The Supreme Court of South Carolina

RE: Extensions in Cases Seeking a Petition for a Writ of Certiorari to Review a Decision of the South Carolina Court of Appeals

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ORDER

Under Rule 242 of the South Carolina Appellate Court Rules (SCACR), a party may seek review of a decision of the South Carolina Court of Appeals by filing a petition for a writ of certiorari and appendix with this Court. In response, the respondent may file a return to the petition for a writ of certiorari, and the petitioner may file a reply to the return. Under the rule, this entire process is to be completed not later than seventy (70) days after the Court of Appeals denied the petition for rehearing or reinstatement in the appeal. When the petition and any return or reply have been filed, the matter is then ready for this Court to determine if the petition for a writ of certiorari will be granted or denied.

Under Rule 242(d)(2), SCACR, "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Therefore, in most cases, the preparation of the petition and return will involve no more than taking the arguments already made in the briefs before the Court of Appeals, putting in the additional case history information, and updating and checking the citations. Additionally, the preparation of the appendix should take little time or effort since it is composed of documents that have already been filed with the Court of Appeals. Rule 242(e), SCACR (content of appendix).

In the event this Court grants the petition for a writ of certiorari, the parties will proceed to serve and file briefs in the manner specified by Rule 242(i), SCACR. Once again, the preparation of these briefs in most cases will merely involve a further refinement of the arguments already made in the petition, return, or reply.

In short, there should be very little reason for a party to need an extension of time to complete any of the steps required by Rule 242, SCACR. Unfortunately, in practice, this has not been the case, and parties have been routinely seeking

multiple extensions. As a result, the final resolution of a case that has already gone through a lengthy appeal process at the Court of Appeals is further delayed.

Accordingly, this Court establishes the following policy regarding extensions in cases filed under Rule 242, SCACR:

> (1) Upon a showing of good cause, a party (or multiple parties if represented by the same counsel) may be granted extensions totaling no more than twenty (20) days during the proceedings before this Court. If multiple extensions are taken within the twenty (20) day cumulative limit, the minimum period that can be requested is five (5) days.
>
> (2) Any extension beyond the twenty (20) days specified in (1) above will be granted only if extraordinary circumstances such as illness or other circumstances beyond the control of the movant warrant the granting of the extension. The parties are warned that the press of other business is not an extraordinary circumstance which will warrant the granting of an extension. These extensions will generally be granted for no more than ten (10) days.

The order shall be effective immediately. For a party (or multiple parties if represented by the same counsel) who has been granted an extension or extensions totaling twenty (20) days or more prior to the date of this order, one additional extension of ten (10) days may be granted upon a showing of good cause, but any further extensions will be granted only upon a showing of extraordinary circumstances as provided in (2) above.

s/ Jean H. Toal C.J.

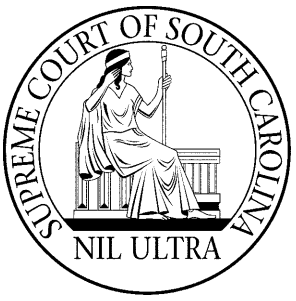
s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
July 16, 2014



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28
July 16, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex parte: Robert W. Harrell, Jr., Respondent,

v.

Attorney General of the State of South Carolina, Appellant.

In re: State Grand Jury Investigation.

Appellate Case No. 2014-001058

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 27412
Heard June 24, 2014 – Filed July 9, 2014

REVERSED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Solicitor General Robert D. Cook, Assistant Deputy Attorney General S. Creighton Waters, Assistant Deputy Attorney General Wayne Allen Myrick, Jr., and Assistant Attorney General Brian T. Petrano, all of Columbia, for Appellant.

Gedney M. Howe III, of Gedney M. Howe III, P.A., and E. Bart Daniel, both of Charleston, and Robert E. Stepp, Robert E. Tyson, Jr., and Roland M. Franklin, Jr., all of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for Respondent.

PER CURIAM: The Attorney General appeals the circuit court's order finding the state grand jury lacks subject matter jurisdiction to investigate a violation of the Ethics, Government Accountability, and Campaign Reform Act[1] (Ethics Act). We reverse.

FACTS/PROCEDURAL BACKGROUND

On February 14, 2013, the Attorney General received an ethics complaint, alleging possible violations of the Ethics Act by the Speaker of the House of Representatives, Robert W. Harrell, Jr. (the Speaker), originally submitted by a private citizen to the House Legislative Ethics Committee (House Ethics Committee).[2] That same day, the Attorney General forwarded the complaint to South Carolina Law Enforcement Division (SLED), and SLED carried out a 10-month criminal investigation into the matter. At the conclusion of the investigation, the Chief of SLED and the Attorney General petitioned the presiding judge of the state grand jury to impanel the state grand jury on January 13, 2014. Acting presiding judge of the state grand jury, the Honorable L. Casey Manning, subsequently impaneled the state grand jury.[3]

On February 24, 2014, the Speaker filed a motion to disqualify the Attorney General from participating in the state grand jury investigation. On March 21, 2014, a hearing was held on the motion. Following that hearing, the court *sua sponte* raised the issue of subject matter jurisdiction, and another hearing was held on May 2, 2014, to address the jurisdictional issue.

By order dated May 12, 2014, the court found it—as presiding judge of the state grand jury—"lack[ed] subject matter jurisdiction" to hear any matter arising from the Ethics Act, and refused to reach the issue of disqualification. In essence,

[1] S.C. Code Ann. §§ 8-13-100 to -1520 (Supp. 2013).

[2] There is no House Ethics Committee investigation currently pending.

[3] The details of the impaneling petition are not public, have not been provided to the Speaker, and were not placed into evidence in the court below when this matter was heard.

the court found that because the complaint was civil in nature, the state grand jury lacked criminal jurisdiction to investigate, and likewise, the Attorney General lacked the authority to investigate absent a referral from the House Ethics Committee. More specifically, the court found "that ethics investigations concerning members and staff of the Legislature are solely within the Legislature's purview to the exclusion of the Courts," and, as such, any alleged criminal violations which arise out of the Ethics Act must be referred from the legislative investigative body to the Attorney General. Citing *Rainey v. Haley*, 404 S.C. 320, 327–28, 745 S.E.2d 81, 85 (2013), the court found the Attorney General's investigation "premature" because the Ethics Act's "administrative remedies have not been exhausted." Finally, the court held that its exercise of jurisdiction over the present action would contravene principles of the separation of powers. Thus, the court discharged the state grand jury and ordered the Attorney General to cease his criminal investigation.[4]

[4] The circuit court specifically stated that its order was not issued pursuant to section 14-7-1630(G) of the South Carolina Code, and ordered the Attorney General and state grand jury to cease investigating this matter because "subject matter jurisdiction was lacking . . . *ab initio*." *See* S.C. Code Ann. § 14-7-1630(G) (Supp. 2013) ("If . . . the presiding judge determines that the state grand jury is not conducting investigative activity within its jurisdiction or proper investigative activity, the presiding judge may limit the investigation so that the investigation conforms with the jurisdiction of the state grand jury and existing law or he may discharge the state grand jury. An order issued pursuant to this subsection or pursuant to subsection (F) . . . may be appealed by the Attorney General to the Supreme Court. If an appeal from the order is made, the state grand jury, except as is otherwise ordered by the Supreme Court, shall continue to exercise its powers pending disposition of the appeal."). On May 19, 2014, the Attorney General filed a "Petition for Supersedeas and Interim Relief pursuant to S.C. Code Ann. § 14-7-1630(G)" in this Court. By order dated May 20, 2014, we found the motion was unnecessary because the order was automatically stayed pending appeal pursuant to section 14-7-1630(G). Therefore, the state grand jury investigation is ongoing.

The Attorney General appealed pursuant to sections 14-7-1630(G) and 14-8-200(b)(6)[5] of the South Carolina Code and Rule 203(d)(1)(A)(v), SCACR.[6] By order dated May 19, 2014, this appeal was expedited.

ISSUE

Whether the circuit court erred in discharging the state grand jury after finding that it lacked jurisdiction to investigate allegations stemming from violations of the Ethics Act?

STANDARD OF REVIEW

"Appellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law." *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993).

ANALYSIS

I. Jurisdiction

The Ethics Act is "a comprehensive statutory scheme for regulating the behavior of elected officials, public employees, lobbyists, and other individuals who present for public service." *Rainey*, 404 S.C. at 323, 745 S.E.2d at 83 (citations omitted).

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[5] *See* S.C. Code Ann. § 14-8-200(b)(6) (Supp. 2013) ("Jurisdiction of the court does not extend to appeals of the following, the appeal from which lies of right directly to the Supreme Court: . . . an order limiting an investigation by a state grand jury pursuant to Section 14-7-1630 . . . .").

[6] *See* Rule 203(d)(1)(A)(v), SCACR ("The notice of appeal shall be filed with the clerk of the lower court and with the Clerk of the Supreme Court in the following cases: . . . Any order limiting an investigation by a State Grand Jury under S.C. Code Ann. § 14-7-1630.").

To enforce the Ethics Act, the General Assembly created the State Ethics Commission and the Senate and House Legislative Ethics Committees. S.C. Code Ann. §§ 8-13-310, -510 (Supp. 2013). "[T]he House and Senate Legislative Committees are charged with the exclusive responsibility for the handling of ethics complaints involving members of the General Assembly and their staff." *Rainey*, 404 S.C. at 324, 745 S.E.2d at 83 (citations omitted).

The House Ethics Committee must conduct its investigation of a complaint filed pursuant to the Ethics Act in accordance with section 8-13-540. *See* S.C. Code Ann. § 8-13-540 (Supp. 2013). This section provides, in relevant part:

> If after [a] preliminary investigation, the ethics committee finds that probable cause exists to support an alleged violation, it shall, as appropriate:
>
> > (a) render an advisory opinion to the respondent and require the respondent's compliance within a reasonable time; or
> >
> > (b) convene a formal hearing on the matter within thirty days of the respondent's failure to comply with the advisory opinion. All ethics committee investigations and records relating to the preliminary investigation are confidential. No complaint shall be accepted which is filed later than four years after the alleged violation occurred.

S.C. Code Ann. § 8-13-540(1)(a)–(b). Following a formal hearing, if the committee finds that a member has violated the Ethics Act, the Act requires the committee to:

> (a) administer a public or private reprimand;
>
> (b) determine that a technical violation as provided for in Section 8-13-1170 has occurred;
>
> (c) recommend expulsion of the member; and/or,

(d) *in the case of an alleged criminal violation, refer the matter to the Attorney General for investigation.*

S.C. Code Ann. § 8-13-540(3)(a)–(d) (emphasis added).

The circuit court read into section 8-13-540(3)(d) a requirement that a House Ethics Committee investigation and referral occur prior to the Attorney General's initiation of his own criminal investigation, which the Attorney General argues was clearly erroneous in light of our constitution and this Court's precedents. We agree.

In *State v. Thrift*, this Court announced that legislative jurisdiction over violations of the Ethics Act is civil in nature. *See Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994). There, the State appealed a pre-trial order of the circuit court dismissing the indictments against multiple defendants charged with public corruption. *Id.* at 287, 440 S.E.2d at 344. The State in *Thrift* submitted that if the Court interpreted a prior version of the Ethics Act[7] to require the State Ethics Commission to refer criminal allegations to the Attorney General as a precondition to the institution of a criminal investigation in every prosecution, then the referral scheme was unconstitutional. *Id. at* 307, 440 S.E.2d at 355.

Noting that the State possesses "wide latitude in selecting what cases to prosecute and what cases to plea bargain," the Court observed that the Attorney General's authority to prosecute derives from our state constitution and thus "cannot be impaired by legislation." *Thrift*, 312 S.C. at 307, 440 S.E.2d at 355; *see* S.C. Const. art. V, § 24 (providing that "[t]he Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record"). Therefore, the Court deemed any requirement placing the power "to supervise the prosecution of a criminal case in the hands of the Ethics Commission" unconstitutional. *Id.*

However, "*by recognizing the civil nature of the Ethics Act complaint*," the Court avoided the constitutional problem caused by the referral language of the old scheme, and concluded:

[7] *See* S.C. Code Ann. §§ 8-13-10 to -1020 (1986).

> In light of our narrow construction of the statute, ... the referral system only applies to civil complaints to the Ethics Commission which are referred by it to the Attorney General for criminal prosecution. ***The absence of a complaint to the Ethics Commission will never operate as a limitation upon the State's independent right to initiate a criminal prosecution***.

Id. (emphasis added).

Rather than looking to *Thrift*, the circuit court found that the House Ethics Committee had exclusive jurisdiction over this matter, relying on the more recent case, *Rainey v. Haley*. *See* 404 S.C. at 322, 745 S.E.2d at 82.

In *Rainey*, the appellant sought a civil declaratory judgment in the court of common pleas that Governor Nikki Haley was criminally culpable for ethical violations allegedly committed while she was a member of the House of Representatives. 404 S.C. at 322, 745 S.E.2d at 82. We affirmed the circuit court's dismissal of the action for lack of jurisdiction, finding the House Ethics Committee had *exclusive* jurisdiction to hear a civil ethics complaint against one of its members. *Id.*[8]

Other than the particular situation defined in section 8-13-530(4), we stated "the Legislature has granted exclusive authority over ethical complaints to the appropriate Ethics Committee" and "it is therefore clear the Legislature intended the respective Ethics Committee to otherwise have exclusive authority to hear alleged ethics violations of its own members and staff." *Id.* at 325–26, 745 S.E.2d at 84. Finally, we opined:

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[8] In so holding, we noted that the statutory scheme permitted court intervention to the exclusion of the House Ethics Committee in the limited situation outlined in section 8-13-530(4) of the South Carolina Code. *Rainey*, 404 S.C. at 325, 745 S.E.2d at 83–84 (citation omitted); *see* S.C. Code Ann. § 8-13-530(4) (Supp. 2013) ("No complaint may be accepted by the ethics committee concerning a member of or candidate for the appropriate house during the fifty-day period before an election in which the member or candidate is a candidate. During this fifty-day period, any person may petition the court of common pleas alleging the violations complained of and praying for appropriate relief by way of mandamus or injunction, or both.").

> [T]he South Carolina Constitution and this Court have expressly recognized and respected the Legislature's authority over the conduct of its own members. Consequently, a court's exercise of jurisdiction over Appellant's ethical complaint against Governor Haley would not only contravene the clear language of the State Ethics Act, it would also violate separation of powers.
>
> In sum, ethics investigations concerning members and staff of the Legislature are intended to be solely within the Legislature's purview, to the exclusion of the courts, except in the singular circumstance expressly provided for in section 8-13-530(4).

Id. at 326–27, 745 S.E.2d at 84–85 (footnotes omitted) (internal citations omitted).

Here, the circuit court placed great significance on the "exclusivity" language in *Rainey*, but failed to consider that case in context: a civil declaratory judgment action. *Rainey* does not affect the clear and unambiguous holding of *Thrift*, as *Rainey* addressed the civil regulatory function of the House Ethics Committee and not a criminal prosecution. Consequently, *Rainey* is distinguishable, and the circuit court erred in relying on it for the proposition that the House Ethics Committee has exclusive jurisdiction over this matter. Furthermore, the circuit court's finding that a referral from the House Ethics Committee was required before the Attorney General could initiate a criminal investigation into this matter not only contravenes *Thrift*, but more importantly, runs afoul of Article V, section 24 of our constitution.

While the Speaker concedes that *Thrift* applies here, he contends that the Attorney General mischaracterizes the circuit court's order, asserting that because the court found that the allegations were "conclusively within the Ethics Code" and the "Attorney General has failed to offer or present to the Court any evidence or allegations which are criminal in nature," in the absence of evidence of conduct constituting a crime, neither the Attorney General nor the state grand jury investigations may proceed without a referral from the House Ethics Committee.

The problem with the Speaker's argument is that it presumes that any complaint originating as a violation of the Ethics Act can never be criminal in nature. To the contrary, section 8-13-1520 provides:

> (A) Except as otherwise specifically provided in this chapter, a person who violates any provision of this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than five thousand dollars or imprisoned for not more than one year, or both.
>
> (B) A person who violates any provision of this Article 13 is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred percent of the amount of contributions or anything of value that should have been reported pursuant to the provisions of this Article 13 but not less than five thousand dollars or imprisoned for not more than one year, or both.

S.C. Code Ann. § 8-13-1520 (Supp. 2013). Thus, the Ethics Act criminalizes violations, and it is in in the Attorney General's exclusive discretion to prosecute such violations.[9] This discretion, while not limitless, is undoubtedly broad. In *Thrift*, this Court explained:

> Both the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands. The Attorney General as the State's chief prosecutor may decide when and where to present an indictment, and may even decide whether an indictment should be sought. Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety. The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor's actions. We must, therefore, analyze the State's agreement within our judicial constraints.

312 S.C. at 291–92, 440 S.E.2d at 346–47 (footnotes omitted).

[9] At oral argument, the Attorney General stated that the decision to prosecute alleged violations of the Ethics Act hinges upon whether the conduct constituting the violation is intentional.

The House Ethics Committee's concurrent civil regulatory authority does not affect the Attorney General's authority to initiate a criminal investigation in any way, whether or not there is a referral, or even a pending House investigation. We liken the House Ethics Committee's authority to govern its members to that of the legal, medical, or any other professional field where, by virtue of receiving a license to practice the profession, the member's behavior is policed by a professional organization. For example, a doctor is subject to oversight by the South Carolina Board of Medical Examiners (the Board) and may have his or her medical license rescinded in disciplinary proceedings, while simultaneously being the focus of a criminal investigation and prosecution, all for the same behavior. Just as a decision (or lack thereof) by the Board would not delay or interrupt a concurrent criminal investigation, the status of a House Ethics Committee investigation cannot affect the Attorney General's decision regarding a criminal prosecution. Thus, we find that the Attorney General's investigation is not circumscribed by the nature of the complaint that triggered the investigation, and whether or not it arises as an alleged violation of the Ethics Act is irrelevant.

Therefore, the circuit court erred in concluding that the House Ethics Committee has exclusive jurisdiction over this complaint.

II. Discharging the State Grand Jury

Having decided that the court erred in finding it was without jurisdiction as presiding judge of the state grand jury to hear these matters, we reiterate that while its rationale was misplaced, the court acted well within its statutory authority in assessing the jurisdiction of the state grand jury beyond the impanelment stage.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008) (citations omitted). "South Carolina circuit courts are vested with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law." *Rainey*, 404 S.C. at 323, 745 S.E.2d at 83 (citing S.C. Const. art. V, § 11). "In determining whether the Legislature has given another entity exclusive

jurisdiction over a case, a court must look to the relevant statute." *Id.* (quoting *Dema v. Tenet Physician Servs.–Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009)).

The state grand jury's authority "extends throughout the State." S.C. Code Ann. § 14-7-1630(A) (Supp. 2013). However, despite its statewide reach, "its jurisdiction is limited to certain offenses" enumerated in section 14-7-1630. *State v. Wilson*, 315 S.C. 289, 291, 433 S.E.2d 864, 866 (1993) (citation omitted). Relevant to this case, the subject matter jurisdiction of a state grand jury covers "a crime, statutory, common law or other, involving public corruption as defined in [s]ection 14-7-1615,[10] a crime, statutory, common law or other, arising out of or in connection with a crime involving public corruption . . . , and any attempt, aiding, abetting, solicitation, or conspiracy to commit a crime, statutory, common law or other, involving public corruption . . . ." S.C. Code Ann. § 14-7-1630(A)(3) (Supp. 2013).

The Attorney General may seek impanelment of the state grand jury "[w]henever the Attorney General and the Chief of [SLED] consider it necessary and normal investigative or prosecutorial procedures are not adequate." *Id.* § 14-7-1630(B).

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[10] Public corruption is broadly defined as "any unlawful activity, under color of or in connection with any public office or employment," by:

> (1) any public official, public member, or public employee, or the agent, servant, assignee, consultant, contractor, vendor, designee, appointee, representative, or any other person of like relationship, by whatever designation known, of any public official, public member, or public employee under color of or in connection with any public office or employment; or
>
> (2) any candidate for public office or the agent, servant, assignee, consultant, contractor, vendor, designee, appointee, representative of, or any other person of like relationship, by whatever name known, of any candidate for public office.

S.C. Code Ann. § 14-7-1615(B)(1)–(3) (Supp. 2013).

In such a case, "the Attorney General may petition in writing to the chief administrative judge of the judicial circuit in which he seeks to impanel a state grand jury for an order impaneling a state grand jury." *Id.* § 14-7-1630(B) (Supp. 2013). The petition for impanelment "must allege the type of offenses to be inquired into" and "in all instances must specify that the public interest is served by the impanelment." *Id.* After "due consideration," the impaneling judge "may order the impanelment of a state grand jury in accordance with the petition for a term of twelve calendar months." *Id.* § 14-7-1630(D).

Once impaneled, the statute further charges the presiding judge of the state grand jury to hear matters pertaining to the state grand jury proceedings:

> Except for the prosecution of cases arising from indictments issued by the state grand jury, the presiding judge has jurisdiction to hear all matters arising from the proceedings of a state grand jury, including, but not limited to, matters relating to the impanelment or removal of state grand jurors, the quashing of subpoenas, the punishment for contempt, and the matter of bail for persons indicted by a state grand jury.

Id. § 14-7-1730 (Supp. 2013). Moreover,

> If . . . the presiding judge determines that the state grand jury is not conducting investigative activity within its jurisdiction or proper investigative activity, the presiding judge may limit the investigation so that the investigation conforms with the jurisdiction of the state grand jury and existing law or he may discharge the state grand jury.

Id. § 14-7-1630(G).

Plainly, the statute contemplates assessment of jurisdiction by the presiding judge beyond the impanelment stage and discharging the state grand jury as a possible outcome.

While the crime of public corruption *could* include violations of the Ethics Act, the state grand jury's jurisdiction is confined to the purposes set forth in the constitution and the state grand jury statute, as circumscribed by the impaneling order. While we reverse the circuit court's order, we in no way suggest that it was

error for the presiding judge to inquire whether the state grand jury was "conducting investigative activity within its jurisdiction or proper investigative activity." S.C. Code Ann. § 14-7-1630(G); *cf. Thrift*, 312 S.C. at 311 n.15, 440 S.E.2d at 357 n.15 (noting that "[t]he grand jury is more than a mere instrument of the prosecution").[11]

CONCLUSION

For the foregoing reasons, we reverse the circuit court order, and remand this case to the circuit court for a decision on whether the Attorney General should be disqualified from participating in these state grand jury proceedings.[12]

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

[11] Due to the secrecy afforded state grand jury proceedings, future arguments regarding jurisdiction, or any other ancillary matter, should be held *in camera*.

[12] At oral arguments, the Attorney General conceded that the motion for disqualification was properly before the presiding judge at this stage of the investigation.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Interest of Stephen W., a Juvenile Under the Age of Seventeen, Appellant.

Appellate Case No. 2012-213481

Appeal from Richland County
Angela R. Taylor, Family Court Judge

Opinion No. 27413
Heard April 2, 2014 – Filed July 16, 2014

AFFIRMED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan M. Wilson and Assistant Attorney General Mark R. Farthing, both of Columbia, for Respondent.

JUSTICE KITTREDGE: In this direct appeal from an adjudication of delinquency in family court, Appellant assigns error to the denial of his motion for a jury trial in a family court juvenile proceeding. Because there is no constitutional right to a jury trial in a family court juvenile proceeding, we affirm.

I.

In August 2012, Appellant, then sixteen years of age, was charged with possession of marijuana. The matter was referred to the family court, where by way of

petition, the case was presented to the court. At the adjudicatory hearing, Appellant moved for a jury trial, claiming that he was entitled to a jury trial under the United States and South Carolina Constitutions. The family court denied Appellant's motion.

The hearing consisted of the officer's testimony, explaining his foot pursuit of Appellant. During the pursuit, Appellant removed items from his pocket and discarded them. After Appellant was detained, three plastic baggies containing marijuana were retrieved from the area where Appellant had placed the items. Appellant testified, denying any knowledge of the drugs. The family court adjudicated Appellant delinquent and ordered that Appellant spend six consecutive weekends at the Department of Juvenile Justice, complete an alternative educational program, and continue with his prior probation[1] for a period of time not to exceed his eighteenth birthday or until he obtained a G.E.D. Appellant filed an appeal, which we certified pursuant to Rule 204(b), SCACR.

II.

The South Carolina Children's Code provides that "[a]ll cases of children must be dealt with as separate hearings by the court and without a jury." S.C. Code Ann. § 63-3-590 (2010). The family court rules are in accord. *See* Rule 9(a), SCRFC ("All hearings in the family courts shall be conducted by the court without a jury."). Appellant contends this statute and family court rule violate his right to a jury trial pursuant to the federal and state constitutions.

"This Court has a very limited scope of review in cases involving a constitutional challenge to a statute." *State v. Harrison*, 402 S.C. 288, 292, 741 S.E.2d 727, 729 (2013) (citing *Joytime Distrib. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 651 (1999)). "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Id*. at 292–93, 741 S.E.2d at 729 (citing *Davis v. Cnty. of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996)). "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt." *Id*. at 293, 741 S.E.2d at 729 (citing *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995)). The party challenging the constitutionality of the

[1] Appellant was on probation for contempt and violation of a school attendance order.

statute has "the burden of proving the statute unconstitutional." *State v. Jones*, 344 S.C. 48, 58, 543 S.E.2d 541, 546 (2001) (citing *State v. Bouye*, 325 S.C. 260, 265, 484 S.E.2d 461, 464 (1997)).

A.

We turn to the United States Supreme Court to resolve Appellant's federal constitutional challenge. In *McKeiver v. Pennsylvania*, in a plurality opinion, six members of the United States Supreme Court agreed that pursuant to the federal constitution, juveniles are not constitutionally entitled to a jury trial in adjudication proceedings. 403 U.S. 528, 530–57 (1971). We find no authority, and Appellant cites none, supporting his position. Appellant has not overcome the presumption of constitutionality regarding section 63-3-590. As a result, we reject Appellant's argument that the federal constitution guarantees him a right to a jury trial in a South Carolina family court juvenile delinquency proceeding.

B.

In examining Appellant's challenge pursuant to the South Carolina Constitution, we begin with the constitutional guarantee to a jury trial, Article I, section 14:

> The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury . . . .

S.C. Const. art. I, § 14. Appellant claims that the phrase "[a]ny person charged with an offense" supports his claim that he is entitled to a jury trial since juveniles are "persons" under South Carolina law[2] and the Children's Code refers to juvenile charges as "offenses."[3] Appellant acknowledges, however, that the right to a jury

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[2] *See, e.g.*, S.C. Code Ann. § 63-1-40(1) (2010) (generally defining "child" as a "person under the age of eighteen" in the context of the South Carolina Children's Code); *id.* § 63-19-20(1) (2010) (defining "child" or "juvenile" to mean "a person less than seventeen years of age" in the context of the South Carolina Juvenile Justice Code).

[3] *See, e.g.*, S.C. Code Ann. § 63-19-360(4) (2010) (providing for juvenile detention services for "juveniles charged with having committed a criminal offense who are

trial under Article I, section 14 turns on whether a right to a jury trial was in existence at the time the Constitution was enacted. Indeed, this provision "securing the right of trial by jury, [is] to be read in the light of the law existing at the adoption of the constitution. [It was] not designed to *extend* the right of trial by jury, but simply to *secure* that right as it then existed." *City Council of Anderson v. O'Donnell*, 29 S.C. 355, 367, 7 S.E. 523, 528 (1888) (emphasis added). Thus, "[t]he right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868." *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) (citing *Medlock v. 1985 Ford F-150 Pick Up*, 308 S.C. 68, 70–71, 417 S.E.2d 85, 86 (1992)). "The right to a jury trial [also] encompasses forms of action that have arisen since the adoption of the Constitution in those cases where the later actions are of like nature to actions which were triable at common law at the time of the adoption of the Constitution." *Id*.

Under the common law in existence at the time of the adoption of the South Carolina Constitution, juveniles were criminally prosecuted in a manner similar to adults and were entitled to the right to a jury trial. *See, e.g., State v. Coleman*, 54 S.C. 162, 162–63, 31 S.E. 866, 866 (1899) (criminal prosecution of a child younger than fourteen); *State v. Toney*, 15 S.C. 409, 409–14 (1881) (appeal of a conviction for malicious trespass obtained at a jury trial). At that time, South Carolina followed the "rule of sevens" when criminally prosecuting children. *Dodd v. Spartanburg Ry. Gas & Elec. Co.*, 95 S.C. 9, 15, 78 S.E. 525, 528 (1913). "[A]t the common law, a child under seven years, is conclusively presumed incapable of committing any crime." *Id*. "Between seven and fourteen, the law also deems the child incapable; but only prima facie so; and evidence may be received to show a criminal capacity." *Id*. "Over fourteen, infants, like all others, are prima facie capable; and he who would set up their incapacity must prove it." *Id*.

In the early twentieth century, South Carolina began experimenting with alternative methods for handling juveniles charged with criminal offenses. *See, e.g.*, Act No. 73, 1917 S.C. Acts 132–35. This eventually resulted in the creation of the South Carolina Children's Code. *See* S.C. Code Ann. § 63-19-10 to -2460

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found, after a detention screening or detention hearing, to require detention or placement outside the home pending an adjudication of delinquency or dispositional hearing").

(2010 & Supp. 2013). Indeed, the current family court juvenile adjudication process was not in existence at the time our Constitution was enacted. Thus, the focus of our inquiry becomes whether the family court juvenile justice system is of "like nature" to juvenile criminal prosecutions at the time of the enactment of the Constitution. *Mims Amusement Co.*, 366 S.C. at 149, 621 S.E.2d at 348.

The very nature of the juvenile system makes clear the family court juvenile adjudication is an inherently different process than a typical criminal prosecution. Indeed, "[t]he primary purpose of the juvenile process is to exempt an infant from the stigma of a criminal conviction and its attendant detrimental consequences." *In re Skinner*, 272 S.C. 135, 137, 249 S.E.2d 746, 746 (1978). "South Carolina, as *parens patriae*, protects and safeguards the welfare of its children. Family Court is vested with the exclusive jurisdiction to ensure that, in all matters concerning a child, the best interest of the child is the paramount consideration." *Harris v. Harris*, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992) (citation omitted); *see also State v. Cagle*, 111 S.C. 548, 552, 96 S.E. 291, 292 (1918) ("The state is vitally interested in its youth, for in them is the hope of the future. It may therefore exercise large powers in providing for their protection and welfare.").

A brief overview of the family court juvenile justice system is illustrative. The Children's Code broadly defines the class of people who may initiate juvenile adjudicatory proceedings, including parents, guardians, "any person who has suffered injury through the delinquency of a child, or an officer having an arrested child in charge." S.C. Code Ann. § 63-19-1020 (2010). Once a case has been initiated, a family court judge hears the matter and makes findings of fact. *Id.* § 63-19-1410(A) (2010). The family court can adjudicate the juvenile as a delinquent and has a wide variety of rehabilitative measures at its disposal, including probation, supervision, restitution, mentoring, treatment, or commitment to the Department of Juvenile Justice not to exceed the juvenile's twenty-first birthday. *Id.* Critically, "[n]o adjudication by the court of the status of a child is a conviction, nor does the adjudication operate to impose civil disabilities ordinarily resulting from conviction . . . . The disposition made of a child or any evidence given in court does not disqualify the child in a future civil service application or appointment." *Id.* § 63-19-1410(C).

These important distinctions between the family court juvenile adjudication process and the traditional criminal justice process demonstrate that the juvenile adjudication process in family court is not of a like nature or similar to the manner

in which juveniles were criminally charged at the time the Constitution was enacted. As a result, the South Carolina Constitution does not entitle juveniles to a jury trial in family court adjudication proceedings.[4]

III.

Because the federal and state constitutions do not entitle a juvenile to a jury trial in a family court delinquency proceeding, the judgment of the family court is affirmed.

AFFIRMED.

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

[4] Our holding today is in accord with the prevailing view. *See* B. Finberg, Annotation, *Right to Jury Trial in Juvenile Court Delinquency Proceedings*, 100 A.L.R.2d 1241, at § 2[a] (1965 & Supp. 2014) ("[I]t is now almost universally held that in the absence of a statute which provides for a jury trial in juvenile court delinquency proceedings, the individual charged with being a delinquent has no right, under the pertinent state or the federal constitution, to demand that the issue of his delinquency be determined by a jury.").

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Jones Rivers, III, Respondent.

Appellate Case No. 2014-001185

Opinion No. 27414
Submitted June 13, 2014 – Filed July 16, 2014

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

William Jones Rivers, III, of Darlington, *pro se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment with conditions prior to seeking readmission. We accept the Agreement and disbar respondent from the practice of law in this state. In addition, respondent shall comply with each of the conditions set forth hereafter in this opinion prior to seeking readmission to the practice of law in this state. The facts, as set forth in the Agreement, are as follows.

Facts

A. Self-Report and Background

In November 12, 2012, after learning his firm's trust account was being investigated by ODC, respondent self-reported his conduct to ODC. He explained that his law partner, John Schurlknight (Partner), handled all of the firm's accounts, including its trust accounts. Respondent admitted that approximately six years before his self-report, Partner told him that the firm had a shortage in the trust account. Partner's plan to resolve the issue was to use money belonging to other clients to keep the account afloat. Respondent did nothing to prevent the implementation of this plan and, as a result, the firm began the self-perpetuating cycle of misappropriation of client funds. Respondent actively participated in this process.

In May 2011, Partner told respondent that the trust account was short a large sum owed to clients, Mr. and Mrs. A, and that Mr. and Mrs. A agreed to accept monthly payments until the entire amount was repaid. Again, respondent took no action to protect the firm's clients, the firm's future clients, or third parties. On June 1, 2011, respondent and Partner signed and gave Mr. and Mrs. A a promissory note acknowledging they owed them $1,695,000 and promised to pay $12,000 per month until the debt was satisfied. The debt was owed because Partner had misappropriated proceeds on claims he settled without Mr. and Mrs. A's knowledge.

Although the exact manner in which the funds were misappropriated varied to some extent from case to case, the firm settled many cases without the respective clients' knowledge or consent and misappropriated some or all of the proceeds. Attorneys and other staff members of the firm routinely signed the names of clients to settlement documents and endorsed their names on settlement checks. Respondent and Partner routinely lied to clients, medical providers, and other lienholders about the status of individual cases.

The ODC investigation that triggered respondent's November 12, 2012, self-report arose from Partner's handling of Mrs. B's personal injury case and her husband's loss of consortium's claim. Partner failed to keep Mr. and Mrs. B informed of the status of their claims and settled their case for $103,000. The settlement documents bearing the couple's purported signatures were forgeries and the funds

were misappropriated. Mrs. B's medical bills, which exceeded the amount of settlement, were not paid. Frustrated at her inability to receive information from Partner, Mrs. B went to attorney J. Ashley Twombley. Partner would not respond to Mr. Twombley's efforts to facilitate communication with Mr. and Mrs. B and ignored demands for the file after Mrs. B hired Mr. Twombley. Mr. Twombley discovered the settlement without Partner's assistance and filed a complaint. Mr. B also filed a complaint.

Partner committed suicide on November 13, 2012. On November 20, 2012, the Court placed respondent on interim suspension. In the Matter of Rivers, (S.C. Sup. Ct. filed November 20, 2012) (Shearouse Adv. Sh. No. 42 at 153). Many of the clients first learned their cases had been settled after they collected their files from the attorney to protect clients' interests. The firm's accounts were overdrawn at that time. Many clients also discovered their medical bills went unpaid and that their credit has been damaged.

For most clients, respondent or Partner held an extremely broad power of attorney secured at the onset of representation. The power of attorney gave the attorney the authority to:

> sign [the client's] name to any documents, pleading, draft, release, or other instrument in connection with this case or the settlement of the same and, to endorse and deposit for payment any negotiable instrument and to disburse the proceeds received.

Although respondent and others at the law firm routinely signed clients' names to settlement checks and documents, they never noted the signatures were affixed pursuant to a power of attorney.[1]

[1] Although attorneys customarily have clients sign a power of attorney to convenience the client by facilitating the deposit of settlement proceeds, a client does not abdicate the right to be informed of settlement offers or the right to make settlement decisions by signing a power of attorney. Further, no power of attorney can obviate a lawyer's responsibility to "abide by a client's decision whether to make or accept an offer of settlement of a matter." Rule 1.2, Rules of Professional Conduct, Rule 407, SCACR.

Respondent contends he did not personally take any of the stolen funds, but acknowledges that the firm's collection of fees in these cases as well as his collection of any attendant salary was entirely inappropriate. Although respondent produced some bank statements to Disciplinary Counsel during an interview, he was unable to produce the vast majority of financial records required by Rule 417 because the records were not maintained. As a result, a complete picture of receipts and disbursements is not available.

On February 6, 2014, respondent pled guilty to one count of mail fraud in violation of 18 U.S.C. § 1341. He has yet to be sentenced, but in his plea agreement he agreed to surrender all assets that would be subject to forfeiture, to make full restitution in an amount to be determined at sentencing, and to confess a monetary judgment in the amount of $1,248,135 representing the gross proceeds of the conduct underlying his conviction.

The Lawyers' Fund for Client Protection (Lawyers' Fund) received more than $1,286,000 in claims from respondent's clients and more than $3,800,000 in claims from Partner's clients. After investigating these claims and limiting individual claims to $40,000 per client, the Lawyers' Fund approved more than $605,000 of the claims involving respondent and $746,000 of those involving Partner. The Lawyers' Fund then paid the maximum of $200,000 to respondent's clients and $200,000 to Partner's clients, with each client receiving a pro rata share of the available funds. See Rule 411, SCACR.

B. Respondent's Cases

Matter I

In February of 2012, respondent settled Client C's workers' compensation case for $110,000 without his client's knowledge and submitted a forged document to the Workers' Compensation Commission. To conceal the settlement, respondent then began sending Client C checks in roughly the amount of his temporary disability payments and explained that the change in the amount was an administrative issue. Client C discovered that his case had been settled only when he investigated why the last two checks he received from the firm bounced.

Matter II

In March of 2011, respondent settled Client D's workers' compensation case for $25,000. Respondent submitted a forged document to the Workers' Compensation Commission and told Client D the case was still pending. The funds were misappropriated. Client D learned of the settlement after respondent was placed on interim suspension.

Matter III

Respondent settled Client E's workers' compensation case for $5,200 without Client E's consent and submitted a forged fee petition to the Workers' Compensation Commission indicating Client E would receive $3,354.48. The funds were misappropriated.

Matter IV

Respondent settled Client F's personal injury case for $50,000, but did not disburse any of the funds to Client F.

Matter V

Respondent settled Client G's personal injury claim for a total of $110,000 without his client's knowledge or consent. Respondent actively misled Client G about the status of his case. Client G learned of the settlement six months after it occurred and first received proceeds eight months after settlement. Client G's medical bills totaling more than $35,000 were not paid; however, Client G was led to believe the bills had been paid.

Matter VI

Respondent represented Client H as personal representative of her mother's estate in the estate's wrongful death action. Respondent settled the action for $147,500. Client H was aware of the settlement but only received $1,000 of the $88,802.12 the estate was to receive.

Matter VII

Respondent represented Client I in a personal injury case that was settled in 2004 for $75,000. Respondent advised Client I a large portion of the proceeds had to be set aside to pay his mounting medical bills, but then failed to pay several of those bills. Client I's file indicates only $21,711.12 of the proceeds were properly disbursed.

Matter VIII

Respondent settled Client J's personal injury claims for a total of $66,666 without his consent and told him his case was still pending. Client J learned his case was settled more than one year after settlement when respondent was placed on interim suspension.

Matter IX

Respondent represented Client K on her claims arising from an accident with an uninsured driver. Respondent settled Client K's claims against her insurance and her mother's insurance for a total available coverage of $75,000, but failed to safeguard the proceeds. He paid Client K a total of $21,390.46 in two payments more than a year later. Respondent did not pay her medical providers even though he negotiated a reduced payment with at least one provider. Two of Client K's medical providers have sent her bills to collections.

Matter X

Respondent represented Client L in a personal injury case and agreed to accept a reduced fee in the event he could settle without litigation. Respondent was able to quickly settled her claims, but her care far exceed the $100,000 in available coverage, and her medical bills were not finalized at the time of settlement. Respondent told Client L that the entire recovery would have to be paid to her medical insurer. However, respondent never paid the medical insurer even though the insurer was willing to settle its subrogation interest for $33,333.33 which would have permitted Client L to have a recovery. All of the proceeds in Client L's case were misappropriated.

Matter XI

Respondent settled Client M's personal injury case for a total of $55,000. Client M was unaware of the settlement and his name was forged on settlement documents. He received no proceeds and his medical bills were not paid.

Matter XII

Respondent represented Client N on a personal injury matter. Client N's medical bills exceeded $500,000. In total, respondent collected $100,000 in Client N's case from three different policies. Client N never saw the settlement checks, did not endorse them, and did not sign any settlement documents. Client N's file does not indicate any of the settlement proceeds were paid to his medical providers.

Matter XIII

Respondent represented Client O in a personal injury claim arising from a slip and fall. Client O repeatedly asked respondent or his staff about her case and was repeatedly told that the defendant would not offer a settlement. Upon review of her file after respondent's interim suspension, Client O discovered that respondent had settled her case for $7,500 and that someone had forged her signature to the general release.

C. Partner's Cases and Other Firm Cases[2]

Matter I

The firm represented Client P and his minor nephew in a personal injury case arising from a car accident. Client P's signature was forged on the insurance release for his claim and he was not advised of the settlement for more than a year after the proceeds were received. Client P also incurred $621.46 in interest on a $1,895 medical bill Partner falsely claimed he paid. Partner settled the minor's claim for $100,000 and misappropriated the net proceeds of $40,008.92.

[2] Respondent is responsible for Partner's misconduct because he ratified specific acts of Partner's misconduct and was aware of Partner's practice of misconduct but failed to take any reasonable remedial action. Rule 5.1, RPC, Rule 407, SCACR.

Matter II

Client Q and her son were injured in a car accident. Partner settled the claims for $10,900 without Client Q's knowledge in October 2012 and her signature was forged on the proceeds check. Partner thereafter lied to Client Q about the status of the case.

Matter III

Respondent initially represented Client R although her file was later assigned to an associate. On the associate's cases, Partner assumed the role of negotiating and paying medical bills and Partner's staff prepared the settlement memos. Client R was led to believe all of her medical bills were paid when her case settled, however, several bills totaling $1,903 were not paid.

Matter IV

Partner and an associate handled multiple matters involving Client S's minor niece. The child's father already had a workers' compensation and personal injury claim arising from an automobile accident when he subsequently died in another automobile accident. A year later, the child's mother was killed in a separate automobile accident. The firm handled all claims related to both parents, but the minor child did not receive all proceeds to which she was entitled. Partner lied to at least one creditor about the status of the claims involving the mother's death and falsely claimed her funeral bill was paid from settlement proceeds. Additionally, the files contain several documents forged after the associate's departure from the firm as well as records of one disbursement that did not occur.

Matter V

Client T hired an associate in the firm to represent him in a personal injury case arising from a serious automobile accident in North Carolina. Throughout the case, Client T suffered diminished brain function that he asserted was caused by the accident. The associate was admitted pro hac vice for Client T's litigation. No other attorney in the firm was admitted to the North Carolina Bar although Partner worked with the associate on the case. The associate remained involved in the case after he left the firm.

Because of Client T's deteriorating health, Partner prepared and Client T executed a power of attorney in favor of his brother, Mr. C. Partner and the associate attended mediation with Client T and Mr. C, but the mediation failed when Client T rejected a $400,000 settlement offer. Shortly after mediation, Partner settled the case for $400,000 without the knowledge or consent of Client T or Mr. C. Client T's name was forged to settlement documents and Partner arranged to have the settlement proceeds released to the firm rather than to the associate who was counsel of record. Client T's endorsement was forged on the check and the proceeds were deposited into a South Carolina bank with no North Carolina branches in violation of the North Carolina Rules of Professional Conduct. Partner misappropriated the proceeds. Partner also paid the associate a fee even though Client T had never agreed to a fee split. Client T acknowledges he received advances from Partner, but the exact amount is in dispute. Client T filed a lawsuit which is currently pending. Partner's conduct violated numerous provisions of the North Carolina Rules of Professional Conduct.

Matter VI

Partner settled Client U's personal injury claim for $10,000 and his related property claim for $2,500. Client U was unaware of the settlement and his signature was forged on the two releases sent to the liability insurance carrier. Client U did not receive any proceeds and his file indicates his medical providers were not paid.

Matter VII

A medical provider complained that the firm settled fifty-three (53) cases without paying the provider and falsely reported the cases had not yet settled. Respondent represented four (4) of the clients who bills were not paid. The provider reports the unpaid bills exceed $250,000.

Matter VIII

Partner represented Client V in a workers' compensation case and related personal injury claim. The workers' compensation case settled, but the employer did not waive its subrogation interest and put Partner and the at-fault driver on notice of its lien in the amount of $95,316.80. Thereafter, Partner settled the personal injury claim and the proceeds were paid directly to the firm. Counsel for Client V's

employer approached Partner about the failure to honor the subrogation lien, but Partner failed to respond to requests for documentation of proceeds or disbursements. The employer believes most or all of the proceeds were misappropriated by the firm.

Matter IX

Partner represented Client W in a personal injury case. Partner settled the case for $125,000 but actively lied to Client W about the status of the case. Client W learned of the settlement after Partner's death. Client W never executed a power of attorney in favor of Partner or the firm, but discovered a forged power of attorney in favor of Partner in his file.

Matter X

Client X hired Partner after settling her personal injury claim with the liability carrier for the policy limits. Client X insisted Partner not settle her underinsured motorist claim for less than the available coverage of $75,000. Partner thereafter settled the claim for $25,000 without Client X's knowledge, lied to her about the status of the case, and misappropriated the money. When Client X confronted Partner about some of his lies, he admitted what he had done and paid her a total of $75,000, three times the amount he had collected on her behalf without her permission. The funds Partner used to pay Client X were misappropriated from other clients.

Matter XI

An associate with the firm represented Client Y in a personal injury matter. The associate settled the claim with Client Y's permission. Client Y was presented with a settlement memo indicating all of her medical bills were paid, but none were paid at the time she received her portion of the proceeds. Eventually, two of her providers were paid but the remaining medical bills, totaling $1,799.63, were never paid.

Matter XII

Attorney Eric Poulin reported that his office represents fifteen (15) clients whose cases respondent and Partner settled without the clients' knowledge. Respondent's

firm received a total of $304,153 in settlement proceeds on behalf of the clients. The clients were unaware of the settlements and many of their medical bills were left unpaid. One client whose case was settled for $100,000 received several small payments from the firm which he believed were advances against future proceeds. The remaining clients received no proceeds. Additionally, Mr. Poulin represents a former firm client whose claim was neither settled nor preserved before the expiration of the statute of limitations.

Matter XIII

Partner paid Client Z $1,000 to secure him as a client on his personal injury and workers' compensation claims arising from a single accident. Partner failed to adequately communicate with Client Z and settled his claims without his knowledge. Although Partner never provided Client Z with a complete accounting of receipts and disbursements, Client Z acknowledges he received numerous advances from Partner that may have equaled or exceeded the total proceeds collected on his claims.

Matter XIV

Partner settled Client AA's personal injury case for $23,500 shortly after receiving his medical bills. Client AA was unaware of the settlement and approximately ten months later, Partner advised her he settled the case for $6,900. Partner paid Client AA $1,000 at that time and presented her with a settlement memo indicating her medical providers were paid. She has since learned that Partner did not pay at least one of her medical bills.

Matter XV

Partner represented Client BB in a personal injury case. Partner settled Client BB's case without his knowledge or consent. Client BB received no proceeds from the settlement.

Matter XVI

Partner took over Client CC's personal injury case upon the departure of the assigned firm associate. Client CC's medical bills exceeded the amount of available coverage. The settlements from Client CC's liability and underinsured

coverage claims totaled $197,000. Additionally, $1,000.00 in Med Pay and $5,000 in personal injury protection coverage were collected. Client CC was not informed of the settlements, did not sign any of the settlement documents or checks, and his file does not indicate how the proceeds were disbursed.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2 (lawyer shall abide by client's decisions concerning objectives of representation); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly inform client of decisions requiring client's informed consent); Rule 1.15 (lawyer shall safekeep client property); Rule 3.3 (lawyer shall not make false statement of fact to tribunal); Rule 4.1 (in course of representing client, lawyer shall not make false statement of material fact to third person); Rule 5.1(c) (lawyer shall be responsible for misconduct of another lawyer when lawyer knows of and ratifies conduct or knows of conduct and fails to take reasonable remedial action); Rule 5.3 (lawyer shall be responsible for misconduct of non-lawyer staff when lawyer knows of and ratifies staff's conduct or knows of conduct or fails to take reasonable remedial action); Rule 8.3(b) (when lawyer knows another lawyer has committed violation of Rules of Professional Conduct that raises substantial question as to that lawyer's honesty, trustworthiness or fitness as lawyer in other respects, lawyer shall inform the appropriate professional authority); Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects on lawyer's honesty, trustworthiness, or fitness in other respects); Rule 8.4(c) (it is professional misconduct for lawyer to commit criminal act involving moral turpitude); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). Respondent further admits that, by his conduct, he violated the Lawyer's Oath found in Rule 402(k), SCACR, and violated the recordkeeping provisions of Rule 417, SCACR.

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(1)(a) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(4) (it shall be ground for discipline for lawyer to be convicted of crime of moral turpitude or serious crime); Rule 7(a)(5) (it shall be ground for discipline for

lawyer to engage 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) (it shall be ground for discipline for lawyer to violate the oath of office taken to practice law in this state and contained in Rule 402(k), SCACR).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state. Respondent shall not apply for readmission until he has completed all terms and conditions of his criminal sentence, including the payment of fines and restitution, has reimbursed the Lawyers' Fund for all expenditures made on claims filed against him or Partner, and has made restitution to his clients and Partner's clients who filed approved claims with the Lawyers' Fund but were not fully reimbursed for their losses. Within fifteen (15) 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., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Erick Eton Hewins, Appellant.

Appellate Case No. 2012-210306

Appeal From Greenville County
The Honorable D. Garrison Hill, Circuit Court Judge

Opinion No. 27415
Heard March 18, 2014 – Filed July 16, 2014

REVERSED

Appellate Defender Carmen Vaughn Ganjehsani, of Columbia, for Appellant.

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

JUSTICE BEATTY: Erick Hewins appeals his conviction for possession of crack cocaine. Hewins contends the circuit court judge erred in ruling he was collaterally estopped from challenging the search of his vehicle, which precipitated the drug charge, because Hewins waived any challenge when he was convicted in municipal court of an open container violation resulting from the same search. We hold the conviction in municipal court had no preclusive effect on Hewins's ability to litigate his motion to suppress in circuit court. Moreover, we find the drug

evidence should have been suppressed because it was discovered during an unlawful search. Accordingly, we reverse Hewins's conviction.

I. Factual / Procedural History

On September 15, 2009 at approximately 11:45 p.m., Officer Charles Cothran of the Greenville Police Department was patrolling the area of Main Street and Stone Avenue when he observed a gold Cadillac make a left turn using a "non-turning lane." As a result of the improper turn, Officer Cothran signaled for the vehicle to stop and Hewins pulled over into a nearby parking lot. Officer Cothran testified that earlier in the evening he had seen Hewins driving this vehicle on two occasions in a "high drug area."

Officer Cothran approached the vehicle and requested that Hewins provide his driver's license, proof of insurance, and vehicle registration. According to Officer Cothran, Hewins was "extremely nervous," spoke with a "quivering" voice, and was rapidly breathing. Due to Hewins's behavior, Officer Cothran requested a backup unit. Because Hewins was unable to locate his proof of insurance or vehicle registration, Officer Cothran returned to his patrol car and searched the computer database for this information and confirmed the vehicle was registered to Hewins.

As Officer Cothran was writing a warning citation, Officer Michael Loftis, a K-9 officer, arrived at the location. After Officer Cothran completed writing the warning citation, he returned to give it to Hewins. When he approached the vehicle, he noticed that Hewins remained nervous and "had not calmed down" despite the fact that he was not being given a traffic ticket. Based on this behavior, Officer Cothran asked Hewins to exit the vehicle for safety reasons. He then conducted a pat down of Hewins and questioned him as to whether he had any guns, drugs, or explosives. Officer Cothran stated Hewins quickly responded that he did not have drugs and continued to exhibit nervous behaviors. Officer Cothran indicated this response made him suspicious. As a result, he asked Hewins for consent to search the vehicle. When Hewins refused, Officer Loftis proceeded to walk his drug-detection dog around the vehicle. After Officer Loftis secured the dog, he informed Officer Cothran that the dog had "alerted" to the driver's side door. In turn, Officer Cothran conducted a search of the vehicle. The search of the center armrest console revealed a mini-bottle of vodka that had been opened and a Tylenol bottle containing two, small "rock-like white pebbles." A field test of the

substance indicated the presence of cocaine. Officer Cothran arrested Hewins for possession of crack cocaine[1] and issued him a ticket for the open container violation.[2]

On October 8, 2009, Hewins appeared in municipal court and was convicted of the open container charge. The municipal court sentenced Hewins to time served and ordered the payment of a fine in the amount of $262.50. Based on his misunderstanding that Hewins had been convicted of possession of crack cocaine in municipal court, Officer Cothran authorized the destruction of the drug evidence.

On May 4, 2010, a Greenville County grand jury indicted Hewins for possession of crack cocaine. Just prior to the start of the trial, Hewins moved to suppress the drug evidence on the ground the search was unlawful. Although counsel for Hewins admitted the initial traffic stop was valid, he asserted the purpose of the stop was concluded after Officer Cothran issued a warning citation for the traffic offense. Counsel maintained that once the traffic stop was concluded any further detention or search was unlawful.

In response, the solicitor asserted Hewins was collaterally estopped from challenging the propriety of the search because he had been convicted in municipal

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[1] S.C. Code Ann. § 44-53-375(A) (Supp. 2009) ("A person possessing or attempting to possess less than one gram of methamphetamine or cocaine base, as defined in Section 44-53-110, is guilty of a misdemeanor and, upon conviction for a first offense, must be imprisoned not more than three years or fined not more than five thousand dollars, or both."). Because a 2010 amendment rewrote section 44-53-375, we have cited to the code section in effect at the time of the offense.

[2] S.C. Code Ann. § 61-6-4020 (2009) ("A person who is twenty-one years of age or older may transport lawfully acquired alcoholic liquors to and from a place where alcoholic liquors may be lawfully possessed or consumed; but if the cap or seal on the container has been opened or broken, it is unlawful to transport the liquors in a motor vehicle, except in the luggage compartment or cargo area. A person who violates this section is guilty of a misdemeanor and, upon conviction, must be fined not more than one hundred dollars or imprisoned for not more than thirty days."). We note that section 61-6-4020 was amended in 2011 to restructure the provisions of the statute and to clarify what constitutes the cargo area of a vehicle. Because this amendment took effect after the date of the offense, we have cited to the code section in effect at the time of the offense.

court for an offense that emanated from the same search. The solicitor explained that the failure to challenge the search in municipal court constituted a waiver by Hewins as to any further issue regarding the search. In support of this position, the solicitor relied on the holding in *State v. Snowdon*, 371 S.C. 331, 638 S.E.2d 91 (Ct. App. 2006), *cert. dismissed as improvidently granted*, 381 S.C. 171, 672 S.E.2d 108 (2009).

In *Snowdon*, the defendant was arrested for breach of the peace. *Id.* at 332, 638 S.E.2d at 92. During a search incident to the arrest, an officer discovered a small amount of marijuana in the defendant's wallet. *Id.* The defendant was charged with breach of the peace and possession of marijuana. *Id.* After he pled guilty to breach of the peace in magistrate's court, the defendant sought to suppress the introduction of the marijuana during his circuit court trial. *Id.* at 333, 638 S.E.2d at 92. The circuit court determined that the defendant's guilty plea in magistrate's court precluded him from contesting the legality of his arrest and, *a fortiori*, the search incident thereto. *Id.* The defendant was convicted of possession of marijuana and sentenced to one year in prison. *Id.*

On appeal, the Court of Appeals affirmed. *Id.* at 334, 638 S.E.2d at 93. In so ruling, the court found the defendant, by having pled guilty to the breach of the peace charge, waived any objection he may have had to assert constitutionally based violations attendant to his initial arrest and the legal consequences flowing therefrom. *Id.* at 333, 638 S.E.2d at 93. Additionally, the court found the defendant was collaterally estopped from relitigating the issue of the validity of his arrest. *Id.* at 334, 638 S.E.2d at 93. Because the defendant had pled guilty to breach of the peace, the court found the issue of whether there was probable cause to arrest him for that offense was necessarily determined in the magistrate court proceeding. *Id.* Thus, the court concluded the doctrine of collateral estoppel prevented the defendant from raising that issue again at his trial for possession of marijuana. *Id.*

Counsel for Hewins disputed the applicability of *Snowdon*, arguing that Hewins did not enter a guilty plea in municipal court. To counter this assertion, the solicitor presented testimony from the records custodian for the City of Greenville Municipal Court. Although the Uniform Traffic Ticket indicated Hewins appeared for a trial, the custodian testified her computer records reflected that Hewins pled guilty.

Counsel for Hewins then resumed his argument and reiterated that *Snowdon* was not applicable. Counsel explained that, unlike the related offenses in

Snowdon, the magistrate court conviction for an open container violation was "a completely separate case" from the possession of crack cocaine offense. Specifically, counsel pointed out that Hewins was not contesting a search incident to an arrest but, rather, a search following the issuance of a warning citation. Finally, counsel claimed there was no evidence that Hewins was represented by counsel during the municipal court proceeding.

At the conclusion of the hearing, the judge granted the State's motion based on *Snowdon*. Ultimately, the jury convicted Hewins of possession of less than one gram of crack cocaine. The trial judge sentenced Hewins to one year in prison. After Hewins appealed to the Court of Appeals, this Court certified the appeal pursuant to Rule 204(b) of the South Carolina Appellate Court Rules.

II. Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted). "We are bound by the trial court's factual findings unless they are clearly erroneous." *Id.* "This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *Id.* The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the decision of the trial court is based upon an error of law or upon factual findings that are without evidentiary support. *Id.*

III. Discussion

A. Arguments

Hewins contends the circuit court judge erred in ruling he was precluded from seeking the suppression of the crack cocaine based on *Snowdon*. In support of this contention, Hewins maintains *Snowdon* is not controlling as it is factually distinguishable. Specifically, he asserts there is no evidence that definitively proves he pled guilty in municipal court as the notation on the Uniform Traffic Ticket indicates he went to trial and there was a verdict of guilty. Moreover, Hewins disputes the application of the doctrine of collateral estoppel as the legality of the search was not at issue or actually litigated during the municipal court proceeding.

Additionally, because there is no evidence that Hewins had the benefit of counsel for the municipal court proceeding, he asserts this uncounseled conviction should not have been used against him in circuit court. Citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and its progeny,[3] Hewins claims any use of his uncounseled municipal court conviction violated the Sixth Amendment.[4]

B. Analysis

1. *Snowdon* is not dispositive

We hold the circuit court judge erred in relying on *Snowdon* as it is factually distinguishable and, thus, not dispositive of the instant case. Initially, we find that Hewins did not plead guilty as did the defendant in *Snowdon*. Instead, Hewins was convicted in municipal court after a trial. Although there is conflicting testimony on this point, the only official court record is the Uniform Traffic Ticket. This document reveals the following: (1) a trial was scheduled for October 8, 2009, (2) Hewins appeared for this trial, (3) the trial was conducted by a trial officer, and (4) a verdict of guilty was entered after the trial.

However, even if Hewins pled guilty in municipal court, we find there are significant differences between the facts of *Snowdon* and the instant case. In *Snowdon*, the defendant was arrested for breach of the peace. *Snowdon*, 371 S.C. at 332, 638 S.E.2d at 92. During a search incident to the arrest, an officer discovered a small amount of marijuana in the defendant's wallet. *Id.* The defendant was charged with breach of the peace and possession of marijuana. *Id.*

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[3] *See Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); *see also Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (finding "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged" (quoting *Argersinger*, 407 U.S. at 40)).

[4] The circuit court judge did not rule on this issue. Thus, we find it is not preserved for our review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding an issue must have been raised to and ruled upon by the trial court in order to be preserved for appellate review).

After he pled guilty to breach of the peace in magistrate's court, the defendant sought to suppress the introduction of the marijuana during his circuit court trial. *Id.* at 333, 638 S.E.2d at 92. The Court of Appeals found that Snowdon, having pled guilty to breach of peace, "waived any objection he may have had, and [could not], therefore, assert constitutionally based violations attendant to his initial arrest and the legal consequences flowing therefrom." *Id.* at 333, 638 S.E.2d at 93.

In *Snowdon*, the Court of Appeals viewed the two offenses as inextricably linked. Specifically, the breach of the peace arrest precipitated the search, which revealed evidence that formed the basis of the marijuana charge. By failing to challenge the initial arrest, the court found Snowdon waived any challenge to the consequences stemming from this arrest.

In contrast, the search in the instant case was not incident to an arrest as it followed the officer's issuance of a traffic citation. Furthermore, the open container charge was completely unrelated to the drug possession charge as the discovery of the vodka bottle did not precipitate the discovery of the drug evidence.

2. Preclusive Effect of a Conviction and Collateral Estoppel

Having concluded that *Snowdon* is not dispositive, the question becomes whether a conviction in a separate criminal proceeding or the doctrine of collateral estoppel precludes a defendant from subsequently challenging a search that uncovered evidence relating to the two separate offenses?

a. Implications of the Entry of a Valid Guilty Plea

It is well-established that a plea of guilty, knowingly and voluntarily entered, generally acts as a waiver of all non-jurisdictional defects and defenses, including challenges regarding constitutional issues. *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999); *State v. Munsch*, 287 S.C. 313, 338 S.E.2d 329 (1985).

Based on this principle, most jurisdictions take the position that a person who pleads guilty waives all non-jurisdictional objections to the proceeding, "including objections to the manner in which evidence against him has been gathered." A. E. Korpela, Annotation, *Plea of Guilty as Waiver of Claim of Unlawful Search and Seizure*, 20 A.L.R.3d 724, § 2[a] (1968 & Supp. 2014) (collecting state and federal cases discussing whether a plea of guilty constitutes a waiver of an unlawful search and seizure as a ground for attacking the conviction).

Thus, by pleading guilty, a defendant is precluded from attempting to vitiate the conviction by allegations that an unlawful search and seizure precipitated the charged offense.

Stated another way, the waiver that results from the entry of a guilty plea is confined to the offense that is the subject of the plea. *See Menna v. New York*, 423 U.S. 61 (1975) (recognizing that a guilty plea conclusively establishes the factual predicate for the offense to which the defendant is pleading guilty); 22 C.J.S. *Criminal Law* § 517 (Supp. 2013) ("[B]roadly stated, where the accused pleads guilty to a charged offense, he or she may not thereafter raise independent claims relating to the deprivation of constitutional rights that antedate the plea."). Thus, by implication, a defendant who pleads guilty waives any assertion of an unlawful search that precipitated the offense to which he pled guilty. Accordingly, even if Hewins pled guilty to the open container violation, his plea would have constituted a waiver of any challenge he may have had to that offense but could not be extended to constitute a waiver of a challenge to the charge of possession of crack cocaine.

Because a guilty plea in municipal court would have had no preclusive effect on Hewins's ability to litigate his motion to suppress in circuit court, we must next determine whether the doctrine of collateral estoppel was applicable.

b. Doctrine of Collateral Estoppel

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* " 'While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue.' " *Id.* (quoting *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct. App. 2008))). "The doctrine of collateral estoppel should not be rigidly or mechanically applied." *Id.* at 555, 684 S.E.2d at 782. "Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." *Id.*

Without explanation, this civil doctrine was applied in the criminal context by our Supreme Court in 1942. *See State v. Brown*, 201 S.C. 417, 23 S.E.2d 381 (1942) (holding defendant was estopped from relitigating the value of stolen goods in magistrate court where circuit court determined value and remanded to magistrate court based on that determination). In *Snowdon*, the Court of Appeals merely referenced *Brown* in a footnote to support the proposition that "[c]ollateral estoppel can be used in a criminal proceeding." *Snowdon*, 371 S.C. at 334 n.2, 638 S.E.2d at 93 n.2.

Given the limited precedent in this state regarding the application of collateral estoppel in criminal proceedings, we have looked to other sources for guidance on this issue. Although the doctrine of collateral estoppel originally developed in civil cases, it has been applied in criminal proceedings. *Ashe v. Swenson*, 397 U.S. 436 (1970). In *Ashe*, the United States Supreme Court explained, "'[c]ollateral estoppel' is an awkward phrase, but stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." *Id.* at 443. In analyzing this doctrine, the Court recognized that collateral estoppel in the criminal context is derived from the Fifth Amendment Double Jeopardy Clause, which forbids any person from being "twice put in jeopardy of life or limb." *Id.* at 442. ("The question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy.").

Against this background, the Court held that a defendant in a criminal case may assert collateral estoppel by relying on an acquittal in a first prosecution to bar litigation of those facts in a subsequent prosecution for a different offense. *Id.* at 443. The Court, however, noted that "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Id.* at 444.

The rule established in *Ashe* is normally invoked by a defendant to prevent the State from relitigating an issue that has been determined in the defendant's favor. *See* E. H. Schopler, Annotation, *Modern Status of Doctrine of Res Judicata in Criminal Case*s, 9 A.L.R.3d 203 (1966 & Supp. 2014) (collecting state and federal cases concerning the question of whether and when a judgment on the merits in a criminal prosecution may be asserted as res judicata or collateral estoppel in a subsequent criminal prosecution); 1 Wharton's Criminal Law § 74

(15th ed. Supp. 2013) ("Collateral estoppel, a branch of the broader principle of res judicata, is applicable in criminal prosecutions and bars relitigation between the same parties of an issue determined at a prior trial.").

"Courts differentiate between offensive and defensive use of collateral estoppel." Kristin C. Dunavant, Comment, *Criminal Procedure--State of Tennessee v. Scarbrough: Precluding The Application of Offensive Collateral Estoppel in Criminal Cases*, 37 U. Mem. L. Rev. 639, 639 (Spring 2007). "While offensive collateral estoppel bars the criminal defendant from relitigating an issue determined in a previous action, defensive collateral estoppel prohibits the prosecution from relitigating an issue determined in a previous action." *Id.*

When the prosecution invokes collateral estoppel against the defendant, its use is "sometimes restricted by concerns such as fairness to the defendant." Anne Bowen Poulin, *Prosecution Use of Estoppel and Related Doctrines in Criminal Cases: Promoting Consistency, Tolerating Inconsistency*, 64 Rutgers L. Rev. 409, 410 (Winter 2012). Specifically, "the State's use of offensive collateral estoppel against a defendant has raised the issue of whether it violates the defendant's Sixth Amendment right to a jury trial." Dunavant, *supra* at 642. "The constitutional argument is that if a court allows the State to invoke offensive collateral estoppel against a criminal defendant, effectively banning the defendant from litigating every element of his offense in front of the jury in a subsequent action, the subsequent jury would not be able to consider all of the facts." *Id.* "Consequently, the use of offensive collateral estoppel would prevent the jury from making every finding necessary to the judgment in the subsequent suit and thus would violate the defendant's constitutional right to a jury trial." *Id.*

Additionally, it has been asserted that "the application of offensive issue preclusion by the government violates the defendant's Fifth Amendment right to due process." Michelle S. Simon, *Offensive Issue Preclusion in the Criminal Context: Two Steps Forward, One Step Back*, 34 U. Mem. L. Rev. 753, 779 (Summer 2004). "Under the Due Process Clause, a criminal defendant has the right to a determination by a jury of whether the prosecution has proved every element of the crime charged beyond a reasonable doubt." *Id.* "By finding that an element of the crime has been conclusively proven, the argument is that the prosecution is relieved of its burden of proof." *Id.* "Not only is the prosecution relieved of its burden of proof, but the burden shifts to the defendant to overcome the prejudice of the jury created by the knowledge of the previous determination." *Id.*

Given the significant constitutional issues raised by the use of offensive collateral estoppel, it is questionable that the policy reasons used to support issue preclusion in civil cases justify the use of the doctrine in the criminal context. *Id.* at 780. Specifically, "[t]he notion of judicial efficiency and finality has been invoked in civil trials to support the use of issue preclusion since the prompt resolution of claims and finality are desirable goals in civil litigation." *Id.* However, it would appear that "the efficiencies of issue preclusion pale in comparison to the importance of upholding a criminal defendant's right to vigorously defend himself and protect his liberty." *Id.*

In view of these constitutional and policy concerns, the majority of federal courts have prohibited the prosecution from invoking collateral estoppel against a defendant. *See United States v. Pelullo*, 14 F.3d 881, 890 (3d Cir. 1994) (denying the use of offensive collateral estoppel in a criminal context because it would violate a defendant's right to a jury trial; noting, "Instances of invoking collateral estoppel against the defendant have been rare, though not unheard of"); *United States v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005) (rejecting the use of offensive collateral estoppel in criminal context); *United States v. Gallardo-Mendez*, 150 F.3d 1240 (10th Cir. 1998) (prohibiting prosecution's use of a guilty plea to collaterally estop a defendant from relitigating an issue in a subsequent criminal proceeding because it would be contrary to the Due Process Clause); *United States v. Harnage*, 976 F.2d 633 (11th Cir. 1992) (precluding the use of offensive collateral estoppel because it would defeat the goal of judicial efficiency).

The majority of state courts that have considered this issue have also precluded the prosecution from invoking collateral estoppel against a defendant. *See Gutierrez v. People*, 29 Cal. Rptr. 2d 376 (Cal. Ct. App. 1994) (holding that defendant's right to a fair trial prevented the State from asserting collateral estoppel to bar defendant from litigating issues of identity and intent based on resolution of those issues in prior trial resulting in final judgment of conviction for attempted murder of the same victim); *State v. Stiefel*, 256 So. 2d 581, 585 (Fla. Dist. Ct. App. 1972) (finding collateral estoppel was inapplicable in subsequent prosecution originating out of the same events that led to a conviction for driving while intoxicated because due process principles "assure an accused a jury trial on all issues relating to each element of a given criminal charge"); *State v. Allen*, 31 A.3d 476 (Md. 2011) (holding prosecution's use of offensive collateral estoppel to establish an essential element of a charged offense in a criminal case violates a defendant's right to trial by an impartial jury and the presumption of innocence); *People v. Goss*, 521 N.W.2d 312 (Mich. 1994) (holding that neither collateral

estoppel nor res judicata could be applied to conclusively establish underlying felony, as a matter of law, in retrial of felony-murder conviction); *State v. Johnson*, 594 A.2d 1288 (N.H. 1991) (concluding that doctrine of collateral estoppel could not be applied offensively in perjury prosecution so as to preclude litigation of primary substantive issue involving a specific finding of fact made by a jury in a prior criminal trial against the defendant); *State v. Igenito*, 432 A.2d 912, 918-19 (N.J. 1981) (concluding that "collateral estoppel, applied affirmatively against a defendant in a criminal prosecution, violates the right to trial by jury in that not only does it seriously hobble the jury in its quest for truth by removing significant facts from the deliberative process, but it constitutes a strong, perhaps irresistible, gravitational pull towards a guilty verdict"); *State v. Scarbrough*, 181 S.W.3d 650 (Tenn. 2005) (holding the prosecution could not invoke the doctrine of offensive collateral estoppel to establish an essential element of a charge in a criminal case).

c. Application of Collateral Estoppel to a Motion to Suppress

As can be seen by the above citations, most courts have considered whether the prosecution's use of offensive collateral estoppel violates a defendant's right to a jury trial. Thus, although these cases are instructive, they are not dispositive of the narrow question presented in the instant case, which is whether a prior conviction may be used against a defendant in a pre-trial motion to suppress?

Without question, the proceedings are different as the use of collateral estoppel in this posture affects a judge's pre-trial ruling and does not necessarily eliminate a jury's consideration of substantive elements of the indicted offense. Accordingly, some courts have declined to adopt a blanket prohibition of the offensive use of collateral estoppel in this context, provided that the requirements of collateral estoppel are met. 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.2(g) (5th ed. Supp. 2013); Poulin, *supra* at 432-40.

Although these authorities identify *five* requirements for the application of the doctrine of collateral estoppel, we find the requirements are consistent with the *three* factors applied by our appellate courts in civil cases. *See Commonwealth v. Cabrera*, 874 N.E.2d 654, 658 (Mass. 2007) ("Five requirements must be met for collateral estoppel to apply *in the context of a suppression motion*: (1) the issues in the two proceedings must be identical; (2) the party estopped must have had sufficient incentive to litigate the issue fully and vigorously; (3) the party estopped must have been a party to the previous litigation; (4) the applicable law must be identical in both proceedings; and (5) the first proceeding must have resulted in a

final judgment on the merits such that the defendant had sufficient incentive and an opportunity to appeal." (footnote omitted) (emphasis added)).

After considering the constitutional and policy issues raised by the use of collateral estoppel in the criminal context, we decline to adopt a blanket prohibition of the State's use of offensive collateral estoppel. Significantly, at oral argument, counsel for Hewins stated that this was not the requested relief and in fact noted instances for which the doctrine's application would be permissible. We emphasize, however, that these instances would be extremely rare.

d. Application of Offensive Collateral Estoppel to the Instant Case

Applying this doctrine to the facts of the instant case, we find Hewins should not have been precluded from litigating his motion to suppress in circuit court because the State failed to establish the requisite factors.

Initially, we note there is no evidence in the record that the issue regarding the constitutionality of the search was actually litigated or directly determined in municipal court. Moreover, even though one search revealed evidence for the open container violation and the drug offense, the suppression issue in the drug case was not necessary to support a conviction in the open container case. Finally, given the minimal penalty for an open container violation, Hewins had little incentive to pursue a suppression motion as he was sentenced to time served and ordered to pay a fine.

Because the State failed to demonstrate each element of the doctrine of collateral estoppel, we find Hewins should not have been precluded from litigating the suppression issue in circuit court. *See United States v. Gregg*, 463 F.3d 160 (2d Cir. 2006) (holding defendant's guilty plea to state charge of criminal impersonation did not waive any Fourth Amendment challenges to the subsequent federal felon-in-possession charge stemming from the same stop and arrest); *United States v. Arreola-Beltran*, 827 F. Supp. 2d 1188 (D. Idaho 2011) (applying five-factor test and finding state court's denial of defendant's motion to suppress did not collaterally estop federal district court from considering motion to suppress the same evidence); *see also People v. Griffin*, 453 N.E.2d 55 (Ill. App. Ct. 1983) (concluding trial court erred in refusing to grant defendant a hearing on his motion to suppress on the ground that his plea of guilty in prior prosecution precluded appeal from denial of motion in that prosecution, but finding error was harmless in

light of overwhelming evidence of defendant's guilt). Accordingly, we reverse the decision of the circuit court judge.[5]

3. Merits of the Motion to Suppress

Given our standard of review, the normal procedural course would be to remand this case to the circuit court to conduct a hearing on Hewins's motion to suppress. *See State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) ("On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error. However, this deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." (citation omitted)). In the interest of judicial economy, we have decided to address the merits of this issue as the parties did in their briefs and at oral argument.[6]

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[5] Additionally, we disagree with State's contention that the law of the case doctrine precluded Hewins from challenging the admission of the drug evidence in the circuit court proceeding. We find the State's reliance on this doctrine is misplaced as it is a discretionary appellate doctrine with no preclusive effect on successive trial proceedings. *See Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119, 754 S.E.2d 486, 490 (2014) ("Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order.").

[6] The sole basis for the dissent's position is its disagreement with our decision "to address the suppression motion on the merits, as it was not ruled on below." Interestingly, the dissent has not consistently expressed this aversion to addressing issues that have not been ruled on. In fact, the dissent has authored at least two decisions and agreed with the Court on several occasions to analyze the merits of an issue despite preservation problems. *See State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) ("Although the issue is not preserved, we instruct the trial judge to remove any suggestion from his general sessions charge that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties."); *Wachovia Bank of S.C. v. Player*, 341 S.C. 424, 428, 535 S.E.2d 128, 130 (2000) (reversing the decision of the Court of Appeals' holding that master lacked jurisdiction, but addressing the merits of petitioner's appeal "in the interest of judicial economy"); *see also Woodson v. DLI Props., L.L.C.*, 406 S.C. 517, 528 n.10, 753 S.E.2d 428, 434 n.10 (2014) ("While remand to the court of appeals is appropriate, in the interest of judicial economy, we address the merits of whether

The Fourth Amendment to the United States Constitution grants citizens the right to be secure against unreasonable search and seizure. U.S. Const. amend. IV. A police officer may "stop and briefly detain a person for investigative purposes" if he "has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot' . . . ." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). "Temporary detention of an individual in the course of a routine traffic stop constitutes a Fourth Amendment seizure, but where probable cause exists to believe that a traffic violation has occurred, such a seizure is reasonable per se." *Tindall*, 388 S.C. at 521, 698 S.E.2d at 205. "In carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." *Id.* (citing *United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir. 1998)). "Any further detention for questioning is beyond the scope of the stop and therefore illegal unless the officer has reasonable suspicion of a serious crime." *Id.*

Recently, this Court addressed the test for determining whether reasonable suspicion exists in the context of a traffic stop. *State v. Provet*, 405 S.C. 101, 747 S.E.2d 453 (2013). "The test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant." *Id.* at 108, 747 S.E.2d at 457 (citing *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)). "Violation of motor vehicle codes provides an officer reasonable suspicion to initiate a traffic stop." *Id.* (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977)). "A traffic stop supported by reasonable suspicion of a traffic violation remains valid until the purpose of the traffic stop has been completed." *Id.* (citing *Arizona v. Johnson*, 555 U.S. 323, 333 (2009)). "The officer may not extend the duration of a traffic stop in order to question the motorist on unrelated matters unless he possesses reasonable suspicion that warrants an additional seizure of the motorist." *Id.* (citing *United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir. 1998)). "Notwithstanding that an officer may not lawfully extend the duration of a traffic stop in order to engage in off-topic questioning, this rule does not limit the scope of the officer's questions to the motorist during the traffic stop." *Id.* at 108-09, 747 S.E.2d at 457. Moreover, "[t]he officer's observations while conducting the traffic stop may create reasonable suspicion to justify further search or seizure." *Id.* at 109, 747 S.E.2d at 457.

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summary judgment in favor of Respondents was proper.") (Pleicones, J., concurring); *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (finding issue preserved and addressing the merits of the issue "in the interest of judicial economy") (Pleicones, J., concurring).

In the instant case, Hewins does not challenge the legality of the initial traffic stop. Rather, he asserts Officer Cothran exceeded the scope of the stop. We agree as the evidence does not support a finding that Officer Cothran had reasonable suspicion of criminal activity to extend the duration of the traffic stop and conduct the search.

Officer Cothran stopped Hewins for making an improper turn. He then obtained Hewins's driver's license but not his vehicle registration or proof of insurance. During this initial contact, Officer Cothran informed Hewins that he would issue a warning citation. Officer Cothran returned to his patrol car to run a check on Hewins's license. After confirming that the vehicle was registered to Hewins, Officer Cothran completed a warning citation.

At this point, the purpose of the traffic stop was fulfilled except for presenting the warning citation to Hewins. Officer Cothran, however, proceeded to order Hewins out of the vehicle and conduct a pat-down search. Following the pat down, Officer Cothran continued to question Hewins as to whether he had any guns, drugs, or explosives. When Hewins denied the presence of any drugs and refused to consent to a search, Officer Cothran asked Officer Loftis to walk his drug-detection dog around the vehicle. After the dog "alerted" to the driver's side of the vehicle, Officer Cothran proceeded to search the vehicle.

We find Officer Cothran's continued detention of Hewins exceeded the scope of the traffic stop and constituted an additional seizure for purposes of the Fourth Amendment. However, our analysis does not end as the question becomes whether Officer Cothran reasonably suspected a serious crime at the point he completed the warning citation.

According to Officer Cothran, he decided to conduct the pat down, continue questioning, and deploy the drug-detection dog based on the following information: (1) earlier in the evening he had seen Hewins drive in a known drug area; (2) Hewins remained nervous despite being given a warning citation rather than a traffic ticket; and (3) when questioned, Hewins quickly responded that he did not have any drugs. We conclude that these facts did not provide Officer Cothran with a reasonable suspicion that criminal activity was afoot. An observation that Hewins was nervous, drove through a known drug area, and Hewins's immediate denial of possessing drugs, cannot justify Officer Cothran's decision to detain Hewins. We find the aggregate of these circumstances was not sufficient to create an objective basis for extending the scope of the traffic stop.

Therefore, we hold the continued detention of Hewins, which included the deployment of the drug-detection dog, was illegal and the drugs discovered during the search of the vehicle should have been suppressed. *Cf. Tindall*, 388 S.C. at 523, 698 S.E.2d at 206 (concluding officer's continued detention of defendant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment where officer ascertained that defendant: (1) was stopped while driving to a "drug hub" city to meet his brother, (2) was driving a rental car rented the previous day by another individual which was to be returned to Atlanta on the day of the stop; (3) did a "felony stretch" on exiting the vehicle; and (4) seemed nervous). *See generally* Thomas Fusco, Annotation, *Permissibility Under Fourth Amendment of Detention of Motorist by Police, Following Lawful Stop for Traffic Offense, to Investigate Matters Not Related to Offense*, 118 A.L.R. Fed. 567, §§ 3-5 (1994 & Supp. 2014) (collecting state and federal cases analyzing whether law enforcement had reasonable suspicion of the criminal activity to justify continued detention following the conclusion of the initial traffic stop).[7]

IV. Conclusion

We hold the circuit court judge erred in finding *Snowdon* dispositive as it is factually distinguishable. Moreover, we expand on the ruling in *Snowdon* as there was no consideration given to the significant constitutional and policy issues raised by the State's use of offensive collateral estoppel. As discussed, most jurisdictions have rejected the State's use of this doctrine because it potentially violates a defendant's right to have a jury determine each element of a charged offense. However, we decline to adopt a blanket prohibition of the State's use of offensive collateral estoppel in criminal proceedings given we can conceive of limited circumstances where the doctrine of collateral estoppel would be appropriate. Yet, we caution against its use and emphasize the rarity of its application. Applying this doctrine to the facts of the instant case, we hold that Hewins should not have been precluded from litigating his motion to suppress in circuit court.

Regarding the merits of Hewins's motion to suppress, we find that it should have been granted. Because the evidence does not support a finding that Officer

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[7] The State maintains the search was valid and cites *Provet* and *State v. Wallace*, 392 S.C. 47, 707 S.E.2d 451 (Ct. App. 2011), *cert. dismissed as improvidently granted*, 401 S.C. 264, 737 S.E.2d 480 (2012) for this position. We, however, find *Provet* and *Wallace* distinguishable as there was considerably more evidence present in those cases to support a finding that the officer had reasonable suspicion of a serious crime to justify the continued detention.

Cothran had reasonable suspicion of criminal activity, the continued detention of Hewins after the completion of the warning citation constituted an illegal detention. Consequently, the drug evidence should have been suppressed. Accordingly, we reverse Hewins's conviction for possession of crack cocaine.

REVERSED.

TOAL, C.J., HEARN, J., and Acting Justice James E. Moore, concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES : I concur in part and dissent in part. I agree with the majority that the circuit court erred in ruling that Hewins was collaterally estopped from arguing his motion to suppress. However, I respectfully dissent from the majority's holding that the motion to suppress should have been granted, as I would not have reached the merits of the suppression motion because it was not ruled on by the lower court.

First, I agree with the majority that collateral estoppel does not apply. However, while the majority distinguishes *Snowdon,*[8] I would go farther and hold that even had the facts of this case been similar to that of *Snowdon*, Hewins would not be collaterally estopped, since none of the requirements for the application for collateral estoppel have been met. Moreover, I share the majority's concern that there may never be an appropriate scenario where the State should be permitted to use offensive collateral estoppel against a criminal defendant. *Cf. Ashe v. Swenson*, 397 U.S. 436 (1970) (allowing *defendant* to assert collateral estoppel to bar litigation of facts that were determined by an acquittal in a previous prosecution).

Second, I disagree with the majority's decision to address the suppression motion on the merits, as it was not ruled on below. In the interest of judicial economy, the majority addresses the merits of the suppression motion, "as the parties did in their briefs and at oral arguments."[9] In my opinion, the concern for judicial economy cannot justify ignoring our precedent requiring an issue be preserved before an appellate court will address the merits of the issue. *See State v. Dunbar,* 356 S.C. 138, 587 S.E.2d 691 (2003)) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge."). Issues not raised and ruled upon in the trial court will not be considered on appeal. *Id.*

While the merits of the suppression motion were argued by Hewins's counsel, no evidence was presented. The State did not touch on the merits contending only that Hewins was collaterally estopped from arguing the suppression motion. As the majority notes, the circuit court did not and could not address the merits of Hewins's motion, but held that Hewins was collaterally estopped from challenging

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[8] *State v. Snowdon*, 371 S.C. 331, 638 S.E.2d 91 (Ct. App. 2006), *cert. dismissed as improvidently granted*, 381 S.C. 171, 672 S.E.2d 108 (2009).

[9] I note that the Hewins does not argue the merits of this motion in his brief, but instead responded to the State's argument in his reply brief. It is well settled appellants may not make new arguments for reversal in their reply brief. Additionally, Hewins does not request this Court rule on the merits, but merely requests we remand this case for a ruling on Appellant's motion to suppress.

the search. As a result, we are presented with a record that is insufficient to determine the merits of this suppression motion. I find it inappropriate for this Court to rule on the merits of a motion when the merits were neither litigated nor ruled on by the lower court. Therefore, I would remand to the circuit court to consider Hewins's suppression motion.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Theodore David Wills, Petitioner.

Appellate Case No. 2010-178266

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Steven H. John, Circuit Court Judge

Opinion No. 27416
Heard December 6, 2012 – Filed July 16, 2014

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Deputy Attorney General S. Creighton Waters, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review the decision of the Court of Appeals affirming the circuit court's decision to admit petitioner's statement made in connection with a proffer agreement. *State v. Wills*, 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010). We affirm.

The first question raised by this case is whether a criminal defendant may waive the protections afforded by Rule 410, SCRE.[1] If we decide that he may, the next issue is whether the Court of Appeals was correct in holding that petitioner did so here.[2] We answer both questions "yes."

Rule 410, SCRE, titled "**INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS**," provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendere;
>
> (3) any statement made in the course of any court proceedings regarding either of the foregoing pleas; or
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> (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

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[1] Although it is questionable whether the Rule 410 issue was preserved for appellate review, it formed the basis for the Court of Appeals' decision upon which we granted certiorari, and we therefore address the merits.

[2] The Court of Appeals' opinion contains a full explanation of the facts of this case, including the terms of the Proffer Agreement.

> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

We agree with the Court of Appeals that a criminal defendant may waive the protections afforded by Rule 410. Here, petitioner and his attorney executed an agreement wherein petitioner agreed that if a subsequent polygraph examination demonstrated deception, inconsistencies, or that petitioner shot the victim, then "the terms of this proffer are null and void **and** any statements made by [petitioner] may be used against him by the State for any legal purpose, including . . . disposition of charges through plea or trial . . . and impeachment." Proffer Agreement section 2 (emphasis supplied). Further, section 7 provides in relevant part not only that petitioner's violation of the Agreement would render the Proffer's terms null and void, but also that "the State shall have the right to use any information obtained through this Proffer in any fashion, whether direct [or] collateral . . . ." Applying the rules of contract construction here, "regardless of the agreement's wisdom or lack thereof," we agree with the Court of Appeals that, on this record, petitioner's Proffer Agreement, entered with the advice and consent of counsel, waived the protections of Rule 410, SCRE.

The decision of the Court of Appeals is

AFFIRMED.

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

JUSTICE BEATTY: I dissent as I believe the majority reaches an incorrect result because it fails to appreciate and analyze the significant issues presented by this case. For reasons that will be discussed, I would find the trial judge erred in allowing the State to use Petitioner's statement during its case-in-chief as it violates principles of contract law and Rule 410 of the South Carolina Rules of Evidence.[3] More importantly, a decision authorizing the State to present a false statement to the jury in order to procure a conviction should not stand as it unquestionably compromises the integrity of our system of justice. Accordingly, I would reverse the decision of the Court of Appeals and remand the matter for a new trial.

I. Factual/Procedural History

On October 13, 2001, officers with the Horry County Police Department were called to investigate a remote location off of Highway 90 in Horry County. Upon arrival, they discovered the body of a young male who had been shot two times in the back. Law enforcement, using fingerprint evidence, later identified the victim as Julian Lee. As a result of the investigation, Petitioner was charged with accessory after the fact and obstruction of justice.

In August 2005, Detective Allen Large of the Horry County Police Department was contacted by the Fifteenth Circuit Solicitor's Office to interview Petitioner, who was incarcerated at J. Reuben Long Detention Center. In response to a plea offer from the State, Petitioner and his attorney, Bill Diggs, met with Detective Large, Detective Neil Livingston, and Assistant Solicitor Scott Hixson to discuss a proffer agreement.[4] In essence, the proffer agreement provided that in

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[3] Rule 410, SCRE (providing that pleas, plea discussions, and related statements are inadmissible against a defendant who made the plea or was a participant in the plea discussions, except in limited circumstances).

[4] "A 'proffer agreement' is generally understood to be an agreement between a defendant and the government in a criminal case that sets forth the terms under which the defendant will provide information to the government during an interview, commonly referred to as a 'proffer session.' " *United States v. Lopez*, 219 F.3d 343, 345 n.1 (4th Cir. 2000). "The proffer agreement defines the obligations of the parties and is intended to protect the defendant against the use of his or her statements, particularly in those situations in which the defendant has revealed

exchange for Petitioner's truthful account of the events surrounding the victim's murder the State would take into consideration his cooperation in offering a sentence recommendation.

The proffer agreement provided in relevant part:

> 1. Theodore David Wills Jr. shall submit himself to agent(s) of the State for the purpose of debriefing regarding this matter and all other matters materially bearing on this matter. He shall be completely truthful concerning his involvement in this matter, and completely truthful concerning the involvement of all other individuals in this matter. He shall truthfully and completely answer all questions posed by agent(s) of the State bearing materially on this matter and shall provide without prompting all information concerning this matter in a complete and truthful manner even if such information is not elicited by agent(s) of the State by direct question. Any and all information provided by Theodore David Wills Jr. under the terms of this proffer may be recorded in any fashion at the election of the State;
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> 2. Theodore David Wills Jr. shall submit himself to a polygraph examination(s) to verify all information provided to the State at the election of the State. The polygraph examiner(s) shall be selected by the State and, for the purpose of this Proffer, are designated agent(s) of the State; upon examination(s) by polygraph, if the responses given by Theodore David Wills Jr. show deception, are inconsistent with information previously provided or indicates he is the person or one of the persons that shot the victim, the terms of this proffer are null and void and any statements made by Theodore David Wills Jr. may be used against him by the State for any legal purpose, including, but not limited to, considerations for charging, bond, disposition of charges through plea or trial of Theodore David Wills Jr. and impeachment;
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> . . . .

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incriminating information and the proffer session does not mature into a plea agreement or other form of cooperation agreement." *Id.*

> 4. In return for Theodore David Wills Jr.'s full compliance with all terms stated within this Proffer, statements provided during his debriefing will not be used in a criminal prosecution currently pending against him by this Office. The State will not seek any additional charges against Theodore David Wills Jr. in connection with the subject of this Proffer;
>
> . . . .
>
> 7. Violation of any term of this Proffer renders all terms null and void; the State shall have the right to use any information obtained through this Proffer in any fashion, whether direct [or] collateral to this matter.

Petitioner and his attorney signed the proffer agreement. Subsequently, Petitioner signed a written waiver of his *Miranda*[5] rights. Petitioner then provided a statement that was recorded in the presence of his attorney, the detectives, and the assistant solicitor. In his statement, Petitioner claimed he drove his brother Donnell Green, Mark Willard, and the victim to the remote location during the early morning hours of October 13, 2001. According to Petitioner, he and the victim believed they were going to rob some drug dealers and "score some quick cash." Petitioner stated he saw Willard shoot the victim and that he heard a second shot as he ran away.

On September 19, 2005, Petitioner submitted to a polygraph examination, which was administered by SLED Agent Ricky Charles's intern. Based on his review of the polygraph results, Agent Charles concluded that Petitioner was deceptive in his statement. Agent Charles did not specify how Wills was deceptive or whether the deception was material to the agreement. As a result, the State claimed the proffer agreement was null and void and proceeded to charge Petitioner with murder.

At the beginning of the trial, the State indicated it intended to use Petitioner's statement as part of its case-in-chief. Counsel for Petitioner objected to the admission of the statement as it was given "in exchange for participation by the State in a plea agreement process." Counsel challenged the proffer agreement as "inherently flawed" because an "unreliable" polygraph examination was used to

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

determine Petitioner's truthfulness. Based on these circumstances, counsel asserted the statement was involuntary and should be suppressed.

In response to defense counsel's objection, the judge held a hearing pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964). After hearing arguments and reviewing the recorded statement, the trial judge found the statement was given voluntarily as Petitioner was apprised of his *Miranda* rights and signed the proffer agreement. The judge, however, cautioned the parties not to make any reference to the use of a polygraph examination. The judge also permitted defense counsel to explain to the jury that Petitioner made the statement in response to the proffer agreement.

During its case-in-chief, the State played the recorded statement to the jury. At the conclusion of the State's case, defense counsel moved for a directed verdict and renewed his objection to the admissibility of the statement. The judge denied the motion and reaffirmed his previous rulings. Petitioner, who did not testify or present any evidence, was ultimately convicted of murder and sentenced to forty years' imprisonment.

On appeal, Petitioner argued the trial judge erred in allowing the jury to hear the statement as it arose out of a proffer agreement and, thus, was inadmissible under Rule 410 of the South Carolina Rules of Evidence. Because the inculpatory admissions were the "centerpiece" of the State's case, Petitioner asserted his conviction should be reversed and the case remanded for a new trial.

The Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Wills*, 390 S.C. 139, 700 S.E.2d 266 (Ct. App. 2010). In so ruling, the court stated that "[o]ur case law unequivocally establishes agreements between defendants and the State should be interpreted 'in accordance with general contract principles.' " *Id.* at 143, 700 S.E.2d at 268 (quoting *State v. Compton*, 366 S.C. 671, 677, 623 S.E.2d 661, 664 (Ct. App. 2005)). The court noted, however, that the "question of whether an agreement can waive the application of [Rule 410] [had been] unanswered." *Id.* at 144, 700 S.E.2d at 268. In answering this question, the court relied on the United States Supreme Court's ("USSC") decision in *United States v. Mezzanatto*, 513 U.S. 196 (1995), wherein the USSC held that "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea statement Rules is valid and enforceable." *Id.* at 145, 700 S.E.2d at 269 (quoting *Mezzanatto*, 513 U.S. at 210). Applying *Mezzanatto*, the court concluded that the proffer agreement: (1) triggered the exclusionary provisions of Rule 410 as it

constituted a plea negotiation; and (2) unambiguously provided that Petitioner's statement could be used against him by the State for any legal purpose if the State determined Petitioner was deceitful. *Id.* at 145, 700 S.E.2d at 269. Finally, the court found the judge properly admitted the statement as Petitioner knowingly and voluntarily entered into the agreement. *Id.* at 146, 700 S.E.2d at 269.

This Court granted Petitioner's request for a writ of certiorari to review the decision of the Court of Appeals.

II. Discussion

A. Arguments

In challenging the decision of the Court of Appeals, Petitioner asserts the facts of the instant case are distinguishable from *Compton* and *Mezzanatto* since those cases did not involve a "polygraph examiner as the decision maker on whether [Petitioner] was telling the truth." Because polygraph examinations are "inherently unreliable," Petitioner contends an arbitrary factor was injected into the agreement. In view of the polygraph provision and the vague terms of the agreement, Petitioner claims it "literally invites solicitors to find ways not to honor a plea agreement."

If the decision of the Court of Appeals is upheld, Petitioner argues the purpose and policy of Rule 410 will be undermined. Specifically, Petitioner avers that *Mezzanatto* only permitted statements made during plea negotiations to be used for impeachment purposes and "did not necessarily provide a basis for the prosecution to use those statements in its case-in-chief." Additionally, Petitioner contends he did not knowingly enter into the proffer agreement as the provision that his statement could be used for "any legal purpose" was vague.

B. Error Preservation

As a threshold matter, the State claims any issue regarding Rule 410 is not preserved for this Court's review as defense counsel failed to cite this rule during his arguments to the trial judge. The State also asserts that the argument before this Court is a "different permutation" than the issues raised to the Court of Appeals. The State claims appellate counsel raises a new argument that the agreement should be declared null and void because the determination of Petitioner's deception was based on an unreliable polygraph examination.

In my view, the issue regarding Rule 410 was properly preserved for this Court's review. Although defense counsel did not cite Rule 410 in his trial arguments, he was aware of its provisions as he emphasized that Petitioner's statement was given during the course of plea negotiations and was inadmissible except for the limited purpose of impeachment. Moreover, the judge clearly understood counsel's argument as he framed the issue as follows: "[T]he real purpose of this motion hearing is to determine whether or not the statement of [Petitioner] which he gave pursuant to this proffer can be used in the course of this trial." Based on the trial arguments, appellate counsel then specifically challenged the trial judge's ruling as erroneous under Rule 410.

Because the substance of Rule 410 was raised to and ruled upon by the trial judge and the Court of Appeals, I address the merits of this issue as it was properly preserved for this Court's review. *See State v. Oglesby*, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) (finding issue regarding Rule 106, SCRE was preserved for appellate review even though defendant failed to specifically cite the rule); *see also State v. Jennings*, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) (recognizing that for an issue to be properly preserved it has to be raised to and ruled on by the trial court).

C. Analysis

Having found the issue properly preserved, I believe the Court must answer the ultimate question of whether a defendant may execute a total waiver of the exclusionary provisions of Rule 410. In answering this question, the analysis involves a series of sequential questions. Initially, it is necessary to determine whether a defendant may waive the exclusionary provisions of Rule 410 via a *Miranda* waiver. If a *Miranda* waiver is not sufficient, then the focus turns to the terms of the proffer agreement. Using principles of contract law as a guide, it is necessary to consider the effect of a breach of the proffer agreement and decide the resultant remedy, i.e., the extent to which the State may utilize statements made by a defendant pursuant to a proffer agreement.

The analysis of each of these questions is premised on this Court's commitment to protect and preserve the integrity of the judicial process. It stands to reason that the integrity of the judicial process is challenged when the State is allowed to introduce a statement that the State has declared false and deceitful yet,

at the same time, insists that the judge and jury accept the statement as truthful. This Court must determine to what extent such a statement may be used without assaulting the integrity of the judicial process.

Cognizant of this Court's duty to ensure the legitimacy of this process, I now assess whether the proceedings in the instant case undermined the purpose for and the protections afforded by Rule 410 and, in turn, Petitioner's right to a fair trial.

(1)

Statements given during plea negotiations are generally inadmissible as they are protected by Rule 410, which provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of nolo contendere;
>
> (3) any statement made in the course of any court proceedings regarding either of the foregoing pleas; or
>
> (4) **any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn**.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Rule 410, SCRE (emphasis added).[6]

In reviewing the legislative history of Rule 410, it is clear Congress recognized that statements made during the course of plea negotiations are decidedly different than other voluntary statements and, thus, sought to limit their admissibility. *See* Advisory Committee Notes to Rule 410, FRE ("As with compromise offers generally . . . free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it."); Paul F. Rothstein, *Federal Rules of Evidence Rule 410* (3d ed. 2012) (discussing legislative history of Rule 410 and stating, "The rule has a number of purposes, the most significant of which is to encourage the early disposition of criminal cases without the cost, expense, and uncertainty of trial. It protects the accused from being placed in the untenable position of having a right to withdraw a guilty plea but being forced to take the stand in order to explain that decision at trial." (footnote omitted)). Were there not this distinction, it would have been unnecessary for Congress to promulgate a rule to protect statements made during plea negotiations.

In examining this distinction, the Fifth Circuit Court of Appeals explained that "[p]lea negotiations are inadmissible, but surely not every discussion between an accused and agents for the government is a plea negotiation." *United States v. Robertson*, 582 F.2d 1356, 1365 (5th Cir. 1978). "Suppressing evidence of such negotiations serves the policy of insuring a free dialogue only when the accused and the government actually engage in plea negotiations: 'discussions in advance of the time for pleading with a view to an agreement whereby the defendant will enter a plea in the hope of receiving certain charge or sentence concessions.' " *Id.* (quoting ABA Standards, Introduction at 3). The court noted that "plea negotiations contemplate a bargaining process, a 'mutuality of advantage,' and a mutuality of disadvantage. That is, the government and the accused both seek a concession for a concession, a Quid pro quo. The accused contemplates entering a plea to obtain a concession from the government. The government contemplates making some concession to obtain the accused's plea." *Id.* at 1365-66 (citations omitted). Thus, in assessing the admissibility of a defendant's statement, it is

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[6] Rule 410 is the substantive equivalent of the federal rule. *See* Notes to Rule 410, SCRE ("Except for subsection (3), this rule is identical to the federal rule. Subsection (3) was amended because South Carolina has no equivalent to Rule 11 of the Federal Rules of Criminal Procedure.").

necessary to "distinguish between those discussions in which the accused was merely making an admission and those discussions in which the accused was seeking to negotiate a plea agreement." *Id.* at 1367.

The Tennessee Court of Criminal Appeals cited the reasoning in *Robertson* to specifically differentiate between statements that are made during plea negotiations and those that are made following a *Miranda* waiver. *State v. Hinton*, 42 S.W.3d 113, 122 (Tenn. Crim. App. 2001). In *Hinton*, the defendant was convicted of first-degree felony murder, attempted first-degree murder, and especially aggravated robbery. *Id.* at 116. On appeal, the defendant raised several issues, including that the trial judge erred in denying his motion to suppress an inculpatory statement that he made during plea negotiations. *Id.* at 119-26.

Initially, the court found the statement was made during the course of plea discussions with an attorney for the prosecuting authority and, thus, Rule 410 protections were implicated. *Id.* at 119-23. Because the defendant gave the statement after being advised of his *Miranda* rights, the court considered whether the statement, which fell within the purview of the rules, was nevertheless admissible. *Id.* at 123. The court found the statement was inadmissible as "the administration of *Miranda* warnings is insufficient to inform the defendant of his rights pursuant to Rules 410 and 11(e)(6)." *Id.* at 126. In reaching this conclusion, the court stated:

> We do not believe that *Miranda* warnings, which do not mention the rights provided by Rules 410 and 11(e)(6), can make a defendant aware of the nature of those rights. **Furthermore, the purposes and protections of *Miranda* are substantially different from the purposes and protections of Rules 410 and 11(e)(6). The purpose of *Miranda* warnings is to secure the privilege against self-incrimination, ensuring that confessions are voluntary and intelligent**. *See State v. Stephenson*, 878 S.W.2d 530 [(Tenn. 1994), *overruled on other grounds by, State v. Saylor*, 117 S.W.3d 239 (Tenn. 2003)]. **The purpose of the protections of Rules 410 and 11(e)(6), on the other hand, is to foster frank and open discussions that lead to plea agreements**. *See* Cohen, et al., § 410.1 at 224 ("Rule 410 . . . is designed to encourage out-of-court settlements by reducing the possible adverse consequences of participating in negotiations."). Perhaps if the rights protected by and the purposes of *Miranda* and the plea-statement rules were the same, such that an

> explanation of one right would serve to explain the nature of the other, a warning and waiver of one would serve as a warning and waiver of the other. However, such is not the case.
>
> We hold that the administration of *Miranda* warnings is insufficient to inform the defendant of his rights pursuant to Rules 410 and 11(e)(6). Because the defendant in the present case was given *Miranda* warnings and nothing more, the record affirmatively indicates that the defendant did not knowingly waive his rights pursuant to the plea-statement rules.

Id. at 126 (emphasis added).

Based on this reasoning, the court determined that "the defendant did not knowingly waive the specific rights afforded by Rule 410 and 11(e)(6)." *Id.* at 124. The court further found the erroneous admission of the statement could not be deemed harmless as "[t]he crux of the state's case consisted of the defendant's statement." *Id.* at 126.

I find the reasoning of *Hinton* persuasive. Applying the foregoing to the facts of the instant case, I believe the trial judge reached his decision under the mistaken belief that the *Miranda* waiver was sufficient to automatically deem Petitioner's statement admissible. This was error as the judge gave no consideration to Rule 410. Because *Miranda* warnings and Rule 410 protections serve distinctly different purposes, Petitioner's *Miranda* waiver did not render a presumptively inadmissible plea statement admissible for the State's use in its case-in-chief. *See Roberts v. Commonwealth*, 896 S.W.2d 4 (Ky. 1995) (finding that statement made by defendant to police officer during plea discussions was not involuntary where defendant was given *Miranda* warnings, had executed a waiver form prior to giving the statement, and there was no evidence that defendant was coerced or threatened; concluding that Commonwealth could not, however, use the defendant's statement against him on retrial as the statement was made in the course of plea discussions and was protected by Rule 410); *Barnett v. State*, 725 So. 2d 797, 800-01 (Miss. 1998) (finding Rule 410 prohibited the admission of a statement at trial where defendant gave the statement, after receiving *Miranda* warnings, in conjunction with plea negotiations).

(2)

Because Petitioner's *Miranda* waiver did not negate the protections of Rule 410, I direct my attention to the terms of the proffer agreement. It is generally recognized that proffer agreements are to be construed in accordance with principles of contract law. *State v. Compton*, 366 S.C. 671, 623 S.E.2d 661 (Ct. App. 2005). However, "[a] plea agreement is not simply a contract between two parties; rather, it implicates the integrity of the criminal justice system and requires courts to exercise judicial authority in considering the agreement." 9 Fed. Proc., L. Ed., *Fulfillment of Plea Agreement-Interpretation of the Agreement*, § 22:960 (Supp. 2013). "As such, the application of contract principles to the interpretation of a plea agreement is tempered by constitutional implications." *Id.* Specifically, proffer agreements, like plea agreements "are unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguards obtain." *United States v. Parra*, 302 F. Supp. 2d 226, 236 (S.D.N.Y. 2004) (citations omitted).

Accordingly, "[o]ne tenet of contract law [that courts] *have* steadfastly applied to plea agreements . . . is that of *contra proferentem*, the principle that ambiguities in contracts 'are to be construed unfavorably to the drafter.' " *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006) (quoting *Black's Law Dictionary* 328 (7th ed. 1999)). "In context of plea agreements, the government is usually the drafter and must ordinarily bear the responsibility for any lack of clarity." *Id.* (citation omitted). Moreover, "[a]s a defendant's liberty is at stake, the government is ordinarily held to the literal terms of the plea agreement it made so that the government gets what it bargains for but nothing more." *Id.* (citations omitted).

Thus, under the above-outlined principles of contract law, I would find the plain terms of the proffer agreement precluded the State from introducing Petitioner's statement during its case-in-chief. As drafted by the State, section 7 of the proffer agreement states that "[v]iolation of any term of this Proffer renders **all terms null and void**." (Emphasis added.) Accordingly, by claiming that Petitioner violated the agreement, the State nullified the entire agreement, including the

waiver provision. In essence, the State rescinded the agreement and avoided its contractual obligations by merely alleging Petitioner's statement was deceptive and nothing more. This rescission rendered Petitioner's statements inadmissible per se.[7]

I find support for this decision in the factually similar case of *State v. Pitt*, 891 A.2d 312 (Md. 2006), wherein the Court of Appeals of Maryland analyzed "the proper balance when the defendant breaches the plea agreement and the State, in response, rescinds the agreement." *Id.* at 316. In *Pitt*, the defendant was arrested on a burglary charge. *Id.* Because the defendant expressed interest in "cutting a deal," the State drafted a plea agreement. *Id.* After waiving his *Miranda* rights, the defendant signed the agreement. *Id.* Under the agreement, the defendant committed "fully and truthfully [to] disclose to the State any and all knowledge and information he may have concerning the investigation" of the burglary. *Id.* In return for the defendant's complete and truthful cooperation, the State agreed to *nol pros* all charges against the defendant arising from the investigation. *Id.* The agreement also specifically provided that, in the event of the defendant's breach, by knowingly withholding evidence from the State or by being less than completely truthful, the State could "prosecute [the defendant] for any offenses in which the State agreed not to prosecute in exchange for cooperation by [the defendant] with the investigation." *Id.* It also permitted the State to "use against [the defendant] in all prosecutions the information and documents that he ha[d] disclosed to the State during the course of his cooperation." *Id.* The plea agreement also contained a provision that the defendant submit to a polygraph examination. *Id.* at 317 n.4.

When the lead investigator became concerned that the defendant had not been forthcoming with all information, he confronted the defendant and requested that he submit to a polygraph examination. *Id.* at 317. The defendant immediately acknowledged that he had not disclosed everything and admitted to committing the burglary with an accomplice, but still wanted the State to honor the plea deal. *Id.* As a result, the State considered the defendant's contract "null and void due to him not completely disclosing the information." *Id.* All of the defendant's statements to the police with respect to the burglary investigation were admitted at his trial.

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[7] In my view, an attorney who allows a client to enter into this type of agreement may be at risk for an allegation of ineffective assistance of counsel.

Id. After he was convicted of first-degree burglary, the defendant appealed his conviction. *Id.*

The Maryland Court of Special Appeals reversed. *Id.* The court concluded that, "although inducements in the context of plea agreements are proper, 'when the State rescinded the plea agreement, statements obtained under it immediately lost their voluntary status and became inadmissible at trial.' " *Id.* at 317 (quoting *Pitt v. State*, 832 A.2d 267, 277 (Md. Ct. Spec. App. 2003)). The State petitioned the Court of Appeals of Maryland for a writ of certiorari to review the decision. *Id.* The court granted the writ of certiorari to address "the admissibility of statements made during plea negotiations when the plea agreement contains a provision making such statements admissible at trial in the event of breach." *Id.*

Ultimately, the court of appeals affirmed the decision of the intermediate appellate court. *Id.* In so ruling, the court recognized that "when the State rescinds a plea agreement for any reason, the obtained statements are rendered inadmissible *per se*." *Id.* at 322. Expanding on the holdings of its prior decisions, the court stated:

> The *reason* for the State's repudiation of the agreement is immaterial with respect to the admissibility of the statement. Whether its reason be sound or unsound, technical or substantial, in good faith or simply because the prosecutor had misgivings or a change of heart, or was utterly arbitrary, is of no matter. The justification *vel non* of the rescission, repudiation, or breach of the agreement by the State goes to whether the defendant is entitled to have the agreement enforced; it does not affect the admissibility of the statement obtained under it.

Id. at 322 (quoting *Allgood v. State*, 522 A.2d 917, 927 (Md. 1987) and citing *Wright v. State*, 515 A.2d 1157 (Md. 1986)). The court noted that this holding was "to ensure that neither the defendant nor the State benefits from breaching the plea agreement." *Id.* at 325.

I am persuaded by this reasoning as it comports with the applicable principles of contract law and properly preserves the protections of Rule 410. Here, the State rescinded the proffer agreement based on its assessment that Petitioner breached the agreement by purportedly failing the polygraph examination. Thus, by their actions, the parties were returned to the position as if there were no proffer agreement. *See* 17A Am. Jur. 2d *Contracts* § 584 (2004)

("Rescission voids the contract ab initio, meaning that it is considered null from the beginning and treated as if it does not exist for any purpose. . . . The effect of rescission of an agreement is to put the parties back in the same position they were in prior to the execution of the contract."). In the absence of a proffer agreement, Petitioner's statements were deemed inadmissible for any purpose under Rule 410. Accordingly, I would find the Court of Appeals erred in affirming the decision of the trial judge.

In view of this decision, the State would be prohibited from introducing Petitioner's statements in the event of a retrial.[8] Because this decision is dispositive, I need not address Petitioner's remaining arguments. However, in order to provide guidance in future cases, I use the instant case as an opportunity to analyze the effect of a valid Rule 410 waiver.

(3)

Alternatively, even if the terms of the proffer agreement did not render it "null and void" and there was no rescission on the part of the State, I would find that Petitioner's breach would not have automatically waived the protections of Rule 410. *See* Christopher B. Mueller and Laird C. Kirkpatrick, 2 *Federal Evidence* § 4:67 (3d. ed. 2012) ("In this situation, it is not the agreement that confers the right to exclude, but Fed. R. Evid. 410, and breaching the agreement does not end the protection accorded by the Rule.").

Instead, it is necessary to consider the effect of a breach and decide the resultant remedy, i.e., the extent to which the State may utilize statements made by a defendant pursuant to a proffer agreement. In doing so, it is necessary to assess the terms of Rule 410 as interpreted by the USSC in the seminal case of *United States v. Mezzanatto*, 513 U.S. 196 (1995).[9] In *Mezzanatto*, the USSC held that "absent some affirmative indication that the agreement was entered into

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[8] The State, however, is not without some benefit as these statements were inevitably used for informational purposes in the murder investigation and initiating charges against Petitioner.

[9] Although Federal Rule of Evidence 410 and our Rule 410 are substantially similar, I look to federal interpretations merely for guidance as this Court is not bound by the USSC's interpretation of the federal rule when we are called upon to interpret our state evidentiary rules.

unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable." *Id.* at 211. The Court, however, only considered the enforceability of such waivers for impeachment purposes.

Justice Thomas, writing the plurality opinion, premised his analysis on the fact that a criminal defendant may waive many rights, including constitutional rights, by voluntary agreement. *Id.* at 201. As a result, the Court concluded that "[b]ecause the plea-statement Rules were enacted against a background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties, we will not interpret Congress' silence as an implicit rejection of waivability." *Id.* at 203-04. The Court further found the defendant "bears the responsibility of identifying some affirmative basis for concluding that the plea-statement Rules depart from the presumption of waivability." *Id.* at 204.

Justice Ginsburg concurred in a separate opinion, which was joined by Justices O'Connor and Breyer, wherein she expressed concern regarding a waiver that would allow the Government to use the defendant's statements in its case-in-chief as this "would more severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining." *Id.* at 211. Because the Government did not seek such a waiver in Mezzanatto's case, she found the Court did not need to "explore" this question. *Id.*

Justice Souter dissented in a separate opinion, which was joined by Justice Stevens. *Id.* at 211-18. The dissent rejected the plurality's holding as there was no consideration given to Congress' intent to preclude waiver. *Id.* at 212-16. The dissent also identified two potential consequences of the majority's decision. *Id.* at 216. First, the dissent noted that "defendants are generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice." *Id.* at 216. Second, the dissent believed the plurality's decision would inevitably lead to "the practical certainty that the waiver demanded will in time come to function as a waiver of trial itself." *Id.* at 217. The dissent explained that "[i]f objection can be waived for impeachment use, it can be waived for use as affirmative evidence, and if the Government can effectively demand waiver in the former instance, there is no reason to believe it will not do so just as successfully in the latter." *Id.*

Thus, the majority of the Court opposed the Government's use of a defendant's statement as affirmative evidence in its case-in-chief.

(4)

Because *Mezzanatto* only addressed whether a defendant's waiver of the exclusionary provisions of Rule 410 authorized the prosecution to use the defendant's statement for impeachment purposes, it is necessary to determine whether the reasoning in *Mezzanatto* should be extended to permit the use of the statement during the prosecution's case-in-chief.

Although our appellate courts have referenced Rule 410, they have not addressed *Mezzanatto* or considered a defendant's written waiver of the protections of Rule 410. However, to a limited extent, these decisions express this Court's inclination to prohibit the use of a defendant's statements made during the course of plea negotiations. For example, in *State v. Thompson*, 329 S.C. 72, 495 S.E.2d 437 (1998), this Court held that the State should not have been permitted to impeach the defendant with privileged information, which was revealed by the defendant during a psychiatric evaluation and disclosed by the defense attorney to the State during plea negotiations. In so ruling, we found the attorney-client privilege, which was not waived by the defendant, extended to his communications with the psychiatrist. *Id.* at 76, 495 S.E.2d at 439. We noted that this analysis had "limited, future application" as scenarios such as the one presented would be governed by Rule 410(4), which provides that a statement made during plea discussions is "not admissible against the defendant." *Id.* at 77 n.1, 495 S.E.2d at 440 n.1. We clarified, however, that "result which would be reached under Rule 410(4) is consistent with the holding in this case." *Id.* Even though *Thompson* is instructive, it is not dispositive of the instant case as *Thompson* did not involve a waiver.

Given the absence of definitive case law in our state and federal jurisdiction, I have looked to other federal jurisdictions for guidance. These courts have identified three levels of waiver: (1) impeachment, (2) rebuttal, and (3) case-in-chief. David P. Leonard, *The New Wigmore: A Treatise on Evidence: Selected Rules of Limited Admissibility* § 5.11 (Supp. 2013).

Some legal scholars have expressed concern over extending the holding in *Mezzanatto* to permit use of a defendant's proffer statements in the Government's case-in-chief. *See* 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal*

Practice and Procedure: Evidence § 5350 (West Supp. 2012) ("Federal prosecutors have exercised the powers granted by *Mezzanatto* to impose procedures far different than those presupposed by the drafters of Rule 410."). They have emphasized that an overreaching extension of *Mezzanatto* constitutes a waiver of a defendant's constitutionally protected rights as "the only defense arguments the defendant can make, without opening the door to the incriminating plea statements, consist of (1) arguing sufficiency of the evidence, (2) impeaching government witnesses, and (3) making general statements as to the defendant's innocence." Adam Robison, Comment, *Waiver of Plea Agreement Statements: A Glimmer of Hope to Limit Plea Statement Usage to Impeachment,* 46 S. Tex. L. Rev. 661, 677 (Spring 2005).

One scholar has identified three consequences of finding that a defendant may execute a total waiver of Rule 410, stating:

> The consequences of finding that Rule 410 is a waivable right are also problematic. First, an exception to the Rule to allow use of otherwise inadmissible statements will eventually swallow the Rule, completely undermining the purpose of enacting the Rule in the first place. Congress would not have enacted Rule 410 if it intended the Rule to be circumvented so easily and frequently that circumvention became the norm, rather than the exception. A second problematic consequence is that the case-in-chief waiver essentially serves as a waiver of the right to trial. When a defendant decides to engage in plea discussions that ultimately fail, the use of his statements at trial in the prosecution's case-in-chief eliminates the need for the prosecution to bring any other evidence to trial because his statements serve as his confession to the crime. Therefore, a case-in-chief waiver becomes a waiver of trial.
>
> By extension, a third consequence arises. A case-in-chief waiver also amounts to a waiver of the defendant's Fifth Amendment rights. The Fifth Amendment guarantees to every citizen the right against forced self-incrimination in criminal trials. Under the Fifth Amendment, a defendant shall not be forced to produce evidence against himself. One purpose of the Fifth Amendment is to preserve the integrity of the judicial system by requiring the prosecution to shoulder the entire burden of proof. Because the prosecution must prove every element of the offense, the Fifth Amendment protects the

> defendant from forcibly helping the prosecution convict him. If a defendant chooses not to testify at his own trial, but he has signed a Rule 410 waiver allowing the prosecution to introduce his incriminating statements made during plea negotiations in its case-in-chief, the defendant's right to choose not to testify and incriminate himself has been breached.

Julia A. Keck, *United States v. Sylvester: The Expansion of the Waiver of Federal Rule of Evidence 410 to Allow Case-in-Chief Use of Plea Negotiation Statements*, 84 Tul. L. Rev. 1385, 1399 (May 2010) (footnotes omitted).

I am persuaded by these authorities and, thus, conclude that the reasoning in *Mezzanatto* should not be extended to permit a case-in-chief waiver. I believe a decision to limit the prosecution's use of a defendant's statements to impeachment effectuates the purpose and protections of Rule 410. Moreover, such a decision is consistent with this Court's opinion in *Thompson*, wherein we held that the State should not have been permitted to impeach the defendant with privileged information, which was disclosed by the defense attorney to the State during plea negotiations.

As evidenced by the facts of the instant case, the fears of the dissent in *Mezzanatto* have become a reality. Specifically, the State's case against Petitioner was based entirely on his statement and, thus, the waiver "function[ed] as a waiver of trial itself." *Mezzanatto*, 513 U.S. at 217 (Souter, J., dissenting).

(5)

Finally, I take this opportunity to express my concern regarding the State's use of a polygraph examination to conclusively determine Petitioner's truthfulness and, in turn, declare the agreement null and void. Because our appellate courts have repeatedly recognized the unreliability of these tests,[10] I believe it was inherently unfair for the State to use subjective results to procure the only substantive evidence against Petitioner. *See People v. Garcia*, 169 P.3d 223, 228

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[10] *See Lorenzen v. State*, 376 S.C. 521, 533, 657 S.E.2d 771, 778 (2008) ("Although this Court in *Council* [*v. State*, 335 S.C. 1, 24, 515 S.E.2d 508, 520 (1999)] declined to recognize a *per se* rule against the admission of polygraph evidence, it indicated that the 'admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the *Jones* factors.' ").

(Colo. Ct. App. 2007) (concluding defendant's statements, which were made during a polygraph examination as part of plea negotiations, were inadmissible as substantive evidence of guilt under Rule 410; stating, "To penalize defendant for cooperating with the prosecution's request by introducing his statements as substantive proof of guilt is palpably unfair and undermines the public policy of encouraging fair compromises."). Moreover, to allow the prosecution to declare the agreement null and void for reason of deception and then not require the prosecution to identify the deception and its materiality to the agreement is fundamentally unfair and violates the general principles of contract law.

Furthermore, even if Petitioner agreed to the State's use of a polygraph to determine truthfulness, I cannot condone the admission of a statement in the State's case-in-chief that has been deemed false. By concluding that Petitioner was being deceptive in his answers, the State found Petitioner's statement to be false. Yet, the State presented this statement to the jury with the intention that the jurors believe it as truthful. The State relied on this false statement as the primary basis to procure a conviction. In essence, the State's action suborns perjury. Because this Court is called upon to uphold the integrity of this state's legal system, I would decline to permit such an affront to the integrity of the judicial process. *See Riddle v. Ozmint*, 369 S.C. 39, 48, 631 S.E.2d 70, 75 (2006) ("A 'prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.' " (*quoting Giglio v. United States*, 405 U.S. 150, 153 (1972)).

III. Conclusion

Based on the foregoing, I would hold the Court of Appeals erred in affirming the trial judge's decision to permit the State to use Petitioner's plea statements during its case-in-chief. Initially, I would find Petitioner's *Miranda* waiver did not operate to waive the protections of Rule 410. Instead, the admissibility of the statements was dependent upon the terms of the proffer agreement. Utilizing the principles of contract law, I believe the agreement was nullified in its entirety when the State found that Petitioner breached the agreement. Because the State rescinded the agreement, it was void *ab initio* and the parties were returned to their original positions. Thus, Petitioner's plea statements were deemed inadmissible pursuant to Rule 410.

As to future cases, I would find that a breach of a proffer agreement on the part of the defendant permits the State to use a defendant's plea statements only for purposes of impeachment. I believe such a decision preserves the protections of Rule 410 and effectively maintains the integrity of the judicial process. Finally, I would caution the State against rescinding an agreement on the sole basis of a failed polygraph examination as these tests are inherently unreliable. Given the lack of reliability, I believe it is patently unfair for the State to use these subjective results as the sole basis for asserting that the defendant was untruthful and, thus, breached a proffer agreement. The inequity is amplified when the State is allowed to use the same statement in its case against the defendant.

I am deeply trouble by the majority's haste to lend the Court's imprimatur to the knowing misleading of the jury by the use of acknowledged false testimony. No interpretation of contract law should suborn perjury. Even if we assume the defendant's statement was false, what rule of law allows a court to ignore the primary role of the prosecutor and the jury to seek the truth?

Based on the foregoing, I would reverse Petitioner's conviction and remand the matter for a new trial.

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Board of Trustees for the Fairfield County School District, Appellant,

v.

State of South Carolina, Chester County School District, Fairfield County Treasurer, and State Department of Education, Respondents.

Appellate Case No. 2012-212697

Appeal from Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 27417
Heard November 7, 2013 – Filed July 16, 2014

AFFIRMED

Armand G. Derfner, of Derfner Altman & Wilborn, LLC, of Charleston , Alice F. Paylor and Rene Stuhr Dukes, both of Rosen Rosen & Hagood, LLC, of Charleston, for Appellant.

James S. Meggs, of Callison Tighe & Robinson, LLC, of Columbia, John Marshall Reagle , Allison Aiken Hanna and Kimberly Kelley Blackburn, all of Childs & Halligan, PA, of Columbia , Attorney General Alan Wilson, Assistant Deputy Attorney General J. Emory

Smith, Jr., Wendy Bergfeldt Cartledge and Shelly Bezanson Kelly, all of Columbia, for Respondents.

JUSTICE PLEICONES: In this direct appeal, the Board of Trustees for the Fairfield County School District (FCSD) appeal the circuit court's grant of summary judgment in favor of the State of South Carolina, Chester County School District (CCSD), the Fairfield County Treasurer, and the State Department of Education (collectively Respondents). We affirm.

FACTS

For the past four decades between 100 and 200 children residing in the Mitford Community of Fairfield County have been attending CCSD schools in the Great Falls area of Chester County. The CCSD schools are closer to the Mitford Community than are any FCSD schools. The Mitford students have been attending CCSD schools at no cost to the students or their families.

Mitford students' attendance at CCSD schools began as a result of a Federal 1970 desegregation order, which required the all African-American Mitford Elementary School be closed, and its students be given the choice of attending CCSD's Great Falls schools. In 1972, the General Assembly passed Act No. 1236, consolidating the Mitford Community into CCSD. This Act was repealed the following year based on an agreement between FCSD and CCSD respecting the Mitford Community's students' enrollment in CCSD's schools. Under this agreement, FCSD paid CCSD $25,000 per year for educational expenses.

In 2007, this long standing agreement began to break down and finally ended in the 2009-10 school year when no agreement was reached for that year or thereafter. In light of the school districts' failure to reach an agreement for payment to CCSD for the cost of educating Mitford Community's students in CCSD's schools and FCSD's refusal to continue negotiations, the General Assembly passed Act No. 294 of 2010 (Act No. 294)[1] in order to provide for a uniform arrangement between FCSD and CCSD.

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[1] Act No. 294 is now codified as S.C. Code Ann. § 59-63-485 (Supp. 2013) and provides:

(A) The General Assembly finds that numerous public school students reside in Fairfield County School District but are entitled to attend the schools of Chester County School District pursuant to Section 59-63-480. The General Assembly finds it necessary to provide by law for uniform arrangements between Fairfield County School District and Chester County School District pertaining to these students.

(B) A student who qualifies for transfer pursuant to Section 59-63-480 may be admitted, and remain enrolled, by Chester County School District upon proof of eligibility as Chester County School District finds acceptable. A roster of these students must be kept current by Chester County School District and sent to Fairfield County School District as and when updated.

(1) Each fiscal year, for each pupil authorized to transfer from Fairfield County School District to Chester County School District pursuant to Section 59-63-480 and actually enrolled in a public school of Chester County School District, the Fairfield County Treasurer, on behalf of and from funds of the Fairfield County School District, shall pay Chester County School District one hundred and three percent of Chester County School District's prior year local revenue per pupil for school operating purposes as reported in Chester County School District's annual audit for the immediately preceding fiscal year.

(2) As used in this section, “prior year local revenue per pupil for school operating purposes” includes any state reimbursement paid for property tax exemptions from Chester County School District ad valorem taxes including, but not limited to, all payments pursuant to Section 11-11-156.

(C) Upon invoice, the Fairfield County Treasurer, on behalf of and from the funds of the Fairfield County School District, shall pay Chester County School District the amount determined pursuant to subsection (B)(1) of this section. Payment to Chester County School District must be completed before the fifteenth day of February in each fiscal year. If the Fairfield County Treasurer fails to pay this invoice by the fifteenth day of February, the South Carolina Department of Education, upon application by Chester County School District, out of the funds otherwise meant for the next Education Finance Act disbursement to Fairfield County School District,

Pursuant to section 59-63-485(C), CCSD has invoiced the Fairfield County Treasurer $1,838,703 for the expenses of educating the Mitford children for the past three school years.

FCSD filed suit against the Respondents seeking a declaratory judgment that Act No. 294 was unconstitutional. FCSD contended that Act No. 294 was unconstitutional special legislation in violation of S.C. Const. art. III, § 34(IX), "because it directly conflicts with and undermines South Carolina's general law governing residence requirements for school attendance and general law governing the financing of schools." CCSD, the State, and FCSD filed cross motions for summary judgment as to the constitutionality of Act No. 294. The circuit court issued an order denying FCSD's motion and granting CCSD and the State's

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> shall pay the invoice on behalf of Fairfield County School District. Any undisputed amounts must be paid when due.
>
> (D) Chester County School District may consider payments pursuant to this act to be anticipated ad valorem taxation for purposes of Subsection 7, Section 15, Article X of the South Carolina Constitution, relating to tax anticipation notes.
>
> (E) The State Superintendent of Education shall settle any dispute between Chester County School District and Fairfield County School District arising from the implementation and administration of this act by the school districts and the State Department of Education.
>
> (F) For the 2009-2010 school and the fiscal year only, the Fairfield County Treasurer, on behalf of and from the funds of the Fairfield County School District, shall pay the Chester County School District an amount calculated pursuant to items (B)(1) and (2) of this section on account of the pupils enrolled in the Chester County School District from Fairfield County pursuant to Section 59-63-480 for the 2009-2010 school year. This amount must be invoiced by the Chester County School District promptly upon the effective date of this section, and must be paid no later than June 30, 2010, or the delinquency provisions of subsection (C) apply to the payment.

motions for summary judgment, holding that Act No. 294 was constitutional special legislation, and FCSD appealed.

Standard of Review

"In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005).

Discussion

The only issue before this Court is whether the circuit court erred in granting summary judgment because FCSD failed to carry its burden of production. The parties agree that Act No. 294 is special legislation because the more general law found in S.C. Code Ann. § 59-63-480 (2004)[2] applies to the transfer of students between school districts based upon geographic proximity. In addition, FCSD

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[2] Section 59-63-480 provides:

> If school children in one county reside closer to schools in an adjacent county, they may attend such schools upon the school authorities of the county of their residence arranging with the school officials of the adjacent county for such admission and upon payment of appropriate charges as herein authorized. The board of trustees in the school district in which the pupils reside shall make written application through its county board of education to the board of trustees of the district in which the school is located for the admission of such children, giving full information as to ages, residence and school attainment, and the board of trustees in the school district, agreeing to accept such pupils, shall give a written statement of agreement. Upon receipt of such application the board of trustees of the school and its county board of education shall determine the monthly per pupil cost of all overhead expenses of the school, which will include all expenses of the school not paid by the State. Upon proper arrangement being made for the payment monthly of such overhead per pupil cost for each such child the same shall be admitted to the schools of the adjacent county.

contends that Act No. 294 violates Article III, § 34(IX) because the General Assembly has failed to set forth any logical basis or sound reason for Act No. 294's enactment. We agree with the circuit court that FCSD failed to present any evidence that the General Assembly had neither a logical basis nor sound reason for enacting Act No. 294 and therefore affirm the circuit court order granting summary judgment.

Article III, § 34(IX), states in pertinent part: "where a general law can be made applicable, no special law shall be enacted." Despite this language, it is well settled that Article III, § 34(IX) does not prohibit all special legislation, as this Court recently explained:

> A law is general when it applies uniformly to all persons or things within a proper class, and special when it applies to only one or more individuals or things belonging to that same class. If the legislation does not apply uniformly, the inquiry then becomes whether the legislation creates an unlawful classification. However, the mere fact that a law creates a classification does not render it unlawful. Instead, the constitutional prohibition against special legislation operates similarly to our equal protection guarantee in that it prohibits unreasonable and arbitrary classifications. A classification is arbitrary, and therefore unconstitutional, if there is no reasonable hypothesis to support it. Accordingly, special legislation is not unconstitutional where there is a substantial distinction having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded. *Charleston County. Sch. Dist. v. Harrell,* 393 S.C. 552, 558, 713 S.E.2d 604, 608 (2011) (citations and quotations omitted).

Thus, where a special law will best meet the exigencies[3] of a particular situation, it is not unconstitutional. *Id.* at 558, 713 S.E.2d at 608 (citing *Med. Soc'y of S.C. v. Med Univ. of S.C.*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999)). Restated, special legislation will survive a constitutional challenge where there is a logical basis and sound reason for resorting to such legislation. *Id.* (citing *Horry County v. Horry County Higher Educ. Comm'n,* 306 S.C. 416, 419, 412 S.E.2d 421, 423

[3] We note that exigency as used in this sense means "that which is required in a particular situation." Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/exigency.

(1991)). Additionally, while not exempt from the requirements of Article III, § 34(IX), this Court has recognized that the General Assembly has broad authority when enacting legislation that deals with education. *Horry County,* at 419, 412 S.E.2d at 423.

The circuit court found that FCSD presented no evidence tending to show that the General Assembly's enactment of Act. No. 294 violated the proscription of Article III, 34(IX). We agree.

FCSD's sole argument below and on appeal is that there is neither a logical basis nor a sound reason for this legislation because the transfer of these students could be provided for by existing general law. This argument, however, merely establishes that Act No. 294 is special legislation and is not probative of the second element that a challenger must establish, that is, whether the General Assembly failed to have a logical basis or sound reason for enacting Act No. 294. Therefore, the circuit court was correct in holding that FCSD had failed to present any evidence as to why there was neither a logical basis nor sound reason for enacting Act No. 294.

It is well settled that the non-moving party may not rely on mere allegations to resist summary judgment but must present some evidence in the form of affidavits or otherwise in support of its proposition. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014). Because FCSD has failed to present any evidence beyond mere allegations that there is neither a logical basis nor sound reason for the enactment of Act No. 294, we must affirm the grant of summary judgment by the circuit court.[4]

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[4] The dissent criticizes this holding because we "myopically focus on the procedural posture of the case" leading to "truncated analysis" that "fails to fully address the constitutional propriety of Act No. 294." First, we readily acknowledge that we endeavor to decide an appeal as the parties have procedurally presented it. We exceed our proper role when we do not honor these boundaries. As to our "truncated analysis," FCSD failed to present any evidence that the termination of this historical arrangement was neither a logical basis nor a sound reason for enacting this special legislation. *Woodson, supra.* Our analysis must necessarily end here.

The dissent however, applies a more "comprehensive analysis." While the dissent acknowledges this Court's deference to the General Assembly and the

AFFIRMED.

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

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burden on FCSD, it then requires a "quantitative or statistical comparison to other school districts" to support the enactment of Act. No. 294. We have never required quantitative or statistical justification of legislation even in the context of special legislation. Assuming this case did turn on such a comparison, FCSD, as the party challenging the legislation, is the party required to present such a quantitative or statistical comparison to other school districts so as to demonstrate the absence of an exigent circumstance. While the dissent applies a "comprehensive analysis," it fails to explain why it requires more from the General Assembly than it requires from the party challenging the legislation.

JUSTICE BEATTY: I respectfully dissent. The majority agrees that Act No. 294 is special legislation; however, it affirms the grant of summary judgment because "FCSD failed to present any evidence that the General Assembly had neither a logical basis nor sound reason for enacting Act No. 294." In reaching this conclusion, the majority myopically focuses on the procedural posture of the instant case and, in turn, effectively discounts the fundamental question regarding the constitutionality of Act No. 294. In my view, the majority's truncated analysis fails to fully address the constitutional propriety of Act No. 294. If one engages in a comprehensive analysis, I believe the result is clear that Act No. 294 is unconstitutional special legislation.

I. Discussion

A. General / Special Legislation

Our state constitution prohibits the enactment of certain special or local laws as it provides, "The General Assembly of this State shall not enact local or special laws . . . where a general law can be made applicable." S.C. Const. art. III, § 34, c. IX. "The purpose of the prohibition on special legislation is to make uniform where possible the statutory laws of this State in order to avoid duplicative or conflicting laws on the same subject." *Med. Soc'y of S.C. v. Med. Univ. of S.C.*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999). "The allowance of special legislation, where a general law could be made applicable, fosters 'legislation by delegation,' which is pernicious." *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 90, 326 S.E.2d 395, 400 (1985) (citations omitted). "Such legislation lacks the settled consideration and consent of the lawmaking body, evades statewide responsibility, encourages local activity, [and] discourages the attrition of minds and the consideration of those problems which make for a wise public policy." *Id.*

The General Assembly may, however, enact "special provisions in general laws." S.C. Const. art. III, § 34, c. X. "[A] general law is defined as follows: 'In order that a law may be general, it must be of force in every county in the state, and while it may contain special provisions making its effect different in certain counties, those counties cannot be exempt from its entire operation.' " *City of Columbia v. Smith*, 105 S.C. 348, 361-62, 89 S.E. 1028, 1032 (1916) (quoting *Dean v. Spartanburg Cnty.*, 59 S.C. 110, 114, 37 S.E. 226, 228 (1900)). Stated another way, "special provisions in general laws" means that "provisions in general

laws, which, while having a limited application, must not be so inconsistent with the general scheme or purpose of the statute as to prevent substantial uniformity of operation throughout the state." *Gamble v. Clarendon Cnty.*, 188 S.C. 250, 257, 198 S.E. 857, 861 (1938).

Legislation regarding education is not exempt from the constitutional prohibition of special laws, "even though art. XI, § 3, gives the General Assembly more discretion with respect to legislation impacting a school district than it has in other areas." *Home Builders Ass'n of S.C. v. Sch. Dist. No. 2 of Dorchester Cnty.*, 405 S.C. 458, 460, 748 S.E.2d 230, 232 (2013). Moreover, "[i]t is firmly settled in this state that while it is primarily for the Legislature to decide whether a general law can be made applicable in any specific case, the question is ultimately a judicial one, in solving which the Courts will give due consideration to the opinion of the Legislature." *Sansing v. Cherokee Cnty. Tourist Camp Bd.*, 195 S.C. 7, 10, 10 S.E.2d 157, 158 (1940).

In answering this question, our appellate courts have continued to adhere to the well-established analytical framework for assessing whether legislation constitutes prohibitive special legislation. *See Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011) (reaffirming test to determine whether special legislation exists as outlined in *Kizer v. Clark*, 360 S.C. 86, 600 S.E.2d 529 (2004)). In *Harrell*, this Court stated:

> "A law is general when it applies uniformly to all persons or things within a proper class, and special when it applies to only one or more individuals or things belonging to that same class." If the legislation does not apply uniformly, the inquiry then becomes whether the legislation creates an unlawful classification. However, the mere fact that a law creates a classification does not render it unlawful. Instead, the constitutional prohibition against special legislation operates similarly to our equal protection guarantee in that it prohibits unreasonable and arbitrary classifications. "A classification is arbitrary, and therefore unconstitutional, if there is no reasonable hypothesis to support it." Accordingly, special legislation is not unconstitutional where there is "a substantial distinction having reference to the subject matter of the proposed legislation, between

> the objects or places embraced in such legislation and the objects and places excluded."

Id. at 558, 713 S.E.2d at 608 (citations omitted). "Thus, where a special law will best meet the exigencies of a particular situation, it is not unconstitutional." *Id.* at 558, 713 S.E.2d at 608 (citing *Med. Soc'y of S.C. v. Med. Univ. of S.C.*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999)). " 'In other words, the General Assembly must have a logical basis and sound reason for resorting to special legislation.' " *Id.* at 559, 713 S.E.2d at 608 (*quoting Horry Cnty. v. Horry Cnty. Higher Educ. Comm'n*, 306 S.C. 416, 419, 412 S.E.2d 421, 423 (1991)).

B. Analysis of Act No. 294

The parties concede that Act No. 294 is special legislation as it applies only to FCSD and CCSD. This concession, however, is not dispositive as one must still analyze the constitutional propriety of Act No. 294. In doing so, it is necessary to first assess whether Act No. 294 conflicts with general law governing the transfer of students to a non-resident school district. In conjunction with this assessment, one must also consider whether Act No. 294 may be deemed a special provision within the general law. If Act No. 294 conflicts with the general law, the question becomes whether the General Assembly espoused a logical basis and sound reason for enacting this special legislation. As will be discussed, I would hold that Act No. 294 is unconstitutional special legislation as it is in direct conflict with existing general law governing the transfer of students to non-resident school districts and there is no evidence that the General Assembly had a logical basis and sound reason for resorting to this special legislation.

(1) General Laws Governing Public Education

The South Carolina Constitution imposes on the General Assembly the duty to "provide for the maintenance and support of a system of free public schools open to all children in the State." S.C. Const. art. XI, § 3. In fulfilling this duty, the General Assembly has enacted a scheme of general laws governing public education throughout our state. Pursuant to these general laws, all South Carolina children who meet the requisite qualifications are entitled to a free public education. *See* S.C. Code Ann. § 59-63-30 (2004) (outlining qualifications for child's attendance in a public school district without charge); S.C. Code Ann. § 59-

63-31 (2004 & Supp. 2012) (identifying additional qualifications for child's attendance in a public school district without charge involving situations such as a court-ordered custody arrangement or foster care placement). In order to achieve this goal, the General Assembly created a method of financing school districts through the use of federal, state, and local funds. *See, e.g.*, S.C. Code Ann. §§ 59-20-10 to -80 (2004 & Supp. 2012) (provisions of the South Carolina Education Finance Act of 1977); *id.* §§ 59-21-10 to -1220 (providing for state aid for schools); *id.* §§ 59-73-10 to -160 (authorizing county taxation for school purposes).

Cognizant that a child's educational needs may be better met by a school in a non-resident district, the General Assembly has enacted general laws authorizing children to transfer to an adjacent school district if it is closer in proximity to the child's home or to an adjoining school district if a particular school would better accommodate the student. *See* S.C. Code Ann. § 59-63-480 (2004) (permitting school children, who reside in county closer to schools to adjacent county, to attend schools in adjacent county upon application by the transferring board of trustees to the board of trustees in the receiving district); *id.* § 59-63-490 (providing that when a child would be "better accommodated at the school of an adjoining school district, whether special or otherwise, the board of trustees of the school district in which such person resides may, with the consent of the board of trustees of the school district in which such school is located, transfer such person for education to the school district in which such school is located, and the trustees of the school district in which the school is located shall receive such person into the school as though he resided within the district").

In each of these situations, the boards of trustees for the transferring and receiving districts are actively involved and statutorily authorized to exercise discretion in the transfer process. *See* S.C. Code Ann. § 59-19-10 (2004) ("Each school district shall be under the management and control of the board of trustees provided for in this article, subject to the supervision and orders of the county board of education."); *id.* § 59-19-90(9), (10)(b) (authorizing board of trustees to transfer and assign pupils as well as prescribe conditions and charges for attendance in public schools of the school district). The General Assembly has recognized the significance of this authority as any infringement constitutes a criminal offense. *See* S.C. Code Ann. § 59-63-500 (2004) ("The trustees of any school district who knowingly permit the enrollment of pupils *who have not been transferred with the consent of the trustees of the district wherein such pupils reside* shall be guilty of a misdemeanor and, upon conviction, shall pay a fine not

exceeding twenty-five dollars or be imprisoned not more than thirty days." (emphasis added)).

Because a receiving school district incurs expenses for educating a non-resident student, the General Assembly has enacted general laws to compensate the district for these expenses. Specifically, section 59-63-480[5] provides for the determination of a monthly per pupil cost and section 59-63-45[6] outlines a method

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[5] Section 59-63-480 provides:

> *If school children in one county reside closer to schools in an adjacent county, they may attend such schools upon the school authorities of the county of their residence arranging with the school officials of the adjacent county for such admission and upon payment of appropriate charges as herein authorized*. The board of trustees in the school district in which the pupils reside shall make written application through its county board of education to the board of trustees of the district in which the school is located for the admission of such children, giving full information as to ages, residence and school attainment, and the board of trustees in the school district, agreeing to accept such pupils, shall give a written statement of agreement. Upon receipt of such application the board of trustees of the school and its county board of education shall determine the monthly per pupil cost of all overhead expenses of the school, which will include all expenses of the school not paid by the State. Upon proper arrangement being made for the payment monthly of such overhead per pupil cost for each such child the same shall be admitted to the schools of the adjacent county.

S.C. Code Ann. § 59-63-480 (2004) (emphasis added).

[6] Section 59-63-45 provides in relevant part:

> Notwithstanding the provisions of this chapter, a nonresident child otherwise meeting the enrollment requirements of this chapter may attend a school in a school district which he is *otherwise qualified to attend if the person responsible for educating the child pays an*

for the calculation and payment of tuition to the non-resident district. S.C. Code Ann. §§ 59-63-45, 59-63-480 (2004).

As evident by its text, section 59-63-45 requires that: (1) the person responsible for educating the non-resident child, presumably his or her parent, to pay tuition to the receiving school district; (2) the amount of tuition, which may be waived in whole or in part by the receiving district, be calculated pursuant to an identified formula; and (3) the non-resident student be included in the enrollment of the school in which he or she is attending to determine the allocation of state funds to that district for funding public education. *Id.* § 59-63-45.

(2) Comparison of Act No. 294 with the General Laws

In comparison with these general laws, Act No. 294 provides a completely different method for the transfer of Fairfield County resident children to CCSD and the calculation and payment of tuition for these students. Act No. 294 also eliminates the statutorily granted authority of FCSD's Board of Trustees with respect to the transfer.

As codified in section 59-63-485, children in Fairfield County may transfer to CCSD without any involvement of their resident district. Unlike the general law of section 59-63-480, the Board of Trustees for Fairfield County no longer makes the written application for the child's transfer nor is involved in reaching an arrangement to compensate CCSD for the costs incurred in educating the non-resident child. S.C. Code Ann. § 59-63-485(B) (Supp. 2012). Furthermore, in contrast to the procedures of section 59-63-45, FCSD rather than a child's parent is responsible for payment of tuition in an amount calculated by CCSD. *Id.* § 59-63-485(B)(1), (2). Notably, CCSD invoices this amount directly to the Fairfield County Treasurer rather than FCSD. *Id.* § 59-63-485(C). If the Fairfield County Treasurer fails to pay the amount invoiced by February 15 of each year, the South Carolina Department of Education is authorized to pay CCSD using funds

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> *amount equal to the prior year's local revenue per child raised by the millage levied for school district operations and debt service reduced by school taxes on real property owned by the child paid to the school district in which he is enrolled.* The district may waive all or a portion of the payment required by this section.

S.C. Code Ann. § 59-63-45(A) (2004) (emphasis added).

otherwise meant for FCSD under the Education Finance Act. *Id.* In view of these significant distinctions, I find that Act No. 294 conflicts with existing general laws.

Moreover, Act No. 294 cannot be deemed a "special provision" in a general law as it impermissibly exempts FCSD and CCSD from the operation of the general law. Although Act No. 294 expressly incorporates section 59-63-480 regarding the transfer to an adjacent district, this reference does not save the legislation. *Id.* § 59-63-485(A), (B), (F). Because Act No. 294 is inconsistent with the scheme of the existing general laws, it prevents substantial uniformity of the operation of general laws throughout the state.

(3) "Logical Basis and Sound Reason" for Act No. 294

Having found Act No. 294 conflicts with the general laws, the question becomes whether the General Assembly had a logical basis and sound reason for enacting the special legislation. I find there is no substantial distinction between FCSD and other school districts throughout the state to warrant the special legislation.

Although the Act states that the "General Assembly *finds* that numerous public school students reside in Fairfield County School District but are entitled to attend the schools of Chester County School District pursuant to Section 59-63-480" and that the "General Assembly *finds* it necessary to provide by law for uniform arrangements between Fairfield County School District and Chester County School District pertaining to these students," I do not believe the incorporation of "finds" is sufficient to escape the constitutional prohibition of special legislation. S.C. Code Ann. § 59-63-485(A) (Supp. 2012) (emphasis added). Indeed, if this were the case, the mere inclusion of the word would serve as blanket protection for all special legislation. *See Thorne v. Seabrook*, 264 S.C. 503, 510, 216 S.E.2d 177, 180 (1975) (" 'If it must be assumed, merely because the statute has been enacted, that the Legislature had information showing that there was a necessity for such legislation with reference to the particular locality, it would follow that all legislation local in form must be upheld, however general the nature and subject-matter of such legislation might be. Such a rule of construction would be contrary to the mandatory character of the constitutional provisions we are considering.' " (*quoting Thomas v. Macklen*, 186 S.C. 290, 298, 195 S.E. 539, 542-43 (1938)).

Instead, the legislative history is devoid of any quantitative data or statistical comparison to other school districts to support the General Assembly's "finding" that the voluntary transfer of students from FCSD to CCSD constitutes a unique or exigent situation justifying the enactment of special legislation. *See Elliott v. Sligh*, 233 S.C. 161, 165, 103 S.E.2d 923, 926 (1958) ("The Legislature may classify, for the purpose of legislation, if some intrinsic reason exists why the law should operate upon some and not upon all, or should affect some differently from others, but this classification must be based upon differences which are either defined by the Constitution, or are natural or intrinsic, and which suggest a reason that may rationally be held to justify the diversity in the legislation." (citation omitted)); *Shillito v. City of Spartanburg*, 214 S.C. 11, 20, 51 S.E.2d 95, 98 (1948) ("The marks of distinction upon which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation.").

In the absence of supporting evidence, I conclude that neither the history nor the number of students choosing to transfer from FCSD to CCSD represents an "exigent situation" in need of special legislation. Until the enactment of Act No. 294, Fairfield County approved these transfers since 1947 and voluntarily reimbursed CCSD for the resultant expenses since 1973 even though it was never statutorily required to do so. Because Fairfield County has the resources and facilities to provide free public education for all of its resident children, I discern no reason why FCSD should now be statutorily required to reimburse CCSD for continued voluntary transfers as the general laws are sufficient to govern the transfer of Fairfield County resident children to CCSD.

The majority reaches the opposite conclusion because it essentially requires FCSD to affirmatively prove a negative proposition, i.e., the General Assembly had neither a logical basis nor sound reason for enacting Act No. 294.[7] The only

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[7] Specifically, the majority notes that "FCSD, as the party challenging the legislation, is the party required to present such a quantitative or statistical comparison to other school districts so as to demonstrate the absence of an exigent circumstance." However, the majority fails to acknowledge that it is impossible to offer evidence of a fact that does not exist, i.e. the *absence* of an exigent circumstance.

way FCSD can satisfy this burden is to refute the reasons advanced by the General Assembly for enacting the special legislation. Thus, in order to establish the constitutional invalidity of Act No. 294, FCSD must attack the plain language of Act No. 294 and the legislative history. As discussed, FCSD has successfully shown that neither the historical agreement[8] between FCSD and CCSD nor the number of Mitford students choosing to attend school in CCSD represents a sound basis or reason for resorting to such special legislation. Consequently, I would hold that Act No. 294 is unconstitutional special legislation because its repugnance to section 34 of Article III is clear beyond a reasonable doubt. *See Thomas v. Macklen*, 186 S.C. 290, 301, 195 S.E. 539, 543-44 (1938) ("A mere classification for the purpose of legislation, without regard to such necessity, is simply special legislation of the most pernicious character, and is condemned by the constitution." (citation omitted)).

II. Conclusion

I recognize that due deference is given to the General Assembly to address the individualized education needs of each school district; however, this deference is not limitless. The instant case presents such a scenario as Act No. 294 goes beyond the funding needs of a particular school district. Act No. 294 conflicts with general law regarding every aspect of the transfer process despite the lack of evidence that FCSD differs from any other district of South Carolina.

Although I am not unsympathetic to the plight of Mitford students who choose to attend school in CCSD, there are general laws in place to allow their continued attendance in CCSD. Moreover, if CCSD is genuinely concerned with their continued attendance, it may: (1) waive all or part of the tuition pursuant to section 59-63-45, or (2) petition the county board of education to adjudicate and effectuate the transfer of Mitford students to CCSD. *See* S.C. Code Ann. § 59-63-510 (2004) ("When a transfer of pupils from one district to another is sought and the trustees of the latter district unreasonably or capriciously withhold their consent, the county board of education of the county in which the districts are

[8] The majority accepts the longstanding agreement between the districts as support for the special legislation on the ground it met the "exigencies" of the particular situation. I cannot do so as the impetus for this agreement was to address desegregation in 1970, which was no longer a concern when the General Assembly enacted Act No. 294 in 2010.

located shall have the right, after hearing, to make the transfer, but only on condition that each pupil so transferred pay semiannually, in advance, if financially able to do so in the opinion of the board of trustees, as tuition, an amount not less than the per capita expenditure from the special tax for operating the school to which the pupil is to be transferred, together with all other charges paid by patrons of such district for any special course or courses.").

Based on the foregoing, I would declare Act No. 294 unconstitutional and, as a result, reverse the order of the circuit court.

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

James Ervin Ramsey, Respondent.

Appellate Case No. 2012-213017

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
The Honorable John C. Hayes, III, Circuit Court Judge

Opinion No. 27418
Heard March 18, 2014 – Filed July 16, 2014

AFFIRMED

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General Robert D. Cook, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Christina J. Catoe and Deputy Assistant Attorney General Curtis A. Pauling, III, all of Columbia, for Petitioner.

Christopher A. Wellborn, of Christopher A. Wellborn P.A., of Rock Hill, for Respondent.

JUSTICE HEARN: The Court granted certiorari to review the court of appeals' opinion in *State v. Ramsey*, 398 S.C. 275, 727 S.E.2d 429 (Ct. App. 2012), affirming the dismissal of a criminal domestic violence (CDV) charge against James Ramsey on the ground that the magistrate lacked authority to hear the case. Specifically, the court found the crime was not committed "in the presence of a law enforcement officer" as required by Section 56-7-15(A) of the South Carolina Code (2006), *amended by* section 56-7-15 (A) (Supp. 2013). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On February 18, 2006, Deputy Chris Farrell responded to a domestic call at the home of Ramsey's estranged wife (Wife). Farrell interviewed both parties and noticed a bruise on Wife's hand, which she indicated was the result of Ramsey attempting to grab a phone from her. Based on his observations, Deputy Farrell issued Ramsey a uniform traffic ticket for CDV.[1]

Ramsey moved to dismiss the charges for lack of jurisdiction. He argued that because the CDV was not committed in the presence of the officer, Deputy Farrell could not issue him a uniform traffic ticket under section 56-7-15(A), and absent a valid uniform traffic ticket, the magistrate lacked authority to hear the case. The magistrate agreed and dismissed the charges. The circuit court affirmed the dismissal on the alternative basis that only offenses listed under Section 56-7-10 of the South Carolina Code (2006), *amended by* 56-7-10 (Supp. 2013), allowed for prosecution solely based on a uniform traffic ticket and at the time the alleged crime was committed, CDV was not listed in section 56-7-10. Therefore, the circuit court concluded the magistrate did not have jurisdiction to hear the CDV charge until an arrest warrant was issued.

The court of appeals affirmed the dismissal. Although the court disagreed with the circuit court's conclusion that CDV could never be prosecuted in magistrate court absent an arrest warrant, it found that pursuant to section 56-7-15, an officer could only issue a uniform traffic ticket for CDV if the crime was committed in his presence. *Ramsey*, 398 S.C. at 280, 727 S.E.2d at 432. Because Deputy Farrell did not see the crime take place, but arrived on the scene after the

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[1] Ramsey was also arrested for burglary at the scene, but that charge was dismissed.

fact, the court held the uniform traffic ticket was invalid and the charges were properly dismissed. *Id.* at 283, 727 S.E.2d at 433. This Court granted certiorari to review the court of appeals' opinion.

ISSUE PRESENTED

Did the court of appeals err in affirming the dismissal of Ramsey's CDV charge because the offense did not occur in the presence of the officer?

STANDARD OF REVIEW

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). The text of a statute is considered the best evidence of the legislative intent or will, and the courts are bound to give effect to the expressed intent of the legislature. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

LAW/ANALYSIS

The State argues the court of appeals erred in holding that under these circumstances, a uniform traffic ticket could not be validly issued pursuant to section 56-7-15(A). We disagree.

We begin our analysis, as we must, with the plain language. Pursuant to Section 22-3-710 of the South Carolina Code (2007): "All proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue." Section 56-7-10 provides an exception to the warrant requirement by allowing the issuance of a uniform traffic ticket to initiate proceedings before the magistrate for specified offenses. At the time of the incident, the list of specified offenses did not include CDV. However, section 56-7-15(A) provided: "The uniform traffic ticket . . . may be used by law enforcement officers to arrest a person for an offense *committed in the presence of a law enforcement officer* if the punishment is within the jurisdiction of magistrate's court and municipal court." (emphasis added).

The text of the statute explicitly authorizes use of a uniform traffic ticket in circumstances where the offense was "committed in the presence of a law enforcement officer." Although the State asks us to construe "in the presence" to include crimes that were freshly committed, we perceive no ambiguity in the language that would allow us to accept such a broad construction. The statute plainly states the offense must be committed in the presence of the officer. This Court has no authority to impose another meaning where the legislative language is clear.

Nevertheless, the State argues there is precedent supporting the proposition that "in the presence" should be interpreted expansively so as to include freshly committed crimes. The State relies on *State v. Martin*, 275 S.C. 141, 268 S.E.2d 105 (1980), where the Court considered the legality of a warrantless arrest for operating a vehicle under the influence when the officer did not witness the defendant driving the vehicle, but arrived at the scene after an accident. In its analysis, the Court observed that: "It is the law of this State that an officer cannot arrest one charged with a misdemeanor, not committed in his presence, without a proper warrant . . ." *Id.* at 144, 268 S.E.2d at 107 (quoting *Mims*, 275 at 48, 208 S.E.2d at 289). However, the Court found this principle was qualified by Section 23-13-60 of the South Carolina Code (2013), which allows an arrest without a warrant for "any suspected freshly committed crime." *Id.* at 145, 268 S.E.2d at 107. The Court therefore harmonized these two distinct concepts and held "while generally an officer cannot arrest, without a warrant, for a misdemeanor not committed in his presence, an officer can arrest for a misdemeanor when the facts and circumstances observed by the officer give him probable cause to believe that a crime has been freshly committed." *Id.* at 145–146, 268 S.E.2d at 107. Although the facts similarly involved a freshly committed offense, the resolution in *Martin* relied on a statute that specifically allowed warrantless arrests for "freshly committed" crimes, rather than ones committed in the presence of the officer. The case unequivocally indicates that the Court regards these as two distinct concepts.

Furthermore, use of the term "freshly committed" in section 23-13-60 illustrates the legislature knows how to draft a statute extending an officer's authority to freshly committed crimes. *See also* S.C. Code Ann. § 16-25-70 (2003) (authorizing officers to effectuate warrantless arrests in suspected cases of domestic violence where the officer "has probable cause to believe that the person is committing or has freshly committed" an act of criminal domestic violence, even if "the act did not take place in the presence of the officer"). The legislature could

have employed this phraseology when enacting section 56-7-15, but it did not and we must give such omission effect. *See* 82 C.J.S. *Statutes* § 478 (2014) ("[W]here a statute contains a given provision, the omission of such a provision from a similar statute concerning a related subject is significant to show that a different intention has existed.").

Nevertheless, the State entreats us to accept the reasoning of an Attorney General's opinion that concludes under section 56-7-15(A), "So long as the officer has probable cause to believe that the offense of criminal domestic violence has been freshly committed, the officer may make the charge by way of the Uniform Traffic Ticket and such ticket bestows jurisdiction . . . ." 2003 WL 22862788 at *4 (S.C.A.G. Nov. 13, 2003). It is well settled that although it may be persuasive authority, an Attorney General's opinion is not binding on this Court, and because we disagree with the reasoning, we decline to adopt it. *See Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560–61, 713 S.E.2d 604, 609 (2011) ("Attorney General opinions, while persuasive, are not binding upon this Court.").

Specifically, the Attorney General's opinion relies on cases we deem inapposite, *Martin* and *State v. Biehl*, 271 S.C. 201, 246 S.E.2d 859 (1978). As discussed *supra*, *Martin* does not support the proposition that "in the presence" encompasses crimes that are freshly committed. In *Biehl*, the Court addressed the scope of section 56-7-10, which generally allows for the issuance of uniform traffic tickets for listed offenses. 271 S.C. at 203, 246 S.E.2d at 860. That statute contains no limiting language as to when a ticket can be issued. The Court therefore found:

> While we do not hold that an officer may arrest for a misdemeanor not committed within his presence, we do hold that the issuance of a uniform traffic ticket vests jurisdiction in the traffic court, even though the officer may not have personally seen the accused person commit the offense with which he is charged.

Id. at 204, 246 S.E.2d at 860. Subsequent to the *Biehl* decision, the legislature enacted section 56-7-15 and specifically included the limiting language that a uniform traffic ticket can be utilized pursuant to that statute where a crime was committed in the presence of the officer. We find this inclusion evinces the South Carolina General Assembly's intent that circumstances where an officer can issue a uniform traffic ticket under section 56-7-10 are distinct from those under section 56-7-15, and *Biehl*'s holding is inapplicable to our analysis.

However, the State reasons that because the General Assembly did not amend section 56-7-15(A) in response to the Attorney General's opinion, it must agree with the result. The State is correct that the Court has accorded some significance to the inaction of the General Assembly in light of an opinion by the Attorney General. *See Calhoun Life Ins. Co. v. Gambrell*, 245 S.C. 406, 414, 140 S.E.2d 774, 778 (1965) (noting that in "concluding that [the Insurance Commission has no power to regulate certain rates and commissions], a fact of particular importance is that the legislature has not seen fit to take any action subsequent to the opinion of the Attorney General [reaching the same conclusion.]"). However, legislative inaction cannot legitimize a flawed analysis nor does it alter our obligation to rely on the plain language of a statute.

We therefore find unavailing the State's arguments that we should look beyond the plain language of the statute in interpreting its scope. In drafting section 56-7-15, the General Assembly chose to confine the use of uniform traffic tickets to instances where an offense is committed in the presence of a law enforcement officer. Because there is no contention Deputy Farrell witnessed the incident, the uniform traffic ticket could not be used to initiate proceedings in magistrate court.

CONCLUSION

For the aforementioned reasons, we hold that at the time of the alleged crime, section 56-7-15 required an officer to be present during the commission of a crime to validly issue a uniform traffic ticket. Therefore, the magistrate properly dismissed the CDV charge. Accordingly, we affirm the court of appeals' opinion.[2]

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[2] However, we clarify that the statute at issue has been revised. As of June 13, 2013, section 56-7-15(A) provides: "The uniform traffic ticket . . . may be used by law enforcement officers to arrest a person for *an offense that has been freshly committed or is committed in the presence of a law enforcement officer* if the punishment is within the jurisdiction of magistrates court and municipal court." (emphasis added). Effective the same day, section 56-7-10(A) was amended to specifically include CDV first and second as offenses subject to the uniform traffic ticket provisions. Additionally, section 56-7-10(B) was amended to provide: "In addition to the offenses contained in subsection (A), a uniform traffic ticket may be used in an arrest for a misdemeanor offense within the jurisdiction of magistrates court that has been *freshly committed or is committed in the presence of a law*

PLEICONES, BEATTY, JJ., and Acting Justice James E. Moore, concur. TOAL, C.J., concurring in result only.

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enforcement officer." (emphasis added). Accordingly, we recognize this opinion has been abrogated and its holding applies only to incidents occurring prior to June 13, 2013.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joe Perry and Osteen Publishing Co., Inc., Appellants,

v.

Harvin Bullock, in his capacity as Sumter County Coroner, Respondent.

Appellate Case No. 2012-212669

Appeal from Sumter County
The Honorable Clifton Newman, Circuit Court Judge

Opinion No. 27419
Heard February 5, 2014 – Filed July 16, 2014

AFFIRMED

Jay Bender, of Baker, Ravenel & Bender, L.L.P, of Columbia, for Appellants.

Andrew F. Lindemann, of Davidson & Lindemann, P.A., of Columbia, for Respondent.

JUSTICE HEARN: The central issue in this case is whether autopsy reports are "medical records" under Section 30-4-20(c) of the South Carolina Code (2007), and therefore exempt from disclosure under the South Carolina Freedom of Information Act, Title 30, Chapter 4 of the South Carolina Code (the FOIA). The appellants brought a declaratory judgment action under the FOIA requesting

production of an autopsy report from a coroner. The circuit court granted summary judgment in favor of the coroner, finding the records were exempt from disclosure as medical records. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Joe Perry, a reporter for *The Item*, a newspaper, sent a FOIA request to Harvin Bullock, the Sumter County Coroner, for the report of the autopsy performed on Aaron Leon Jacobs.[1] Sumter County denied Perry's request on the basis that pursuant to the FOIA, the autopsy report is a "medical record" and is therefore by definition not a public record subject to disclosure.

Perry, along with Osteen Publishing Company, Inc. (collectively, Appellants), filed this declaratory judgment action against Bullock in his official capacity as Sumter County Coroner. Appellants sought injunctive relief, alleging the autopsy report is not a medical record and therefore must be disclosed pursuant to the FOIA. Appellants therefore requested production of the records and attorney's fees.

Bullock answered, asserting the records are exempt from the FOIA as medical records. He also asserted the records are subject to the authorization and consent provisions of the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104–191, 110 Stat. 1936 (HIPAA) and thus any state law requiring disclosure of the autopsy report would be preempted by HIPAA.

The parties filed cross motions for summary judgment. In support of his motion, Bullock submitted an affidavit of Dr. Janice Ross, the pathologist who performed the autopsy, which indicated she considered the report to be a medical record. Additionally, Bullock argued the issue was moot because Perry received the autopsy reports from another source.[2] Appellants objected to the court's

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[1] Jacobs was shot and killed by police officers.

[2] In an article Perry wrote after the inception of this suit, he referenced "an autopsy report from Newberry Pathology Associates" which he received from the South Carolina State Law Enforcement Division. However, in his response to Bullock's requests for admission, Perry stated he "received a necropsy report relating to an autopsy on the body of 'Arron Jacobs'" and that although he believed this was the

consideration of Dr. Ross's affidavit, arguing that whether the autopsy report was a medical record within the meaning of the FOIA was a question of law and an expert witness is not competent to opine on matters of law.

After a hearing on the motions and an *in camera* review of the report, the circuit court granted summary judgment in favor of Bullock, holding that autopsy reports are medical records and therefore exempt from the FOIA's disclosure requirements.

ISSUE PRESENTED

Did the circuit court err in holding the autopsy report is a medical record exempt from the FOIA's disclosure requirements?

LAW/ANALYSIS

Appellants argue the circuit court erred in granting summary judgment in favor of Bullock by finding the autopsy report is a medical record under section 30-4-20(c). We disagree.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." *State v. Baucom*, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000). The plain language of a statute is considered the best evidence of the legislature's intent. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012). When interpreting an undefined statutory term, the Court must look to its usual and customary meaning. *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998).

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report he requested from Bullock, he had "not had the opportunity to compare [them]."

The FOIA was enacted based on the General Assembly's finding "that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy." S.C. Code Ann. § 30-4-15 (2007). Accordingly, the FOIA's essential purpose is to protect the public from secret government activity. *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991). Because the FOIA is remedial in nature, it should be liberally construed to carry out the purpose mandated by the legislature. *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003).

The FOIA requires public bodies to disclose public records upon request and defines public records as "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." S.C. Code Ann. § 30-4-20. However, "[r]ecords such as . . . medical records . . . and other records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of [the FOIA] . . . . *Id.*

The phrase "medical records" is not defined within the statute and therefore, we turn to its normal and customary meaning. *See, e.g.*, *Branch v. City of Myrtle Beach*, 340 S.C. 405, 409–10, 532 S.E.2d 289, 292 (2000) ("When faced with an undefined statutory term, the Court must interpret the term in accord with its usual and customary meaning."). *Merriam-Webster* defines a medical record as "a record of a patient's medical information (as medical history, care or treatments received, test results, diagnoses, and medications taken)." Merriam-Webster Online, http://www.merriam-webster.com/medical/medical%20records. Thus, plainly stated, medical records are those records containing medical information.

We find autopsy reports fit neatly within that general understanding of medical records. Section 17-5-5(1) of the South Carolina Code (2014) defines an autopsy as "the dissection of a dead body and the removal and examination of bone, tissue, organs, and foreign objects for the purpose of determining the cause of death and manner of death." Although the objective of an autopsy is to determine the cause of death, as the statute indicates, the actual examination is comprehensive. Thus, the medical information gained from the autopsy and

indicated in the report is not confined to how the decedent died. Instead, an autopsy, which is performed by a medical doctor, is a thorough and invasive inquiry into the body of the decedent which reveals extensive medical information, such as the presence of any diseases or medications and any evidence of treatments received, regardless of whether that information pertained to the cause of death. Accordingly, we find an autopsy report falls within the definition of a medical record as that term is commonly understood.

The reference to "medical records" in other portions of the Code supports that conclusion by indicating the General Assembly considered autopsy reports to be included within that term. Section 17-5-120 of the South Carolina Code (2014), entitled "Availability of *medical records* to coroner of another state," allows for "Records, papers, or reports *concerning the death of a person* on file at any . . . medical facility in this State are available to a coroner of another state . . . ." (emphasis added). The title refers to "medical records" and the statute only mentions reports about the death of an individual, which encompasses autopsy reports. *See Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (holding the title of a statute and heading of a section can be used to clarify ambiguity or doubt in a statute provided the interpretation does not undo or limit the plain meaning of the text). Section 17-5-120 also specifically notes: "The release of these records to the coroner of another state is not prohibited by [the FOIA] or any other provision of law." The reference to the FOIA as a law of *exclusion* indicates the General Assembly assumed the FOIA barred dissemination of these types of reports.

Additionally, the Attorney General's office has long held the opinion that autopsy reports are medical records and exempt from disclosure under the FOIA. *See* 2011 WL 782314 (S.C.A.G. Feb. 23, 2011) ("[T]his Office has consistently opined that autopsy records, including photographs, are confidential under State law."); 1981 WL 96613 (S.C.A.G. Oct. 27, 1981) ("The details of an autopsy report are of such an intimate, personal nature concerning vivid medical allusions to parts of the human body, their description and indications of prior history. A report of this nature constitutes a medical record which is not available for public consumption.").

Appellants contend a similar argument was made and rejected with regard to the disclosure of death certificates in *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984). There, this Court held death certificates are

not medical records simply because they contain medical information. Specifically, the Court found that although "death certificates contain a medical certification of the cause of death[,] they are not medical records in the normal sense but are statements of conclusion by persons required by law to make such findings after the death of a citizen of the state." *Id.* at 566, 324 S.E.2d at 314. We find the reasoning of *Sexton* inapplicable here. A death certificate includes no more than the cause of death, if known. In contrast an autopsy is a comprehensive medical examination of a body designed to reveal not only the cause of death, but also the decedent's general medical condition at the time of death including information unrelated to the cause of death. This is the type of information that would necessarily be contained in medical records when a person is alive. We decline to allow a person's death to change the nature of the record into one subject to disclosure under the FOIA.

Appellants also rely on the canon of statutory construction *expressio unius est exclusio alterius* to support their contention that the legislature did not intend to exempt autopsy reports as medical records. Specifically, Appellants point to Section 30-4-40(a)(18) of the South Carolina Code (2007) which provides: "A public body may but is not required to exempt from disclosure . . . [p]hotographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy . . . ." Appellants argue that if autopsy reports are medical records, this specific exemption would be unnecessary because these autopsy related materials would already be excluded.

We disagree. The language of section 30-4-40(a)(18) refers to items "of or relating to the performance of an autopsy," not items that are a part of an autopsy report. Autopsy reports contain specific and detailed medical information, but separate pictures or video *of the procedure*, while possibly sensational or salacious, do not make specific medical conclusions regarding the decedent. Accordingly, we find this statute compliments the exclusion of autopsy reports under the FOIA. It further limits access to autopsy information by allowing public bodies to also decline to disclose related images and audio recordings. We therefore find this statute has no bearing on the disclosure of the actual autopsy report.

CONCLUSION

While cognizant of our obligation to strictly construe the FOIA in favor of disclosure, we are nevertheless compelled here by the plain meaning of the

statutory term to conclude that an autopsy report is exempt from the FOIA's disclosure requirement. Although there may be policy concerns militating against this result, that is a matter for the legislature and not for this Court. Accordingly, we affirm the circuit court and hold autopsy reports are excluded from disclosure under the FOIA as medical records.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent because, in my opinion, an autopsy report is not a medical record within the meaning of the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. §§ 30-4-10 *et seq*. (2007 and Supp. 2013). I would hold that such a report is subject to disclosure as provided in S.C. Code Ann. § 17-5-280 (2014), and would therefore reverse the circuit court's order and remand for further proceedings.

Section 30-4-20(b) (2014) provides that "records which by law are required to be closed to the public are not made open to the public under [FOIA] . . . ." The initial question, then, is whether autopsy reports are required by law to be closed to the public. In my opinion, they are not closed records, although the right to access them is limited by the terms of § 17-5-280.

Chapter 5 of Title 17 of the South Carolina Code regulates "Coroners and Medical Examiners." Under this chapter, autopsy is a defined term:

> (1) "Autopsy" means the dissection of a dead body and the removal and examination of bone, tissue, organs, and foreign objects for the purpose of determining the cause of death and manner of death.
>
> Section 17-5-5(1) (2014).

Section 17-5-280 provides that autopsy reports be made available to prosecutors and law enforcement agents if "necessary for the performance of [their] official duties." Further, § 17-5-280 provides that an autopsy report "**must be furnished upon request to any party to whom the cause of death is a material issue**." (emphasis supplied). In my view, this statute[3] demonstrates that autopsy records are not required by law to be closed to the public under FOIA, and also establishes the legal standard for release of autopsy reports to the public.

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[3] While this statute specifically refers to medical examiners, it is evident that in counties such as Sumter the coroner is the person responsible for maintaining autopsy records.

In my opinion, the majority errs when it affirms the circuit court's holding that an autopsy report is a medical record[4] and therefore absolutely exempt from disclosure under FOIA. Nonetheless, the majority is rightly concerned with the public dissemination of potentially exempt information that may be contained in an autopsy report, such as that obtained from the decedent's medical records. Should the autopsy report contain material which is not subject to disclosure, then the coroner or medical examiner to whom the FOIA request is made may redact that information as provided by § 30-4-40(b) (2007).

I respectfully dissent, and would reverse and remand for further proceedings consistent with the standard for dissemination of autopsy reports.

[4] The "Coroners and Medical Examiners" chapter treats medical records in a separate statute and creates an extremely limited exception allowing these otherwise exempt documents to be made available to out-of-state coroners. S.C. Code Ann. § 17-5-120 (2014); see also S.C. Code Ann. § 30-4-40(a)(18) (2007) (recognizing limited exception in § 17-5-120).