SUSPENSIONS-
COMMISSION ON CLE AND SPECIALIZATION
2001 REPORT OF COMPLIANCE
AS OF APRIL 3, 2002

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William C. Wooden
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The Supreme Court of South Carolina

In the Matter of Larry S. Drayton, Respondent.

O R D E R

By opinion of this same date, respondent has been suspended from the practice of law in this state for ninety days. The Office of Disciplinary Counsel has requested that the Court appoint an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that Lee S. Bowers, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Bowers shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Bowers may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and

any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Lee S. Bowers, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Lee S. Bowers, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Bowers' office.

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

Columbia, South Carolina

April 8, 2002

The Supreme Court of South Carolina

In the Matter of Gregory A. Newell, Respondent.

O R D E R

By opinion of this same date, respondent has been suspended from the practice of law in this state for nine months. The Office of Disciplinary Counsel has requested that the Court appoint an attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that David A. Quattlebaum, III, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Quattlebaum shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Quattlebaum may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and

any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that David A. Quattlebaum, III, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that David A. Quattlebaum, III, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Quattlebaum's office.

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

Columbia, South Carolina

April 8, 2002

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

April 8, 2002

ADVANCE SHEET NO. 10

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Quality Trailer Products, Inc., Respondent,

v.

CSL Equipment Company, Inc. and I Corp., Defendants,

of which I Corp. is Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25435
Heard February 20, 2002 - Filed April 1, 2002

DISMISSED

Charles E. Carpenter, Jr., S. Elizabeth Brosnan, and Alexander H. Twedt, of Richardson, Plowden, Carpenter & Robinson, P.A., of Columbia, for appellant.

W. Mark White and W. Chaplin Spencer, Jr., of Spencer & Spencer, P.A., of Rock Hill, for

respondent.

James B. Richardson, Jr., of Richardson & Birdsong, of Columbia, for Amicus Curiae, *Pro se.*

PER CURIAM: Appellant I Corp. appeals the trial court's denial of its motion for judgment notwithstanding the verdict ("JNOV") and its motion for new trial following a jury verdict for Respondent Quality Trailer Products, Inc. ("QTP"). We dismiss the appeal as untimely.

FACTS

QTP brought suit against CSL Equipment Company, Inc. ("CSL") and I Corp. QTP asserted causes of action against I Corp. for breach of the South Carolina Bulk Transfers Act ("The Act"),[1] promissory estoppel, and successor liability. The trial court granted I Corp.'s motion for directed verdict on QTP's claim arising under the Act, and submitted the other two theories to the jury. In its general verdict, the jury found I Corp. liable to QTP. In addition, the trial court awarded QTP prejudgment interest.

Following the jury verdict, I Corp. made timely post trial motions for JNOV, and for a new trial (collectively, "first motion"). By order dated December 20, 1999, and filed December 21, 1999, the trial court denied the first motion.

On December 30, 1999, I Corp. filed a motion captioned as a motion to "Alter, Amend or Reconsider Judgment and Findings Denying Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial" ("second motion"). The caption of the second motion indicated it was

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[1]S.C. Code Ann. §§ 36-6-101 through 111 (1976). The legislature repealed the Act *in toto* effective July 1, 2001.

made pursuant to "S.C.R.Civ.P. 52, 59, and 60." In fact, the second motion was almost a duplicate of the first motion. The only changes I Corp. made were to caption the second motion differently, and to change the relief sought to coincide with the second motion's caption. The trial court recognized that the second motion was, in substance, identical to the first motion, and by order dated February 16, 2000, and filed February 21, 2000, denied the second motion. I Corp. filed its notice of appeal on March 17, 2000.

ISSUE

Did I Corp.'s second motion toll the time period for filing an appeal?

ANALYSIS

Rule 203(b)(1), SCACR, provides that a notice of appeal from a judgment of the Court of Common Pleas

> shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

In Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), the Court of Appeals held that a successive Rule 59(e), SCRCP, motion, following the denial of a similar motion, did not toll the time for filing appeal, where the court's ruling on the first such motion did not change its ruling at trial. The Court of Appeals noted that Coward Hund did not challenge any new ruling in its second Rule 59 motion. The Court of Appeals agreed with the prevailing federal rule that "a second motion for

reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration." Coward Hund Const. Co., Inc., at 3, 518 S.E.2d at 58.

Here, the question is whether the filing of a successive motion, raising issues already raised to and ruled upon by the trial judge, stays the time to appeal. We hold that it does not.

Although the caption identifies Rule 52, SCRCP, as one basis for the motion, that rule simply does not apply here. Rule 52, SCRCP, provides that:

> In all actions tried upon the facts *without a jury or with an advisory jury*, the court shall find the facts specially and state separately its conclusions of law thereon . . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or *any other motion except as provided in Rule 41(b).*

(Emphasis supplied). Rule 41(b), SCRCP, does not apply to this case.[2] Since this was an action tried by a jury, Rule 52, SCRCP, does not apply.

Despite its caption, I Corp.'s second motion was not a Rule 59(e), SCRCP, motion. The motion did not ask the trial court to rule on an issue presented but not ruled upon in any previous motion. In its order denying the second motion, the trial court remarked that "the [second] Motion is an exact compilation of the prior motion for judgment notwithstanding the verdict and motion for new trial with a few procedural alterations. In sum, the Motion seeks the reversal of the Order, but provides no additional assertion of fact or argument of law." We agree with the trial court's interpretation of the second

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[2]Rule 41(b), SCRCP, applies to cases tried without a jury. The rule requires the judge, as trier of fact, to make specific findings as provided in Rule 52(a), SCRCP, where the judge renders judgment on the merits against the plaintiff.

motion.

Notwithstanding its caption, the second motion did not ask for relief available pursuant to Rule 60, SCRCP. Rule 60 allows a motion for relief from the judgment based on a number of specific grounds, including clerical mistake, other mistake, inadvertence, excusable neglect, newly discovered evidence, and fraud. The second motion raised none of these grounds.

We agree with the rationale of Coward Hund and hold that **successive** new trial motions or motions for JNOV do not toll the time for serving notice of appeal. The time for filing appeal is not extended by submitting the same motion under a different caption.[3] See Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its "substance and effect" rather than how it is captioned by movant). See also Sears v. Sears, 422 N.E.2d 610 (Ill. 1981) (a successive motion that was little more than a slightly lengthened redraft of the first motion was improper and did not extend the time for filing appeal); Boughton v. McAllister, 576 N.W.2d 94 (Iowa 1998) (a party should not be allowed to extend the time for appeal indefinitely by filing successive motions that address the same issue).

I Corp. argues on appeal that the second motion was required to preserve issues raised, but not ruled upon, in the trial court's order denying JNOV and new trial. The second motion did not, however, identify a single issue raised but not ruled upon – it merely recites, verbatim, the arguments made in the earlier motions. The trial court's denial of the JNOV and new trial motions was a ruling on all issues raised, and preserved for appellate review all issues raised therein.

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[3]We do not intend to suggest that I Corp.'s initial JNOV and new trial motions were not proper or did not toll the time for serving the notice of appeal. Clearly they did. See Rule 203(b)(1), SCACR. However, the issue is whether the time for serving notice of appeal is tolled by subsequently filing the same motion under a different caption.

CONCLUSION

We find that I Corp.'s second motion literally recites the arguments previously raised and previously ruled upon by the trial court in I Corp.'s first motion. The second motion was not, despite its caption, an appropriate Rule 59(e) motion. It was simply a successive motion for JNOV and new trial, and thus did not toll the time for serving the notice of appeal. I Corp. did not serve its notice of intent to appeal within the time prescribed in Rule 203, SCACR. We therefore dismiss the appeal as untimely. See Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985) (timely service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served).

MOORE, A.C.J., WALLER, BURNETT and PLEICONES, JJ., and Acting Justice George T. Gregory, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Nathaniel White, Appellant.

Appeal From Richland County
James Carlyle Williams, Jr., Circuit Court Judge

Opinion No. 25436
Heard February 20, 2002 - Filed April 1, 2002

AFFIRMED

Assistant Appellate Defender Tara S. Taggart, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Solicitor Warren B. Giese, all of Columbia, for respondent.

JUSTICE WALLER: White was convicted of first-degree burglary and sentenced to life imprisonment without parole pursuant S.C. Code Ann. § 17-25-45 (Supp.2000). We affirm.

FACTS

White was charged with the August 21, 1999, burglary of a motel room at the Comfort Inn on Main Street in Columbia. Immediately prior to the burglary, at approximately 10:30pm, White approached Deborah Sims, her boyfriend Jeffrey Walker, and Sims' son Richard, at the motel swimming pool. Sims and her son were staying at the motel while work was done on their home. Sims' boyfriend gave White a cigarette and a couple of dollars, and White left. Shortly thereafter, White was seen by the motel security guard going from room to room attempting to enter with a keycard. Upon reaching room 203, which was registered to Sims, the door opened and White entered. White heard the security guard calling for help on her radio and fled from the room; he was apprehended by the guard in the lobby. Sims advised the security guard that her son's room key, which had been hidden under a towel near the pool, was missing. The jury convicted White of first-degree burglary.

ISSUES

1. Does application of S.C. Code Ann. § 17-25-45(A) to White violate the prohibition against cruel and unusual punishment?[1]

2. Did the trial court err in refusing to instruct the jury on second and third-degree burglary?

1. CRUEL AND UNUSUAL PUNISHMENT

The state sought imposition of a sentence of life without parole pursuant

[1] S.C. CONST. Article I, § 15; U.S. CONST. Amend VIII.

to S.C. Code Ann. § 17-25-45(A)(the Two-Strikes law)[2] based upon White's current conviction for first-degree burglary, a most serious offense, and the fact that he had two prior armed robbery convictions, which were also most serious offenses.[3] White contends imposition of life imprisonment without parole, under the facts of this case, constitutes cruel and unusual punishment. His primary assertion is that because he had spoken with the victims at the pool prior to stealing their room key, the only evidence is that he was attempting to enter a room which, at the time, was not being used as a dwelling. We disagree.

Temporary absence from a "dwelling" is irrelevant to the charge of first-degree burglary. See State v. Ferebee, 273 S.C. 403, 257 S.E.2d 154 (1979)(temporary absence of occupants does not prevent residence from being subject of a burglary; if occupants leave with intent to return, breaking and entering during their absence constitutes burglary). See also Gillum v. State 468 So.2d 856 (Miss. 1985)(temporary absence from home does not destroy character of home as a "dwelling" subject to burglary if dweller leaves with intent to return); People v. Fleetwood, 217 Cal. Rptr. 612 (Cal. App. 4th Dist. 1985)("dwelling" status unaffected by temporary absence of occupant).

Further, Sims' boyfriend testified that Sims' son Richard had gone up to the room one time, and that both his children and Richard had been "in and out" of the room all day. Accordingly, regardless of the presence of the occupants

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[2] That section provides, in pertinent part:

> Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has one or more prior convictions for:
>
> (1) a most serious offense. . .

[3] White also had numerous other convictions which were not relied upon to enhance sentencing.

in the room at the time of the crime, it remained a "dwelling" within the meaning of the burglary statute.

Moreover, application of the Two-Strikes law to White does not constitute cruel and unusual punishment. Recently, in State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001), we rejected the defendant's claim that imposition of life without parole pursuant to S.C. Code Ann. § 17-25-45 constituted cruel and unusual punishment. There, we held the most serious nature of armed robbery, when combined with the defendant's prior most serious offense of assault and battery with intent to kill, was not disproportionate to a sentence of life without parole; the sentence was proportionate to that of other criminals in this state with a second most serious offense conviction; and life sentences for armed robbery were imposed under recidivist laws in other states.

The sentencing here likewise withstands a cruel and unusual punishment challenge. White has two prior convictions for the most serious offense of armed robbery. Further, notwithstanding the motel room White entered was unoccupied, the crime he committed is first-degree burglary, a most serious offense. Given that a life sentence is possible for even first offense first-degree burglary convictions, see S.C. Code Ann. § 16-11-311(B), a life sentence without parole for a recidivist with one or more previous convictions of most serious offenses does not constitute cruel and unusual punishment. As in Jones, White's life sentence is proportionate to any other criminal who has a second most serious conviction, and life sentences for first-degree burglary under recidivist laws have withstood such a challenge before. Cf. Tombrello v. State, 421 So.2d 1319 (Ala.Crim.App.1982)(holding life imprisonment is not cruel and unusual punishment for a first degree burglary conviction after previous convictions).

We note that the Ninth Circuit Court of Appeals recently held application of the California Three-Strikes law, imposing 25-year-to-life sentences for petty theft, constituted cruel and unusual punishment under the Eighth Amendment. Brown v. Mayle, 2002 WL 187415 (9th Cir.) (Feb. 7, 2002). The Brown court relied upon its recent opinion in Andrade v. California, 270 F.3d 743 (9th Cir. 2001), in which it held that a 50-year-to-life sentence for two petty theft

convictions violated the Eighth Amendment. However, both Andrade and Brown were based upon the fact that the core conduct for which the defendants had received their "third strike" were not traditionally punishable as felonies, but were generally misdemeanor first offenses with minimum jail sentences.[4] Unlike those cases, White is charged with the violent felony offense of first-degree burglary, punishable in-and-of itself by up to life imprisonment. Accordingly, Brown and Andrade are inapposite. We hold the sentence here withstands a cruel and unusual punishment challenge. Jones, supra.

2. CHARGE ON LESSER-INCLUDED OFFENSES

White next asserts the trial court erred in refusing to charge on the lesser-included offenses of second- and third-degree burglary. Essentially, he claims that since the hotel was a "building" the jury could have found he committed second or third-degree, rather than first-degree burglary. We disagree.

Pursuant to S.C. Code Ann. § 16-11-312(B)(Supp. 2001), a person is guilty of second-degree burglary if he "enters a building without consent and with intent to commit a crime therein, and . . . [t]he entering or remaining occurs in the nighttime."[5] White asserts that since a "dwelling" is also a "building," he was entitled to a second-degree burglary charge. We disagree.

We specifically rejected this contention in State v. Goldenbaum, 294 S.C.

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[4] Unlike the recidivist statute in question in Brown and Andrade, S.C. Code Ann. § 17-25-45 would not impose a life sentence for the offenses of the defendants in those cases as they were neither most serious nor serious offenses.

[5] Under § 16-11-312 (A), a person may also be found guilty of second-degree burglary if he or she enters a dwelling without consent and with intent to commit a crime therein. However, where the dwelling is entered in the nighttime, the crime is first-degree burglary under § 16-11-311. It is undisputed the entering in this case occurred in the nighttime.

455, 365 S.E.2d 731 (1988)(where victim's apartment was a "dwelling," there was no evidence from which the jury could have inferred defendant was guilty of second- or third-degree burglary). See also State v. Bernsten, 295 S.C. 52, 367 S.E.2d 152 (1988)(lesser degrees of burglary need not be submitted to the jury when there is uncontroverted evidence that the structure entered was a dwelling).

Finally, we find the trial court properly held the motel room in question was being used as a dwelling under S.C. Code Ann. §§ 16-11-10 and 16-11-310 (dwelling is defined to include any building in which there sleeps a tenant or person who lodges there with a view to the protection of property; for purposes of burglary statute, dwelling also means living quarters of a building used or normally used for sleeping, living, or lodging by a person). Accord State v. Hobgood, 434 S.E.2d 881 (N.C. 1993)(motel room "regularly and usually occupied by travelers for the purpose of sleeping" is considered a sleeping apartment). See also State v. Hussain, 942 P.2d 1168 (Ariz. App. 1997)(motel room qualifies as a "residential structure" within burglary statute); People v. Fleetwood, 217 Cal. Rptr. 612 (Cal. App. 4th Dist. 1985)(historically and traditionally, hotel rooms have been included within the definition of dwelling house); Commonwealth v. Correia, 457 N.E.2d 648 (Mass. 1983)(motel constituted a "dwelling house" within purview of statute prohibiting breaking and entering a dwelling house in the nighttime). See also 3 Wharton's Criminal Law § 335, at 208 (1980) ("rooms of an inn, hotel, or lodging house" regarded as dwelling house). Further, as noted above, the fact that the "dwelling" was temporarily unoccupied is irrelevant in light of the fact that the occupant intended to return. State v. Ferebee, supra. See also State v. Steadman, 257 S.C. 528, 186 S.E.2d 712 (1972)(upholding jury charge to the effect that it is not necessary entire building be devoted to dwelling purposes, nor that the dwelling area entered be constantly inhabited).

Here, given that the motel room was a "dwelling" as a matter of law, the trial court did not err in refusing the request to charge second-degree burglary. State v. Goldenbaum, supra; State v. Bernsten, supra.

AFFIRMED.

MOORE, A.C.J., BURNETT, PLEICONES, JJ., and Acting Justice George T. Gregory, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

O'Bryant Harris, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenville County
John W. Kittredge, Circuit Court Judge

Opinion No. 25437
Submitted December 13, 2001 - Filed April 8, 2002

DISMISSED

Assistant Appellate Defender Robert M. Pachak, of S.C. Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Allen Bullard, all of Columbia, for respondent.

JUSTICE MOORE: We granted a writ of certiorari in this post-conviction relief (PCR) case to consider petitioner's request for reclassification to non-violent offender status. We now dismiss the writ as improvidently granted.

FACTS

Petitioner was indicted by the State Grand Jury for conspiracy to traffick 400 grams or more of cocaine under S.C. Code Ann. § 44-53-370(e)(2)(e) (Supp. 2000). He admitted he participated in a Miami-based drug trafficking ring and was involved in transporting many kilos of cocaine between 1990 and 1996. In exchange for his cooperation with law enforcement, he was offered a plea agreement which he accepted. Under the agreement, petitioner pled guilty to conspiracy to traffick ten to twenty-eight grams of cocaine, first offense, in violation of § 44-53-370(e)(2)(a). He was sentenced to ten years and classified as a violent offender. In his PCR action, petitioner contested his classification as a violent offender. The application for relief was dismissed.

ISSUE

Is a conviction for conspiracy to traffick under § 44-53-370(e) properly classified as a violent offense?

DISCUSSION

Under S.C. Code Ann. § 16-1-60 (Supp. 2000), certain offenses are defined as "violent crimes."[1] This section specifically includes "drug

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[1]This classification affects a defendant's parole status. *See, e.g.,* S.C. Code Ann. §§ 24-21-610 (Supp. 2000) (must serve at least one-third of sentence for violent crime) *and* -645 (parole review every two years). Petitioner makes no claim counsel misadvised him about his parole status.

trafficking as defined in § 44-53-370(e)" as a violent crime.

Section 44-53-370(e)(2), under which petitioner pled guilty, provides:

> (e) Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of. . . .
>
> (2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is [specifying certain amounts relevant to sentencing].

(Emphasis added). As defined in this section, there is no distinction between conspiracy to traffick and the substantive offense of trafficking. Further, § 44-53-370(e) provides that a person convicted of conspiracy under this section must be sentenced with a full sentence and not one-half of the sentence as otherwise provided in S.C. Code Ann. § 44-53-420 (Supp. 2000) for conspiracy drug charges.[2] The legislature clearly intended that conspiracy to traffick be treated as trafficking under § 44-53-370(e).

See Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000) (unless counsel gives erroneous parole advice, parole information is not a ground for collateral attack of a guilty plea).

[2]"Notwithstanding Section 44-53-420, a person convicted of conspiracy pursuant to this subsection must be sentenced as provided in this section with a full sentence or punishment and not one-half of the sentence or punishment prescribed for the offense."

In conclusion, a conviction under § 44-53-370(e), whether for trafficking or conspiracy to traffick, is properly classified as a violent crime under § 16-1-60. Accordingly, petitioner is not entitled to reclassification.

DISMISSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of K.
Douglas Thornton, Respondent.

Opinion No. 25438
Submitted March 1, 2002 - Filed April 8, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr. and Senior Assistant Attorney General Nathan Kaminski, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Irby E. Walker, Jr., of Conway, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an agreement pursuant to Rule 21, Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension of not less than thirty days nor more than nine months. We accept the agreement and suspend respondent for nine months from the date of this opinion.

Facts

I. Social Security Administration Matter

Respondent agreed to represent client in a workers' compensation matter on July 15, 1997. Respondent and client executed a fee agreement pertaining to the representation on the workers' compensation claim. Client proceeded to file a pro se claim with the Social Security Administration (SSA) for disability insurance benefits. On March 25, 1998, client received notice his SSA claim was denied. He asked respondent to represent him in contesting the denial by SSA. No separate fee agreement was executed.

Respondent filed a request for reconsideration of client's claim. Respondent also filed a form to appoint respondent as client's representative. The form stated that respondent would not charge client a fee unless it was approved by SSA, and that he would notify SSA if he chose not to collect a fee.

On September 21, 1998, respondent settled client's workers' compensation claim for $42,000 and was paid $10,500 as his fee. In December 1998, client received notice that SSA was granting his claim, but reducing the amount because of the workers' compensation award. On January 18, 1999, respondent filed another Request for Reconsideration to adjust the monthly payment. Respondent contacted SSA several times during the following months.

On October 19, 1999, respondent received notice that SSA was requesting benefit calculations and an itemized list of attorney's fees. On October 21, 1999, respondent sent SSA the requested benefit computations and stated that he would forward the itemized attorney's fee bill later that day. Respondent never sent the itemized attorney's fee bill.

In January 2000, respondent notified client that he anticipated being suspended from the practice of law due to his failure to file a state

income tax return. As a result of the conversation, client agreed to loan respondent $1,000. Client changed his mind when he arrived at respondent's office. However, client again changed his mind after talking with respondent and agreed to the loan. Respondent prepared a hand written promissory note dated January 14, 2000. The note calls for respondent to repay the sum of $1,000 immediately upon respondent's receipt of attorney's fees from the SSA.

On January 22, 2000, respondent received notice that SSA raised client's monthly benefit and that $1,211 was withheld to pay attorney's fees if needed. Respondent never submitted an invoice to SSA for attorney's fees. In August 2000, client contacted another attorney to discuss repayment of the $1,000 loan with respondent. Respondent indicated that because he was suspended from the practice of law he was unable to prepare a statement of attorney's fees. On March 14, 2001, after client had contacted Disciplinary Counsel, respondent sent a letter to SSA waiving any attorney's fees and asking that any funds withheld be sent to client.

On January 23, 2001, Disciplinary Counsel provided notice of the complaint and requested a response from respondent. On February 23, 2001, after receiving no response, Disciplinary Counsel wrote respondent a Treacy letter.[1] Respondent submitted an untimely response on March 15, 2001.

II. Construction Claim Matter

Clients retained respondent to represent them in a dispute with a developer and general contractor concerning defects in the construction of their residence. On March 12, 1990, respondent filed a summons and complaint against the developer. On September 18, 1990, the court entered an order of default against the developer and granted respondent's motion to amend the pleadings to name the general contractor as an additional defendant. The order deferred entering a judgment against the developer

[1] In the Matter of Treacy, 277 S.C. 514, 299 S.E.2d 240 (1982).

pending a hearing on the merits.

Thereafter, respondent filed an amended complaint naming the general contractor as a defendant. Because the case had been stricken from the docket by agreement, it was reinstated and re-numbered. Before the trial was completed, clients and the general contractor reached an agreement whereby the contractor agreed to make repairs and make a cash payment to clients. In return, clients agreed not to execute on any judgment which might subsequently be obtained against the contractor in excess of $11,500. On May 15, 1992, an order was signed confirming the agreement and entering a judgment against the developer in the amount of $21,172. The order specifically stated that in the event of a default by the contractor, clients would be entitled to petition for judgment against the contractor, not to exceed $11,500.

The general contractor did not make the repairs as required by the agreement. As a result, respondent filed a new suit against the contractor asking for specific performance or, in the alternative, an award of $11,500. When the contractor failed to file an answer, respondent filed an affidavit and order of default. However, respondent did not subsequently apply to the court for judgment against the general contractor or proceed with a damages hearing. As a result, respondent failed to protect clients' interest by obtaining and recording a judgment against the contractor.

Instead, respondent filed another action entitled "Complaint for Examination of Defendant in Supplemental Proceedings" under the old docket number. He also filed an "Affidavit to Obtain Order to Examine Defendant in Supplemental Proceedings." The affidavit stated that a judgment was obtained against the contractor in the sum of $11,500, based on the judgment dated May 15, 1992. Respondent admits he should have known that he never obtained a money judgment against the general contractor, and that the order of May 15, entered a judgment against the developer.

Respondent did not collect any proceeds as a result of the

supplemental proceedings. Additionally, respondent dismissed the judgment against the contractor on the separate suit stating that it had been settled. Respondent admits he never consulted with clients prior to dismissing the action.

After respondent's representation of clients ended, a foreclosure action was brought against the general contractor. Clients submitted a claim on any additional funds believing respondent had perfected a judgment against the contractor for the $11,500 based on the May 15 judgment. The Master-In-Equity ruled that the May 15 judgment was not a judgment against the contractor, but solely against the developer. Therefore, the Master ruled clients did not have a valid claim to any of the surplus funds.

On June 22, 2001, Disciplinary Counsel commenced a preliminary investigation and requested respondent file a response. Respondent failed to respond in a timely manner. On July 10, 2001, after receiving no response, Disciplinary Counsel wrote respondent a Treacy letter. Respondent submitted an untimely response on September 4, 2001.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation, and shall consult with the client as to the means by which they are pursued); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 1.8 (a lawyer shall not enter into a business transaction with a client unless the transaction and terms are fair and reasonable, the client is given the opportunity to seek advice of independent counsel, and the client consents in writing); Rule 8.1 (failing to respond to a

lawful demand for information regarding a disciplinary matter); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(d)(engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(3)(failing to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state).

Conclusion

Respondent has fully acknowledged that his actions were in violation of the Rules for Lawyer Disciplinary Enforcement and the Rules of Professional Conduct. We therefore suspend respondent from the practice of law for nine months. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Larry S. Drayton, Respondent.

Opinion No. 25439
Submitted February 27, 2002 - Filed April 8, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Larry S. Drayton, pro se, of Ridgeland.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of any sanction deemed appropriate by this Court. We accept the Agreement and impose a definite suspension of ninety days from the practice of law. The facts as admitted in the Agreement are as follows.

Facts

In 1993, this Court suspended respondent from the practice of

law because of his failure to complete the Continuing Legal Education requirements for the year 1992. However, respondent did not surrender his certificate to practice law, as required by the Rules for Lawyer Disciplinary Enforcement. Respondent remained suspended from the practice of law until 1999, when this Court granted his petition for reinstatement.

In December 1997, during the course of his suspension, respondent assisted a non-custodial parent at a child support conference. In connection with this conference, respondent negotiated with a representative from the South Carolina Department of Social Services and signed an order on behalf of the non-custodial parent. Also in December 1997, respondent assisted a friend at a Rule to Show Cause hearing in family court and assisted in establishing a repayment plan.

Law

By his conduct, respondent has violated the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state); and Rule 30(f) (a lawyer who has been suspended from the practice of law shall, within fifteen days after the suspension, surrender his or her certificate of admission to practice law in this state to the Clerk of the Supreme Court).

Conclusion

Respondent has fully acknowledged that his actions in the aforementioned matters were in violation of the Rules for Lawyer Disciplinary Enforcement. We therefore suspend respondent from the practice of law for ninety days. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of J.
Stephen McCormack, Respondent.

Opinion No. 25440
Submitted February 27, 2002 - Filed April 8, 2002

DISBARRED

Henry B. Richardson, Jr., of Columbia, for the Office of Disciplinary Counsel.

J. Stephen McCormack, pro se, of Ridgeland.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and disbar respondent, retroactive to the date respondent was placed on interim suspension.[1] The facts as admitted in the agreement are as follows.

[1]Respondent was placed on interim suspension by order of this Court dated January 28, 2002.

Facts

Respondent represented client in a probate matter. The Probate Court directed opposing counsel to remit $12,759.56 to client and/or the trust, for which client served as trustee. The Probate Court set forth specific directions concerning the distribution and use of these funds.

In accordance with the Probate Court's order, opposing counsel issued a check made payable to respondent. Respondent did not deposit the check into his escrow or trust account. Instead, respondent deposited the check into a joint personal account held by himself and his mother.

From these funds, respondent paid himself a fee, as well as the fee of another lawyer as directed by the Probate Court. In violation of the Probate Court's order, respondent then used the remaining funds for the benefit of himself and/or his mother.

Upon being confronted by client, respondent acknowledged that he had "borrowed" from the funds to pay his mother's mortgage. Respondent has since repaid a portion of the money that he owes client; however, respondent still owes client approximately $4,946.25. Respondent is currently unable to repay client the balance due and has sought protection under the United States Bankruptcy Code.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.15 (a lawyer shall hold and safeguard property of clients separate from the lawyer's own business or personal property; upon receiving funds in which a

client has an interest, a lawyer shall promptly notify the client; a lawyer shall promptly deliver to the client any funds that the client is entitled to receive); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); Rule 8.4(c) (engaging in conduct involving moral turpitude); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Respondent also admits that he violated the financial record keeping requirements found in Rule 417, SCACR.

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state. Respondent shall not be entitled to seek reinstatement or readmission to the practice of law until he has fully repaid all funds owed client and/or the trust, including reasonable interest, and until he has reimbursed the Lawyer's Fund for Client Protection for any and all amounts paid, including reasonable interest, in connection with this matter. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Gregory
A. Newell, Respondent.

Opinion No. 25441
Submitted February 27, 2002 - Filed April 8, 2002

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Senior Assistant Attorney General Nathan Kaminski, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Gregory A. Newell, pro se, of Greenville.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an agreement pursuant to Rule 21, Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension of nine months. We accept the agreement. The following facts are set forth in the agreement.

Facts

In the first matter, the client retained respondent in 1991 to

handle a lawsuit against a realtor and warranty company. Respondent failed to file the lawsuit within the statute of limitations, failed to inform the client that the statute of limitations had run, and continued to assure the client that he was working on the case. Respondent ignored the client's repeated requests for information regarding the status of the case and requests to view the case file.

In the second matter, the client retained respondent to file an action for divorce and to gain custody of her minor child. Respondent's failure to properly serve the husband resulted in the dismissal of the divorce action. Respondent re-filed the action, but failed to inform the client that the first suit had been dismissed.

In a third matter, respondent was retained to represent the client in a personal injury case. Respondent did not file the lawsuit until six days before the expiration of the statute of limitations, despite the client's belief that suit had been filed almost two years earlier. As a result of respondent's delay in filing the lawsuit, the client's case was called for trial five years after she retained respondent. On the day the case was called for trial, respondent was out of town and had failed to ask for the court's protection. Respondent did communicate with the court and a continuance was granted; however, respondent failed to communicate directly with the client. The client's case was eventually settled, at which time respondent reduced his contingency fee by $1,500.

In a fourth matter, respondent was retained to file a bankruptcy petition. Respondent failed to file the petition because the client had not paid respondent the filing fee. However, respondent did not inform client that her petition had not been filed or his reason for not filing the petition.

In a fifth matter, respondent was appointed in a Post-Conviction Relief (PCR) matter. Respondent failed to keep the client reasonably informed about the status of his case and failed to comply with reasonable requests for information.

In two of these matters, the clients paid respondent non-refundable retainers. Respondent has made only partial refunds of the retainers.

Disciplinary Counsel conducted separate preliminary investigations into each of these matters and requested that respondent file responses to each client's allegations. Respondent filed a response in only one matter. In all other matters, respondent ignored Counsel's requests for information. The Commission's investigative panel subsequently authorized a Full Investigation. Disciplinary Counsel served respondent with a Notice of Full Investigation advising respondent of his duty to fully respond to the allegations contained therein. Respondent failed to respond to the Notice of Full Investigation.

Law

As a result of his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (failing to provide competent representation to a client); Rule 1.2(a) (failing to abide by a client's decisions concerning the objectives of representation); Rule 1.3 (failing to act with reasonable diligence and promptness in representing a client); Rule 1.4(a) (failing to keep a client reasonably informed about the status of a matter and to promptly comply with reasonable requests for information); Rule 2.1 (failing to exercise independent professional judgment and render candid advice); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(3) (knowingly failing to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5) (engaging in conduct tending to bring the courts or legal profession into disrepute); and Rule 7(a)(6) (violating the oath of office taken upon

admission to practice law).

Conclusion

Respondent fully acknowledges that his actions in the aforementioned matters were in violation of the Rules of Professional Conduct and the Rules for Lawyer Disciplinary Enforcement. We hereby suspend respondent from the practice of law for nine months. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, Rule 413, SCACR. Within thirty days of the date of this opinion, respondent shall file an affidavit with the ODC showing that he has repaid all unearned or inequitable attorney fees referred to in the Agreement for Discipline by Consent and shall provide reasonable documentation thereof. Respondent shall also make available for inspection and/or copying by the ODC or its investigators his law firm financial records to determine compliance with this provision.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Daniel Alexander Walker, Petitioner.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal From Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25442
Heard March 6, 2002 - Filed April 8, 2002

REVERSED

Melvin L. Roberts, of Roberts & D'Agostino, of York, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson,

Assistant Attorney General Melody J. Brown, all of Columbia, and Solicitor Thomas E. Pope, of York, for respondent.

JUSTICE PLEICONES: We granted certiorari to consider the Court of Appeals' opinion affirming Petitioner's conviction for cultivating marijuana on the land of another. State v. Walker, Op. No. 2000-UP-608 (S.C. Ct. App. filed October 10, 2000). We find Petitioner was entitled to a directed verdict and reverse.

FACTS

In September 1997, Dr. George Stretcher ("Stretcher") discovered a number of marijuana plants growing on his property and alerted the authorities. Police searched the area and found five marijuana fields, three on Stretcher's property and two on adjacent property owned by Mary Taylor. William Bennett ("Bennett"), an investigator with the South Carolina Forestry Commission, installed a video surveillance camera aimed at one of the fields. Bennett also visually inspected all five fields. He found evidence that the plants in all the fields except one had been fertilized. Soil had been piled up around the bases of the plants, and a number of plants had been thinned out; Bennett found culled marijuana plants discarded at the edge of the fields. Additionally, Bennett noticed that tree limbs and other vegetation had been cleared out around the fields allowing more light to penetrate.

About a month after Stretcher's discovery, Charles Yates ("Yates") was deer hunting in the area when Petitioner approached him in the woods. Petitioner was carrying a black plastic bag. The bag appeared to Yates to be quite heavy. Petitioner said he was lost and asked Yates for directions to the dirt road that traversed the property. Yates gave Petitioner directions. When Yates asked Petitioner to reveal the contents of the black bag, Petitioner ran into the woods.

Suspicious of Petitioner's activity, Yates called the police and reported

the incident. Police responded to the scene and Yates helped them search for Petitioner. The police eventually discontinued the search and left the area. Later, as Yates was driving home, he saw Petitioner standing in the dirt road. Petitioner motioned for Yates to stop, and Yates complied. Yates agreed to give Petitioner a ride. Later that evening, Yates again contacted the police.

Very early the next day Bennett checked the surveillance equipment he had previously installed, and viewed the video tape. The tape depicted a man resembling Petitioner, carrying a black bag, harvesting marijuana. The time code on the tape indicated this activity occurred less than an hour before Yates reported seeing Petitioner in the woods.

Later that morning, police officers returned to the area, and encountered Petitioner on the dirt road. They placed him under arrest.

Petitioner was indicted and tried for trafficking marijuana, manufacturing marijuana, and two counts of cultivating marijuana on the land of another.[1] Following presentation of the State's evidence Petitioner moved for a directed verdict on all charges. The trial court denied the motion. The jury found Petitioner guilty on three counts, acquitting him on the count charging cultivation of marijuana on the Taylor property. Petitioner appealed.

The Court of Appeals reversed the trafficking conviction and affirmed the two remaining convictions. We granted certiorari to consider the conviction for cultivating marijuana on the land of another.[2]

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[1]One count of cultivating was based on the marijuana plants found on Stretcher's property, the other count on the marijuana plants found on the Taylor property.

[2]Evidence sufficient to sustain a conviction for manufacturing marijuana may not always be sufficient to sustain a conviction for cultivating marijuana on the lands of another, even where there is no dispute the property belonged to someone other than the defendant. The manufacturing statute,

ISSUE

Did the Court of Appeals err in determining Petitioner was not entitled to a directed verdict on the charge of cultivating marijuana on the land of another?

ANALYSIS

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). "When a motion for a directed verdict is made in a criminal case where the State relies exclusively on circumstantial evidence, the trial judge is required to submit the case to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced." State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001).

South Carolina Code Ann. § 16-11-617 (Supp. 2001) provides that

> It is unlawful for a person to enter on the land of another for the purpose of cultivating or attempting to cultivate marijuana. The provisions of this section are cumulative to other provisions of law. To constitute a violation of this section, a minimum of

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S.C. Code Ann. § 44-53-370 (a)(1) (2002), when read in conjunction with the definitional statute, S.C. Code Ann. § 44-53-110 (2002), and State v. Austin, 276 S.C. 441, 442, 279 S.E.2d 374, 375 (1981), equates the act of "harvesting" with the offense of "manufacturing." The code, however, does not equate "harvesting" with "cultivating."

twenty-five marijuana plants must be cultivated. . . .

The code does not define "cultivating" or "cultivate." Since it is a criminal statute, we must construe § 16-11-617 strictly against the State and in favor of the defendant. Stardancer Casino, Inc. v. Stewart, __ S.C. __, 556 S.E.2d 357 (2001).

Webster defines "cultivate" as

> 1. to prepare and use (soil or land) for growing crops; till 2. to break up the surface soil (around plants) in order to destroy weeds, prevent crusting, and preserve moisture 3. to grow (plants, crops, fish, etc.) from seeds, bulbs, shoots, etc. 4. to improve or develop (plants) by various horticultural techniques 5. to improve by care, training, or study; refine . . . 6. to promote the development or growth of; acquire and develop . . . 7. to seek to develop familiarity with; give one's attention to; pursue

Webster's New World College Dictionary 352 (4th ed. 1999).

We do not agree with the Court of Appeals that the videotape depicts "a person cultivating the plants." The videotape shows a man matching Petitioner's description in a field of marijuana, picking, or harvesting, the plants. The man in the video is not tilling or breaking up the soil; he is not planting seeds, or transplanting young marijuana plants; he is not applying fertilizer, or otherwise preparing or improving the soil. Nothing in the video depicts the *cultivation* of marijuana as that word is commonly defined. Bennett's testimony that the fields were cultivated does not establish Petitioner cultivated them. Yates' description of his encounter with Petitioner, while it does suggest that Petitioner is the man shown in the video harvesting marijuana, is not evidence that Petitioner cultivated the crop. In fact, apart from his presence in the area, there is no evidence connecting Petitioner with the cultivation of the marijuana. See State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987) (where evidence merely places defendant at

scene of crime, but fails to show defendant committed the crime charged, defendant is entitled to directed verdict).

Construing the evidence in the light most favorable to the State, we find it merely raises a suspicion of Petitioner's guilt. See State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (lower court should grant motion for directed verdict where evidence merely raises the suspicion accused is guilty). We therefore REVERSE the decision of the Court of Appeals.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Freddie Jackson, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenwood County
Henry F. Floyd, Trial Judge
Larry R. Patterson, Post-Conviction Judge

Opinion No. 25443
Submitted February 21, 2002 - Filed April 8, 2002

AFFIRMED

Aileen P. Clare, of the Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant Attorney General W. Bryan Dukes, all of Columbia, for respondent.

PER CURIAM: We granted certiorari to determine whether participation in a "community supervision program" (Program) as defined in S.C. Code Ann. §24-13-100 (Supp. 2001) is a collateral consequence of sentencing. We hold that it is, and therefore affirm the post-conviction relief (PCR) judge's order denying petitioner relief.

Petitioner pled guilty to second degree criminal sexual conduct, a violation of S.C. Code Ann. §16-3-653 (1985). Under §24-13-100, all Class A, B, and C felonies, and all "exempt" offenses which are punishable by a maximum term of imprisonment of twenty years or more are "no parole offenses." Second degree criminal sexual conduct is a class C felony. S.C. Code Ann. §16-1-90(C)(Supp. 2001).

An individual, such as petitioner, convicted of a "no parole offense" must serve 85% of "the actual term of imprisonment imposed," less any part suspended, before becoming eligible for early release, discharge, or participation in the Program. S.C. Code Ann. §24-13-150(A)(Supp. 2001). All persons serving "no parole" sentences, except those under a death sentence or a life sentence, participate in the Program following their term of incarceration. S.C. Code Ann. §24-21-560(A)(Supp. 2001). Petitioner contends his plea was involuntary because his trial counsel was ineffective in failing to inform petitioner about the Program in advising him whether to plead guilty. We disagree.

In our view, the Program serves essentially the same function for persons convicted of "no parole offenses" as parole does for other inmates. It is well settled that parole eligibility is a collateral consequence of sentencing, and that trial counsel need not advise a client of his parole eligibility, Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983), or ineligibility, Knox v. State, 340 S.C. 81, 530 S.E.2d 887 (2000), in order to render effective assistance. Petitioner's trial counsel was not required to inform petitioner that, as a collateral consequence of his sentencing, he would

participate in the Program. Since he has not demonstrated that counsel was ineffective, petitioner has not met his burden of showing the resulting plea was involuntary. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001).

The order denying petitioner's PCR application is

AFFIRMED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

In re: Amendments to Rule 410, SCACR.

ORDER

Pursuant to Art. V, § 4 of the South Carolina Constitution, Rule 410, SCACR, is amended as follows:

1. Rule 410(c)(2) is amended by deleting the phrase "to the Treasurer of the South Carolina Bar" contained in the third sentence and by deleting the fourth sentence.

2. Rule 410(e) is amended by deleting the third paragraph.

These amendments shall be effective immediately.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
April 3, 2002

The Supreme Court of South Carolina

In re: Amendment to Rule 8.3(d) of Rule 407, SCACR.

ORDER

Pursuant to Art. V, § 4 of the South Carolina Constitution, Rule 8.3(d) of Rule 407, SCACR, is amended by replacing "Lawyers Caring about Lawyers Committee" with "Lawyers Helping Lawyers."

This amendment shall be effective immediately.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 4, 2002

The Supreme Court of South Carolina

In re: Amendment to Rule 402(c)(3), SCACR.

ORDER

Pursuant to Art. V, § 4 of the South Carolina Constitution, Rule 402(c)(3) is amended to read:

> has received a JD or LLB degree from a law school which was approved by the Council of Legal Education of the American Bar Association at the time the degree was conferred.

This amendment shall apply to applications for admission filed on or after the date of this Order.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 4, 2002

The Supreme Court of South Carolina

South Carolina Department of Social Services, Respondent,

v.

Cindy Jones Hickson, Billy Hickson, and Destiny Danielle Hickson, DOB: 11/25/97, a minor under the age of eighteen (18) years, Defendants,

of whom Billy Hickson is, Petitioner.

O R D E R

The South Carolina Department of Social Services sought to terminate the parental rights of Cindy Hickson (Mother) and Billy Hickson (Father) to their minor child (Danielle). The family court terminated the parental rights of both parents. Mother did not appeal. Father appealed pursuant to Ex parte Cauthen, 291 S.C. 465, 354 S.E.2d 381 (1987). The Court of Appeals affirmed the termination of Father's parental rights. South

Carolina Dep't of Soc. Servs. v. Hickson, Op. No. 2001-UP-470 (S.C. Ct. App. filed November 1, 2001). Father then filed a petition for writ of certiorari, pursuant to Cauthen.

We deny Father's petition for writ of certiorari. However, we take this opportunity to hold that it is unnecessary to file a petition for writ of certiorari after a Cauthen appeal has been decided by the Court of Appeals. The filing of a Cauthen appeal ensures that the trial transcript will be reviewed for any possible issues of arguable merit. Thus, it is unnecessary to file a petition for writ of certiorari after the Court of Appeals has affirmed pursuant to Cauthen.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
April 3, 2002

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Betty Jeanne Jocoy,
Respondent,

v.

Nancy Hess Jocoy and William Gregg Jocoy,
Defendants,

Of whom Nancy Hess Jocoy is,
Appellant.

Appeal From York County
J. Buford Grier, Master-in-Equity

Opinion No. 3473
Submitted February 4, 2002 - Filed April 1, 2002

AFFIRMED

Douglas F. Gay, of Gay & Walters, of Rock Hill, for appellant.

Thomas B. Roper, of Rock Hill, for respondent.

HEARN, C.J.: Betty Jocoy (Mrs. Jocoy) purchased a home but

titled it in her daughter-in-law Nancy's name. After being forced to leave the home, Mrs. Jocoy brought this action seeking to establish a resulting trust in the property. The master-in-equity found that a resulting trust was created and granted title to Mrs. Jocoy. Nancy appeals arguing the master erred in not finding Mrs. Jocoy had given her the property. We affirm.[1]

FACTS

In 1992, Mrs. Jocoy suffered a stroke that left her partially paralyzed and unable to speak but did not affect her mental abilities. In 1994 after living with a series of relatives, she began discussing with her son, William Jocoy, and her daughter-in-law the possibility of her purchasing a home and William's family caring for her there until her death. Mrs. Jocoy desired this arrangement to avoid living in a nursing home.

Mrs. Jocoy and Nancy agreed that Mrs. Jocoy would pay for the home but title would be in Nancy's name.[2] The family selected and purchased a home, and Mrs. Jocoy and William's family resided there until 1997 when William and Nancy separated and William moved out of the home. That fall, Nancy was diagnosed with cancer which rendered her unable to care for Mrs. Jocoy. As a result, William placed Mrs. Jocoy in a nursing home.[3]

William and Nancy have since reconciled and currently live in the home. Mrs. Jocoy brought this action against Nancy asking the court to transfer title to her as the beneficiary of a resulting trust. The master found a resulting

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

[2]Initially, Mrs. Jocoy wanted to leave the home to William and Nancy in her will. Nancy balked at this idea because she feared that Mrs. Jocoy might change her will and leave the property to someone else. Mrs. Jocoy titled the home in Nancy's name to avoid claims by her son's creditors.

[3]Mrs. Jocoy now lives in assisted living facility near her sister's home in Pennsylvania.

trust had been established and ordered title be placed in Mrs. Jocoy's name. Nancy appeals.

LAW/ANALYSIS

Actions to determine resulting trusts sound in equity. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). As such, this court may determine facts in accordance with our view of the preponderance of the evidence. Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "While this permits us a broad scope of review, we do not disregard the findings of the Master, who saw and heard the witnesses and was in a better position to evaluate their credibility." Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

"The general rule is that when real estate is conveyed to one person and the consideration is paid by another, it is presumed that the party who pays the purchase money intended a benefit to himself and a resulting trust is raised in his behalf." Lollis v. Lollis, 291 S.C. 525, 528, 354 S.E.2d 559, 561 (1987). However, when the conveyance is made to a spouse, child or other person for whom the purchaser has a duty to provide, this presumption does not attach. Hayne, 327 S.C at 249, 489 S.E.2d at 475-76. Instead, the presumption is that the purchaser intended a gift or advancement. Id. Either of these presumptions is rebuttable on a showing of the purchaser's intent to the contrary through parol evidence. Id.; Lollis, 291 S.C. at 529, 354 S.E.2d at 561.

In this case, it is undisputed that Mrs. Jocoy provided all of the consideration for the home and that title was placed in Nancy's name. Our next inquiry is which presumption applies. South Carolina law has not addressed how a son-in-law or daughter-in-law should be treated with respect to the resulting trust presumptions. Other jurisdictions have reached differing results on the issue. See Ryan v. Ryan, 104 So. 2d 700, 702 (Ala 1958) (finding no gift presumption arises between mother-in-law and son-in-law); Varap v. Varap, 222 N.E.2d 77, 84 (Ill. App. Ct. 1966) (holding when a parent purchases property that is titled in his or her name and the name of a child, there is a presumption of a gift to the child; however, "[t]his presumption of gift does not arise where

the relationship between the payor and the grantee is more remote – i.e., there is no presumption of a gift to a son-in-law"); McQuaide v. McQuaide, 168 N.E. 500, 505 (Ind. App. 1929) ("In some of the adjudicated cases this [presumption of a gift] has been applied where the nominal grantee is a son-in-law.").

In our view, the better approach is that no gift is presumed to a son-in-law or daughter-in-law. The parent-child relationship is easily distinguishable from that of a parent and a son-in-law or daughter-in-law. Moreover, other areas of South Carolina law draw the same distinction. For example, contributions by one party's parents may be treated as contributions by that party in divorce actions. See Sexton v. Sexton, 308 S.C. 37, 43, 416 S.E.2d 649, 654 (Ct. App. 1992) reversed on other grounds by 310 S.C. 501, 427 S.E.2d 665 (1993). Another analogy may be drawn to our intestate scheme which makes no provision for in-laws. See S.C. Code Ann. § 62-2-101 (1987). Thus, the general rule under South Carolina law appears to be that sons-in-law and daughters-in-law are not treated the same as sons and daughters. Accordingly, we find the general rule presuming a resulting trust applies in this case.

Nancy argues that the evidence unequivocally establishes that Mrs. Jocoy intended a gift to William and only an intent to keep a life estate for herself.[4] We note that this argument is inconsistent with William and Nancy's actions in placing Mrs. Jocoy in a nursing home and failing to pay her rent for her alleged life interest. Moreover, our review of the evidence convinces us that Mrs. Jocoy intended to live in her own house, cared for by her son and his family. Although she testified that she meant for William and Nancy to receive the property after her death, that does not take away from the clear and convincing evidence showing her intent to keep a beneficial interest in the property for herself. Therefore, Nancy has failed to rebut the presumption of a resulting trust. Accordingly, the judgment of the master is

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[4]Nancy argues on appeal that Mrs. Jocoy holds an equitable life estate rather than a resulting trust. She cites no authority recognizing such a property interest, and we could find none. We decline to create such an interest here.

AFFIRMED.

CONNOR and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Norma B. Polson,

Respondent,

v.

Elizabeth D. Craig, Laura D. Young, Catherine Jean DuBose, Cheryl Ann DuBose, Richard Preston DuBose, and James Newton DuBose,

Appellants.

In re:

Estate of Martha S. Broadbent

Case Number: 97-ES-16-120

J. Alex Stanton,

Petitioner,

v.

Norma B. Polson, Dana Polson Hadley, Daphene Polson, David B. Polson, Elizabeth

D. Craig, Laura D. Young, Catherine Jean DuBose, Cheryl Ann DuBose, Richard Preston DuBose, James Newton DuBose, Janie Hough, Harvey Knight, and John Richard DuBose,

Respondents.

Appeal From Darlington County
James Carlyle Williams, Jr., Circuit Court Judge

Opinion No. 3474
Heard January 9, 2002 - Filed April 8, 2002

AFFIRMED

Robin Page Freeland, of Bell, Tindal & Freeland, of Lancaster; and Harriet E. Wilmeth, of Hartsville, for appellants.

Peter L. Murphy, of Columbia, for respondent Norma B. Polson.

GOOLSBY, J.: Elizabeth D. Craig, Laura D. Young, Catherine Jean DuBose, Cheryl Ann DuBose, Richard Preston DuBose, and James Newton DuBose (referred to collectively as Appellants) appeal the circuit court's reversal of the probate court's finding that Norma Polson is entitled to eight hundred shares of Exxon stock owned by Martha Broadbent at her death. The circuit court reversed, ruling Polson is entitled not only to the original four

hundred shares of stock devised in Martha Broadbent's will but to all additional shares resulting from stock splits of those shares. We affirm.

FACTS

This case began when Alex Stanton, in his capacity as Personal Representative, petitioned the probate court for an order declaring Norma Polson's interest in shares of Exxon stock owned by Martha Broadbent at the time of her death. Norma Polson is the daughter of William B. and Norma B. Broadbent. When Polson was growing up in Hartsville, her parents were good friends of John and Martha DuBose. The Broadbent and DuBose families lived near each other for many years and saw each other frequently. Sometime after Norma Broadbent and John DuBose passed away, William Broadbent and Martha DuBose married. William Broadbent died in 1965.

In his will, William Broadbent devised four hundred shares of Standard Oil of New Jersey stock to Martha.[1] The will provided in pertinent part:

ARTICLE IV

> I give and bequeath to my wife, MARTHA S. BROADBENT, the remaining four hundred (400) shares of capital stock of Standard Oil of New Jersey, if owned by me at the time of my death, together with all dividends, rights and benefits declared thereon subsequent to the time of my death and all rights and benefits thereof. This bequest to my wife is unstricted (sic) and without condition. However, in the event that she should have no need for these shares of stock during her lifetime, it is my request that she give said shares to my daughter, Norma B. Polson, at my wife's demise. (emphasis added).

[1] William inherited the stock from his sister.

In 1967, Martha wrote a will stating in part, "I hereby give and bequeath unto Norma B. Polson, daughter of my late husband, four hundred (400) shares of capital stock of Standard Oil Company."

Martha Broadbent died in 1997. In her last will, dated March 19, 1984, Martha repeated the 1967 devise of four hundred shares of Standard Oil stock to Norma Polson.

At the time of Martha's death, however, Standard Oil of New Jersey no longer existed; it had become Exxon Corporation in 1972. Due to subsequent stock splits, the original four hundred shares greatly increased in number.

After hearing the evidence, the probate court concluded Martha intended only a general devise of four hundred shares of Exxon stock to Polson.[2] Because the devise is general, the court held Polson is not entitled to additional shares resulting from stock splits.[3] Polson appealed to the circuit court.

The circuit court reversed, finding that the probate court erred as a matter of law in holding the devise is general and that S.C. Code Ann. section 62-2-605 (Supp. 2001) is not controlling.[4] Under section 62-2-605, if the devise is

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[2] The probate court concluded the will contained a patent ambiguity, and admitted extrinsic evidence. We note that extrinsic evidence is admissible when there is a latent ambiguity, not a patent ambiguity. See Shelley v. Shelley, 244 S.C. 598, 137 S.E.2d 851 (1964). In the instant case, however, we do not reach the issue of whether the probate court properly admitted extrinsic evidence because the parties did not raise this issue.

[3] The court later reconsidered its order and held that Polson is entitled to additional shares from the stock split after Martha's death but not to shares from splits prior to Martha's death. This order gave Polson a total of eight hundred shares.

[4] The circuit court also found the probate court erroneously held the will contained a patent rather than a latent ambiguity.

specific, Polson is entitled to the original four hundred shares and to all additional stock resulting from splits.[5]

ANALYSIS

Appellants argue the probate court's finding that Martha intended a general devise of only four hundred shares is supported by the evidence. They further contend Polson failed to present any evidence of Martha's intent to devise Polson more than four hundred shares of Exxon stock.

An action involving the construction or interpretation of a will is an action at law and the findings of the trial judge will only be disturbed on appeal when they are based on an error of law or are without evidence that reasonably supports them.[6]

Courts in this state construe wills and devises in accordance with applicable provisions of the South Carolina Probate Code unless the testator's will indicates a contrary intent.[7] S.C. Code Ann. section 62-2-605 addresses increases in devised stock as a result of stock splits. This section provides:

> (a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:
>
> (1) as much of the devised securities as is a part of the estate at the time of the testator's death;

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[5] See S.C. Code Ann. § 62-2-605(a)(2) (Supp. 2001).

[6] Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); NationsBank of South Carolina v. Greenwood, 321 S.C. 386, 468 S.E.2d 658 (Ct. App. 1996).

[7] S.C. Code Ann. § 62-2-601 (1987).

(2) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options;

(3) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization, or other similar action initiated by the entity;

(4) any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.

(b) Distributions prior to death with respect to a specifically devised security not provided for in subsection (a) are not part of a specific devise.[8]

This section accords with the general rule that,

> the legatee of a specific bequest of shares of corporate stock, as distinguished from the legatee of a general bequest, is entitled to any accretions to the bequeathed shares which are received by the testatrix, as a result of a stock split, subsequent to the making of such bequest. The rationale behind this rule is that "[a] stock split in no way alters the substance of the [testatrix's] total interest or rights in the corporation . . . . [It] is merely a dividing up of the outstanding shares of a corporation into a greater number of units without disturbing the stockholder's original proportional participating interest in the corporation." * * * If the legatee is not awarded the additional shares, the value of the specific bequest would be substantially reduced, contrary to the testatrix's intent.[9]

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[8] Id. § 62-2-605 (emphasis added).

[9] Rosenfeld v. Frank, 546 A.2d 236, 242 (Conn. 1988) (emphasis added).

A specific devise involves property capable of being separated and distinguished from the balance of the testator's property.[10] "A specific devise differs from a general devise in that it is not intended by the testator to be paid out of the estate generally, but is to be paid solely by delivering to the devisee that specific article given by the will."[11]

Cornelson v. Vance[12] is a South Carolina case involving the determination of whether a devise of stock was general or specific. In Cornelson, the court strictly applied the presumption in favor of a general legacy in order to avoid an ademption.[13] Although Cornelson is not on point, the probate court here relied heavily on Cornelson, stating, "[t]he fact that the decedent in Cornelson did not own the stock at the time of her death does not affect the definition of a general legacy set forth in that case." This statement underscores the probate court's misunderstanding of the application of the presumption in favor of a general legacy.

> In determining whether a bequest of stock in a named corporation is general or specific, there exists a presumption in favor of finding a general legacy. "Two reasons are given for this [presumption]; to prevent an ademption in case the testator parts with the stock before his death, and to secure uniformity of contribution in case of a deficiency of assets." *When the reasons, however, behind the presumption do not exist and or "a contrary*

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[10] Gist v. Craig, 142 S.C. 407, 451, 141 S.E. 26, 40 (1927).

[11] In re Estate of Wales, 727 P.2d 536, 537 (Mont. 1986) (citation omitted) (emphasis added).

[12] 220 S.C. 47, 66 S.E.2d 421 (1951).

[13] Ademption occurs when specifically devised property is no longer a part of the testator's estate at the time of death. Rikard v. Miller, 231 S.C. 98, 97 S.E.2d 257 (1957); Fenzel v. Floyd, 289 S.C. 495, 347 S.E.2d 105 (Ct. App. 1986).

> *intent appears from the will"; . . . ; the presumption will not apply*.[14]

"'[A] very slight indication of an intention to give shares then in his ownership is enough to make [a] legacy specific . . . .'"[15]

Ademption is not an issue in this case. The second reason behind the presumption in favor of a general legacy is also not present here because there is no evidence of a deficiency of assets in Martha's estate.

We therefore look to the evidence to determine whether there is an indication, however "slight," of Martha's intent to make the legacy specific. Martha's last will states in pertinent part:

> ITEM II. I hereby will and bequeath unto Norma B. Polson, daughter of my late husband, four hundred (400) shares of capital stock of Standard Oil Company.

The probate court held the lack of a possessive term such as "my stock" or "the stock which I own" demonstrates the bequest is general. Appellants argue Martha's use of the term "four hundred" evidences an intent to limit the devise to four hundred shares.

In examining the record to see if the probate court's finding that Martha intended only a general devise of stock or its monetary equivalent is supported by the evidence, we can find no evidence Martha intended anything other than to give Polson the stock she received from William Broadbent's will. All of the evidence indicates Martha's reference to "four hundred" shares is a specific reference to the four hundred shares of Standard Oil stock she received from

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[14] Rosenfeld v. Frank, 546 A.2d at 242-43 (citations omitted) (bracket and emphasis in original).

[15] Id. at 243 (quoting Fid. Title & Trust Co. v. Young, 125 A. 871, 873 (Conn. 1924)).

William Broadbent. Martha's early will, written shortly after William's death, and Martha's refence to "four hundred" shares in her later will indicate Martha intended to comply with the request in William's will that she return the shares to Polson in the event she had no need of them.

Jean DuBose testified Martha "wanted to return the 400 shares that Bill gave to her – back to Norma." There is evidence that Martha kept this Exxon stock separate from her stock portfolio.[16] Even Pam Yarborough's deposition and testimony stating that Martha intended to give Polson four hundred shares of stock does not support the finding that the devise of "four hundred" shares is not a specific reference to the four hundred shares Martha received from William Broadbent.

Standard Oil of New Jersey did not exist at the time Martha executed the will. The only possible reason for the description of the stock as Standard Oil stock was that the stock Martha intended to give Polson is the same Standard Oil stock William devised to her in his will. Martha's two wills and all the evidence support the conclusion that Martha intended to return to Norma the same stock she received from William, not merely its monetary equivalent, if it remained

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[16] In a letter to Polson, Cheryl DuBose wrote:

> Given my new knowledge of Grandma's financial situation and how it is being used to support her, I think I understand why the Exxon stock is not in the Merrill Lynch portfolio. It is my theory that Grandma has been very careful to protect your's (sic) and your children's interest in the Exxon stocks, and would not consider putting them in an account whose value is borrowed against.

See Gist v. Craig, 142 S.C. at 451, 141 S.E. at 40 (stating a specific devise is one in which the property devised is separate and distinguished from all other property of the testator).

in her estate at the time of her death. This stock is clearly separable and distinct from the rest of the property in Martha's estate.

In view of the above, we agree with the circuit court that the probate court erred in applying a presumption in favor of a general bequest under these circumstances. In fact, the order from the probate court reflects that the only possible conclusion is that the devise is specific rather than general. The court stated, "[s]ince we can easily identify which 400 shares Mrs. Broadbent wanted Mrs. Polson to have by simply allowing corporate records to confirm the current name of Exxon Corporation from the previous name of Standard Oil Company, we do not have to 'rewrite' her will to change the number of shares to Mrs. Polson."

Furthermore, because the evidence indicates the devise to Polson is specific, it is unnecessary for Polson to show that Martha intended she receive additional shares resulting from stock splits. Subsection 62-2-605(a)(2) entitles Polson to "any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options." This subsection permits Polson to claim the additional stock resulting from stock splits. Had Martha not intended this result, she could have included a statement to the contrary in her will.[17]

We therefore conclude the probate court's finding that the devise is a general one, not subject to section 62-2-605, is not supported by reasonable evidence and is governed by an error of law regarding the application of the presumption in favor of a general devise. We accordingly affirm the circuit court's order holding that Polson is entitled to the original four hundred shares and all additional stock resulting from subsequent stock splits.

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[17] Estate of Holden v. Holden, 343 S.C. 267, 539 S.E.2d 703 (2000) (holding a party is presumed to have knowledge of existing law). See also Padgett v. Black, 229 S.C. 142, 148, 92 S.E.2d 153, 156 (1956) ("'a will speaks at the death of the testator'") (quoting Key v. Weathersbee, 43 S.C. 414, 424, 21 S.E. 324, 328 (1895)).

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Sandra Crawley,

Appellant.

Appeal From Spartanburg County
Gary E. Clary, Circuit Court Judge

Opinion No. 3475
Heard January 10, 2002 - Filed April 8, 2002

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy

Attorney General Donald J. Zelenka, and Assistant Attorney General Tracey C. Green all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for respondent.

HOWARD, J.: Sandra Crawley was convicted of murder and sentenced to life in prison. She appeals, arguing the trial court erred by (1) allowing her confession into evidence; (2) denying her motion for a mistrial; and (3) allowing the State to introduce testimony regarding her relationship with Eugene Davis. We affirm.

FACTS/PROCEDURAL HISTORY

Eugene Davis was stabbed to death on October 28, 1987. The murder remained unsolved until January 12, 1999. While investigating Davis's death, the police determined that Crawley and her husband had a relationship with Davis. Specifically, police learned that Crawley stayed with Davis on several occasions after her husband assaulted her.

As a result of this information, Officer Denton transported Crawley from the Spartanburg County Detention Center, where she was incarcerated on an unrelated charge, to the Sheriff's Department, where she was questioned regarding her involvement. During the interrogation, Crawley twice confessed that she participated in Davis's murder.

Crawley was ultimately convicted of murder and sentenced to life in prison. This appeal follows.

DISCUSSION

A. Admissibility of the Confessions

The first issue presented on appeal is whether the trial judge erred in admitting Crawley's two statements into evidence. The trial court held a

Jackson v. Denno[1] hearing and then ruled Crawley was advised of her Miranda[2] rights, knowingly and intelligently waived those rights, and gave her statements to the police freely and voluntarily. Crawley argues the trial court erred in not suppressing her confessions.

The test regarding the admissibility of a confession is voluntariness. State v. Von Dohlen, 322 S.C. 234, 243, 471 S.E.2d 689, 694 (1996) ("A confession is not admissible unless it was voluntarily made."). The voluntariness of a confession is determined from an examination of the totality of the circumstances. Id. at 243, 471 S.E.2d at 694-95. To introduce the statement made after a defendant has been advised of his rights, the State must prove by a preponderance of the evidence he voluntarily waived those rights. State v. Reed, 332 S.C. 35, 42, 503 S.E.2d 747, 750 (1998). "Once a voluntary waiver of the Miranda rights is made, that waiver continues until the individual being questioned indicates that he wants to revoke the waiver and remain silent or circumstances exist which establish that his 'will has been overborne and his capacity for self-determination critically impaired.'" State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (quoting State v. Moultrie, 273 S.C. 60, 62, 254 S.E.2d 294, 294-95 (1979)). This Court will not disturb the trial court's findings of fact regarding the voluntariness of a statement absent an abuse of discretion. State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998).

The interrogation lasted approximately seven and a half hours. During this time, Crawley was given a lie detector test, which lasted an hour and a half. She also received dinner and restroom breaks. At 11:45 p.m., Crawley gave a statement in which she confessed to participating in Davis's murder. Approximately an hour later, she gave a more detailed statement in which she stated, "I did stab [Eugene Davis] along with [my husband]. I don't remember how many times I stabbed him, but I'm sure it was more than once."

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[1] 378 U.S. 368 (1964).

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

On appeal, Crawley first argues the confessions were inadmissible because she was not told Davis's murder was the subject of the inquiry before she waived her right to remain silent. We disagree.

Officer Denton admitted he did not tell Crawley the subject of the investigation before she arrived at the Sheriff's Department or before she signed the Miranda waiver. However, we conclude this does not affect the voluntariness of the confessions. See Colorado v. Spring, 479 U.S. 564, 576 (1987). As the Supreme Court reasoned,

> Once Miranda warnings are given, it is difficult to see how official silence could cause a suspect to misunderstand the nature of his constitutional right – "his right to refuse to answer any question which might incriminate him." United States v. Washington, 431 U.S. 181, 188, 97 S.Ct. 1814, 1819, 52 L.Ed.2d 238 (1977). "Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." Ibid. We have held that a valid waiver does not require that an individual be informed of all information "useful" in making his decision or all information that "might . . . affec[t] his decision to confess." Moran v. Burbine, 475 U.S., at 422, 106 S.Ct., at 1141. "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." Ibid. . . . [T]he additional information could affect only the wisdom of a Miranda waiver, not its essentially voluntary and knowing nature. Accordingly, the failure of the law enforcement officials to inform [the defendant] of the subject matter of the interrogation could not affect [the defendant's] decision to waive his Fifth Amendment privilege in a constitutionally significant manner.

Id. at 576-577. Therefore, Crawley's ignorance regarding the subject of the questioning does not make her confessions inadmissible.

Crawley next contends the police knew she was addicted to crack cocaine, pain pills, nerve pills, Xanax, Valium, and alcohol and used all of these substances on a daily basis. She testified she was suffering from withdrawal symptoms at the time she confessed to the murder because she had been in jail for three days and had not had access to the drugs. She claims her withdrawal affected her adversely, so as to render her confessions unknowing and involuntary.

However, Officer Wood testified he had known Crawley in his capacity as a police officer for seventeen years. According to Officer Wood, he was aware of Crawley's addiction, but Crawley did not act any different on the day of the interrogation than she did any other day. He testified she understood what was occurring, and he disputed her assertions that she asked to be left alone or that she cried during the interrogation.

We find this evidence supports the trial judge's conclusion that Crawley's statements were knowingly, intelligently, and voluntarily given, despite any withdrawal from alcohol and drugs. Therefore, the trial court did not abuse its discretion in admitting Crawley's statements. Kennedy, 333 S.C. at 429, 510 S.E.2d at 715; see also Bright v. State, 455 S.E.2d 37 (Ga. 1995) (finding that even if the defendant had been exhibiting symptoms of drug withdrawal, that fact alone does not render the statement involuntary).

B. Mistrial

Crawley next argues the trial court abused its discretion by refusing to declare a mistrial when a witness testified Crawley called Davis "from the jailhouse." Crawley argues this testimony placed her character in issue to her prejudice. We disagree.

The decision to grant or deny a motion for a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Although this decision is vested in the sound discretion of the trial court, the power of the court to declare a mistrial should be used with

the greatest caution and for plain and obvious causes. State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999).

During his testimony, Paul David Hensley testified he was a friend of Davis and he had also known Crawley and her family for a long time. Hensley stated he talked to Crawley on Davis's phone when she called prior to the murder. When the State inquired as to who initiated this phone call, Hensley replied, "I think she called him from the jailhouse, as far as I can remember." Crawley objected and moved for a mistrial. The trial judge denied the motion, but instructed the witnesses not to mention a jail.

We conclude the trial judge did not abuse his discretion in denying the motion for a mistrial. Hensley's statement was vague and provided no particulars regarding Crawley's connection, if any, to the "jailhouse." It was not apparent from this casual remark whether Crawley herself was incarcerated or was visiting someone else at the jail. See Council, 335 S.C. at 1, 515 S.E.2d at 508 (ruling the trial judge did not abuse his discretion in denying a mistrial after witness improperly alluded to SLED fingerprint database containing the defendant's prior fingerprint card because it was questionable whether jury even understood the implication of a prior criminal record from the witness's statement, and therefore, there was no prejudice).

C. Hearsay Testimony

Crawley next argues the trial judge erred by allowing testimony from the Davis's daughter, Teresa Davis Gilliam, that Davis told her he was dating Crawley and Crawley was going to come stay with him. Crawley argues this testimony was hearsay and highly prejudicial, requiring reversal. We disagree.

Any error in the admission of this testimony was clearly harmless because Crawley admitted her close relationship to Davis in her statement to police and Officer Wood testified without objection that Crawley stayed with Davis for two to three day periods, using his residence as a "safe house" when her husband beat her. Thus, we find no reversible error because the statement was merely cumulative. See State v. Griffin, 339 S.C. 74, 77-78, 528 S.E.2d 668, 670

(2000) ("There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted.").

CONCLUSION

Accordingly, for the reasons discussed above, Crawley's conviction is

AFFIRMED.

CONNOR, and ANDERSON, JJ., concur.