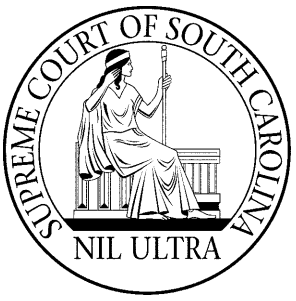

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45
November 12, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

In the Matter of the Care and Treatment of Vincent Neal Way, Petitioner/Respondent,

v.

The State of South Carolina, Respondent/Petitioner.

Appellate Case No. 2011-199686
Lower Court Case No. 2007-CP-1002613

ORDER

The State's petition for rehearing is denied. This Court does, however, substitute the attached, amended majority and concurring opinions previously filed in this matter. The substantive changes are to the legal analysis regarding the dismissal of certiorari as to the State in section III(B) of the original majority opinion and in footnote 3 of the original concurring opinion.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
November 12, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Vincent Neal Way, Petitioner/Respondent,

v.

The State of South Carolina, Respondent/Petitioner.

Appellate Case No. 2011-199686

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 27444
Heard November 20, 2013 – Re-Filed November 12, 2014

AFFIRMED AS MODIFIED IN PART;
CERTIORARI DISMISSED IN PART AS IMPROVIDENTLY GRANTED

Appellate Defender LaNelle Cantey Durant, of Columbia, for Petitioner/Respondent.

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

JUSTICE BEATTY: A jury found Vincent Neal Way met the definition of a sexually violent predator (SVP) under South Carolina's SVP Act, S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2013). The circuit court ordered Way to begin involuntary civil commitment for long-term control, care, and treatment in the SVP treatment program administered by the South Carolina Department of Mental Health. Way appealed, and the Court of Appeals affirmed. *In re the Care & Treatment of Way*, Op. No. 2011-UP-268 (S.C. Ct. App. filed Aug. 24, 2011). This Court granted cross petitions for a writ of certiorari filed by Way and the State. As to Way's appeal, we affirm as modified, and we dismiss the State's petition for a writ of certiorari as improvidently granted.

I. FACTS

In 1993, Way pled guilty to committing a lewd act on a minor. The victim was Way's 13-year-old niece, who was spending the night with Way (who was then about 28 years old) and his wife. The victim reported that Way put his hand inside her clothing while she was sleeping on the couch and fondled her, kissed her thigh, and then laid on her and "began humping her." Way was sentenced to ten years in prison, suspended upon the service of eighteen months in prison and five years of probation.

In 1995, while on probation, Way pled guilty to contributing to the delinquency of a minor. In that matter, Way allowed two girls who were runaways, one 13 and one 15, to spend the night at his home without notifying the police.

While still on probation in 1997, Way pled guilty to committing a lewd act upon a minor. The victim was a 13-year-old girl, who reported that Way met her at a boat dock in 1995 and gave her marijuana, then had sexual intercourse with her. Way was sentenced to fifteen years in prison for this offense.

In 2007, prior to his release from prison, Way was referred to the multidisciplinary team, which determined there was probable cause to believe Way met the statutory definition of an SVP.[1] The multidisciplinary team referred Way's

[1] An SVP is defined as "a person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder

case to the prosecutor's review committee, which filed a petition with the circuit court for civil commitment proceedings. The circuit court concluded probable cause existed and ordered a mental evaluation of Way to be performed by Dr. Donna Schwartz-Watts. Dr. Schwartz-Watts performed an evaluation and was the State's expert. Way also obtained an independent mental evaluation by an expert of his own choosing, Dr. Tom Martin.

At the civil commitment proceeding in 2009, Dr. Schwartz-Watts testified that she believed Way suffered from a mental abnormality or personality disorder as defined by the SVP Act. Specifically, she diagnosed him as having a sexual disorder, not otherwise specified, based on his prior sexual history with several 13-year-old girls. She also diagnosed Way as having amnesia (for events prior to 1994) based on a head injury he sustained in a car accident in 1994. She found, however, that any memory loss was not due to brain damage because testing revealed Way has "a high average IQ."

Dr. Schwartz-Watts stated her evaluation indicated Way was likely to re-offend. In particular, she noted his subsequent offenses occurred while he was still on probation and the incidents occurred in places where others were present, which showed Way had an inability to control his impulses.

Just before Way testified, Way's counsel renewed a motion to preclude the State from mentioning the fact that Way had seen an expert of his own choosing, Dr. Martin, who would not be testifying. Counsel acknowledged Way saw Dr. Martin and was evaluated, but stated the doctor did not make a report of his findings.

The circuit court observed that one can always comment about a witness who is not called, and that it is done every day in criminal and civil cases. Way's counsel countered that the inference usually applies to fact witnesses, whereas here, they consulted an expert for an evaluation in accordance with a statute that made the funds available for a second evaluation. The court disagreed, stating the statute merely creates a right. The court explained, "I don't think there is anything that precludes the State from asking him, did you demand to be evaluated, to have

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that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1)(a)-(b) (Supp. 2013).

an independent evaluation, and was that evaluation done? I think that ends the inquiry."

During cross-examination, the State asked Way if, "in preparation for this hearing, you were transported . . . from the jail to Columbia to see a Dr. Martin to be evaluated for these proceedings," and Way confirmed that he was transported to see a doctor and that he was asked questions and had evaluations, but he did not recall any specifics.

In closing argument, the State made the following additional reference to Dr. Martin and invoked what is commonly called the "missing witness rule," arguing the jury could infer the absence of Dr. Martin indicated that his testimony would have been adverse to Way:

> Now on cross-examination I asked the respondent, did you go to be evaluated by Dr. Martin pursuant to this case?
>
> . . . .
>
> Now Dr. Martin is not here. And the question, I think the inference you can draw from that is would Dr. Martin's testimony, if he was here, be adverse to the respondent? So, that's where we are.

At the conclusion of the evidence, the jury found Way met the definition of an SVP, and the circuit court ordered him to be civilly committed for long-term control, care and treatment. Way appealed, and the Court of Appeals affirmed. This Court granted cross-petitions for certiorari by Way and the State regarding the State's cross-examination of Way and its closing argument.

II. STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law." *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012). "The scope of cross-examination rests largely in the discretion of the trial court." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App. 2009) (citation omitted). Likewise, "[a] trial court is allowed broad discretion in dealing with the range and propriety of closing argument to the jury." *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 352, 638 S.E.2d 96, 102 (Ct. App. 2006).

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). To warrant reversal, an appealing party must demonstrate not only error in the court's ruling, but also resulting prejudice. *Id.* at 390, 529 S.E.2d at 539; *see also Duncan*, 385 S.C. at 133, 682 S.E.2d at 884 (stating reversal requires a showing of both a manifest abuse of discretion and prejudice).

III. LAW/ANALYSIS

The pertinent issues before the Court of Appeals concerned (1) the cross-examination of Way, during which the State asked Way whether he had another evaluation performed by Dr. Martin; and (2) the State's closing argument, in which it argued an adverse inference could be taken by the jury from Dr. Martin's absence at trial. The Court of Appeals "agree[d] with the trial court's decision to allow the State to cross-examine Way regarding a second mental evaluation, [but] h[e]ld it was improper for the State to imply a negative inference regarding the absence of Way's expert witness before the jury." *In re the Care & Treatment of Way*, Op. No. 2011-UP-268 (S.C. Ct. App. filed Aug. 24, 2011), slip op. at 4. However, the Court of Appeals affirmed on the basis of harmless error. *Id.* at 6.

A. Way's Appeal

In his appeal, Way challenges the propriety of both the State's cross-examination of Way and its invocation of the missing witness rule in closing argument.

We disagree with the Court of Appeals to the extent it found it did not constitute error for the State to question Way about Dr. Martin. The Court of Appeals found this issue should properly be addressed according to the South Carolina Rules of Evidence (SCRE) and established precedent. *Id.* at 4. The court noted all relevant evidence is generally admissible under Rule 402, SCRE, yet relevant evidence may be excluded under Rule 403, SCRE if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* The court also cited precedent for the proposition that a trial judge has wide latitude in the admissibility of evidence, and that an appellate court reviews such rulings based on an abuse of discretion standard. *Id.* (citing, *inter alia, State v. Torres*, 390 S.C. 618, 703 S.E.2d 226 (2010)).

While the Court of Appeals was correct that the admission of this testimony is governed by the SCRE and our case law, for the reasons discussed in another decision issued by this Court, *In re the Care & Treatment of Gonzalez*, Op. No. 27443 (S.C. Sup. Ct. filed Sept. 3, 2014) (Shearouse Adv. Sh. No. 35 at 31), we find the probative value of questioning Way about his retention of a non-testifying psychiatric expert was substantially outweighed by the danger of unfair prejudice. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). As a result, we conclude the State should not have been allowed to cross-examine Way about his retention of his non-testifying expert witness, Dr. Martin.

We further conclude that it was error to allow the State to assert during closing argument that the jury could infer the missing witness's testimony would have been adverse to Way's case. The Court of Appeals found it was error because when a party lacks control over the retained expert witness, an adverse inference is improper. *Way*, No. 2011-UP-268, slip op. at 5. As we explained in *Gonzalez*, we believe invocation of the missing witness rule should be limited to fact witnesses, and it should not be invoked as to medical, psychological, psychiatric, or similar medical expert *opinion* witnesses. The application of an adverse inference as to these types of experts allows a jury to simply *speculate* as to what the expert might have said. In our view, an adverse inference is not appropriate regarding the opinions held by medical, psychological, psychiatric, or similar medical experts, as the condition of a party is based upon numerous complex factors that do not readily lend themselves to being reduced to a discrete, adverse inference, as compared to a fact witness.

That being said, however, we must next examine whether the errors as to the State's cross-examination and closing argument constitute reversible error under a harmless error analysis. "Error is harmless where it could not have reasonably affected the result of the trial." *Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009). "Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result." *Id.* (citing *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991)). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *Id.* (citation omitted).

In this case, the Court of Appeals held any error was harmless beyond a reasonable doubt, stating "[e]vidence of Way's prior sexual criminal history, the testimony of the State's expert witness, and the testimony of the victim of Way's 1993 [] offense provided relevant and substantive evidence to support the jury's determination." *Way*, No. 2011-UP-268, slip op. at 6.

During cross-examination, the State asked Way if he had seen Dr. Martin for an evaluation, and during cross and closing the State never referred to Dr. Martin as Way's expert or mentioned that Way had retained Dr. Martin for an independent evaluation but then did not call him as a witness, so there was only limited information elicited at trial in this regard. All of the information regarding Dr. Martin's role as Way's expert was confined to the colloquy among the parties and the circuit court. In addition, Way was not prevented from rebutting the adverse inference if he deemed it necessary. *See Dansbury v. State*, 1 A.3d 507, 522 (Md. Ct. Spec. App. 2010) ("Where a party raises the missing witness rule during closing argument, its use is just that—an argument. . . . Furthermore, the opposing side also has an opportunity to refute the argument and counter with reasons why the inference is inappropriate." (alteration in original) (citation omitted)). Consequently, we agree with the Court of Appeals that any error could not have reasonably affected the outcome here.

B. The State's Appeal

The State has also filed a cross-petition for a writ of certiorari in this case. However, we now dismiss the writ of certiorari as to the State as improvidently granted.

IV. CONCLUSION

Based on the foregoing, the decision of the Court of Appeals is affirmed as modified as to Way's appeal, and we dismiss the writ of certiorari as to the State.

AFFIRMED AS MODIFIED IN PART; CERTIORARI DISMISSED IN PART AS IMPROVIDENTLY GRANTED.

TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only in a separate opinion.

JUSTICE PLEICONES: I agree with the majority that it was error for the trial judge to permit the State to invoke the missing witness rule[2] for the reasons set forth in my concurrence *In the Matter of Gonzalez,* Op. No. 27443 S.C. ___, ___ S.E.2d ___, 2014 WL (S.C. Sup. Ct. filed September 3, 2014) (Pleicones, J., concurring). I also agree the error was harmless.[3] I therefore concur in result only and would affirm the Court of Appeals' decision as modified.

[2] I disagree with the majority's discussion of Rule 403. As I understand the majority's opinion in *Gonzalez,* the missing witness rule can *never* be invoked for opinion witnesses. Therefore, a Rule 403 analysis is unnecessary. Likewise, I would find the majority's distinction between the invocation of the rule on cross-examination or during closing argument unnecessary.

[3] Unlike the majority, I do not base my harmless error finding on the fact that Way could have rebutted the adverse inference if he deemed it necessary.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nucor Corporation, Appellant,

v.

South Carolina Department of Employment and Workforce and Kim A. Legette, Respondents.

Appellate Case No. 2012-206406

Appeal from The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Opinion No. 27462
Heard January 7, 2014 – Filed November 12, 2014

AFFIRMED

Nosizi Ralephata and John S. Wilkerson, III, both of Turner, Padget, Graham & Laney, of Charleston, for Appellant.

Nancy Bloodgood and Lucy Clark Sanders, both of Foster Law Firm, LLC, of Daniel Island, and Sandra Bell Grooms and Debra S. Tedeschi, both of Columbia, for Respondents.

JUSTICE KITTREDGE: This direct appeal from the Administrative Law Court (ALC) presents a threshold procedural challenge to appealability and substantively, to the awarding of unemployment benefits to an employee terminated for failing a drug test administered by a laboratory that was not properly certified. Because this appeal arises from a final resolution of all issues, we find the matter is appealable. We affirm the ALC.

I.

The facts are straightforward. Respondent Kimberly Legette was employed by Appellant Nucor Corporation (Nucor) from August 24, 1998, through April 22, 2010. Nucor terminated Legette's employment on April 22, 2010, after Legette failed a random on-site drug test in violation of Nucor's drug policy. A hair sample collected from Legette by Nucor on April 6, 2010, tested positive for marijuana. Pursuant to Nucor's drug policy, a second hair sample was collected on April 15, 2010, which also tested positive for marijuana. Although Legette obtained an independent drug test on April 15, 2010, which tested negative for drugs, she was fired from her job at Nucor based on the two positive drug test results.

Legette subsequently applied for unemployment benefits. Nucor requested that Legette be denied unemployment benefits, contending she was statutorily ineligible to receive them because she was fired for violating Nucor's drug policy by testing positive for drugs.

There are various reasons a person may be statutorily ineligible to receive unemployment benefits upon termination from employment, including:

> (2)(a) Discharge for misconduct connected with the employment . . . [including] conduct . . . in deliberate violation[] or disregard of standards of behavior which the employer has the right to expect of his employee . . . .
>
> (3)(a) Discharge for illegal drug use . . . if the:
>
> > (i) company has communicated a policy prohibiting the illegal use of drugs, the violation of which may result in termination; and

(ii) insured worker fails or refuses to provide a specimen pursuant to a request from the employer, or otherwise fails or refuses to cooperate by providing an adulterated specimen; or

(iii) insured worker provides a blood, hair, or urine specimen during a drug test administered on behalf of the employer, which tests positive for illegal drugs or legal drugs used unlawfully, provided:

(A) the sample was collected and labeled by a licensed health care professional or another individual authorized to collect and label test samples by federal or state law, including law enforcement personnel; and

(B) *the test was performed by a laboratory certified by the National Institute on Drug Abuse, the College of American Pathologists or the State Law Enforcement Division*; and

(C) an initial positive test was confirmed on the specimen using the gas chromatography/mass spectrometry method, or an equivalent or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse;

. . . .

(4) Discharge for gross misconduct . . . due to . . . failure to comply with applicable state or federal drug and alcohol testing and use regulations . . . .

S.C. Code Ann. § 41-35-120 (Supp. 2013) (emphasis added).

The procedural history is a morass. On May 26, 2010, the Department of Employment and Workforce (DEW) initially determined that Legette was disqualified from receiving unemployment benefits for twenty-six weeks under subsection (2) of section 41-35-120 for misconduct by violating Nucor's policy concerning drug use. Legette appealed that decision to the DEW appeal tribunal (Tribunal). During the Tribunal hearing, Legette denied using marijuana but admitted being in the presence of a family member who smoked marijuana regularly. The Tribunal determined Legette was indefinitely disqualified from

receiving unemployment benefits. The Tribunal, however, grounded its decision under subsection (3) of section 41-35-120 because she was discharged from employment for illegal drug use.

Legette appealed the Tribunal's decision to the DEW appellate panel (Panel). In its decision, the Panel did not address any of the previous findings regarding subsections (2) or (3) of section 41-35-120. Rather, the Panel reversed the previous determinations on the basis of subsection (4), finding the negative results from Legette's independent drug test demonstrated that Legette had not used illegal drugs and was therefore not barred from receiving unemployment benefits by subsection (4) of section 41-35-120.

Thereafter, Nucor petitioned the Administrative Law Court (ALC) for judicial review, arguing the positive results of the drug tests administered by the laboratory retained by Nucor demonstrated Legette was statutorily ineligible to receive employment benefits under subsections (2), (3), and (4) of section 41-35-120. On May 24, 2011, the ALC rejected Nucor's arguments and affirmed as to subsections (2) and (4), adopting the Panel's findings as findings of fact. The ALC declined to make a finding as to subsection (3). Rather, the ALC found the Panel failed to address whether the laboratory that performed the drug tests was properly certified. As a result, the ALC remanded the matter to the DEW to determine whether subsection (3) barred Legette's eligibility to receive unemployment benefits. *See* S.C. Code Ann. § 41-35-120(3)(a)(iii)(B) (providing that drug testing under this subsection must be performed by a "laboratory certified by the National Institute on Drug Abuse [NIDA], the College of American Pathologists or the State Law Enforcement Division").

Thereafter, Nucor filed a notice of appeal with the court of appeals, seeking review of the ALC's May 24, 2011 decision as to subsections (2) and (4), arguing the ALC's decision was a final determination as to Legette's eligibility under those two subsections, notwithstanding the remand as to subsection (3). However, the court of appeals dismissed the appeal, finding the ALC's order was not a final decision and thus was not immediately appealable. The matter was remanded to the DEW pursuant to the prior order of the ALC.

Upon remand, the matter was apparently referred to the Tribunal, which ruled just as it had originally, finding the drug testing laboratory Nucor used was properly certified and, therefore, that Legette was disqualified from receiving benefits

pursuant to subsection (3) based on her illegal drug use. Legette appealed, and on December 9, 2011, the Panel reversed, addressing subsection (3) for the first time. The Panel found the drug testing laboratory Nucor used was not properly certified in accordance with the requirements of subsection (3). Nucor contended that the laboratory it selected met the certification requirements of the NIDA.

The NIDA organization referenced in section 41-35-120(3)(a)(iii)(B) no longer exists. The Tribunal had earlier determined that the drug testing laboratory's Department of Health and Human Services (HHS) certification was the functional equivalent of NIDA certification and thus complied with the statutory certification requirements. However, the Panel disagreed and found the laboratory retained by Nucor was not statutorily certified.[1] The Panel concluded that under the circumstances, positive drug test results from a non-certified laboratory could not serve as a basis to deny unemployment benefits.

Neither party appealed the Panel's December 9, 2011 decision to the ALC; thus, the Panel's findings became the final agency decision. *See* S.C. Code Ann. § 41-35-740 (Supp. 2013) ("A decision of the department, in the absence of an appeal from it as provided in this article, becomes final ten days after the date of notification or mailing of it . . . ."). Moreover, the Panel's decision stands as the law of the case. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case." (citing *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970))).

On January 9, 2012, Nucor filed a second notice of appeal to challenge the ALC's May 24, 2011 decision as to subsections (2) and (4). Specifically, Nucor stated:

> Appellant [is] not challenging the [December 9, 2011] decision of the Appellate Panel on the single narrow issue regarding certification of the laboratory [under subsection (3) of section 41-35-120]. As a result, [the ALC's May 24, 2011] Order is now final as to all issues raised to that body by Appellant and is ripe for appeal.

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[1] The Panel found "that [the College of American Pathologists] certified hair testing at the time of the April 2010 drug tests and that the employer could have complied with the statute by utilizing a [College of American Pathologists] certified lab to confirm the hair test."

The appeal was certified for review by this Court pursuant to Rule 204(b), SCACR.

II.

Respondents DEW and Legette argue this matter is not appealable because Nucor failed to appeal the Panel's December 9, 2011 findings regarding subsection (3) to the ALC. Therefore, according to Respondents, Nucor may not seek judicial review of the ALC's May 24, 2011 findings as to subsections (2) and (4) because there is no final order from the ALC for this Court to review pursuant to section 1-23-610 of the South Carolina Code. Nucor counters that the ALC's prior order concerning subsections (2) and (4) became final when the Panel's decision regarding subsection (3) became the final agency decision. While the more prudent course may have been for Nucor to appeal the Panel's subsection (3) decision to the ALC, we believe Nucor is technically correct on the appealability issue.

Judicial review of disputes arising from the DEW is governed by the Administrative Procedures Act (APA). S.C. Code Ann. § 41-35-750 (Supp. 2013). Pursuant to the APA, "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review . . . ." S.C. Code Ann. § 1-23-380 (Supp. 2013). In proceedings governed by the APA, "[a] final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010) (citation omitted). "An agency decision which does not decide the merits of a contested case is not a final agency decision subject to judicial review." *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73–74, 744 S.E.2d 552, 556 (2013) (internal marks omitted) (citing *S.C. Baptist Hosp. v. S.C. Dep't of Health & Envtl. Control*, 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987)) (finding an order remanding matter to the administrative agency was not a final order and was not immediately appealable).

As previously noted, Nucor initially filed a notice of appeal with the court of appeals immediately following the ALC's May 24, 2011 order. However, because the ALC ordered a remand and did not finally determine the issue of Legette's

eligibility for unemployment benefits, the court of appeals found the order was interlocutory and not immediately appealable. Nucor now contends that the ALC's May 24, 2011 order became final as to the rulings on subsections (2) and (4) when no appeal was taken from the Panel's December 9, 2011 order concerning subsection (3). Nucor argues it was not required to appeal the Panel's December 9, 2011 decision regarding subsection (3), to which it takes no exception, in order to seek judicial review of the ALC's May 24, 2011 determination regarding subsections (2) and (4), which were finally determined by the ALC and were not at issue upon remand to the agency. We agree, although the final decision concerning subsection (3) is inextricably linked to the issues raised in Nucor's brief.

While Nucor's decision not to challenge the Panel's adverse finding as to subsection (3) does not foreclose an appeal from the final judgment, the unappealed finding that the laboratory Nucor selected was not properly certified under subsection (3) impacts, under these particular circumstances, appellate review of the ALC's final judgment respecting subsections (2) and (4) of section 41-35-120. This is so because the central argument of Nucor on appeal focuses on the purported error of the ALC in relying on a test administered by a laboratory other than the one utilized by the employer. Nucor's assignment of error is that it was improper to rely on "an off-site test not performed by the employer." Nucor's position may be correct where the employer-retained laboratory is properly certified under subsection (3) and the other requirements of section 41-35-120 are met. Moreover, we agree with Nucor that an employer may elect to discharge an employee as a result of a positive drug test administered by a non-certified laboratory. But our agreement with Nucor in this regard is not dispositive of this appeal.

The narrow question before us as framed by Nucor is whether, in the context of determining Legette's eligibility for benefits in this case, it was permissible to consider evidence other than the positive drug test results from the non-certified laboratory retained by Nucor, including the drug testing performed off-site at Legette's request by another laboratory. We find it was permissible to consider the additional evidence. Nucor makes the argument that a finding under subsection (3) "does not mean . . . an employer cannot utilize one or more sections of the same statute, which would otherwise be just as applicable to reach the same result." We do not disagree with Nucor in the abstract. In this case, however, Nucor's reliance on several statutory grounds to justify the nonpayment of unemployment benefits

arises from one fact—the positive drug test results. That renders Nucor's failure to utilize a certified laboratory a relevant consideration under the entirety of section 41-35-120. Consequently, Nucor's argument that the ALC could not consider evidence beyond the positive drug test results from Nucor's retained non-certified laboratory is rejected.[2]

In sum, we conclude there is evidence to support the ALC's finding that the positive results from Legette's on-site drug tests did not bar her from receiving unemployment benefits under subsections (2) and (4) of section 41-35-120. Although we agree the results of the on-site drug tests support Nucor's challenge to Legette's eligibility for unemployment benefits, we may not substitute our view of the evidence for that of the fact-finder. Under the deferential substantial evidence standard of review, we are constrained to affirm the ALC's factual findings when supported by some evidence in the record. *See Engaging & Guarding Laurens Cnty.'s Env't (EAGLE) v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 334, 342, 755 S.E.2d 444, 448 (2014) ("In determining whether the ALC's decision was supported by substantial evidence, this court need only find that, upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached." (citing *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010))); *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010) ("In applying a substantial evidence test, an appellate court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact . . . ." (citations omitted)). The contrary evidence, including the off-site drug test results and otherwise, provides sufficient evidence to survive the substantial evidence standard of review.

III.

We find the ALC's May 24, 2011 order was final and appealable once the Panel's December 9, 2011 decision became final, and we affirm the findings of the ALC as to subsections (2) and (4) of section 41-35-120 because they are supported by substantial evidence in the record.

[2] We agree with the views expressed in Chief Justice Toal's concurring opinion.

AFFIRMED.

HEARN, J. concurs. PLEICONES and BEATTY, JJ., concurring in result only. TOAL, C.J., concurring in a separate opinion.

CHIEF JUSTICE TOAL: While I concur with the result reached by the majority based on the particular facts of this case, I write separately to express my misgivings regarding the Panel's use of such a strict reading of section 41-35-120. Legette tested positive for marijuana twice, as demonstrated through drug tests administered by a certified laboratory. While the laboratory was not one of the three listed in the subsection (3)(B) of the statute, the Tribunal determined that the laboratory's certification was comparable to that of the three listed in the statute. Further, one of the three laboratories listed in the statute (the NIDA) no longer exists. As such, not only do I urge the General Assembly to consider amending the statute to reflect this change, but I also find that Nucor's drug tests on Legette served as a reliable indicator of her illegal drug usage, which is clearly a proper ground for termination. Additionally, a for-cause termination for illegal drug use would completely justify a denial of unemployment benefits.

Nonetheless, the Panel decided not to accept evidence of the positive drug tests because the laboratory that performed the tests was not one of the three listed in the statute. I do not believe this reading is faithful to the legislative intent of the statute, which is to have the drug tests performed by a reliable, outside laboratory.

However, Nucor did not properly place the laboratory certification issue before this Court. It did not seek a ruling from the ALC on this issue. While subsections (2) and (4) received a final ruling from the ALC and are thus appealable, the ruling on subsection (3) regarding the validity of the laboratory's certification was not appealed to the ALC. Thus, the ALC did not rule upon this issue, and the Panel's ruling that the certification was inadequate is the law of the case. As a result, this issue is not appealable here.

Given the procedural posture of this case, I believe the majority reached the correct result; however, I also believe that, had Nucor properly appealed the laboratory's certification, Legette would not be entitled to unemployment benefits given her multiple positive drug tests. Therefore, I concur in the result reached by the majority.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jomar Antavis Robinson, Petitioner.

Appellate Case No. 2012-212042

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27463
Heard June 19, 2014 – Filed November 12, 2014

AFFIRMED AS MODIFIED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Salley W. Elliott, both of Columbia, and Solicitor Kevin Scott Brackett, of York, for Respondent.

CHIEF JUSTICE TOAL: Jomar Robinson (Petitioner) appeals the court of appeals' decision affirming his convictions for possession of crack cocaine with intent to distribute (PWID), PWID within one-half mile of a public park, unlawful carrying of a pistol, possession of marijuana, and resisting arrest. *See State v. Robinson*, 396 S.C. 577, 722 S.E.2d 820 (Ct. App. 2012). We affirm as modified.

FACTS/PROCEDURAL BACKGROUND

On Thursday, March 20, 2008, the York Police Department received several anonymous complaints that people were selling drugs and carrying weapons outside of the Hall Street Apartments in York, South Carolina. Starting at 10:00 p.m., Sergeant Rayford Ervin, a police officer working with the York County Drug Enforcement Unit, stood in a wooded area across the street from the apartment complex and used a pair of binoculars to conduct covert surveillance.

Over the next half hour, five cars stopped in front of Apartment 122, where five men stood on the porch of that unit. Each time a car stopped, the same man wearing a black jacket and blue jeans walked from the porch to the car, spoke briefly with the car's occupants, conducted a "hand to hand transaction," and then rejoined the other four men on the porch. As a veteran narcotics officer, Ervin found "that type of activity [] consistent with drug sales," particularly because Thursdays tend to "have more drug dealing activity going on." He therefore called for backup.

At 10:30 p.m., Lieutenant James Ligon and Officer Brian Schettler parked in front of Apartment 122 with the illuminated headlights pointed towards the porch. Ligon and Schettler identified themselves as police officers and walked onto the porch of Apartment 122. At that point, the five men standing on the porch were standing in two groups, with two men wearing black jackets and jeans—Laquaris Patton and Petitioner—on the left side of the porch, and the other three men (none of whom were wearing jackets) on the right side.[1] Because of Ervin's description of the potential drug dealer's clothing, the officers were primarily interested in Patton and Petitioner. Ligon asked both men for identification, which they readily provided.

[1] The other three men's names were Odarius Williams, Jerome Neely, and Travis Walton. The Record is unclear which man rented Apartment 122, although it is clear that Petitioner did not rent the apartment.

While Ligon inspected the two drivers' licenses, both officers began to smell a strong odor of green marijuana emanating from Petitioner's side of the porch. Further, Ligon noticed the butt of a gun protruding from the pocket of Petitioner's jacket. As a result, Ligon informed Patton and Petitioner that the officers were going to conduct a *Terry*[2] frisk for drugs and weapons.

At that point, Petitioner began to back away from the officers, and, in fear for his safety, Ligon lunged for and seized the gun, immediately before Petitioner also reached for it. A struggle ensued, during which Petitioner's jacket fell to the ground. Petitioner fled the scene, abandoning his jacket. Ligon pursued Petitioner, and after another brief scuffle, subdued and arrested Petitioner. After Ligon brought Petitioner back to Apartment 122, Schettler searched Petitioner's discarded jacket and found a semiautomatic pistol, a bag containing 3.2 grams of marijuana, a bag containing 0.84 grams of loose crack cocaine rocks, and a bag containing 2.97 grams of crack cocaine rocks packaged in eleven individually wrapped bags.

Prior to his trial, Petitioner made a motion to suppress the gun and drugs, claiming that the police conducted a warrantless search and seizure of him on the curtilage of Apartment 122, and that the gun and drugs were obtained after the officers illegally entered on the property. The trial court denied the motion to suppress, finding that Petitioner did not have a reasonable expectation of privacy on the porch of Apartment 122, and that the officers, possessing a reasonable suspicion to investigate, entered the property merely to talk to the men on the porch and request their identifications.

At trial, after Ligon testified on behalf of the State, but before the State had formally introduced the gun or drugs into evidence, defense counsel introduced the bag of marijuana during cross-examination of Ligon in an attempt to discredit the officer.[3] Later in the trial, Petitioner objected to the State introducing the gun and the bags of crack cocaine into evidence.

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[2] *Terry v. Ohio*, 392 U.S. 1 (1968).

[3] Petitioner sought to prove that Ligon lied about the strong odor of green marijuana on the night of his arrest, and questioned Ligon regarding whether he could smell the bagged marijuana from certain distances.

Ultimately, the jury convicted Petitioner of PWID, PWID within one-half mile of a public park, unlawful carrying of a pistol, possession of marijuana, and resisting arrest. The trial court sentenced Petitioner to life without the possibility of parole. *See* S.C. Code Ann. § 17-25-45 (2014).

Petitioner appealed, arguing that the trial court erred in refusing to suppress the gun and drugs. The court of appeals affirmed the trial court's decision. *See Robinson*, 396 S.C. at 577, 722 S.E.2d at 820. Specifically, the court of appeals summarily dismissed Petitioner's contention that the trial court should have suppressed the marijuana, finding that because Petitioner introduced the marijuana during his cross-examination of Ligon, he waived his objection to the marijuana. *Id.* at 583, 722 S.E.2d at 823. Further, the court of appeals found that (1) Petitioner was not a resident or overnight guest of Apartment 122, and thus did not have a reasonable expectation of privacy on the porch of the apartment; and (2) the police had reasonable suspicion to enter the porch without a warrant and conduct a *Terry* frisk. *Id.* at 583–86, 722 S.E.2d at 823–24.[4]

This appeal followed.

ISSUE

Whether Petitioner established that his Fourth Amendment rights were violated by the officers' entry onto the porch of Apartment 122?

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only, and are therefore bound by the trial court's factual findings unless clearly erroneous. *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010); *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). Because the admission of evidence is within the sound discretion of the trial court, appellate courts should not reverse the decision of the trial court absent an abuse of discretion. *State v. Wright*, 391

[4] Petitioner also contended that the trial court erred in qualifying one of the State's witnesses as an expert. The court of appeals affirmed the trial court's decision to qualify the witness as an expert, *see Robinson*, 396 S.C. at 586–88, 722 S.E.2d at 825–26, and Petitioner does not challenge that ruling here.

S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (defining an abuse of discretion as a decision "'based on an error of law, or, when grounded in factual conclusions, [a decision] without evidentiary support'" (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000))).

ANALYSIS

The Fourth Amendment to the United States Constitution protects the people's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; *cf.* S.C. Const. art. I, § 10. At its core, the Fourth Amendment "stands [for] the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). Accordingly, warrantless searches and seizures inside a man's home are presumptively unreasonable absent a recognized exception to the warrant requirement. *United States v. Karo*, 468 U.S. 705, 714–15 (1984); *Wright*, 391 S.C. at 442, 706 S.E.2d at 327.[5] Likewise, the Fourth Amendment extends the same protection to a home's curtilage, including a porch. *Florida v. Jardines*, 133 S. Ct. 1409, 1414–15 (characterizing the front porch as a "classic exemplar" of the curtilage); *accord State v. Herring*, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009).

However, "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 352 (1967). For this reason, mere visual observations from public thoroughfares do not constitute a search, *United States v. Jones*, 132 S. Ct. 945, 953 (2012), and police officers need not "shield their eyes" when passing by a home, *California v. Ciraolo*, 476 U.S. 207, 213 (1986). Rather, the Fourth Amendment is not triggered unless a person has an actual and reasonable expectation of privacy, *Katz*, 389 U.S. at 361 (Harlan, J., concurring), or unless the government commits a common-law trespass for the purpose of obtaining information, *Jones*, 132 S. Ct. at 949.

[5] Even searches conducted under facts unquestionably showing probable cause are unconstitutional absent a warrant, "for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police.'" *Katz v. United States*, 389 U.S. 347, 357 (1967) (alteration in original) (quoting *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963)).

Moreover, "'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.'" *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)); *accord State v. Hiott*, 276 S.C. 72, 78, 276 S.E.2d 163, 166 (1981). Thus, while the Fourth Amendment protects people, and not places, "the extent to which the Fourth Amendment protects people may depend upon where those people are." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas*, 439 U.S. at 134; *Alderman*, 394 U.S. at 171–72.

This is not to say that a person cannot have a "legally sufficient interest" in a place other than his own home. *Rakas*, 439 U.S. at 142–43. Rather, to claim the protection of the Fourth Amendment, a defendant must demonstrate that he had an actual and reasonable expectation of privacy in the place searched. *Carter*, 525 U.S. at 88 (quoting *Rakas*, 439 U.S. at 143–44 & n.12); *State v. McKnight*, 291 S.C. 110, 115, 352 S.E.2d 471, 473 (1987); *see also Rakas*, 439 U.S. at 136–39 (rejecting the "target theory," in which anyone who was the target of an illegal search has an automatic right to challenge the search, regardless of where the search occurred).

"The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure" by demonstrating he had an expectation of privacy in the area illegally searched. *Rakas*, 439 U.S. at 130 n.1; *accord Rawlings v. Kentucky*, 448 U.S. 98, 104–05 (1980); *State v. Crane*, 296 S.C. 336, 340–41, 372 S.E.2d 587, 589 (1988); *see also In re Bazen*, 275 S.C. 436, 437–38, 272 S.E.2d 178, 178 (1980) ("If the officer was not to approach [an open garage where a disturbance was occurring] . . . , appellant had ample opportunity to in some manner demonstrate an expectation of privacy in the garage. Instead, he did nothing." (citing *State v. Easterling*, 257 S.C. 239, 185 S.E.2d 366 (1971)). In determining whether the criminal defendant met his burden, courts may consider factors such as:

a. whether the defendant owned the home or had property rights to it;[6]

[6] *United States v. Salvucci*, 448 U.S. 83, 91 (1980).

b. whether he was an overnight guest at the home;[7]

c. whether he kept a change of clothes at the home;[8]

d. whether he had a key to the home;[9]

e. whether he had dominion and control over the home and could exclude others from the home;[10]

f. how long he had known the owner of the home;[11]

g. how long he had been at the home;[12]

h. whether he attempted to keep his activities in the home private;[13]

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[7] *Carter*, 525 U.S. at 90; *Minnesota v. Olson*, 495 U.S. 91, 93, 96–97 & n.6 (1990); *State v. Missouri*, 361 S.C. 107, 110, 115, 603 S.E.2d 594, 595, 597 (2004); *State v. Flowers*, 360 S.C. 1, 6, 598 S.E.2d 725, 728 (Ct. App. 2004).

[8] *Olson*, 495 U.S. at 97 n.6; *Missouri*, 361 S.C. at 110, 115, 603 S.E.2d at 595, 597; *Flowers*, 360 S.C. at 6, 598 S.E.2d at 728.

[9] *Rakas*, 439 U.S. at 149 (discussing *Jones v. United States*, 362 U.S. 257 (1960), *overruled on other grounds by Salvucci*, 448 U.S. at 85); *Missouri*, 361 S.C. at 110, 115, 603 S.E.2d at 595, 597.

[10] *Rawlings*, 448 U.S. at 105; *Rakas*, 439 U.S. at 149 (discussing *Jones*, 362 U.S. at 257); *Flowers*, 360 S.C. at 6, 598 S.E.2d at 728.

[11] *Carter*, 525 U.S. at 91; *Rawlings*, 448 U.S. at 105; *Missouri*, 361 S.C. at 110, 115, 603 S.E.2d at 595, 597.

[12] *Carter*, 525 U.S. at 90; *Missouri*, 361 S.C. at 110, 115, 603 S.E.2d at 595, 597.

[13] *Olson*, 495 U.S. at 99; *Rawlings*, 448 U.S. at 105; *Rakas*, 439 U.S. at 149 (discussing *Katz*, 389 U.S. at 352); *Missouri*, 361 S.C. at 110, 115, 603 S.E.2d at 595, 597; *Bazen*, 275 S.C. at 437–38, 272 S.E.2d at 178.

i. whether he engaged in typical domestic activities at the home, or whether he treated it as a commercial establishment;[14]

j. whether he alleged a proprietary or possessory interest in the premises and property seized (even if only at a motion to suppress, where that admission cannot be used against him to determine his guilt)[15]; and

k. whether he paid rent at the home.[16]

As an initial matter, the parties dispute who had the burden of proving the alleged illegality of the police officers' actions here. Each party has the burden to prove separate things during the motion to suppress. The State bears the burden to demonstrate that it was entitled to conduct the search or seizure under an exception to the Fourth Amendment's warrant requirement. *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013). The State also bears the burden to show that the warrantless entry was limited in scope and duration in accordance with the exigent circumstances which required its presence. *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion).

However, the criminal defendant retains the burden to establish that he is asserting his own Fourth Amendment rights, rather than vicariously asserting the rights of others; therefore, the defendant bears the burden to demonstrate that he had an actual and reasonable expectation of privacy in the place illegally searched. *Rakas*, 439 U.S. at 130 n.1. Here, assuming *arguendo* that the police officers committed a Fourth Amendment violation when they entered the porch of

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[14] *Carter*, 525 U.S. at 90–91; *Missouri*, 361 S.C. at 110, 115, 603 S.E.2d at 595, 597.

[15] *Rawlings*, 448 U.S. at 105; *Rakas*, 439 U.S. at 148; *Crane*, 296 S.C. at 340–41, 372 S.E.2d at 589; *Neeley*, 271 S.C. at 43, 244 S.E.2d at 528 (quoting *Brown v. United States*, 411 U.S. 223, 229 (1973)); *but see Salvucci*, 448 U.S. at 92 ("We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched.").

[16] *Missouri*, 361 S.C. at 110, 115, 603 S.E.2d at 595, 597; *Flowers*, 360 S.C. at 6, 598 S.E.2d at 728.

Apartment 122 without a warrant, the burden rests with Petitioner to establish that he had a reasonable expectation of privacy in the porch of Apartment 122.

Petitioner failed to carry his burden, as he produced no testimony whatsoever that would implicate any of the factors set forth, *supra*, demonstrating that he had an expectation of privacy in the porch of Apartment 122. At no point did Petitioner claim to be the renter, an overnight guest, or have any other connection to Apartment 122. Thus, we find that Petitioner was "merely present with the consent of the householder," and as such, did not have a reasonable expectation of privacy on the porch of Apartment 122. *See Carter*, 525 U.S. at 90; *accord Robinson*, 396 S.C. at 584, 722 S.E.2d at 823–24 ("Furthermore, there is no evidence [Petitioner] was an overnight guest or otherwise had a connection to the premises or apartment lessee to give him a reasonable expectation of privacy. [Petitioner] failed to establish that he had an expectation of not being discovered on the porch, nor did he ask the police to leave.").

Petitioner contends that our consideration of his expectation of privacy in the porch of Apartment 122 is both unnecessary and inappropriate. Citing *United States v. Jones*[17] and *Florida v. Jardines*,[18] Petitioner argues that any time the police commit an unauthorized trespass onto private property, the trespass is per se a violation of the Fourth Amendment, which anyone can assert; therefore, there is no need to engage in an expectation of privacy analysis. We disagree.

In both *Jones* and *Jardines*, the Supreme Court found that the police officers who conducted warrantless searches of the defendants' property committed Fourth Amendment violations, solely because of the officers' unauthorized entry onto and use of the defendants' property. In so finding, the Supreme Court focused primarily on a common law trespass test, involving licenses to enter and use private property. *See, e.g.*, *Jardines*, 133 S. Ct. at 1415–17.

Importantly, in both cases, the Supreme Court noted that the defendants were the owners of the property searched, or otherwise definitively had the right to assert any alleged Fourth Amendment violations.[19] Thus, because the

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[17] 132 S. Ct. 945 (2012).

[18] 133 S. Ct. 1409 (2013).

[19] *See Jardines*, 133 S. Ct. at 1413 (stating that the criminal defendant was the

Government's trespasses violated the *Jones* and *Jardines* defendants' *own* Fourth Amendment rights, the Supreme Court was not required to address the interplay between the trespass test and the defendants' reasonable expectations of privacy. *See, e.g.*, *Jones*, 132 S. Ct. at 950; *cf. Rakas*, 439 U.S. at 133–34 ("'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.'" (quoting *Alderman*, 394 U.S. at 174)).

As an example of this interplay, if the police commit a warrantless trespass on a homeowner's land, and search and seize the homeowner or his property, the homeowner clearly could assert a Fourth Amendment violation because he would be asserting *his own* right to be free of governmental searches and seizures on his own property. The homeowner would satisfy both *Jones* and *Katz*, because not only could he demonstrate an unauthorized trespass, but also that he had a reasonable expectation of privacy in his home.

In contrast, here we are presented the situation in which a casual guest wishes to assert an alleged trespass on *another's* property. Petitioner maintains that the officers' entry onto the curtilage of Apartment 122 satisfies *Jones*'s trespass test, and that consideration of Petitioner's reasonable expectation of privacy under *Katz* is thus irrelevant. We cannot accept such a proposition, as it ignores the factual dissimilarities between his own case and the defendants in *Jones* and *Jardines*—particularly, the lack of any substantial connection to the property allegedly trespassed upon.

Today we hold that, even if the ultimate Fourth Amendment violation a criminal defendant seeks to vindicate is a trespass under *Jones*, the defendant must demonstrate that he had an actual and reasonable expectation of privacy in the area upon which the police illegally trespassed. *See Rakas*, 439 U.S. at 130 n.1 ("The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure."). In doing so, we merely reaffirm the long-standing notion that a defendant must

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homeowner); *Jones*, 132 S. Ct. at 949 n.2 (stating that the criminal defendant's wife owned the vehicle searched, that the criminal defendant was the exclusive driver of the vehicle, that the Government did not challenge the court of appeals' holding that "the vehicle registration did not affect his ability to make a Fourth Amendment objection," and that the Supreme Court therefore refused to consider whether the defendant had a reasonable expectation of privacy in the vehicle).

establish that his own Fourth Amendment rights were violated by the illegal entry, rather than vicariously asserting the Fourth Amendment rights of the property owner. In other words, establishing that an illegal trespass occurred is not enough to satisfy the Fourth Amendment. *Cf. Jones*, 132 S. Ct. at 960 (quoting *Karo*, 468 U.S. at 713 ("[A]n actual trespass is neither necessary nor sufficient to establish a constitutional violation.")); *Rakas*, 439 U.S. at 136–39 (finding "targets" of illegal searches do not have an automatic right to challenge the search, regardless of where the search occurred).

Accordingly, because Petitioner made no showing that he had a reasonable expectation of privacy in the porch of Apartment 122, he failed to establish that his Fourth Amendment rights were violated. We find the court of appeals did not err in affirming the trial court's refusal to suppress the illegal drugs and gun.[20]

CONCLUSION

For the foregoing reasons, the court of appeals' opinion is

AFFIRMED AS MODIFIED.

HEARN, J. concurs. PLEICONES, BEATTY and KITTREDGE, JJ., concurring in result only.

[20] Because Petitioner did not establish that he had a reasonable expectation of privacy in the place searched, we decline to address whether the officers' conduct was in fact illegal, as well as whether Petitioner waived his right to object to the admission of the marijuana. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts need not address remaining issues when determination of prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Karl Lane, Respondent.

Appellate Case No. 2013-002606

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Pickens County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 27464
Submitted August 20, 2014 – Filed November 12, 2014

REVERSED

Attorney General Alan M. Wilson and Assistant Attorney General J. Benjamin Aplin, both of Columbia, for Petitioner.

Appellate Defender Carmen V. Ganjehsani, of Columbia, for Respondent.

PER CURIAM: The State seeks a writ of certiorari to review the court of appeals' decision in *State v. Lane*, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013). We grant the petition, dispense with further briefing, reverse the court of appeals' decision, and reinstate Respondent's conviction and sentence.

Respondent was convicted of first-degree burglary and sentenced to 215 months' imprisonment in connection with the theft of several firearms from the victim's home. The court of appeals reversed the trial court's refusal to direct a verdict of acquittal for Respondent, finding that the State did not present substantial circumstantial evidence to prove that Respondent committed the burglary. We disagree, for in viewing the evidence in the light most favorable to the State, which we are constrained to do, the State presented substantial circumstantial evidence of Respondent's guilt.

On the afternoon of the burglary, the victim's neighbor observed a red Mitsubishi Gallant with gray primer paint on the front fender and a paper license plate parked in the victim's driveway. The neighbor observed two people in the vehicle, one of whom walked back and forth from the vehicle to the victim's front door. Later that evening, following the burglary, the victim found a piece of paper with a unique username and password printed upon it lying next to his driveway. Officers determined that the piece of paper was issued to Respondent by the local unemployment office. Suspecting Respondent's involvement in the burglary, an investigator went to interview Respondent at his girlfriend's parents' home. When the investigator arrived, he observed a red Mitsubishi Gallant with gray primer paint on the front fender and a paper license plate in the driveway. Respondent was initially evasive, asking his girlfriend's mother to lie to the investigator and state that he was not home. Eventually, however, Respondent spoke with the investigator and acknowledged driving the Mitsubishi Gallant on the day of the burglary and receiving the piece of paper from the unemployment agency.

We find that the aforementioned evidence was sufficient to withstand Respondent's motion for a directed verdict. *See State v. Weston*, 367 S.C. 279, 292–93, 625 S.E.2d 641, 648 (2006) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." (citations omitted)).

Accordingly, we reverse the decision of the court of appeals and reinstate Respondent's conviction and sentence.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tyrone Aiken, Matthew Clark, Eric Graham, Bradford M. Haigler, Angelo Ham, J'Corey S. Hull-Kilgore, Damian Inman, Rogert Legette, Terriel Mack, Jennifer L. McSharry, Wallace Priester, Davon Reed, Dondre M. Scott, Edgar L. Thomas, James Van, et al., Petitioners,

v.

William R. Byars, Jr., Director, South Carolina Department of Corrections, and Alan Wilson, Attorney General of South Carolina, Respondents.

Appellate Case No. 2012-213286

ORIGINAL JURISDICTION

Opinion No. 27465
Heard January 8, 2014 – Filed November 12, 2014

RELIEF GRANTED

John H. Blume, Sheri L. Johnson, Keir M. Weyble, of Cornell Law School, of Ithica, NY; Elizabeth Franklin-Best, of Blume, Norris, & Franklin-Best, LLC, of Columbia; Joshua A. Bailey, of Finklea Law Firm, of Florence; Charles Grose, Jr., of Grose Law Firm, of Greenwood; Diana L. Holt, of Diana Holt, LLC, of Columbia; and Chief Appellate Defender Robert M. Dudek, of Columbia, all for Petitioners.

Attorney General Alan M. Wilson, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Benjamin Aplin, all of Columbia, for Respondents.

Christopher D. Scalzo, of Greenville, for Amicus Curiae, S.C. Public Defender Association.

Joseph M. McCulloch, Jr., of Law Offices of Joseph M. McCulloch, Jr., of Columbia, and Abby F. Rudzin and Abby C. Johnston, both of O'Melveny & Myers, LLP, of New York, NY, for Amicus Curiae, The South Carolina State Conference of the NAACP.

John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for Amicus Curiae, South Carolina Psychological Association.

JUSTICE HEARN: In this case brought in our original jurisdiction, fifteen inmates who were sentenced to life without parole as juveniles petition this Court for resentencing in light of the United States Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012).[1] We hold their sentences violate the Eighth Amendment under *Miller* and the petitioners and those similarly situated are entitled to resentencing.

FACTUAL/PROCEDURAL BACKGROUND

The petitioners were all convicted for homicides committed while they were juveniles. Some pled guilty and others were convicted after a jury trial. Some were found directly responsible for the relevant homicide while others were convicted under a theory of accomplice liability. All were sentenced to life without parole according to existing sentencing procedures, which made no

[1] In South Carolina, pursuant to Section 63-19-20 of the South Carolina Code (2010), a juvenile is a person less than seventeen years of age. However, *Miller* extends to defendants under eighteen years of age and therefore for the purposes of this opinion we consider juveniles to be individuals under eighteen.

distinction between defendants whose crimes were committed as an adult and those whose crimes were committed as a juvenile. In most of the sentencing hearings—but not all—defense counsel mentioned the age of the defendant at the time of the crime, and in some cases, there was a brief discussion of the defendant's life prior to commission of the crime. Of the fifteen petitioners, thirteen of their cases have become final.[2]

The petitioners filed a petition for a writ of certiorari in our original jurisdiction, naming the Director of the South Carolina Department of Corrections, William R. Byars, Jr., and Attorney General Alan Wilson as the respondents. We granted certiorari to address the effect of *Miller* on the petitioners and others similarly situated who were sentenced to life without parole as juveniles.

ISSUES PRESENTED

I. Does *Miller* apply retroactively?

II. Does *Miller* apply to juveniles who received a nonmandatory sentence of life without parole?

LAW/ANALYSIS

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.[3] Although the earliest Eighth Amendment cases focused on the barbarous nature of a punishment, the jurisprudence evolved to encompass challenges to the proportionality of the sentence to the offense. *Gregg v. Georgia*, 428 U.S. 153, 170–72 (1976). When considering whether a sentence is proportional, the Supreme Court has

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[2] Our holding is moot with respect to Damian Inman, whose convictions and sentences were reversed on other grounds in *State v. Inman*, 409 S.C. 19, 760 S.E.2d 105 (2014), and Dondre Scott, whose convictions and sentences were reversed on other grounds in *State v. Scott*, 406 S.C. 108, 749 S.E.2d 160 (Ct. App. 2013).

[3] The Eighth Amendment applies against the states by virtue of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

acknowledged that the scope of the Eighth Amendment is not static, but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

In *Miller*, the United States Supreme Court confronted a challenge to the mandatory imposition of life without parole sentences on juveniles as violative of the Eighth Amendment's prohibition of cruel and unusual punishments. 132 S. Ct. at 2461. In considering this question, the Supreme Court analyzed two strands of precedent impacting the proportionality compelled by the Eighth Amendment. The first line of cases dealt with categorical bans on certain sentences based on the inability to reconcile the class of offenders and the severity of the penalty. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court invalidated the death penalty for all juvenile offenders. Thereafter, in *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders. The *Miller* Court noted that *Graham* equated life without parole sentences for juveniles to the death penalty, invoking a second line of cases that require sentencing authorities to consider the individual characteristics of a defendant and the details of his offense prior to imposing a sentence of death. 132 S. Ct. at 2463–64; *see also Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (holding that "in all but the rarest kind of capital case" the sentencer must "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (requiring "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death"). The Court therefore held that "the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violates the Eighth Amendment." 132 S. Ct. at 2464. A sentencer must be allowed to consider that "youth is more than a chronological fact," and carries with it "immaturity, irresponsibility, impetuousness[,] and recklessness," factors as transient as youth itself. *Id.* at 2467 (alteration in original). Although a court may still sentence a juvenile to life without parole after an individualized hearing, the Court cautioned that given "children's diminished culpability and heightened capacity for change" the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 2469.

I. RETROACTIVITY

Before considering whether *Miller* applies to juveniles who received a sentence of life without parole under a nonmandatory scheme, we first must resolve the threshold issue of whether *Miller* applies retroactively.

Under our current jurisprudence, the United States Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), governs whether a new rule of criminal procedure is retroactive.[4] *Talley v. State*, 371 S.C. 535, 640 S.E.2d 878 (2007). In *Teague*, the Supreme Court held that a new constitutional rule of criminal procedure should not apply to cases that became final before the new rule is announced. 489 U.S. at 310. However, this general prohibition against the retroactive application of new constitutional rules is subject to two exceptions.[5] First, a new rule may be applied retroactively if the rule is substantive. *Id*. at 311. Second, a new rule may be applied retroactively if it is a "watershed rule" of criminal procedure. *Id*. We need not consider whether *Miller*'s holding constitutes a watershed rule because we find it is substantive and thus meets *Teague*'s first exception.

A rule is substantive if it prohibits the States from criminalizing certain conduct or prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Saffle v. Parks*, 494 U.S. 484, 494 (1990) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304, 321 (2002)). New substantive rules apply retroactively on collateral review because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin*, 542 U.S.

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[4] This Court has not addressed whether it should employ a more expansive analysis for determining retroactivity after *Danforth v. Minnesota*, 552 U.S. 264 (2008), which held that state courts can use a broader test than *Teague*. *Id*. at 282 (holding that *Teague* "does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*"). We find it unnecessary to do so today because *Miller* is clearly retroactive under *Teague*.

[5] The parties do not dispute that *Miller* announced a new rule, only whether an exception applies.

348, 352 (2004) (internal quotation marks omitted). By contrast, a rule that merely regulates the manner in which a defendant is adjudicated guilty is procedural. *Id*.

We conclude *Miller* creates a new, substantive rule and should therefore apply retroactively.[6] The rule plainly excludes a certain class of defendants—juveniles—from specific punishment—life without parole absent individualized considerations of youth.[7] Failing to apply the *Miller* rule retroactively risks subjecting defendants to a legally invalid punishment. Moreover, while not in itself determinative, we find support for our conclusion in the Court's decision to apply the rule announced in *Miller* to the companion case *Jackson v. Hobbs*, 378 S.W.3d 103 (2011). Although *Miller* was on direct appeal, *Jackson* involved a petition for habeas corpus after the affirmance of the defendant's convictions. That case was therefore final and was before the Court on collateral review. As noted by the Iowa Supreme Court, "There would have been no reason for the Court to direct such an outcome if it did not view the *Mille*r rule as applying retroactively to cases on collateral review." *Ragland*, 836 N.W. 2d at 116.

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[6] Our holding is in accord with several other jurisdictions that have addressed this question. *See, e.g.*, *People v. Williams*, 982 N.E.2d 181, 196–97 (Ill. App. Ct. 2012); *State v. Ragland*, 836 N.W. 2d 107, 116 (Iowa 2013); *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 281 (Mass. 2013); *Jones v. State*, 122 So.3d 698, 702 (Miss. 2013); *see also* Erwin Chemerinsky, *Chemerinsky: Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A J. Law News Now (Aug. 8, 2012, 8:30 AM), http://www.abajournal.com/news/article/chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/ ("[*Miller*] says that it is beyond the authority of the criminal law to impose a mandatory sentence of life without parole. It would be terribly unfair to have individuals imprisoned for life without any chance of parole based on the accident of the timing of the trial.").

[7] We fear that the dissent is conflating the retroactivity analysis and the applicability analysis. A particular jurisdiction's statutory framework has no bearing on the threshold determination of whether *Miller* applies retroactively. A new rule announced by the Supreme Court is not amorphous; it is either a substantive rule of law that applies retroactively, or it is not.

II. SCOPE OF *MILLER*'S HOLDING

A. Applicability of *Miller* to the petitioners

Having concluded the rule in *Miller* applies retroactively, we now turn to whether it extends to the petitioners, who were sentenced to life without parole under a nonmandatory statutory scheme.

In analyzing the precedent relevant to the constitutional question before it, the Court in *Miller* noted that *Roper* and *Graham* established that children were constitutionally different from adults for sentencing purposes, a conclusion that was based on common sense as well as science and social science. 132 S. Ct at 2464. "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 2465. Specifically, the Court noted juveniles differ from adults in their general "lack of maturity and [] underdeveloped sense of responsibility," "vulnerab[ility] . . . to negative influences and outside pressures, including family and peers," and still evolving character and personality traits. *Id.* at 2464 (ellipsis in original) (quoting *Roper*, 543 U.S. at 569–70). Important to our determination of the breadth of the *Miller* decision is this statement by the majority: "*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." *Id*. at 2465.

Thus, the *Miller* Court unequivocally held that youth has a constitutional dimension when determining the appropriateness of a lifetime of incarceration with no possibility of parole, and that the mandatory penalty schemes at issue prevented the sentencing authority from considering the differences between adult and juvenile offenders before imposing a sentence of life without parole. Focusing on *Graham*'s treatment of juvenile life sentences as analogous to capital punishment, the majority held that *Woodson* and its progeny required an individualized sentencing proceeding before imposing a sentence of life without parole on a juvenile offender. *Id.* at 2467.

We recognize that in holding the Eighth Amendment proscribes a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders, the Court did not expressly extend its ruling to states such as South Carolina whose sentencing scheme *permits* a life without parole sentence to be imposed on a juvenile offender but does not *mandate* it. Indeed, the Court noted

that because its holding was sufficient to decide the cases before it, consideration of the defendants' alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles was unnecessary. *Id.* at 2469. However, we must give effect to the proportionality rationale integral to *Miller*'s holding—youth has constitutional significance. As such, it must be afforded adequate weight in sentencing.

Thus, we profoundly disagree with the position advanced by the respondents and the dissent that the import of the *Miller* decision has no application in South Carolina. *Miller* is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution. Contrary to the dissent's interpretation, *Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered.

As evidenced by the record, although some of the hearings touch on the issues of youth, none of them approach the sort of hearing envisioned by *Miller* where the factors of youth are carefully and thoughtfully considered.[8] Many of the attorneys mention age as nothing more than a chronological fact in a vague plea for mercy. *Miller* holds the Constitution requires more. As the majority states

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[8] The dissent's discussion of the individual sentencing hearings—in particular its recitation of Angelo Ham's—does not dissuade us of the accuracy of this statement. Instead it highlights the distinction between its reading of *Miller* and ours—we recognize and give credence to the decision's command that courts afford youth and its attendant characteristics constitutional meaning. The dissent would simply continue to treat the characteristics of youth as any other fact.

We are likewise unfazed by the dissent's criticism that we have failed to pinpoint an abuse of discretion; that admonition appears to arise from a fundamental misunderstanding of our holding. We have determined that the sentencing hearings in these cases suffer from a constitutional defect—the failure to examine the youth of the offender through the lens mandated by *Miller*. We decline to denominate the error an abuse of discretion because the sentencing courts in these instances did not have the benefit of *Miller* to shape their inquiries. Those courts will have the opportunity on resentencing to exercise their discretion within the proper framework as outlined by the United States Supreme Court.

succinctly, "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* We believe this statement deserves universal application. The absence of this level of inquiry into the characteristics of youth produced a facially unconstitutional sentence for these petitioners. In our view, whether their sentence is mandatory or permissible, any juvenile offender who receives a sentence of life without the possibility of parole is entitled to the same constitutional protections afforded by the Eighth Amendment's guarantee against cruel and unusual punishment. The petitioners and those similarly situated are accordingly entitled to resentencing to allow the inmates to present evidence specific to their attributes of youth and allow the judge to consider such evidence in the light of its constitutional weight.

B. Appropriate Procedure

We turn finally to the scope of the resentencing hearings that we order today. *Miller* requires the sentencing authority "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. at 2469. Consequently, *Miller* establishes a specific framework, articulating that the factors a sentencing court consider at a hearing must include: (1) the chronological age of the offender and the hallmark features of youth, including "immaturity, impetuosity, and failure to appreciate the risks and consequence"; (2) the "family and home environment" that surrounded the offender; (3) the circumstances of the homicide offense, including the extent of the offender's participation in the conduct and how familial and peer pressures may have affected him; (4) the "incompetencies associated with youth—for example, [the offender's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the offender's] incapacity to assist his own attorneys"; and (5) the "possibility of rehabilitation." 132 S. Ct. at 2468.

While we do not go so far as some commentators who suggest that the sentencing of a juvenile offender subject to a life without parole sentence should mirror the penalty phase of a capital case,[9] we are mindful that the *Miller* Court specifically linked the individualized sentencing requirements of capital sentencing to juvenile life without parole sentences. 132 S. Ct. at 2463, 2467–68. Thus, the

[9] *See* Chemerinsky, *supra* note 6.

type of mitigating evidence permitted in death penalty sentencing hearings unquestionably has relevance to juvenile life without parole sentencing hearings, in addition to the factors illustrated above.

Without question, the judge may still determine that life without parole is the appropriate sentence in some of these cases in light of other aggravating circumstances. Our General Assembly has made the decision that juvenile offenders may be sentenced to life without parole, and we honor that decision. However, *Miller* requires that before a life without parole sentence is imposed upon a juvenile offender, he must receive an individualized hearing where the mitigating hallmark features of youth are fully explored.[10]

CONCLUSION

We hold the principles enunciated in *Miller v. Alabama* apply retroactively to these petitioners, to those similarly situated, and prospectively to all juvenile offenders who may be subject to a sentence of life imprisonment without the possibility of parole. Accordingly, any individual affected by our holding may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced.

BEATTY, J., concurs. PLEICONES, J., concurring in a separate opinion. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

[10] We decline the dissent's invitation to set out a specific process for trial court judges to follow when considering whether to sentence a juvenile to life without parole. The United States Supreme Court did not establish a definite resentencing procedure and we likewise see no reason to do so. We have the utmost confidence in our trial judges to weigh the factors discussed herein and to sentence juveniles in light of this new constitutional jurisprudence.

JUSTICE PLEICONES: I agree with the majority that petitioners and those similarly situated should be allowed to seek resentencing in a proceeding that complies with the standards announced in *Miller v. Alabama*, 132 S.Ct. 2455 (2012). While I agree with the dissent that *Miller* does not require that we grant relief to juveniles who received discretionary life without the possibility of parole (LWOP) sentences, and that the majority exceeds the scope of current Eighth Amendment jurisprudence in ordering relief under *Miller*, I would reach the same result under S.C. Const. art. I, §15.

For the reasons given above, I concur in the result reached by the majority to allow persons sentenced as juveniles to LWOP to be resentenced upon their timely request.

CHIEF JUSTICE TOAL: I respectfully dissent. I would find the petitioners are not entitled to resentencing pursuant to *Miller v. Alabama*, 132 S. Ct. 2455 (2012), because the *Miller* decision is retroactive only with respect to juveniles sentenced to mandatory life without parole (LWOP), and because South Carolina utilizes a non-mandatory sentencing scheme.[11]

Pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), a court decision implicating a constitutional right applies retroactively when the holding creates a new substantive rule or is a watershed rule of criminal procedure. *Talley v. State*, 371 S.C. 535, 541–44, 640 S.E.2d 878, 880–82 (2007) (citing *Teague*, 489 U.S. at 300–01, 305, 311–12). A rule is a new substantive rule if it prohibits a certain category of punishment for a class of defendants because of their status or offense. *Id.* at 543, 640 S.E.2d at 882; *see also Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (stating new substantive rules apply retroactively on collateral review because they "carry a significant risk that a defendant . . . faces a punishment that the law cannot impose on him" (internal quotation marks omitted)).

As the majority acknowledges, *Miller* "plainly excludes a certain class of defendants—juveniles—from specific punishment—[mandatory LWOP]." *See also Miller*, 132 S. Ct. at 1460; *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014). As such, I agree that *Miller* is retroactive with respect to any juvenile sentenced to mandatory LWOP.

However, I depart from the majority with respect to the scope of *Miller*'s retroactive application. *Miller*'s holding explicitly applies only where sentencing courts were "preclude[d] . . . from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," because the courts did not "have the opportunity to consider mitigating circumstances." *Id.* at 2467, 2475. Were South Carolina to employ a mandatory sentencing scheme, such as those at issue in *Miller*, I would not hesitate to retroactively apply the holding to any prisoner collaterally attacking his sentence.

However, South Carolina employs a discretionary sentencing scheme, in which sentencing courts consider all mitigating evidence presented by the criminal

[11] *See* S.C. Code Ann. §§ 16-3-20(A), -85(C) (2003 & Supp. 2010) (permitting a discretionary sentence of LWOP for murder or homicide by child abuse, but also imposing mandatory minimum terms of imprisonment for each crime).

defendant. *See* S.C. Code Ann. §§ 16-3-20(A), -85(C). Thus, South Carolina courts already consider the hallmark features of youth.

To the extent the majority wishes to provide courts with more explicit directions to consider the *Miller* factors in future sentencing hearings, I do not object; however, such future direction does not change the fact that petitioners' sentencing courts were given "*the opportunity* to consider mitigating circumstances." *Miller*, 132 S. Ct. at 2475 (emphasis added); *see also id.* at 2466 ("But the mandatory penalty schemes at issue here *prevent* the sentencer from taking account of these central considerations [regarding youth and impetuosity]. By removing youth from the balance—by subjecting a juvenile to the same [LWOP] sentence applicable to an adult—these laws *prohibit* a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." (emphasis added)).

In my opinion, it is a leap of faith for the majority to extend *Miller*'s holding—*expressly applicable only to mandatory sentencing schemes*—to a discretionary sentencing scheme, and to require strict compliance with a rule that the Supreme Court has not yet set forth. The majority states that it is simply "giv[ing] effect to the proportionality rationale integral to *Miller*'s holding"; however, I find significant the fact that the majority cannot cite a single other jurisdiction with a discretionary sentencing scheme that has decided to apply *Miller* retroactively to discretionary LWOP sentences. Accordingly, I would find *Miller* does not apply retroactively in discretionary sentencing jurisdictions such as South Carolina.

Ironically, the majority and I agree that *Miller*'s holding means that juveniles may not be sentenced to mandatory LWOP because courts must consider each juvenile's individual circumstances; however, the majority's holding does exactly the opposite, ordering resentencing for *all* of the petitioners, *with* ***no individualized consideration*** *of the adequacy of their original sentencing hearing*. Even if I were to agree that *Miller* applies retroactively in South Carolina, we must consider whether the sentencing courts abused their discretion in sentencing each of the petitioners.[12]

[12] In its zeal to reach its desired result, the majority makes no inquiry into whether the sentencing courts abused their discretion. *See State v. Dawson*, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013) ("In criminal cases, the appellate court sits to

Perhaps the best example from the petitioners' sentencing hearings of how the courts exercised discretion and considered the juveniles' individual circumstances is shown through the joint sentencing hearing of Petitioner Angelo Ham (Petitioner Ham) and his juvenile co-defendant, Dennis Hunter (Hunter). The sentencing testimony revealed that Petitioner Ham, Hunter, and Anthony Robinson (Robinson) (collectively, the defendants) jointly planned and executed an armed robbery during which Robinson murdered the victim (Victim), an elderly store manager.[13]

The day before the murder, Robinson shot his live-in girlfriend, and the police issued an arrest warrant for Robinson for assault and battery with intent to kill. Needing money so that he could leave town and avoid arrest, Robinson approached Petitioner Ham and Hunter and asked them to help him plan a robbery. Petitioner Ham maintained that he participated in the planning and execution of the robbery under duress, claiming that Robinson threatened to kill him if he refused to help. However, others testified at the sentencing hearing that Petitioner Ham was the "leader of this pack" because Petitioner Ham was the one who knew Victim prior to the robbery, and because Petitioner Ham was aware of Victim's habit of working late at the store by himself, thus making Victim a more accessible target.

Under the influence of marijuana and cocaine, the defendants drove to Victim's store after the store had closed for the night. Hunter stayed in the car, while Petitioner Ham and Robinson approached the store. Petitioner Ham

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review errors of law only. *A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law*." (emphasis added) (citations omitted)); *see also State v. Cantrell*, 250 S.C. 376, 379, 158 S.E.2d 189, 191 (1967) (stating a judge is given broad discretion during sentencing proceedings and it is presumed that he or she has considered the information presented during the sentencing proceeding before imposing a punishment).

[13] At the time of the crime, Petitioner Ham was fifteen years old, Hunter was seventeen years old, and Robinson was nineteen years old. Neither Hunter nor Robinson is a petitioner here because the court did not sentence Hunter to LWOP, and because Robinson was an adult when he committed the crimes and is thus unaffected by *Miller*'s holding.

convinced Victim to open the door, and he and Robinson rushed past Victim into the store. The defendants were aware that Victim kept a gun at the store, and Robinson therefore immediately shot Victim ten times.[14]

The police arrested the defendants soon after the robbery and murder. Hunter immediately gave a videotaped statement to the police, and strongly and consistently indicated his willingness to testify against both of his co-defendants. Based on Hunter's testimony, the State noticed Robinson with its intent to seek the death penalty against him.[15]

Petitioner Ham and Hunter pled guilty to robbery and murder. In a joint sentencing hearing, the Solicitor and Victim's family recounted Victim's community service and moral characteristics, such as his generosity to his employees and the community as a whole.

In mitigation, Petitioner Ham's and Hunter's attorneys painted a colorful picture of the boys' pasts. First and foremost, the attorneys cited the boys' youth, specifically noting that their youth made them ineligible for the death penalty because they lacked the judgment of an adult and could not reason or make "correct decisions" like an adult could.

Petitioner Ham's attorney stated that prior to being "waived up" to circuit court, a doctor evaluated Petitioner Ham and recommended that he remain in the juvenile system to face these charges, a recommendation which the court ultimately disregarded. The doctor noted that Petitioner Ham had a "borderline" I.Q. score and a third grade reading comprehension level.[16] Notes from Petitioner

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[14] Victim's body exhibited defensive wounds, indicating that he did not die immediately.

[15] Petitioner Ham likewise agreed to give a videotaped statement admitting his guilt in the robbery and murder; however, he was more apprehensive about testifying against Robinson because the two were incarcerated in the same facility, and he was concerned that Robinson would retaliate against him if he chose to testify. Ultimately, Robinson entered a guilty plea in exchange for receiving a LWOP sentence. After Robinson pled guilty, Petitioner Ham stated that he would have testified against Robinson had the matter gone to trial.

[16] The court later spoke to Petitioner Ham and found that, to the extent he suffered

Ham's school file indicated that Petitioner Ham was "easily influenced by others" and succumbed readily to peer pressure. Moreover, the testimony revealed that Petitioner Ham had little to no contact with his father while he was growing up, that he had an older brother who was currently in jail, and that he was "in and out" of the Department of Juvenile Justice throughout his youth. Finally, Petitioner Ham's attorney stated that his stepfather abused him, and that Petitioner Ham witnessed numerous acts of domestic violence between his mother and stepfather.

Hunter's background was similar, revealing that his grandmother and grandfather raised Hunter and his four younger siblings. While living with his grandparents, Hunter performed well in school and avoided trouble. However, when Hunter was fourteen, Hunter's grandfather died, Hunter's performance in school declined sharply, and Hunter began "hanging out with the wrong crowd." Ultimately, Hunter dropped out of school in ninth grade. Although Hunter eventually wished to return to school, the school refused to readmit him because of his numerous behavioral problems. At age fifteen, Hunter began breaking the law, "and it was just downhill at that point." Hunter's grandmother, mother, and sister all remained involved in his life and supported him throughout the court proceedings.

After hearing all of the relevant testimony, the court acknowledged that punishing Petitioner Ham and Hunter would not restore Victim's life or the lives of his family members, who were distraught throughout the proceedings. The court differentiated between Hunter—who remained in the car throughout the robbery and murder and thus had no contact with Victim—and Petitioner Ham, who lured Victim to the door and was an active participant in the crimes. The court likewise noted that Hunter immediately realized the consequences of his actions and took steps to ensure that he and his co-defendants were brought to justice, whereas Petitioner Ham was merely willing to testify had Robinson's case gone to trial.

Finally, the court gave Petitioner Ham and Hunter the opportunity to speak. Hunter chose not to address the court or Victim's family; however, Petitioner Ham took the opportunity to inform the court that he felt his attorney was "ineffective" and that therefore his sentence "shouldn't be carried on [sic] today" because he "d[id]n't want him as [his] counsel [any] more." After resolving the issue, the

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from a limited I.Q., he was nonetheless fully able to rationalize, think, and communicate.

court asked four separate times whether there was any evidence Petitioner Ham would like to call to the court's attention in order to aid the court in determining an appropriate sentence. Rather than expressing remorse or reiterating his attorney's previous statements, Petitioner Ham denied his guilt in the crimes entirely, stating that "just because we was at this store at a particular time . . . doesn't mean that we actually killed anybody, we actually robbed anybody, we even committed a crime." Petitioner Ham further accused Hunter and Robinson of lying in their confessions, and denied that the eyewitnesses' testimony corroborated the defendants' guilt.

The court then stated:

> Mr. Hunter and Mr. Ham, one of the things judges try to look at to see what is the possibility of some type of rehabilitation. What degree of remorse might exist when it comes to making a determination in sentencing.
>
> Mr. Hunter, from your standpoint it appears that there is a terrible crime that has been committed; that there is some recognition of what you have done, your responsibility in it, and your desire to try and have judgment entered in connection with this matter and to have the consequences of your sentence, whatever that sentence might be.
>
> Mr. Ham, on your behalf, however, it appears that there is no real sense of remorse; that having pled guilty you're now trying to recant the testimony that you previously gave; that as to your involvement that previous statements are incorrect and you have no remorse and you have no acceptance of the responsibility in connection with this matter.
>
> . . .
>
> I . . . find that . . . you have simply refused to accept and acknowledge any responsibility in here and—today and give me any hope that there is any reason to believe that you can be rehabilitated.

The court then sentenced Petitioner Ham to LWOP for Victim's murder; however, the court found that Hunter's situation was "different." The court stated that Hunter showed "some semblance that you can live long enough and/or remorseful enough that you should get the opportunity to live in society again at an advanced age." Therefore, the court sentenced Hunter to forty years for Victim's murder.

In considering Petitioner Ham's sentencing hearing, I cannot see how the sentencing court abused its discretion. Rather, I applaud the sentencing court in conducting such a thorough hearing, one in which it already considered each of the five *Miller* factors. Accordingly, it strikes me as absurd that the majority orders resentencing for *all* petitioners without considering the adequacy of the original hearings.[17]

Further, and more egregiously, the majority fails to give adequate instructions to the resentencing courts regarding how to conduct the resentencing hearings. As demonstrated, *supra*, at least some of the original sentencing hearings were entirely compliant with *Miller*. For those cases, the majority does not provide any further direction to the resentencing courts regarding how to conduct a new hearing, nor identifies any facts that the courts should consider on remand that were not already considered. Rather, the majority simply directs all of the resentencing courts to give "constitutional meaning" to youth and its attendant characteristics, and to "fully explore the impact of the defendant's juvenility on the sentence rendered." These two directives are unmistakably vague and provide little concrete guidance, thus demonstrating the adequacy of the original hearings. *See Cantrell*, 250 S.C. at 379, 158 S.E.2d at 191 (stating that a sentencing judge is presumed to have considered the information presented during the sentencing proceeding before imposing a punishment).[18] While the majority may disagree with the propriety of the petitioners' sentences, the Court is not a fact finder, and must apply the relevant legal principles. It is of no use to say that the sentencing

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[17] To be sure, unlike Petitioner Ham's sentencing hearing, and given the limited records before us, some of the petitioners' hearings could be viewed as less than exemplary; however, again, we must make such a determination on an individual basis, considering the specific circumstances of each hearing, and determining whether sentencing the petitioner to LWOP in that particular case was an abuse of the sentencing court's discretion.

[18] For similar reasons, I find the majority's statement that the "absence of *this* level of inquiry into the characteristics of youth produced a facially unconstitutional sentence" unhelpful to the resentencing courts. (Emphasis added). The majority disavows requiring a sentencing hearing which mirrors the penalty phase of a capital case, but to the extent Petitioner Ham's hearing does not comply with *Miller*, I am at a loss as to what—besides a penalty-phase-like hearing—would suffice.

hearings were inadequate, and simultaneously fail to give specific instruction to the resentencing court on how to avoid the same mistake in the future.

In my view, the dangers present in *Miller*—namely, that the sentencing courts were *foreclosed* from considering age as a mitigating factor based on the imposition of mandatory LWOP—were simply not present in the petitioners' cases. Specifically, when a juvenile is sentenced to LWOP by way of a discretionary sentencing scheme, the unifying principle from *Roper*, *Graham*, and *Miller*—that children, for purposes of imposing the most serious punishments, are constitutionally different—is not violated. *See Miller*, 132 S. Ct. at 2466–68, 2474–75 ("Such mandatory penalties, by their nature, preclude a sentence from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it").

Thus, I would ultimately find *Miller* does not apply retroactively to discretionary LWOP sentences, and certainly does not entitle each and every petitioner to resentencing. The petitioners each received a discretionary sentence, which *Miller* explicitly permits. *See Miller*, 132 S. Ct. at 2469.

CONCLUSION

For the foregoing reasons, I would find the rule announced in *Miller* does not apply retroactively to the petitioners herein, or any other similarly situated defendants who collaterally attack their convictions. Therefore, I would deny petitioners' requests for resentencing.

KITTREDGE, J., concurs.

The Supreme Court of South Carolina

In the Matter of Max B. Singleton, Respondent.

Appellate Case No. 2014-002364

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

November 7, 2014

The Supreme Court of South Carolina

Re: Amendments to Rule 413, South Carolina Appellate Court Rules

Appellate Case No. 2014-000444
2014-000445
2014-000451
2014-000452

ORDER

The Commission on Lawyer Conduct has proposed a number of amendments to the Rules for Lawyer Disciplinary Enforcement, which are contained in Rule 413, SCACR. The amendments permit lawyers to permanently resign in lieu of discipline; adopt additional duties for lawyers following disbarment, suspension, or resignation; permit limited disclosure of the existence of a disciplinary complaint to Lawyers Helping Lawyers if the lawyer is in need of treatment for substance abuse or a mental health issue; and adopt procedures for handling grievances filed against disciplinary counsel or a lawyer member of disciplinary counsel's staff.

Rule 413 is amended as set forth in the attachment to this Order. The amendments are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
November 12, 2014

The following Rules for Lawyer Disciplinary Enforcement, contained in Rule 413, SCACR, are amended as provided below.

Rule 4(f)(1), RLDE, is amended to provide as follows:

(f) Powers and Duties of Investigative Panel. An investigative panel shall have the duty and authority to:

> **(1**) review the recommendations of disciplinary counsel after investigation and either issue a letter of caution, issue notice of intent to impose a confidential admonition, enter into a deferred discipline agreement, consider an agreement for discipline by consent or motion for permanent resignation in lieu of discipline, authorize formal charges, refer the matter to another agency, or dismiss the complaint;

Rule 12, RLDE, is amended to add paragraph (h), which provides as follows:

(h) Disclosure to Lawyers Helping Lawyers. Commission counsel, disciplinary counsel, or a member of the staff of the Commission or disciplinary counsel, may disclose the existence of a complaint to a representative of the South Carolina Bar Lawyers Helping Lawyers Committee regarding the lawyer's need for treatment for substance abuse or a mental health issue. Disclosure under this rule shall be limited to the existence of the complaint and the issue(s) of concern and shall not reveal the nature or details of the complaint unless such disclosure is necessary for the committee to proceed.

Rule 19, RLDE, is amended to add paragraph (e), which provides as follows:

(e) Complaints Against Disciplinary Counsel. If a complaint is filed against disciplinary counsel or a lawyer member of disciplinary counsel's staff, Commission counsel shall review the complaint. If the complaint does not allege professional misconduct, Commission counsel shall refer the matter to disciplinary counsel who will address it as an internal management issue. If the complaint alleges professional misconduct pursuant to these rules or the Rules of Professional Conduct, Commission counsel shall issue a notice of investigation in accordance with the procedures set forth in subsection (c)(1)(A) and (B) of this rule. Commission counsel shall refer the complaint and the response to an investigative panel. The investigative panel shall either dismiss the complaint or refer the matter for investigation to the Office of the Attorney General of South Carolina or a lawyer member of the Commission appointed by the chair. Upon completion of the investigation, the Office of the Attorney General or the lawyer member of the Commission shall report to the investigative panel and recommend dismissal, acceptance of an agreement for discipline by consent, or formal charges. An investigative panel may not impose a letter of caution or other confidential discipline upon disciplinary counsel or a lawyer member of disciplinary counsel's staff. The confidentiality and disclosure provisions of Rule 12 apply to the Office of the Attorney General with regard to complaints investigated pursuant to this rule.

Rule 27(h), RLDE, is amended to provide as follows:

(h) Notice of Decision. The Commission shall transmit notice of all public discipline imposed against a lawyer, transfers to and from incapacity inactive status, permanent resignations in lieu of discipline, and reinstatements to the National Discipline Data Bank maintained by the American Bar Association, the disciplinary enforcement agency of every other jurisdiction in which the lawyer is admitted, and the South Carolina Bar. The Commission shall transmit notice of a decision suspending or disbarring a lawyer, transferring a lawyer to incapacity inactive status, or ordering a lawyers' permanent resignation in lieu of discipline to the clerk of court in each county in which the lawyer maintained an office and the chief judge for administrative purposes having authority over any county in which the lawyer maintained an office. The Commission may also establish policies for giving notice of public discipline to other courts, agencies and organizations. The Commission shall not provide notice when an admonition is imposed.

Rule 30, RLDE, is amended to provide as follows:

RULE 30
DUTIES FOLLOWING DISBARMENT, SUSPENSION, OR PERMANENT RESIGNATION

(a) Notice to Clients. A lawyer who is disbarred, suspended, or granted permanent resignation in lieu of discipline shall promptly notify, or cause to be notified, by registered or certified mail, return receipt requested, all clients being represented in a pending matter. The notice shall advise the client of the disbarment, suspension, or permanent resignation in lieu of discipline and of the consequent inability to act as an attorney. The notice shall also advise the client to seek legal advice of the client's own choice elsewhere and, if the matter involves pending litigation or administrative proceedings, of the desirability of the prompt substitution of another lawyer to act as the client's attorney in the proceedings.

(b) Notice to Other Counsel. A lawyer who is disbarred, suspended, or granted permanent resignation in lieu of discipline shall promptly notify, or cause to be notified, any co-counsel in any pending matter and any opposing counsel in any pending matter, or in the absence of opposing counsel, the adverse parties, of the disbarment, suspension, or permanent resignation in lieu of discipline and of the consequent inability of the lawyer to act as an attorney. The notice shall state the place of residence of the client of the disbarred, suspended, or permanently resigned lawyer.

(c) Withdrawal From Representation. In the event the client does not obtain substitute counsel within 10 days of the date of the notice, it shall be the responsibility of the disbarred, suspended, or permanently resigned lawyer to move in the court or agency in which the proceedings are pending for leave to withdraw.

(d) Refund of Fees and Return of Property. A disbarred, suspended, or permanently resigned lawyer shall promptly refund any part of any fees paid in advance that has not been earned. The lawyer shall also deliver to all clients being represented in pending matters any papers or other property to which they are entitled and shall notify them and any counsel representing them of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property. If a receiver or an attorney

to assist the receiver has been appointed under Rule 31, the return of client fees and property shall be accomplished by the receiver or the attorney appointed to assist the receiver.

(e) Duty to Maintain Records. The lawyer shall keep and maintain records showing compliance with the requirements of this rule, and shall make these records available to disciplinary counsel upon request.

(f) Surrender of Certificate. A lawyer who has been disbarred or granted permanent resignation in lieu of discipline shall, within fifteen (15) days after the order of disbarment or permanent resignation in lieu of discipline, surrender his or her certificate of admission to practice law in this state to the Clerk of the Supreme Court. The certificate shall be destroyed by the Clerk.

(g) Duty to Cooperate with Receiver. If a receiver or an attorney to assist the receiver has been appointed under Rule 31, a lawyer who has been disbarred, suspended, or granted permanent resignation in lieu of discipline shall cooperate with the receiver and any attorney appointed to assist the receiver and shall comply with requests to take specific action regarding the client files and accounts.

(h) Remove Indicia of the Practice of Law. A lawyer who has been disbarred, suspended, or granted permanent resignation in lieu of discipline shall promptly remove any indicia of the practice of law that the lawyer is capable of removing or deleting, including signage, letterhead, website(s), Internet profiles, email address(es), and any form of advertising or solicitation created or maintained by the lawyer.

(i) Affidavit to Be Filed. Within 15 days after the effective date of the disbarment, suspension, or permanent resignation in lieu of discipline, the lawyer shall file and serve an affidavit with the Supreme Court, disciplinary counsel, and the Commission on Lawyer Conduct showing:

> **(1)** Compliance with the provisions of the order of disbarment, suspension, or permanent resignation in lieu of discipline and this rule;
>
> **(2)** All other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and
>
> **(3)** Residence or other addresses where communications may thereafter be directed.

(j) Failure to Comply. A disbarred, suspended, or permanently resigned lawyer who fails to comply with the requirements of this rule may be held in criminal or civil contempt by the Supreme Court. Further, if a disbarred or suspended lawyer fails to timely surrender the certificate to practice law or to timely file the affidavit as required by sections (f) and (i) of this rule, the time before the disbarred or suspended lawyer is eligible to seek reinstatement under Rules 32 or 33, RLDE, shall not begin to run until the certificate and affidavit are actually received by the Clerk of the Supreme Court.

Rule 34, RLDE, is amended to provide as follows:

RULE 34
EMPLOYMENT OF LAWYERS WHO ARE DISBARRED, SUSPENDED, TRANSFERRED TO INCAPACITY INACTIVE STATUS, OR PERMANENTLY RESIGNED

A lawyer who is disbarred, suspended, transferred to incapacity inactive status, or permanently resigned shall not be employed directly or indirectly by a member of the South Carolina Bar as a paralegal, investigator or in any other capacity connected with the practice of law, nor be employed directly or indirectly in the State of South Carolina as a paralegal, investigator or in any capacity connected with the practice of law by a lawyer licensed in any other jurisdiction. Additionally, a lawyer who is disbarred, suspended, transferred to incapacity inactive status, or permanently resigned shall not serve as an arbitrator, mediator or third party neutral in any Alternative Dispute Resolution proceeding in this state nor shall any member of the South Carolina Bar directly or indirectly employ a lawyer who has been disbarred, suspended, transferred to incapacity inactive status, or permanently resigned as an arbitrator, mediator or third party neutral in any Alternative Dispute Resolution proceeding. Any member of the South Carolina Bar who, with knowledge that the person is disbarred, suspended, transferred to incapacity inactive status, or permanently resigned, employs such person in a manner prohibited by this rule shall be subject to discipline under these rules. A lawyer who is disbarred, suspended, transferred to incapacity inactive status, or permanently resigned who violates this rule shall be deemed in contempt of the Supreme Court and may be punished accordingly.

Rule 35, RLDE is adopted by the Court and provides as follows:

RULE 35
RESIGNATION IN LIEU OF DISCIPLINE

(a) Motion for Resignation in Lieu of Discipline. A lawyer who desires not to contest or defend against allegations of misconduct in connection with a pending disciplinary investigation or formal proceedings may file a motion for permission to permanently resign in lieu of discipline by delivering to the Commission and serving on disciplinary counsel an affidavit that includes the following:

(1) A statement that the permanent resignation in lieu of discipline is freely and voluntarily rendered and that the lawyer is not being subjected to coercion or duress;

(2) A statement that the lawyer is aware that there is a pending investigation or formal charges involving allegations of misconduct, that the lawyer acknowledges that disciplinary counsel can prove those allegations, and that the lawyer desires not to contest or defend against those allegations;

(3) A statement that the lawyer is fully aware that the resignation, if granted, will be permanent and that the lawyer will never be eligible to apply, and will not be considered, for admission or reinstatement to the practice of law or for any limited practice of law in South Carolina;

(4) Identification of all other jurisdictions in which the lawyer is admitted to practice law and a statement that the lawyer will promptly seek to resign permanently from those jurisdictions if the motion is granted;

(5) A statement from Commission counsel that all costs incurred by the Commission and the Office of Disciplinary Counsel in connection with the pending disciplinary proceedings have been paid in full; and

(6) A statement from the Lawyers' Fund for Client Protection that all payments made on behalf of the lawyer have been reimbursed to the Fund.

(b) Disciplinary Counsel's Return and Lawyer's Opportunity to Withdraw. Disciplinary counsel shall file a return within thirty days of service including (1) a detailed statement of the allegations of misconduct giving rise to the proceedings;

(2) disciplinary counsel's concurrence with or opposition to the motion for permanent resignation based on the best interests of the public and the profession; and (3) proof of service on the lawyer. The lawyer may withdraw the motion within ten days after service of disciplinary counsel's return. If the lawyer does not timely file a withdrawal of the motion, the detailed statement of the allegations shall be deemed to have been conclusively established for the purpose of consideration of the motion.

(c) Submission to the Investigative Panel. An investigative panel of the Commission shall consider the lawyer's affidavit and disciplinary counsel's return and shall then file with the Supreme Court its recommendation regarding the lawyer's motion.

(d) Action by the Supreme Court. The Supreme Court shall either reject the motion or issue a decision ordering the lawyer's permanent resignation. If the motion for permanent resignation is rejected by the Supreme Court, the proceedings shall continue. The rejected affidavit and disciplinary counsel's return shall be withdrawn, shall remain confidential, and shall not be used against the lawyer in any further proceedings. If the motion for permanent resignation is granted by the Supreme Court, the lawyer's motion and affidavit, the return of disciplinary counsel, and the recommendation of the investigative panel shall be public. The order granting the request shall be published.

(e) Effect of Filing on the Proceedings. The filing of a motion for permanent resignation in lieu of discipline does not, without the consent of disciplinary counsel, serve to delay or suspend any pending disciplinary investigation or formal proceedings.

The Supreme Court of South Carolina

Re: Amendments to Rule 408, South Carolina Appellate Court Rules

Appellate Case No. 2014-002159

ORDER

The Chief Justice's Commission on the Profession has proposed amending Rule 408, SCACR, to require that newly admitted members complete an Essentials Series course during their first annual Continuing Legal Education reporting year.

Pursuant to Article V, § 4 of the South Carolina Constitution, we amend Rule 408, SCACR, as set forth in the attachment to this order. Additionally, Rule 420, SCACR, is amended to provide that the Commission on the Profession shall have the responsibility to ensure the presence of a professionalism component in the Essentials Series Program. The amendments are effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
November 12, 2014

Rule 408(a)(3), SCACR, is amended to read as provided below, with the current paragraph (a)(3) renumbered as paragraph (a)(4).

> **(3) Continuing Legal Education Requirements for the First Reporting Year after Admission.** Newly admitted members are exempt from CLE requirements during the reporting year in which they are admitted to the South Carolina Bar. The first required reporting year for newly admitted members begins on March 1 after the date of admission. Before the end of the first required reporting year, newly admitted members admitted pursuant to Rule 402, SCACR, unless exempt as set forth below, must complete an Essentials Series course administered by the South Carolina Bar, in addition to satisfying the CLE requirements in (a)(2) above. Hours earned by attendance at an Essentials Series course will be applied to the member's first required reporting year. Members who live and practice outside of South Carolina may take an Essentials Series course online. The following newly admitted members shall be exempt from completing an Essentials Series course:
>
> > **(A)** members called to active military duty and who elect to become Military Members under 410(h)(1)(E), SCACR;
> >
> > **(B)** inactive members who remain inactive through the end of the first required reporting year;
> >
> > **(C)** members who have been admitted to practice law in another jurisdiction for at least two (2) years prior to admission in South Carolina;
> >
> > **(D)** members who took the South Carolina Bar's Bridge the Gap Program prior to March 2013.

Rule 420(c)(4), SCACR, is amended to provide:

> **(4)** To ensure the presence of a professionalism component in the Bridge the Gap and Essentials Series Programs;

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Donna Lynn Phillips, Appellant

Appellate Case No. 2012-212663

Appeal From Pickens County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5280
Heard September 10, 2014 – Filed November 12, 2014

AFFIRMED

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

Attorney General Alan McCrory Wilson and Assistant Attorney General John Benjamin Aplin, both of Columbia, for Respondent.

FEW, C.J.: A jury convicted Donna Lynn Phillips of homicide by child abuse in connection with the death of her grandson. On appeal, Phillips argues the trial court erred by denying her directed verdict motion because the State's evidence was insufficient to prove her guilt. We affirm.

I. Facts and Procedural History

On March 17, 2008, the twenty-two-month old victim arrived by ambulance at the emergency department of Baptist Easley Hospital with no heartbeat or pulse. A urine sample collected from the child tested positive for opiates. After doctors resuscitated the child, he was airlifted to Greenville Memorial Hospital, where he later died. According to the medical examiner, his death resulted from an overdose of hydrocodone—an opiate.

As part of the investigation into the child's death, an officer with the Pickens County Sheriff's Office retrieved from Phillips' home a bottle of Tussionex—a prescription cough syrup—that was prescribed to her. The officer submitted the bottle for chemical testing, and the results indicated the medication contained hydrocodone.

The State indicted Phillips for homicide by child abuse under subsection 16-3-85(A)(1) of the South Carolina Code (2003). The indictment alleged Phillips caused the death of the child "by facilitating or allowing the excessive ingestion of opiate drugs." In addition, the State indicted Latasha Honeycutt—the child's mother—for homicide by child abuse and Jamie Edward Morris—the child's father and Phillips' son—for aiding and abetting homicide by child abuse under subsection 16-3-85(A)(2). The State tried the three co-defendants together.

At the close of the State's case, Phillips moved for a directed verdict, arguing the State failed to prove she gave the child Tussionex or that she did so with the requisite mental state. The trial court denied the motion. The jury convicted Phillips of homicide by child abuse, and the trial court sentenced her to twenty-five years in prison.[1]

II. Evidence Presented at Trial

At trial, the State presented the following evidence to prove Phillips' guilt.

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[1] The jury found Morris guilty of aiding and abetting but acquitted Honeycutt. This court affirmed Morris's conviction. *State v. Morris*, Op. No. 2014-UP-112 (S.C. Ct. App. filed March 12, 2014).

A. Defendants' Statements Made to Police

Detective Rita Burgess with the Pickens County Sheriff's Office spoke with Morris, Phillips, and Honeycutt at the hospital and subsequently took each of their written statements. According to their statements, the child spent the weekend with Morris and Phillips. Specifically, Morris and Phillips picked the child up from Honeycutt's home around 2:00 p.m. on Friday, March 14, and returned him to Honeycutt on Sunday around 7:30 p.m. Phillips told Det. Burgess the child "had a runny nose all weekend . . . . [a]nd by Sunday, he was coughing and congested." She claimed Morris gave him children's Tylenol on Sunday afternoon, although she "did not know how much of a dose he had given" the child. Phillips stated that when she and Morris took the child back to Honeycutt's home that evening, the child "was breathing hard" and Morris had to "move[] [the child] around in the car seat to try to help his breathing." Phillips claimed she told Honeycutt the child needed to go to the doctor, and that Morris gave Honeycutt the child's Medicaid card and told her "to get him to the doctor" because "his breathing sounded bad."

According to Honeycutt's statements to police, the child returned home Sunday evening and "was extremely sleepy and pitching a fit." She noticed the child "sounded congested" and "had a runny nose." The next morning around 8:00 a.m., Honeycutt changed the child's diaper, during which time the child never awoke. Honeycutt told Det. Burgess she then went back to sleep until approximately 10:00 a.m., when she checked on the child and found him unresponsive. She called out to her boyfriend Brandon Roper, who discovered the child was not breathing. Honeycutt called 911, which phone records confirm occurred at 11:15 a.m. that morning.

Det. Burgess further testified that during the conversation with Phillips at the hospital, Phillips "made random statements" regarding the prescription drug Lortab—a narcotic pain medication containing hydrocodone. Specifically, Phillips told Det. Burgess, "I hope [the child] didn't get any of my Lortab." Phillips also mentioned her sister takes Lortab and "hoped [the child] did not get her sister's Lortab." Moreover, according to Phillips' written statement, Phillips spoke to Brandon Roper at the hospital and told him she had Lortab but "didn’t think the child could have gotten it."

Charlie Lark, an investigator with the Pickens County Sheriff's Office, testified about a conversation he had with Morris regarding the child's death. Morris

claimed he did not see Phillips give the child any medication. Morris stated, however, that Phillips had prescriptions for Lortab and cough medicine, specifically Tussionex, that she kept in a basket in her closet. Morris told Lark that Phillips "had a hard time reaching" the basket due to its placement on the top shelf, so he got it down for her twice during the weekend. Although Morris mentioned "the child was playing with the bottles" on one occasion, he told Lark "the tops were on the medication" and "to his knowledge, none of the medication had come out of the bottles."

Lark also testified regarding a conversation he had with Phillips, in which she expressed concern that she "accidentally dropped [a hydrocodone pill] on the floor, and the child could have picked it up." Phillips told Lark, however, she did not see the child "get any medication."

B. Medical Evidence

Jeffrey Morris Hollifield, a chemist, conducted tests on the liquid in the Tussionex bottle. He testified the tests detected two controlled drug substances in the bottle that were consistent with the two active ingredients in Tussionex—hydrocodone and chloropheniramine. Although the bottle originally contained twelve teaspoons of medication, Hollifield testified a little over eight teaspoons were missing from the bottle.

According to the testimony of Robert Foery, a forensic toxicologist, the child's urine and blood samples revealed the presence of hydrocodone and chloropheniramine. Foery testified the concentration of hydrocodone in the child's blood—102 nanograms per milliliter—was at least two-and-a-half times higher than the therapeutic range recommended for an adult—10 to 40 nanograms per milliliter. In fact, he stated the amount of hydrocodone found in the child's blood would be considered "very high" even for an adult. He further testified the child's death was not the result of a single dose of Tussionex but was caused by receiving multiple doses of the medication. He testified the first dose was probably administered sometime after midnight on Sunday, during the early morning hours. As to whether the child could have died from ingesting Phillips' Lortab, Foery explained that although Lortab contains hydrocodone, it also contains acetaminophen. Because acetaminophen was not found in the child's blood or urine, Foery concluded the child did not ingest Lortab.

Michael Ward, a forensic pathologist and the chief medical examiner for Greenville County, testified that had the child received medical treatment any time before Sunday night, he would have lived. He also noted the child had a lesion on his lower back, which he testified was a pressure ulcer caused by a lack of blood flow for a period of time. He explained pressure ulcers are common "in comatose patients where they lay in one position for a prolonged time without movement." Dr. Ward also stated the child had "a fairly large amount of firm, knot-like stool," which was consistent with a period of constipation, a side effect of taking hydrocodone. He testified that although it was possible for constipation to result from a single dose of hydrocodone, the degree of constipation indicated the child received multiple doses rather than a single dose. As to the effect hydrocodone would have on the child's behavior, Dr. Ward stated the child would "not have the usual respiratory drive" and would exhibit symptoms of irritability, sleepiness, lethargy, and, ultimately, unconsciousness.

C. Phillips' Testimony

Phillips testified in her defense. According to her testimony, the child had a "runny nose" on Friday and Saturday but was otherwise "full of life." By Sunday afternoon, however, the child "started crying" and neither she nor Morris "could[] console him." Phillips admitted she had a prescription for Tussionex but denied giving any to the child. Specifically, she stated she would "never" give a child medicine not prescribed to him. When asked if Morris gave the child Tussionex, she stated, "No, he wouldn’t. I know my son knows better than that."

She further testified she got the basket of medicine down from the shelf in her closet on Saturday morning, and although the child "grabbed a bottle" of medication from it, he did not ingest any of it. She claimed the child could not have accessed the medication without her knowledge because it was stored on the top shelf of her closet.

D. Other Witnesses' Testimony

Both of Phillips' co-defendants testified at trial. According to Morris's testimony, the child was very active on Saturday and Sunday, although on Sunday he had "a little cough every now and then" and "breathed a little funny." During its case-in-chief, the State presented evidence that on Saturday evening, Morris called and left a voicemail at the DSS office indicating he needed a Medicaid card because the

child was sick. Morris testified he called DSS on Saturday because he misplaced the child's Medicaid card, which he later found on Sunday. Morris told the jury he gave the Medicaid card to Honeycutt on Sunday evening and asked her to take him to the doctor. He testified he did not take the child to the doctor over the weekend because he "didn't feel his symptoms were severe enough."

Morris further testified there was not "even a sheer possibility" that the child ingested Tussionex while in his care. Although he admitted retrieving the Tussionex from Phillips' closet on Friday and Saturday, he denied that he or Phillips gave the child any medication, except Tylenol on Sunday afternoon. Kayla Roper—the sister of Honeycutt's boyfriend Brandon—testified, however, that while at the hospital, she overheard Phillips say to Morris that Phillips gave the child some cough medicine over the weekend and "surely to God that's not what is wrong." Brandon also testified that when a nurse told Morris and Phillips that opiates were found in the child's urine sample, Phillips "got [Morris] by the arm and . . . drag[ged] him out the back door of the hospital."

III. Directed Verdict Motion

In reviewing a denial of a directed verdict, we must view the evidence in the light most favorable to the State. *State v. Jarrell*, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002). If there is any direct evidence of guilt, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt, we must find the trial court properly submitted the case to the jury. *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); *State v. Rogers*, 405 S.C. 554, 563, 748 S.E.2d 265, 270 (Ct. App. 2013).

To convict a defendant of homicide by child abuse, the State must prove (1) the defendant "cause[d] the death of a child . . . while committing child abuse or neglect"; and (2) "the death occur[red] under circumstances manifesting an extreme indifference to human life." § 16-3-85(A)(1). Phillips argues the trial court erred in denying her directed verdict motion because the State failed to present sufficient evidence to prove either of these elements.

A. The Evidence Proving Child Abuse

A trial court must deny a directed verdict motion when the State presents "any direct evidence" or "substantial circumstantial evidence" to prove the defendant's

guilt. *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (emphasis removed). "Direct evidence is based on personal knowledge or observation and . . . , *if true*, proves a fact without inference or presumption." *Rogers*, 405 S.C. at 563, 748 S.E.2d at 270 (internal quotation marks and citation omitted) (alteration in original). "The presentation of direct evidence 'immediately establishes the main fact to be proved.'" *Id.* (quoting *State v. Salisbury*, 343 S.C. 520, 524 n.1, 541 S.E.2d 247, 249 n.1 (2001)). For this reason, the existence of "any direct evidence" proving the defendant's guilt requires the denial of a directed verdict motion. *Odems*, 395 S.C. at 586, 720 S.E.2d at 50. "Circumstantial evidence, on the other hand, is proof of a chain of facts and circumstances from which the existence of a separate fact may be inferred." *Rogers*, 405 S.C. at 563, 748 S.E.2d at 270. If the State relies exclusively on circumstantial evidence to prove guilt, that evidence must be "substantial" to justify denying the motion. *Odems*, 395 S.C. at 586, 720 S.E.2d at 50; *see also Rogers*, 405 S.C. at 565, 748 S.E.2d at 271 ("We find the State's proof that [the defendant] is guilty of murder consisted entirely of circumstantial evidence, and therefore, we review the trial court's decision to deny his directed verdict motion under the 'substantial circumstantial evidence' standard . . . ." (citation omitted)).

The State made no argument at trial as to the existence of direct evidence proving Phillips' guilt. In its appellate brief, the State refers generally to the existence of "substantial evidence." At oral argument, this court asked counsel whether the following testimony from Kayla is direct evidence: "I heard [Phillips] say that she . . . gave the child some cough medicine over the weekend and 'surely to God that's not what is wrong.'" Phillips' counsel responded it was circumstantial evidence because even if the jury believed Kayla's testimony, it would need to assume the "cough medicine" she referred to was Tussionex. The State, responding to the same question, told the court it believed the statement was direct evidence.

We find Kayla's testimony regarding what she heard Phillips say at the hospital is direct evidence of child abuse. Direct evidence is that which requires only the factfinder's determination that the evidence is credible before it may find the existence of a disputed fact. If the jury believed Kayla's testimony, the evidence would "immediately establish[] the main fact to be proved"—Phillips gave the child cough medicine. This evidence, when combined with the medical testimony that the cough medicine had to be Tussionex and the child died from receiving multiple doses of it, establishes that Phillips "cause[d] the death of [the]

child . . . while committing child abuse." § 16-3-85(A)(1); *see also* S.C. Code Ann. § 16-3-85(B)(1) (2003) (defining "child abuse" as "an act . . . which causes harm to the child's physical health or welfare"). Therefore, we find the trial court properly denied Phillips' directed verdict motion as it relates to the element of child abuse.[2]

B. The Evidence Proving Mental State

To prove a defendant guilty of homicide by child abuse, the State must demonstrate the "the death occur[red] under circumstances manifesting an extreme indifference to human life." § 16-3-85(A)(1). Phillips contends that even if the State proved she committed child abuse by giving the child Tussionex, it failed to prove she acted with extreme indifference to human life. To support her argument, she points to *State v. Jarrell*, in which the court of appeals defined "extreme indifference" as "a mental state akin to intent characterized by a deliberate act culminating in death." 350 S.C. at 98, 564 S.E.2d at 367. She asserts there is no evidence proving she intended to harm the child but, instead, the evidence demonstrates that her "only intent was to the help the child feel better" by giving him medicine.

Subsection 16-3-85(A)(1) does not require the State to prove a defendant acted with the intent to harm in order to prove extreme indifference. Instead, the State must prove the defendant performed a deliberate act that he or she knew would create a risk of death to the child. A deliberate act in the face of such knowledge is a reckless disregard of the risk, and thus demonstrates an extreme indifference to the child's life. *See State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 173 (2003) (finding the deliberate ingestion of cocaine in the face of "public knowledge

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[2] The State also asserts Phillips' failure to seek medical care after giving the child multiple doses of Tussionex constituted child abuse or neglect. *See* § 16-3-85(B) (defining "child abuse or neglect" as "an act *or omission* by any person which causes harm to the child's physical health," and stating "harm" includes the "fail[ure] to supply the child with adequate . . . health care" that causes a "condition resulting in death" (emphasis added)). We need not address this argument because we find the State presented direct evidence that Phillips committed child abuse by giving the child multiple doses of Tussionex. *See State v. Hepburn*, 406 S.C. 416, 428 n.14, 753 S.E.2d 402, 408 n.14 (2013) (declining to decide other issues when the determination of one issue was dispositive).

that usage of cocaine is potentially fatal . . . was sufficient evidence to submit to the jury on whether [the defendant] acted with extreme indifference to her child's life"); *Jarrell*, 350 S.C. at 98, 99, 564 S.E.2d at 367 (stating "indifference in the context of criminal statutes [is] the conscious act of disregarding a risk which a person's conduct has created" and finding the defendant's deliberate act "created a grave risk of death to her child, evidencing her extreme indifference to his life"). Therefore, to prove Phillips acted with extreme indifference to the child's life, the State was required to prove Phillips intended to give the child Tussionex with the knowledge that doing so would create a risk to the child's life.

With this in mind, we turn to the issue of whether the State's evidence was sufficient to prove this element. We find the record contains direct evidence that Phillips knew giving prescription medication to the child when it was not prescribed to him would put the child's health at risk. In fact, Phillips embraced her own knowledge of this risk in her attempt to show the jury she was not the type of person who would give the child Tussionex:

> I would never---I was not raised that way. I would never give a child any kind of medicine that was not prescribed for them. I would never give a child anything under the age of two years old. Anybody in my family has better sense . . . .

She continued to make this claim throughout her testimony, stating, "I would never give this medicine or any medicine to [the] child." When asked if Morris gave the child Tussionex, Phillips testified, "No, he wouldn't. I know my son knows better than that. Like I said, my whole family, they had better sense. Nobody gave [the] child anything." We find this testimony to be direct evidence that Phillips knew giving the child her prescription medication created a risk to the health of the child.

Additionally, we find the health risks associated with giving children medications prescribed to adults are a matter of common knowledge. Federal law requires a patient to obtain a prescription for medication that cannot be bought over-the-counter because these medications are "not safe for use except under the supervision of a practitioner licensed by law to administer such drug[s]." 21 U.S.C. § 353(b)(1)(A) (2013). Phillips' bottle of Tussionex contained a label with the following warning: "federal law [provides] that prescribed medications are only for the person they're prescribed to."

The common knowledge of the health risks associated with prescription medication was discussed in *Commonwealth v. Walker*, 812 N.E.2d 262 (Mass. 2004). In that case, a jury convicted the defendant of involuntary manslaughter, finding he caused the death of a woman by mixing prescription sleeping medication into her alcoholic drink. 812 N.E.2d at 266. On appeal, the defendant argued the Commonwealth's evidence was insufficient to prove "his conduct posed a high degree of likelihood that substantial harm would result" because the drug was "a legally prescribed medication that has numerous legitimate and 'fairly safe' uses." 812 N.E.2d at 269. The Supreme Judicial Court of Massachusetts rejected his argument, stating, "A person of ordinary intelligence would be aware that there are varying risks associated with all prescription medications. It is a matter of both common knowledge and common sense that a prescription is required to obtain certain medications precisely because they contain drugs that are not safe except when administered and supervised by a physician or other properly licensed practitioner." 812 N.E.2d at 271 n.17.

We understand the direct evidence of Phillips' mental state proves only that she gave the child cough medicine with the knowledge that doing so posed a risk to his *health*. The law requires the State to prove she acted in reckless disregard of a risk of *death*. However, the medical evidence in this case demonstrated that Phillips, knowing the safety risks associated with her conduct, gave the child multiple doses of Tussionex, resulting in a toxic blood level of hydrocodone that was up to ten[3] times higher than the normal range for an adult. In addition, the State presented evidence that Phillips tried to cover up her actions and shift the blame from herself by (1) telling police Morris gave the child Tylenol on Sunday; and (2) suggesting the child could have accidentally ingested Lortab prescribed to her sister or Brandon. *See State v. Martin*, 403 S.C. 19, 26, 742 S.E.2d 42, 46 (Ct. App. 2013) ("[A]ny guilty act, conduct, or statements on the part of the accused are . . . evidence of consciousness of guilt." (citation omitted)). We also consider the fact that Phillips knew Morris had to "move[] [the child] around in the car seat to . . . help his breathing" on the way to Honeycutt's home Sunday evening. In

[3] Foery testified "the concentration of the drug in the [child's] blood is somewhere between two and a half and five times higher than it should be for a therapeutic [adult] dose." However, the child's level of 102 nanograms per milliliter is actually up to ten times what Foery testified was the "therapeutic range for an adult . . . 10 to 40 nanograms per milliliter."

addition, Phillips admitted telling Honeycutt the child needed medical attention and that Morris told Honeycutt "to get him to the doctor" because "his breathing sounded bad."

From this combination of direct and circumstantial evidence, a jury could infer Phillips acted with extreme indifference to the child's life. Thus, we find the trial court properly submitted the case to the jury.

IV. Conclusion

We find the State's evidence supports the trial court's decision to deny Phillips' directed verdict motion. Therefore, her conviction of homicide by child abuse is **AFFIRMED**.

THOMAS and LOCKEMY, JJ., concur.