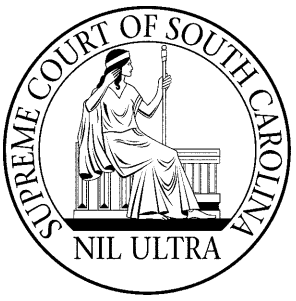

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 42
October 22, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

US SUPREME COURT - EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

PETITIONS FOR REHEARING

27431 - In the Matter of Alma C. Defillo	Pending
27440 - Stephen C. Whigham v. Jackson Dawson Comm.	Denied 10/9/2014
27442 - Shaul Levy v. Carolinian	Pending
27444 - In the Matter of the Care and Treatment of Vincent N. Way	Pending
27447 - The State v. Desmond Sams	Pending
27450 - D.R. Horton v. Wescott Land	Pending
2014-MO-022 - Travelers Property v. Senn Freight	Denied 10/08/2014
2014-MO-035 - Mokhtar Elkachbendi v. Anne Elkachbendi	Pending

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2014-UP-363-SCDSS v. Johnny Dickerson

2014-UP-364-Bruce Miller v. Columbia Forest, Inc.

PETITIONS FOR REHEARING

5219-Moorhead Construction Inc. et al. v. Pendleton Station et al.	Granted 10/22/14
5241-Richard A. Fisher v. Shipyard Village Council	Pending
5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5253-Sierra Club v. SCDHEC and Chem-Nuclear Systems, Inc.	Pending
5254-State v. Leslie Parvin	Pending
5256-James D. Fowler v. Nationwide Mutual	Pending
5257-State v. Jefferson Perry	Pending
5261-State v. Roderick Pope	Pending
5263-Milton P. Demetre Family Ltd. Partnership v. Beckmann	Pending
5264-Prakash Solanki v. Wal-Mart	Pending
5266-State v. Anthony K. Blakney	Pending
5267-Steve Bagwell v. State	Pending
5268-Julie Tuten v. David C. Joel	Pending
5270-56 Leinbach Investors, LLC v. Magnolia Paradigm	Pending

5271-Richard Stogsdill v. SCDHHS	Pending
5272-Cindy Ella Dozier v. American Red Cross	Pending
2014-UP-224-State v. James E. Wise	Pending
2014-UP-240-Robert A. Warren, Jr. v. State	Pending
2014-UP-270-Progressive Northern Ins. v. Stanley Medlock	Pending
2014-UP-299-Lucille Smith v. The Heirs at Law of Benjamin Days	Pending
2014-UP-318-Linda Johnson v. Heritage Healthcare	Pending
2014-UP-326-Bernard Bagley v. SCDPPPS	Pending
2014-UP-332-State v. Michael Anthony Rogers	Pending
2014-UP-337-State v. Elizabeth Dinkins	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4909-North American Rescue v. Richardson	Pending	
4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending	
4979-Major v. City of Hartsville	Pending	
5008-Willie H. Stephens v. CSX Transportation	Pending	
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending	
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending	
5031-State v. Demetrius Price	Pending	
5052-State v. Michael Donahue	Pending	
5055-Hazel Rivera v. Warren Newton	Granted	10/08/14
5077-Kirby L. Bishop et al. v. City of Columbia	Pending	

5078-Estate of Livingston v. Clyde Livingston	Pending
5092-Mark Edward Vail v. State	Pending
5099-Roosevelt Simmons v. Berkeley Electric	Pending
5112-Roger Walker v. Catherine Brooks	Pending
5118-Gregory Smith v. D.R. Horton	Pending
5140-Bank of America v. Todd Draper	Pending
5152-Effie Turpin v. E. Lowther	Pending
5156-State v. Manuel Marin	Pending
5160-State v. Ashley Eugene Moore	Pending
5175-State v. Karl Ryan Lane	Pending
5176-Richard A. Hartzell v. Palmetto Collision, LLC	Pending
5191-Jacqueline Carter v. Verizon Wireless	Pending
5193-Israel Wilds v. State	Pending
5196-State v. James Anderson	Pending
5197-Gladys Sims v. Amisub	Pending
5201-Phillip Grimsley v. SLED	Pending
5203-James Teeter v. Debra Teeter	Pending
5205-Neal Beckman v. Sysco Columbia	Pending
5209-State v. Tyrone Whatley	Pending
5214-State v. Alton W. Gore, Jr.	Pending
5217-H. Eugene Hudson v. Mary Lee Hudson	Pending

5224-State v. Alex Lorenzo Robinson	Pending
5227-State v. Frankie Lee McGee	Pending
5230-State v. Christopher L. Johnson	Pending
5231-Centennial Casualty v. Western Surety	Pending
5232-State v. Clarence W. Jenkins	Pending
5242-Patricia Fore v. Griffco of Wampee, Inc	Pending
5243-Kerry Levi v. Northern Anderson County EMS	Pending
5244-Clifford Thompson v. State	Pending
5246-State v. Jason A. Johnson	Pending
5247-State v. Henry Haygood	Pending
5265-State v. Wayne McCombs	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Denied 10/08/14
2012-UP-078-Seyed Tahaei v. Sherri Tahaei	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-479-Elkachbendi v. Elkachbendi	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending

2012-UP-577-State v. Marcus Addison	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending
2012-UP-663-Carlton Cantrell v. Aiken County	Pending
2013-UP-015-Travelers Property Casualty Co. v. Senn Freight	Pending
2013-UP-062-State v. Christopher Stephens	Pending
2013-UP-066-Dudley Carpenter v. Charles Measter	Pending
2013-UP-071-Maria McGaha v. Honeywell International	Pending
2013-UP-081-Ruth Sturkie LeClair v. Palmetto Health	Pending
2013-UP-090-JP Morgan Chase Bank v. Vanessa Bradley	Denied 10/08/14
2013-UP-127-Osmanski v. Watkins & Shepard Trucking	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2013-UP-158-CitiFinancial v. Squire	Pending
2013-UP-188-State v. Jeffrey A. Michaelson	Pending
2013-UP-251-Betty Jo Floyd v. Ken Baker Used Cars	Pending
2013-UP-257-Matter of Henson (Woods) v. Breakfield	Pending
2013-UP-290-Mary Ruff v. Samuel Nunez	Pending
2013-UP-297-Greene Homeowners v. W.G.R.Q.	Pending
2013-UP-310-Westside Meshekoff Family v. SCDOT	Pending
2013-UP-322-A.M. Kelly Grove v. SCDHEC	Pending

2013-UP-358-Marion L. Driggers v. Daniel Shearouse	Pending
2013-UP-424-Lyman Russell Rea v. Greenville Cty.	Pending
2013-UP-435-State v. Christopher Spriggs	Pending
2013-UP-442-Jane AP Doe v. Omar Jaraki	Pending
2013-UP-461-Ann P. Adams v. Amisub of South Carolina Inc.	Pending
2013-UP-489-F.M. Haynie v. Paul Cash	Pending
2014-UP-013-Roderick Bradley v. The State	Pending
2014-UP-020-Joseph Marshall v. Carrie Marshall	Pending
2014-UP-034-State v. Benjamin J. Newman	Pending
2014-UP-047-State v. Sam Harold Smith	Pending
2014-UP-056-In the matter of the care and treatment of P. Guess	Pending
2014-UP-074-Tim Wilkes v. Horry County	Pending
2014-UP-087-Moshtaba Vedad v. SCDOT	Pending
2014-UP-088-State v. Derringer Young	Pending
2014-UP-091-State v. Eric Wright	Pending
2014-UP-094-Thaddeus Segars v. Fidelity National	Pending
2014-UP-103-State v. David Vice	Pending
2014-UP-113-State v. Jamaal Hinson	Pending
2014-UP-114-Carolyn Powell v. Ashlin Potterfield	Pending
2014-UP-121-Raymond Haselden v. New Hope Church	Pending
2014-UP-122-Ayree Henderson v. State	Pending

2014-UP-128-3 Chisolm Street v. Chisolm Street	Pending
2014-UP-132-State v. Ricky S. Bowman	Pending
2014-UP-143-State v. Jeffrey Dodd Thomas	Pending
2014-UP-159-City of Columbia v. William K. Wilson	Pending
2014-UP-167-State v. David G. Johnson	Pending
2014-UP-172-Willie Rogers v. Charles Carr	Pending
2014-UP-173-Reda Reilly v. Kevin Reilly	Pending
2014-UP-178-State v. Anthony R. Carter	Pending
2014-UP-180-State v. Travas D. Jones	Pending
2014-UP-183-Allison Johnson v. Russell Johnson	Pending
2014-UP-187-State v. Mark Peters	Pending
2014-UP-192-Lawrence Terry v. Allen University	Pending
2014-UP-203-Helena P. Tirone v. Thomas Dailey	Pending
2014-UP-206-State v. Forrest K. Samples	Pending
2014-UP-210-State v. Steven Kranendonk	Pending
2014-UP-222-State v. James Curtis Tyner	Pending
2014-UP-228-State v. Taurus L. Thompson	Pending
2014-UP-230-State v. Travis N. Buck	Pending
2014-UP-241-First Citizens Bank v. Charles T. Brooks, III	Pending
2014-UP-265-State v. Gregory A. Ivery	Pending
2014-UP-266-Mark R. Bolte v. State	Pending

2014-UP-273-Gregory Feldman v. William Casey	Pending
2014-UP-279-Jacqueline Smith v. Horry County Schools	Pending
2014-UP-282-State v. Donald M. Anderson	Pending
2014-UP-284-John Musick v. Thomas Dicks	Pending
2014-UP-288-Gayla Ramey v. Unihealth Post Acute	Pending
2014-UP-323-SCDSS v. Rubi B.	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Matthew Jamison, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2012-212996

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
William P. Keesley, Post-Conviction Relief Judge

Opinion No. 27454
Heard March 5, 2014 – Filed October 22, 2014

REVERSED

Assistant Attorney General Brian T. Petrano, of Columbia, for Petitioner.

Tricia A. Blanchette, of Columbia, for Respondent.

JUSTICE KITTREDGE: This is a post-conviction relief (PCR) matter. Respondent Matthew Jamison pled guilty to voluntary manslaughter and was sentenced to twenty years in prison. No direct appeal was taken. Respondent's first application for PCR was denied. Respondent filed a second PCR application

alleging newly discovered evidence. The PCR judge granted relief, and the court of appeals affirmed. *Jamison v. State*, Op. No. 2012-UP-437 (S.C. Ct. App. filed July 18, 2012). We reverse.

I.

This case involves a shooting that occurred at a party one Saturday evening in June 2000, following a series of altercations between apparent rival drug dealers, one of whom was Respondent Matthew Jamison.[1] On the night of the shooting, Respondent encountered the rival group at a concert in Columbia, South Carolina. An eyewitness testified that the group walked past Respondent and "gave him a look like, yeah, we're going to get you tonight." After the concert, Respondent encountered the group again in a parking lot. Hundreds of people were crowded in the parking lot, and an eyewitness saw Respondent leaning against the front of a vehicle in the parking lot. According to Respondent, an individual he referred to as "Jig" pointed at him, and Jig and others with him approached Respondent as if they were going to "blitz" or jump Respondent. Respondent pulled a gun and fired shots towards the group. One of the bullets struck and killed the fifteen-year-old victim, an innocent bystander who was not involved in the ongoing dispute. By all accounts, the intended target was Jig.

Immediately following the shooting, Respondent was apprehended while attempting to flee from the scene. That night, Respondent gave a statement to police in which he admitted firing the gun into the crowd. Respondent was indicted for murder, but his attorney negotiated with the solicitor for Respondent to plead guilty to the lesser included offense of voluntary manslaughter.

Before accepting Respondent's guilty plea, the plea judge engaged in a thorough plea colloquy with Respondent, specifically including the following:

> The Court: Now, realizing, [Respondent], that when you plead guilty, you admit the truth of the allegation contained in this indictment against you. You're saying that I had a gun and I shot [the victim] and he died. You understand that?
>
> The Defendant: Yes, sir.

[1] Several weeks prior to the shooting, it appears Respondent was attacked in his home by several men whose street nicknames are Jig, Little Thee, Fax, and Butter.

The Court: All right. I tell you that, sir, because you may have some defenses to this charge, [Respondent]. Of course, I have no way of knowing that, but you need to realize that by pleading guilty here today, you give up any defenses you might have. Do you understand that, sir?

The Defendant: Yes, sir.

. . . .

The Court: Now, [Respondent], I'll ask you, once again, did you commit this offense?

The Defendant: Yes, sir.

The Court: All right. So, [Respondent], once again, you're telling me you are pleading guilty to . . . voluntary manslaughter, because you did, in fact, . . . shoot [the victim] and as a result of your gunshot, [the victim] was killed. You shot him and he died, is that correct?

The Defendant: Yes, sir.

. . . .

The Court: Now, [Respondent] has anyone promised you anything or held out any hope of reward in order to get you to plead guilty?

The Defendant: No, sir.

The Court: Has anyone threatened you or used force to get you to plead guilty?

The Defendant: No, sir.

The Court: Has anyone used any pressure or intimidation to cause you

to plead guilty?

The Defendant: No, sir.

The Court: Have you had enough time to make up your mind as to whether or not you want to plead guilty?

The Defendant: Yes, sir.

The Court: Are you pleading guilty of your own free will and accord?

The Defendant: Yes, sir.

Additionally, during the plea hearing, Respondent's counsel stated the following on behalf of Respondent:

> [Respondent] had no individual animus against [the victim]. [The victim] was standing with a group of folks that had been engaged with [Respondent] some time in the past and that night as well and he fired towards that crowd because he thought that they were coming at him and he was coming at them.
>
> And he understands the aspect we know in the law as transferred intent. It was not a self-defense. It may have been a very imperfect self-defense. *But those are the issues that we would have brought forward.* But he had no individual animus. He had no reason. Didn't even know this boy. It was a shot at a crowd of people in a very crowded environment in which this young man was struck and killed and died as a result.

(emphasis added). The plea judge sentenced Respondent to twenty years in prison. No direct appeal was taken.

In his first PCR application, Respondent alleged his guilty plea was not knowingly and voluntarily entered. At the PCR hearing, plea counsel testified the theory of the defense was as follows:

> It was that "Jig" had a gun and had come at—had come at

> [Respondent]. It was a very imperfect self-defense because nobody else sees a gun. There was no other gun found, as I recall it. [Respondent] in his statement to the police says something about—he fails to say to the police, I saw "Jig" with a gun while he was coming at me. His words were, "they were going to blitz me." That means a whole bunch of them were going to jump him. But later he tells me that "Jig" had a gun. And we wouldn't ever verify that. I mean, I talked to lots of witnesses, went to the scene, had a private investigator. We went out several times trying to get any one person to say that "Jig" had a gun. We couldn't do that.[2]

The PCR judge denied relief. Respondent sought a writ of certiorari, and his counsel filed a *Johnson*[3] petition. Respondent filed a *pro se* petition, in which he raised, for the first time, a newly discovered evidence claim.

Specifically, Respondent claimed that, while serving his prison sentence, he met a fellow inmate who allegedly was an eyewitness to the shooting incident and was willing to provide testimony to support Respondent's self-defense claim. Attached to Respondent's *pro se* petition was an affidavit of Theotis Bellamy, in which Bellamy discussed the prior difficulties between Respondent and the group involved in the incident and stated he believed Respondent would have been further harmed "if things did not happen the way they did" on the night of the shooting. Bellamy's affidavit also stated he previously had an opportunity to give

---

[2] Indeed, by all accounts, finding willing witnesses was an extremely difficult task. At the plea hearing, the solicitor's comments revealed the similar difficulty the State encountered in obtaining witnesses:

> One of the other tragic parts of this case was that nobody even came forward. Of the hundreds of people at the party, not one was willing to give the police a statement that night as to what they saw and heard. Even when we were preparing this case . . . out there trying to find other witnesses, these people: "Jig" and "Thee," these people that could have been witnesses—"Butter," who is a relative of the victim's, they weren't even willing to come forward and help the State out in this case.

[3] *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

his version of what happened on the night of the shooting; however, he did not share his knowledge with defense investigators earlier because Jig had threatened his family and he was afraid. Ultimately, the court of appeals denied the petition.

While the *Johnson* petition from his first PCR application was pending before the court of appeals, Respondent filed a second PCR application alleging newly discovered evidence and attached a second affidavit by Bellamy that was essentially the same as the first.

At the second PCR hearing, Respondent admitted shooting the victim but maintained he was defending himself against the group led by Jig. Respondent claimed he was scared when the group approached him because they had previously shot at and threatened him and jumped on one of his family members. Respondent explained that his guilty plea was influenced by the fact that no witness would come forward and corroborate his contention that Jig had a weapon.[4] Respondent stated he would not have pled guilty but would have insisted on going to trial if he could have presented a stronger self-defense claim.

Bellamy testified at the PCR hearing that he knew the members of the rival group and that they carried guns. Specifically, Bellamy said he saw Jig with a gun in his pants just before the shooting occurred. Bellamy stated he saw the group approach Respondent at the after-party, gesturing "like they're fixing to pull out weapons," and that Respondent shot at Jig before Jig could shoot Respondent. Bellamy stated he did not come forward previously because Jig threatened him and his family, but now that Jig was serving time in the federal penitentiary, he felt more comfortable testifying in court.

The PCR judge granted Respondent relief on the basis of "fundamental fairness" and ordered a new trial. The PCR judge found Respondent met his burden of proving that Bellamy's eyewitness testimony constituted newly discovered

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[4] Respondent explained that although he admitted the shooting from the outset, his counsel advised him that it would be difficult to establish a self-defense claim that would overcome the State's physical evidence and Respondent's statement to police on the night of the shooting, in which Respondent did not claim to be acting in self-defense or explain that he fired shots because he was scared for his life when he saw Jig with a gun.

evidence and that Bellamy's testimony would likely change the result at trial. In granting relief, the PCR judge stated:

> While the record demonstrates that a claim of self-defense was known to the Applicant from the outset and that his attorney tried to get someone to back up that claim, no one would come forward. This Court is concerned about granting a new trial because a claim of self-defense can be waived. Yet, no law has been cited to the Court concerning whether the entry of a guilty plea where self-defense was specifically mentioned, constitutes a waiver of that defense and prohibits granting a new trial on [the basis of] after-discovered evidence when someone does not come forward to corroborate that claim. . . . Here, the Applicant could have gone to trial [and] told his version of the events to the jury . . . . While the Court has concerns about granting a new trial when the Applicant clearly knew he had a self-defense claim from the beginning and did not present it, the Court feels that the issue is one of fundamental fairness. . . . Plea counsel informed the court and undoubtedly advised the Applicant that the claim of self-defense could not be established. It was too risky to attempt, in the opinion of plea counsel. The only reasonable reading of this record is that the Applicant relied upon that advice to elect to accept the plea bargain.[5] . . . So, despite the fact that there is a question in the Court's mind as to whether a person who waives a known claim of self-defense can thereafter assert it when a corroborating witness comes forth with after-discovered evidence, in the absence of authority being cited by either side on this issue, this Court feels that fairness dictates a new trial.

The State sought a writ of certiorari, which was granted, but the court of appeals affirmed the PCR judge's order. *Jamison v. State*, Op. No. 2012-UP-437 (S.C. Ct. App. filed July 18, 2012). This Court granted the State's petition for a writ of certiorari to review the court of appeals' decision.

II.

[5] Respondent has never raised an ineffective assistance of counsel claim regarding counsel's advice to accept the plea bargain.

"This Court gives deference to the PCR judge's findings of fact, and 'will uphold the findings of the PCR court when there is any evidence of probative value to support them.'" *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) (quoting *Miller v. State*, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008)). "However, we review questions of law *de novo*, and 'will reverse the decision of the PCR court when it is controlled by an error of law.'" *Id*. (quoting *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012)).

A.

The State contends Respondent's newly discovered evidence claim is successive and thus procedurally barred because it was previously raised to the court of appeals in Respondent's *pro se Johnson* petition in the appeal of his first PCR application. We disagree.

The South Carolina Uniform Post-Conviction Procedure Act (PCR Act) allows an applicant to file an application for relief "[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence." S.C. Code Ann. § 17-27-45(C) (2014) (allowing applications to be filed within one year of the date of actual discovery of the facts or from the date when the facts "could have been ascertained by the exercise of reasonable diligence").

Following Respondent's first PCR hearing and the subsequent order denying relief, Respondent discovered Bellamy was willing to testify to what happened on the night of the shooting. Accordingly, Respondent attached Bellamy's first affidavit to his *pro se* petition to the court of appeals pursuant to *Johnson v. State*. The court of appeals denied the petition, stating in its order the decision was made "[a]fter careful consideration of the entire record as required by *Johnson v. State*."

The State argues the language in the court of appeals' order reflects that its review of all issues was on the merits, and thus, Respondent's second PCR application was successive because Bellamy's affidavit was previously presented to and considered by the court of appeals.

A petition filed pursuant to *Johnson v. State* is the post-conviction relief equivalent

of a direct appeal filed pursuant to *Anders v. California*.[6] *Johnson*, 294 S.C. at 310, 364 S.E.2d at 201. This Court recently held that, "[u]nder the *Anders* procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any *preserved* issues with potential merit." *McHam v. State*, 404 S.C. 465, 475, 746 S.E.2d 41, 46 (2013) (citations omitted). Thus, this Court concluded the merits of an unpreserved claim were not considered by the court of appeals on direct appeal pursuant to *Anders*. *Id*. at 475, 746 S.E.2d at 47 (noting issues raised on direct appeal and found to be unpreserved may be the subject of a subsequent PCR claim).

Although Bellamy's affidavit was presented to the court of appeals in Respondent's *pro se* petition, it was not properly before the court of appeals because it was not part of the lower court record. *See* Rule 243(f), SCACR (the appendix shall include only matter that was presented to the PCR court). Because the discovery of Bellamy's testimony was not properly before the court of appeals, it was not part of the *Johnson* review. *McHam*, 404 S.C. at 475, 746 S.E.2d at 47. Therefore we find, as a procedural matter, this issue was properly raised in Respondent's second PCR application.

B.

The State also argues that because Respondent pled guilty, he is therefore not entitled to PCR in the face of newly discovered evidence. Specifically, the State contends that by pleading guilty, Respondent waived any argument relating to potential trial evidence, including claims of newly discovered evidence. Notably, Respondent has never argued that his guilty plea was entered involuntarily or unknowingly or that he pled guilty as a result of ineffective assistance of counsel; rather, the sole basis upon which Respondent has claimed to be entitled to PCR was because of the newly discovered evidence of Bellamy's testimony. Thus, the narrow issue presented to this Court is whether and to what extent an otherwise valid guilty plea may be vacated in PCR proceedings on the basis of newly discovered evidence.

Traditionally, in South Carolina, "'[t]o obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have

[6] 386 U.S. 738 (1967).

been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.'" *McCoy v. State*, 401 S.C. 363, 368 n.1, 737 S.E.2d 623, 625 n.1 (2013) (quoting *Clark v. State*, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993)).

The State contends the PCR judge committed an error of law in applying this traditional, five-factor newly discovered evidence test in evaluating Respondent's PCR claim. Specifically, the State argues this traditional five-factor test applies only where a defendant has gone to trial and was convicted—not where a defendant pled guilty. The State further contends that, during the plea colloquy, Respondent waived his right to have a trial and present any defenses, and therefore, Respondent may not subsequently raise a PCR claim on the basis of newly discovered evidence relating to a claim of self-defense.

"[I]n South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." *State v. Rice*, 401 S.C. 330, 331–32, 737 S.E.2d 485, 485–86 (2013) (citing *Hyman v. State*, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). "'A guilty plea represents a break in the chain of events which has preceded it in the criminal process.'" *Id.* at 332, 737 S.E.2d at 486 (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). By entering a guilty plea, "[a]n accused [] waives the right to trial and the incidents thereof and the constitutional guarantees with respect to criminal prosecutions." *Rivers v. Strickland*, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975) (citation omitted). "A plea of guilty is an admission or a confession of guilt, and [is] as conclusive as a verdict of a jury; it admits all material fact averments of the accusation, leaving no issue for the jury, except in those instances where the extent of the punishment is to be imposed or found by the jury." *State v. Fuller*, 254 S.C. 260, 266, 174 S.E.2d 774, 777 (1970) (citations omitted); *see North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (noting guilty pleas constitute a waiver of trial and an express admission of guilt upon which a sentence may be imposed). Thus, "'[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" *Rice*, 401 S.C. at 332, 737 S.E.2d at 486 (quoting *Tollett*, 411 U.S. at 267).

Nevertheless, the PCR Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there exists evidence of material

facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief. S.C. Code Ann. § 17-27-20(A)(4) (2014). Thus, by its plain language, the PCR Act affords "any person" the ability to seek post-conviction relief on the basis of newly discovered evidence—not just individuals convicted and sentenced following trial. Accordingly, we must reject the State's claim that the waiver of trial and admission of guilt encompassed in a guilty plea necessarily preclude post-conviction relief in *all* cases.

We nevertheless acknowledge that a valid guilty plea must be treated as final in the vast majority of cases. Indeed, "[w]hat is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof." *McMann v. Richardson*, 397 U.S. 759, 773 (1970) (noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained). "Furthermore, there must be some consequence attached to the decision to plead guilty." *People v. Schneider*, 25 P.3d 755, 761 (Colo. 2001) ("A defendant who voluntarily and knowingly enters a plea accepting responsibility for the charges is properly held to a higher burden in demonstrating to the court that newly discovered evidence should allow him to withdraw that plea.").

Although we find that a guilty plea does not preclude post-conviction relief following a guilty plea in all circumstances, we nonetheless conclude that the traditional, five-factor newly discovered evidence test is not the proper test for analyzing whether a PCR applicant is entitled to relief on the basis of newly discovered evidence following a guilty plea. As the Supreme Court of Colorado has noted, in the case of a guilty plea:

> [I]t was not an independent trier of fact that determined the defendant's guilt based upon sworn trial testimony—it was the defendant who acknowledged his own guilt. Because of that simple fact, the trial court handling the postconviction proceeding is necessarily in a different position. That court does not have the full record of the prior trial, but it does have the defendant's own statements of guilt. [The traditional, five-factor newly discovered evidence test] presumes that the [PCR] judge is in a position to weigh

> the new testimony against that provided at the prior trial and assess whether an acquittal verdict would enter based upon new evidence. In the circumstance in which there never was a trial on the charges, the [PCR] court is hampered in that assessment.

Id. Indeed, the traditional, newly discovered evidence factors are "difficult, if not impossible to apply when the moving party pleaded guilty instead of standing trial." *In re Reise*, 192 P.3d 949, 954 (Wash. Ct. App. 2008).

Guided by the language of section 17-27-20(A)(4) of the PCR Act, we hold that, when a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions. In so holding, we caution that it will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated through post-conviction relief on the basis of newly discovered evidence, for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will generally preclude any subsequent challenge to factual guilt. *Cf. Reise*, 192 P.3d at 955 (finding a defendant may withdraw his guilty plea on the basis of newly discovered evidence only when necessary to correct manifest injustice). Such a determination will not be resolved in a formulaic manner, but will necessarily be context dependent.

Turning to the facts of this case, we find there is evidence in the record to support the PCR judge's finding that Respondent could not have discovered Bellamy's testimony prior to pleading guilty. We, however, find the interests of justice do not require that Respondent's guilty plea and sentence be vacated and conclude the PCR judge erred in granting relief. During the thorough plea colloquy, Respondent admitted having a gun and shooting the victim, specifically waived the right to present any defense, and testified that he did so freely and voluntarily. Respondent's PCR testimony reveals that his decision to plead guilty rested on

several considerations: the strength of the State's evidence against him, the relative weakness of his self-defense claim, and his counseled determination that it was to his advantage to plead guilty to the lesser charge of manslaughter in order to avoid going to trial on the indicted offense of murder. Although Respondent might have pled differently had he known Bellamy could provide eyewitness testimony, Respondent is bound by his plea and conviction unless he can demonstrate the interest of justice requires that they be vacated. To grant relief under these circumstances would undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea.

"The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Brady v. United States*, 397 U.S. 742, 757 (1970). "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Id*. Further, the weight and quality of Bellamy's testimony as "evidence of *material* facts, not previously presented and heard" is severely undermined because it pertains not to a theory of self-defense but to one of transferred self-defense. S.C. Code Ann. § 17-27-20(A)(4) (emphasis added). Specifically, Bellamy's testimony would tend to show Respondent fired shots at Jig before Jig could shoot Respondent; however, the victim who died in this case was an innocent, fifteen-year-old bystander, not Jig. The transferability of intent in a self-defense claim has not been recognized in South Carolina, and Respondent does not ask this Court to recognize it now. *See State v. Porter*, 269 S.C. 618, 622, 239 S.E.2d 641, 643 (1977) (noting the theory of transferred self-defense has not been accepted in South Carolina); *cf State v. Wharton*, 381 S.C. 209, 215, 672 S.E.2d 786, 789 (2009) (noting the applicability of the doctrine of transferred intent to voluntary manslaughter cases remains an unsettled question in South Carolina). Therefore, Bellamy's testimony does not constitute evidence of *material* facts within the language of section 17-27-20(A)(4), and Respondent's guilty plea made without the knowledge of Bellamy's potential testimony does not constitute an injustice that would permit Respondent to disavow his guilty plea. Rather, given the totality of the circumstances of this particular case, we find the interest of justice is best served by enforcing Respondent's validly entered guilty plea and upholding Respondent's conviction and sentence.

III.

Because Bellamy's testimony does not constitute evidence of material facts not previously presented and heard that, in the interest of justice, requires Respondent's conviction and sentence to be vacated, Respondent is not entitled to relief.
In reversing the court of appeals, we reinstate Respondent's conviction and sentence pursuant to his guilty plea.

REVERSED.

TOAL, C.J. and HEARN, J., concur. PLEICONES, J., dissenting in a separate opinion in which BEATTY, J., concurs.

JUSTICE PLEICONES: While I find great appeal in the majority's thoughtful "in the interest justice" test, I respectfully dissent as I would adhere to our traditional test to determine whether a post-conviction relief (PCR) applicant is entitled to a new trial based on after discovered evidence. Applying our traditional test, I would affirm the court of appeals as I am bound to uphold the PCR judge's order when there is evidence in the record to support the decision.

Rather than adopt a new test, I adhere to the five-part inquiry we recently affirmed to determine whether a PCR applicant is entitled to a new trial based on after discovered evidence after entering a guilty plea. *See McCoy v. State*, 401 S.C. 363, 368, 737 S.E.2d 623, 625 n.1 (2013). In my opinion, the "interest of justice" is served best by applying the same standard to determine if a PCR applicant is entitled to a new trial, whether the applicant has pled guilty or been convicted by a jury. I fear the majority's new test may give rise to the unintended consequence of dissuading criminal defendants from entering guilty pleas, further contributing to our already crowded General Sessions dockets.

The majority implicitly acknowledges, as I believe it must, that it is adopting a new test. Under the majority's framework, the key inquiry, one which differs substantially from the standard affirmed in *McCoy*, is whether "the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the 'interest of justice' requires the applicant's guilty plea be vacated." Since this is a new rule, were we to adopt it, I would apply it prospectively. *See Talley v. State*, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007). Further, even were we to apply this new test to Respondent, I would find the "interest of justice" standard requires a factual determination and is one which should be made by the PCR judge. Therefore, I would remand to the PCR judge to determine whether Bellamy's testimony constitutes after discovered evidence under this new analytical framework.

As I would apply the standard analytical framework to determine whether the PCR judge properly found Bellamy's testimony constitutes after discovered evidence, I turn to the five factors affirmed in *McCoy*. In my view, the following evidence supports a finding that Bellamy's testimony constitutes after discovered evidence: (1) Bellamy testified that Jig had a gun, and Respondent shot Jig after Jig gestured towards Respondent in a manner that suggested Jig was going to pull out his weapon; (2) Respondent discovered Bellamy's testimony after the entry of his guilty plea; (3) Respondent could not have discovered the testimony before his plea because Jig secured Bellamy's silence by threatening Bellamy and his family;

(4) Bellamy's testimony is material because it tends to prove Respondent's claim of self-defense;[7] and (5) Bellamy's testimony is not merely cumulative or impeaching because no one gave the police a statement as to what happened on the night of victim's murder. *See McCoy*, 401 S.C. at 368, 737 S.E.2d at 625 n.1 (outlining the five factors to determine whether a PCR applicant is entitled to a new trial on the basis of after discovered evidence). Employing our standard analysis, I find there is evidence in the record to affirm the court of appeals' decision even though the PCR judge failed to make explicit findings on the after discovered evidence issue. *See Williams v. State*, 363 S.C. 341, 343–44, 611 S.E.2d 232, 233 (2005) (finding this Court will uphold the PCR judge's findings if there is any evidence of probative value in the record to support them); Rule 220(c), SCACR (stating this Court may affirm any ruling, order, decision, or judgment upon any ground appearing in the record).

I disagree with the majority's finding that Bellamy's testimony is not material on the basis that we have not recognized "the transferability of intent in a self-defense claim." In my opinion, if there is any such doctrine as "transferred self-defense," it has no applicability to this case.[8] Whether a defendant harms an unintended victim

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[7] *See State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011).

[8] Below is one formulation of the doctrine:

> [O]ne who kills in self-defense does so without the mens rea that otherwise would render him culpable of the homicide. . . .
>
> However, if A had no criminal intent with respect to B, as where A is exercising a lawful right of self-defense, [no criminal intent] could exist as to C. It follows, then, that A in shooting C has not committed a criminal act, the essential [sic] of a mens rea being impossible of proof. The inquiry must be whether the killing would have been justifiable if the accused had killed the person whom he intended to kill, as the unintended act derives its character from the intended.

while acting in self-defense is irrelevant since the question is whether the defendant's state of mind entitled him to react as he did. *See, e.g.*, *Dickey*, 394 S.C. at 499, 716 S.E.2d at 101. On the other hand, transferred intent permits a jury to find a defendant criminally responsible even though the defendant did not have the "intent" to harm the victim. *See State v. Fennell*, 340 S.C. 266, 271 - 72, 531 S.E.2d 512, 515 (2000) (explaining transferred intent as a legal fiction by which a jury may convict a defendant even though he did not act with the requisite *mens rea* towards an unintended victim). Thus, a defendant need not have a specific "intent" in order to assert a viable claim of self-defense; instead, the only question is whether Bellamy's testimony would have entitled him to a charge on self-defense. Although the answer to this question is undeniably close, and is one that underscores the important gatekeeping function of our PCR judges, I am constrained by our standard of review. *See Williams*, 363 S.C. at 343–44, 611 S.E.2d at 233.

Because I would adhere to the five factor test set forth in *McCoy*, and because I find there is probative evidence in the record to support the PCR judge's findings, I would affirm the court of appeals.

BEATTY, J., concurs.

State v. Clifton, 290 N.E.2d 921, 923 (Ohio Ct. App. 1972).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

AJG Holdings, LLC, Stalvey Holdings, LLC, David Croyle, Linda Croyle, Jean C. Abbott, Lynda T. Courtney, Sumter L. Langston, Diane Langston, Carl B. Singleton, Jr., Virginia M. Owens and Stoney Harrelson, Respondents,

v.

Levon Dunn, Pamela S. Dunn and Robin H. Sasser and Charles E. Sasser, as Personal Representatives for the Estate of Helen Sasser, Petitioners.

Appellate Case No. 2011-188346

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Georgetown County
The Honorable John M. Milling, Circuit Court Judge

Opinion No. 27455
Heard October 8, 2014 – Filed October 22, 2014

AFFIRMED

Stephen P. Groves, Sr., of Charleston, for Petitioners.

Jack M. Scoville, Jr., of Georgetown, for Respondents.

PER CURIAM: We granted certiorari to review the court of appeals' decision in *AJG Holdings, LLC v. Dunn*, 392 S.C. 160, 708 S.E.2d 218 (Ct. App. 2011). We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities: *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 350, 628 S.E.2d 902, 907 (Ct. App. 2006) ("[A] developer may reserve to himself, in his sole discretion, the right to amend restrictive covenants . . . provided five conditions are met: (1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants; (2) *the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development*; (3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants; (4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and as otherwise may be provided by law; and (5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy." (emphasis added)); *see McLeod v. Baptiste*, 315 S.C. 246, 247, 433 S.E.2d 834, 835 (1993) ("[A] grantor lacks standing to enforce a covenant against a remote grantee when the grantor *no longer owns real property* which would benefit from the enforcement of that restrictive covenant." (emphasis added) (citation omitted)); *see also Armstrong v. Roberts*, 254 Ga. 15, 16, 325 S.E.2d 769, 770 (1985) ("So long as the developer owns an interest in the subdivision being developed his own economic interest will tend to cause him to exercise a right to waive restrictions in a manner which takes into account harm done to other lots in the subdivision. There is some economic restraint against arbitrary waiver. After the developer has divested himself of all interest in the subdivision this economic restraint is lacking. . . . . A developer of a subdivision who reserved the authority to waive restrictions in covenants running with the land no longer possesses that authority *after divesting himself of his interest in the subdivision*." (emphasis added)); *Richmond v. Pennscott Builders, Inc.*, 251 N.Y.S.2d 845, 849 (Sup. Ct. 1964) ("A right reserved to release restrictions cannot be exercised after the reserver has conveyed all of his land and thus, used to ruin all of the property of others who have bought and improved their land on the faith of the restrictions. Accordingly, the provision in the deed restrictions here involved, reserving to [the developer] the right to waive such restrictions by

written consent, could be exercised by it *only so long as it retained part of the tract in its possession*." (emphasis added) (internal quotations and citations omitted)).

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Energy Users Committee,
Appellant/Respondent,

v.

South Carolina Electric and Gas, South Carolina Office of Regulatory Staff and Pamela Greenlaw, Respondents,

and Sierra Club, is Respondent/Appellant.

Appellate Case No. 2013-000529

Appeal From The Public Service Commission

Opinion No. 27456
Heard April 16, 2014 – Filed October 22, 2014

AFFIRMED

Scott Elliott, of Elliott & Elliott, P.A., of Columbia, for Appellant/Respondent.

Robert Guild, of Columbia, for Respondent/Appellant.

Belton Townsend Zeigler, of Pope Zeigler, LLC, and James B. Richardson, Jr., both of Columbia, K. Chad Burgess and Matthew W. Gissendanner, of Cayce, Florence P. Belser, Nanette S. Edwards, Jeffrey M. Nelson, and Shannon Bowyer Hudson, all of Columbia, for Respondents.

CHIEF JUSTICE TOAL: The South Carolina Energy Users Committee (the SCEUC) and the Sierra Club (collectively, Appellants) appeal orders of the Public Service Commission (the Commission) approving Respondent South Carolina Electric & Gas's (SCE&G) application for updated capital cost and construction schedules, pursuant to the Base Load Review Act, S.C. Ann. §§ 58-33-210 to -298 (Supp. 2013) (the BLRA).[1] In essence, this appeal presents the questions of whether the Commission applied the correct section of the BLRA, and whether the Commission must also consider the prudence of project completion at the update stage. We affirm.

FACTS/PROCEDURAL BACKGROUND

On March 2, 2009, SCE&G obtained an initial base load review order[2] authorizing it to complete a project involving the construction of two 1,117 net megawatt nuclear units in connection with the construction of a nuclear power plant at the V.C. Summer Nuclear Station located near Jenkinsville, South Carolina.

On May 15, 2012, SCE&G petitioned the Commission for a base load review order approving updates to the capital cost and construction schedules for the project. SCE&G sought approximately $283 million in capital costs to be recouped from its customers in rates pursuant to the BLRA. The application comprised the following changes to the costs enumerated in the initial base load review order: (1) an Engineering, Procurement, and Construction Contract (EPC) change order resulting from a settlement agreement for schedule changes and

[1] The South Carolina Office of Regulatory Staff (ORS) is also a respondent, made party pursuant to section 58-4-10 of the South Carolina Code. *See* S.C. Code Ann. § 58-4-10 (Supp. 2013).

[2] A base load review order is "an order issued by the [C]ommission pursuant to Section 58-33-270 establishing that if a plant is constructed in accordance with an approved construction schedule, approved capital costs estimates, and approved projections of in-service expenses, as defined herein, the plant is considered to be used and useful for utility purposes such that its capital costs are prudent utility costs and are properly included in rates." S.C. Code Ann. § 58-33-220(4).

additional costs related to the time frame in which the Combined Operating License was received from the Nuclear Regulatory Commission, the redesign and construction of certain components, and certain Unit 2 site conditions ($137.5 million); (2) owner's costs ($131.6 million); (3) transmission costs ($7.9 million); and (4) additional EPC change orders for cyber security ($5.9 million), healthcare costs ($139,573), and wastewater piping ($8,250). With respect to updates to the construction schedules, SCE&G sought to delay the completion date of Unit 2 by eleven months, which would advance the date for completion of the entire project by seven and one-half months.

The Commission received timely notices to intervene by the Sierra Club,[3] the SCEUC, an organization consisting of industrial customers of SCE&G, and Pamela Greenlaw, a residential customer.[4]

A hearing was convened before the Commission to assess the application on October 2–3, 2012. By order dated November 15, 2012, the Commission approved $278.05 million of the $283 million in cost increases to the previously approved capital cost budget and approved the updated construction schedule, finding the cost increases resulted from "the normal evolution and refinement of construction plans and budgets for the Units and not the result of imprudence on the part of SCE&G."

Appellants filed petitions for reconsideration. In their petitions, along with specific errors, Appellants averred that the Commission erred generally in permitting the modifications after SCE&G did not anticipate the cost adjustments when it originally filed for an initial base load review order; that SCE&G was required to present a full evaluation of the prudence of the decision to continue to construct the nuclear units; and that the evidence in the Record was insufficient to meet that burden. By order dated February 14, 2013, the Commission denied

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[3] The Sierra Club is a non-profit organization dedicated to "protect[ing] the wild places of the earth" and to "promot[ing] the responsible use of the earth's ecosystems and resources." The Sierra Club's South Carolina Chapter consists of nine local groups and more than 5,000 members, some of whom are ratepayers of SCE&G and neighbors to the site of the proposed nuclear plant.

[4] Pamela Greenlaw is not party to this appeal.

Appellants' petitions for rehearing, finding they lacked merit. This appeal of the Commission's base load review order and decision to deny the petitions for reconsideration followed.

ISSUES

I. Whether the Commission erred by applying the wrong section, and therefore the wrong standard, of the BLRA?

II. Whether the Commission erred in holding that a prudency evaluation of the need for the continued construction of the units is not required under the BLRA?

III. Whether the evidence supports the Commission's finding that the additional capital costs were prudent under the BLRA?

STANDARD OF REVIEW

"This Court employs a deferential standard of review when reviewing a decision from the Commission and will affirm the Commission's decision if it is supported by substantial evidence." *S.C. Energy Users Comm. v. Pub. Serv. Comm'n of S.C.*, 388 S.C. 486, 490, 697 S.E.2d 587, 589–90 (2010) (citing *Duke Power Co. v. Pub. Serv. Comm'n of S.C.*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001)). "The Commission is considered the expert designated by the legislature to make policy determinations regarding utility rates." *Id.* at 490, 697 S.E.2d at 590 (citing *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004)); *see also Hamm v. Pub. Serv. Comm'n of S.C.*, 289 S.C. 22, 25, 344 S.E.2d 600, 601 (1986) (stating that because the Commission is an "expert" in utility rates, "the role of a court reviewing such decisions is very limited" (quoting *Patton v. Pub. Serv. Comm'n of S.C.*, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984))). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987); *see also Nucor Steel v. Pub. Serv. Comm'n of S.C.*, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992) ("Where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason."). Thus,

> [b]ecause the Commission's findings are presumptively correct, the party challenging the Commission's order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole.

S.C. Energy Users Comm., 388 S.C. at 491, 697 S.E.2d at 590 (citing *Duke Power Co.*, 343 S.C. at 558, 541 S.E.2d at 252); *see also* S.C. Code Ann § 1-23-380(A)(6) (Supp. 2013).

ANALYSIS

I. Statutory Construction

Appellants argue that the Commission erred as matter of law by failing to apply the relevant legal standard in granting SCE&G's request because the additional capital costs could have been anticipated when SCE&G applied for an initial base load review order in 2008, and therefore, the additional costs were imprudent under the BLRA. In so arguing, they claim that the Commission erred by applying the prudence standard found in section 58-33-270(E) of the South Carolina Code, rather than the standard found in section 58-33-275(E). *See* S.C. Code Ann. §§ 58-33-270(E), -275(E).

The purpose of the BLRA "is to provide for the recovery of the prudently incurred costs associated with new base load plants . . . when constructed by investor-owned electrical utilities, while at the same time protecting customers of investor-owned electrical utilities from responsibility for imprudent financial obligations or costs." *S.C. Energy Users Comm.*, 388 S.C. at 494–95, 697 S.E.2d at 592 (citing S.C. Code Ann. § 58–33–210 (Supp. 2009) (Editor's Note)). Therefore, the objectives of the BLRA are:

> (1) to allow SCE&G to recover its "prudently incurred costs" associated with the nuclear facility; and (2) to protect customers "from responsibility for imprudent financial obligations or costs."

Id.

In an *initial* application for the approval of capital and construction costs

pursuant to the BLRA, the Commission shall issue a base load review order approving rate recovery for capital costs if it determines, *inter alia*, that "the utility's decision to proceed with construction of the plant is prudent and reasonable considering the information available to the utility at the time." S.C. Code Ann. § 58-33-270(A)(1). The Commission's order must establish:

> (1) the anticipated construction schedule for the plant including contingencies;
>
> (2) the anticipated components of capital costs and the anticipated schedule for incurring them, including specified contingencies;
>
> (3) the return on equity established in conformity with Section 58-33-220(16);
>
> (4) the choice of the specific type of unit or units and major components of the plant;
>
> (5) the qualification and selection of principal contractors and suppliers for construction of the plant; and
>
> (6) the inflation indices used by the utility for costs of plant construction, covering major cost components or groups of related cost components. Each utility shall provide its own indices, including: the source of the data for each index, if the source is external to the company, or the methodology for each index which is compiled from internal utility data, the method of computation of inflation from each index, a calculated overall weighted index for capital costs, and a five-year history of each index on an annual basis.

Id. § 58-33-270(B)(1)–(6); *see also Friends of the Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 370, 692 S.E.2d 910, 915 (2010) (listing the necessary components of an initial base load review order).

However,

> (E) As circumstances warrant, the utility may petition the commission, with notice to the [ORS], for an order *modifying* any of

> the schedules, estimates, findings, class allocation factors, rate designs, or conditions that form part of any base load review order issued under this section. The commission shall grant the relief requested if, after a hearing, the commission finds:
>
> > (1) as to the changes in the schedules, estimates, findings, or conditions, that the evidence of record justifies a finding that the changes are not the result of imprudence on the part of the utility; and
> >
> > (2) as to the changes in the class allocation factors or rate designs, that the evidence of record indicates the proposed class allocation factors or rate designs are just and reasonable.

S.C. Code Ann. § 58-33-270(E) (emphasis added).

Appellants argue that the Commission erred in applying section 58-33-270 to SCE&G's application. They argue that the proper legal standard in this case is found in section 58-33-275 of the BLRA, which provides:

> So long as the plant is constructed or being constructed in accordance with the approved schedules, estimates, and projections set forth in Section 58-33-270(B)(1) and 58-33-270(B)(2), as adjusted by the inflation indices set forth in Section 58-33-270(B)(5), the utility must be allowed to recover its capital costs related to the plant through revised rate filings or general rate proceedings.

S.C. Code Ann. § 58-33-275(C). However,

> [i]n cases where a party proves by a preponderance of the evidence that there *has been a material and adverse deviation* from the approved schedules, estimates, and projections set forth in Section 58-33-270(B)(1) and 58-33-270(B)(2), as adjusted by the inflation indices set forth in Section 58-33-270(B)(5), the commission may disallow the additional capital costs that result from the deviation, *but only to the extent that the failure by the utility to anticipate or avoid the deviation, or to minimize the resulting expense, was imprudent*

> *considering the information available at the time that the utility could have acted to avoid the deviation or minimize its effect.*

Id. § 58-33-275(E) (emphasis added).

In *South Carolina Energy Users Committee v. SCE&G*, we found that the Commission abused its discretion in allowing SCE&G to recoup contingency costs in an initial base load review order. 388 S.C. at 491, 697 S.E.2d at 590. In so finding, we said:

> [T]he enactment of section 58-33-270(E) of the South Carolina Code . . . reveals that the General Assembly anticipated that construction costs could increase during the life of the project. Under section 58-33-270(E), SCE&G may petition the Commission for an order modifying rate designs.

Id. at 496, 697 S.E.2d at 592–93. This is exactly the course that SCE&G followed here.

Thus, we find the BLRA contemplates changes to an initial base load review order and provides the mechanism to accomplish such changes in section 58-33-270, not section 58-33-275, as Appellants argue. *Cf. Friends of the Earth*, 387 S.C. at 369, 692 S.E.2d at 914–15 (stating that "section 58-33-270(E) . . . provides that once a final order by the Commission has been issued, a 'utility may petition the [C]ommission . . . for an order modifying any of the schedules, estimates, findings, class allocation factors, rate designs, or conditions that form part of any base load review order issued under this section,'" and that "[c]learly the General Assembly did not contemplate the Commission's ability to prevent subsequent modification of its orders under the [BLRA], as subsection (E) expressly provides the utility that right"). On the other hand, section 58-33-275(E) applies only after a utility has already deviated from an existing base load review order and attempts to recoup costs from the deviation. In that situation, a party must demonstrate by a preponderance of the evidence that the utility has deviated from the original base load review order, and then the utility may only recoup costs that were not the result of imprudence. Thus, the Commission correctly rejected Appellants' attempt to convert the modification proceeding into a deviation proceeding, and because SCE&G sought to update the existing base load review order, section 58-33-270 plainly applied. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581

(2000) ("[I]t is not the court's place to change the meaning of a clear and unambiguous statute."); *see also Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.").[5]

Therefore, we find the Commission did not err in applying section 58-33-270 to SCE&G's application for an additional base load review order to update the capital costs and construction schedules contained in the original base load review order.

II. Continued Construction

Relying on section 58-33-280(K) of the BLRA, Appellants next argue that the Commission should have conducted a prudency evaluation of the entire construction project "going forward" at the time of the modification request. We disagree.

Section 58-33-280(K) provides:

> Where a plant is abandoned after a base load review order approving rate recovery has been issued, the capital costs and AFUDC[6] related to the plant shall nonetheless be recoverable under this article provided that the utility shall bear the burden of proving by a

[5] The titles of the sections lend further support to SCE&G's and ORS's positions as section 58-33-270 is entitled "Base load review orders; contents; *petitions for modification*; settlement agreements between [ORS] and applicant," whereas, section 58-33-275 is entitled "Base load review order; parameter; challenges; *recovery of capital costs*." (Emphasis added). *See Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 373 n.2, 718 S.E.2d 432, 436 n.2 (2011) ("This Court may, of course, consider the title or caption of an act in determining the intent of the Legislature." (citation omitted)).

[6] "AFUDC" is "the allowance for funds used during construction of a plant calculated according to regulatory accounting principles." S.C. Code Ann. § 58-33-220(1) (Supp. 2013).

> preponderance of the evidence that the decision to abandon construction of the plant was prudent. Without limiting the effect of Section 58-33-275(A), recovery of capital costs and the utility's cost of capital associated with them may be disallowed only to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time that the utility could have acted to avoid or minimize the costs. The commission shall order the amortization and recovery through rates of the investment in the abandoned plant as part of an order adjusting rates under this article.

The mere fact that the BLRA provides for a course of action in the event of the abandonment of a construction project has no relevance under these circumstances. In fact, the express language of the BLRA contradicts Appellants' contention. Section 58-33-275(A) provides:

> A base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and are properly included in rates so long as the plant is constructed or is being constructed within the parameters of:
>
> > (1) the approved construction schedule including contingencies; and
> >
> > (2) the approved capital costs estimates including specified contingencies.

S.C. Code Ann. § 58-33-275(A). Moreover, "[d]eterminations under Section 58-33-275(A) may not be challenged or reopened in any subsequent proceeding, including proceedings under [s]ection 58-27-810 and other applicable provisions and [s]ection 58-33-280 and other applicable provisions of this article." *Id.* § 58-33-275(B).

Practically speaking, it would be nonsensical to include such a requirement at this stage. As the Commission aptly noted,

> [T]he BLRA was intended to cure a specific problem under the prior statutory and regulatory structure. Before adoption of the BLRA, a utility's decision to build a base load generating plant was subject to relitigation if parties brought prudency challenges after the utility had committed to major construction work on the plant. The possibility of prudency challenges while construction was underway increased the risks of these projects as well as the costs and difficulty of financing them. In response, the General Assembly sought to mitigate such uncertainty by providing for a comprehensive, fully litigated and binding prudency review before major construction of a base load generating facility begins. The BLRA order related to [the initial base load review order], is the result of such a process. It involved weeks of hearings, over 20 witnesses, a transcript that is more than a thousand pages long and rulings that have been the subject of two appeals to the South Carolina Supreme Court.

The Commission found that the BLRA did not require it to reassess the prudency of the entire construction project at that base load order review stage, and we adopt its logic:

> Update proceedings are likely to be a routine part of administering BLRA projects going forward (including future projects proposed by other electric utilities), such that under the Sierra Club's argument, the prudence of the decision to build the plant will be open to repeated relitigation during the construction period if a utility seeks to preserve the benefits of the BLRA for its project. Reopening the initial prudency determinations each time a utility is required to make an update filing would create an outcome that the BLRA was intended to prevent and would defeat the principal legislative purpose in adopting the statute.[7]

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[7] However, we agree with ORS that Appellants received the review they sought because the Commission addressed the prudency of the entire construction project anyway:

> In any event, although not required by the terms of the BLRA, the record in this proceeding has provided the Commission with the sufficient evidence on which to examine and evaluate the positions of

Therefore, we find Appellants' argument that the Commission should have conducted a prudency evaluation of the entire construction project at this modification stage unavailing.

III. Sufficiency of the Evidence

Next, Appellants argue that SCE&G failed to meet its burden to establish that the costs were prudent. We disagree.

As pointed out in SCE&G's brief, Appellants do not argue that the decision is not supported by substantial evidence, but that the Commission should have decided the modification application differently.

We agree that Appellants failed to demonstrate that the factual findings are unsupported by reliable, probative, and substantial evidence in the record. *See Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) ("Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached. The possibility of drawing two inconsistent conclusions from the evidence will not mean the agency's conclusion was unsupported by substantial evidence. Furthermore, the burden is on appellants to prove convincingly that the agency's decision is unsupported by the evidence." (internal citations and quotation marks omitted)). To the contrary, the Commission parsed all of the evidence presented during the hearing and provided a detailed summary of all of the testimony on which it based its very technical findings. Thus, there is no doubt that the Commission's findings are supported by substantial evidence in the Record. Therefore, we find that this issue lacks merit.

> SCE&G and the Sierra Club on the factual issue of whether continuing with the construction of the Units is prudent and whether the additional costs and schedule changes are prudent. Based on the evidence of the record before us, the Commission concludes that the construction of the Units should continue and that the additional costs and schedule changes are not the result of imprudence on the part of SCE&G . . . .

CONCLUSION

For the foregoing reasons, we affirm the Commission's orders.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Moorhead Construction, Inc., Craft Construction Company, Inc., and Miller Construction Company, LLC, Respondents,

v.

Enterprise Bank of South Carolina, Pendleton Station, LLC, and Angelo Penza, Defendants,

Of whom Enterprise Bank of South Carolina is the Appellant.

Appellate Case No. 2012-213318

Appeal From Anderson County
Ellis B. Drew, Jr., Master-in-Equity

Opinion No. 5219
Heard April 11, 2014 – Filed April 16, 2014
Withdrawn, Substituted and Refiled October 22, 2014

VACATED AND REMANDED

Thomas Elihue Dudley, III and M. Stokely Holder, Kenison, Dudley & Crawford, LLC, both of Greenville, for Appellant.

David James Brousseau, McIntosh, Sherard, Sullivan & Brousseau, of Anderson, for Respondents.

FEW, C.J.: The respondents—Moorhead Construction, Inc., Miller Construction Company, LLC, and Craft Construction Company, Inc.—sought foreclosure of their mechanic's liens against Enterprise Bank of South Carolina, and the master awarded them money judgments. Enterprise Bank appeals, arguing the master had no legal basis for entering money judgments against it. We vacate the judgments and remand for foreclosure proceedings.

Pendleton Station, LLC ("PSL") hired Moorhead to be the general contractor for a development project involving two tracts of land owned by PSL—the "2-Acre Tract" and "Tract A"—and another tract owned by an individual investor—"Tract B." Moorhead subcontracted with Miller and Craft to perform work on the project. Enterprise Bank served as the construction lender for the project.

Two years into the project, PSL stopped paying Moorhead and its subcontractors and defaulted under the loan agreements with Enterprise Bank. PSL executed a deed-in-lieu of foreclosure to Enterprise Bank that conveyed title to Tract A, and Enterprise Bank subsequently obtained title to the 2-Acre Tract and Tract B. The respondents each filed mechanic's liens on all three tracts. They then brought suit for breach of contract against PSL and foreclosure against Enterprise Bank. The master did not rule on the claims against PSL but entered money judgments against Enterprise Bank.

We hold the master had no authority to enter money judgments in the respondents' foreclosure actions against Enterprise Bank. The procedures for enforcing a mechanic's lien are provided by statute, *see* S.C. Code Ann. §§ 29-5-10 to -440 (2007 & Supp. 2013), and "must be strictly followed." *Cohen's Drywall Co. v. Sea Spray Homes, LLC*, 374 S.C. 195, 199, 648 S.E.2d 598, 600 (2007). A court cannot depart from the plain language of the statute when enforcing a mechanic's lien. *See Zepsa Constr., Inc v. Randazzo*, 357 S.C. 32, 38, 591 S.E.2d 29, 32 (Ct. App. 2004) (holding a party was "limited to recovery provided for by the strict terms of the mechanic's lien statute"); *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 27, 336 S.E.2d 488, 490 (Ct. App. 1985) (stating mechanic's liens can only be "enforced in accordance with the conditions of the statute creating them"); *Clo-Car Trucking Co. v. Clifflure Estates of S.C., Inc.*, 282 S.C. 573, 576, 320 S.E.2d 51, 53 (Ct. App. 1984) (stating the court is "not at liberty to

depart from the plain meaning of [the] language" contained in the mechanic's lien statute).

As a matter of law, Enterprise Bank cannot be liable for money judgments because the respondents had no contractual relationship with Enterprise Bank or any other right to recover damages. *See Arnet Lewis Constr. Co., Inc. v. Smith-Williams & Assocs., Inc.*, 269 S.C. 143, 151, 236 S.E.2d 742, 746 (1977) (allowing a party that brought an action to foreclose a mechanic's lien to recover a judgment based upon a contract cause of action because the complaint stated "facts sufficient to constitute a [contract] cause of action"). Rather, the exclusive remedy available to the respondents against Enterprise Bank is foreclosure of their mechanic's liens. *See* S.C. Code Ann. § 29-5-260 (2007) (stating when the master determines a valid and enforceable mechanic's lien exists, it "shall order a sale of the property"); *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 353, 338 S.E.2d 631, 635 (1985) (stating "the mechanic's lien statute may not be used as a vehicle for collecting damages for breach of contract"). We find the master erred by awarding money judgments instead of ordering foreclosure.

Furthermore, it is the function of the master, not the appellate courts, to determine whether foreclosure is appropriate and, if so, to order it. Enterprise Bank raises eleven issues on appeal with multiple subparts, each containing separate arguments that the master committed error. We find it appropriate to remand for the master to reconsider the parties' arguments as to all disputed issues and make the necessary findings of fact and conclusions of law on the record before deciding whether to order foreclosure.

The respondents assert "foreclosure is no longer an issue" on remand because Enterprise Bank issued a bond that substituted for the real property involved in this lawsuit pursuant to South Carolina Code section 29-5-110 (2007). Under section 29-5-110, an owner of property may "secure the discharge of such property from [a mechanic's] lien" by filing a surety bond, which "take[s] the place of the property . . . and shall be subject to the lien." However, neither the record nor the respondents' petition for rehearing support the respondents' assertion—that Enterprise Bank's bond substituted for the real property under section 29-5-110. Rather, the record indicates Enterprise Bank's bond served to stay execution of the money judgments under South Carolina Code subsection 18-9-130(A)(1) (2014). Thus, the stay granted under this subsection affects only the money judgments that we find were improperly ordered, *not* the foreclosure action.

Even if Enterprise Bank's bond was effective under section 29-5-110, the foreclosure action must still proceed on remand as ordered. The effect of a bond under section 29-5-110 is that the debt owed to the respondents would be paid out of the bond—and it would not be necessary to proceed with the actual sale of the property at a foreclosure sale. However, a section 29-5-110 bond has no effect on the law that applies. *See* 56 C.J.S. *Mechanics' Liens* § 299 (2009) ("The giving of a bond to discharge property from a mechanic's lien . . . does not change the lien claimant's burden to prove he or she is entitled to payment under the mechanic's lien law."); Am. Jur. 2d *Mechanics' Liens* § 307 (2007) ("To enforce a bond discharging a mechanic's lien from property, the lienor must establish his or her rights both to the lien and foreclosure thereof."). The respondents' right to receive payment under the bond—as opposed to receive the property itself in foreclosure—is still dependent upon the merits of the issues related to foreclosure of their mechanic's liens. *See* 53 Am. Jur. 2d *Mechanics' Liens* § 308 (2007) ("If there is no right to foreclosure because the right to a lien is not established, there is no right to recover against the surety on the bond."). Thus, unless the respondents can demonstrate they were entitled to foreclosure of their mechanics liens, they are not entitled to receive the proceeds of the bond.

We find the master erred in awarding money judgments on the respondents' foreclosure claims. Thus, the order of the master is

VACATED and REMANDED.

GEATHERS, J., concurs.

SHORT, J., concurring in part and dissenting in part:

I concur in part and dissent in part. I concur with the majority that as a matter of law, Enterprise Bank cannot be liable for a money judgment because Respondents had no contractual relationship with Enterprise Bank or any other right to recover damages. I also agree the exclusive remedy available to Respondents against Enterprise Bank is foreclosure of their mechanic's liens. Therefore, the master erred by awarding money judgments instead of ordering foreclosure.

I find the master correctly determined Respondents' mechanic's liens were filed in accordance with South Carolina law, and the master correctly determined the

amounts due to Respondents at that time under the mechanic's liens. The master also found Respondents established both its right to the lien and foreclosure thereof. I dissent because I disagree with the majority's finding that the entire foreclosure action must still proceed on remand. I would remand the case for the master to determine the amounts now due to Respondents and to take appropriate action to proceed with foreclosure on the property, primarily to determine the validity of Defendant Penza's mortgage on Tract B.