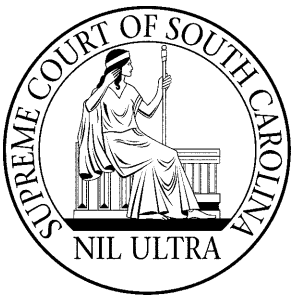

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
July 28, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, Respondent,

v.

NV Sumatra Tobacco Trading, Co., Appellant.

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

Opinion No. 26522
Heard May 28, 2008 – Filed July 21, 2008

AFFIRMED

Joel W. Collins, Jr., Gray T. Culbreath, and Christian Stegmaier, of Columbia; Christopher L. Rissetto and Jason P. Matechak, of Washington, D.C., for appellant.

Attorney General Henry Dargan McMaster and Assistant Deputy Attorney General J. Emory Smith, Jr., of Columbia, for respondent.

ACTING CHIEF JUSTICE MOORE: Respondent (the State) filed a complaint alleging that appellant, NV Sumatra Tobacco Trading Co.

(Sumatra), is a tobacco product manufacturer under the Tobacco Escrow Fund Act, S.C. Code Ann. § 11-47-10, *et seq.* (Supp. 2007). The State alleged Sumatra had failed to make the escrow deposit and provide the certification required by the Act for cigarettes that had been sold in South Carolina.

Sumatra filed an answer and moved to dismiss the action for lack of personal jurisdiction. In a 2003 order, the court ruled it had personal jurisdiction. The parties then filed cross-motions for summary judgment. In a 2006 order, the court granted the State's motion and denied Sumatra's motion. The court found that Sumatra had failed to comply with the Escrow Fund Act and assessed a civil penalty of $307,630.08. The court also prohibited Sumatra from selling cigarettes to South Carolina consumers for a period of two years. Finally, the court ordered Sumatra to pay attorney fees of $7,875.00 and filing fees of $95.00. Sumatra appeals both the 2003 and 2006 orders.

FACTS

Under the Master Settlement Agreement, a group of United States-based tobacco product manufacturers agreed to pay money damages to the participating states, including South Carolina, for Medicare and Medicaid costs incurred by the states in paying health care expenses of in-state cigarette smokers and for education and cessation programs.

The South Carolina Tobacco Escrow Fund Act requires a tobacco product manufacturer having sales of cigarettes in this state (whether directly or through a distributor, retailer, or similar intermediary) to:

> (a) become a participating manufacturer, (as that term is defined in section II(jj) of the Master Settlement Agreement)[1] and generally perform its financial obligations under the Master Settlement Agreement; or

[1] *See* § 11-47-20(e) (Supp. 2007).

> (b)(1) place into a qualified escrow fund[2] by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation)--- . . . for . . . 2001 . . .: $0.136125 per unit sold . . .

S.C. Code Ann. § 11-47-30 (Supp. 2007). The Act defines "tobacco product manufacturer" to include an entity that

> (1) manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer . . . [or]
>
> (2) is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; . . .

§ 11-47-20(i).

Sumatra is a corporation organized under the laws of the Republic of Indonesia and its business address is located in Indonesia. Sumatra produces a number of tobacco products, including United brand cigarettes, the cigarettes at issue here. Sumatra also sells its products on the Indonesian retail market. Sumatra alleges it sells tobacco products destined for non-Indonesian markets solely to UNICO Trading Pte., Ltd. (UNICO), a Singapore corporation. Sumatra alleges UNICO is not an agent of Sumatra or a distributor of Sumatra's products, but that UNICO acts entirely as an independent reseller. Sumatra states that it and UNICO are separate legal entities with no overlapping ownership or control and that UNICO has no authority to bind or otherwise act on Sumatra's behalf.

---

[2]*See* § 11-47-20(f) (Supp. 2007).

Sumatra admits that UNICO may have sold cigarettes produced by Sumatra to Silmar Trading Ltd., a British Virgin Islands corporation. Sumatra states it does not have any contractual relationship with Silmar Trading to sell its cigarettes in South Carolina. Sumatra states that Silmar Trading may have engaged American Automotive Security Products, d/b/a F.T.S. Distributors (FTS), a United States importer based in Miami, Florida, for the purpose of selling tobacco products produced by Sumatra in the United States.

ISSUES

I. Did the circuit court err by denying Sumatra's motion to dismiss the complaint for lack of personal jurisdiction?

II. Did the circuit court err by granting summary judgment to the State?

DISCUSSION

I. Personal jurisdiction

Sumatra argues that, when determining whether personal jurisdiction exists, the court erred by relying on an affidavit of Basil E. Battah, the president of FTS. Sumatra claims the affidavit is not authenticated; however, this argument is not preserved for review. At the 2003 hearing, Sumatra objected to the introduction of the affidavit on the grounds of irrelevance and hearsay. Sumatra merely mentioned the affidavit was not authenticated. Sumatra did not raise this issue in any of its submissions to the lower court including the motion for reconsideration of the personal jurisdiction order. In fact, Sumatra previously used the Battah affidavit in making its argument on the merits that Sumatra was not shipping to a United States distributor. Therefore, Sumatra's arguments regarding the authentication of the Battah affidavit and its arguments regarding the alleged facial defects of the document are not preserved for the Court's review. *See* Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000) (to preserve an issue

for appellate review, the issue must have been raised to and ruled upon by the trial court). Given the authentication argument is not preserved, the fact the Battah affidavit is a duplicate rather than the original is of no moment.[3] *See* Rule 1003, SCRE (a duplicate is admissible to same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original).

Sumatra argues the court erred by denying Sumatra's motion to dismiss for lack of personal jurisdiction. The court found that the connections of Sumatra's cigarettes, known as the United brand, to the United States are numerous. The court cited to Sumatra's admission that it manufactured the United brand and owned the United States trademark for it in 2001. The court noted the bill of lading attached to the Battah affidavit which showed a shipment of over 91,000 pounds of Sumatra cigarettes to the United States to FTS in December 2000. The court noted the Department of Revenue reports that 6,868,000 United brand cigarettes were sold in 2001, including those shipped by FTS. The court further noted that Sumatra had filed an ingredient report with the Center for Disease Control.

The 2003 court found the allegations in the complaint that Sumatra intended to sell cigarettes in the United States are amply sufficient to make the prima facie showing for jurisdiction due to the large volume of Sumatra's sales in South Carolina. The court pointed out that Sumatra acknowledged that its ownership of the trademark for United brand cigarettes could be construed as an indication that Sumatra itself has the intent to sell this brand in the United States.

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[3]Sumatra further argues the Battah affidavit is inadmissible hearsay. However, Sumatra does not point to any particular statement within the affidavit that would not be admissible in evidence; therefore, this argument is deemed abandoned. *See* Colleton County Taxpayers Ass'n v. School Dist. of Colleton County, 371 S.C. 224, 638 S.E.2d 685 (2006) (issue is deemed abandoned if the argument in the brief is conclusory).

The 2003 court found that personal jurisdiction was properly asserted over Sumatra because the requirements of due process are met, *i.e.* there are sufficient minimum contacts by Sumatra with South Carolina such that the court has the power to adjudicate the action and the exercise of jurisdiction is fair. The court stated that Sumatra's conduct has demonstrated its intent to avail itself of the vast, lucrative markets of each state in the United States.

The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 611 S.E.2d 505 (2005). The decision of the trial court will be affirmed unless unsupported by the evidence or influenced by an error of law. *Id.*

Initially, the court properly found that the allegations in the complaint that Sumatra intended to sell its United brand cigarettes in South Carolina were sufficient to make the prima facie showing for personal jurisdiction. *See* Cockrell, *supra* (at the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction in the complaint or in the affidavit); Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993) (there is no "other evidence" requirement for personal jurisdiction where the complaint itself demonstrates jurisdiction). While the 2003 court could have stopped its analysis there, it chose to proceed with the more in-depth determination of personal jurisdiction. The 2006 court found that Sumatra had not offered any reason for a different conclusion regarding personal jurisdiction on summary judgment.

Specific jurisdiction over a cause of action arising from a defendant's contacts with the state is granted pursuant to the long-arm statute. Cockrell, *supra* (citing S.C.Code Ann. § 36-2-803). In the instant case, S.C. Code Ann. § 36-2-803(1)(h) (2003)[4] applies to the facts of this case and states that a court may exercise personal jurisdiction over a person who acts directly or by

[4]S.C. Code Ann. § 36-2-803 has since been amended. The subsection has not been changed; however, the previous statute applies because the new statute is applicable only to causes of action arising after July 1, 2005.

an agent as to a cause of action arising from the person's production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used and consumed. South Carolina's long-arm statute has been construed to extend to the outer limits of the due process clause. *Id.* Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process. *Id.*

Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Id.* (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)). Further, due process mandates that the defendant possess sufficient minimum contacts with the forum state, so that he could reasonably anticipate being haled into court there. *Id.* (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). Without minimum contacts, the court does not have the "power" to adjudicate the action. *Id.* The court must also find that the exercise of jurisdiction is "reasonable" or "fair." *Id.* If either prong fails, the exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992).

The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. This theory of personal jurisdiction is known as the "stream of commerce" theory.[5]

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[5]Sumatra contends this Court should embrace the "stream of commerce plus" theory of personal jurisdiction. This theory arose in a plurality opinion by Justice Sandra Day O'Connor of the United States Supreme Court in Asahi Metal Ind. Co., Ltd. v. Superior Court of California, 480 U.S. 102 (1987). The "stream of commerce plus" theory states that the placement of a product into the stream of commerce, without more, is not an act of the defendant purposely directed toward the forum state. The theory maintains

Southern Plastics Co., *supra* (citing World-Wide Volkswagen Corp., 444 U.S. at 297).

While it is true Sumatra is not registered to do business in South Carolina, has no office in South Carolina, and no person representing Sumatra has been in South Carolina, physical presence in the State is not required to establish personal jurisdiction. *See* Southern Plastics Co., *supra*. The dispositive issue is whether Sumatra possesses minimum contacts with South Carolina.

It is clear Sumatra has minimum contacts with the United States as a whole and, via the stream of commerce theory, the State has shown Sumatra has minimum contacts with South Carolina. The facts pointing to minimum contacts are as follows: (1) Sumatra admits it manufactured the United brand cigarettes; (2) Sumatra admits it owns the United States trademark for that brand; (3) the Department of Revenue states 6,868,000 United brand cigarettes were sold in South Carolina in 2001; (4) Sumatra, either on its own or by someone else on its behalf, filed an ingredient report for the United brand cigarettes with the Center for Disease Control; (5) Sumatra admits it packaged its cigarettes in packs and cartons which bear the United States-required health warnings; and (6) the United brand packaging identifies the cigarettes as an "American blend," has a Surgeon General's warning, and shows an eagle and striped packaging. Regardless of how the cigarettes arrived in South Carolina, minimum contacts are established by the above information. Sumatra's actions indicate that it purposely availed itself of conducting business in all 50 states, including South Carolina. It is troubling that Sumatra insists it could engage in the activities listed above but avoid

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that additional conduct indicating an intent or purpose to serve the market in the forum state is also necessary. Asahi, 480 U.S. at 112. Only three other justices signed onto this theory. Justice William Brennan and three other justices maintained that simply placing a product into the stream of commerce is consistent with the Due Process Clause and they would not require a showing of additional conduct to assert jurisdiction. *Id.* at 117. We, therefore, decline to embrace the "stream of commerce plus" theory.

paying into state escrow accounts and avoid suit in each and every state of the nation by asserting the lack of personal jurisdiction in each state. We find Sumatra should have reasonably anticipated that it would be haled into court in a state such as South Carolina.[6]

While there are sufficient minimum contacts such that the court has the "power" to adjudicate the action, it must also be determined whether the exercise of jurisdiction is "reasonable" or "fair." Cockrell, *supra*. Under the fairness prong, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction. *Id.*

The exercise of jurisdiction over Sumatra is reasonable and fair. While it may be inconvenient for Sumatra to travel to the United States to defend the action against it, the State's interest in exercising jurisdiction outweighs any such inconvenience. The State has a valid interest in protecting itself against any suits that arise from a person smoking the United brand of cigarettes. Given the volume of those cigarettes sold within South Carolina, it is reasonable for Sumatra to be haled into a South Carolina court.

The State has shown that the court has the power to adjudicate the action and that it is reasonable to exercise jurisdiction. Therefore, the exercise of jurisdiction over Sumatra does not offend due process.

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[6]*See* State v. Grand Tobacco, 871 N.E.2d 1255 (Ohio Ct. App.), appeal not allowed, 868 N.E.2d 680 (Ohio 2007) (finding a foreign tobacco product manufacturer has sufficient minimum contacts with Ohio such that the state can exercise personal jurisdiction over the company; noting that over 25 million units of Grand Tobacco's products were sold in Ohio from 2000 to 2003; and that Grand Tobacco took steps within the United States to trademark its products, to comply with federal regulations for the sale of cigarettes by submitting ingredient lists to the Center for Disease Control, and to distribute its products; it had purposely availed itself of conducting business in all 50 states, including Ohio).

Accordingly, the lower court properly found it could exercise personal jurisdiction over Sumatra.

II. Summary judgment

Sumatra argues the court erred by granting summary judgment to the State and denying its cross-motion for summary judgment.

The lower court, in its 2006 order, found that Sumatra is a tobacco product manufacturer under the Escrow Fund Act. The court noted that Sumatra admitted it is a manufacturer and that it did not contest that its cigarettes were sold in South Carolina. The court stated that the only question was whether Sumatra intended that the cigarettes it manufactured be sold in the United States and that this question was answered by several undisputed facts: (1) Sumatra's acknowledgement that it manufactures the United brand; (2) Sumatra's acknowledgement that its United States trademark for the brand may indicate an intent to sell in the United States; (3) the Department of Revenue's reports that almost seven million United brand cigarettes were sold in South Carolina in 2001; (4) Sumatra's packaging for United brand identifies it as an "American blend;" and (5) the Center for Disease Control's ingredient reporting compliance list showing that an ingredient list was submitted for Sumatra. The court noted that these factors, even without the bill of lading attached to the Battah affidavit, are sufficient to conclude Sumatra is a "tobacco product manufacturer" within the meaning of § 11-47-20(i)(1).

We find the trial court properly granted the State's motion for summary judgment and ordered Sumatra to make payments pursuant to the Escrow Fund Act because the above undisputed facts cited by the trial court establish Sumatra's intent to sell its cigarettes in South Carolina as required by the Escrow Fund Act.[7] *See* Rule 56(c), SCRCP (summary judgment is

[7]Sumatra argues the Escrow Fund Act violates the takings provision of the South Carolina Constitution and that the Act, as applied to Sumatra, violates antitrust laws. The trial court found that these arguments were not before the court because they were not raised in Sumatra's answer. The court

appropriate when "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"). Accordingly, the decisions of the lower court are

AFFIRMED.

BEATTY, J., and Acting Justices J. Michelle Childs and John W. Kittredge, concur. Acting Justice James W. Johnson, Jr., not participating.

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also denied the motion to amend the answer because Sumatra filed the motion to amend after the motion for summary judgment was filed and over two years after Sumatra had filed its answer. Sumatra does not appeal the denial of the motion to amend. Accordingly, whether the motion to amend was properly denied is not preserved for the Court's review and thus the takings and price-fixing arguments are not before the Court. *See* Rule 208(b)(1)(D), SCACR; Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003) (issue not argued in the brief is deemed abandoned and precludes consideration on appeal).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bruce Randall Miller, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 26523
Submitted April 16, 2008 – Filed July 28, 2008

REVERSED

Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Karen Ratigan, of Columbia, for Respondent.

JUSTICE BEATTY: In this case, the post-conviction relief (PCR) court found trial counsel was not ineffective in establishing Bruce Randall Miller's defense of third-party guilt for the charge of armed robbery. This Court granted certiorari to review the PCR court's decision. Because Miller's sole defense was mistaken identity and third-party guilt, we conclude there is no probative evidence to support the PCR court's findings of fact and conclusions of law regarding trial counsel's effectiveness. Therefore, we reverse the decision of the PCR court and grant Miller relief with respect to his armed robbery conviction.

FACTUAL/PROCEDURAL HISTORY

Around 9:00 a.m. on December 9, 2001, James Holden stopped by the Li'l Cricket convenience store on White Horse Road in Greenville to use the pay phone. As Holden was getting back into his truck, he was approached by an African-American male asking for directions to Interstate 85. After Holden motioned in the direction of I-85, the man pointed a gun at him and demanded his wallet. When the man realized that Holden did not have any money in his wallet, he ordered Holden to empty his pockets. Holden then turned over $106 in cash. According to Holden, the man took the money and drove off in a "bluish purple" colored vehicle. Holden followed the vehicle until the man pulled into a nearby apartment complex. During the pursuit, Holden was able to take down the license plate number.

Holden returned to the convenience store and called police to report the robbery. Stacy Snider, a deputy with the Greenville County Sheriff's Department, responded to the scene. Holden described the suspect as a medium build, five-foot-ten inch, 170 pound African-American male with a "Fu Manchu mustache," similar to a goatee. In terms of clothing, Holden claimed the suspect was wearing a white ski hat, a black nylon jacket, a black shirt, dark pants, and dark tennis shoes. He further stated the suspect was wearing "a necklace or a gold braid or something made into the shirt." Holden also described the suspect's vehicle and gave the license plate number to Deputy Snider.

Using this information, Deputy Snider determined that the vehicle, a Kia Sephia, was registered to Stephanie Pauling.

On December 12, 2001, Antonio Bailey, an investigator with the Greenville County Sheriff's Department, continued the investigation by contacting Holden. Based on Holden's written statement and the vehicle registration, Investigator Bailey interviewed Stephanie Pauling, Miller's then girlfriend, and her aunt, Brenda Johnson, who lived at the address where the vehicle had been registered. As a result of this investigation, Investigator Bailey compiled a photographic lineup and presented it to Holden on December 18, 2001. At that time, Holden selected Miller's photograph and positively identified him as the man who had robbed him. The next day, Investigator Bailey arrested Miller. The Greenville County jail intake form listed Miller as five-feet-eight inches tall and weighing 130 pounds.

After a Greenville County grand jury indicted him, Miller was tried for armed robbery. In addition to Holden and the investigating officers, the State presented Stephanie Pauling as its primary witness to establish that Miller had access to her vehicle at the time of the armed robbery. Pauling testified she began dating Miller in September 2001 and eventually moved in with him. She claimed that Miller often borrowed her car and that he drove off in the vehicle on December 2, 2001. According to Pauling, she did not see Miller until one week later. At that time, Miller told her that she could find her car on Poinsette Highway where he had left it. Because Miller claimed he had lost her car keys, Pauling arranged to meet with her aunt, Brenda Johnson, who gave her the spare set of car keys in order that she could retrieve the car. When questioned about the specifics of the armed robbery, Pauling testified that Miller owned a handgun and that Miller was wearing a gold medallion on the day of the robbery.

On cross-examination, Miller's trial counsel brought out that Pauling was currently charged with three armed robberies in Greenville. With respect to one of these robberies, Pauling admitted that she initially implicated Miller, but ultimately changed her statement and identified Derrick Miller, Bruce Miller's nephew, as a

participant. During this portion of cross-examination, the State objected as trial counsel began to question Pauling about Derrick Miller and his involvement in the robberies. Outside the presence of the jury, trial counsel inquired whether he would be permitted to question Pauling regarding the specifics of her three armed robbery charges in an attempt to establish that Derrick Miller, not Bruce Miller, was the person who robbed Holden. The trial judge sustained the State's objection and trial counsel concluded his cross-examination of Pauling.

Following the bench conference, trial counsel proffered his cross-examination of Pauling. During the proffer, Pauling testified that Derrick Miller was a co-defendant in all three armed robberies with which she had been charged. She also described Derrick Miller as an African-American male, who was approximately five-feet-seven inches tall, weighed 170 pounds, and had facial hair over his lip and under his chin. At the conclusion of the proffer, trial counsel contended this testimony was relevant as evidence of third-party guilt. Specifically, he stated that he wanted to establish before the jury that another individual with similar physical characteristics to Bruce Miller had access to Pauling's vehicle and had been involved in recent armed robberies in Greenville using the same vehicle during the same time period. The trial judge then permitted trial counsel to recall Pauling and question her again outside the presence of the jury. During this second proffer, Pauling acknowledged that her car was used during each of the three robberies for which she and Derrick Miller were charged as well as the one for which Bruce Miller was charged.

After denying Miller's motion for a directed verdict and a brief recess, the trial judge returned to the courtroom and informed the attorneys that he had reversed his earlier ruling. The judge stated that he would permit Miller's counsel to question Pauling regarding Derrick Miller's physical characteristics and that Pauling would be "testifying consistent with the proffer."

During her cross-examination before the jury, Pauling described Derrick Miller as an African-American male who was approximately five-feet-seven inches tall and weighed 170 pounds. She also

acknowledged that he has a "Fu Manchu mustache." In reply, the State recalled Holden as a witness who again positively identified Bruce Miller as the man who robbed him.

Miller did not testify or present any witnesses on his behalf. After the jury convicted him of armed robbery, the trial judge sentenced him to eighteen years imprisonment.

Miller appealed his conviction to the Court of Appeals. After the Court of Appeals affirmed his conviction,[1] Miller filed an application for post-conviction relief. The State filed a return and requested an evidentiary hearing.

At the hearing, Miller's PCR counsel called Bruce Miller and trial counsel as witnesses. Miller maintained that his nephew, Derrick Miller, committed the armed robbery for which he was charged. Miller claimed his trial counsel was ineffective in that he failed to: (1) obtain an expert witness on eyewitness identification testimony; and (2) adequately present the third-party guilt of his nephew, Derrick Miller. In terms of third-party guilt, Miller believed that trial counsel should have established that his nephew had similar physical features and had been charged with three armed robberies in Greenville that occurred around the time Holden was robbed. Additionally, Miller claimed that Derrick used Pauling's vehicle and owned a handgun similar to the one that Holden claimed to have seen during the robbery.

Trial counsel admitted that he erred in failing to bring out through Pauling's cross-examination that her car was used and a similar handgun was used in the robbery of Holden as well as the other three armed robberies for which she and Derrick Miller were charged. Because Miller's sole defense was misidentification and third-party guilt, trial counsel conceded that he "missed [his] opportunity" during Pauling's testimony to specifically tie in the gun and vehicle used in all of the robberies. By means of explanation, trial counsel stated he was

[1] State v. Miller, Op. No. 2004-UP-620 (S.C. Ct. App. filed Dec. 13, 2004).

remiss in not connecting the handgun and Pauling's vehicle because he was caught off guard when the trial judge reversed his initial ruling.

At the conclusion of the hearing, the PCR court denied Miller's application for post-conviction relief. Although he acknowledged that it was a "close case," the court found Miller did not meet his burden of proof to warrant relief. In a written order, the PCR court affirmed his oral ruling and dismissed Miller's application. Specifically, the court held that Miller did not meet his burden of establishing error or prejudice regarding how trial counsel failed to effectively handle the following issues: (1) eyewitness identification; and (2) third-party guilt. In terms of third-party guilt, the court found that "trial counsel was allowed to present a third party guilt defense at trial. This Court finds that trial counsel's hindsight admission regarding his failure to ask Pauling (during the second cross-examination) about the similar car and gun does [not] operate to satisfy the Applicant's burden of proving error."

This Court granted Miller's petition for certiorari to review the PCR court's denial of his application for post-conviction relief.

DISCUSSION

Miller asserts the PCR court erred in failing to find trial counsel was ineffective in not cross-examining Stephanie Pauling regarding similar armed robberies allegedly committed by Derrick Miller. Because his entire defense rested on mistaken identity and third-party guilt,[2] Miller contends his counsel's ineffectiveness was prejudicial and warranted a reversal of his conviction. We agree.

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[2] In terms of third-party guilt, this Court has imposed strict limitations on its admissibility. State v. Mansfield, 343 S.C. 66, 81, 538 S.E.2d 257, 265 (Ct. App. 2000). "Evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are inconsistent with the defendant's guilt." Id. "The evidence must raise a reasonable inference as to the accused's innocence." Id. Recently, after Miller's trial, our United States Supreme Court clarified the

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), cert. denied, 128 S. Ct. 370 (2007).

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. (citing Strickland v. Washington, 466 U.S. 668 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Ard, 372 S.C. at 331, 642 S.E.2d at 596. "Furthermore, when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" Id. (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)).

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). We will uphold the findings of the PCR court when there is any evidence of probative value to support them. Suber v. State, 371 S.C. 554, 558-59, 640

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above-outlined rule regarding the admission of third-party guilt in Holmes v. South Carolina, 547 U.S. 319 (2006). Holmes essentially permits a defendant to introduce evidence of third-party guilt regardless of the strength of the State's case if the evidence offered by the accused as to the commission of the crime by another person is limited to such facts as are inconsistent with his own guilt and that raise a reasonable inference or presumption as to his own innocence. Holmes, 547 U.S. at 328-29.

S.E.2d 884, 886 (2007). However, this Court will reverse if there is no probative evidence to support the PCR court's findings or the decision is controlled by an error of law. Id.; Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

Although we are cognizant of our deferential standard of review, we find there is no probative evidence to support the PCR court's findings of fact and conclusions of law regarding trial counsel's effectiveness. We believe the record established that trial counsel's performance was deficient and that, but for counsel's error, there was a reasonable probability that the result of Miller's trial would have been different.

The State established the charge of armed robbery against Bruce Miller based on a single eyewitness. Both trial counsel and Miller maintained that the defense theory was misidentification and third-party guilt. In terms of misidentification, trial counsel failed to call an expert witness to testify regarding eyewitness identification testimony. Thus, the key defense was third-party guilt.

In view of this limited defense, it was crucial for trial counsel to elicit testimony from Pauling that showed the similarities between the armed robberies for which she and Derrick Miller were charged and the one for which Bruce Miller was charged. Based on the proffer of Pauling's testimony and the transcript from the PCR hearing, it is clear that trial counsel could have established Derrick Miller's third-party guilt by showing that Pauling's vehicle was used as the "get away" car in each of the robberies and that a similar handgun was used.

Although trial counsel, through Pauling's testimony, was able to establish a physical description of Derrick Miller, this was not sufficient to adequately establish a defense of third-party guilt. A review of Holden's testimony reveals that he described the robber as an African-American male who was approximately five-feet-ten inches tall and weighed 170 pounds. He also described the robber's facial hair as a "Fu Manchu mustache" or "goatee." Significantly, this description is akin to Derrick Miller's physical features rather than Bruce Miller's.

Additionally, Pauling's credibility was questionable at best given she initially implicated Bruce Miller in one of the other three armed robberies until she became aware that he could not have been involved because he was in jail at the time of the crime. Inferentially, Pauling could have been "covering" for Derrick Miller for Holden's armed robbery as she did when she falsely identified Bruce Miller in another robbery.

Furthermore, trial counsel conceded he was remiss in failing to adequately cross-examine Pauling regarding the specifics of the other armed robberies. Counsel attempted to elicit specific testimony of third-party guilt during the proffer of Pauling's testimony; however, he failed to do so in front of the jury when given an opportunity by the trial judge to question her further regarding the use of her car and a similar gun during the charged robberies.

Based on the foregoing, we conclude the record is devoid of any probative evidence to support the PCR court's decision to dismiss Miller's application. Clearly, both the trial judge and the PCR court recognized there was evidence of third-party guilt. Specifically, the trial judge gave trial counsel the opportunity to establish this defense before the jury. Moreover, the PCR court found that "trial counsel clearly pursued the defense of third-party guilt at trial." Yet, the evidence established that counsel was deficient in adequately cross-examining Pauling regarding the specifics of the other three armed robberies for which she and Derrick Miller were charged as well as pointing out that Derrick Miller's physical features were similar to the robber as described by Holden. Because Miller's sole defense was mistaken identity and third-party guilt, he was prejudiced by trial counsel's error and entitled to post-conviction relief.

CONCLUSION

For the foregoing reasons, we reverse the PCR court's decision and grant relief as to Miller's armed robbery conviction.

REVERSED.

MOORE and WALLER, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which PLEICONES, J., concurs. PLEICONES, J., dissenting in a separate opinion in which TOAL, C.J., concurs.

CHIEF JUSTICE TOAL: I join in Justice Pleicones' dissent. In my opinion, this evidence does not meet the threshold for third-party guilt.

In my view, testimony that Pauling and Derrick Miller committed other robberies using Pauling's vehicle and that a similar gun was used in all four robberies is not evidence that is inconsistent with Petitioner's guilt. *State v. Beckham*, 334 S.C. 302, 317, 513 S.E.2d 606, 614 (1999) (recognizing that third-party guilt evidence is limited to facts which are inconsistent with the defendant's guilt). Furthermore, I agree with Justice Pleicones that Petitioner failed to show he was prejudiced by trial counsel's alleged failure to adequately present this evidence. The jury heard testimony from Pauling that she pled guilty to an armed robbery that she committed with Derrick Miller in which she drove the "get-away" vehicle.

Furthermore, in my view, Petitioner failed to show trial counsel was ineffective in failing to call an expert on witness identification. Petitioner did not offer any such expert at his PCR hearing, and thus, he failed to meet his burden of proving prejudice. *See Lorenzen v. State*, 376 S.C. 521, 530, 657 S.E.2d 771, 776-77 (2008) (holding that the PCR applicant failed to show he was prejudiced by trial counsel's failure to call an eyewitness identification expert because "it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense.").

For these reasons, I believe there is evidence to support the PCR court's findings, and I would affirm the order denying Petitioner relief.

PLEICONES, J., concurs.

JUSTICE PLEICONES: I respectfully dissent and would affirm the post-conviction relief (PCR) judge's finding that petitioner's trial counsel was not ineffective in failing to adequately present evidence of third-party guilt. E.g., Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (PCR findings must be upheld where supported by any evidence of probative value in the record).

Under South Carolina's third-party guilt evidence rule:

> Evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect that than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible…. [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. State v. Gregory, 198 S.C. 98 at 104-105, 16 S.E.2d 532 at 534-535 (1941) (quoting 16 C.J., Criminal Law § 1085, p. 560 (1918) and 20 Am.Jur., Evidence § 265, p. 254 (1939); footnotes omitted).
>
> Cited in Holmes v. South Carolina, 547 U.S. 319, 328 (2006).[3]

At the outset, I must express reservations whether the third-party guilt evidence proffered by petitioner at trial met the threshold for

[3] In Holmes, the United State Supreme Court found unconstitutional a variant of South Carolina's third-party guilt rule which permitted strong evidence of guilt (especially forensic) to trump the defendant's right to present third-party guilt evidence.

admissibility. In my view, Stephanie Pauling's testimony did little more than raise a conjectural inference that Derrick Miller, rather than petitioner, may have robbed James Holder. State v. Gregory, *supra*.

In any case, there is evidence in the record to support the PCR judge's finding that trial counsel was not deficient in casting suspicion on Derrick through his cross-examination of Pauling. The majority points to two facts which trial counsel failed to elicit to find trial counsel ineffective: 1) that Pauling's car was used in her and Derrick's armed robberies and 2) that a similar gun was used in all four robberies. In my view, trial counsel's failure to cross-examine Pauling about these two "similarities" was not deficient nor was petitioner prejudiced thereby. Strickland v. Washington, 460 U.S. 668 (1984) (defendant alleging trial counsel was ineffective must establish both deficient performance and resulting prejudice).

It appears that Pauling testified for the State in petitioner's trial as part of an understanding that, following her testimony, she was to be permitted to plead down her three armed robbery charges to three counts of accessory after the fact. In those three cases, Pauling was alleged to have been the getaway car driver while two codefendants (one Derrick) robbed or attempted to rob convenience stores and a fast food restaurant. While Pauling did not explicitly testify that she was driving her car during these three crimes, there was no suggestion that she was driving any other vehicle.[4] The testimony focused on only this automobile, as did the attorneys' closing arguments. In my opinion, trial counsel's failure to specifically question Pauling about the car used in the armed robberies in which she was the getaway driver was not deficient, nor was petitioner prejudiced by this omission since it was clear to the jury that the same car was involved in all four incidents. Strickland v. Washington, *supra*.

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[4] This is especially so in light of Pauling's testimony that only she, her aunt, and petitioner were permitted to drive the car, and evidence that her participation in the three robberies was motivated, at least in part, by the fact she had just lost her job and was unable to make her car payments.

The majority also holds trial counsel's failure to exploit the similarities between the gun used to rob Holder and the gun used in the three other armed robberies was ineffective. During her *in camera* trial testimony, however, Pauling stated that the gun used in the robberies in which she participated "didn't look like the other one." In my opinion, counsel cannot be deemed ineffective for failing to present evidence at trial through Pauling of the guns' similarities.

Having concluded that there is evidence of probative value in the record which supports the findings of the PCR judge, I would affirm the order denying petitioner a new trial. Ard v. Catoe, *supra*.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Beaufort
County Magistrate George
Peter Lamb, Respondent.

Opinion No. 26524
Submitted July 22, 2008 – Filed July 28, 2008

PUBLIC REPRIMAND

Deborah Stroud McKeown, Commission Counsel, Assistant Disciplinary Counsel Joseph P. Turner, Jr., and James G. Bogle, Senior Assistant Attorney General, all of Columbia, for Office of Disciplinary Counsel.

John P. Freeman, of Columbia, for Respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. Respondent has also resigned his position and has agreed never to seek nor accept a judicial office in South Carolina without the express written permission of this Court after written notice to ODC. We accept the agreement and publicly reprimand respondent, the most severe sanction we are able to impose under these circumstances.

Facts

Respondent admits in the Agreement for Discipline by Consent that he made inappropriate statements in commenting on a warrant. Specifically, respondent referred to the use of crack cocaine and addiction thereto as a "black man's disease." On another occasion, respondent reacted in an overly harsh manner to comments made by a speaker at a seminar on criminal domestic violence.

Respondent also admits that during a bond hearing, he directed a defendant in a criminal domestic violence case to look at the victim, which was contrary to instructions given to the defendant by the transportation officer from the detention center. While conducting bond court on another occasion, respondent incorrectly advised a defendant of the penalty for the charge against the defendant.

Finally, respondent admits engaging in behavior that, while unintentional, could reasonably have been viewed as inappropriate by female employees.

Law

By his conduct, respondent has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (a judge shall observe high standards of conduct so that the integrity and independence of the judiciary is preserved); Canon 1A (a judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities); Canon 2(A)(a judge shall avoid impropriety and the appearance of impropriety by acting at all times in a manner that promotes public confidence in the integrity of the judiciary); and Canon 3B (a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity). Respondent has also violated the following provisions

of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rule 7(a)(1)(it shall be a ground for discipline for a judge to violate the Code of Judicial Conduct); Rule 7(a)(4)(it shall be a ground for discipline for a judge to persistently perform judicial duties in an incompetent or neglectful manner); and Rule 7(a)(9)(it shall be a ground for discipline for a judge to violate the Judge's Oath of Office contained in Rule 502.1, SCACR).

Conclusion

We accept the Agreement for Discipline by Consent and issue a public reprimand because respondent is no longer a magistrate and because he has agreed not to hereafter seek nor accept another judicial position in South Carolina without first obtaining permission from this Court.[1] As previously noted, this is the strongest punishment we can give respondent, given the fact that he has already resigned his duties as a magistrate. See In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996)("A public reprimand is the most severe sanction that can be imposed when the respondent no longer holds judicial office.") Accordingly, respondent is hereby publicly reprimanded for his conduct.

PUBLIC REPRIMAND.

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

[1] Respondent has agreed that, in the event he does seek such permission from this Court, he shall not do so without prior written notice to ODC and without allowing ODC to disclose to this Court information relevant to these proceedings and any information relevant to the issue of respondent holding judicial office.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Freddie Vernell Lomax, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 26525
Submitted June 26, 2008 – Filed July 28, 2008

REVERSED

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

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Karen Ratigan, of Columbia, for Respondent.

JUSTICE BEATTY: In this post-conviction relief case, the Court granted certiorari to review the PCR judge's denial of relief for Freddie Vernell Lomax's plea of guilty to multiple drug offenses. In her petition, Lomax's (Petitioner's) sole contention is that the PCR judge erred in failing to find a conflict of interest existed when her plea counsel simultaneously represented both Petitioner and her husband during guilty pleas which arose out of related offenses. We reverse the decision of the PCR judge.

FACTUAL/PROCEDURAL HISTORY

On August 20, 1997, Petitioner distributed crack cocaine to an undercover officer near a public park in Greenville. Based on this transaction, officers with the Greenville County Sheriff's Department served Petitioner with two arrest warrants for the charges of distribution of crack cocaine and distribution of crack cocaine within a half mile of a public park. The officers proceeded to serve the warrants after they observed Petitioner drive away from her home. After they stopped Petitioner, the officers arrested her and searched her vehicle. This search revealed .58 grams of cocaine and 64.79 grams of crack cocaine.

As a result of the vehicle search, the officers sought to procure a search warrant for Petitioner's home. While waiting for the search warrant, the officers conducted surveillance of Petitioner's home. Shortly after their arrival, the officers observed Noah Lomax, Petitioner's husband (Husband), drive away from the residence. The officers stopped him a short distance from the residence. At that time, he consented to a search of his vehicle. During their search, the officers found 22.47 grams of cocaine, 178.11 grams of crack cocaine, $17,000 in cash, as well as seventeen clear plastic bags.

Subsequently, Husband gave a statement to the officers that he knew his wife was being arrested and he went to their home to remove the drugs and money. As a result of their investigation, the officers

executed a search warrant for the couple's home. During the search, the officers discovered quantities of marijuana, crack cocaine, and a mixture of both drugs. Additionally, they discovered $1,369 in cash.

Petitioner was released from jail after serving nineteen days. Less than a month after her release, Petitioner distributed crack cocaine to undercover officers on three separate occasions.

Based on Petitioner's conduct, a Greenville County grand jury indicted Petitioner for the following offenses: four counts of distribution of crack cocaine; distribution of crack cocaine within a half mile of a school or public park; trafficking in crack cocaine in excess of 200 grams, which was later amended to an amount between 28 and 100 grams; possession with intent to distribute cocaine within proximity of a school; trafficking in cocaine; possession with intent to distribute crack cocaine within proximity of a school; possession with intent to distribute marijuana; and possession with intent to distribute marijuana within proximity of a school.

Subsequently, Petitioner and Husband, both represented by the same attorney, simultaneously pled guilty. The solicitor explained to the plea judge that the State intended to present both pleas jointly given the defendants were husband and wife and the facts giving rise to their charges were the same. After engaging in a plea colloquy with Petitioner and Husband individually, the plea judge accepted their guilty pleas as freely and voluntarily given and issued his respective sentences.

Husband pled guilty to possession of marijuana with intent to distribute within proximity of a school and was sentenced to three years' imprisonment. The judge sentenced Petitioner to concurrent terms of ten years on each count of distribution of crack cocaine, ten years for distribution of crack cocaine within proximity of a school, twenty-five years for trafficking in crack cocaine, ten years for trafficking in cocaine, ten years for PWID crack cocaine within proximity of a school, ten years for PWID cocaine within proximity of

a school, five years for PWID marijuana, and ten years for PWID marijuana within proximity of a school.

Petitioner did not appeal her guilty plea or sentences. On November 20, 1998, Petitioner filed an application for post-conviction relief. The State filed a Return and requested an evidentiary hearing.

On December 14, 2006, the PCR court held a hearing on petitioner's application.[1] At the PCR hearing, Petitioner's PCR counsel called Petitioner and her plea counsel as witnesses. Petitioner contended she was hurt by plea counsel's representation of both her and Husband at the plea proceeding. Petitioner believed that plea counsel's argument for leniency on behalf of Husband was detrimental to her given that counsel compared her involvement in the crimes to that of Husband. Petitioner also claimed she was prejudiced by plea counsel's dual representation because plea counsel "lingered" more on Husband's case. Petitioner asserted that plea counsel should have focused more on her case because she had confessed to the crimes and was subject to a more severe sentence.

Additionally, Petitioner testified she was informed that she would be tried separately and did not recall ever being asked whether she wanted to waive any conflict of interest and proceed jointly with Husband. Petitioner further stated that had she known the sentence that she would receive by pleading guilty, she would have requested a jury trial.

On cross-examination, Petitioner acknowledged that when she hired plea counsel to represent her for a bond reduction she was aware that counsel was already representing Husband. Petitioner further admitted that she agreed to have plea counsel represent both her and Husband on the indicted offenses.

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[1] On May 6, 2002, a circuit court judge erroneously dismissed Petitioner's application on the mistaken belief that she was no longer incarcerated. After Petitioner's application was reinstated, the circuit court conducted the hearing on December 14, 2006.

Plea counsel acknowledged she represented Petitioner and Husband on charges that stemmed from the same incident. Although plea counsel could not remember whether she discussed the conflict of interest issue with Petitioner, she remembered specifically talking to Husband about it. Counsel also stated neither Petitioner nor Husband voiced any objection to the dual representation, but instead, indicated they wanted her to represent them together.

On cross-examination, plea counsel stated her standard practice was to have clients sign a release or a waiver of a conflict of interest. However, she could not specifically recall whether Petitioner or Husband had signed such a document. Even if this document had been signed by Petitioner and Husband, plea counsel testified she could not produce it given she had shredded the case file years earlier.

At the conclusion of plea counsel's testimony, the PCR judge inquired whether counsel had favored one client over the other. In response, plea counsel stated:

> No. I did spend a lot more time with [Husband] in the beginning because he was—I mean, this guy had had the same job for so many years. He was very close to retirement and they had fired him. So we did—I spent a lot of time with him seeing if there was anything we could do to get his job back.
>
> As far a favoring one over the other, I certainly did not do that. I knew that Petitioner was in more trouble. I was hoping to get [Husband] extricated from the thing altogether. But, I mean, he did give a statement saying that he knew the stuff was there and he had gone to the house to remove it. And I did, on the record, ask that his sentence be reconsidered. I don't know if I, actually, filed it. But, I

did ask [the plea judge] to reconsider [Petitioner's] sentence.[2]

At the conclusion of the hearing, the PCR judge denied Petitioner's application. In reaching this decision, the PCR judge found Petitioner was not prejudiced by plea counsel's dual representation because there was "no actual conflict of interest in the matter." In his written order, the PCR judge affirmed his oral ruling and explained his decision. The PCR judge prefaced his analysis with a finding that plea counsel's testimony was credible whereas Petitioner's testimony was not credible. The PCR judge went on to conclude that Petitioner failed to meet her burden of proof that plea counsel was ineffective. In reaching this conclusion, the judge found Petitioner: admitted her guilt at the plea proceeding; acknowledged the facts presented by the solicitor; communicated that she understood the rights she was waiving by pleading guilty; was satisfied with plea counsel's representation; and had not been coerced in any way to plead guilty. Additionally, the PCR judge specifically held that there was no actual conflict of interest with plea counsel's dual representation of Petitioner and Husband.

This Court granted certiorari to review the PCR judge's denial of Petitioner's application for post-conviction relief.

DISCUSSION

Petitioner argues the PCR judge erred in failing to find that a conflict of interest existed when her plea counsel simultaneously represented both Petitioner and Husband during guilty pleas which arose out of related offenses. We agree.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). "There is a strong

[2] The record indicates that plea counsel only asked the judge to reconsider Husband's sentence.

presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), cert. denied, 128 S. Ct. 370 (2007).

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "In the context of a challenge to a guilty plea, a PCR applicant must establish both that his plea counsel's representation was deficient and that there is a reasonable probability that but for counsel's deficient representation, the applicant would not have pled guilty." James v. State, 377 S.C. 81, 83-84, 659 S.E.2d 148, 149 (2008). "In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law. Suber, 371 S.C. at 558-59, 640 S.E.2d at 886.

"The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." State v. Sterling, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "An actual conflict of interest occurs where an attorney

owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that an actual conflict of interest occurs:

> when a defense attorney places himself in a situation inherently conducive to divided loyalties . . . . If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir. 1979)).

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). Additionally, the fact that counsel does not advise a defendant of the potential conflict of interest does not affect the constitutionality of the conviction. Jackson v. State, 329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998). Moreover, the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

"However, a defendant need not demonstrate prejudice if there is an actual conflict of interest." Gregory, 364 S.C. at 153, 612 S.E.2d at 450. "'But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.'" Duncan, 281 S.C. at 438, 315 S.E.2d at 811 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)).

Applying the above-outlined analytical framework to the facts of the instant case, we find the PCR judge erred in denying Petitioner's application for post-conviction relief. As will be discussed, we hold the

PCR judge erred in failing to find that an actual conflict of interest existed, thus rendering plea counsel's representation ineffective.

At the PCR hearing, both plea counsel and Petitioner testified that counsel spent more time preparing Husband's case despite the fact that Petitioner was pleading guilty to a majority of the charged offenses and faced a more severe sentence.

In terms of the conflict of interest, plea counsel acknowledged that she discussed this issue with Husband, but could not recall specifically talking to Petitioner about such a conflict. Plea counsel also admitted that she argued for leniency in Husband's case and requested the plea judge reconsider his sentence. In contrast, plea counsel did not make these arguments on behalf of Petitioner. Moreover, Petitioner's and Husband's interests were adverse to one another given Petitioner pleaded guilty to the majority of the drug charges whereas Husband pleaded guilty to a single charge of PWID marijuana within proximity of a school. Significantly, plea counsel stated at the plea proceeding that Husband was originally "charged with everything," but she "was able to get the solicitor who had the case at the time to dismiss all of his cases." A review of the plea proceeding also reveals that plea counsel argued for leniency on behalf of Husband by comparing his more limited involvement in the crimes to that of Petitioner. We believe plea counsel's approach essentially pitted Husband against Petitioner, which was clearly detrimental to Petitioner's interests.

In light of the foregoing, we find Petitioner established that an actual conflict of interest adversely affected her plea counsel's performance. See Thomas v. State, 346 S.C. 140, 143-45, 551 S.E.2d 254, 256 (2001) (holding Petitioner in PCR proceeding demonstrated actual conflict of interest that affected her counsel's performance given counsel jointly represented Petitioner and her husband in a case where solicitor offered a plea bargain that would allow the charge against one spouse to be dismissed if the other spouse would plead guilty to the entire amount of cocaine); see also Staggs v. State, 372 S.C. 549, 551-52, 643 S.E.2d 690, 691-92 (2007) (Petitioner in PCR proceeding

demonstrated actual conflict of interest that adversely affected counsel's trial performance where his counsel, who represented him on the charge of murder, also simultaneously represented Petitioner's father, mother, and brother on related accessory after the fact of murder charges); see generally Allan L. Schwartz, Circumstances Giving Rise to Conflict of Interest Between or Among Criminal Codefendants Precluding Representation by Same Counsel, 34 A.L.R.3d 470 (1970 & Supp. 2008) (outlining cases which consider what particular circumstances give rise to conflict of interest where single counsel represents multiple codefendants).

Because Petitioner demonstrated an actual conflict of interest, she did not have to demonstrate prejudice in order to be entitled to post-conviction relief. Accordingly, we reverse the decision of the PCR judge.

REVERSED.

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

The Supreme Court of South Carolina

In the Matter of Samuel
Michael Ogburn, Respondent.

ORDER

Respondent was suspended on December 10, 2007, for a period of sixty (60) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

July 28, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sandra Blanding, Appellant,

v.

Long Beach Mortgage Company, Washington Mutual, Inc., Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust, Respondents.

Appeal From Berkeley County
Robert E. Watson, Master-in-Equity

Opinion No. 4387
Submitted May 1, 2008 – Filed May 6, 2008
Withdrawn, Substituted and Refiled July 21, 2008

AFFIRMED

Jay J. Hulst, of Moncks Corner, for Appellant.

Tina Cundari and Elizabeth Van Doren Gray, both of Columbia, for Respondents.

HUFF, J.: In this declaratory judgment action involving insurance proceeds, Sandra Blanding appeals the master's grant of summary judgment in favor of Long Beach Mortgage Company, Washington Mutual, Inc., and Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust. We affirm. [1]

FACTUAL/PROCEDURAL BACKGROUND

The present case arises out of a dispute regarding the parties' rights with respect to casualty insurance proceeds paid for foreclosed property owned by Sandra Blanding. In February 2003, Blanding executed and delivered a mortgage for $40,000 to Money First Financial Services, Inc., for the purchase of a manufactured home. The mortgage was secured by real property located in Berkley County, South Carolina, to which the manufactured home was permanently attached. Shortly thereafter, the mortgage was assigned to Long Beach Mortgage Company, a wholly owned subsidiary of Washington Mutual, Inc. Approximately one year later, in January 2004, the mortgage was assigned to Deutsche Bank National Trust Company, as trustee for Long Beach Mortgage Loan Trust 2003-4.[2]

As the borrower, Blanding was required to maintain insurance on her property which named Lender as mortgagee and/or as an additional loss payee. Specifically, the mortgage requires as follows:

> **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against

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

[2] Collectively, Long Beach Mortgage Company, Washington Mutual, Inc. and Deutsche Bank National Trust Company are the lender and defendants in this case (hereinafter "Lender").

> loss by fire . . . . All insurance policies required by Lender and renewals of such policies . . . shall name Lender as mortgagee and/or as an additional loss payee.

Additionally, the mortgage provides: "[i]f Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense." The mortgage further states that in the event of loss:

> Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance proceeds were required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened . . . . If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

Finally, the mortgage provides that attorneys' fees incurred in "a legal proceeding that might significantly affect Lender's interest in the property and/or rights under this Security Instrument" shall become the additional debt of Blanding as the borrower.

In August 2004, Blanding purchased a home insurance policy from Foremost Insurance Company (Foremost). The policy issued by Foremost provided for $63,000 worth of coverage on Blanding's residence and named Washington Mutual as the lienholder. In addition, the policy included an "other insurance" clause providing "[i]f both this and other insurance apply to a loss, [Foremost] will pay our share. Our share will be the proportionate amount that this insurance bears to the total amount of all applicable insurance." In November 2004 Lender, apparently under the misapprehension that Blanding had not obtained coverage on the property as required, obtained an insurance policy from American Security Insurance Company (American Security) providing $48,000 worth of coverage on

Blanding's property. The American Security policy also included an "other insurance" clause which states "[i]f there is any other valid or collectible insurance which would attach if the insurance under this policy had not been effected, this insurance shall apply only as excess and in no event as contributing insurance and then only after all other insurance has been exhausted."

On December 7, 2004, the Master-in-Equity issued an order finding Blanding failed to make payments due as provided on the note. He ordered Blanding's mortgage be foreclosed and the property sold at public auction. At the time of foreclosure, the total debt due on the mortgage, including interest, escrow adjustments, late charges, costs, and attorneys' fees, was $51,995.14. On January 1, 2005, prior to the foreclosure sale, Blanding's residence was destroyed by fire. On January 5, 2005, the property was sold at public auction to Lender for $2,500.

On January 31, 2005, American Security issued a check to Washington Mutual Bank in the amount of $22,403.91 for losses arising out of the fire. Thereafter, on May 27, 2005, Foremost issued a check in the amount of $62,750[3] made payable to Blanding and her attorneys, as well as Washington Mutual and Deutsche Bank. When Lender discovered proceeds were issued under the Foremost policy, Lender returned the $22,403.91 to American Security based on its determination it was required to do so under the terms of the policy. The parties disagreed as to their rights to the Foremost proceeds, with Lender asserting these proceeds were to be applied first to the full amount of Blanding's debt due on the mortgage.

Blanding filed this declaratory judgment action on November 10, 2005 asserting Lender failed and refused to apply the other insurance proceeds paid in connection with the loss, and claiming she was entitled to an accounting of her debt and application of "any and all insurance proceeds paid or payable to

[3] The check initially issued by Foremost, in the amount of $62,750, represents the total amount of coverage less the $250 deductible. Later, when the initial check expired and Blanding requested a new one, Foremost issued a check in the amount of $63,000, instead of $62,750.

or received by [Lender]." Lender answered and counterclaimed, asserting the American Security policy applied only "as excess and in no event as contributing," and it was therefore entitled to receive from Blanding the amount of the debt at the time of foreclosure, less the $2,500 received in the foreclosure sale, together with prejudgment interest and attorneys' fees. Blanding replied to Lender's counterclaim, maintaining she was entitled to a set-off or credit for insurance proceeds received by Lender, including those retuned to American Security. She further generally denied Lender's counterclaim for prejudgment interest and attorneys' fees, and asserted her own right to recover attorneys' fees and costs.

The matter was referred to the Master-in-Equity by order dated January 27, 2006. Subsequently, both Blanding and Lender filed motions for summary judgment seeking a determination of the parties' rights with respect to the casualty insurance proceeds paid for Blanding's foreclosed property. Blanding argued she was entitled to have the proceeds from the American Security policy credited toward her debt and she was therefore due $35,908.77 from the Foremost proceeds, while Lender was entitled to only $27,091.23. In the alternative, Blanding maintained the excess "other insurance" clause in the American Security policy was void as a matter of law, and therefore the American Security coverage was contributive insurance. Under this application, Blanding claimed entitlement to a credit of $27,216, leaving a balance due to Lender of $22,279.14 and $40,720.86 due Blanding from the Foremost proceeds. Lender asserted the American Security policy provided excess coverage only, and that Blanding was seeking to recover insurance proceeds to which she was not entitled and had refused to endorse the Foremost check to allow the proceeds to be applied to her debt. Accordingly, Lender maintained it was entitled to recover prejudgment interest and attorneys' fees incurred in the current litigation. Blanding argued Lender was not entitled to attorneys' fees as the mortgage had been released, and any obligations under the mortgage agreement were therefore terminated.

Upon consideration of the cross-motions for summary judgment, and following a separate hearing on attorneys' fees, the Master ruled Lender was "entitled to be paid for the debt owed at the time of foreclosure, less $2,500,

the amount bid by [Lender] at the foreclosure sale, plus pre-judgment interest, [attorneys'] fees, and costs" from the proceeds available in this case. The master further determined the Foremost policy provided primary coverage while the American Security policy provided secondary or excess coverage only, and the insurance proceeds from Blanding's Foremost policy should be the first applied to the sums secured by the mortgage agreement. He found Lender entitled to $49,495.14 on Blanding's debt due, plus $6,736.48 in prejudgment interest and $6,768.38 in attorneys' fees. Accordingly, the Master ordered Lender was entitled to the full amount of the $63,000 in available insurance proceeds. Blanding then filed a motion for reconsideration and to alter or amend judgment pursuant to Rule 59 of the South Carolina Rules of Civil Procedure which, with the exception of the deletion of one sentence from the order, was denied. This appeal followed.

STANDARD OF REVIEW

Summary judgment is proper where no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Hurst v. E. Coast Hockey League, Inc., 371 S.C. 33, 36, 637 S.E.2d 560, 561 (2006). On appeal from a grant of summary judgment, the appellate court applies the same standard governing the trial court. Id. at 35, 637 S.E.2d at 561. The trial court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

LAW/ANALYSIS

I. Master's Refusal to Apply American Security Proceeds

Blanding first contends the master erred in failing to apply the insurance proceeds paid by American Security to reduce her outstanding debt. She argues that the American Security payment of $22,403.91 was paid in settlement of the fire and, under the terms of the mortgage agreement, these sums must therefore be applied to her debt. Specifically, she points to the language of the agreement that "any insurance proceeds, . . . shall be applied to restoration or repair," and if " restoration or repair is not economically feasible . . . , the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower." Blanding asserts this language requires Lender to apply the proceeds of the American Security policy to her debt, and that she is then entitled to any excess proceeds after application of both the American Security and Foremost policy proceeds.

In making this argument, Blanding does not dispute that the sums originally paid by American Security were returned by Lender after discovery of the Foremost coverage. However, she contends the return of those funds did not "expunge the payment of those proceeds" nor alter the requirement that these proceeds be applied to her mortgage debt. Blanding makes several arguments as to why the returned funds must be included in the payment of insurance proceeds under the mortgage agreement.

A. "Other Insurance" Clauses

Blanding argues the Master's determination of which policy pays first is irrelevant, as both insurers have already paid. She asserts the "other insurance" clauses, used by the Master to determine which policy was primary, do not apply because this is not a contribution action between insurers, but a dispute between insureds over proceeds that have already been paid. Accordingly she maintains the Master erroneously relied on the "other

insurance" clauses in the two policies in refusing to apply the American Security proceeds. We disagree.

"[C]ourts faced with the distasteful chore of apportioning liabilities among multiple insurers should look to the language of the policies to ascertain whether the policies are intended to provide primary or secondary coverage." S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc., 327 S.C. 207, 214, 489 S.E.2d 200, 203 (1997) (emphasis in original). "In other words, the relevant question is not whether a policy is blanket or specific, but what is the 'total policy insuring intent' embodied within the policy." Id. "One method insurance companies use to indicate whether they intend to provide primary, secondary, or other coverage is to include in their policies 'other insurance' clauses that attempt to apportion liability among multiple insurers." Id. at 215, 489 S.E.2d at 204. "An 'excess' clause, the most common kind of 'other insurance' clause, provides a policy will cover only amounts exceeding the policy limits of other insurance covering the same risk to the same property." Id.

We find disingenuous Blanding's assertion that the rules concerning determination of policy coverage among more than one policy do not apply because this is an action between insureds, as opposed to insurers. The crux of this litigation is which proceeds are available to be applied to the loss. In the present case, the mortgage agreement provides Blanding is required to maintain property insurance naming Lender "as mortgagee and/or an additional loss payee." In the event of loss, the mortgage further provides: "the insurance proceeds shall be applied to the sums secured by [the mortgage agreement], whether or not then due, with excess, if any, paid to Borrower." Therefore, under the plain and unambiguous terms of the mortgage agreement, any insurance proceeds must be first applied to sums secured by the mortgage agreement, with any excess paid to Blanding. The American Security policy provided that if there were "any other valid or collectible insurance which would attach if the insurance under this policy had not been effected, this insurance shall apply only as excess and in no event as contributing insurance and then only after all other insurance has been exhausted." (emphasis added). Here, it is undisputed that the Foremost policy was collectible insurance that would attach had the American Security

policy not been effected. Additionally, the Foremost policy was sufficient to cover the loss of the insured property and, thus, the American Security policy, as an excess policy, would provide no proceeds.

B. Policies' Coverage of the Same Interests for Same Insureds

Blanding maintains, however, even if the Master properly considered the "other insurance" clauses to apply in a dispute between insureds, his analysis was still flawed because, in order for the "other insurance" clauses to apply, the policies must cover the same risk and same interest for the benefit of the same insured over the same period of time. She argues the policies cover different interests for the benefit of different insureds, and therefore the "other insurance" clauses are inapplicable. We disagree.

Our courts have held that "'[o]ther insurance' clauses are intended to apportion an insured loss between or among insurers where two or more policies offer coverage of the same risk and same interest for the benefit of the same insured for the same period." S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc., 327 S.C. 207, 212, 489 S.E.2d 200, 202 (1997). "These clauses began their lives as an attempt to prevent fraud in the overinsuring of property." Id. Further, our courts have held that a mortgagor and mortgagee have separate and distinct interests in the same property which they may insure. Johnson v. Fid. & Guar. Ins. Co., 245 S.C. 205, 209, 140 S.E.2d 153, 155 (1965); Murdaugh v. Traders & Mechs. Ins. Co., 218 S.C. 299, 307-308, 62 S.E.2d 723, 726-27 (1950).

While we agree with Blanding that she and Lender had separate and distinct interests in the property for insurance purposes, we disagree that, as a result, the two policies in question fail to cover the same interests for the benefit of the same insureds. Although the parties have separate insurable interests, it is possible for both to have contracted to insure the same insurable interest. Thomas v. Penn Mut. Fire Ins. Co., 244 S.C. 581, 585, 137 S.E.2d 856, 858 (1964). The policy issued by Foremost provided for $63,000 worth of coverage on Blanding's dwelling at her Pineville address, naming Blanding as the insured but also denoting Washington Mutual as the lienholder, as required by the mortgage agreement which states Blanding

"shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire" and that "[a]ll insurance policies required by Lender and renewals of such policies . . . shall name Lender as mortgagee and/or as an additional loss payee." Accordingly, the Foremost policy, while insuring Blanding's interest in the property, likewise insured Lender's interest in the property. The American Security policy provided the named insured mortgagee was Washington Mutual Bank, and named Blanding as the additional insured. It likewise insured the property at Blanding's Pineville address stating, "it is agreed that the insurance applies to the property described above and to any person shown as an Additional Insured with respect to such property. . . ." It further noted "[l]oss, if any, shall be adjusted with and payable to the above Named Insured Mortgagee, and the Additional Insureds as their interests may appear. . . ." Thus, the American Security policy insured the same property, during the same period, against the same risk for the benefit of the same insureds. Both policies were intended to provide coverage for the mortgaged property that was security for the debt. Thus, the two policies, while insuring the parties' separate and distinct interests, each insured the same interest of the mortgagor and the same interest of the mortgagee. In other words, while Blanding and Lender may have separate and distinct interests insured by the policies, both policies insured both parties' interests. Accordingly, we find the two policies contracted to insure the same insurable interest, and there is no merit to Blanding's assertion that the "other insurance" clause in the American Security policy is inapplicable on this basis.

C. "Other Insurance" Clause Conflict with Statutory Law

Finally Blanding claims, even if the policies did cover the same risks, interests, and insureds during the same period of time, the "other insurance" clause in the American Security policy conflicts with statutory law and is therefore invalid. Specifically, Blanding points to sections 38-75-20 and 38-75-220 of the South Carolina Code of Laws in support of this argument. Section 38-75-20 provides in pertinent part:

> No insurer doing business in this State may issue a fire insurance policy for more than the value stated in the policy or the value of

> the property to be insured. . . . If two or more policies are written upon the same property, they are considered to be contributive insurance, and, if the aggregate sum of all such insurance exceeds the insurable value of the property, as agreed by the insurer and the insured, each insurer, in the event of a total or partial loss, is liable for its pro rata share of insurance.

S.C. Code Ann. § 38-75-20 (2002). Section 38-75-220 provides in part:

> No insurer transacting a mobile home insurance business in this State and writing hazard insurance covering loss from physical damage to the mobile homes may issue a policy for more than the value stated in the policy or the value of the property to be insured. . . . If two or more such policies are written upon the same property and covering the same interests, they are considered to be contributive insurance, and, if the aggregate sum of all such insurance exceeds the insurable value of the property, as agreed by the insured and insurer, each insurer, in the event of a total or partial loss, is liable for its pro rata share of insurance.

S.C. Code Ann. § 38-75-220 (2002).

Blanding argues, to the extent the two policies in question cover the same interests, the "other insurance" clause in the American Security policy is invalid because it conflicts with sections 38-75-20 and 38-75-220 of the South Carolina Code. She argues under these sections such policies are deemed to be concurrent and contributive as a matter of law, and as such, each insurer is primarily liable for its pro rata share of the loss to the extent the aggregate sum of insurance exceeds the insurable value of the property. Again, we disagree.

"[I]f policies insure the same entity and interest against the same casualty, then the coverage provided by the policies is concurrent, thus requiring pro rata contribution absent a contrary provision in an 'other insurance' clause contained in one of the policies." S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc., 327 S.C. 207, 214, 489 S.E.2d 200, 203 (1997)

(emphasis added). Here, the American Security policy contains an "other insurance" clause that provides "[i]f there is any other valid or collectible insurance which would attach if the insurance under this policy had not been effected, this insurance shall apply only as excess and in no event as contributing insurance and then only after all other insurance has been exhausted." Thus, the policy language clearly provides to the contrary and the coverage provided by the policy is not "concurrent and contributive as a matter of law."

II. Award of Attorneys' Fees

Blanding raises as her next issue the propriety of the award of attorneys' fees.[4] The Master determined attorneys' fees were warranted under the terms of the mortgage agreement, which provided such fees became the additional debt of Blanding. Here, the mortgage agreement contains broad language regarding Lenders' rights to recover attorneys' fees:

> **Protection of Lender's Interest in the Property and Rights Under this Security Agreement**. If . . . there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations) . . . then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument . . . . Lender's actions can include, but are not limited to . . . (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument.

[4] In the present case, the master awarded Lender attorneys' fees in the amount of $6,768.38, which is the amount of proceeds remaining after the debt ($49,495.14) and prejudgment interest ($6,736.48) were satisfied. The amount of attorneys' fees, which is only a small portion of the $39,335.50 Lender asserted it incurred, is not in dispute.

> Any amount disbursed by Lender under this [section] shall become additional debt of Borrower secured by this Security Instrument.

Blanding maintains, however, attorneys' fees are not recoverable under the terms of the mortgage because Lender's rights under the mortgage were extinguished when the foreclosure judgment was entered. We disagree.

Blanding cites section 29-3-780 of the Code for the proposition that once Lender foreclosed the mortgage and the property was sold, Lender's lien against the property was released, cancelled, and satisfied. This section provides that "[u]pon confirmation of the circuit court of the report of the master . . . pursuant to decree of foreclosure, the officer of the court making the sale shall cause to be recorded in the office where the foreclosed mortgage is recorded a release, cancellation, and satisfaction of the lien. . . ." S.C. Code Ann. § 29-3-780 (2007). This section further provides, "However, nothing in this section may be construed to satisfy any unpaid portion of the debt secured by the mortgage." Id. Thus, while the mortgage may well have been deemed "released, cancelled, and satisfied" under this section, the sale is not construed to satisfy any unpaid portion of the debt secured by the mortgage agreement. By the clear terms of the agreement, the attorneys' fees incurred by Lender in pursuing the insurance proceeds became the additional debt of Blanding secured by the mortgage agreement and were thus unpaid debt secured by the mortgage agreement that remained unsatisfied under section 29-3-780.

Blanding further cites Ryan v. S. Mut. Bldg. & Loan Ass'n, 50 S.C. 185, 27 S.E. 618 (1897) for the proposition that the mortgage agreement merged into the foreclosure judgment such that the contract was extinguished, and therefore the attorneys' fee provision was no longer viable. However, Ryan involved a suit for double the sum of interest collected by the defendant alleged to be received in excess of lawful interest, challenging the collection of the money as usurious, instituted subsequent to receipt of the proceeds in a foreclosure judgment and sale. Id. at 186, 27 S.E.2d at 618-19. There, the court determined the contract said to be usurious had become

merged into the judgment of foreclosure, extinguishing the original contract. Id. at 190, 27 S.E. at 619. The court further noted "[t]he judgment became a new debt," and was not "infected by the usurious nature of the cause of action." Id. In so ruling, the court was guided by the law that "[a] judgment is the final determination of the rights of the parties in an action . . . and is conclusive of all matter necessarily involved, whether raised or not; especially if the party denying the adjudication knew of the matter, and could have interposed it at the previous trial, either in support of a claim or as a defense." Id. at 188, 27 S.E. at 619. In the case at hand, Lender could not have raised the issue of attorneys' fees incurred in the collection of the insurance proceeds, as no insurance issues were implicated at that time since the property had not yet been destroyed by fire. Thus, this matter could not have been raised at the foreclosure proceeding and we do not believe the mortgage agreement was completely merged into the foreclosure such as to extinguish the broad conveyance of rights to collect attorneys' fees in "a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under" the mortgage agreement. Accordingly, we find no error in the award of attorneys' fees.

III. Award of Prejudgment Interest

Lastly, Blanding contends the Master erred in awarding prejudgment interest to Lender, running from the date of issuance of the Foremost check to Blanding until the date of the summary judgment hearing. We disagree.

Blanding asserts the $49,495.14 awarded to Lender from the insurance proceeds does not constitute damages and this is, therefore, not a liquidated damages case with a stated account. She further maintains she never had possession or control of the proceeds and, accordingly, could not have paid the proceeds to Lender. "The law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty." Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 133, 631, S.E.2d 252, 258 (2006). Thus, "the proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by

conditions existing at the time the claim arose." Id. at 133, 631 S.E.2d at 259. Consequently, "[t]he right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party." Id. at 133-34, 631 S.E.2d at 259. Rather, "[i]t is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable." Id. at 134, 631 S.E.2d at 259.

Here, Blanding's indebtedness was certain throughout litigation. The measure of recovery was fixed by conditions existing at the time the proceeds were issued. Accordingly, Blanding was obligated to pay the insurance proceeds when she received them in May 2005. We further find no merit to Blanding's assertion she had no control over the proceeds because the check was made out to her along with Lender. She merely had to endorse the check along with Lender to have the proceeds applied to her debt.

Blanding also argues Lender is entitled to no more than $49,495.14 from the available insurance proceeds as that is the extent of Lender's interest in the property at the time of the fire. Thus, she maintains, by awarding prejudgment interest, the Master effectively allowed Lenders to recover a deficiency judgment. However, the award of prejudgment interest did not alter or add to the Lender's interest in the property. As noted by the master, "[t]he foreclosure judgment fixed the amount of [Blanding's] debt and was a final adjudication thereof. The award of prejudgment interest does not alter the foreclosure judgment. The interest is being awarded on top of the amount due and owing, not in alteration of that amount."

Blanding next contends if Lenders are entitled to prejudgment interest on their interest in the proceeds, she is likewise entitled to prejudgment interest on the remaining insurance proceeds that she was due after payment of her debt. We disagree. In her complaint, Blanding sought application of available insurance proceeds. Lenders admitted the Foremost Insurance proceeds were to be applied to Blanding's debt, but denied that they refused to apply any other available insurance proceeds, i.e. those form the American Security policy. As previously found, the Foremost policy was sufficient to cover the loss of the insured property and, thus, the American Security policy, as an excess policy, provided no proceeds for the loss. Had Blanding

relinquished the sum certain due Lenders at the time the proceeds were issued to her, she would have received the excess proceeds from the Foremost policy at that time. It is clear Lenders sought only their share of the proceeds from the Foremost policy when this action was instituted by Blanding. Because Lenders did not deny Blanding her interest in the excess, we find no merit to her assertion she is entitled to prejudgment interest.

Blanding also contends the original foreclosure judgment included $7,517 in prejudgment interest on her debt and that by including prejudgment interest on this same debt, the Master's award amounted to a double recovery of prejudgment interest. Blanding fails to recognize, however, that this is a separate proceeding seeking insurance proceeds that were due to Lender. The prejudgment interest awarded by the Master here does not reflect that amount due in prejudgment interest from the mortgage foreclosure, but from the interest accrued from the time the insurance proceeds from the fire were made available by the Foremost check to Blanding, but were not paid to Lender as due.

Finally, Blanding argues, because the parties deposited the proceeds into the Clerk's Office by consent, she is relieved of any liability for prejudgment interest. She further asserts in a footnote that should Lender be entitled to an award of prejudgment interest, she should be allowed to offset the interest earned on the funds while on deposit with the Clerk.

In reviewing the record before us, it does not appear either of these arguments was raised to the Master in the summary judgment arguments. In her motion for reconsideration pursuant to Rule 59, SCRCP, Blanding stated only, "To the extent that any prejudgment interest is awarded to [Lender], [Blanding] is entitled to offset against any such award the interest earned while the funds were on deposit with the Clerk." In the hearing on her motion for reconsideration, Blanding questioned how the court intended "to treat the interest paid on the proceeds since their deposit with the court," stating that the Clerk pays interest on the funds deposited at around 4.5 percent. The Master indicated he was "not aware of that," did not know if that was correct, and stated the matter was not before him. He concluded, "I do not know anything about any interest that the Clerk of Court has been

awarding on this money and I am not going to do that." Accordingly, it appears Blanding's argument that she had no liability based upon the deposit of the funds with the Clerk was never raised to the Master and therefore is not properly preserved on appeal. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). As to the offset argument, this contention was first raised in Blanding's motion for reconsideration and therefore is not preserved for review. See Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a Rule 59, SCRCP, motion is not preserved for appellate review).[5]

Based upon the foregoing, the decision of the Master is

AFFIRMED.

ANDERSON and KITTREDGE, JJ., concur.

[5] We would note that the Master found Lender entitled to a total judgment of $63,000 from the insurance proceeds, inclusive of prejudgment interest. Lender will receive this specific amount, and thus Blanding should ultimately receive any remaining accrued interest on the $63,000 deposited with the Clerk.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carrie Williams and Robert Williams, Appellants,

v.

Nancy Watkins and Babcock Center, Inc., Respondents.

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4429
Submitted June 2, 2008 – Filed July 23, 2008

AFFIRMED

Hemphill P. Pride, II, of Columbia, for Appellants.

Christian Stegmaier, of Columbia, for Respondents.

KONDUROS, J.: This appeal arises from the circuit court's order granting summary judgment in favor of Babcock Center and its employee, Nancy Watkins, on Carrie and Robert Williamses' claims for defamation and the intentional infliction of emotional distress. On appeal, the Williamses

argue the court erred in finding South Carolina's Omnibus Adult Protection Act shields Babcock Center and Watkins from civil liability for claims stemming from their reporting the suspected abuse of a vulnerable adult. We affirm.[1]

FACTS

In 1991, the Department of Social Services (DSS) placed an eight-year old, disabled child (Client) in Carrie Williams's (Caregiver's) licensed, therapeutic foster care home. Caregiver's husband, Robert Williams, also lived in the home.[2] Caregiver subsequently contracted with Babcock Center to operate a CTH, and she continued to care for Client in her home until 2004.

On January 7, 2004, while attending a program at Babcock Center, Client told administrator, Nancy Watkins, of specific actions toward her by Caregiver's husband. Client was now twenty-one years old, and Watkins believed the conduct Client described to her was sexually abusive. Watkins immediately notified consulting psychologist, Dr. Wilton Hellams, of Client's disclosure. That evening, Client met with Dr. Hellams and repeated her specific allegations against Caregiver's husband. Following the counseling session, Dr. Hellams told Watkins he found Client's allegations to be credible. As a result, Watkins immediately moved Client to a respite-care home.

Pursuant to South Carolina law, DDSN regulations, and Babcock Center policy, the following day, Watkins reported Client's statements to the Sheriff's Department and the Adult Protective Services (APS) Program of DSS. Three months later, DSS notified Watkins its investigation had indicated "there was a potential for abuse" of Client in Caretaker's home.

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[1] This case was decided without oral argument pursuant to Rule 215, SCACR.

[2] The South Carolina Department of Disabilities and Special Needs (DDSN) contracted with Babcock Center to provide programs for vulnerable adults and to supervise their care in licensed community training homes (CTHs).

Upon receiving the APS report, the Center terminated its CTH contract with Caretaker.

Subsequently, Caretaker and her husband filed an action against Babcock Center and Watkins alleging defamation and the intentional infliction of emotional distress. As an affirmative defense to these claims, Babcock Center and Watkins asserted South Carolina's Omnibus Adult Protection Act shielded them from civil and criminal liability related to reporting Client's statements alleging sexual abuse by Caretaker's husband. The circuit court conducted a hearing on September 23, 2005, and granted summary judgment on both actions in favor of Babcock Center and Watkins. This appeal followed.

STANDARD OF REVIEW

In reviewing the grant of summary judgment, this court applies the same standard that governs the trial court; 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. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); see also Rule 56(c), SCRCP. "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant . . . ." Willis v. Wu., 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004). Summary judgment is appropriate when "plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." Byerly v. Connor, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992).

LAW/ANALYSIS

Caretaker and her husband argue the circuit court erred in granting summary judgment in favor of Babcock Center and Watkins because genuine issues of material fact remain regarding their actions for defamation and the intentional infliction of emotional distress. We disagree.

The Omnibus Adult Protection Act

In 1993, South Carolina's General Assembly enacted the Omnibus Adult Protection Act ("the Act") to protect vulnerable adults from abuse, neglect, and exploitation. 1993 Act No. 110, § 1, codified as S.C. Code Ann. §§ 43-35-5 to -595 (Supp. 2007).[3]

A. Vulnerable Adults

The Act promulgated statutes designed to protect a class of adults from abuse, neglect, and exploitation. The Act defines a "vulnerable adult" as:

> [A] person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.

S.C. Code Ann. § 43-35-10 (Supp. 2007).[4]

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[3] The purpose of the Act was to: address the continuing needs of vulnerable adults; define abuse, neglect, and exploitation in a uniform manner, without regard to setting; clarify reporting requirements; provide victims with emergency protective custody; define the court's role in adult protection; and provide civil and criminal penalties to perpetrators of the abuse, neglect, or exploitation of vulnerable adults. S.C. Code Ann. § 43-35-5 (Supp. 2007).

[4] Under the Act, a "facility" includes a nursing care, community residential care, or psychiatric facility, as well as any other "residential program operated or contracted for operation by the Department of Mental Health or [DDSN]." S.C. Code Ann. § 43-35-10(4) (Supp. 2007).

We find Client is a "vulnerable adult" under the Act because she is over eighteen years old, unable to provide for her own care or protection, and a resident of a facility. Accordingly, Client is entitled to special protections from abuse, neglect, and exploitation.

B. Mandated Reporters

The Act imposes a duty on certain individuals to report if they have "reason to believe that a vulnerable adult has been or is likely to be abused, neglected, or exploited." S.C. Code Ann. § 43-35-25(A) (Supp. 2007). Individuals designated as "mandated reporters" under the Act include physicians, nurses, dentists, optometrists, medical examiners, coroners, and other medical, mental health or allied health professionals, Christian Science practitioners, religious healers, school teachers, counselors, psychologists, mental health or mental retardation specialists, social or public assistance workers, caregivers, staff or volunteers of an adult day care center or facilities, and law enforcement officers. Id. Furthermore, the Act also requires reporting by "any other person who has actual knowledge that a vulnerable adult has been abused, neglected, or exploited." Id.[5] Reporting the suspected conduct within twenty-four hours or the following working day is the reporter's individual responsibility. S.C. Code Ann. § 43-35-25(C)-(D) (Supp. 2007). Provided the Act's mandatory reporting requirements are met, the reporter may additionally report suspected abuse, neglect, or exploitation directly to law enforcement; "and in cases of emergency, serious injury, or suspected sexual assault, law enforcement must be contacted immediately." S.C. Code Ann. § 43-35-25(G) (Supp. 2007).

We find Watkins's duties as a social worker and program administrator make her a mandated reporter under the Act. Accordingly, the Act imposes a duty on her to report Client's statements, which gave Watkins "reason to

[5] Moreover, the Act encourages voluntary reporting: "[A]ny person who has reason to believe that a vulnerable adult has been or may be abused, neglected, or exploited may report the incident." S.C. Code Ann. §43-35-25(B) (Supp. 2007).

believe" Caregiver's husband sexually assaulted Client. Additionally, because Watkins suspected sexual assault, the Act required her to report Client's statements to both APS and law enforcement. S.C. Code Ann. § 43-35-25 (Supp. 2007).

At the hearing before the circuit court, Caregiver's counsel contended Watkins "should have considered the source and nature of the complaint." In stating Watkins "reported a spurious allegation made by a profoundly mentally and physically handicapped young lady," counsel implies allegations of abusive conduct made by a vulnerable adult, such as Client, should be taken less seriously by a mandated reporter than if they were made by a functionally-average adult. Clearly, such an interpretation is contrary to the General Assembly's intent to provide enhanced protections to adults who are particularly vulnerable to mistreatment. Moreover, we believe the General Assembly established brief time limits for reporting precisely to discourage second-guessing by mandated reporters.

The Act defines abuse, neglect, and exploitation; however, neither the Act nor our courts have addressed the perspective from which a mandated reporter should view the vulnerable adult's allegations. The Minnesota Court of Appeals specifically addressed this question while construing a statute under its similar, Vulnerable Adults Act. In re Kleven, 736 N.W.2d 707 (Minn. Ct. App. 2007). In Kleven, an employee of a group home for disabled men argued the verbal abuse she allegedly had inflicted upon the men should be viewed from the perspective of the residents, all vulnerable adults, rather than from the perspective of a reasonable person. Id. at 710. However, the court held in Kleven that to accept such an argument "would mean that the more vulnerable the adult, the worse his caretaker could permissibly treat him. . . . [This] interpretation is an affront to the purpose of the act and leads to absurd results, which we presume the legislature did not intend." Id. at 711.

We find Watkins, by promptly reporting Client's statements to APS and law enforcement, acted precisely as the Act intended.

C. Immunity from Liability

Having determined Client is a vulnerable adult and Watkins is a mandated reporter, whose duty to report was triggered by Client's statements, we turn next to whether the Act shields Watkins and Babcock Center from civil and criminal liability that could otherwise arise from the act of reporting.

> A person who, acting in good faith, reports pursuant to this chapter or who participates in an investigation or judicial proceeding resulting from a report is immune from civil and criminal liability which may otherwise result by reason of this action. In a civil or criminal proceeding good faith is a rebuttable presumption.

S.C. Code Ann. § 43-35-75(A) (Supp. 2007).

According to the affidavit of APS supervisor, Judy Irvin, Watkins reported Client's suspected sexual abuse "in good faith." Furthermore, under the Act, a report of the abuse, neglect, or exploitation of a vulnerable adult is presumably made "in good faith." Caretaker fails to produce evidence that defeats the presumption that Watkins reported in good faith. Additionally, our review of the record confirms Watkins reported Client's suspected abuse in good faith. Accordingly, we conclude Watkins and Babcock Center are immune from any potential liability flowing from the report.[6]

[6] Richland County Deputy Terry Cryer interviewed Client and stated he found the allegations had merit. Moreover, the DSS report stated Watkins reported in good faith and "there was potential for abuse" in Caretaker's licensed CTH.

D. Penalties for Failure to Report

Caretaker and her husband further allege Watkins improperly reported Client's allegations to the Sheriff's Department and DSS. We disagree.

To the contrary, a mandated reporter who has actual knowledge that abuse, neglect, or exploitation of a vulnerable adult has occurred, and who knowingly and willfully fails to report this knowledge is guilty of a misdemeanor, and upon conviction, the person must be fined in an amount up to $2,500 or imprisoned up to one year. S.C. Code Ann. § 43-35-85(A) (Supp. 2007). Furthermore, a mandated reporter with reason to believe abuse, neglect, or exploitation of a vulnerable adult has occurred, or is likely to occur, and who knowingly and willfully fails to report is subject to disciplinary action by the appropriate licensing board. Id. Therefore, we find Watkins properly reported Client's allegations to law enforcement and DSS.

CONCLUSION

Finding no genuine issue exists as to any material fact, we hold the Act entitles Watkins and Babcock Center to immunity from all civil and criminal liability related to their good faith report of the suspected abuse of a vulnerable adult. Additionally, under these facts, a failure to report the suspected sexual abuse would have resulted in a violation of the law, subjected a mandated reporter to penalties, and most importantly, subjected a vulnerable adult to the continuing potential for abuse. Accordingly, the circuit court's order granting summary judgment is

AFFIRMED.

HEARN, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Elbert W. Breeze, Appellant.

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

Opinion No. 4430
Submitted June 2, 3008 – Filed July 23, 3008

AFFIRMED

Appellate Defender Eleanor Duffy Cleary, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Christina J. Catoe, Office of the Attorney General, all of Columbia; and

Solicitor Robert Mills Ariail of Greenville, for Respondent.

WILLIAMS, J.: In this criminal case, we affirm the trial court's determination that Elbert Breeze (Breeze) properly waived his Miranda[1] rights. We also affirm the trial court's decision not to charge the jury that an adverse inference could be suggested from the State's failure to preserve the marijuana.

FACTS

Officer Michael Collier (Collier) of the South Carolina Highway Patrol was observing a driver's license checkpoint in Greenville County, South Carolina. Collier observed Breeze approach the checkpoint, abruptly stop, and jerk his car into a driveway without using a turn signal. Collier approached Breeze and requested Breeze provide his driver's license. In response to this request, Breeze "took off running."

Collier chased Breeze, pushed him to the ground, and ordered him to remain down. Breeze got up, and Collier responded by using pepper spray on him. Breeze still managed to get up and run. Collier again chased and pushed Breeze to the ground. This series of events occurred a few more times until additional officers arrived to assist Collier. Breeze was once again sprayed with pepper spray, subdued, and arrested. After Breeze was placed in handcuffs, officers offset the effects of the pepper spray by decontaminating Breeze with an aerosol water bottle.

After Breeze's arrest, Officer Johnny Black (Black) of the South Carolina Highway Patrol informed Breeze of his Miranda rights. Subsequently, Breeze was searched based on a search incident to the arrest. This search revealed a substance, which was later tested to be marijuana. The total weight of the marijuana was 394.34 grams. After being informed of his

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

Miranda rights, Breeze admitted to the officer the marijuana belonged to him. Breeze stated he ran because he "had five bags of marijuana in his pockets . . . ."

Breeze argued he did not freely and voluntarily waive his right to remain silent. The trial court found the State had proved Breeze "voluntarily and intelligently gave up his rights and that his statement was voluntary."

Prior to trial, the State informed Breeze the marijuana had been destroyed. Breeze asked the trial judge to charge the jury with the following: "When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party." The trial judge denied this request.

Following a jury trial, Breeze was convicted of possession of marijuana with intent to distribute and resisting arrest. Breeze was sentenced to seven years for the possession with intent to distribute charge and one year for the resisting arrest charge. The sentences were to run consecutively. This appeal follows.

STANDARD OF REVIEW

In criminal cases, this Court reviews errors of law only. State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007). Thus, we are bound by the trial court's factual findings unless they are clearly erroneous. Id.

LAW/ANALYSIS

Breeze makes three arguments on appeal. First, he argues the trial court committed error when it refused to suppress his statement to the police. Second, he claims the trial court committed error by not allowing him to argue that the destruction of the marijuana was a violation of his right to a fair trial under the Due Process Clause. Third, Breeze contends the trial court erred in refusing to instruct the jury that an adverse inference could be made from the State's failure to produce the marijuana. We address each argument in turn.

A. Breeze's statement

Breeze initially contends the trial court improperly determined his statement was voluntary. We disagree.

The process for ascertaining whether a statement is voluntary is bifurcated because the process involves determinations by both the trial judge and the jury. Id. at 378-79, 652 S.E.2d at 448. Initially, the trial judge must conduct an evidentiary hearing[2] in the absence of the jury. Id. At this phase of the proceedings, the State must show the statement was voluntarily made by a preponderance of the evidence. Id. If the trial court determines the State has met its burden, the statement is submitted to the jury where its voluntariness must be established beyond a reasonable doubt. Id.

Our role when reviewing a trial court's ruling concerning the admissibility of a statement upon proof of its voluntariness is not to reevaluate the facts based on our view of the preponderance of the evidence. Id. Rather, our standard of review is limited to determining whether the trial court's ruling is supported by any evidence. Id. Thus, on appeal the trial court's findings as to the voluntariness of a statement will not be reversed unless they are so erroneous as to show an abuse of discretion. Id. With this is mind, we now turn our attention to the trial court's determination that Breeze's statement was voluntary.

The Fifth Amendment to the United States Constitution provides, "No person shall be . . . compelled in any criminal case to be a witness against

[2] This hearing is commonly referred to as a Jackson v. Denno hearing based upon the United States Supreme Court's decision in that case. 378 U.S. 368 (1964).

himself . . . ." U.S. Const. amend. V.[3] The Fifth Amendment's right against self-incrimination was made applicable to the individual states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964) ("We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States.").

Based on the Fifth Amendment's protection against self-incrimination, the United States Supreme Court announced, "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards . . . ." Miranda, 384 U.S. at 444. Before the accused is subjected to custodial interrogation, he or she must be informed of the right to remain silent; any statement made may be used as evidence against him or her; the right to the presence of an attorney; and if he or she cannot afford an attorney one will be appointed prior to questioning. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996).

However, the Fifth Amendment does not act to provide a uniform prohibition against the taking of any and all statements made by a suspect to law enforcement officials. Miller, 375 S.C. at 379-80, 652 S.E.2d at 449. Volunteered exculpatory or inculpatory statements arising from custodial interrogation are not barred by the Fifth Amendment. Id. The test of voluntariness is whether a suspect's will was overborne by the circumstances surrounding the given statement. Id. at 384, 652 S.E.2d at 451. In making this determination, the trial court must examine the totality of the circumstances surrounding the statement. Id.

In the present case, Breeze maintains his statement was not voluntary because his statement occurred shortly after a physical altercation caused by his resisting arrest. At the Jackson v. Denno hearing, the trial court heard testimony from Officer Black that Breeze acknowledged his understanding of

[3] The South Carolina Constitution has a similar provision, which provides that no person shall "be compelled in any criminal case to be a witness against himself." S.C. Const. art. I, § 12.

his rights by an "affirmative nod of the head and grunted, uh-huh." Black further testified Breeze was informed he had the option to answer any or all the questions or answer none of the questions. When asked whether he wished to cooperate, Breeze once again nodded his head up and down and grunted "uh-huh."

Black stated Breeze admitted the marijuana belonged to him. According to Black, Breeze stated he ran because he "had five bags of marijuana in his pockets." Black added Breeze was not threatened in any way to make a statement. Additionally, prior to being questioned, the officers offset the effects of the pepper spray by decontaminating Breeze with an aerosol water bottle.

Conversely, Breeze did not contradict Black's testimony with respect to the issue of whether the statement was voluntary. Breeze did not state the pepper spray made him less capable of understanding and waving his Miranda rights. Nor did Breeze assert he was coerced into making the statements. Faced with Black's undisputed testimony the trial court concluded the State had showed that Breeze voluntarily made the statement.

Based upon Black's testimony, we cannot conclude the trial court's ruling is unsupported by any evidence. See Miller, 375 S.C. at 387-88, 652 S.E.2d at 453 (upholding the trial court's determination of voluntariness because the trial court had the opportunity to listen to the testimony, assess the demeanor and credibility of witnesses and weigh evidence accordingly when defendant's attorney testified defendant was coerced into making a statement by a promise of a lenient sentence but where three law enforcement officials and an assistant attorney general denied any promise of lenience). We next turn our attention to Breeze's second and third issues on appeal.

B. Due Process and jury charge

Prior to trial, Breeze was informed the marijuana in question was inadvertently destroyed. Due to this destruction of evidence, Breeze contends the trial court's decision not to allow him to argue the evidence was destroyed as a result of the State's mistake was a violation of his right to a

fair trial under the Due Process Clause. Additionally, Breeze contends the trial court erred in refusing to instruct the jury that an adverse inference could be drawn from the State's failure to produce the marijuana. We disagree.

The State does not have an absolute duty to safeguard potentially useful evidence that might vindicate a defendant. State v. Cheeseboro, 346 S.C. 526, 538-39, 552 S.E.2d 300, 307 (2001). "To establish a due process violation, a defendant must demonstrate (1) that the State destroyed the evidence in bad faith, or (2) that the evidence possessed an exculpatory value apparent before the evidence was destroyed and the defendant cannot obtain other evidence of comparable value by other means." Id.

With respect to the bad faith prong, we believe the following facts demonstrate the State's actions were not in bad faith. Originally, Breeze's trial was scheduled for January 15, 2002. Breeze failed to appear, and as a result, a bench warrant for his arrest was issued. As a product of this warrant, when law enforcement officials checked the status of the case, it appeared as "disposed." It is the policy of the highway patrol to destroy drugs when a case is listed as disposed.

During Black's direct examination, the following two questions were proposed regarding the destruction of the marijuana: (1) "Does the highway patrol have a destruction of marijuana policy?" and (2) "[W]as that destruction policy followed?" Black answered in the affirmative to both questions. On cross-examination, Breeze asked, "Trooper Black, where is the marijuana?" Black replied, "It was destroyed pertinent to patrol policy." This was the extent of the testimony the jury heard regarding the destruction of the marijuana.

The foregoing demonstrates the State's actions were not in bad faith but rather an inadvertent mistake. We also note Breeze's actions, by not attending his first trial, led to his case being marked as disposed, which resulted in the destruction of the marijuana. Additionally, Breeze concedes the marijuana was not destroyed in bad faith. (Appellant's Br. 11)

Breeze may establish his Due Process rights were violated if he can demonstrate the destroyed evidence possessed an exculpatory value that was apparent before the evidence was destroyed and that he cannot obtain this evidence by other means. Cheeseboro, 346 S.C. at 538-39, 552 S.E.2d at 307. Here, the destroyed evidence Breeze complains of was inculpatory rather than exculpatory.

The substance found on Breeze was field tested by an officer who stated that in his opinion it was marijuana. Prior to its destruction, an expert qualified to analyze marijuana testified the substance obtained on Breeze was marijuana. Thus, the evidence destroyed was inculpatory rather than exculpatory. Moreover, Breeze also admits he failed to demonstrate the marijuana had any exculpatory value. (Appellant's Br. 11) Therefore, Breeze has failed to establish that the destruction of the marijuana violated his Due Process rights.

Additionally, contrary to Breeze's claims, the trial court did not prohibit Breeze from arguing the evidence was destroyed as a result of the State's mistake. The State provided Breeze with a "Destruction of Evidence" form. Breeze argued he should have been provided this form in response to his discovery request. Breeze asked the trial court to issue sanctions against the State by not allowing the State to mention the bench warrant or grant a mistrial.

The State responded to this argument by explaining the form was not disclosed during discovery because the State did not intend to introduce the form at trial. The State intended to limit testimony regarding the destruction of the marijuana to the effect that the drugs were destroyed. Breeze requested the trial court grant him permission to ask the testifying officers about the procedures relating to the destruction of the evidence and the State not be allowed to mention the bench warrant.

The trial court ruled if Breeze decided to entertain this argument, then the State would be permitted to go into the bench warrant because Breeze had opened the door. The trial court reasoned if Breeze inquired into the procedures utilized in destroying evidence, the State would necessarily have

to examine why the marijuana was destroyed in Breeze's case. Namely, the marijuana was destroyed because the case was listed as disposed, which was the result of the bench warrant.

The trial court did not prohibit Breeze from commenting on the State's mistake. The trial court conditioned Breeze's inquiry into the destroyed drugs on the fact the State had a right to introduce why the case was listed as disposed. Consequently, Breeze's contention that the trial court prevented him from making an argument regarding the destroyed marijuana fails.

Along this same line of reasoning, during the jury charge conference, Breeze requested the jury be charged that an adverse inference could be drawn against the State for failing to produce the marijuana. The trial court denied this request.

Generally, the trial judge is required to charge only the current and correct law of South Carolina. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302-03 (2002). To warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial. Id.

In support for his argument, Breeze cites Kershaw County Board of Education v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990).[4] However, the case cited is a civil case and is, therefore, clearly distinguishable on that ground to this criminal case. See State v. Simmons, 267 S.C. 479, 482, 229 S.E.2d 597, 598 (1976) ("Even greater caution should be exercised by the courts in permitting an adverse inference comment in criminal proceedings than in civil proceedings."). Even if we assume,

[4] Breeze requested the jury be charged as follows: "When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party." This language is remarkably similar to the language used in Kershaw County Board of Education. 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990) ("[W]hen evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party.").

without deciding, the trial court's failure to give the requested charge was erroneous, we conclude any such error did not result in prejudice.

According to testimony, Breeze ran from the police because he "had five bags of marijuana in his pockets." Two officers testified that the substance found on Breeze was marijuana. Additionally, Breeze admitted the marijuana belonged to him. Based upon these facts, we are convinced any error was harmless beyond a reasonable doubt. Burkhart, 350 S.C. at 261, 565 at 302-03 (To warrant reversal, a trial judge's refusal to give a requested charge must be both erroneous and prejudicial.).

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.[5]

THOMAS and PIEPER, JJ., concur.

[5] We decide this case without oral arguments pursuant to Rule 215, SCACR.