with an automobile while she was unlocking a gate at BellSouth's premises. As a result, she sustained severe injuries with resulting permanent physical disability, including brain damage. The single commissioner awarded her $450.62 compensation benefits per week for the remainder of her life pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2002). BellSouth did not appeal that order.

Thereafter, Cox applied for a partial lump sum payment of $120,000 from the back end of her lifetime benefits based on her life expectancy in order to purchase a home. After a hearing on the application, the single commissioner held Cox had proven entitlement to the lump sum payment.

BellSouth appealed this order to the appellate panel of the full commission, which reversed the portion of the order of the single commissioner pertaining to Cox's lump sum award. It found "While claimant had valid reasons for requesting partial lump sum payment of benefits, the Commission is constrained by S.C. Code Ann. § 42-9-10 and S.C. Code Ann. § 42-9-301 and cannot award a partial lump sum."

Cox appealed this ruling to the circuit court, which reversed the determination of the full commission. The court ruled the full commission does have the statutory authority to award a partial lump sum payment in brain damage cases. BellSouth appealed.

STANDARD OF REVIEW

Our review of a decision of the workers' compensation commission is governed by the Administrative Procedures Act. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Although this court may not substitute its judgment for that of the full commission as to the weight of the evidence on questions of fact, we may reverse where the decision is affected by an error of law. S.C. Code Ann. § 1-23-380 (A)(6) (Supp. 2002).

LAW/ANALYSIS

BellSouth argues the circuit court erred in reversing the order of the full commission. It asserts section 42-9-10 prohibits the payment of lump sum payments in physical brain injury cases. We disagree.

As the question of whether partial lump sum payments are permitted from lifetime benefits awards has not been directly addressed by our courts, the matter is one of first impression in our state.[1] As always, we look first to

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[1] The supreme court has addressed the issue of whether partial lump sum payment of attorneys' fees was allowed in lifetime benefits cases. Glover v. Suitt Construction Co., 318 S.C. 465, 458 S.E.2d 535 (1995). The Court found such payments were authorized under S.C. Code Ann. 42-9-10 (Supp. 2002) despite the language prohibiting "total lump sum payments," narrowly tailoring its rationale to a consideration of regulatory provisions and public policy arguments as they relate to payment of private counsel in workers' compensation cases. Id. The court acknowledged the uncertainty section 42-9-10 creates with respect to partial lump sum payments generally:

> Employer contends our interpretation of § 42-9-10 will permit the Commission to order partial lump sum benefits to a claimant awarded lifetime benefits, a result clearly not intended by the legislature. The

the language of the statutes. The cardinal rule of statutory interpretation is to ascertain the intent of the legislature. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Id. (citations omitted). In addition, as workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, we must strictly construe such statutes, leaving it to the legislature to amend and define any ambiguities. Wigfall v. Tideland Util., Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003).

Section 42-9-10 governs payment of compensation for total disability. It provides, in pertinent part: "Notwithstanding the provisions of § 42-9-301, no total lump sum payment may be ordered by the commission in any case under this section where the injured person is entitled to lifetime benefits." (emphasis added).

The plain meaning of the term "total" in section 42-9-10 indicates the General Assembly did not intend to prohibit partial lump sum payments of

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> sole issue presently before this Court is lump sum payment of attorney's fees and, accordingly, we decline to address Employer's contention. In any event, if, as Employer suggests, the statute and regulation may be so construed, the matter is one for the General Assembly.

Id. at 470, 458 S.E.2d at 538 n.4.

lifetime benefits. Had the General Assembly desired to eliminate all lump sum payments in lifetime benefits cases, it could have omitted the word "total" from the provision, or it could have specifically provided that "all" lump sum payments were prohibited.

We find this interpretation of the statute in harmony with the overall purpose of the workers' compensation system. In cases that do not involve lifetime benefits, the commission may order total or partial lump sum payment of benefits when it "deems it not to be contrary to the best interest of the employee or his dependents, or when it will prevent undue hardship on the employer or his insurance carrier, without prejudicing the interest of the employee or his dependents." S.C. Code Ann. § 42-9-301 (1985). Once the commission makes such an award, the burden of proof as to the commission's abuse of discretion in making such an award is upon the employer or carrier in any appeal proceeding. Id.

Permitting partial lump sum payments provides the commission needed flexibility in lifetime benefits cases, flexibility it regularly exercises with respect to all other compensation awards, to ensure the best interests of the injured worker are protected. The risk that the beneficiary will squander the lump sum payment and be left as a ward of the state is reduced by allowing the commission discretion in deciding whether to award a lump sum payment with consideration of the factors set forth in section 42-9-301.

We are therefore convinced by the language of the statute and the legislative intent that can be discerned that the restriction against "total" lump sum payments set out in section 42-9-10 should be construed strictly and not expanded to prohibit all lump sum payments in lifetime benefits cases. In the present case, there has been no allegation that the partial lump sum award is tantamount to a total lump sum payment. We hold that the commission erred as a matter of law in ruling that it was not empowered to award a partial lump sum. As the commission has not addressed whether a lump sum award

would be appropriate under the facts of this case, we remand the matter for further proceedings consistent with this opinion.[2]

AFFIRMED and REMANDED.

GOOLSBY and BEATTY, JJ. concur.

[2] Cox conceded at oral argument that the commission should provide for a present day discount for any lump sum payment it awards.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Tunzy Antwain Sanders, Appellant.

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

Opinion No. 3684
Heard September 9, 2003 – Filed October 20, 2003

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Derrick K. McFarland, of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for Respondent.

STILWELL, J.: In a re-trial, Tunzy Sanders was convicted of murder, attempted armed robbery, and criminal conspiracy. He appeals, arguing his rights under the Confrontation Clause of the Sixth Amendment were violated when the trial court admitted the prior testimony of Aurelien Vigier, a jailhouse informer, inasmuch as he was unable to confront and cross-examine Vigier about an alleged "tacit understanding" that Vigier would receive "some benefit by virtue of his cooperation in this case." We affirm.

BACKGROUND

Sanders and two others were charged following the shooting death of a restaurant employee who was leaving at the close of business with that day's proceeds.

At the first trial, two jailhouse informants, Aurelien Vigier and David Staley, testified appellant confessed to the crime while imprisoned. The State also introduced the statement of Temetrius Williams, which placed Sanders and his cohorts at the scene with the intent to commit a robbery. Williams retracted her statement on the stand.

The jury found Sanders guilty as charged. Sanders appealed the convictions on the ground his Sixth Amendment right to counsel was violated when his sister, an attorney from another state, was removed as counsel prior to trial. Our supreme court reversed the convictions and remanded the case for a new trial. State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000).

Prior to re-trial of the case, the State moved to admit a transcript of Vigier's testimony from the first trial into evidence, asserting Vigier could not be located for service of subpoena because he had left the state in violation of the terms of a probationary sentence. Sanders objected to the admission of the prior testimony, arguing its admission would violate the Confrontation Clause of the Sixth Amendment to the United States Constitution. Specifically, Sanders' sister, acting as defense counsel, asserted that had she been allowed to participate at the first trial she would have been more thorough than defense counsel was in cross-examining Vigier concerning his alleged deal with the State in exchange for his testimony

against Sanders. She further asserted that facts regarding the alleged deal were revealed only after Vigier testified in the first trial. The trial court found Vigier's testimony was admissible under Rule 804, SCRE.

The case proceeded to re-trial without a jury. Despite Sanders' denial of any involvement in the murder or robbery, the trial court found Sanders guilty as charged and sentenced him to thirty-five years imprisonment for murder, twenty-five years imprisonment for armed robbery, and five years imprisonment for criminal conspiracy.

DISCUSSION

Sanders asserts the admission of Vigier's prior testimony violated his Confrontation Clause rights because he was not afforded an opportunity to cross-examine the witness regarding "subsequent revelations" pertaining to the State's alleged "deal" with the witness. We disagree.

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Ohio v. Roberts, 448 U.S. 56, 66 (1980). Here, Vigier was unavailable and his prior testimony fell within an established hearsay exception. Thus, Sanders' Confrontation Clause rights were not violated.

Under Rule 804(b), SCRE, certain statements are not excluded by the hearsay rule if the declarant is unavailable as a witness. Rule 804(b)(1) provides:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

"Unavailable" is defined in Rule 804(a) and includes situations in which the declarant is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means. Here, it is uncontested that the State made numerous unsuccessful attempts to procure Vigier's appearance at the re-trial by subpoena and that Vigier was, therefore, unavailable within the meaning of Rule 804(a) and (b).

The more central question, however, is whether Sanders was afforded an opportunity and had a sufficiently similar motive to develop Vigier's testimony during the first trial. We agree with the trial court that Sanders had such motive and opportunity. At the first trial, Vigier testified that while he was incarcerated with Sanders, Sanders told him he shot and killed the victim with a .22 caliber pistol, then cleaned the gun and threw it on top of a restaurant in Georgia. He further testified the State had not offered him a deal and that no promises were made to him to secure his testimony. During cross-examination, Vigier acknowledged he hoped he would get a deal because of his testimony.

During the re-trial, the assistant solicitor made the following statement regarding his conversations with Vigier before the first trial:

> We were actually approached by his attorney . . . and he asked us if we would give him consideration. And we told his attorney . . . we couldn't get him a deal right now, but we would certainly take into account when . . . it came time for him to go to court . . . . The State is willing to stipulate that he did receive a

> recommended probation sentence sometime after . . . testifying in this trial, as well as the trial of his co-defendants. And it's the State's testimony that he was not given any deal, that we told him his cooperation would be considered when it came time for his case to go to court.

In ruling the testimony admissible, the court stated that in its opinion "there was at least some tacit understanding that [Vigier] might get some benefit at some point in time by virtue of [his] cooperation."

Sanders would have this court hold that the assistant solicitor's statements amount to a significant revelation as to secret negotiations, and Sanders' unawareness of these negotiations during the prior proceedings negatively impacted his ability to effectively cross-examine Vigier. Our review of the record convinces us differently. The assistant solicitor's recount of his conversations with Vigier was consistent with Vigier's testimony at the first trial: Vigier expected he would receive some benefit from his testimony against Sanders, but the State made no promise of a deal to secure his testimony. Despite ample opportunity, the only question defense counsel asked Vigier about his communications with the solicitor's office was whether he was hoping to receive a deal from them. Additionally, although Sanders argues the change in other evidence made Vigier's testimony more central to the State's case in the re-trial, Vigier nevertheless testified Sanders confessed to the crimes and thus Sanders unquestionably had a motive to develop any potential weaknesses in his testimony during cross-examination. Because Sanders had sufficient opportunity and motive to develop Vigier's testimony during the original trial to satisfy the requirements of Rule 804(b)(1), SCRE and because Vigier was unavailable, the court properly admitted Vigier's prior testimony in the re-trial. As such, Sanders' right of confrontation was not violated.

AFFIRMED.

HOWARD and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Durrette Wooten, Jr., Respondent,

v.

Mona Rae Howell Wooten, Appellant.

Appeal From Charleston County
Judy C. Bridges, Family Court Judge

Opinion No. 3685
Submitted September 8, 2003 – Filed October 20, 2003

AFFIRMED

Robert Rosen, of Charleston, for Appellant.

James T. McLaren and C. Dixon Lee, III, both of Columbia; and Lon H. Shull, of Mt. Pleasant; for Respondent.

KITTREDGE, J.: In this domestic action, Mona Rae Wooten (Wife) appeals from the family court's order denying her request to require Thomas Durrette Wooten, Jr. (Husband) to secure his alimony support obligation with a life insurance policy. We affirm.

FACTS/PROCEDURAL HISTORY

Wife and Husband married in March 1976 and separated in February 1999. Husband commenced this action against Wife in June 1999 seeking an order of separate maintenance, equitable division of marital property, and related relief. Wife answered, generally denying Husband's entitlement to the relief sought in his complaint. She also counterclaimed seeking, among other things, an award of alimony and an order requiring Husband to maintain or procure insurance on his life for the benefit of Wife and the parties' children.

Following a five-day hearing in April and May 2000, the family court awarded Wife, among other requested relief, one-half the value of the parties' marital estate ($664,078), and $4,300 per month in permanent, periodic alimony.[1] Furthermore, the family court specifically reserved jurisdiction to determine Wife's request for an order requiring Husband to secure his alimony obligation with a life insurance policy naming Wife as beneficiary. After a subsequent hearing, the court issued a December 2001 order finding Wife failed to establish any compelling reason requiring such security. This appeal follows.

ISSUES

I. Did the family court err in ruling that a "compelling reason" must exist to require a supporting spouse to secure his or her alimony obligation with life insurance?

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[1] Husband separately appealed the award of alimony.

II. Did the family court err in failing to evaluate the request for life insurance in the light of the statutory factors?

STANDARD OF REVIEW

In appeals from the family court, the appellate court has authority to find the facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). However, this broad scope of review does not require us to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Neither are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

LAW/ANALYSIS

I. Appropriate Standard

As a primary issue on appeal, Wife asserts the family court employed an inappropriate standard in considering her request that Husband be required to secure his alimony obligation. We hold the family court judge correctly ruled that a "compelling reason" must exist to warrant the maintenance of life insurance by the supporting spouse. See McElveen v. McElveen, 332 S.C. 583, 603, 506 S.E.2d 1, 11 (Ct. App. 1998) (securing alimony and child support obligations with life insurance policies proper only under compelling circumstances).

Wife acknowledges that a "compelling reason" must be shown to require the purchase or maintenance of life insurance as security for a child support obligation. The child support statute, S.C. Code Ann. § 20-3-160 (1976), has since its inception recognized the availability of life insurance as security for the support obligation. The statute is silent as to the appropriate standard, yet Wife is constrained by longstanding case law to concede that life insurance may not be

required to secure the payment of child support in the absence of a compelling reason to do so.

The alimony statute, S.C. Code Ann. § 20-3-130, was amended in 1990 to expressly provide for life insurance on the supporting spouse for the benefit of the supported spouse.[2] Before 1990, such relief was available pursuant to case law. See Hardin v. Hardin, 294 S.C. 402, 404-405, 365 S.E.2d 34, 35-36 (Ct. App. 1987) (recognizing that family court may, under "special circumstances," require a supporting spouse to secure an alimony obligation with a life insurance policy).

Section 20-3-130(D), like the child support counterpart in section 20-3-160, is silent as to the proper standard. Wife argues that one effect of the 1990 amendment was to remove the "compelling reason" standard. We disagree. We discern no legitimate reason, from legislative history or otherwise, to require a lesser threshold standard for imposing life insurance or other security with respect to the payment of alimony. The precedent of this court, both before and after 1990, has consistently applied the "compelling reason" standard to secure the payment of alimony and child support. See, e.g., McElveen, 332 S.C. at 603, 506 S.E.2d at 11; Hardin, 294 S.C. at 404-405, 365 S.E.2d at 35-36.

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[2] S.C. Code Ann. § 20-3-130(D) (Supp. 2002) provides:

> In making an award of alimony or separate maintenance and support, the court may make provision for security for the payment of the support including, but not limited to, requiring the posting of money, property, and bonds and may require a spouse, with due consideration of the cost of premiums, insurance plans carried by the parties during marriage, insurability of the payor spouse, the probable economic condition of the supported spouse upon the death of the payor spouse, and any other factors the court may deem relevant, to carry and maintain life insurance so as to assure support of a spouse beyond the death of the payor spouse.

II. Statutory Factors

Wife next contends the family court judge erred in failing to evaluate the request for life insurance in the light of the statutory factors enumerated in S.C. Code Ann. § 20-3-130(D) (Supp. 2002). We disagree.

The alimony statute sets forth certain factors to which the family court judge must give "due consideration" when "mak[ing] provision for security for the payment of [alimony]." Here, the request for life insurance to secure the payment of alimony was denied because Wife failed to establish a compelling reason to do so. While it is preferable for the family court judge to address the statutory factors enumerated in section 20-3-130 (D), the deficiency here does not require us to vacate the judgment below. See Griffith v. Griffith, 332 S.C. 630, 646-47, 506 S.E.2d 526, 535 (Ct. App. 1998)("[W]hen an order from the family court is issued in violation of Rule 26(a), SCRFC, the appellate court 'may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence.'")(quoting Holcombe v. Hardee, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991)). In the present matter, the family court made findings regarding the health condition of each party, Wife's earnings and benefits from employment, and Husband's longstanding practice of making his alimony payments in a timely manner. Having carefully canvassed the record, we concur with these findings. Moreover, we have examined the record in light of the statutory factors and conclude the court correctly denied Wife's request for life insurance to secure the payment of alimony.

Wife relies heavily on the self-evident truth that she, like any former spouse receiving alimony, would benefit financially from life insurance in the event of the payor's death. That fact, however, does not translate into a "compelling reason," for to so hold would essentially require life insurance in almost every case where alimony is awarded. It is significant to note that alimony terminates upon certain conditions, including the death of either spouse. See S.C. Code Ann. §

20-3-130(B)(1) (1976). A court-mandated requirement for life insurance to secure the alimony payments is the exception, not the rule.

AFFIRMED.

STILWELL and HOWARD, JJ., concur.