The Supreme Court of South Carolina

In the Matter of John Leon Schurlknight, Deceased.

Appellate Case No. 2012-213364

ORDER

Pursuant to Rule 31 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR), the Office of Disciplinary Counsel has filed a Petition for Appointment of Attorney to Protect Clients' Interests in this matter. The petition is granted.

IT IS ORDERED that Nicholas W. Lewis, Esquire, is hereby appointed to assume responsibility for Mr. Schurlknight's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Schurlknight maintained. Mr. Lewis shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Schurlknight's clients. Mr. Lewis may make disbursements from Mr. Schurlknight's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Schurlknight maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Schurlknight, shall serve as notice to the bank or other financial institution that Nicholas W. Lewis, Esquire, has been duly appointed by this Court.

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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina

November 15, 2012

The Supreme Court of South Carolina

In the Matter of John D. Bowers, Petitioner

Appellate Case No. 2012-213163

ORDER

The records in the office of the Clerk of the Supreme Court show that on October 16, 2007, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, dated September 20, 2012, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of John D.

Bowers shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
November 19, 2012

The Supreme Court of South Carolina

Re: Temporary Hearings in Family Court

ADMINISTRATIVE ORDER

Pursuant to Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the following procedures shall apply to all Temporary Hearings scheduled after the date of this Order:

1. Hearings on Motions for Temporary Relief shall be set as quickly as possible, but in no event later than four weeks of the filing of the motion. The Chief Judge for Administrative Purposes (Chief Judge), with the assistance of the Clerk of Court, shall monitor the scheduling of Temporary Hearings to ensure this deadline is met. In order for both sides to have adequate time to prepare for the temporary hearing, service of the Motion for Temporary Relief should be completed as expeditiously as possible.

2. Attorneys requesting a Temporary Hearing must designate on the Motion for Temporary Relief the name of opposing counsel if known.

3. Attorneys representing the moving party shall list all conflict dates and times when requesting a hearing on Motions for Temporary Relief.

4. The Clerk of Court shall coordinate the scheduling of Temporary Hearings with all counsel known to be involved in the case.

5. Attorneys representing parties at the Temporary Hearing are encouraged to consult with one another prior to the hearing to attempt to resolve issues on a temporary basis.

6. All routine Temporary Hearings shall be allotted fifteen minutes and each party shall be limited to eight pages of affidavits, excluding the Background Information Form SCCA 459 (11/12), proposed parenting plans, financial declarations, attorneys' fees affidavits, and attachments or exhibits offered

only as verification of information contained in the affidavits. Parties wishing to extend the fifteen minutes limit to thirty minutes must request additional time from the Clerk of Court and will not be held to the eight-page document limit set forth herein.

7. Either Counsel of record may upon written request of the Chief Administrative Judge ask that a matter be deemed complex, and if such request is granted, the Judge shall set the temporary hearing for appropriate time to consider the issues.

8. Each party shall submit at the Temporary Hearing a Financial Declaration, a Background Information Sheet Form SCCA 459 (11/12), and a proposed parenting plan pursuant to S.C. Code Section 63-15-220 if custody is contested. The presiding judge may consider imposing appropriate sanctions pursuant to Rule 20(d) of the *South Carolina Rules of Family Court* for willful noncompliance if a Financial Declaration is not produced to the family court judge at the time of the Temporary Hearing.

s/ Jean H. Toal
Jean Hoefer Toal
Chief Justice

November 21, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF _____ _____ Plaintiff, vs. _____ Defendant.	)))))))))	IN THE FAMILY COURT ____JUDICIAL CIRCUIT **TEMPORARY HEARING BACKGROUND INFORMATION PROVIDED BY:** _____ Docket No. _____

1. Date of Marriage: _____

2. Date of Separation: _____

3. Unemancipated Children:

Child's Name	Date of Birth	Child's Name	Date of Birth
1.		4.	
2.		5.	
3.		6.	

4. Gross Monthly Incomes (indicate if imputed):

Husband/Father: $_____ (_____ imputed)

Wife/Mother: $_____ (_____ imputed)

5. If child support is a contested issue, complete the following, using monthly amounts:

	Father	Mother
A. Previously Ordered Alimony OR Child Support:	_____	_____
B. Other Children in the Home:	_____	_____
C. Health Insurance Premium for Children:	_____	_____
D. Regularly Occurring Extraordinary Med. Exp.:	_____	_____
E. Gross Work-Related Child Care Expense:	_____	_____

6. The following are issues that are settled or contested as indicated on a temporary basis:

	Contested	Settled
Paternity	_____	_____
Custody	_____	_____
Visitation	_____	_____
Child Support	_____	_____
Alimony	_____	_____
Use of Property	_____	_____
Attorney's Fees and Costs	_____	_____
Vehicles	_____	_____
Health insurance	_____	_____

Other: _____

7. Attached is a completed and signed Financial Declaration.

8. If child support is a contested issue, attach a child support calculation pursuant to the South Carolina Department of Social Services Child Support Guidelines.

_____

Attorney for the Plaintiff/Defendant

The Supreme Court of South Carolina

RE: ABC Trial Rosters in the Family Court

O R D E R

Pursuant to Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that an ABC Trial Roster shall be set for each term of family court. Any contested case set for three or more hours shall be designated as the "A" case. Each "A" case is to be backed up by a "B" case and a "C" case. If the "A" case goes to trial, the "B" and "C" cases are to be continued and rescheduled as an "A" case. If any of the "A", "B", or "C" cases settle, the presiding judge shall conduct a hearing(s) to approve the settlement(s) and dispose of the case(s) before commencing the contested case.

This Order shall apply to the terms of family court set for the week of January 7, 2013 and all subsequent terms thereafter. This Order shall remain in effect until amended or rescinded by Order of the Chief Justice.

s/ Jean H. Toal
Jean Hoefer Toal
Chief Justice

November 21, 2012
Columbia, South Carolina

The Supreme Court of South Carolina

RE: Duties of Family Court Chief Judges for Administrative Purposes

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O R D E R

Pursuant to Article V, Section 4 of the South Carolina Constitution and S. C. Code Ann. §63-3-20,

IT IS ORDERED that the authority of a family court judge designated as a chief judge for administrative purposes shall include, but not be limited to, the following administrative purposes and acts:

1. To call, or cause to be called, meetings of the county bar associations within the circuit for the purpose of preparing trial rosters and for such other purposes as they shall deem necessary. In any circuit with two chief judges for administrative purposes, each chief judge may call, or cause to be called, these meetings for the county for which he or she has been designated as chief judge.

2. To set an ABC Trial Roster for all terms of family court and designate which presiding judge shall hear such trial roster or rosters. All contested "A" cases set for three or more hours are to be backed up by a "B" case and a "C" case. If the "A" case goes to trial, the "B" and "C" cases are to be continued and rescheduled as an "A" case. If any of the "A", "B", or "C" cases settle, the presiding judge shall conduct a hearing to approve the settlement and dispose of the case(s) before commencing the contested case. In any circuit with two chief judges for administrative purposes, each chief judge shall set the trial rosters and designate which presiding judge shall hear the trial roster or rosters for the county for which he or she has been designated as chief judge.

3. To establish ABC Trial Rosters that equitably assign cases to each presiding judge in all instances where multiple judges are presiding over concurrent terms of family court.

4. To review the list of proposed cases submitted by DSS Child Protective Services for the development of and inclusion on the trial roster. A status conference for a matter on the list of proposed cases or trial roster may be scheduled at any time.

5. To review the list of proposed Juvenile cases submitted by the Department of Juvenile Justice or the Solicitor's Office for the development of and inclusion on the trial roster. A status conference for a matter on the list of proposed cases or trial roster may be scheduled at any time.

6. To hold all temporary hearings within four weeks of the request for such hearing being filed. To ensure that this timeline is met, the chief judge for administrative purposes, with the assistance of the docketing clerk, shall monitor the scheduling of these matters. In all temporary hearings allotted fifteen minutes, each party shall be limited to eight pages of affidavits, excluding proposed parenting plans, financial declarations, attorneys' fees affidavits, and attachments or exhibits offered only as verification of information in the affidavits. Parties wishing to exceed the fifteen minutes limit must request additional time from the scheduling clerk. Any temporary hearing requiring more than thirty minutes must be deemed complex upon application to the chief judge.

7. To equitably apportion a multi-county term among the designated counties.

8. To assist the clerk of court in fulfilling his or her responsibility pursuant to S. C. Code Ann. §14-17-210(1976) to assign courtrooms and offices to the presiding circuit and family court judges.

9. To assure where practicable that family court convenes each day of a term within the guidelines specified by the Chief Justice. In any circuit with two chief judges for administrative purposes, each chief judge shall be responsible for the county for which he or she has been designated as chief judge.

10. To coordinate the activities of the family court with other affected persons and agencies to ensure cooperation and effective judicial service. In any circuit with two chief judges for administrative purposes, each chief judge shall coordinate the activities of the family court for the county for which he or she has been designated as chief judge.

11. To direct the clerks of court and presiding judges to keep and maintain such records as deemed necessary, upon the approval of the Chief Justice, of the disposition of cases during each term of family court. To help increase the reliability of caseload information, regularly review the lists of pending cases in the records maintained by the clerks of court with the data collected and reported by the South Carolina Judicial Department and bring any discrepancies to the attention of the clerks of court so that the records may be reconciled.

12. To grant continuances when requested by counsel or self-represented litigants for good and sufficient legal cause stated in writing prior to the commencement of any term of court.

13. To resolve any scheduling and other administrative problems which arise in conducting the terms of family court.

14. To ensure that all matters that arise during the weeks designated as "in chambers" are heard within the time frames set by statute or rule.

15. To consider requests to be relieved of appointments to serve as counsel or guardian ad litem for indigents pursuant to Rule 608(f)(3), SCACR.

16. To perform such other administrative duties as shall be assigned from time to time by the Chief Justice.

17. Except as specifically authorized herein, no rule affecting the operation of the courts shall be adopted without the prior approval of the Chief Justice.

IT IS FURTHER ORDERED that when a chief judge for administrative purposes has a conflict in a matter or proceeding and is thereby prevented from performing these duties in a matter or proceeding reserved to the chief judge for administrative purposes, the following procedures shall be followed:

a. In those circuits with only one chief administrative judge, the matter or proceeding shall be referred to the Chief Justice for assignment to a chief administrative judge of an adjoining circuit to administer.

b. In those circuits with two chief administrative judges, the matter or proceeding shall be referred to the other chief administrative judge to administer. If the other chief administrative judge is also disqualified, the matter or proceedings shall be referred to the Chief Justice for assignment to a chief administrative judge of an adjoining circuit to administer.

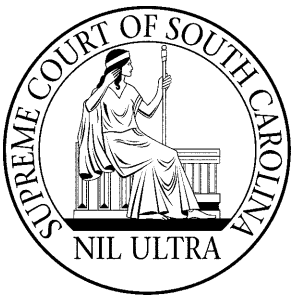
c. Should the chief administrative judge(s) in the circuit and those in the adjoining circuits be disqualified, the matter or proceeding shall be referred to the Chief Justice for assignment to a chief administrative judge of another circuit to administer.

IT IS FURTHER ORDERED that if a trial or hearing has commenced and the judge is unable to proceed, the chief judge for administrative purposes shall assign the trial or hearing to a successor judge. If the chief administrative judge has a conflict and is thereby prevented from performing this duty, the matter shall be referred to the Chief Justice to assign a successor judge. The successor judge may proceed with the trial or hearing upon certifying familiarity with the record and determining that the proceedings may be completed without prejudice to the parties. The successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify without undue burden. A successor judge may provide for the recall of any witness.

IT IS FURTHER ORDERED that the Order dated June 28, 2007 is rescinded. This Order shall remain in effect until amended or rescinded by Order of the Chief Justice.

s/ Jean H. Toal
Jean Hoefer Toal
Chief Justice

November 21, 2012
Columbia, South Carolina



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 42
November 21, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA

In The Supreme Court

Harleysville Mutual Insurance Company, Petitioner,

v.

The State of South Carolina; The South Carolina Department of Insurance; David Black, in his Official Capacity as Director of the South Carolina Department of Insurance; Crossmann Communities of North Carolina, Inc.; and Beazer Homes Corp., Respondents.

ORIGINAL JURISDICTION

Opinion No. 27189
Heard March 7, 2012 - Filed November 21, 2012

ACT DECLARED UNCONSTITUTIONAL IN PART

C. Mitchell Brown, Dwight F. Drake, William C. Wood, Jr., Michael J. Anzelmo, all of Nelson Mullins Riley & Scarborough, of Columbia, for Petitioner.

Charles E. Carpenter, Jr. and Carmen V. Ganjehsani, both of Carpenter Appeals & Trial Support, for SC Department of Insurance and David Black, Director; Attorney General Alan Wilson, Deputy

Attorney General Robert D. Cook, and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, for State of South Carolina; Wallace K. Lightsey and William M. Wilson, III, both of Wyche, PA, of Greenville, for Crossman Communities of North Carolina and Beazer Homes.

Debra Sherman Tedeschi, of Columbia, and Laura A. Foggan, of Wiley Rein, of Washington D.C., for Amicus Curiae American Insurance Association and Complex Insurance Claims Litigation Association.

CHIEF JUSTICE TOAL: This Court accepted the petition of Harleysville Mutual Insurance Company (Petitioner) in its Original Jurisdiction to assess constitutional challenges to Act No. 26 of the South Carolina Acts and Joint Resolutions, which regulates coverage provided by commercial general liability (CGL) insurance policies for construction-related work. Act No. 26, 2011 S.C. Acts 88 [hereinafter Act. No. 26]. We hold that the retroactivity clause of Act No. 26[1] violates the Contract Clauses of the state and federal Constitutions, and that the statute may only apply prospectively to CGL insurance contracts executed on or after its effective date of May 17, 2011.

FACTS/ PROCEDURAL BACKGROUND

On January 7, 2011, this Court issued an initial opinion in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company*, Op. No. 26909 (S.C. Sup. Ct. filed Jan. 7, 2011) (Shearouse Adv. Sh. No. 1 at 32) (*Crossmann I*), wherein it addressed the definition of "occurrence" in a CGL policy. In *Crossman I*, the Court held where "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," the term is unambiguous and retains its inherent fortuity requirement. *Crossmann I* at 46. Based on this determination, this Court found that Respondents Crossmann Communities of North Carolina, Inc. and Beazer Homes Investment Corporation (collectively Crossmann) were not entitled

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[1] Act. No. 26 is codified at S.C. Code Ann. § 38-61-70 (Supp. 2011). The retroactivity clause of Act No. 26 provides, "This section applies to any pending or future dispute over coverage that would otherwise be affected by this section as to all commercial general liability policies issued in the past, currently in existence, or issued in the future." *Id.*

to coverage under Petitioner's CGL policy for claims arising out of damage to condominiums caused by faulty workmanship. *Id.* at 47.

Specifically, this Court reasoned that because "the damage to the insured's property [was] no more than the natural and probable consequences of faulty workmanship," there was "no fortuity element present under this factual scenario." *Id.* The Court elaborated that, "[f]or faulty workmanship to give rise to potential coverage, the faulty workmanship must result in an occurrence, that is, an unintended, unforeseen, fortuitous, or injurious event." *Id.* at 49. In so ruling, this Court overruled its earlier decision in *Auto-Owners Insurance Company v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), on the ground that the *Newman* opinion "permitted coverage for faulty workmanship that directly causes further damage to property in the absence of an 'occurrence' with its fortuity underpinnings." *Id.*

On January 26, 2011, the General Assembly introduced Senate Bill 431, which was subsequently passed as Act No. 26 of the South Carolina Acts and Joint Resolutions and ratified on May 17, 2011 upon the Governor's signature. Act No. 26 was codified as section 38-61-70 of the South Carolina Code and provides in relevant parts:

> (B) Commercial general liability insurance policies shall contain or be deemed to contain a definition of "occurrence" that includes:
>
> > (1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and
> >
> > (2) property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself.
>
> . . . .
>
> (E) This section applies to any pending or future dispute over coverage that would otherwise be affected by this section as to all commercial general liability insurance policies issued in the past, currently in existence, or issued in the future.

S.C. Code Ann. § 38-61-70 (Supp. 2011).

On May 23, 2011, this Court heard arguments on the petition for rehearing in *Crossmann I*. That same day, Petitioner filed a Petition for Original Jurisdiction in which it sought a declaration by this Court that Act No. 26 is unconstitutional. This Court granted the petition on July 7, 2011.

On August 22, 2011, this Court changed its initial position in *Crossmann I* and found in favor of coverage based on an "occurrence." *See Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011) (*Crossmann II*).[2] In doing so, the Court reaffirmed its decision in *Newman* and clarified that "negligent or defective construction resulting in damage to otherwise non-defective components may constitute 'property damage,' but defective construction would not." *Id.* at 50, 717 S.E.2d at 594. The Court further found that, "the expanded definition of 'occurrence' is ambiguous and must be construed in favor of the insured, and the facts of the instant case trigger the insuring language of Harleysville's policies." *Id.*

ISSUES

I. Whether Act No. 26 of the South Carolina Acts and Joint Resolutions unconstitutionally violates the separation of power doctrine.

II. Whether Act No. 26 of the South Carolina Acts and Joint Resolutions is unconstitutional special legislation or deprives Petitioner of equal protection under the law.

III. Whether the retroactive application of Act No. 26 of the South Carolina Acts and Joint Resolutions unconstitutionally violates the state and federal Contract Clauses.

STANDARD OF REVIEW

"This Court has a very limited scope of review in cases involving a constitutional challenge to a statute." *Joytime Distribs. & Amusement Co. v. State,*

[2] We use the abbreviations *Crossman I* and *Crossman II* for ease of reference in referring to the procedural history of this case. In doing so, we do not suggest that *Crossman II* reverses *Crossman I* or that there are two separate opinions from this Court. An opinion of an appellate court is not final until the remittitur is filed in the lower court. *See, e.g., Brackenbrook North Charleston, LP v. Cnty. of Charleston*, 366 S.C. 503, 623 S.E.2d 91 (2005). The timely filing of a petition for rehearing stays the sending of the remittitur, thereby depriving the decision of finality. *See State v. Hallock*, 277 S.C. 413, 288 S.E.2d 398 (1982). *Crossman I* was neither final nor enforceable because the remittitur was stayed. After this Court granted rehearing and the parties reargued the case, we filed *Crossman II* and sent the remittitur. Consequently, *Crossman II* is the only decision of this Court.

338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Id.* "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." *Id.*

ANALYSIS

I. Separation of Powers Doctrine

Petitioner implores this Court to "strike down" Act No. 26 on the ground the General Assembly was without authority to create legislation which attempts to overturn and directly control this Court's ultimate decision in *Crossmann II*. Petitioner contends that in adopting the current version of Act No. 26, the General Assembly violated the doctrine of separation of powers.

The doctrine of separation of powers is succinctly stated in our constitution:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

S.C. Const. art. I, § 8. The operational effect of this doctrine is to prevent one branch of government from usurping the power and authority of another. *Knotts v. S.C. Dep't of Natural Res.*, 348 S.C. 1, 7, 558 S.E.2d 511, 514 (2002).

In explaining this constitutional provision in the context of statutory interpretation, the Court has stated, "The construction of a statute is a judicial function and responsibility." *Lindsay v. Nat'l Old Line Ins. Co.*, 262 S.C. 621, 628, 207 S.E.2d 75, 78 (1974). "Subject to constitutional limitations, the legislature has plenary power to amend a statute. However, a judicial [interpretation] of a statute is determinative of its meaning and effect, and any subsequent legislative amendment to the contrary will only be effective from the date of its enactment and cannot be applied retroactively." *Id.* at 629, 207 S.E.2d at 78; *see Steinke v. S.C. Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999) (concluding the General Assembly could not retroactively overrule this Court's interpretation of a statute, but noting that the General Assembly may resolve statutory conflict in future cases).

We find that the General Assembly did not violate the doctrine of separation of powers by enacting Act No. 26. As evidenced by the procedural and legislative history, it is clear the General Assembly wrote and ratified Act No. 26 in direct response to this Court's decision in *Crossmann I*. Had *Crossmann I* been this Court's final opinion, the doctrine might have been implicated. However, given that in *Crossmann II* we revised our initial decision in *Crossman I*, we do not find that the General Assembly, in this instance, retroactively overruled this Court's interpretation of a statute. Any concern about Act No. 26's retroactive provision is best analyzed under a Contract Clause framework, which we address in Part III of this opinion.

II. Special Legislation and Equal Protection

Petitioner next contends this Court should invalidate Act No. 26 as "special legislation" because it "is narrowly drafted to favor only a small section of one particular industry." Specifically, Petitioner claims Act No. 26 expands coverage for "construction professionals" performing "construction related work" under a CGL insurance policy, "but would not provide the same for a non-construction professional under an identical CGL insurance contract."

In a related argument, Petitioner asserts that Act No. 26 violates the Equal Protection Clause by "classifying and treating issuers of CGL policies differently than issuers of other types of insurance policies that make an 'occurrence' a prerequisite to coverage." Additionally, Petitioner argues that the "newly imposed definition of 'occurrence' applies only to certain CGL policies that insure a construction professional for liability arising from construction-related work." Ultimately, Petitioner claims there is no rational basis to warrant this differential treatment.[3]

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[3] In support of this position, Petitioner relies on *Broome v. Truluck*, 270 S.C. 227, 241 S.E.2d 739 (1978). In *Broome*, this Court found a statute violated equal protection as it granted immunity from suit after ten years to "architects, engineers, and contractors" engaged in the improvement of real property but not to owners and manufacturers of the components that went into the construction. We find *Broome* distinguishable as the statute in that case provided immunity from suit to an exclusive group of individuals involved in the same property. Here, the General Assembly did not single out a particular group for preferential treatment but, instead, broadly covered the entire construction industry and construction professionals.

With respect to the prohibition against special legislation, our state constitution provides, "The General Assembly of this State shall not enact local or special laws . . . where a general law can be made applicable." S.C. Const. art. III, § 34, cl. IX. "The purpose of the prohibition on special legislation is to make uniform where possible the statutory laws of this State in order to avoid duplicative or conflicting laws on the same subject." *Med. Soc'y of S.C. v. Med. Univ. of S.C.*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999).

Similarly, the Equal Protection Clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. "Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). "If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Id.* "Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis." *Id.*

Recently, this Court reiterated the framework established in *Kizer v. Clark*, 360 S.C. 86, 600 S.E.2d 529 (2004), to determine whether special legislation exists and to assess potential equal protection violations. *Cabiness v. Town of James Island*, 393 S.C. 176, 712 S.E.2d 416 (2011). In *Cabiness*, this Court explained:

> When a statute is challenged on the ground that it is special legislation, the first step is to identify the class of persons to whom the legislation applies. *Kizer*, 360 S.C. at 92–93, 600 S.E.2d at 532. In this regard, our special legislation framework largely tracts that for determining whether a statute violates one's right to equal protection. *Id.* at 93, 600 S.E.2d at 533. If the statute treats all class members equally, then the law is general legislation and permissible. *Id.* at 92–93, 600 S.E.2d at 532. The law must be general both in form and in operation. *Id.* at 93, 600 S.E.2d at 532.
>
> If the legislation does not apply uniformly, the second step is to determine the basis for that classification. *Id.* It is well-settled that the mere fact a statute creates a classification does not render it unconstitutional special legislation. *Id.* Rather, it is only arbitrary classifications with no reasonable hypothesis to support them that are

> prohibited. *Id.* at 93, 600 S.E.2d at 533. Again, this parallels our analysis under the rational basis test for equal protection challenges. A classification is constitutional "if some intrinsic reason exists why the law should operate upon some and not upon all, or should affect some differently than others," or the special law "best meet[s] the exigencies of a particular situation." *Id.*

Cabiness, 393 S.C. at 189, 712 S.E.2d at 423. "The General Assembly must have a logical basis and sound reason for resorting to special legislation." *Med. Soc'y of S.C.*, 334 S.C. at 279, 513 S.E.2d at 357. "We will not declare a statute unconstitutional as a special law unless its repugnance to the Constitution is clear beyond a reasonable doubt." *Id.*

As a threshold matter, we question whether a special legislation analysis is applicable given Act No. 26 appears to be a general law in that it uniformly applies to all construction CGL insurance policies issued in South Carolina and, thus, is not "special" in the prohibited sense. Based on our review of the legislative history, it appears Act No. 26 was drafted as the result of lobbyists' efforts to combat the effects of *Crossmann I*. This, however, did not transform Act No. 26 into special legislation. *See Kizer*, 360 S.C. at 93 n.1, 600 S.E.2d at 532 n.1 ("[T]he fact that a law was enacted as a result of lobbying does not transform it into special legislation."). Nevertheless, to the extent that Act No. 26 can plausibly be construed as special legislation, we have included a discussion of Petitioner's claim in conjunction with the equal protection issue.

Initially, we disagree with Petitioner's bare assertion that the Court should employ a "strict scrutiny" analysis. We conclude a "rational basis" test is applicable for a determination of whether Act No. 26 constitutes special legislation or violates the Equal Protection Clauses. We find that Act No. 26 withstands this minimal level of scrutiny as we believe the General Assembly had a logical reason and sound basis for enacting this provision.

It is well-established that the insurance industry is highly regulated by the General Assembly. As evidenced by this Court's discussion in *Crossmann II*, insurance coverage for construction liability lacks clarity and has been the subject of significant litigation, particularly with respect to whether construction defects constitute "occurrences" under CGL insurance policies. By ratifying Act No. 26, the General Assembly properly exercised its authority in an attempt to definitively resolve or at least minimize this frequently-litigated issue.

In order to address this limited area of insurance law, our state General Assembly promulgated a law that meets the exigencies of this situation and is

consistent with prior and recent decisions of this Court. Thus, in this instance, we find that Act No. 26 does not constitute special legislation or violate equal protection.

III. Contract Clause

Finally, Petitioner argues that the retroactive application of Act No. 26 is unconstitutional in that such application violates the state and federal Contract Clauses. We agree.

South Carolina's constitution provides:

> No bill of attainder, ex post facto law, **law impairing the obligation of contracts**, nor law granting any title of nobility or hereditary emolument, shall be passed, and no conviction shall work corruption of blood or forfeiture of estate.

S.C. Const. art. I, § 4 (emphasis added); *see also* U.S. Const. art. I § 10 (also prohibiting the impairment of contracts). To establish a Contract Clause violation, the Court must examine "(1) whether there is a contractual relationship; (2) whether the change in the law impairs that contractual relationship; and whether the impairment is substantial." *Hodges v. Rainey*, 341 S.C. 79, 93, 533 S.E.2d 578, 585 (2000) (citing *Gen. Motors Corp. v. Romein*, 503 U.S. 181 (1992)).

It is undisputed a contractual relationship existed. Thus, we must ask whether the statute, as applied retroactively, substantially impairs insurance contracts. We hold that Act No. 26 substantially impairs the contractual relationship by mandating that all CGL policies be legislatively amended to include a new statutory definition of occurrence and by applying this mandate retroactively. While the dissent believes the new provision merely clarifies existing law, we find the statute fundamentally changes the definition of occurrence.

In *Newman*, this Court suggested "that a CGL policy *may* provide coverage where faulty workmanship causes third party bodily injury or damage to other property besides the defective work product" leaving open the possibility there may be instances where coverage might not be provided. 385 S.C. at 193, 684 S.E.2d at 544 (emphasis added); *see also Crossmann*, 395 S.C. at 50 n.6, 717 S.E.2d at 594 n.6 (holding "we elect to adhere to our precedent in *Newman*"). In doing so, *Newman* examined the interaction of the traditional definition of occurrence with the faulty workmanship exclusion in the insurance contract. Occurrence, as we confirmed in *Crossmann II*, traditionally means an "accident" or

a "continuous or repeated exposure to substantially the same general harmful conditions." *Crossmann*, 395 S.C. at 47, 717 S.E.2d at 592; *Newman*, 385 S.C. at 192, 684 S.E.2d at 543. Here, however, the legislature has rewritten and expanded the traditional definition of occurrence to also mandate the inclusion of faulty workmanship:

> Commercial general liability insurance policies *shall* contain or be deemed to contain a definition of "occurrence" that includes:
>
> ….
>
> (2) property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself.

S.C. Code Ann. § 38-61-70 (emphasis added). While we hold that it is within the legislature's power to statutorily define the meaning of "occurrence," it violates the Contract Clause to apply this new definition retroactively as it substantially impairs pre-existing contracts by materially changing their terms. *Hodges*, 341 S.C. at 94, 533 S.E.2d at 585–86 (holding "[f]or purposes of Contract Clause analysis, a statute can be said to impair a contract when it alters the reasonable expectations of the contracting parties"); *Henry v. Alexander*, 186 S.C. 17, 194 S.E. 649 (1937) (holding a deviation from the terms of a contract constitutes an impairment of contract); *Superior Motors, Inc. v. Winnebago Indus., Inc.*, 359 F. Supp. 773, 777 (D.S.C. 1973) (stating impairment of contract occurs when legislation "attempts to make material alterations in the character, terms or the legal effect of an existing contract").

Because we hold that Act No. 26 substantially impairs Petitioner's contractual rights, the next question is whether the Act is reasonable and necessary to effectuate a legitimate legislative purpose. *Ken Moorhead Oil Co. v. Federated Mut. Ins. Co.*, 323 S.C. 532, 545, 476 S.E.2d 481, 488–89 (1996). "Traditional analysis of reasonableness and necessity focuses on such issues as (1) whether an emergency exists justifying the impairment; (2) whether the law was enacted to protect a basic societal interest, rather than a favored group; (3) whether the law is narrowly tailored to the emergency at hand; (4) whether the imposed conditions are reasonable; and (5) whether the law is limited to the duration of the emergency." *Id.* Considering these factors and given the lengthy and drawn out history of litigation in this area, we cannot conclude that the General Assembly needed to enact Act No. 26 in order to address a pressing emergency. Consequently, the retroactivity provision is neither necessary nor reasonable, and therefore, we hold it unconstitutional.

As a result of our holding above, we sever the unconstitutional portion from the body of the statute, which "remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution."[4] *Joytime Distribs. & Amusement Co.*, 338 S.C. 634, 648–49, 528 S.E.2d 647, 654 (1999).

CONCLUSION

Thus, while we find that Act No. 26 of the South Carolina Acts and Joint Resolutions does not violate the separation of powers doctrine, is not unconstitutional special legislation and does not deprive Petitioner of equal protection, we hold the retroactivity provision of Act No. 26 unconstitutional in violation of the state and federal Contract Clauses. Act No. 26 may only apply prospectively to contracts executed on or after its effective date of May 17, 2011.

ACT DECLARED UNCONSTITUTIONAL IN PART.

KITTREDGE and HEARN, JJ., concur. BEATTY, J., concurring in part and dissenting in part in a separate opinion. PLEICONES, J., has filed a separate opinion concurring with the opinion of Justice Beatty.

[4] The Amici Curiae also assert that Act No. 26 violates the principles of federalism and the Commerce Clause. Specifically, they contend that Act No. 26 may affect essential terms of insurance agreements entered in other states. To the extent that Act No. 26 is not limited to South Carolina, they claim the General Assembly improperly imposed its "public policy objections to the application of traditional occurrence definitions to construction cases involving faulty workmanship, on sister states." We find several procedural barriers prevent the Amici from presenting this argument. The Amici lack standing to assert their challenge, and their claim is not ripe for review as they posit a hypothetical scenario, which Petitioner does not raise and which may not come to fruition. *See James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010) (recognizing that "[j]usticiability encompasses several doctrines, including ripeness, mootness, and standing," and precluding amici from raising an issue not raised by the named party under Rule 213, SCACR).

JUSTICE BEATTY (concurring in part and dissenting in part): I agree with the majority's findings that Act No. 26 does not violate the separation of powers doctrine, is not unconstitutional special legislation, and does not deprive Petitioner of equal protection. Furthermore, I agree with the majority's resolution of Petitioner's arguments regarding the principles of federalism and the Commerce Clause. I, however, respectfully dissent as to the majority's holding that the retroactivity provision of Act No. 26 violates the state and federal Contract Clauses. I find no violation and would declare Act No. 26 constitutional in both substance and application.

I. Contract Clauses

Petitioner urges this Court to declare Act No. 26 invalid as the state and federal Contract Clauses render it unconstitutional. Petitioner is primarily concerned with the provision of the statute that states, "This section applies to any pending or future dispute over coverage that would otherwise be affected by this section as to all commercial general liability insurance policies issued in the past, currently in existence, or issued in the future." S.C. Code Ann. § 38-61-70(E) (Supp. 2011).

Petitioner asserts the Act substantially impairs the contractual rights of the parties to existing contracts because Act No. 26 expands the meaning of the term "occurrence" and increases the risk that insurers previously agreed to insure. Petitioner further contends this interference with private contracts was not a justified exercise of legislative authority as there was no legitimate public purpose for the Act. Instead, Petitioner avers that Act No. 26 was "passed merely to suit the needs of a particularized sub-section of an industry by retroactively changing the bargain for which those particular insureds originally contracted."

At least facially, Petitioner's claim seems meritorious as Act No. 26 expressly provides for its retroactive application, which is generally disfavored due to the potential unfairness to the contracting parties. However, as will be discussed, I find that Act No. 26 is not an unconstitutional "retrospective law" as it constitutes a clarification, through codification, of extant law.

a. Retrospective Legislation

Retrospective laws have been analyzed as follows:

> One modern definition of a "retrospective law," often cited, is that every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed is a retrospective statute. Legislation is considered retroactive if its application determines the legal significance of acts or events that occurred prior to the statute's effective date. A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law; instead, a court must ask whether the new provision attaches new legal consequences to events completed before its enactment.
>
> The mere fact that a statute has a retrospective application does not necessarily render it unconstitutional. For instance, a statute that merely clarifies rather than changes existing law does not operate retrospectively even if it is applied to transactions predating its enactment. The retroactive nature of clarifying legislation has limits and must not operate in a manner that would unjustly abrogate "vested rights." However, retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation because it can deprive citizens of legitimate expectations and upset settled transactions.

16B Am. Jur. 2d *Constitutional Law* § 735 (2009) (footnotes omitted) (emphasis added).

Applying the above-definitions, I find that Act No. 26 merely: (1) clarified this Court's decisions in *L-J, Inc. v. Bituminous Fire and Marine Insurance Company*, 366 S.C. 117, 621 S.E.2d 33 (2005) and *Auto-Owners Insurance Company v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009); and (2) preemptively codified *Crossmann*.

In analyzing the definition of "occurrence" in a CGL policy, this Court in *L-J* adhered to the majority rule that "faulty workmanship standing alone, resulting in damage only to the work product itself, does not constitute an occurrence under a CGL policy." *L-J, Inc.*, 366 S.C. at 121, 621 S.E.2d at 35. The Court reasoned that "faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions." *Id.* at 123, 621 S.E.2d at 36. The Court noted that a "CGL policy may, however, provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, *not in cases where faulty workmanship damages the work product alone*." *Id.* at 123 n.4, 621 S.E.2d at 36 n.4.

Four years later, the Court decided *Newman* wherein it relied on the analysis in *L-J* and found that a "subcontractor's negligence resulted in an 'occurrence' falling within the CGL policy's initial grant of coverage for the resulting 'property damage' to the [home]." *Newman*, 385 S.C. at 194, 684 S.E.2d at 545. In so ruling, the Court gave effect to the subcontractor exception to the "your work" exclusion in the standard CGL policy and recognized that this exclusion did not apply "if the damaged work or the work out of which the damage arises was performed on [policyholder's behalf] by a subcontractor." *Id.* at 195, 684 S.E.2d at 545.

As noted by the majority, the Court in *Crossmann* reaffirmed its decision in *Newman* and clarified that "negligent or defective construction resulting in damage to otherwise non-defective components may constitute 'property damage,' but the defective construction would not." *Crossmann*, 395 S.C. at 50, 717 S.E.2d at 594.

In comparison, Act No. 26 defines "occurrence," to include "property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself." Thus, I find the definition in Act No. 26 is indistinguishable from those espoused by this Court in *L-J*, *Newman*, and *Crossmann*. Because Act No. 26 merely clarifies rather than changes existing law, it does not operate retrospectively even though it is applied to transactions predating its enactment. Thus, I conclude the retroactive application of the Act does not render it unconstitutional as a retrospective law. *See Segars v. Gomez*, 360 F. Supp. 50, 53 (D.S.C. 1972) (discussing retroactivity and recognizing that the General Assembly "may ratify and validate any past act which it could originally have authorized provided it still has the power to authorize it, and its authorization does not impair vested rights"); *Moore v. Stills*, 307 S.W.3d 71, 81 (Ky. 2010) (recognizing that statutory amendments that clarify existing law or codify judicial precedent do not come within the rule against retroactive legislation as "such amendments do not

impair rights a party possessed when he or she acted or give past conduct or transactions new substantive legal consequences").[5]

b. Existing Contracts

Even if Act No. 26 is deemed clarifying legislation, Petitioner claims the express retroactivity provision of Act No. 26 operates to abrogate the parties' vested rights. Thus, Petitioner advocates for this Court to sever the provision from the Act. In analyzing Petitioner's argument that Act No. 26 impermissibly impairs existing contracts, I turn to a discussion of our state and federal Contract Clauses.

In restricting powers of the states, the United States Constitution provides that, "No state shall . . . pass any . . . law impairing the obligation of contracts." U.S. Const. art. I, § 10, cl. 1. Our state constitution contains a similar provision. S.C. Const. art. I. § 4. Accordingly, this Court has followed federal precedent construing the federal Contract Clause in analyzing the Contract Clause of the South Carolina Constitution. *Ken Moorhead Oil Co. v. Federated Mut. Ins. Co.*, 323 S.C. 532, 476 S.E.2d 481 (1996).

"The general purpose of the Contract Clause is to encourage trade and credit by promoting confidence in the stability of contractual obligations. While the Clause prohibits the government from arbitrarily impairing the obligations of

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[5] Because the definition of "occurrence" in section 38-61-70 clearly gives effect to our decisions in *L-J* and *Newman* and preemptively codified our decision in *Crossmann*, I believe the majority mischaracterizes the General Assembly's enactment of section 38-61-70 as a "fundamental change" in the definition of occurrence in standard CGL policies as there is no evidence to support such a conclusion. It is evident the General Assembly was cognizant of the litigious history surrounding standard CGL policies and sought to rectify these problems through a statutory pronouncement that was entirely consistent with this Court's interpretation of these policies. Interestingly, *Newman* chronicled the history of CGL policies and stated that "interpreting 'occurrence' as we do in this case gives effect to the subcontractor exception to the 'your work' exclusion in the standard CGL policy." *Newman*, 385 S.C. at 195, 684 S.E.2d at 545. Thus, section 38-61-70 precisely codifies what Chief Justice Toal espoused in *Newman*. Simply stated, section 38-61-70 does nothing more than define occurrence without any discernable distinction from this Court's prior decisions, particularly *Newman*. In my opinion, the majority ignores the visible overlay of this Court's decisions with the statutory language of section 38-61-70.

contract, there must be a careful balancing of the competing interests involved." *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 30, 416 S.E.2d 641, 645 (1992).

In discussing the Contract Clause, the United States Supreme Court stated, "Although the Contract Clause appears literally to proscribe 'any' impairment, . . . 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.'" *U.S. Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 21 (1977) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934)). "As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." *Id.* at 25.

However, "[b]y attaching new and perhaps unanticipated legal consequences to past conduct, retroactive legislation threatens to 'deprive citizens of legitimate expectations and upset settled transactions.'" *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 176 (4th Cir. 2010) (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)).

To establish a Contract Clause violation, Petitioner must show: (1) the existence of a contract; (2) the law changed actually impaired the contract and the impairment was substantial; and (3) the law was not reasonable and necessary to carry out a legitimate government purpose. *Hodges v. Rainey*, 341 S.C. 79, 93, 533 S.E.2d 578, 585 (2000).

In view of my conclusion that Act No. 26 merely clarifies existing law, I would find that Petitioner has failed to satisfy the second prong of the above-outlined test as Petitioner cannot establish that Act No. 26 impaired existing CGL insurance contracts. Because the implicated term "occurrence" is part of the standard-form CGL policy, these contracts have not been impermissibly impaired as this term has been consistently defined and interpreted by this state's appellate courts and now codified by the General Assembly.[6] Accordingly, I would decline to sever the express retroactivity provision of Act No. 26.[7]

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[6] Furthermore, given that insurance is a highly-regulated industry, Petitioner's contractual rights could not have been substantially impaired as Petitioner was undoubtedly aware of the existing case law and the potential for regulation. *See Ken Moorhead Oil Co. v. Federated Mut. Ins. Co.*, 323 S.C. 532, 540, 476 S.E.2d 481, 486 (1996) ("In determining the extent of impairment to a contract, one must 'consider whether the industry the complaining party has entered has been

II. Conclusion

Although Petitioner raises multiple challenges attacking the constitutionality of Act No. 26, I find that none warrant the invalidation of the enacted statute. In contrast to the majority, I do not believe Act No. 26 violates the state and federal Contract Clauses as the General Assembly enacted this provision to clarify existing law. Accordingly, I would declare Act No. 26 and, in turn, section 38-61-70 constitutional.

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regulated in the past.'" (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)).

[7] The only contracts that could arguably be impaired would be those that were altered after January 7, 2011 in response to *Crossmann* and entered into prior to May 17, 2011, the effective date of Act No. 26. The existence of such contracts appears unlikely as Petitioner notes that "[s]ince 1966, CGL insurance contracts, including contracts issued by Harleysville, have defined 'occurrence' as 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.'" Thus, the existing CGL contracts would have retained the standard-form definition of "occurrence."

JUSTICE PLEICONES: I agree with Justice Beatty who rightly points out, in my opinion, that Act 26 merely codifies this Court's definition of occurrence. The majority relies on a statement in *Newman*[8] that a CGL policy *may* provide coverage where faulty workmanship causes third party bodily injury or damage to other property, contrasts it with the "shall" language of the statute, and concludes that the statute rewrites and expands the judicial definition of occurrence. I believe the majority misreads the *Newman* "may." At this juncture, the *Newman* court is discussing the facts of *L-J*, a case where there was no occurrence because the negligent construction of the roadway only caused damage to the road itself.[9] The *Newman* opinion then relates that the *L-J* court "went on to explain" that there may be coverage where the faulty workmanship causes third party injury or damage to other property. The *L-J* court was suggesting hypothetically that there would be coverage where the damaged property is not the defective work product but only if the other prong of occurrence is met, that is, if there were an accident. [10] In this context, the "may" suggests merely that a different set of circumstances may lead to a different result, not that where there is an occurrence, the decision to find coverage is optional.

I agree with Justice Beatty that there is no constitutional infirmity in Act 26.

[8] *Auto-Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009).
[9] There would be no occurrence under § 38-61-70 (B)(2) because the only property damaged was the faulty workmanship itself.
[10] Specifically, *L-J* is employing the subjunctive mood, discussing a hypothetical situation not present in that case.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Lawrence Phillips, Respondent.

Appellate Case No. 2011-197426

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Colleton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 27190
Submitted November 5, 2012 – Filed November 21, 2012

AFFIRMED AS MODIFIED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Deputy Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Petitioner.

Appellant Defender Breen Richard Stevens, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

PER CURIAM: The State appeals the Court of Appeals' decision invalidating respondent's sentence of life without parole. We grant the petition for certiorari, dispense with further briefing, and affirm as modified.

FACTS

Respondent was convicted of second-degree arson and sentenced to life without parole (LWOP). The Court of Appeals affirmed the second-degree arson conviction, but reversed and remanded as to the LWOP sentence finding the use of a 1979 burning conviction was inappropriate for sentence enhancement purposes. *State v. Phillips*, 393 S.C. 407, 712 S.E.2d 457 (Ct. App. 2011). The State now seeks review of the Court of Appeals' decision.

DISCUSSION

Upon conviction of a serious offense, a person must be sentenced to LWOP if the person has two or more prior convictions for a serious offense. S.C. Code Ann. § 17-25-45(B) (Supp. 2008). When a prior conviction is for an offense not found in §17-25-45, trial judges can look to the elements of the prior offense to determine if they are equivalent to the elements of an offense found in the statute for purposes of sentence enhancement. *See State v. Lindsey*, 355 S.C. 15, 583 S.E.2d 740 (2003); *State v. Washington*, 338 S.C. 392, 526 S.E.2d 709 (2000).

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Baucom*, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000). The Court should give words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010).

The Court of Appeals found respondent's 1979 conviction for burning did not contain the same elements as the second-degree arson statute and thus did not qualify as a serious offense for LWOP purposes. The Court of Appeals determined the two statutes contained many of the same elements but differed in identifying the type of building harmed. Specifically, the Court of Appeals found the 1979 burning statute applied to "any building other than a dwelling," whereas the second-degree arson statute only applied to "any structure designed for human

occupancy." Thus, the Court of Appeals reasoned that in order for the 1979 burning conviction to be used for LWOP purposes, the burning must have been of a structure designed for human occupancy.[1]

The Court of Appeals further determined the State failed to present evidence respondent burned any of the structures delineated in the second-degree arson statute; thus, the Court of Appeals found respondent's 1979 conviction did not sufficiently mirror the second-degree arson statute for sentence enhancement purposes.

We find that the Court of Appeals erred in interpreting the second-degree arson statute to be limited to structures designed for human occupancy. Under the plain reading of the statute, the phrase "or any structure designed for human occupancy" does not contain language indicating that it applies to the subsection as a whole. While the other categories of structures listed may be considered buildings designed for human occupancy, this phrase should not be considered all encompassing. *Sweat*, *supra* (stating courts should give words their ordinary meaning and should not resort to forced construction to limit or expand a statute).

However, while the structure respondent burned in 1979 need not have been designed for human occupancy to be considered second-degree arson, it must fall into one of the categories delineated in the statute. The only category it could possibly fall into is "a public or private school facility." The Court of Appeals did not err in determining the State failed to meet its burden of proving respondent burned a school facility. Accordingly, the Court of Appeals properly concluded the 1979 conviction should not have been used for sentence enhancement purposes under § 17-25-45.

Moreover, although the Court of Appeals erroneously interpreted former § 16-11-110(B), we note that the impact of this erroneous interpretation has been limited by the 2010 amendment to the statute.

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[1] The Court of Appeals erroneously states former § 16-11-110(B) provides that "schools, churches, businesses, and any other 'structure designed for human occupancy'" receive the same protection as dwellings. (Emphasis added). The statute does not contain the word "other," which leads to the Court of Appeals' flawed interpretation of the statute.

CONCLUSION

The portion of the Court of Appeals' opinion reversing respondent's sentence is

AFFIRMED AS MODIFIED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mary Robyn Priester, Individually and as Natural Mother/Next of Kin, and Personal Representative of the Estate of James Lloyd Priester, Appellant,

v.

Preston Williams Cromer, Stage Light Management, d/b/a Showgirls(z); and Lloyd Brown, individually and doing business as Showgirls(z), and Nikki D's Inc. and Ford Motor Company, Defendants,

of whom Ford Motor Company, is Respondent.

ON REMAND FROM THE UNITED STATES SUPREME COURT

Appeal from Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 27191
Heard September 20, 2011 - Filed November 21, 2012

REAFFIRMED

Darrell T. Johnson, Jr., of Hardeeville; James B. Richardson, Jr., of Columbia; Leslie A. Brueckner, of Oakland, California; and Matthew W. H. Wessler, of Washington, D.C., for Appellant.

Curtis L. Ott and Carmelo B. Sammataro, of Turner Padget Graham & Laney, of Columbia and Gregory G. Garre, of Latham & Watkins, of Washington, D.C., for Respondent.

Adam Tremaine Silvernail, of Columbia; Larry E. Coben, of Anapol Schwartz, of Scottsdale, Arizona; and Patrick M. Ardis, of Wolff Ardis, of Memphis, Tennessee, for Amicus Curiae, Center for Auto Safety.

Gray T. Culbreath and Brian A. Comer, both of Collins & Lacy, of Columbia, and David B. Salmons and Bryan M. Killian, both of Bingham McCutchen, of Washington, D.C., for Amicus Curiae, Alliance of Automobile Manufacturers.

William C. Wood, Jr., of Nelson Mullins Riley & Scarborough, of Columbia, for Amicus Curiae, Product Liability Advisory Council.

JUSTICE KITTREDGE: This case returns to us on remand from the United States Supreme Court (USSC) for reconsideration in light of its decision in *Williamson v. Mazda Motor of America, Inc.*, 131 S.Ct. 1311 (2011). In our previous decision,[1] we concluded Appellant's state-law products liability claims against Ford Motor Company were preempted by Federal Motor Vehicle Safety Standard ("FMVSS") 205. We reaffirm our previous decision.

Appellant filed a products liability claim against Respondent Ford Motor Company premised on the allegation that its 1997 Ford F-150 pick-up truck was defective and unreasonably dangerous because it did not incorporate laminated glass in the vehicle's side and rear windows. As was true with virtually all passenger vehicles

[1] *Priester v. Cromer*, 388 S.C. 425, 697 S.E.2d 567 (2010), *vacated*, 131 S.Ct. 1570 (2011).

manufactured at the time,[2] Respondent utilized tempered glass in vehicle side windows.[3] In connection with implied conflict preemption, *Williamson* revisited the Supreme Court's decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

We construe the key language in *Williamson* to hold that manufacturer choice among alternatives operates to preempt a state law claim only where the state law stands as an obstacle to a significant federal regulatory objective. Similarly, our previous decision was not based upon the notion that the mere presence of manufacturer choices in FMVSS 205 preempted Appellant's state tort suit. We adhere to the view that the manifest purpose of the federal regulatory scheme underlying FMVSS 205 would be frustrated if these state claims were allowed to proceed. Assuming implied conflict preemption remains a viable part of preemption, we believe it applies here to preclude Appellant's state law claims.

I.

The case arises from a single-vehicle accident. On August 17, 2002 at 3:45 a.m., Preston Cromer was driving a 1997 Ford F-150 pick-up truck at an excessive speed near St. George, South Carolina, when he drove off the road and rolled the truck several times. Appellant's son, James Lloyd Priester, who was in the rear seat of the truck and not wearing his seatbelt, was ejected through the rear window and

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[2] In response to increased seatbelt usage and mandatory seatbelt laws, vehicle manufacturers generally elected to utilize tempered glass in side windows. According to the amicus brief of the Center for Auto Safety, as of 2007, more than 90% of all vehicles sold in North America incorporated tempered glass in side windows, while perhaps 5 to 9% utilized laminated glass.

[3] We note that the case came to us from the grant of summary judgment based on preemption. Accordingly, we do not address the substantial threshold question of whether the absence of laminated glass in the side and rear windows rendered the vehicle defective and unreasonably dangerous as a matter of state law. In other words, as a matter of state law, did a vehicle manufacturer have a duty at the time the 1997 Ford F-150 pick-up truck was manufactured to utilize laminated glass in the side and rear windows? By focusing solely on preemption, we are answering a question that presupposes (without deciding) Appellant's claim would not be barred as a matter of state law. In essence, we are putting the cart before the horse.

died at the scene. Cromer and Priester, both of whom were under twenty-one years old, were apparently intoxicated after they had allegedly been served alcohol at Showgirls(z), a strip club located in Santee, South Carolina.[4]

Appellant filed a products liability claim against Ford, alleging causes of action for strict liability and breach of warranty for failing to use laminated glass in the vehicle's side and rear windows, which Appellant claimed would have retained occupants inside the vehicle during the crash. Ford denied the allegations and moved for summary judgment, arguing FMVSS 205 impliedly preempted Appellant's state law claims. The trial court found FMVSS 205 preempted Appellant's claims and granted Ford's motion for summary judgment.

In our initial opinion, we affirmed summary judgment and held FMVSS 205 preempted Appellant's state law products liability claim. In doing so, we relied on *Geier*, in which the USSC found an earlier version of a similar federal regulation—FMVSS 208 dealing with passive restraint systems (e.g., airbags, automatic seatbelts, ignition interlock devices, etc.)—impliedly preempted a state tort suit.

Thereafter, in February 2011, the USSC decided *Williamson*, which also involved the preemptive effect of FMVSS 208. In *Williamson*, the USSC found that, even though FMVSS 208 was structured to provide manufacturers with a choice between two different kinds of seatbelts for rear inner seats, the regulation did not preempt a state tort suit premised upon a manufacturer's failure to install the lap-and-shoulder seatbelt, one of the two permitted kinds. Shortly after its decision in *Williamson*, the USSC vacated the judgment of this Court, and remanded for our further consideration in light of its decision. *See Priester v. Ford Motor Co.*, 131 S.Ct. 1570 (2011).[5]

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[4] The record also includes other allegations of drug use.

[5] While a grant-vacate-remand ("GVR") order may call into question the correctness of a lower court's judgment, it is not a definitive determination that the judgment was improper. *Lawrence v. Chater*, 516 U.S. 163, 168 (1996) ("[T]he GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review."). The USSC has stated, "[i]ndeed, it is precisely because we are uncertain, without undertaking plenary analysis, of the legal impact of a new development, especially

II.

The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). "'[T]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Id.* (quoting *Malone v. White Motor Co.*, 435 U.S. 497, 504 (1978)). "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). Preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Moreover, "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

A federal law may either expressly or impliedly preempt a state law. Congress may expressly preempt state law through specific language clearly stating its intent. On the other hand, implied preemption occurs through "field preemption"[6] or "implied conflict preemption." Implied conflict preemption occurs in one of two ways—either where compliance with both federal and state regulations is physically impossible or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). It is this latter type of implied conflict preemption, sometimes called "obstacle" or "frustration-of-purpose" preemption, which is implicated in *Geier*, *Williamson*, and the present case.

The issue in *Williamson* was whether federal law preempted a state tort suit premised on a manufacturer's decision not to install lap-and-shoulder seatbelts at certain rear interior seats, which were permitted, but not required, by the 1989 version of FMVSS 208. In 1984, the Department of Transportation ("DOT")

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one, such as the present, which the lower court has had no opportunity to consider, that we GVR." *Id.* at 174. Accordingly, we must consider whether our previous decision is affected by *Williamson*.

[6] Field preemption occurs when the scheme of federal regulation is so pervasive that it is reasonable to infer that Congress left no room for the states to regulate. Both sides agree field preemption is not implicated in this case.

rejected a regulation that would have required the use of shoulder seatbelts in rear seats. However, by 1989, DOT concluded that several factors had changed. DOT opted to require installation of shoulder seatbelts for rear outer seats but permitted a choice between lap belts and shoulder belts for rear inner seats. At that time, DOT was convinced shoulder belts were safer regardless of seating position; however, due to concerns about additional costs, DOT elected to permit manufacturers to choose which type of belt to install in rear inner seats. Nevertheless, DOT actively encouraged manufacturers to install shoulder belts where feasible. *Williamson*, 131 S.Ct. at 1137-38. Essentially, the question before the USSC was whether the preservation of options was a deliberate policy judgment in furtherance of a "significant federal regulatory objective," which would be frustrated by a state tort suit. *Id.* at 1136.

A critical factor in the USSC's analysis in *Williamson* was its view of the scope of its earlier *Geier* decision, in which it found that a state tort suit imposing a duty upon a manufacturer to equip all cars with airbags would conflict with the purpose of an earlier version of the same federal safety standard—FMVSS 208. In *Geier*, the USSC rejected the idea that FMVSS 208 set a minimum safety standard for airbag installation based on the DOT's accompanying comments, which made clear that a range of choices was deliberately sought.[7] The USSC noted the DOT's policy judgment that safety would be best promoted if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car. *Id.* at 881. Thus, the rule of state law created by the tort suit would have presented an obstacle[8] to important means-related federal objectives served

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[7] In *Geier*, DOT identified five reasons why its decision to maintain manufacturer choice would promote FMVSS 208's safety objectives: (1) DOT desired to promote consumer acceptance of emerging airbag technology; (2) none of the options offered superior safety under all circumstances; (3) at the time, airbag designs posed potential additional safety risks; (4) DOT was interested in spurring additional technological developments; and (5) implementing airbag technology would increase costs. *See Geier*, 529 U.S. at 875-76.

[8] The members of the USSC disputed the extent to which the term "state law" encompasses the common law, as well as positive enactments, such as statutes and regulations. The majority in the 5-4 *Geier* decision stated:

> In effect, petitioners' tort action depends upon its claim that

by the manufacturer options provided in FMVSS 208—namely the safety objective achieved through the variety and mix of devices that the federal regulation sought and the gradual passive restraint phase-in that was deliberately imposed.[9] *Id.* at 880-81.

In *Williamson*, the Solicitor General, on behalf of DOT, argued FMVSS 208 did not preempt the state tort suit and urged the USSC to sustain DOT's assessment that petitioners' tort action was not only consistent with but actually furthered the purposes and objectives of both the Motor Vehicle Safety Act ("the Safety Act") and its implementing safety-standard regulations promulgated by NHTSA. 131 S.Ct. at 1139. Accordingly, it was logical to conclude the state tort suit was not preempted because retaining the lap-only belt option was not designed to further safety goals of the federal regulatory scheme.

In *Williamson*, the USSC noted that, like *Geier*, the regulation left manufacturers with a choice and the state tort suit would restrict that choice. But unlike *Geier*, the Court did not believe that choice furthered a significant regulatory objective.

> manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord. Such a state law – *i.e.*, a rule of state tort law imposing such a duty – by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought.

Id. at 881, 896-99. Notwithstanding the heated debate in *Geier*, the majority in *Williamson* apparently accepted rather unceremoniously the premise that the term "state law" encompassed common law tort claims, even in the presence of a statutory savings clause. *Williamson*, 131 S.Ct. at 1137, 1139-40. ("[L]ike the tort suit in *Geier*, the tort suit here would restrict [manufacturer] choice. . . . We consequently conclude that, even though the tort suit may restrict the manufacturer's choice, it does not 'stand as an obstacle to the accomplishment of the full purposes and objectives' of federal law.") (quoting *Hines*, 312 U.S. at 67).

[9] In *Geier*, the USSC also noted a regulation requiring airbag installation could have made the adoption of a mandatory state buckle-up law less likely. *Geier*, 529 U.S. at 880-81.

The Court emphasized that the reason DOT did not mandate shoulder belts was not due to safety concerns, but because of concerns over costs. *Id.*

A central point of the USSC's analysis was the government's position and how much deference to afford it. The Court noted the government's consistent position that "state tort law does not conflict with a federal minimum standard merely because state law imposes a more stringent requirement," and the Solicitor General's explanation that "a standard giving manufacturers multiple options for the design of a device would not pre-empt a state suit claiming that a manufacturer should have chosen one particular option, where 'the Secretary [of Transportation] did not determine that the availability of options was necessary to promote *safety*.'" *Id.* (emphasis added).

The USSC concluded that consideration of the regulation's history, the agency's contemporaneous explanation, the agency's advocacy for shoulder belts (notwithstanding the lap-only belt option), and the agency's interpretive views indicated that, unlike *Geier*, the decision to maintain manufacturer choice was not based on a deliberate policy decision designed to further significant regulatory or safety objectives. Thus, even though the state tort suit restricted manufacturer choice, it did not stand as an obstacle to the accomplishment of the purposes and objectives of the federal law and was, therefore, not preempted. *Id.* at 1139-40.

Justice Sotomayor authored a concurring opinion, in order "to emphasize the Court's rejection of an overreading of *Geier* that has developed since that opinion was issued." *Id.* at 1140. Justice Sotomayor wrote:

> [T]he mere fact that an agency regulation allows manufacturers a choice between options is insufficient to justify implied pre-emption; courts should only find pre-emption where evidence exists that an agency has a regulatory objective–e.g., obtaining a mix of passive restraint mechanisms, as in *Geier*–whose achievement depends on manufacturers having a choice between options.

Id. at 1140. Justice Sotomayor also emphasized that Mazda failed to carry its burden of establishing that DOT "deliberately sought variety to achieve greater safety." *Id.* at 1141. Thus, in our view, Justice Sotomayor's concurrence clarified

that, in terms of key regulatory features, variety for its own sake is not a "significant" regulatory objective. Rather, variety becomes a significant federal objective when it is employed as a deliberate means to achieve greater safety.

In sum, we believe *Williamson* did not eviscerate *Geier* or relegate it to outlier status. Rather, *Williamson* clarified that a deliberate decision to retain manufacturer choice is, in and of itself, insufficient to establish preemption. Rather, the party claiming preemption has the burden of proving that an agency deliberately sought a variety of means to achieve a "significant" federal purpose. The significant federal purpose here is, of course, safety. Several other courts have interpreted *Williamson* similarly. *See Morris v. Mitsubishi Motors North America, Inc.*, 782 F.Supp. 2d. 1149, 1158 (E.D. Wash. 2011) ("A tort claim may proceed, even if it may have the effect of restricting the manufacturer's choice, when a Court finds that the choice allotted to manufacturers by a regulation is *not intended* to further a significant regulatory objective."); *Lake v. Memphis Landsmen L.L.C.*, W2011-00660-COA-RM-CV, 2011 WL 5022790, *10-11 (Tenn. Ct. App. filed Oct. 21, 2011) ("*Williamson* merely clarifies that manufacturer choice alone is not sufficient to find implied pre-emption of state tort claims. Rather, the inclusion of manufacturer choice must be in furtherance of a specific regulatory objective in order to form the basis of implied pre-emption of the state suit.").[10]

With these concepts in mind, we address our previous opinion finding Appellant's claims were preempted.

III.

A review of our earlier decision reveals that this Court's determination did not depend solely on the presence of a choice between laminated and tempered glass in FMVSS 205. Rather, in determining Appellant's claims were preempted, this Court considered the text of FMVSS 205, its history, and the reasons given by the National Highway Traffic Safety Administration ("NHTSA") for its regulatory decisions. Accordingly, we conclude our previous decision is consistent with the *Williamson* framework and is therefore undisturbed by it.

[10] We note the Supreme Court of Tennessee granted the Lakes' application for permission to appeal on March 6, 2012.

Although we recited the text, history, and purpose of FMVSS 205 in our previous opinion, without the benefit of *Williamson*, we did not explicitly incorporate each of those factors in our discussion of whether Appellant's tort suit was preempted. Thus, in light of *Williamson*, we take this opportunity to clarify the underpinnings of our previous decision.

A. Regulation 205

The Safety Act was promulgated to improve highway safety, specifically "to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101 (2006).[11] Under the authority of the Safety Act, DOT through

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[11] The Motor Vehicle Safety Act, contains an express preemption clause which states:

> When a motor vehicle safety standard is in effect under this chapter, a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

49 U.S.C. § 30103(b)(1). That section also states "Compliance with a motor vehicle safety standard does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). In *Geier*, a majority of the USSC found the presence of a statutory savings clause made clear Congress intended state tort suits to fall outside the scope of the express preemption clause; however, the savings clause did not foreclose or limit the operation of "ordinary pre-emption principles, grounded in longstanding precedent." *Geier*, 529 U.S. at 868. This finding was hotly contested by the four-member dissent in *Geier*, which felt the statutory savings clause "was obviously intended to limit the pre-emptive effect of the Secretary's safety standards." *Id.* at 894-99. However, the majority in *Williamson* did not revisit the wisdom in this step of the *Geier* framework and simply applied it without further analysis. *Williamson*, 131 S.Ct. at 1136-37 ("In light of *Geier*, the statute's express pre-emption clause cannot pre-empt the common-law tort action; but neither can the statute's saving[s] clause foreclose or limit the operation of ordinary conflict pre-emption principles. We consequently turn our attention to *Geier*'s third subsidiary question, whether, in fact, the state tort action conflicts with the federal regulation."). We are constrained to honor the USSC's view that the presence of a

the National Highway Traffic Safety Administration ("NHTSA") promulgated FMVSS 205, which specifies requirements for glazing materials used in motor vehicles and motor vehicle equipment.[12] The stated purpose of FMVSS 205 is as follows:

> S2. Purpose. The purpose of this standard is to *reduce injuries resulting from impact to glazing surfaces*, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to *minimize the possibility of occupants being thrown through the vehicle windows in collisions*.

49 C.F.R. § 571.205 (emphasis added).

Since its adoption in the 1960s, FMVSS 205 has provided that laminated glass may be used anywhere in the vehicle including the windshield and that tempered glass may be used anywhere in the vehicle except the windshield. The American National Standard Institute (ANSI) defines the two types as:

1. *Laminated Glass*. This consists of two or more sheets of glass held together by an intervening layer or layers of plastic material. It will crack and break under sufficient impact, but the pieces of glass tend to adhere to the plastic and not to fly. If a hole is produced, the edges are likely to be less jagged than would be the case with ordinary glass.

2. *Tempered Glass*. . . . This consists of a single sheet of specially treated plate, sheet, or float glass. . . . When broken at any point, the entire piece immediately breaks into innumerable small pieces, which may be described as granular, usually with no large jagged edges.

The word "glazing" refers to glass in general, and the term "advanced glazing" is frequently used to refer to laminated glass and other glass-plastic glazing materials, all of which are constructed, treated, or combined with other materials as to withstand more impact before shattering as compared to tempered glass. Thus, we

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savings clause does not foreclose ordinary preemption principles.

[12] The regulation incorporates by reference ANS Z26, which is a safety code adopted by the American National Standard Institute and the Society of Automotive Engineers. 49 C.F.R. § 571.205.

use the term "advanced glazing" to refer to laminated glass as opposed to tempered glass.

As this Court observed in our initial *Priester* opinion, "it can be stated generally that tempered glass is safer for vehicle occupants wearing seatbelts, where the risk of ejection is reduced, because it provides less risk of additional injuries. Laminated glass is safer for unbelted passengers, where the risk of ejection is increased, because it is likely to keep a passenger inside the vehicle due to the 'adhering' quality of the glass." *See* National Highway Traffic Safety Admin., Ejection Mitigation Using Advanced Glazing: Final Report 53-54 (Aug. 2001).

B. NHTSA Study

Beginning in the late 1980s, NHTSA became concerned with the significant number of fatalities and serious injuries resulting from rollover accidents. NHTSA explored two different approaches to determine the safety enhancement potential of each: preventing rollover accidents from occurring and protecting vehicle occupants during a rollover, including reducing the likelihood of ejections.[13] As a result, NHTSA published two Advanced Notices of Proposed Rulemaking ("ANPRM") in 1988 announcing the agency's intent to reduce the risk of ejections in crashes. NHTSA believed new side window designs incorporating different configurations and advanced glazing could potentially reduce the risk of ejection and sought public comments on its approach. *See* Side Impact Protection—Passenger Cars, 53 Fed. Reg. 31712 (proposed Aug. 19, 1988); Side Impact Protection—Light Trucks, Vans, and Multipurpose Passenger Vehicles, 53 Fed. Reg. 31716 (proposed Aug. 19, 1988).

In November 1995, NHTSA published a status report regarding its research into ejection mitigation using advanced glazing (hereinafter "1995 Report"). *See* National Highway Traffic Safety Admin., Ejection Mitigation Using Advanced Glazing: A Status Report (Nov. 1995). The 1995 Report documented the problem

[13] NHTSA reported that, based on 1982-1985 statistics, 19.5% of all vehicle fatalities each year were the result of an occupant's complete ejection from the vehicle and 4.3% were from partial ejection of an occupant through glazing. Further data showed that, of the fatalities involving ejection, 34% were ejected through the side windows.

of vehicle occupants being ejected through side glazing and described the research NHTSA had performed with prototype glazing systems. The 1995 Report noted the need to address concerns about potential increased risk of head, neck and laceration injury; however, no adequate technology existed at that time to allow NHTSA to develop reliable testing procedures and to measure the test results of various glazing materials. The 1995 Report concluded that preliminary research suggested advanced glazing systems may offer "significant safety potential" by reducing the likelihood of occupant ejection but that research "should be continued to more fully evaluate the safety implications of alternative glazing systems." *Id.* at 11-1 to -3.

In 2001, Congress directed NHTSA to complete its study of glazing materials. In August 2001, NHTSA complied and issued a final report ("Final Report") on its twelve-year research program on whether ejection mitigation could be accomplished by using advanced glazing. *See* National Highway Traffic Safety Admin., Ejection Mitigation Using Advanced Glazing: Final Report (Aug. 2001). Within the Final Report, there was much discussion of the costs, risks and benefits of advanced glazing, including NHTSA's recognition that no one type of safety glazing material was shown to possess the maximum degree of safety under all conditions. Noting "98 percent of occupants completely ejected and killed during rollover crashes were unbelted," and that "seatbelts currently provide excellent protection against ejection," the Final Report reiterated the federal policy of promoting seatbelt use[14] and stated that "[a]ny safety countermeasure to prevent ejection would be a supplement to the primary protection provided by the seat belt." *Id.* at 53. NHTSA reported that its research indicated advanced glazing systems would lead to better occupant retention in crashes but went on to note that the number of fatalities prevented by advanced side glazing would diminish with an increased rate of seatbelt use. *Id.* at 37-47.

Further, the Final Report similarly noted that "[s]ince the benefits of ejection mitigation occur primarily for unbelted occupants, a critical factor in this research program was to investigate any possible injury risk, particularly for belted

[14] Although it is not specifically cited in the Final Report, Congress has enacted a statute finding that mandatory seatbelt use is in the public interest. 49 U.S.C. § 30127(d). ("Seat belt use laws – Congress finds that it is in the public interest for each state to adopt and enforce mandatory seat belt use laws and for the United States government to adopt and enforce mandatory seat belt use regulations.").

occupants." *Id.* at 26, 53-54 ("Knowing the [scope of] potential head injury is particularly important since ejection almost exclusively occurs for unbelted occupants, while any potential for increased injuries would occur for all occupants, belted and unbelted."). Ultimately, NHTSA indicated it was "*extremely reluctant* to pursue a [glazing] requirement that may increase injury risk for belted occupants to provide safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle," and thus, "the agency will not continue to examine potential regulatory requirement for advanced side glazing." *Id.* at 54. (emphasis added).

Thereafter, NHTSA withdrew the ANPRMs and abandoned any effort to require advanced glazing in vehicle side windows. *See* Withdrawal of Advance Notices of Proposed Rulemaking, 67 Fed. Reg. 41365, 41367 (June 18, 2002). NHTSA cited safety and cost concerns and explained the "two primary reasons" for its decision were "the advent of other ejection mitigation systems, such as side air curtains and the need to develop performance standards for them, and the fact that advanced side glazing in some cases appears to increase the risk of neck injury." 67 Fed. Reg. 41365, 41367 (June 18, 2002). The agency concluded "[g]iven these concerns, NHTSA believes it would be more appropriate to devote its research and rulemaking efforts with respect to ejection mitigation to projects other than advanced glazing. . . . The focus will shift from advanced glazing to the development of more *comprehensive*, performance-based test procedures. . . . establishing the safety performance that must be achieved." *Id.* at 41367 (emphasis added).

C. Discerning the Federal Purpose

Considering the text and history of FMVSS 205 and NHTSA's stated desire to reduce passenger ejection through "comprehensive" safety performance, we believe the regulation embodies two separate and equally compelling purposes: reducing injuries resulting from impact to glazing surfaces *and* minimizing the possibility of occupants being ejected through vehicle windows. The objective of promoting safety was at the core of NHTSA's deliberate decision not to require advanced glazing in side windows. We believe it is significant that NHTSA indicated a desire to pursue a "comprehensive" approach[15] that would provide

[15] In our opinion, NHTSA's subsequent regulatory action further demonstrates its desire to find a "comprehensive" solution to prevent occupant ejection. On

safety benefits to both belted and unbelted passengers and specifically declined to require a particular option that would be safer for only one category of pasengers. Indeed, as the Tennessee Court of Appeals stated, "[i]t appears that the NHTSA left the options for glass open so that the manufacturers could choose the safety features that best accomplished both purposes." *Lake*, 2011 WL 5022790 at *14.

Additionally, we find the Final Report demonstrates that the collateral federal goal of promoting seatbelt use is a key component of any motor vehicle safety objective, including FMVSS 205. The regulation's history demonstrates NHTSA was understandably reluctant to choose between promoting safety for belted occupants or for unbelted occupants, particularly where requiring advanced side glazing would likely result in an increased risk of injury, primarily for *belted* occupants.

D. Agency View

Having considered the text and history of FMVSS 205, in accordance with *Geier* and *Williamson*, the next analytical step would be to examine NHTSA's position on the preemptive effect, if any, of FMVSS 205. However, this Court does not have the benefit of an express agency position on this issue. Thus, our conclusion must be drawn from the record before us.

January 19, 2011, NHTSA promulgated FMVSS 226 regarding ejection mitigation measures such as side air curtains. This standard requires ejection countermeasure systems to be in place in the side windows (but not back windows or sunroofs) of certain vehicles. FMVSS 226 does not specify particular systems or options manufacturers must use; rather, NHTSA expects that manufacturers will meet the standard's performance requirements by modifying existing side impact air bag curtains, which may be supplemented with the use of advanced glazing. 76 Fed.Reg. 3212 (January 19, 2011). Notably, in the Final Rule, NHTSA stated that it did not adopt previously proposed standards requiring the "use of advanced side glazing in side windows because [it] did not find a safety need supporting the approaches." *Id.* at 3219.

E. Minimum Safety Standard Counterargument

In our previous opinion, we considered *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007) (finding FMVSS 205 was a minimum safety standard and did not preempt a state tort suit). However, we ultimately rejected the minimum safety standard argument adopted by *O'Hara* and advocated by Appellant. Upon remand, Appellant still contends FMVSS 205, through its incorporation of ANSI Z26, simply lists various performance tests qualifying window materials must meet and thereby establishes only a safety floor while permitting manufacturers to install additional or better protections. Therefore, Appellant asserts, FMVSS 205 does not preempt a state tort claim that would hold a manufacturer liable for using tempered glass in vehicle side windows. In support of this contention, Appellant cites *Williamson*, *O'Hara*, and *MCI Sales and Service, Inc. v. Hinton*, 329 S.W.3d 475 (Tex. 2010),[16] all of which find the federal safety regulation does not preempt

[16] In its Amicus Brief, the Center for Auto Safety suggests that the fact that the USSC issued a GVR order in the present case but denied certiorari in *MCI Sales & Service, Inc. v. Hinton*, 329 S.W.3d 475 (Tex. 2010), in which the Supreme Court of Texas found a state tort claim that a company should have installed laminated glass windows was not preempted by FMVSS 205, is a clear indication that this Court should reverse its previous decision. While that argument may have ostensible merit, we do not view the denial of certiorari in *Hinton* as dispositive. In *Hinton*, the jury found the plaintiffs' injuries were caused by a lack of seatbelts without regard to the plaintiffs' glass claims. However, because the case was remanded for a new trial, the Texas Supreme Court opted to rule on the preemptive effect of FMVSS 205 in anticipation that it would be a prominent issue upon retrial. *Id.* at 495 n.19 ("[O]ur conclusion that the seatbelt claim is not preempted is sufficient to uphold the jury's verdict. Even so, we discuss the preemptive effect of FMVSS 205 because, in light of the remand for a new trial, the issue of glazing materials will feature prominently on retrial. Accordingly, we address it to provide guidance to the trial court."). Accordingly, the portion of the *Hinton* opinion dealing with FMVSS 205 was not a final decision and, therefore, was not within the scope of the USSC's review. *See Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) ("To be reviewable by this Court, a state-court judgment must be final in two senses: it must be subject to no further review or correction in any other tribunal; it must also be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein.") (internal quotations omitted).

a state tort suit. In light of *Williamson*, we take this opportunity to discuss more fully our reasoning for rejecting Appellant's argument.

The Motor Safety Vehicle Act indeed directs the DOT to establish "*minimum* standard[s] for motor vehicle performance, or motor vehicle equipment." 49 U.S.C. § 30102 (emphasis added).[17] Furthermore, ANSI Z26 states that the standard "is intended to provide *minimum* requirements" for safety glazing materials. 49 C.F.R. § 571.205 (incorporating by reference ANSI Z26) (emphasis added).

We are also cognizant *Williamson* makes clear that the mere presence of choice among various alternatives does not necessarily mean that a regulation is something other than a minimum safety standard. 131 S.Ct. at 1139 ("[T]o infer from the mere existence of [choice] that the federal agency intends to bar States from imposing stricter standards would treat all such federal standards as if they were *maximum* standards, eliminating the possibility that the federal agency seeks only to set forth a *minimum* standard potentially supplemented through state tort law."); *see also Hinton*, 329 S.W.3d at 497 ("[W]hen *Geier*'s reasoning is oversimplified to find preemption based on a choice between two safety options and then exported to other safety standards where the unique text and history of FMVSS 208's passive restraint requirements are not relevant, we must respectfully disagree.").

Further, in *O'Hara*, the Fifth Circuit Court of Appeals reviewed the text and history of FMVSS 205 and determined "it is best understood as a minimum safety standard." 508 F.3d at 763; *see also Hinton*, 329 S.W.3d at 498 ("We find nothing in the standard's text, history, or NHTSA's comments to indicate that FMVSS 205 is anything other than a minimum standard."). Specifically, the *O'Hara* court noted that NHTSA's 2003 Final Rule commentary contained no language that preserving the option of tempered glass would "serve the safety goals of [FMVSS 205]." 508 F.3d at 761. Both the *Hinton* and *O'Hara* courts also considered what they characterized as NHTSA's silence regarding a "positive desire to preserve the use of tempered glass" as instructive in finding FMVSS 205 is simply a minimum

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[17] Section 30101 authorizes Congress "to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce." 49 U.S.C. § 30101. Section 30102 defines "motor vehicle safety standard."

standard. *Hinton*, 329 S.W.3d at 497; *see also O'Hara*, 508 F.3d at 761. Additionally, those courts examined NHTSA's Notice of Withdrawal and concluded it did not expressly reject advanced glazing as unsafe; rather, the courts noted cost concerns and what they characterized as "minor safety issues" to justify NHTSA's discontinuance of advanced glazing research. *O'Hara*, 508 F.3d at 761-62, *Hinton*, 329 S.W.3d at 497. Thus, the courts concluded that "[n]othing in the text of FMVSS 205 indicates that it is anything other than a minimum materials standard. . . . [T]he standard simply limits the range of available choices." *Hinton*, 329 S.W.3d at 495; *see O'Hara*, 508 F.3d at 763 ("[N]othing in the Notice of Withdrawal undermines the conclusion, drawn from the text and Final Rule commentary, that FMVSS 205 is a minimum safety standard.").

We acknowledge that Appellant's "minimum safety standard" argument has appeal. However, we find the concept of a "minimum standard" difficult to apply in this context because neither glass option (tempered or laminated) is safer overall, under every set of circumstances; rather, we believe the choice of glazing material can best be characterized as a safety tradeoff, depending on whether the desire is to maximize safety for belted or unbelted passengers.[18] NHTSA's findings regarding FMVSS 205 make clear that advanced glazing is a safer choice when a passenger is unbelted because it is more likely to prevent ejection from the vehicle. However, those findings also make clear that tempered glass is the safer choice when a passenger complies with the law and is belted because tempered glass is less likely to injure occupants upon impact. Because each type of glass has both benefits and drawbacks, it is therefore virtually impossible to posit which option is "less safe" and which is "more safe." Thus, it is difficult to reconcile this unavoidable tradeoff with a conclusion that either option results in an overall greater level of safety than the other, as contemplated in *Geier*. 529 U.S. at 870 (referring to "actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor").

By contrast, in *Williamson*, the safety benefits of lap-and-shoulder seatbelts were clearly known and quantified, and it was firmly established that those seatbelts are

[18] *See* ANSI/SAE Z26.1—1996 § 2.2 ("One safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type. Since accident conditions are not standardized, no one type of material can be shown to possess the maximum degree of safety under all conditions, against all conceivable hazards.").

obviously the *safer choice in all situations*. *See Williamson*, 131 S.Ct. at 1138 ("[DOT] was convinced that lap-and-shoulder belts would increase safety; it did not fear additional safety risks arising from use of those belts; [and] it had no interest in assuring a mix of devices . . . ."). Moreover, NHTSA *affirmatively encouraged* the use of the lap-and-shoulder seatbelt over the use of the lap belt alone where it was feasible to do so and declined to make lap-and-shoulder belts an immediate requirement only due to cost concerns. *See id.* The Court found that, while the state tort suit potentially restricted the manufacturer's choice, it did not "'stan[d] as an obstacle to the accomplishment . . . of the full purposes and objectives' of federal law." *Id.* at 1139-40 (quoting *Hines*, 312 U.S. at 67) (alteration in original). In fact, quite the opposite was true—the state tort suit actually furthered NHTSA's goal of promoting lap-and-shoulder seatbelts.

We also think that, in misconstruing FMVSS 205 as a minimum safety standard, *O'Hara* too casually dismisses the additional risk of neck injury that advanced glazing imposes upon belted passengers. *See O'Hara*, 508 F.3d at 761-62 (stating "some data indicated that advanced glazing might slightly increase the likelihood of minor neck injuries when compared to tempered glass"); *Hinton*, 329 S.W.3d at 498 (stating NHTSA's decision to abandon further advanced glazing research was due to "cost concerns and minor safety issues"). We do not believe NHTSA's view on the increased risk of injury to belted passengers can fairly be characterized as a "minor safety issue." Rather, NHTSA explicitly cited this safety concern as one of two "primary reasons" for abandoning its proposed rulemaking. We believe a tort action mandating advanced glazing in side windows, which serves to increase protection for unbelted passengers while increasing risk of injury to belted passengers, would directly frustrate the purpose of FMVSS 205.

Finally, we think that *O'Hara* and *Hinton* overstate the significance of NHTSA's silence regarding "preserving the option" of tempered glass in its 2003 amendment of FMVSS 205.[19] We disagree this amendment demonstrates the agency intended

[19] In 2003, NHTSA adopted a final rule updating the version of the ANSI standards incorporated by reference in FMVSS 205 from the 1977 version (as amended by the 1980 supplement) to the 1996 version of the industry standards. *See* Federal Motor Vehicle Standards; Glazing Materials; Low Speed Vehicles, 68 Fed. Reg. 43964 (July 25, 2003). No part of this Final Rule was focused on ejection mitigation using advanced glazing.

205 to be a minimum standard. Rather, we believe NHTSA deliberately chose to retain the option of tempered glass by abandoning the proposed rule requiring advanced glazing.[20]

F. Preemption Analysis

Based on *Geier* and *Williamson*, Appellant's common law products liability claims would restrict a manufacturer's choice of glass and would constitute a "state law" imposing a duty upon manufacturers of all similar vehicles to install laminated glass in side and rear windows. We believe such a state law would frustrate two significant federal purposes underlying FMVSS 205—namely Congress' fundamental desire to promote safety and the collateral goal of increasing seatbelt use. We believe NHTSA's deliberate decision not to require laminated glass in all vehicle windows demonstrates a determination that safety is best served where manufacturers may choose the safer choice for each vehicle. Further, a state law which increases safety for unbelted passengers while simultaneously decreasing safety for lawfully belted passengers would frustrate the collateral federal purpose of increasing seatbelt use. Accordingly, we find Appellant's state tort suit requiring laminated glass would stand as an obstacle to significant federal safety objectives and is therefore preempted.

IV.

For the foregoing reasons and having considered *Williamson*, this Court's previous decision is reaffirmed.

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[20] Both *Hinton* and *O'Hara* found NHTSA's 2002 Withdrawal of Proposed Rulemaking was parallel to the Coast Guard's statements in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). In *Sprietsma*, the USSC considered whether a claim that a motor boat should have been equipped with a propeller guard was preempted by the Federal Boat Safety Act of 1972, 46 U.S.C. §§ 4301-4311. In our view, *Sprietsma* is inapposite because it involved the government's decision not to regulate in an area devoid of federal regulation. Any such attempt to assign preemptive effect to nonexistent federal law is, in our judgment, meritless. In contrast, here, FMVSS 205 is a federal regulation from which a federal purpose may be gleaned. Thus, we are persuaded that *Sprietsma* is distinguishable from the line of cases dealing with FMVSS 205 and does not impact our analysis.

REAFFIRMED.

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

JUSTICE PLEICONES: This case is before us on remand from the United States Supreme Court for reconsideration in light of *Williamson v. Mazda Motor of America, Inc*., 131 S.Ct. 1131 (2011). Although I previously joined in the result that the majority reaches now for a second time, my reconsideration in light of *Williamson* leads me to the opposite conclusion.

In *Williamson*, the Court discussed *Geier v. American Honda Motor Co*., 529 U.S. 861 (2000). In doing so, it made clear that state tort suits are preempted only when the evidence shows that retaining manufacturer choice is "a *significant objective* of the federal regulation." *Williamson*, 131 S.Ct. at 1136 (emphasis in original). The Court's language emphasizes the clear evidence it relied on in *Geier* to support a finding of preemption. *Id*. at 1137. ("DOT's contemporaneous explanation of its 1984 regulation [found to preempt state tort suits in *Geier*] made *clear* that manufacturer choice was an *important* means for achieving its *basic* objectives.") (emphasis added). The Court then lists four specific reasons that had been articulated by the agency itself in that contemporaneous explanation for determining that manufacturer choice was needed. *Id*. (citing agency explanation that phase-in period for requiring airbags was needed because doing so would "give manufacturers time to improve airbag technology and develop other, better passive restraint systems"; avoid a public backlash; avoid potential injuries to unbelted occupants, particularly children; and avoid possibility that airbags would not be replaced when needed because of the high cost of doing so). The Court further explained that the history of the regulation at issue in *Geier* and the Government's understanding of it also supported the conclusion that tort liability was preempted. *Id*. at 1136-37.

Turning to the regulation at issue in *Williamson*, the Court found that it, unlike the regulation at issue in *Geier*, did not reflect a *significant objective* of preserving manufacturer choice. The *Williamson* Court took the time to note each of the specific reasons given by the agency for the need to preserve manufacturer choice in *Geier* and their absence from the agency explanation in *Williamson*. *Id*. at 1138. The Court then turned to the reasons cited by the agency in *Williamson* for declining to require a single standard, and, despite some references to minor safety concerns, found that the agency had declined to require a particular safety measure because of cost-effectiveness concerns. *Id*. at 1138-39. Thus, although the agency clearly chose to maintain manufacturer choice, the Court found that it did not do so as an affirmative, significant objective.

Turning then to this case and the evidence regarding the NHTSA's decision not to impose in FMVSS 205 a requirement that advanced glazing be used in side windows, as I read the relevant agency documents, they fail to demonstrate that the NHTSA had any *objective* of maintaining manufacturer choice, much less a significant objective in doing so. The NHTSA discontinued its study of the benefits of advanced glazing and withdrew its proposal to require it in side windows because it believed its resources would be better devoted to developing regulations related to other ejection mitigation devices and because of cost and minor safety concerns. *See* Notice of Withdrawal, 67 Fed. Reg. 41,365 (June 18, 2002). The NHTSA had explained in its Ejection Mitigation Using Advanced Glazing Final Report (Aug. 2001) (Final Report) that it encountered difficulty in quantifying the neck injuries that should be attributed to the use of advanced glazing in place of tempered glass. *See* Final Report at 36 ("No assessment of actual neck injury levels due to shear loads or moments was made since no accepted lateral neck injury criteria exist."). The agency further noted extreme variability in test results aimed at collecting data on neck loads. *See id*. (stating that both the lowest and second highest measurements of axial neck load were obtained in replicate tests on tempered glass impacts). None of these reasons express the agency's belief that manufacturer choice is needed in order to achieve an agency objective and therefore is a significant objective in and of itself.

The NHTSA's explanation of its decision not to pursue study of advanced glazing parallels that of the Coast Guard in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). In *Sprietsma*, the United States Supreme Court found that a state tort action was not preempted when the Coast Guard declined to require installation of propeller guards on all boats. The *Sprietsma* Court characterized the Coast Guard's explanation for its decision as "reveal[ing] only a judgment that the available data did not meet the . . . 'stringent' criteria for federal regulation." *Id*. at 66-67. Moreover, the Coast Guard's decision not to mandate propeller guards was due in part to concerns that "feasible propeller guards might prevent penetrating injuries but increase the potential for blunt trauma caused by collision with the guard." *Id*. at 61. Nonetheless, the *Sprietsma* Court found that the Coast Guard "most definitively did not reject propeller guards as unsafe[,]" citing the Coast Guard's indication that it might promote propeller guard use as a means of reducing propeller strike accidents. *Id*. at 67 & n.11. Advanced glazing is much the same. It prevents ejection but might increase the risk of comparatively minor injury. In addition, the NHTSA has most definitively not rejected advanced

glazing as unsafe, continuing to require its use in windshields. *See* FMVSS 205; *O'Hara v. General Motors Corp*., 508 F.3d 753, 761-63 (5th Cir. 2007).

The *Sprietsma* Court also noted that the Coast Guard focused on the lack of a universally appropriate propeller guard for all types of boat operation; it reasoned that "nothing in [the Coast Guard's] official explanation would be inconsistent with a tort verdict premised on a jury's finding that some type of propeller guard should have been installed on this particular kind of boat equipped with respondent's particular type of motor." *Id*. at 67. Although the NHTSA has made no comparable statement to the effect that no single standard might be universally appropriate for side window glazing, it is also clear that the NHTSA did not make vehicle-specific determinations or formulate an *objective* that manufacturers' fleets contain a mixture of devices, as the DOT did in *Geier*. *See Geier*, 529 U.S. at 878-81. Indeed, if, as the majority finds, the NHTSA's regulation was designed to maintain manufacturer choice *so that they would install the safer choice for each vehicle*, the regulation is entirely consistent with a tort verdict premised on a jury's finding that advanced glazing should have been used in a particular window of a particular vehicle model. *See Sprietsma* at 67.

Finally, I do not read the NHTSA explanation as finding that use of advanced glazing would "decreas[e] safety for lawfully belted passengers" as the majority concludes.[21] Therefore, I find no basis for concluding that requiring advanced glazing would frustrate what the majority acknowledges is merely a *collateral* federal purpose of increasing seatbelt use. *Williamson*, *supra*.

Thus, I would reverse the grant of summary judgment and remand for further proceedings.

[21] Indeed, the Final Report implies that advanced glazing would provide some safety benefits to belted as well as unbelted occupants. The report indicates that belted occupants may occasionally be ejected from vehicles. *See* Final Report at 15. It also indicates that a substantial portion of ejection injuries result from partial ejections, though without noting whether belted occupants may be partially ejected. *Id*. at 9. The Final Report does not indicate whether estimates of the overall costs and benefits of advanced glazing for belted occupants are available.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Vernon Sulton and Willie Mae Scott, Respondents,

v.

HealthSouth Corporation d/b/a HealthSouth of South Carolina, Inc., d/b/a HealthSouth Rehabilitation Hospital, Kathy Hoover, RN, Lisa Page, RN, Sharon Miller, RN, Kim Harris, RN, Betty Casteal, RN, and Norine Corbin, RN, Appellants.

Appellate Case No. 2010-171126

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

Opinion No. 27192
Heard October 17, 2012 – Filed November 21, 2012

REVERSED AND REMANDED

C. Mitchell Brown, William C. Wood, Jr., and Brian P. Crotty, of Nelson Mullins Riley & Scarborough, and Carmello B. Sammataro, of Turner Padget Graham & Laney, all of Columbia, for Appellants .

John S. Nichols, of Bluestein Nichols Thompson & Delgado, of Columbia, Fernando Xavier Starkes, of Starkes Law Firm, of Columbia, Chad Alan McGowan of McGowan Hood & Felder, of Rock Hill, and William

Jones Andrews, Jr., of McGowan Hood & Felder, of Columbia, for Respondent.

JUSTICE PLEICONES: In this direct appeal, Appellants HealthSouth Corporation (HealthSouth) and the individual named nurse defendants challenge the jury's verdict in a negligence and loss of consortium action. We reverse and remand for a new trial.

FACTS

Vernon Sulton (Sulton) was rendered paraplegic by gunshot wounds he received as a bystander at an armed robbery. After initial treatment at Richland Memorial Hospital, he was transferred to the HealthSouth Rehab Hospital in Columbia, South Carolina. He was admitted with a sacral stage two pressure ulcer. In the eleven days Sulton remained at HealthSouth, the pressure ulcer progressed from stage two to stage four. Sulton underwent a colostomy and surgery that included a skin graft, and the pressure ulcer eventually fully healed. Sulton and his wife, Willie Mae Scott (Scott), sued HealthSouth and several of its nurses, alleging that Sulton had been injured by the defendants' negligent provision of nursing care. Scott alleged a cause of action for loss of consortium. Sulton died of unrelated causes prior to trial. In the survival action, a jury found against all defendants and awarded $306,693.25 in economic damages but no non-economic damages. In the loss of consortium action, the jury found HealthSouth alone liable to Scott for four million dollars in non-economic damages. The jury also found that HealthSouth had been willful, wanton, or reckless. In the punitive damages phase of the bifurcated proceedings, the jury awarded eight million dollars in punitive damages. HealthSouth moved for JNOV, new trial absolute, and new trial *nisi remittitur*. These motions were denied. This appeal followed.

ISSUES

I. Did the trial court err when it instructed the jury that heightened risk creates a greater duty of care in a medical malpractice case?

II. Was the verdict form flawed such that Appellants were prejudiced?

III. Did the trial court err when it permitted Respondents to refer to HealthSouth's net operating revenue?

DISCUSSION

I. Heightened duty of care in jury charge

Appellants argue they are entitled to a new trial because the trial court improperly instructed the jury that they owed a heightened duty of care to Sulton and Scott. We agree.

A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. *Keaton ex rel. Foster v. Greenville Hosp. System*, 334 S.C. 488, 495-96, 514 S.E.2d 570, 574 (1999). An erroneous jury instruction constitutes grounds for reversal only if the appellant can show prejudice from the erroneous instruction. *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961).

In a medical malpractice action, the duty of care under South Carolina law is "that of an average, competent practitioner acting in the same or similar circumstances." *King v. Williams*, 276 S.C. 478, 482, 279 S.E.2d 618, 620 (1981) (citation omitted).

In this case, the trial court instructed the jury over Appellants' objection that

> [I]t is the general law applicable to all persons that if there is a great degree of danger present then there is a greater duty of care to percent [prevent] injuries to other persons. A similar rule applies to physicians or healthcare providers in their treatment of their patients. When there's a risk of substantial danger present and the symptoms of the patient are consistent with such a risk then the healthcare provider has a duty to respond in proportion to the risk. The greater the risk of the condition to the patient the greater the duty of the healthcare provider to respond appropriately and to provide appropriate treatment.

Appellants contend that this charge wrongly heightened their duty and that they were prejudiced thereby. We agree.

In *Pittman v. Stevens*, 364 S.C. 337, 613 S.E.2d 378 (2005), this Court addressed a nearly identical jury instruction.[1] In *Pittman*, the trial court failed to use this charge when requested to do so. *Id*. at 340, 613 S.E.2d at 379. After finding that the trial court did not err since the jury charge as a whole correctly stated South Carolina law, the Court explained that "there is no South Carolina case law supporting [the heightened duty instruction's] application in a medical malpractice action." *Id*. at 342, 613 S.E.2d at 380-81. Such a charge is likely to confuse or mislead a jury into believing that the duty is something greater than "ordinary care under the circumstances." *Id*. at 343, 613 S.E.2d at 381. The Court concluded by stating that "**this instruction is even more inappropriate in a medical malpractice case**" because "[e]very medical decision encompasses varying degrees of danger." *Id*. (emphasis added).

Respondents argue that *Pittman* is distinguishable from the present case because the *Pittman* Court merely refused to reverse the trial court after it declined to give this requested instruction, while the present case considers the question whether it was error to give the instruction. Although this distinction is accurate, *Pittman* does not merely hold that the instruction was superfluous but also criticizes it as improper, especially in a medical malpractice case. We hold that it was error for the trial court to give the instruction.

Respondents argue that Appellants were not prejudiced despite the improper instruction because the trial court also advised the jury of the proper standard at several points. Conversely, Appellants urge us to hold, as did a North Carolina court, that as a rule "an erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated." *Crow v. Ballard*, 263 N.C. 475, 478, 139 S.E.2d 624, 627 (N.C. 1965). The North Carolina standard does not comport with South Carolina jurisprudence regarding jury instructions, which analyzes jury instructions as a whole and emphasizes prejudice analysis. *See, e.g.*, *Ardis v. Sessions*, 383 S.C. 528, 682 S.E.2d 249, 251 (2009). Nevertheless, we agree that, in this case, the erroneous instruction went to the heart of the case and was "not cured by the fact that in other portions of the charge the law [was] correctly stated" because Appellants introduced evidence to demonstrate that they did exercise reasonable care in relation to the pressure ulcer.

[1] This charge is apparently taken from Judge Ralph King Anderson Jr.'s book, *South Carolina Request to Charge*.

Moreover, if the jurors believed that the law imposed a heightened duty on Appellants as a result of Sulton's vulnerability, their perception of the egregiousness of Appellants' breach of that duty would likely have been correspondingly exaggerated. Thus, the fact that the jurors also found HealthSouth reckless, willful, and wanton and awarded substantial punitive damages demonstrates the pervasive potential impact of the improper charge.

Accordingly, we find that Appellants are entitled to a new trial.

Although not necessary to our decision, we address two additional issues raised by HealthSouth that may arise upon retrial.

II. Verdict form

HealthSouth argues that flaws in the verdict form entitle it to a new trial. We agree.

"[A] special verdict question may be so defective in its formulation that its submission results in a prejudicial effect which constitutes reversible error. . . . The prejudicial effect of a defective verdict form may be cured where the trial court provides clear and cogent jury instructions." *South Carolina Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 303, 641 S.E.2d 903, 908-09 (2007) (citations omitted).

In the liability stage of the proceedings in this case, both the Appellants and Respondents submitted proposed verdict forms. Over Appellants' objection, the trial court provided the jury with the verdict form that had been submitted by Respondents. The first question on the verdict form was designed to permit a finding of liability on the survival action, the second question on the consortium action. Each question began with a textual portion that read, "We the jury find for the Plaintiff . . . and against the Defendant HealthSouth Corporation . . . and the following:" This introductory text was followed by a list of the names of the individual nurses, from which the jury could select any or all or, alternatively, select "NONE OF THE ABOVE." An additional portion of each question allowed the jury to determine the related damages. The third question asked the jury whether it found that "HealthSouth Corporation . . . by and through its employees was reckless, willful, or wanton and that their conduct was proximate cause of injury to Plaintiff[.]"

HealthSouth argues that the verdict form failed to give the jury a way to find against some or all of the individual nurse defendants while simultaneously finding in favor of HealthSouth Corporation. We agree and find the form's overall structure both confusing and prejudicial, since it strongly suggests that HealthSouth was necessarily more culpable than the individual defendants despite the fact that Respondents' theory at trial was based on HealthSouth's vicarious rather than direct liability.

III. Punitive damages award

After the jury returned a verdict finding HealthSouth reckless, willful, and wanton, the court proceeded to a punitive damages phase of trial in which the jury returned an $8 million verdict against HealthSouth. HealthSouth argues that the trial court erred when it permitted Respondents to refer to HealthSouth's net operating revenue. We agree.

In assessing punitive damages, "the wealth of a defendant is a relevant factor" in determining the defendant's ability to pay, but only evidence of net worth and extrapolations from net worth may be introduced on the issue. *Branham v. Ford Motor Co*., 390 S.C. 203, 239-40, 701 S.E.2d 5, 24-25 (2010). In addition, such evidence must be handled cautiously, since "the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Id*. at 239, 701 S.E.2d at 24 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)).

In this case, the trial court properly declined to admit HealthSouth's 10-K financial form, the only evidence offered by Respondents at the punitive damages phase. However, the trial court proceeded to permit Respondents' counsel, over HealthSouth's objection, to inform the jury that HealthSouth's 2009 net operating revenue as shown on the 10-K was $1.911 billion.[2]

This was improper for two reasons. First, HealthSouth's financial information was presented to the jury through counsel's arguments without supporting evidence. *See South Carolina Dept. of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d

[2] The record reflects that this phase was irregular, consisting solely of arguments. Only the 10-K form was offered in evidence, and no evidence of any kind was actually admitted.

511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence."); *O'Leary-Payne v. R.R. Hilton Head, II, Inc*., 371 S.C. 340, 352, 638 S.E.2d 96, 102 (Ct. App. 2006) ("Closing arguments must be confined to evidence in the record and reasonable inferences therefrom.").[3]

Second, informing the jury of a corporation's net operating revenue is improper under *Branham*, and the prejudicial effect of doing so is self-evident. Net revenue has no necessary relation to net worth and it could be, as HealthSouth contends, that shareholder equity was actually negative (i.e., the corporation had no net worth). Putting this huge sum of money into the minds of the jury, reflecting the company's net income but accounting for none of its expenses and obligations, was almost certainly misleading and very likely to have stirred any jury bias against big businesses. *Branham*, *supra*.

CONCLUSION

Because the trial court improperly instructed the jury that Appellants owed Respondents a heightened duty of care, we

REVERSE AND REMAND for a new trial on all issues as to all Appellants.

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

[3] We do not suggest that the 10-K form should have been submitted into evidence. Neither do we preclude reliance on such financial data by an expert witness under Rule 703, SCRE.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael D. Shavo, Respondent.

Appellate Case No. 2012-213107

Opinion No. 27193
Submitted November 2, 2012 – Filed November 21, 2012

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, Charlie Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Columbia, for Respondent Michael D. Shavo.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of any sanction provided by Rule 7(b), RLDE. Respondent requests that any suspension be made retroactive to September 22, 2009, the date of his interim suspension. *In the Matter of Shavo*, 385 S.C. 230, 683 S.E.2d 799 (2009). In light of respondent's cooperation in the investigation of this matter and the recommendation of the investigative panel of the Commission on Lawyer Conduct, we accept the Agreement and suspend respondent from the practice of law in this state for three (3) years, retroactive to the date of his interim suspension. The facts, as set forth in the Agreement, are as follows.

Facts

On August 24, 2010, after the issuance of an indictment, respondent entered a plea agreement and pled guilty to 18 U.S.C. § 1001 (2000) admitting he made a false statement to a governmental agency, that he acted willfully and knowingly, and that the false statement was material to a matter within the jurisdiction of the governmental agency. On May 17, 2011, respondent was sentenced to five (5) years of probation. In addition, he was held jointly and severally liable for restitution in the amount of $483,250.00.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); Rule 7(a)(4) (it shall be ground for discipline for lawyer to be convicted of a serious crime); and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Conclusion

We accept the Agreement for Discipline by Consent and impose a definite suspension of three (3) years, retroactive to September 22, 2009, the date of respondent's interim suspension. Respondent must satisfy all the terms of his criminal sentence, including payment of restitution and completion of probation, before he shall be permitted to file a Petition for Reinstatement. Within fifteen

days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Frank L. Valenta, Jr., Respondent.

Appellate Case No. 2011-203929

Opinion No. 27194
Submitted November 6, 2012 – Filed November 21, 2012

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

D. Cravens Ravenel, of Columbia, for Respondent Frank L. Valenta, Jr..

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a letter of caution, confidential admonition, or public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent is the General Counsel at the South Carolina Department of Motor Vehicles (SCDMV). When a case brought as the result of a uniform traffic ticket is disposed of in court, the ticket is forwarded to SCDMV for processing. If the

underlying case is reopened by a judge, the judge issues an order requiring the SCDMV to return the ticket.

In respondent's opinion, the SCDMV was receiving orders to return tickets on reopened matters in which the court did not have jurisdiction. As a result, respondent was concerned that his agency's return of the tickets assisted judges in violating the law and that defense attorneys might have been encouraging judges to overlook jurisdictional issues.

In light of his concerns, between 2007 and 2009, respondent presented sessions on criminal appeals at the Magistrate's Mandatory School. Issues related to the return of tickets in reopened cases were addressed during these presentations.

In addition, after consultation with other lawyers, at least one of whom had experience in disciplinary matters, respondent began sending letters to judges who ordered the SCDMV to return a ticket when respondent believed the order violated the law. The letter advised the judge of respondent's view of the applicable law and requested the judge sign and return his letter if the judge wished the SCDMV to proceed with returning the ticket. Consequently, between September 2009 and July 2010, respondent willfully refused to comply with twenty-one magistrate court orders to return tickets. Instead of filing a motion to have the legal issue judicially resolved, respondent sent each magistrate a letter explaining his view of the law, purportedly as a justification for his unilateral decision to disobey a court directive.[1]

In November 2009, a judge who received one of respondent's letters instructed respondent, once again, to return the ticket. Rather than complying with the judge's instruction, respondent sent a complaint against the judge to the Commission on Judicial Conduct. In March 2010, the Commission on Judicial Conduct dismissed the complaint and, shortly thereafter, respondent ceased the practice of sending the letters, as well as unilaterally deciding what court orders he would follow based on his own view of the law.

[1] We do not reach the merits of the underlying dispute as it relates to the authority of a judge to recall a ticket.

In cases in which respondent knew the defendant was represented by counsel, respondent sent copies of his letter to counsel because he suspected that some of the attorneys were not aware of the statutes and case law. However, in cases of pro se defendants, respondent did not provide a copy of his letter to the defendants. At the time, respondent did not consider his letters to be ex parte communications because the SCDMV was not a party to the cases. Respondent acknowledges that, although the SCDMV was not technically a party to the orders, it was the custodian of the tickets.

Law

Respondent admits that by his conduct he has violated the following provision of the Rules of Professional Conduct, Rule 407, SCACR: Rule 3.5(b) (lawyer shall not communicate ex parte with a judge during a proceeding unless authorized to do so by law or court order). Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We find respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

K.C. Langford, III, Appellant.

Appellate Case No. 2010-173128

Appeal From Edgefield County
William P. Keesley, Circuit Court Judge

Opinion No. 27195
Heard April 18, 2012 – Filed November 21, 2012

AFFIRMED

Elizabeth Anne Franklin-Best, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Deputy Attorney General David A. Spencer, all of Columbia, and Solicitor Donald V. Myers, of Lexington, for Respondent.

E. Charles Grose, Jr., of Greenwood, and Tara S. Waters, of Laurens, for Amicus Curiae South Carolina Public Defender Association.

Solicitor David M. Pascoe, Jr., of Columbia, for Amicus Curiae Solicitors' Association of South Carolina.

JUSTICE HEARN: We must determine whether Section 1-7-330 of the South Carolina Code (2005), which vests control of the criminal docket in the circuit solicitor, violates the separation of powers principle embodied in Article 1, Section 8 of the South Carolina Constitution. In 1980, we recognized that "[t]he authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases." *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). "This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." *Id.* The time has now come for us to acknowledge that section 1-7-330 is at odds with this intrinsically judicial power. We therefore hold that section 1-7-330 violates the separation of powers and therefore is unconstitutional. However, because K.C. Langford, III, the Appellant herein, suffered no prejudice as a result of section 1-7-330, we affirm his convictions.

FACTUAL/PROCEDURAL BACKGROUND

On August 14, 2008, Ji Quing Chen, along with his son, Li Guan Xin, and wife, Li Ai Ming, left the Chinese restaurant they own in Johnston, South Carolina, shortly after 10:00 p.m. and headed home. With them was a black bag containing the day's earnings. When they arrived home, Ji Quing stayed outside to water some plants while his wife and son entered the house. As he was tending to his garden, three men wearing masks came out from the bushes, forced him to the ground, hit him, and took his wallet. Concerned that his father had not yet come inside, Li Guan stepped out onto the porch to check on him. Once he was outside, the men forced Li Guan to the ground and asked where the restaurant's money was. He told them it was in the house, and one of the men went inside to find it. That man returned shortly with the black bag, and all three of them ran off. Because the men wore masks, the victims were unable to provide a useful description to law enforcement. Moreover, it does not appear the men left any forensic evidence during the commission of these crimes.

Investigators eventually met with Alvin Phillips, who in a statement dated September 28, 2008, confessed that he was one of the men who robbed the family. He further identified his cousin and Langford as the two remaining suspects. In the absence of an eye-witness identification and forensic evidence, Phillips' statement was the only evidence implicating the other men. Langford was arrested shortly thereafter on October 3, and he was indicted for criminal conspiracy a few months later in December 2008. However, he was not indicted for armed robbery, first degree burglary, and kidnapping until May 5, 2010, nineteen months following his arrest. He would remain incarcerated until his trial.

The State attributed the delay in procuring these indictments to difficulties in finding Chinese interpreters to translate what Ji Quing and his family, none of whom spoke English well, were relaying to investigators. Furthermore, Phillips retracted his statement implicating Langford while the two of them were housed in the same detention facility. He did so first in a signed statement dated January 29, 2009. On March 31, 2009, he signed another statement wherein he attested that the original statement he made to police in September 2008 was not true and he was not in the "right state of mind" when he made it. According to the State, Langford and his co-defendant pressured Phillips into recanting. In fact, Phillips testified Langford even brought him these later statements to sign. To avoid further intimidation, Phillips was moved to another facility. At some point thereafter, although it is not clear when, Phillips again agreed to testify against Langford.

On June 29, 2009, nearly nine months after he was taken into custody, Langford made what appears to be a *pro se* motion for a speedy trial. A hearing was held on May 17, 2010, and Langford renewed his motion at that time and joined it with a motion to dismiss.[1] This was the date on which the State originally planned to try Langford and his co-defendant, with Phillips serving as a cooperating witness who would testify against them. But the State received word that morning that Phillips decided to invoke his privilege against self-incrimination and would not testify at the trial. Allegedly, this was due to pressure Langford and Phillips' cousin continued to exert on him even after his transfer. Phillips now would not be available for cross-examination at trial, and the State therefore could

[1] It does not appear the court ever ruled on Langford's ostensibly *pro se* motion prior to this hearing. Moreover, the record suggests that the hearing was held upon the motion of Langford's co-defendant, Phillips' cousin. This motion was styled as a motion to dismiss or, in the alternative, a motion for a speedy trial.

not use his prior statement implicating Langford.[2] Because the State's case against Langford rested almost exclusively on Phillips' statement, without it the State effectively was prevented from going forward.

To remedy the situation, the State needed to try Phillips first or, presumably, obtain a guilty plea with the attendant waiver of his right to remain silent. However, Phillips had retained new counsel just eight days prior to the hearing who understandably was not ready to move forward during that term of court. The State therefore requested a continuance so it could proceed against Phillips at the next available opportunity, at which point it would then be able to try Langford. Although the court was "deeply concerned" by the twenty-month delay in the case, it found that "[n]one of this delay was occasioned by any impropriety on the part of the State." It also recognized that, for all intents and purposes, the State could not proceed in the absence of Phillips' testimony. The court accordingly denied Langford's motion to dismiss and granted the State a continuance. However, cognizant of the delays which had already accrued, the court ordered the State to try Langford within nine months, and it further directed that Langford could renew his motion at that time if the State failed to do so.[3]

Phillips pled guilty in August 2010 and once again agreed to testify for the State. Langford's case was then called for trial on September 7, 2010, nearly two years after his arrest.[4] The jury convicted Langford on all four charges, and the court sentenced him to twenty years' imprisonment on the armed robbery, kidnapping, and first degree burglary charges, and five years' imprisonment on the civil conspiracy charges, all to run concurrently. This appeal followed. After the appeal was perfected, the court of appeals granted permission for the South Carolina Public Defender Association to file an amicus curiae brief challenging the

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[2] *See Bruton v. United States*, 391 U.S. 123, 126 (1968) (holding the Confrontation Clause bars the admission of a statement of a co-defendant who remains silent which is to be used against the other defendant at trial).

[3] The court would have set an earlier deadline, but there were scheduling conflicts with a pending death penalty trial and a visiting judge. Additionally, while Langford did file what seems to be another *pro se* motion to dismiss on May 25, 2010, it does not appear the court ruled on it.

[4] This was only the second General Sessions term of court for Edgefield County after May 17, 2010, the term in which the State received the continuance.

constitutionality of section 1-7-330. This case subsequently was certified to us pursuant to Rule 204(b), SCACR.

ISSUES PRESENTED

I. Is section 1-7-330 constitutional?

II. Did Langford suffer any prejudice as a result of the solicitor controlling when his case would be called for trial?

LAW/ANALYSIS

I. SECTION 1-7-330

We agree with the Public Defender Association that section 1-7-330 is unconstitutional. Before we reach the merits of this question, however, we must first address the State's position that it is not preserved for our review.

Constitutional questions must be preserved like any other issue on appeal. *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001). As the State correctly notes, this issue was not raised to or ruled upon by the circuit court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue must have been raised to and ruled upon to be preserved for review). Moreover, Langford's statements of the issue on appeal do not raise this question. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Indeed, this issue is only before us by way of the amicus brief filed by the Public Defender Association, and our rules provide that an amicus brief "shall be limited to argument of the issues on appeal *as presented by the parties.*" Rule 213, SCACR (emphasis added).

Nevertheless, we previously have considered arguments raised only by an amicus when they concern a "matter of significant public interest." *Ex parte Brown*, 393 S.C. 214, 216, 711 S.E.2d 899, 900 (2011). We stress that this exception to Rule 213 must be applied narrowly and only under the appropriate circumstances so as not to eviscerate the long-standing preservation requirements in our jurisprudence. However, we have little trouble concluding that who decides when criminal defendants in this State should be tried is a matter of significant

public interest as envisioned by *Brown*.[5] We therefore proceed to analyze the constitutionality of section 1-7-330.

Section 1-7-330 states in full:

> The solicitors shall attend the courts of general sessions for their respective circuits. Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial. *Provided,* however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term.

In reviewing the validity of this statute, we are reluctant to find it unconstitutional. *See In re Treatment and Care of Luckbaugh*, 351 S.C. 122, 134, 568 S.E.2d 338, 344 (2002). We will therefore make every presumption in favor of its validity. *Id.* The party challenging the statute bears the heavy burden of proving that "its repugnance to the constitution is clear and beyond a reasonable doubt." *Id.* at 134-35, 568 S.E.2d at 344.

The Public Defender Association contends section 1-7-330 violates the separation of powers by impermissibly conferring judicial responsibilities upon a member of the executive branch. Our constitution mandates that "the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8.

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[5] We do not take lightly the dissent's concern that by addressing the merits of the Public Defender Association's argument we offend our rules of preservation, but remain convinced this issue falls easily within our exception. Moreover, if the issue is truly unpreserved, as the dissent contends, we are at a loss to understand why the dissent addresses the merits. Preservation in South Carolina is a threshold issue and if an issue is unpreserved, it is not properly before the court and the merits should not be reached. *See State v. Roach*, 377 S.C. 2, 3, 659 S.E.2d 107, 107 (2008) (noting that issues not preserved for review should not be addressed); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (same).

> One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws.

State ex rel. McLeod v. McInnis, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

We begin by ascertaining where in our system of government solicitors fall. We note the only reference to solicitors in the constitution is in the article creating the judicial department. *See* S.C. Const. art. V, § 24. However, this section also provides that "[t]he General Assembly shall provide by law for their duties." *Id*. To that end, Section 1-1-110 of the South Carolina Code (2005) squarely places solicitors in the executive branch. Moreover, the Solicitors' Association of South Carolina unequivocally states in its own amicus brief defending section 1-7-330, "The Office of Solicitor is part of the Executive Branch of our state government." Accordingly, we conclude solicitors are members of the executive branch.

We must next determine whether vesting solicitors with the exclusive authority to prepare the dockets for General Sessions is an infringement on the court's powers. "[A] usurpation of powers exists, for purposes of [the] constitutional separation of powers doctrine, when there is a significant interference by one branch of government with the operations of another branch." 16A Am. Jur. 2d *Constitutional Law* § 246. This rule is not fixed and immutable, however, as there are grey areas which are "tolerated in complex areas of government." *McInnis*, 278 S.C. at 313, 295 S.E.2d at 636 (1982). There consequently is "some overlap of authority and some encroachment to a limited degree." *Id*.; *see also* 16A Am. Jur. 2d *Constitutional Law* § 244 ("Separation of powers does not require that the branches of government be hermetically sealed; the doctrine of separation requires a cooperative accommodation among the three branches of government; a rigid and inflexible classification of powers would render government unworkable."). At its core, the doctrine therefore "is directed only to those powers which belong exclusively to a single branch of government." 16A Am. Jur. 2d *Constitutional Law* § 246.

As we noted at the outset of this opinion, a court's power to hear and decide cases "carries with it the inherent power to control the order of its business." *Williams*, 274 S.C. at 279, 262 S.E.2d at 883. Setting the trial docket therefore is

the prerogative of the court. Section 1-7-330, on the other hand, states, "Preparation of the dockets for general sessions courts shall be *exclusively vested in the circuit solicitor* and the solicitor shall determine the order in which cases on the docket are called for trial." (emphasis added). Vesting a member of the executive branch with the exclusive authority to perform an inherently judicial function unquestionably is a violation of separation of powers. *See Hagy v. Pruitt*, 331 S.C. 213, 222, 500 S.E.2d 168, 173 (Ct. App. 1998) (Howard, J., concurring) ("[A] statute which attempts to exercise ultimate authority over the inherent power of the court is unconstitutional because it violates the separation of powers doctrine . . . ."), *aff'd*, 339 S.C. 425, 529 S.E.2d 714 (2000). This is not a grey area where some encroachment can be tolerated, but rather a complete invasion into the court's domain.

The dissent, however, takes a different approach and contends that finding the statute unconstitutional will somehow permit courts to infringe upon the powers of the solicitor.[6] Nevertheless, the dissent correctly acknowledges that the discretion afforded the solicitor "does not mean that the solicitor's authority is unrestrained by judicial oversight. The trial judge has the ultimate authority to determine whether a case called by the solicitor will be tried at a particular juncture." Thus, it appears the dissent truly believes the court has always had the authority to control the docket. In light of that position, we are at a loss as to why it believes our holding today infringes on the solicitor's power.

In fact, we believe our holding is consistent with the dissent's support for the importance of judicial restraint on prosecutorial power. However, unlike the dissent, we recognize that by providing that the "[p]reparation of the dockets for general sessions courts shall be *exclusively vested in the circuit solicitor* and the *solicitor shall* determine the order in which cases on the docket are called for trial"

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[6] Undoubtedly, the solicitor has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain. True too is the fact that he must grapple with marshaling witnesses, ranging from victims, to police officers, to experts. Because the State bears the burden of proof, the solicitor also does not want to call the case before he himself is ready. Moreover, he is the person most knowledgeable about the status of the case. These are all truisms we cannot dispute, and they are prerogatives of the solicitor (and, to a large degree, of defense counsel as well) and are unaffected by our decision.

(emphasis added), the plain and unambiguous language of section 1-7-330 cannot be squared with this oversight. The statute must therefore yield.

Accordingly, we hold section 1-7-330 is unconstitutional beyond a reasonable doubt.

II. PREJUDICE

Our determination that section 1-7-330 violates separation of powers is not dispositive of Langford's appeal. To warrant reversal, Langford must demonstrate that he sustained prejudice as a result of the solicitor setting when his case was called for trial. As this case comes to us, two different forms of prejudice are alleged: (1) Langford was denied his right to due process because section 1-7-330 permitted the solicitor to judge shop, and (2) Langford was denied his right to a speedy trial. We disagree that Langford's trial suffered from any infirmities as a result of section 1-7-330 and therefore affirm his convictions.

A. Due Process

We consider first whether the power impermissibly granted to the solicitor by section 1-7-330 enabled him to violate Langford's due process rights. Although many different violations are discussed anecdotally, the only due process violation said to have occurred in this case is that section 1-7-330 permitted the solicitor to select the judge who would preside over Langford's trial. Although we question the extent to which section 1-7-330 actually permitted judge shopping, we proceed assuming *arguendo* that it did so.

A criminal defendant has a due process right to have his case heard by a fair and impartial judge. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."). Similarly, he has the right to have a judge assigned to his case "in a manner free from bias or the desire to influence the outcome of the proceedings." *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987) (Kozinksi, J.). On the other hand, he does not have a right to "any particular procedure for the selection of the judge." *Id.* Thus, there is no right to have one's judge selected randomly, nor is there one to have a case heard by any particular judge. *Sinito v. United States*, 750 F.2d 512, 515 (6th Cir. 1984). Moreover, a defendant has "no

vested right in the order in which cases are assigned for trial." *Levine v. United States*, 182 F.2d 556, 559 (8th Cir. 1950).

Accordingly, a state may use any method to select judges so long as it is impartial and not geared towards influencing the trial's outcome. Without a doubt, permitting solicitors—who represent a party in the case—to select the judge raises the specter of partiality and calls the validity of the entire system into question. *See United States v. Pearson*, 203 F.3d 1243, 1257 (10th Cir. 2000) ("In our view, if the assignment of a case to an individual judge should not be based on 'the desire to influence the outcome of the proceedings,' then allowing a prosecutor to perform that task raises substantial due process concerns." (quoting *Cruz*, 812 F.2d at 574)); *Tyson v. Trigg*, 50 F.3d 436, 442 (7th Cir. 1995) (Posner, J.) ("The practice of allowing the prosecutor to choose the . . . trial judge is certainly unsightly, as the Indiana court of appeals opined; it does lack the appearance of impartiality . . . ."); *Cruz*, 812 F.2d at 574 ("The suggestion that the case assignment process is being manipulated for motives other than the efficient administration of justice casts a very long shadow, touching the entire criminal justice system . . . ."). Some courts have therefore struck down their systems of permitting prosecutors to select judges. *State v. Simpson*, 551 So. 2d 1303, 1304 (La. 1989) (doing so on due process grounds); *McDonald v. Goodstein*, 83 N.Y.S.2d 620, 625 (Sup. Ct. 1948) (holding that granting prosecutors control over choosing the judge threatens the independence of the judiciary); *see also Rosemond v. Catoe*, 383 S.C. 320, 326 n.1, 680 S.E.2d 5, 8 n.1 (2009) ("We acknowledge the practice of the prosecutor selecting the trial judge is inappropriate and troubling.").

However, as Judge Posner wrote, "[t]he presumption that judges are unbiased is more than a pious hope." *Tyson*, 50 F.3d at 439. Furthermore, "[t]he right to a judge who is free from the mere *appearance* of partiality is not part of due process at all." *Id.* at 442. Hence, we will not presume the judge is partial simply because he was selected by the prosecutor, for adopting such a rule would "conflate[] the appearance of partiality with actual partiality." *Francolino v. Kuhlman*, 224 F. Supp. 2d 615, 636 (S.D.N.Y. 2002), *aff'd*, 365 F.3d 137 (2d Cir. 2004); *see also Pearson*, 203 F.3d at 1262 ("[W]e cannot presume that a federal judge selected by the prosecutor will be his agent or henchman."). In order to be entitled to relief, a defendant therefore must establish actual partiality and prejudice on the part of the judge. *Pearson*, 203 F.3d at 1263 (finding prosecutorial selection of judge harmless error because there was no evidence the judge decided any issue in a manner more favorable to the prosecution than other judges would

have); *Tyson*, 50 F.3d at 442 (holding permitting the prosecutor to choose the judge "does lack the appearance of impartiality[,] but that is all, so far as the record of this case discloses, and it is not enough"); *Sinito*, 750 F.2d at 515 ("Even when there is an error in the process by which the trial judge is selected . . . the defendant is not denied due process as a result of the error unless he can point to some resulting prejudice."); *Francolino*, 224 F. Supp. 2d at 636 ("While the Court agrees that the former system gave the appearance of partiality, maintaining that Justice Snyder was in fact partial is a separate matter."); *State v. Huls*, 676 So. 2d 160, 167 (La. Ct. App. 1996) (noting a showing of prejudice was required even after the Louisiana Supreme Court struck down the practice of prosecutorial selection of judges on due process grounds).

The only support offered for the allegation of bias by the presiding judge in this case, Judge Keesley, is the simple fact that he ruled in favor of the State on previous issues that arose. Yet, there is not a shred of evidence that he did so out of any animus towards Langford or allegiance to the State. The contention that a judge was biased *solely* because he ruled against a defendant is untenable and insulting towards the court, and it would set a dangerous precedent were we to sanction it. Moreover, Judge Keesley ordered in May 2010 that the State try the case within nine months, and he would have ordered the State to do so sooner but for scheduling conflicts. Simply put, there is no suggestion that Judge Keesley conducted Langford's trial in anything but a fair and impartial fashion. We therefore find no evidence of actual prejudice in the record.

Undoubtedly, section 1-7-330 leaves room for abuses which can deny a defendant due process. Not only can the State theoretically pick a judge to preside because he will favor the prosecution, but the Public Defender Association's brief contains very troubling examples of abuses occurring in other cases and in other forms. Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 Am. J. Crim. L. 325, 351-69 (2005) (detailing the potential ills of prosecutorial control of the docket). Perhaps this is why South Carolina until today has stood alone amongst our sister states in permitting the prosecutor to control the docket. *See id.* at 327 (noting that South Carolina is the only state with such a system). Of course, the vast majority of solicitors operate the criminal courts in a fair and even-handed manner, and the abuses cited generally are not associated with any nefarious intent. They do, however, inevitably stem from the nature of a system that allows the prosecution to control the criminal docket.

Nevertheless, we cannot equate the potential for abuse with it actually occurring in this case. Indeed, whether the statute may be unconstitutional in other circumstances has no bearing on whether it has been unconstitutionally applied in the case at hand. *See Simeon v. Hardin*, 451 S.E.2d 858, 871 (N.C. 1994) (holding prosecutorial control of the docket is facially constitutional and must be attacked on an as-applied basis). We must therefore determine whether Langford's rights were infringed based on the record before us. Under the lens of the only deprivation alleged to have occurred in this case, we find no evidence that Langford's due process rights were violated even if the State was able to select Judge Keesley to preside.

B. Speedy Trial

Langford also contends the State's dilatory practices in calling his case deprived him of his right to a speedy trial.[7] The Sixth Amendment to the United States Constitution provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. Similarly, the South Carolina Constitution guarantees that "[a]ny person charged with an offense shall enjoy the right to a speedy . . . trial." S.C. Const. art. I, § 14. The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense. *State v. Waites*, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978).

The Supreme Court of the United States has deemed this right "generically different from any of the other rights enshrined in the Constitution for the protection of the accused." *Barker v. Wingo*, 407 U.S. 514, 519 (1972). This is due

[7] We reject the State's argument that this issue is not preserved for review due to Langford's failure to renew his motion to dismiss when his case was called for trial. In its May 2010 order denying Langford's original motions, the court required the State to try the case within nine months. It then said Langford could renew his motion to dismiss at that time if the State failed to do so. Because nine months had not yet passed when the case was tried, it would have been futile for Langford to raise the issue again. *See State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (finding appellant did not waive an objection by not presenting it to circuit court because it would have been futile to do so).

in large part to the reality that "[d]elay is not an uncommon defense tactic" and "deprivation of the right to a speedy trial does not per se prejudice the accused's ability to defend himself." *Id.* at 521. More important, however, is the vagueness of this right, which makes it nearly impossible to determine when it has been violated. *Id.* Indeed, the various procedural safeguards built into the criminal process require that it "move at a deliberate pace." *United States v. Ewell*, 383 U.S. 116, 120 (1966). Thus, "there is no fixed point . . . when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial." *Barker*, 407 U.S. at 521.

Accordingly, "[t]he right to a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). Stated differently, "[a] speedy trial does not mean an immediate one; it does not imply undue haste, for the [S]tate, too, is entitled to a reasonable time in which to prepare its case; it simply means a trial without unreasonable and unnecessary delay." *Wheeler v. State*, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966). Because of the vagaries of this unavoidably ad hoc inquiry, the Supreme Court has acknowledged that it "can do little more than identify some of the factors" for courts to examine. *Barker*, 407 U.S. at 530. These factors include the length of the delay, the reason for it, the defendant's assertion of his right to a speedy trial, and any prejudice he suffered.[8] *Id.*; *see also Waites*, 270 S.C. at 107, 240 S.E.2d at 653 (recognizing the same factors apply under South Carolina law).

The Supreme Court has counseled further that none of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Barker*, 407 U.S. at 533. Instead, they are all related and must be considered along "with such other circumstances as may be relevant." *Id.* Thus, the Supreme Court created a balancing test which is a rejection of "inflexible approaches" and weighs "the conduct of both the prosecution and the defense." *Id.* at 529-30. If a court concludes that this right has been violated, dismissal of the charges "is the only possible remedy." *Id.* at 522. A court's decision on whether to dismiss on speedy trial grounds is reviewed for an abuse of discretion. *See State v.*

[8] The circuit court did not cite to *Barker* or explicitly apply any of these factors. However, the court's analysis largely tracks the substance of the test, and no party has contended the court did not use the proper legal framework when ruling on Langford's motions.

Edwards, 374 S.C. 543, 571, 649 S.E.2d 112, 126 (Ct. App. 2007) (applying abuse of discretion standard to speedy trial claim), *rev'd on other grounds*, 384 S.C. 504, 682 S.E.2d 820 (2009); *see also State v. Redding*, 561 S.E.2d 79, 80 (Ga. 2002) (noting the inquiry is whether court abused its discretion under *Barker*). "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008)

We begin our analysis with the "triggering mechanism" of a speedy trial claim, which is the length of the delay. *Barker*, 407 U.S. at 530. We should not even examine the remaining factors "[u]ntil there is some delay which is presumptively prejudicial." *Id.* The clock starts running on a defendant's speedy trial right when he is "indicted, arrested, or otherwise officially accused," and therefore we are to include the time between arrest and indictment. *United States v. MacDonald*, 456 U.S. 1, 6 (1982). The Supreme Court was quick to remind in *Barker*, however, that even the length of time necessary to trigger the full inquiry "is necessarily dependent upon the peculiar circumstances of the case." 407 U.S. at 530-31. Thus, a simple prosecution for ordinary street crime may have a lower threshold for a presumptively prejudicial delay than a more complex conspiracy case. *Id.* at 531; *see also id.* at 531 n.31 (suggesting that a delay of nine months could have been presumptively prejudicial in a case that depended on eyewitness testimony (citing *United States v. Butler*, 426 F.2d 1275, 1277 (1st Cir. 1970))).

In the case before us, Langford's speedy trial clock began when he was arrested on October 3, 2008, and ran until he was tried twenty-three months later on September 7, 2010. Moreover, while the charges against him were serious, the factual proof was not complicated. Thus, this length of time is presumptively prejudicial and triggers the remaining *Barker* inquiry. *See Waites*, 270 S.C. at 108, 204 S.E.2d at 653 (holding a two-year-and-four-month delay in a prosecution for assault and battery of a high and aggravated nature and for pointing and presenting a firearm implicated the rest of the *Barker* analysis); *see also Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."); *Brooks v. State*, 674 S.E.2d 871, 873-74 (Ga. 2009) (finding a nineteen-month delay presumptively prejudicial in trial for murder, aggravated assault, and firearms offenses).

Turning to the second element, the Supreme Court has stated that "different weights should be assigned to different reasons" for the delay. *Barker*, 407 U.S. at 531. A deliberate attempt by the State to delay the trial as a means of impairing the accused's ability to defend himself "should be weighted heavily against the government." *Id.* Neutral reasons, which could include overcrowded dockets or negligence, are "weighted less heavily" but still count against the State because it bears the ultimate responsibility for these circumstances. *Id.*; *see also State v. Pittman*, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007) ("The ultimate responsibility for the trial of a criminal defendant rests with the State."). Delays occasioned by the defendant, however, weigh against him. *Vermont v. Brillon*, 129 S. Ct. 1283, 1290 (2009). This is not only in accord with the reality that delay may be a defense tactic, but it is also a recognition that a defendant should not be able to procure a dismissal of the charges against him due to delays he caused. *See id.*

The State advances two different reasons for the delays in Langford's prosecution. First, it argues that the initial twenty-month delay in indicting him was due to its inability to have a "meaningful" conversation with the victims because it could not find an interpreter. Although we are not persuaded the State used its best efforts to secure an interpreter, there is no evidence that it intentionally tarried in finding one. At most, the State was negligent, and this is a neutral reason for delay which does not weigh heavily against it.

Next, the State contends the final four-month delay in trying Langford, running from May 2010 to September 2010, was the result of Langford coercing Phillips to not testify. From our review of the record, there is evidence that Langford and his co-defendant persuaded Phillips to remain silent. So long as he did so, he would be unavailable for cross-examination. Thus, the State would be unable to use Phillips' original statement as evidence against Langford. *See Bruton*, 391 U.S. at 126. The loss of this crucial piece of evidence therefore effectively gutted the State's case on the day of trial.

The State consequently needed to first procure a waiver of Phillips' right to remain silent, and then it could try Langford using the statement. Because Phillips' attorney was not ready to proceed during that term of court, however, a continuance was required for this to happen.[9] From that point on, the State moved

[9] Langford's argument that the State simply could have redacted Phillips' references to him in the statement to avoid *Bruton* misses the point. Phillips was the key

with reasonable haste given the few General Sessions terms scheduled for Edgefield County during that time. We agree with the circuit court that the delays already incurred are troubling, but we cannot ignore the fact that this additional delay is the product of Langford's efforts to spoil the State's evidence. Therefore, we will not count it against the State. *See United States v. Loud Hawk*, 474 U.S. 302, 316 (1986) (holding a defendant who causes delays in his trial "should not be able upon return to the district court to reap the reward of dismissal for failure to receive a speedy trial").

The third factor in the *Barker* analysis is the defendant's assertion of his right to a speedy trial. While Langford first filed what seems to be a *pro se* speedy trial motion in June 2009, the record suggests that he never sought a ruling on it until the May 2010 hearing. Moreover, while Langford did file a *pro se* motion for a speedy trial/motion to dismiss days after the court issued its May 2010 order, it was never ruled upon and he never renewed his motion when the case was called for trial. Although it may have been futile for him to raise the issue again from an error preservation standpoint, the "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *See Barker*, 407 U.S. at 532.

Finally, we must consider the prejudice Langford suffered. The Supreme Court has identified three different types of prejudice the right to a speedy trial seeks to prevent: (1) oppressive pre-trial incarceration; (2) anxiety stemming from being publicly accused of a crime; and (3) the possibility that the accused's defense will be impaired due to the death or disappearance of witnesses or the loss of memory with the passage of time. *Id.* "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Langford was in jail for nearly two years pending trial. "The time spent in jail awaiting trial has a detrimental impact on the individual" through its attendant job loss, disruption of family life, and encouragement of "idleness." *Id.* While we are cognizant of not minimizing the deleterious effects of lengthy pre-trial

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prosecution witness, and his testimony was essential to the State's case. Holding that the State was required to forego the use of Phillips' statement against Langford without consideration of why Phillips changed his mind would allow Langford to benefit from his tampering with the State's star witness.

incarceration, the two-year delay in bringing this case to trial does not amount to a constitutional violation in the absence of any actual prejudice to Langford's case.[10] *See State v. Kennedy*, 339 S.C. 243, 250, 528 S.E.2d 700, 704 (Ct. App. 2000) ("While Kennedy may have been slightly prejudiced by the twenty-six month pretrial incarceration, the more important question is whether he was prejudiced because the delay impaired his defense."). To that end, Langford has not demonstrated how his own defense was prejudiced by the delay. Although he does argue the final delay enabled the State to secure Phillips' testimony and thereby bolster its case against him, he fails to recognize that the State only had to do so because of his interference. Moreover, he cannot point to any evidence of anxiety caused by the stigma of being accused of these crimes.

Looking at these factors and the case as a whole, and taking into account the balance of the State's interests and Langford's, we do not believe the circuit court abused its discretion in finding Langford was not denied a speedy trial in the constitutional sense.

CONCLUSION

For the foregoing reasons, we hold section 1-7-330 is unconstitutional under the separation of powers clause of our constitution. The General Sessions docket will henceforth be managed pursuant to the administrative order issued in conjunction with this opinion. Nevertheless, we affirm Langford's convictions because he has not shown he was prejudiced by the solicitor's control over calling his case for trial. In particular, we find no due process violation or a denial of his right to a speedy trial.

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

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[10] While extreme delays may warrant relief based solely on pre-trial incarceration, this case has not crossed that threshold. *See Doggett*, 505 U.S. at 657 ("[T]o warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice.").

JUSTICE PLEICONES: I respectfully dissent from that part of the opinion that finds S.C. Code Ann. § 1-7-330 (2005) unconstitutional.

As explained below, the constitutionality of the statute is not before us. It is axiomatic that this Court will not address a constitutional issue unless it is necessary to a resolution of the case. *E.g., S.C. Dep't of Soc. Servs. v. Cochran*, 356 S.C. 413, 589 S.E.2d 753 (2003). It is also axiomatic that we sit to review the lower court's order based upon the issues properly presented by the parties for our consideration. *E.g., Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011). Constitutional issues are not exempt from issue preservation requirements. *Id.* Further, our rule restricts amicus to the issues presented by the parties, Rule 213, SCACR: to strike down a statute as unconstitutional based upon an amicus brief is tantamount to a *sua sponte* declaration. Unless a statute infringes upon our jurisdiction, we may not *sua sponte* declare it unconstitutional. *See State v. Keenan*, 278 S.C. 361, 296 S.E.2d 676 (1982). We should not decide the constitutionality of § 1-7-330 on this record.

Even if the constitutionality of § 1-7-330 were before us, under our existing precedents I find that the statute does not offend the separation of powers doctrine**.** I agree that solicitors are executive officers. S.C. Code Ann. § 1-1-110 (2005). Further, I agree that § 1-7-330 vests the exclusive authority to prepare the general sessions docket in the solicitor, and also authorizes her to determine the order in which the docketed cases are called. Finally, I do not disagree with the majority that by vesting exclusive authority in the solicitor to prepare the general sessions docket, and by permitting the solicitor to call cases from that docket in his desired order, § 1-7-330 could lead to unnecessary delay, oppressive haste, and other abuses. As I interpret the statute, however, I do not believe that it violates the South Carolina Constitution.

We have recently addressed a separation of powers challenge to prosecutorial authority:

> Under the separation of powers doctrine, which is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case. Both the South Carolina Constitution [footnote 5 citing S.C. Const. art. V, § 24] and South Carolina case law [footnote 6 citing

> *McLeod v. Snipes*, 266 S.C. 415, 223 S.E.2d 853 (1976)] place the unfettered discretion to prosecute solely in the prosecutor's hands. The Attorney General as the State's chief prosecutor may decide when and where to present an indictment, and may even decide whether an indictment should be sought. Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety. The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion . . . .
>
> *State v. Thrift*, 312 S.C. 282, 291-292, 440 S.E.2d 341, 346-347 (1994) cited with approval in *State v. Needs*, 333 S.C. 134, 146, 508 S.E.2d 857, 863 (1998); *State v. Burdette*, 335 S.C. 34, 40, 515 S.E.2d 525, 528 (1999).

Further, "[a]ll the authorities agree that, in the exercise of a discretionary official act, an executive officer cannot be restrained, coerced, or controlled by the judicial department." *State v. Ansel*, 76 S.C. 395, 57 S.E. 185 (1907).

Subject to the limitations discussed below, the solicitor has the discretion to decide when to prosecute and how to prosecute a case. This does not mean that the solicitor's authority is unrestrained by judicial oversight. The trial judge has the ultimate authority to determine whether a case called by the solicitor will be tried at a particular juncture. *See State v. Mikell*, 257 S.C. 315, 185 S.E.2d 814 (1971) ("In the calling of cases for trial the solicitor has a broad discretion in the first instance, and the trail [sic] judge has a broad discretion in the final analysis."). This is so because the trial judge has "the inherent power to control the order of [the court's] business to safeguard the rights of litigants" through her discretion to grant a continuance. *Williams v. Bordon's Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980). In *Williams*, the Court held the General Assembly violated the separation of powers doctrine by enacting a statute which purported to limit the court's discretion to grant a continuance in any case which involved an attorney-legislator as "attorney of record, witness, or otherwise." If we read § 1-7-330 as preventing a trial judge from exercising her discretion to require a solicitor to place a case upon a future docket if necessary to safeguard the rights of the defendant, then we would render the statute unconstitutional. Such an interpretation would create a

separation of powers issue, not between the executive and the judiciary, but between the legislative branch and the judicial branch since we would find the statute unconstitutionally infringes upon judicial authority. *Williams, supra.* Nothing in § 1-7-330 affects the court's inherent authority to safeguard litigants' rights; rather, the statute represents the reasonable delegation of preparing the general sessions docket to the solicitor.

The solicitor is a party to every general sessions proceeding, and has the information and resources necessary to determine when a case is ready to be called. If the solicitor is perceived to be unlawfully delaying the call of a case, the defendant has available the remedy of a speedy trial motion: If it is called with undue haste, the defendant may seek a continuance. It is only logical to have the solicitor initially set the docket since he knows the status of the law enforcement investigation, of the examination of the forensic evidence, of any codefendant's case, and of the defendant's other charges. *See State v. Mikell, supra* ("A prosecuting attorney normally has many cases for disposition. He must plan ahead to expedite the work of the court . . . ."). The solicitor bears the burden of proof in every case and should not ordinarily be compelled to call his case before he is ready. *Id.*("solicitor has authority to call cases in such order and in such manner as will facilitate the efficient administration of his official duties, **subject to the broad discretion of the trial judge**.")(emphasis supplied). In my opinion, there is no separation of powers problem with § 1-7-330. *E.g.*, *State v. Thrift, supra*.

Finally, I disagree with the premise of the majority's opinion, "that section 1-7-330 is at odds with [the courts'] intrinsically judicial power." Even if one were to grant that the statute creates some overlap of executive and judicial authority, it cannot be said that preparing a docket and calling cases from that docket usurps the judicial power vested in the unified judicial system under S.C. Const. art. V, §1 (1977). *See Carolina Glass Co. v. Murray*, 87 S.C. 270, 291-292, 69 S.E. 391, 399 (1910) *overruled in part on other grounds McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

In my opinion, however, we cannot reach the constitutionality of that statute in this case. Were we to reach the issue, I would interpret the statute in a way that does not offend the separation of powers doctrine. If the Court is nonetheless determined to declare § 1-7-330 unconstitutional, then we must both deal with our precedents and describe the new system in sufficient detail that the parties most intimately involved in the process can implement the necessary changes.

I concur in the majority's decision to affirm this appeal and in the sentiment that our General Sessions docketing system needs reform, but dissent from so much of that opinion as reaches and decides the constitutionality of § 1-7-330.

The Supreme Court of South Carolina

RE: DISPOSITION OF CASES IN GENERAL SESSIONS

O R D E R

Pursuant to the provisions of S.C. CONST. Art. V §4, and in furtherance of this Court's decision in *State v. Langford*,

IT IS ORDERED that:

Cases in General Sessions Court shall proceed as follows:

(A) All cases shall be assigned to a 180 day track consistent with the Uniform Differentiated Case Management Order which is incorporated herein and made a part hereof by reference. The Chief Judge for Administrative Purposes (CJAP) may entertain motions to remove any case from the track and establish a scheduling order where appropriate.

(B) Cases within the 180 day track or cases that have exceeded the 180 day track by less than one (1) year, shall remain under the control of the Solicitor, subject to the provisions set forth below:

(1) General Docket. The General Docket consists of all pending General Sessions matters. Absent the grant of a speedy trial motion, the Solicitor shall have the initial responsibility for designating when a case is ready for trial. Upon determining that a case is ready for trial, the Solicitor shall file with the Clerk of Court a "NOTICE OF COURT DOCKETING" on a form prescribed by the Supreme Court and shall serve all parties and counsel of record. Upon receiving such notice, the Clerk shall place the case on the Court Docket and the matter may be called

for trial any time after thirty (30) days from the filing of the NOTICE OF COURT DOCKETING. The Court Docket consists of all matters that the Solicitor has deemed ready for trial. Once the case is placed on the Court Docket, the Court assumes the responsibility for setting a trial date and the Clerk, under the direction and supervision of the CJAP, shall publish a trial roster from the Court Docket of cases subject for trial at least twenty-one (21) days before each term of court. Publication shall be effected once the Clerk makes the trial roster available in the Clerk's office or on the Clerk's internet site. The Clerk shall also distribute the trial roster to those attorneys listed upon it by Fax, US Mail, hand delivery, or electronic delivery. Cases on the trial roster not reached for trial will be subject to being called for the next two terms of court before being republished. It is the responsibility of each defense attorney to notify the defendant that the case is scheduled for trial and to remind the defendant of the right and obligation to be present at trial. Motions for continuance or other relief from a published trial roster shall be made in accordance with Rule 7, SCRCrimP. The CJAP or presiding judge shall rule on the motion.

(2) Nothing herein shall affect the Court's ability to schedule motions or other pretrial proceedings as may be appropriate, or the right of the CJAP to add cases to any trial roster or designate cases for a day certain as the CJAP deems appropriate, subject to the notification requirements set forth in paragraph B(1), above.

(C) Cases more than one year beyond their 180 day track will be automatically transferred to the CJAP's supervision as follows:

(1) Judicial Docket. If the Solicitor has not filed a NOTICE OF COURT DOCKETING in accordance with Paragraph (B) (1) above for any case more than one (1) year beyond its assigned track, it will be automatically transferred to the Judicial Docket, which the Clerk shall maintain separate and apart from the regular Court Docket. The CJAP will administer and supervise the Judicial Docket. The Solicitor must notify the Clerk within fifteen (15) days after expiration of this period of time of all

cases that are in this category and furnish the following information: (1) Indictment number; (2) Defendant's name; (3) Date of Arrest; (4) Assigned Assistant Solicitor; (5) Defense Counsel; (6) Date of Indictment (True Bill); (7) Track expiration date; (8) Prior request(s) for continuance. The Clerk will maintain the Judicial Docket which will include this information.

(2) Upon placement on the Judicial Docket, the CJAP shall arrange for the scheduling of trial or other disposition of the case. Additionally, the CJAP may upon the request of any party transfer the case to the trial roster in accordance with Paragraphs (B) (1) and (2).

(3) If the case has not been disposed of more than one (1) year following its transfer to the Judicial Docket, the CJAP will dismiss the case, absent the Solicitor establishing good cause. Both the Solicitor and the defendant shall be notified of the pending dismissal and be given an opportunity to be heard. Cases dismissed pursuant to this provision will be without prejudice, unless otherwise specified by the CJAP. The Solicitor will notify the victim(s) of cases dismissed pursuant to this provision.

(D) Non-Track Cases:

The Solicitor shall furnish to the CJAP a quarterly status report of all non-track cases. The report shall contain information regarding the progress of the case and the expected disposition date.

(E) Old Case Disposition:

Any case, including non-track cases, pending four (4) or more years from the date of indictment by the Grand Jury shall be dismissed by the CJAP, unless the Solicitor shall show good cause why it should not be dismissed. Such dismissal is without prejudice, unless otherwise specified by the CJAP and the Solicitor shall have the right to re-present the matter to the Grand Jury. Before ordering dismissal, the Clerk of Court shall notify the Solicitor and the defendant of the Court's intention to dismiss the case. The Solicitor shall: (1) within ten (10) days of

receiving the notice from the Court, notify the victim(s) in writing of the Court's intended disposition and invite the victim(s) to file a written response with the Solicitor within ten (10) days; and (2) within thirty (30) days file a written response with the Court setting forth in detail the reasons, including the response(s) of the victim(s), why the case should not be dismissed and advising the court of the expected time of disposition. The defendant may submit a written response within thirty days of the Solicitor's filing. The CJAP may schedule a hearing, dismiss the case without a hearing, or take such further action as may be appropriate. Failure to respond as set forth herein will result in the matter being dismissed pursuant to this provision. If the Solicitor shows good cause, the case shall automatically be transferred to the Judicial Docket.

This order shall be effective February 4, 2013.

s/ Jean H. Toal C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Because I dissent from the opinion,
I respectfully do not join in this order.

s/ Costa M. Pleicones J.

November 21, 2012

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Linda T. Terry, Respondent,

v.

William E. Terry, Jr., Appellant.

Appellate Case No. 2011-191006

Appeal from Greenville County
Alexander Kinlaw, Jr., Family Court Judge

Opinion No. 27196
Heard May 22, 2012 – Filed November 21, 2012

AFFIRMED

Christopher T. Brumback and Edward C. Nix, both of Greenville, for Appellant.

Alex Kornfeld, Brian R. Miller, and William S.F. Freeman, all of Greenville, for Respondent.

JUSTICE KITTREDGE: William E. Terry, Jr., appeals from a family court order holding him in contempt for failing to vacate the parties' marital residence as required under the temporary order. The appeal is manifestly without merit, and we affirm pursuant to Rule 220, SCACR. Because Appellant erroneously believed that the filing and service of a notice of appeal from the family court's temporary order divested the family court of jurisdiction from considering the contempt

matter, we elect to address and clarify the effect of an attempted appeal from a family court temporary order.

I.

Respondent Linda E. Terry (Wife) filed an action for separate support and maintenance against Appellant William E. Terry, Jr. (Husband). Wife sought temporary relief, including exclusive possession of the marital residence. At the temporary hearing, the family court awarded Wife exclusive possession of the marital residence and ordered Husband to vacate the residence. Husband failed to do so, which prompted Wife to file a rule to show cause to hold Husband in contempt. Prior to the contempt hearing, Husband filed a notice of appeal from the temporary order. At the contempt hearing, Husband argued the filing of the notice of appeal stayed the temporary order and thus divested the family court of jurisdiction to proceed with the contempt hearing. The able family court judge summarily and correctly rejected Husband's argument. Husband was properly held in contempt and sanctioned.

Although Husband ultimately vacated the marital residence, he appealed from the contempt order asserting that his filing of the notice of appeal from the temporary order stayed the temporary order and divested the family court of jurisdiction to enforce its order. Regarding the matter of appealability, Husband advanced two arguments in the family court and on appeal: (1) the filing of the notice of appeal from the temporary order "automatically stayed" the effect and enforcement of the temporary order, and; (2) the temporary order was immediately appealable because it affected a "substantial right" within S.C. Code Ann. § 14-3-330(2) (Supp. 2011).[1] Husband nevertheless withdrew his appeal from the temporary order and proceeded on his appeal from the contempt order.

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[1] The dissent would reverse on grounds never raised. By "analogiz[ing] the grant or denial of temporary relief in a domestic action to . . . [an] injunction issued by the court of common pleas in a law case[,]" the dissent would hold that a family court temporary order is immediately appealable under S.C. Code Ann. § 14-3-330(4) (1977 and Supp. 2011). We find no support in either the text of S.C. Code Ann. section 14-3-330, including subsection (4), or our jurisprudence for the proposition that a family court temporary order is immediately appealable as a matter of right. Even the dissent "readily admit[s] that [family court temporary orders] do not fit neatly within any category of appealable intermediate orders

II.

For the benefit of the bench and bar, we take this opportunity to clarify the effect of filing a notice of appeal from a temporary, *pendente lite* family court order. A notice of appeal from a temporary order does not, standing alone, operate to stay the effect or enforcement of the order.[2] A temporary order of the family court is without prejudice to the rights of the parties. Such orders are, by definition, temporary—they neither decide any issue with finality nor affect a substantial right within the meaning of S.C. Code Ann. Section 14-3-330(2) (Supp. 2011).[3] The

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under S.C. Code Ann. § 14-3-330 (1977 and Supp. 2011)." The dissent further attempts to create an ambiguity in the temporary order by claiming the temporary order is unclear whether Wife "was awarded possession of the home as a component of support or as or as temporary equitable division." As noted, neither argument has ever been made in this case. Thus, the dissent would reverse the family court on grounds raised for the first time in the dissenting opinion. *See State v. Langford*, Op. 27195 (SC Supreme Court filed November 21, 2012) (Pleicones, J., dissenting) ("It is also axiomatic that we sit to review the lower court's order based upon the issues properly presented by the parties for our consideration.").

[2] We, of course, recognize that the law does not leave parties without an immediate remedy from a temporary order in those circumstances where warranted. *See, e.g.*, Rule 241(c), SCACR (holding any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal). Moreover, this Court has authority to entertain a common law petition for a writ of certiorari. There was no effort in this case to seek either a supersedeas or a writ of certiorari, nor would such requests have been justified here. The award of temporary possession of the marital residence, while clearly important to the parties, neither constitutes a "substantial right" within the meaning of section 14-3-330(2) nor generally raises an issue warranting immediate appellate court intervention.

[3] Section 14-3-330(2) provides that this Court shall have appellate jurisdiction over an order affecting a substantial right made in an action when such order effectively determines the action and prevents a judgment from which an appeal might be taken.

family court at the final hearing has the authority to redress any error from the temporary order. *See Watson v. Watson*, 291 S.C. 13, 24, 351 S.E.2d 883, 890 (Ct. App. 1986) (affirming family court's authority at trial to adjust adulterous wife's equitable division share to recoup temporary support to which she was not entitled).

In *Neville v. Neville*, we acknowledged the infrequent practice of parties filing a notice of appeal from a temporary family court order, and we held that "the interests of justice will be served best if appeals from *pendente lite* orders are held in abeyance until the final order is entered in the family court." 278 S.C. 411, 411, 297 S.E.2d 423, 423 (1982). The filing of a notice of appeal from a temporary order pursuant to *Neville* has never been construed to stay the effect and enforcement of the temporary order. In the thirty years following *Neville*, the practice of filing a notice of appeal from a temporary order remains rarely utilized.

Perceived errors in family court temporary orders are to be redressed as they always have, at the final hearing. For issue preservation purposes, any such challenge must be placed on the record at the commencement of the final hearing. The family court has wide discretion in fashioning equitable relief, including the authority to make adjustments in the equitable distribution and otherwise to remedy an error in the temporary order. If a party desires to challenge the family court's final resolution of the matter, the aggrieved party may appeal from final judgment.

AFFIRMED.

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

JUSTICE HEARN: I concur in the majority's excellent opinion and write separately only to address my concern with the dissent's use of the term "temporary equitable division." The majority quite correctly notes that the nature of the relief ordered was not argued by Husband in his effort to avoid compliance with the temporary order, and that it would contravene settled appellate principles for us to consider an issue not raised to us. In addition to that, I would note that by its very nature and pursuant to the statute which authorizes it, equitable division is a permanent remedy employed by the family court in the final order. *See* S.C. Code Ann. § 20-3-620(C) (Supp. 2011) ("The court's order as it affects distribution of marital property shall be a final order not subject to modification except by appeal or remand following proper appeal."). Neither Section 20-3-620 of the South Carolina Code nor case law provides that equitable division can be effected temporarily. *Id.* In my view, the family court judge here simply granted temporary possession of the marital home to Wife. It was not, nor could it have been, a "temporary equitable division" of the marital home because no such remedy exists.

JUSTICE PLEICONES: I write separately as I understand the rules governing automatic stays following the appeal of a *pendente lite* family court order somewhat differently than does the majority. As explained below, I would reverse the contempt order.

In *Neville v. Neville*, 278 S.C. 411, 297 S.E.2d 423 (1982), this Court stated that appeals from temporary family court orders are to be held in abeyance pending the final order. Implicit in *Neville* is the holding that such orders are immediately appealable. I readily admit that such orders do not fit neatly within any category of appealable intermediate orders under S.C. Code Ann. § 14-3-330 (1977 and Supp. 2011). However, I note that § 14-3-330(4) permits the immediate appeal of a temporary injunction issued by the court of common pleas in a law case and I would analogize the grant or denial of temporary relief in a domestic action to such an injunction, and hold it is immediately appealable under S.C. Code Ann. § 14-3-320 (Supp. 2011) (appeals in equity matters). *See also* S.C. Code Ann. § 63-3-630(A) (2010) (right to appeal family court orders "governed by the same rules, practices, and procedures that govern appeals from the circuit court"). In any case, the policy reasons for permitting such immediate appeals are clear: if no direct appeal lies, then these orders are reviewable only upon a common law petition for a writ of certiorari. Since the Court of Appeals does not have original jurisdiction to entertain common law writs,[4] it would fall to this Court to decide all such matters. Moreover, it cannot be denied that, for example, final custody determinations can be influenced by the status quo during the litigation, especially if that process is lengthy. Thus, allowing an immediate appeal and supersedeas in appropriate custody cases can result in fairness to both parties at the final hearing.

Accepting that *pendente lite* family court orders are immediately appealable, the question then becomes whether that appeal acts as an automatic stay of the relief granted in that order. As a general rule, an appeal acts as a stay. Rule 241(a), SCACR. Exceptions to the automatic stay rule are found in Rule 241(b), in statutes, court rules, and case law. For example, no family court order regarding a child, child support, or alimony is stayed, Rule 241(b)(6), nor are family court orders awarding temporary attorneys' fees or costs. Rule 241(b)(9).

In order to determine whether appellant's appeal of the temporary order awarding respondent exclusive possession of the marital home and requiring appellant to vacate acted as a stay, it is necessary to determine the nature of that order. If it was

[4] S.C. Const. art. V, § 9; S.C. Code Ann. §§ 14-8-200(a); 14-8-220 (Supp. 2011).

in the nature of support, then appellant's appeal did not act to automatically stay the requirement that he leave the home. *Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989). If, however, that order was in the nature of equitable division, then the appeal acted as an automatic stay. *Id.*; *see also Chris v. Chris*, 287 S.C. 161, 337 S.E.2d 209 (1985) (appeal from a final order automatically stayed requirement that appellant vacate the marital home and execute a deed conveying the property to the respondent).

As I read the family court's order of November 24, 2010, it is unclear whether respondent was awarded possession of the home as a component of support or as temporary equitable division.[5] Thus, it is unclear whether appellant's appeal of that order acted as a stay of the requirement that respondent receive exclusive possession of the marital home *pendente lite*. It is well settled that an individual may not be held in contempt for failing to comply with an ambiguous order. *E.g. County of Greenville v. Mann*, 347 S.C. 427, 556 S.E.2d 383 (2001).

Under these circumstances, I would reverse the contempt citation.

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[5] Although the term "temporary equitable division" is not commonly used, it describes a situation where, for example, each spouse is awarded use of the vehicle they ordinarily drive *pendente lite*, but those vehicles are subsequently considered part of the marital property when the court decides the final equitable division of property.

While I realize that it is unusual to award possession of the marital home as "temporary equitable division," I believe it is at least arguable that is what the family court intended here. In his January 24, 2011 order, the judge stated "[Respondent] has not been awarded the marital home. This case is still pending and the question of the final possession of the marital home and the division of all equity in the marital home has not yet been determined by this Court."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Town of Mount Pleasant, Appellant,

v.

Robert L. Chimento, Scott Richards, Michael Williamson, Jeremy Brestel and John T. Willis, Respondents.

Appeal from Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 27197
Heard October 19, 2010 - Filed November 21, 2012

REVERSED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General Robert D. Cook, Senior Assistant Attorney General C. Havird Jones, Jr., and Assistant Attorney General Mary Frances Jowers, all of Columbia, for Appellant.

Jeffrey Alton Phillips, of Travelers Rest, and William W. Wilkins and Kirsten E. Small, both of Nexsen Pruet, of Greenville, for Respondents.

James W. Sheedy, of Driscoll Sheedy, of Rock Hill, and Thomas C. Goldstein, of Washington, for Amicus Curiae.

JUSTICE PLEICONES: Respondents were convicted in municipal court of violating S.C. Code Ann. § 16-19-40(a) (2003) which makes it unlawful to "play . . . in any house used as a place of gaming . . . any game with cards. . . ." after they were found playing Texas Hold'em and gambling in a residence leased by Nathan Stallings.[1] On appeal, the circuit court reversed respondents' convictions finding they were entitled to directed verdicts or, alternatively, that § 16-19-40(a) is unconstitutional. We reverse.

FACTS

Stallings leased a home in Mt. Pleasant where he lived with his fiancé and a roommate. He used an internet social networking site[2] to meet other poker players, and established a regular Sunday night game at his home. He added a regular Wednesday night game after another friend[3] could no longer host those games. People Stallings "met" on this site and their friends were welcome at the games.

Stallings testified that players would buy in to the game for a minimum of $5 and a maximum of $20. They could purchase more chips as needed. Stallings took a "rake" out of the pot in an amount sufficient to cover the cost of the food and drink he provided. If the rake did not cover his expenses, then others (most often the night's winners) would contribute money.

The municipal judge found, based on expert testimony presented by the respondents, that Texas Hold'em is a game of skill. The municipal judge also held that if a game of skill were without the ambit of gaming, then he would acquit the respondents, but that there was no clear indication whether the legislature intended to criminalize only gambling on games of chance. At the hearing, the municipal judge declined to find § 16-19-40 unconstitutional. The circuit court reversed, and the Town appeals that order.

Before this Court, as they did before the lower courts, respondents freely admit they were playing Texas Hold'em, a card game, and do not deny they were betting

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[1] Stallings pled guilty to keeping a house used as a place of gaming in violation of § 16-19-40 in a separate proceeding.

[2] Identified as charlestonpokermeetups.com in the transcript.

[3] Respondent John Willis.

on this game. All parties agree that the term "gaming" as used in § 16-19-40 is synonymous with gambling.

ISSUES

1) Whether respondents were entitled to directed verdicts because betting money on a game of skill at a residence is not prohibited by § 16-19-40?

2) If respondents are not entitled to directed verdicts, should their convictions have been set aside because § 16-19-40(a) is unconstitutional?

ANALYSIS

A. Directed Verdict

The circuit court held that respondents were entitled to directed verdicts because it is not unlawful to gamble on a game of skill in a residence. We disagree.

Section 16-19-40 is the "modern" version of a statute first enacted in 1802. In its present form, it reads:

> **§ 16-19-40. Unlawful games and betting.**
>
> If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open space at (a) any game with cards or dice, (b) any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank (f) any other table or bank of the same or the like kind under any denomination whatsoever or (g) any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes, except the games of billiards, bowls, backgammon, chess, draughts, or whist when there is no

> betting on any such game of billiards, bowls, backgammon, chess, draughts, or whist or shall bet on the sides or hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days or fined not over one hundred dollars, and every person so keeping such tavern, inn, retail store, public place, or house used as a place for gaming or such other house shall, upon being convicted thereof, upon indictment, be imprisoned for a period not exceeding twelve months and forfeit a sum not exceeding two thousand dollars, for each and every offense.

Subsection (g) referencing video games was added in 1999. Prior to that amendment, the statute was last amended in 1909 when the penalty section was changed.[4] The only other major substantive alteration occurred in 1816, and is discussed in more detail *infra*.

The statute, with its modern punctuation, provides:

> (1) Any person who plays or shall bet on the sides or hands of such as do game at any
>
> - tavern
> - inn
> - store for the retailing of spirituous liquors
> - house used as a place of gaming
> - barn
> - kitchen
> - stable
> - other outhouse
> - street
> - highway
> - open wood
> - race field
> - open place

[4] 1909 S.C. Acts No. 43, § 1 p. 66.

(2) at

a) any game with cards or dice
b) 1. any gaming table, commonly called A, B, C, or E, O
   2. any other gaming table known or distinguished by any other letters or by any figures
c) any roley-poley table
d) rouge et noir
e) any faro bank
f) any other table or bank of the same or like kind under any denomination whatsoever or
g) any licensed gambling machine or device

except at

- billiards
- bowls
- backgammon
- chess
- draughts or
- whist

when there is no betting on any such game of billiards through whist

(3) shall be guilty

and

(4) every person so keeping such

- tavern
- inn
- retail store
- public place or
- house used as a place for gaming or

- such other house

(5) shall be guilty.

The statute's preamble indicates that as originally enacted, the legislation was designed to prohibit gambling in public places:

> No. 1786. AN ADDITIONAL ACT for the more effectual prevention of gaming.
>
> In order the more effectually to prevent gaming at taverns, inns, stores for the retailing spirituous liquors, and other public houses; and also in streets, high-ways, woods and race-fields, which must often be attended with quarrels and controversies, the impoverishment of many people and their families, and the ruin of the health and corruption of the morals and manners of youth, who in such places frequently fall in company with lewd, idle, disorderly and dissolute persons, who have no other way of maintaining themselves but by gaming: Preamble
>
> I. *Be it therefore enacted*, by the honorable the Senate and House of Representatives, now met and sitting in the General Assembly, and by the authority of the same, That if any person or persons shall, at any time after the passing of this Act, play at any tavern, inn, store for the retailing [sic] spirituous liquors, or in any other public house, or in any street, high-way, or in any open wood, high-way, race-field or open place, at any game or games, with cards or dice, or at any gaming table, commonly called A B C or E O, or any gaming table known or distinguished by any other letters or by any figures, or rowley powley table, or at *rouge et noir*, or at any faro bank, or at any other gaming table or bank of the same or the like and under any denomination whatsoever; except the games of billiards, bowls, backgammon, chess or draughts; or shall bet on the sides or hands of such as do game; any justice of the peace or of the quorum may, upon view, or information upon oath made before him, bind over to appear at the next court of sessions of the district in which such play shall be carried on, all and singular Games not to be played at. Games that may be played at.

played.

the said persons who shall so play or bet; and shall require him or them to give security for his or their appearance thereat; and on his or their failure to give such security, shall commit him or them to the common gaol of the said district; and shall also bind over the keeper or keepers of such taverns, inns, retail stores or public places, to appear at the said ensuing court of sessions; and every person so playing, upon being convicted thereof upon indictment, shall forfeit the sum of twenty-five dollars; and every person so keeping such tavern, inn, retail store or public place, shall, upon being convicted thereof upon indictment, forfeit the sum of fifty dollars for each and every offense.

Penalty for betting or playing, or keeping a gaming place.

II. *And be it further enacted* by the authority aforesaid, That all and every keeper or keepers, exhibitor or exhibitors, of either of the gaming tables commonly called A B C or E O, or of any other table distinguished and known by any other letters, or by any figures, or rowley powley, or *rouge et noir*, or of a faro bank, or of any other gaming table or bank of the same or the like kind, under any other denomination whatsoever, shall be deemed and treated as vagrants; and moreover, it shall and may be lawful for any justice of the peace, by warrant under his hand, to order any such gaming table to be seized, and publicly burnt or destroyed.

Keepers of gaming tables to be treated as vagrants.

III. *And be it enacted* by the authority aforesaid, That nothing contained in this Act shall extend, or be construed to extend, to repeal or make void any law or act, or part of any law or act, now in force in this State, relative to gaming, or the prevention and punishment thereof.

This Act not to repeal other Acts on the same subject.

1802 S.C. Acts No. 1786.

1. Residence as Place of Gaming

The circuit court agreed with respondents that a residence could not qualify as a "house used as a place of gaming" under § 16-19-40. We disagree.

In 1806, a defendant was convicted of violating the statute after he was indicted for permitting and encouraging persons to play at prohibited games in his dwelling house. On appeal, the sufficiency of the indictment was challenged on the ground the statute did not use the words "permit and encourage," nor did the indictment allege that the defendant kept his dwelling for gaming purposes or that he allowed gambling on the premises. The appeal was affirmed without a full opinion, but Justice Brevard dissented. It appears that all members of the Court were in agreement that a dwelling house could qualify as a "place kept to accommodate gamesters," with Justice Brevard expressing his opinion in dicta that the legislature could not have intended the statute to apply to "a casual game being played in a man's home." *State v. Brice*, 4 S.C.L. (2 Brev.) 66 (1806). Thus, a residence used as a place for gambling could be a "public house" under the original language of the statute.

In 1816, the gaming statute was amended to "more effectively . . . prevent the pernicious practice of gaming" by adding to the places where the playing of the games and/or gambling were prohibited. Specifically, after the term "store for the retailing [of] spirituous liquors," the phrase "or in any other public house" was stricken and the phrase "or in any house used as a place of gaming, or in any barn, kitchen, stable or other outhouse" substituted. 1816 S.C. Acts No. 2096 p. 26.

In 1823, the Court explained that the legislature's intent in adopting this 1816 amendment was to ensure that gaming in buildings separate from, even if attached to, the "principal or mansion house" were covered by the statute. *State v. Faulkener*, 13 S.C.L. (2 McCord) 438 (1823). A residence could qualify as a prohibited place under the 1802 version of the statute, *Brice*, *supra*, and the 1816 amendment preserved the inclusion of a residence or "mansion-house" as a prohibited location while expanding the definition to include outbuildings typically found on residential property. *Faulkener*, *supra*.

In addition to expanding the list of prohibited places, there was another consequence of the 1816 amendment. By altering the prohibition on playing prohibited games from "public house" to "house used as a place of gaming," the legislature effectively adopted the view of Justice Brevard in his Brice dissent. What was originally a ban on merely playing these games "in a public house" became a ban on playing on these games in a residence or mansion house only when that house was "used as a place of gaming." Thus, individuals gambling on a

casual game in a person's home were no longer subject to prosecution under this statute.

If, however, a dwelling house is being used "as a place of gaming," then all those playing the game, whether or not they are betting on it, and those present and betting, even if not playing, are guilty of violating § 16-19-40. To the extent that respondents argue that a residence or dwelling cannot be a house within the meaning of this statute, their contention is refuted by *Faulkener*, *supra*, and the plain language of the statute.

Given that the parties agree that gaming and gambling are synonyms, then Stallings's house was undeniably being used for gambling on the night of the raid. Moreover, there was sufficient evidence to withstand a directed verdict motion in light of Stallings's own testimony regarding the regular Sunday/Wednesday games that his dwelling was "a house used as a place of gaming." *See State v. Lane*, 82 S.C. 144, 63 S.E. 612 (1909) (State need not prove by direct evidence that gambling took place on more than one occasion to prove a house is a "gambling den").

2. Gambling

The circuit court, however, adopted the so-called "American Rule" or "dominant factor doctrine," holding that "gaming" as used in § 16-19-40 applies only to betting on games of chance, and not to betting on games where skill, rather than chance, is the predominant factor. In so doing, the court relied primarily on cases deciding whether a particular scheme was a lottery. *E.g.*, *Johnson v. Phinney*, 218 F.2d 303 (5th Cir. 1955); *Opinion of the Justices*, 795 So.2d 630 (Ala. 2001); *Morrow v. State*, 511 P.2d 127 (Alaska 1973).[5] Reliance on the "American Rule"

[5] Other cases relied upon by respondents are also easily distinguishable. *E.g.*, *People v. Hua*, 885 N.Y.S.2d 380 (N.Y. Crim. Ct. 2009) (relying on statutory definition); *Town of Centerville v. Burns*, 126 S.W.2d 322 (Tenn. 1939) (British Rule rather than American Rule). Respondents also cite five cases in brief for the proposition that the test for "gambling" is the American Rule. None of the five cases actually hold this. *Indoor Rec. Enterprises, Inc. v. Douglas*, 235 N.W.2d 398 (Neb. 1975) (statute and constitution prohibited gambling on games of chance); *In re Allen*, 377 P.2d 280 (Cal. 1962) (ordinance prohibited betting on game of chance); *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85 (Nev. 1961)

and lottery cases is misplaced, however, as § 16-19-40 criminalizes the playing of certain games and gambling, not a lottery. *Compare* § 16-19-30 (2003) (making it unlawful to sell lottery tickets).

In South Carolina, a lottery is a specific form of gambling, one "in which a large number of tickets are sold and a drawing is held for certain prizes." *Johnson v. Collins Entertainment Co., Inc.*, 333 S.C. 96, 508 S.E.2d 575 (1998). In *Collins*, the dissenters would have adopted a much broader definition of lottery, and thus would have reached the issue of the role of "chance versus skill" in determining whether a particular scheme was a lottery. The *Collins* dissenters would have held that the "American Rule" applied to distinguish lotteries from non-prohibited games. The fact that most courts hold that a scheme is not a lottery if skill rather than chance predominates does not resolve the question whether, in South Carolina, betting on a card game in which skill rather than chance is the dominant factor is unlawful gaming. *Compare* § 16-19-30 (criminalizing lotteries) with § 16-19-40 (criminalizing gaming).

Under the plain language of § 16-19-40, gambling on a game of skill is a violation if that gambling is being done in a prohibited location. The statute specifically lists several games that are exempt from the absolute ban on playing games in prohibited locations: billiards, bowls, backgammon, chess, draughts, and whist. These games all involve skill, yet betting on these games is a crime under the statute. § 16-19-40; *see State v. Yoe*, 76 S.C. 46, 56 S.E. 542 (1907) (statute made it unlawful to play certain games without respect to whether there is betting or not, but other games (i.e. billiards, etc.) are unlawful at those places only if bet upon); *cf. State v. Robinson*, 40 S.C. 553, 18 S.E. 891 (1894) (no error in defining gambling in jury instruction by charging not a crime to throw dice unless betting is involved). A violation of the gaming prohibition of § 16-19-40 does not depend on whether the particular game involves more skill than chance.

(offering a prize for winning a contest is not gambling); *State v. Stroupe*, 76 S.E.2d 313 (N.C. 1953) (statute defines gambling as betting on a game of chance); *D'Orio v. Startup Candy Co.*, 266 P.2d 1037 (Utah 1928) (statute/constitution prohibit lotteries, games of chance, and gift enterprises); and *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58 (Mo. 1994) (lotteries forbidden).

The statutory meaning of the word "gambling" in South Carolina includes games in which skill outweighs chance. For example, S.C. Code Ann. § 32-1-10 (2007), found in an article captioned “Gambling Contracts,” permits persons who have lost money or other thing(s) of value in an amount equal to at least $50 at cards, at a dice table, or “at any other game whatsoever,” or by betting on those games, to recover their losses under certain circumstances. The plaintiffs in such a suit are almost uniformly referred to as “gamblers” regardless whether the enterprise was unlawful. *See Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993). Gambling as defined in South Carolina includes betting money on the outcome of any "game" whatsoever, regardless of the amount of skill involved in the game. § 32-1-10.

Finally, there is precedent that indicates § 16-19-40 is concerned with wagering regardless of the skill involved in the game wagered upon. In *State v. Red*, 41 S.C.L. (7 Rich.) 8 (1853), the court rejected appellant’s argument that his conduct in running a betting game of “Thimble” or “Thimbles and Balls” was not within § 16-19-40 because he was a “juggler” and his “game” was an exhibition of his dexterity. The Court held appellant’s conduct was within the statute’s terms “because he kept a bank, and a wager depended on his success or failure.” The opinion concluded:

> If the prohibited games be confined to those alone in which the stake is won or lost by chance, the result would follow, that the gambler who relied on the practiced legerdemain of a juggler, whilst he professed that the stake depended on fortune, will escape punishment by playing falsely.

In other words, gambling/gaming depends not on the skill/chance ratio, but on the wager.

We hold that one "games" within the meaning of § 16-19-40 when money is wagered on Texas Hold’em, even though it is a game in which skill predominates. *See Atchison v. Gee*, 15 S.C.L. (4 McCord) 211 (1827) (betting on horse racing is gaming); *State v. O’Neal*, 210 S.C. 305, 42 S.E.2d 523 (1947) (poker is gaming); *State v. White*, 218 S.C. 130, 61 S.E.2d 754 (1950) (room where poker played for money is gambling room); *cf. Allendale County Sheriff’s Office v. Two Chess Challenge II*, 361 S.C. 581, 606 S.E.2d 471 (2004) (video game in which player’s skill could alter outcome not a “game of chance” within the meaning of that term in § 12-21-2712).

Whether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game's outcome. The circuit court erred in holding that respondents were entitled to directed verdicts because they were not gaming within the meaning of § 16-19-40.

B. Constitutionality

The circuit court held that if respondents were not entitled to directed verdicts, their convictions must be set aside because § 16-19-40 was either unconstitutionally overbroad or void for vagueness. We disagree.

The circuit court held § 16-19-40(a) was unconstitutionally overbroad because it criminalizes all games played with cards or dice "regardless of whether the dominant factor in a particular game is skill or chance." The judge cited *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), for the proposition that a legislative enactment which "makes criminal activities which by modern standards are normally innocent" is overbroad. In *Papachristou*, the United States Supreme Court struck down an archaic vagrancy ordinance because it was void for vagueness, and thus offended due process, and not because it was overbroad. Overbreadth is a challenge predicated on the First Amendment, and cannot be used except where the statute arguably suppresses protected speech or conduct. *State v. Neuman*, 384 S.C. 395, 683 S.E.2d 268 (2008). Section 16-19-40 does not offend the First Amendment.

The circuit court also held that § 16-19-40(a) is void for vagueness because it provides no definition of the term "house used as a place of gaming." As the parties concede, gaming and gambling are synonymous. The term of art "house used as a place of gaming" is meant to distinguish the prohibited place from "a house where people are gaming." As the Court said in 1909, the evidence of keeping a gaming house is determined by the facts and circumstances. *State v. Lane*, *supra*. In deciding a void-for-vagueness challenge to a statute, the Court must look first to see whether the allegedly unconstitutional statute has been interpreted or limited by prior judicial decisions. *Kolender v. Lawson*, 461 U.S. 352 (1983), *citing Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982). Here, we have our earlier decisions in *State v. Brice*, *supra*; *State v. Faulkener*, *supra*; *State v. Lane*, *supra*; *see also Stardancer Casino, Inc. v.*

Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001) (boat not a public place within meaning of § 16-19-40), all interpreting the statute's allegedly vague terms. Even if we had not heretofore construed the statute so as to answer respondents' vagueness challenge, we could do so here and uphold their convictions. *See*, *e.g.*, *State v. Watkins*, 262 S.C. 178, 203 S.E.2d 429 (1974) (construing obscenity statute on remand from the United States Supreme Court and affirming conviction). The circuit court erred in finding § 16-19-40(a) unconstitutionally vague.[6]

Moreover, the evidence showed that Stallings's house was used regularly twice a week for poker games at which there was gambling, and that the games were advertised to interested persons on the website, and open to those individuals and their friends.

One whose conduct clearly falls within the statutory proscription does not have standing to raise a void-for-vagueness challenge. *E.g.*, *State v. Neuman*, *supra*. We find respondents lack standing to challenge § 16-19-40,[7] but also note that a

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[6] Both the circuit judge and the dissent rely upon the arresting officer's testimony as proof of the statute's vagueness. A statute's constitutionality is judged on an objective, not subjective, basis. *E.g.*, *City of Greenville v. Bane*, 390 S.C. 303, 308, 702 S.E.2d 112, 114 (2010) (issues are whether the statute's terms are "sufficiently defined to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise Judge and jury of standards for the determination of guilt"). Moreover, in many cases, it is "up to the police . . . to determine just where [a statutory] line is drawn," for example, where the issue is obscenity, loitering, disturbing the peace, or driving under the influence. The fact that an officer must make a judgment call does not render a statute unconstitutionally vague, any more than does the fact that a determination of guilt ultimately turns on the evidence (i.e., facts and circumstances) adduced at trial.

[7] "The constitutionality of a statute must be considered in light of the standing of the party who seeks to raise the question and of its particular application . . . ." *Schneider v. State*, 255 S.C. 594, 596, 180 S.E.2d 340, 341 (1971) (internal citation omitted). Standing is not a separate issue when the constitutionality of a statute is challenged under the due process clause, but is instead the foundation of the inquiry. Since the trial court admittedly ruled on § 16-19-40's constitutionality, it necessarily did so in light of respondents' standing. *Schneider*, *supra*. Lack of

person of reasonable intelligence would understand the statute to prohibit gambling on a card game at a house where players were invited on a regular basis to engage in this activity, especially where, while not a profit-making commercial activity, the players were required to contribute money to cover the host's expenses.

CONCLUSION

We find that the circuit court erred in reversing respondents' convictions, and therefore the order on appeal is itself

REVERSED.

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

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standing ends the inquiry into a criminal statute's vagueness. *E.g.*, *United State v. Williams*, 553 U.S. 285, 304 (2008).

CHIEF JUSTICE TOAL: While I agree wholeheartedly with the constitutional analysis contained in the excellently researched and beautifully written dissenting opinion, because of the unique circumstances of this case, I cannot join in that opinion. For the reasons stated *infra*, I concur in the result reached by the majority that these defendants' convictions must stand, and the circuit court must be reversed.

The dissent is completely correct in its conclusion that section 16-19-40 is void for vagueness because that section fails to give adequate notice of the prohibited conduct and fails to provide law enforcement with the requisite guidance to ensure its fair administration. However, I agree with the majority that these Appellants are foreclosed from challenging the constitutionality of this section because they were engaged in conduct that fell so clearly within the statutory proscription. This was not your penny ante game of poker organized in someone's home, but a regular card game hosted in Stallings's home after advertisements were posted on the Internet to recruit players who paid to participate. Thus, they do not have standing to challenge the statute as vague. *See, e.g., United States v. Williams*, 553 U.S. 285, 304 (2008) (stating "ordinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others'" (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–495, and nn. 6 and 7 (1982)) (alteration in orginal)); *State v. Neuman*, 384 S.C. 395, 403, 683 S.E.2d 268, 272 (2008) ("One to whose conduct the law clearly applies does not have standing to challenge it for vagueness." (quoting *Curtis v. State,* 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001))).

Furthermore, and perhaps more importantly, we cannot sever the language, "a house used as a place of gaming," from section 16-19-40 without striking the provision in its entirety. "The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and if of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution." *Joytime Distrib. & Amusement Co., Inc. v. State*, 338 S.C. 634, 648–49, 528 S.E.2d 647, 654 (1999) (citations omitted). On the other hand, "[w]hen the residue of an Act, *sans* that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision." *Id.* (quoting *Dean v. Timmerman*, 234 S.C. 35, 43, 106 S.E.2d 665,

669 (1959)). Striking "house used as a place of gaming" would render the remaining provisions incomplete, leaving the State powerless to regulate gambling in locations other than those explicitly listed in the statute. Moreover, it is highly unlikely that the legislature would have enacted this statute absent the stricken language, as the legislature amended section 16-19-40 in 1816 to specifically include this language.

In my opinion, striking this language would also open the door wide to *all* heretofore illegal gaming practices in this state, including video poker. *See* S.C. Code Ann. § 16-19-40(g) (proscribing the playing of "any machine or device . . . used for gambling purposes"). Because of this very real consequence, I am concerned that striking this critical language from the statute would beget, as elucidated by the General Assembly in 1816 when amending section 16-191-40, the "impoverishment of many people, corruption of the morals and manners of youth, . . . the tendency which is vice, misery and crime, as examples in this state have abundantly proven." These dire concerns resonate as much today as they did nearly 200 years ago. I do not need to remind any person of the havoc wreaked upon this State as a result of the "pernicious" practice of video poker. Although there are other sound provisions outlawing video poker, *see* S.C. Code Ann. §§ 12-21-2710, 2712 (2000), I am loathe to strike the critical language from the general ban on gaming in the event that it guts these provisions, and consequently, South Carolina's longstanding prohibition against gambling.

Section 16-19-40 is hopelessly outdated, as it applies to *any* gaming activity (including *all* card games) played in a residential home whether wagering occurs or not. This section expired in usefulness long ago and should not form the basis of a modern anti-gambling statute. Thus, I now charge the legislature to modernize section 16-19-40, as I am inclined to agree with the dissent that this provision is constitutionally infirm. However, for the aforementioned reasons, I join the majority in result only, and would reverse the circuit court under these circumstances.

JUSTICE HEARN: "Poker, *n.* A game said to be played with cards for some purpose to this lexicographer unknown." Ambrose Bierce, *The Devil's Dictionary.* In pursuit of this unknown purpose, Nathan Stallings organized regular semi-weekly poker games at his home in Mount Pleasant, South Carolina. Robert Chimento, Scott Richards, Michael Williamson, Jeremy Brestel, and John Willis (collectively, Respondents) participated in these games and were subsequently arrested during a raid on Stallings' home. Respondents were then convicted of violating Section 16-19-40(a) of the South Carolina Code (2003), which makes it unlawful to "play . . . in any house used as a place of gaming . . . any game with cards."

Respondents argue the term "any house used as a place of gaming" is unconstitutionally vague. A majority of this Court fails to give adequate consideration to Respondents' challenge and instead disposes of the issues with arguments which are neither preserved for review nor meritorious. There is nothing unique about this case that would justify doing so. For these reasons and the reasons stated below, I dissent.

FACTUAL/PROCEDURAL BACKGROUND

Stallings used an internet social networking website to meet other poker players in and around Charleston, South Carolina. Eventually, he established a regular Sunday night game held at his house in neighboring Mount Pleasant and later added Wednesday night games as well. Stallings advertised these games[8] on the same networking website, and all members of the website could view the advertisement. Although Stallings maintained that these games were not open to the public, anyone who was a member of the website or a friend of a member could attend.

[8] These were relatively low-stakes games. The buy-in was between $5 and $20, and the small and big blinds were twenty-five and fifty cents, respectively. Although the total pot at the table could be as high as $200, the average pot was between $5 and $10. Stallings would take a small rake to cover the cost of food and beverages, but he did not make a profit from the games.

Acting on a tip from a confidential informant, Officer Justin Hembree of the Mount Pleasant Police Department set-up surveillance of Stallings' home on a game night. Officer Hembree observed a large number of cars parked outside the house, and participants used the parking lot of a nearby CVS for overflow. Armed with this information, he secured permission to send someone into the house undercover with audio and video recording capabilities and money to gamble. The resulting video revealed exactly what officers expected: a group of people playing poker for money.

Police accordingly secured a search warrant, and seven officers entered Stallings' house during one of the games. Officer Hembree testified that within the home, the officers found approximately twenty people, including Respondents, with cards and money on the table. Based on these observations and Officer Hembree's experience, he believed Stallings' residence was a "house used as a place of gaming." However, he testified that "it has never been the practice of the Mount Pleasant Police Department to focus on four or five guys playing poker." Furthermore, Officer Hembree testified that it was his understanding that "if it's a group of people that randomly meet once every six months or whatever they meet and play a game of poker, that's not a house of gaming. My understanding of the statute is a constant use of one location for the purpose of gaming." He also believed the game needed to be for-profit in order to be gambling. In the end, however, Office Hembree conceded that whether or not a location is a house used as a place of gaming depends on the person investigating the claim.

In accordance with his understanding of section 16-19-40(a), Officer Hembree issued citations to Respondents for gambling. The municipal court convicted Respondents of violating the statute,[9] but it declined to find any constitutional defects in section 16-19-40. On appeal to the circuit court, the court reversed the municipal court's application of the statute to Respondents, and alternatively held section 16-19-40 unconstitutionally vague.

[9] Stallings pled guilty to keeping a house used as a place of gaming in violation of section 16-19-40 in a separate proceeding.

LAW/ANALYSIS

Section 16-19-40(a) criminalizes the "play[ing] . . . in any house used as a place of gaming . . . any game with cards or dice."[10] I agree with the circuit court that the statutory language "any house used as a place of gaming" is unconstitutionally vague. Because this issue would be dispositive, I need not reach the remaining arguments raised on appeal and addressed by the majority.

We possess a very limited scope of review in cases involving a constitutional challenge to a statute. *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (per curiam). "All statutes are presumed constitutional and will, if possible, be construed so as to render them

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[10] Section 16-19-40 provides in full,

> If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or *in any house used as a place of gaming*, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open place at (a) any game with cards or dice, (b) any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank (f) any other table or bank of the same or the like kind under any denomination whatsoever or (g) any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes, except the games of billiards, bowls, backgammon, chess, draughts, or whist when there is no betting on any such game of billiards, bowls, backgammon, chess, draughts, or whist or shall bet on the sides or hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days or fined not over one hundred dollars, and every person so keeping such tavern, inn, retail store, public place, or house used as a place for gaming or such other house shall, upon being convicted thereof, upon indictment, be imprisoned for a period not exceeding twelve months and forfeit a sum not exceeding two thousand dollars, for each and every offense.
>
> (emphasis added). Only the italicized words are at issue in this case.

valid." *Last v. MSI Constr. Co.*, 305 S.C. 349, 352, 409 S.E.2d 334, 336 (1991) (citations omitted). "This Court is directed by the constitution, and our precedent, to make every effort to find acts of the General Assembly constitutional." *Joytime Distribs.*, 338 S.C. at 653, 528 S.E.2d at 657. The party seeking to invalidate the statute has the burden of proving beyond a reasonable doubt that the statute violates some provision of the constitution. *State v. White*, 348 S.C. 532, 537, 560 S.E.2d 420, 422 (2002).

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *Curtis v. State*, 345 S.C. 557, 571, 549 S.E.2d 591, 598 (2001). When entertaining a challenge to a criminal statute on the ground that it is void for vagueness, we have less tolerance for vagueness than in the civil context because "the consequences of imprecision are qualitatively less severe" in the latter. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). To survive a vagueness challenge, a statute must satisfy two criteria. First, the statute must provide sufficient notice of the conduct prohibited. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also State v. Houey*, 375 S.C. 106, 119, 651 S.E.2d 314, 321 (Waller, J., concurring). Second, the statute must also not be written in such a manner as to permit or encourage arbitrary and discriminatory enforcement. *Kolender*, 461 U.S. at 357; *see also Houey*, 375 S.C. at 119, 651 S.E.2d at 321. If a challenger sufficiently proves the statute fails either prong, then the statute is impermissibly vague. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000).

The rationale underpinning the first requirement of sufficient notice is "that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617 (1954); *see also Huber v. S.C. State Bd. of Physical Therapy Exam'rs*, 316 S.C. 24, 26, 446 S.E.2d 433, 435 (1994) ("The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies."). Due process therefore requires that a penal statute be sufficiently definite in its terms "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Harriss*, 347 U.S. at 617; *see also City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 473-74 (1993) ("The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice . . . .").

The second requirement—that the statute provide officials with clear standards for enforcement—is closely related to the first requirement. If a would-

be offender cannot reasonably understand the conduct to be proscribed, then neither would a police officer. *People v. Stuart*, 797 N.E.2d 28, 34-35 (N.Y. 2003). However, the second requirement is considered a more important aspect of the vagueness doctrine. *Kolender*, 461 U.S. at 358. "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). A vague statute would, therefore, allow police to be "guided not by clear language, but by whim." *Stuart*, 797 N.E.2d at 35. Stated differently, if "arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Nevertheless, the mere fact that it may be difficult to determine whether certain conduct falls within the statute does not render it unconstitutionally vague. *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). Furthermore, simply because a statute contains an undefined term does not automatically make the statute vague, *Lansdell v. State*, 25 So. 3d 1169, 1176 (Ala. Crim. App. 2007), and words in the statute may be "measured by common understanding and practices," *see Curtis*, 345 S.C. at 572, 549 S.E.2d at 599.

A statute can be challenged as vague on its face or as applied. An as-applied challenge requires the moving party to show that the statute cannot be constitutionally applied to the defendant under the particular facts of the case. *Chapman v. United States*, 500 U.S. 453, 467-468 (1991). A facial challenge, on the other hand, is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, if the moving party fails to show that the statute is unconstitutional as applied to him, any facial challenge must necessarily fail because there is at least one circumstance where the statute would constitutionally apply. *Stuart*, 797 N.E.2d at 36; *see also City of Chicago v. Morales*, 527 U.S. 41, 78 n.1 (1999) (Scalia, J., dissenting) ("[A] facial attack, since it requires unconstitutionality in all circumstances, necessarily presumes that the litigant presently before the court would be able to sustain an as-applied challenge.").

I note that there is much confusion as to whether the *Salerno* test for a facial challenge—i.e., the challenger must show the act is unconstitutional in all its applications—is still the proper standard. *See Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1178 (1996) (Scalia, J., dissenting from the denial of certiorari) (stating the question of *Salerno*'s viability "cries out for our review"). *Compare Morales*, 527 U.S. at 55 n.22 (plurality) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* . . . ."), *with id.* at 80 (Scalia, J., dissenting) ("Unsurprisingly, given the clarity of our general jurisprudence on this point, the Federal Courts of Appeals *all* apply the *Salerno* standard in adjudicating facial challenges."). In fact, the plurality in *Morales* opined the *Salerno* formulation is really one of third-party standing that cannot be imposed on state courts entertaining facial challenges. *Morales*, 527 U.S. at 55 n.22 (plurality). Although various members of the Supreme Court have called the *Salerno* test into question, it appears that *Salerno* is the appropriate framework to use when the challenged law does not infringe upon any constitutionally protected conduct.[11] *See Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 546 (5th Cir. 2008); *see also Stevens*, 130 S. Ct. at 1587 ("To succeed in a *typical* facial attack, Stevens would have to establish 'that no set of circumstances exist under which [the statute] would be valid.'" (emphasis added)). Because neither party, nor the amicus, argues that gambling is a constitutionally protected activity,[12] *Salerno*'s standard applies.

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[11] In two recent First Amendment cases, the Supreme Court arguably suggested a different standard for a successful facial challenge, stating that facial challenges will fail if the statute has "'a plainly legitimate sweep.'" *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring)); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *Glucksberg*, 521 U.S. at 740 n.7)). *Stevens*, however, was not a "typical" case and noted that "which standard applies in a typical case is a matter of dispute that we need not and do not address." 130 S. Ct. at 1587. *Washington State Grange* recognized the dispute regarding the *Salerno* test but believed the challenged act would survive either standard. 552 U.S. at 449. Until a majority of the Supreme Court definitively says otherwise, I believe the *Salerno* standard is the correct one to apply in these situations.

[12] And rightfully so:

In my opinion, Respondents' challenge fails the first prong of our vagueness analysis. As reasonable, intelligent people, Respondents should have understood the statute prohibited their conduct. It banned playing cards, with betting involved, in a house used as a place of gaming; Respondents participated in bi-weekly, organized poker games at someone's home with strangers that responded to advertisements on the internet, with a buy-in and the house taking a rake. While I question whether other individuals under different circumstances would have sufficient notice of whether their conduct is proscribed, such as four individuals who play a penny-ante poker or bridge game once per month, it is clear that Respondents were on notice their gambling fell within the ambit of the statute.

A majority of the Court extrapolates from this that Respondents lack standing to raise this issue.[13] While I do not disagree with the majority's view that standing is a threshold determination in any appeal, it is not the province of this Court to inject an entirely new issue into a case after briefing and oral argument have long since been completed. The issue of Respondents' standing to make this constitutional argument was never presented to the circuit court judge, let alone ruled on, and was neither raised in Appellant's brief nor mentioned during oral argument. For the majority to now make this argument *for* the Appellant and to

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> Of course every activity, even scratching one's head, can be called a "constitutional right" if one means by that term nothing more than the fact that the activity is covered (as all are) by the Equal Protection Clause, so that those who engage in it cannot be singled out without "rational basis." But using the term in that sense utterly impoverishes our constitutional discourse.

Morales, 527 U.S. at 84 (Scalia, J., dissenting).

[13] I also believe it is somewhat of a misnomer to deem this question one of "standing." When an individual lacks standing to assert a claim, a court cannot review its merits. Here, however, a determination that a party lacks standing to challenge a vague statute necessarily involves an examination of the merits of his claim. *Compare Harriss*, 347 U.S. at 615 ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."), *with Curtis*, 345 S.C. at 572, 549 S.E.2d at 598 ("One to whose conduct the law clearly applies does not have standing to challenge it for vagueness."). It therefore is not so much that he lacks standing, but that he loses.

use it as the foundation for a decision in its favor is not only manifestly unfair to Respondents, it is contrary to longstanding principles of appellate jurisprudence. *Georgetown League of Women Voters v. Smith*, 393 S.C. 350, 354 n.2, 713 S.E.2d 287, 289 n.2 (2011) (Pleicones) (finding the issue of standing was not before the Court because "this issue was neither raised nor ruled upon below, nor do the parties mention it in their briefs."); *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked."). The case relied upon by the majority as supplying an avenue to *sua sponte* reach Respondents' lack of standing merely states a party must, of course, have standing to challenge the constitutionality of a statute; it does not stand for the proposition that cases involving constitutional questions are an exception to our preservation rules for standing. *Cf. In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) ("A constitutional claim must be raised and ruled upon to be preserved for review."). Even assuming the issue of standing appears somewhere in the record, I know of nothing in our precedents that would permit us to *reverse* on a ground that was not properly argued to us. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding that an appellate court can rely on any reason "appearing in the record to *affirm* the lower court's judgment" (emphasis added)).

Moreover, even if Respondents do not have standing to claim they lacked notice, the Supreme Court has expressly held that the second prong of the vagueness test is an *independent* ground on which a statute can be found invalid. *Hill*, 530 U.S. at 732. If notice to the individual always precluded a vagueness challenge, then the second prong could never be independent. It therefore must be analyzed outside of Respondents' own expectations. Thus, any notice they may have had does not bear on whether they are permitted to also claim the statute fails to provide clear standards for enforcement. That they knew they were committing a crime does not lessen the fact their prosecution could have been the result of arbitrary and discriminatory enforcement. Such notice would be of little comfort to Respondents if others who equally should have known they were illegally gambling were not cited because police interpreted the statute differently. *See Morales*, 527 U.S. at 63 (majority opinion) (stating that the fact "police have adopted internal rules limiting their enforcement to certain designated areas in the city would not provide a defense to a loiterer who might be arrested elsewhere"). I therefore believe there are no impediments to us considering this alternative

argument, which the Supreme Court has deemed the more important of the two. *Kolender*, 461 U.S. at 358.

Even though Respondents should "have known they had it coming," *Morales*, 527 U.S. at 82 (Scalia, J., dissenting), the record shows they were cited for violating section 16-19-40 only because they satisfied the additional criteria imposed by the Mount Pleasant police. In other words, the use of the language "any house used as a place of gaming" in section 16-19-40 fails to establish minimum guidelines to govern law enforcement, thereby permitting arbitrary and discriminatory enforcement. I would accordingly hold that statutory language is unconstitutionally vague.

Turning to the merits of Respondents' challenge, it is necessary to first determine exactly what is prohibited by the challenged language in section 16-19-40. Based on my review of the statute, a view with which a majority of this Court agrees, it is not a blanket prohibition of all gaming in the home. When the act was originally passed, it sought to address the many evils that commonly accompany gambling:

> quarrels and controversies, the impoverishment of many people and their families, and the ruin of the health and corruption of the morals and manners of youth, who in such places frequently fall in company with lewd, idle, disorderly and dissolute persons, who have no other way of maintaining themselves but by gaming . . . .

1802 Act No. 1786. The General Assembly used nearly identical language when it amended the statute to cover gambling occurring in the home by adding the "any house used as a place of gaming" language. *See* 1816 Act No. 2096. The General Assembly therefore sought to prohibit something far more pernicious and insidious than a penny-ante bridge or poker game on a Tuesday night, even when it expanded enforcement of the ban into the home. Accordingly, a strict reading of the statute encompasses more conduct than the General Assembly originally envisioned and is contrary to its intent. *See McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.").

Thus, whether a person violates this portion of the statute hinges on whether he is actually gambling in a "house used as place of gaming." As the record amply demonstrates, there is much confusion as to what a "house used as a place of gaming" actually is. Because the statute does not provide any additional language regarding its scope, we are left to divine what is proscribed from these seven words alone. In entertaining a vagueness challenge, we are to give the words in a statute their common meaning. *See Curtis*, 345 S.C. at 572, 549 S.E.2d at 599. Here, however, I do not believe the phrase "house used as a place of gaming" has a common understanding that lends itself to consistent enforcement. The words "used as *a place of gaming*" (emphasis added) connote something more than just a house where people happen to be gaming. Indeed, the arresting officer testified before the municipal judge that "it has never been the practice of Mount Pleasant police to focus on four or five guys playing poker."[14] He further testified, "Based on my understanding of the statute, if it's a group of people that randomly meet once every six months or whatever they meet and they play a game of poker, that's not a house of gaming." The State, which represented the Town on appeal, also conceded at oral argument that the "statute does not encompass the Friday night friendly poker game or the penny-ante bridge game conducted at your house."

Because the statute itself provides no guidance, it was up to police and local governments to determine just where this line is drawn. To that end, Officer Hembree believed that the frequency of the games, the number of players involved, and whether the game was run for a profit all factored into whether individuals were playing in a "house used as a place of gaming." However, none of these criteria appears in the statute, and Officer Hembree's decision to issue Respondents a citation was based on these additional elements imposed simply to ferret out conduct he truly believed violated the statute. Officer Hembree therefore had to take it upon himself to make a policy decision based on his own personal opinions as to what should be covered by the statute. It is also clear from Officer Hembree's testimony that had another officer entered Stallings' home, the officer could have come to a different conclusion.

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[14] I mean no disrespect whatsoever to Officer Hembree. He executed a well-planned operation and truthfully testified as to what he and the Town honestly believed the statute covered. His equivocation and inability to definitively state the criteria to prosecute under section 16-19-40 is not the result of his own intent to bend the requirements of the statute, but rather emanates from the statute's own lack of guidance as to what conduct is prohibited.

As the Supreme Court noted long ago, "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1875). But that is precisely what was done here. The General Assembly's use of broad language to proscribe a more narrow course of conduct demonstrates the very constitutional infirmity the Supreme Court recognized in *Reese*, where it is now left to the courts and law enforcement personnel to separate prohibited gaming from innocuous conduct without any standards but their own.

The plurality's construction of "any house used as a place of gaming" amply proves this point. In opining this portion of section 16-19-40 does not cover a casual game of poker, the plurality writes, "What was originally a ban on merely playing these games 'in a public house' became a ban on playing these games in a residence or mansion house *only when that house was 'used as a place of gaming.*'" (emphasis added). Thus, it later writes that "[t]he term of art a 'house used as a place of gaming' is meant to distinguish the prohibited place from 'a house where people are gaming.'" I completely agree. However, instead of providing any criteria to aid law enforcement in determining just when a residence is elevated from a "house where people are gaming" to a "house used as a place of gaming," it is able to do no more than simply state it depends on the "facts and circumstances." I do not believe that merely resting this distinction on the particular facts and circumstances cures the infirmities of section 16-19-40. Rather, it only underscores the impermissible vagueness in a statute which leaves the determination of what constitutes a house used as a place of gaming up "'to the moment-to-moment judgment of the policeman on his beat.'" *See Kolender*, 461 U.S. at 360 (quoting *Smith*, 415 U.S. at 575).

"Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. However, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008). What is left undetermined by this text of section 16-19-40 is what constitutes a house used as a place of gaming, and police and local governments had to fill this gap themselves. This will not do, and the decision to prosecute some individuals as opposed to others cannot emanate from law

enforcement's imposition of its own additional criteria. Here, Respondents were cited not just for playing poker and betting inside someone's home; they were cited because the meetings were regular, attended by up to twenty people each time, and the house allegedly made a profit. The challenged portion of section 16-19-40 is therefore unconstitutionally vague as applied to Respondents because their arrest and conviction was the result of an ad hoc and subjective application of additional criteria designed to give the guidance section 16-19-40 left wanting.

Turning next to whether the phrase "any house used as a place of gaming" is facially vague, I find persuasive the following passage from Justice Breyer's concurrence in *Morales* concluding an ordinance was facially invalid because it laid too much discretion on police officers:

> The reason *why* the ordinance is invalid explains how that is so. As I have said, I believe the ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what circumstances. And I see no way to distinguish in the ordinance's terms between one application of that discretion and another. The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications.

527 U.S. at 71 (Breyer, J., concurring in part and concurring in the result).

Accordingly, when a statute such as section 16-19-40 or the one at issue in *Morales* grants officers too much discretion, the decision to target a certain individual is based upon the officer's own understanding of what the statute proscribes and not solely upon the language of the statute itself. Therefore, every arrest or citation is the result of the officer's personal exercise of discretion; the individuals he lets be are only granted that relief because he has decided their conduct does not fall within the proscription as he understands it. I agree with Justice Breyer that the inescapable conclusion accordingly is that the statute's application is invalid in every case, rendering it facially unconstitutional. A criminal statute is the place for setting forth with precision what conduct constitutes a crime, and our law does not sanction the idea that police and the

prosecution can subjectively vary from the statutory elements and impose their separate criteria. If part of a statute permits such variance, as the one before us today does, that language is unconstitutionally vague.

In writing to hold section 16-19-40 facially void by prohibiting gambling in "any house used as a place of gaming," I am not unmindful of the Supreme Court's admonition that "[f]acial challenges are disfavored." *See Wash. State Grange*, 552 U.S. at 450; *see also Jansen v. State ex rel. Downing*, 137 So. 2d 47, 50 (Ala. 1962) ("[S]uch power should be exercised only when a statute is so incomplete, so irreconcilably conflicting, or so vague or indefinite, that it cannot be executed, and the court is unable, by the application of known and accepted rules of construction, to determine, with any reasonable degree of certainty, what the legislature intended."). In my opinion, however, this is one of the rare cases where a statute provides too little guidance to police officers and thereby accords them too much discretion in the statute's enforcement. Therefore, I would find section 16-19-40 "is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *See Kolender*, 461 U.S. at 361.

I close by responding to two points made in the Chief Justice's separate concurrence, which ostensibly are why she believes this case is "unique." I disagree that any uncertainty concerning the statute's severability impacts its constitutionality. I know of no authority for this position, and the Chief Justice cites none. To the contrary, we have long held that when an unconstitutional portion of a statute cannot be severed from the rest, the statute as a whole falls. *See, e.g., Fairway Ford, Inc. v. Timmons*, 281 S.C. 57, 314 S.E.2d 322 (1984) ("The rule is that where a part of a statute is unconstitutional, if such part is so connected with the other parts as that they mutually depend upon each other as conditions and considerations for each other, so as to warrant the belief that the Legislature intended them as a whole, and if they cannot be carried into effect, the Legislature would not have passed the residue independently of that which is void, the whole act is void." (quoting *Townsend v. Richland Cnty.*, 190 S.C. 270, ___, 2 S.E.2d 777, 781 (1930))). I also disagree that we may not strike as unconstitutionally vague only that portion of the statute—"any house used as a place of gaming"—which was challenged in this case without impacting the balance of the statute.

Finally, I cannot comprehend her concern that if any part of the statute is held unconstitutional, a parade of horribles will ensue, including the resurrection of video poker. The prohibition of video poker is found in Section 12-21-2710 of the South Carolina Code (2000). This is a completely separate section (and title) of the code and makes no reference at all to section 16-19-40. In fact, it is entirely independent and separate from the general gambling prohibitions involved here. Striking section 16-19-40 in whole or in part would have no impact on section 12-21-2710.

The Chief Justice's fear that gambling and all its attendant vices would return unabated if we strike down a portion of this statute has no place in the execution of our duty to declare law unconstitutional. The decision to ban gambling and prevent the ills that accompany it rests solely with the General Assembly; but it must do so in a constitutional manner. In my view, we abandon our role as the neutral arbiter of a statute's constitutionality the very moment we decide to save a statute because we like what it does.

CONCLUSION

For the foregoing reasons, I would affirm the circuit court's holding that the portion of section 16-19-40 prohibiting gambling in "any house used as a place of gaming" is unconstitutionally vague as applied and on its face. While I recognize that doing so would upset the law as it has existed for almost 200 years, when a law is unconstitutional it is our duty to so declare.

KITTREDGE, J., concurs.

The Supreme Court of South Carolina

RE: Amendments to Rule 402, SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 402 of the South Carolina Appellate Court Rules (SCACR) is hereby amended as follows:

(1) Rule 402(a), SCACR, is amended to read:

(a) Board of Law Examiners.

(1) Members. The Board of Law Examiners shall consist of members of the South Carolina Bar who are actively engaged in the practice of law in South Carolina and who have been active members of the South Carolina Bar for at least seven (7) years. The Board members shall be appointed by the Supreme Court for three (3) year terms and shall be eligible for reappointment. At least one member shall be appointed from each Congressional District. In case of a vacancy on the Board, the Supreme Court shall appoint a member of the South Carolina Bar to serve the remainder of the unexpired term.

(2) Chair; Secretary. The Supreme Court shall appoint a chair from among the members of the Board. The Clerk of the Supreme Court shall serve as secretary of the Board ex officio.

(3) Duties. The Board of Law Examiners shall determine whether applicants for admission to the practice of law in South Carolina possess the necessary legal knowledge for admission. The members of the Board are authorized to make rules and regulations for conducting the Examination, including a list of the subjects upon which applicants may be tested and regulations providing for the accommodation of disabled

applicants. These rules and regulations shall not become effective until at least ninety (90) days after they are approved by the Supreme Court. The Supreme Court shall designate six (6) members of the Board who shall each have primary responsibility for preparing and grading a section of the essay Examination (including the preparation of model answers). For each Examination, the Chair shall assign one of these members to each essay section. The Board shall assign the remaining members to assist with the preparation and grading of the essay sections of the Examination.

(2) Rule 402(i)(2), SCACR, is amended to read:

(2) Content; Grading; Passing. The Bar Examination shall consist of seven (7) sections. Six (6) of these sections shall be composed of essay questions prepared by the Board of Law Examiners. The Multistate Bar Examination shall be the seventh (7th) section. To pass the Multistate portion of the Examination, an applicant must attain a scaled score of at least 125. To pass an essay section, the applicant must obtain a score of seventy (70). Once an applicant reaches seventy (70) points on an essay section, that section will receive a passing grade and will not be graded further. An applicant must pass six (6) of the seven (7) sections to pass the Bar Examination; provided, however, that an applicant who receives a scaled score of 110 or less on the Multistate Bar Examination shall fail the Bar Examination without any grading of the essay questions. The Board shall notify the Clerk of the Supreme Court of the results of the essay sections.

(3) Rule 402(i)(7), SCACR, is amended to read:

(7) Prohibited Contacts. An applicant shall not, either directly or through an agent, contact any member of the Board of Law Examiners or any member of the Supreme Court regarding the questions on any section of the Bar Examination, grading procedures, or an applicant's answers. This provision does not prohibit an applicant from seeking verification of the MBE score as permitted by (6) above.

(4) Rule 402(o), SCACR, is amended to read:

(o) Immunity.

(1) The Board of Law Examiners, the Committee on Character and Fitness, and the members, employees, and agents of the Board or Committee, are absolutely immune from all civil liability for conduct and communications occurring in the performance of their official duties relating to the Examination, character and fitness qualification, and licensing of persons seeking to be admitted, readmitted or reinstated to the practice of law.

(2) Records, statements of opinion, testimony and other information regarding an applicant for admission, readmission or reinstatement to the Bar communicated by any entity, including any person, firm, or institution, to the Board of Law Examiners, the Committee on Character and Fitness, or to the members, employees or agents of the Board or Committee, are absolutely privileged, and civil suits predicated thereon may not be instituted.

These amendments shall be effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
November 16, 2012

The Supreme Court of South Carolina

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

Appellate Case No. 2012-213416

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on interim suspension and to the appointment of an attorney to protect his clients' interests.

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

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

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

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

Mr. Lewis' appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

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

Columbia, South Carolina

November 20, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Willie Riley, Respondent,

v.

Ulysses Green, individually and as Personal Representative of the Estate of Daniel Green, and Estate of Daniel Green, Pearlie Mae Graves, Sarah Lee Green, Daniel Green, III, Mildred Ann Green, Larry B. Green, Thomas Price, John Doe and Richard Roe, fictitious persons designated to represent all the unknown heirs and distributes of Ernestine Green and Daniel Green, Jr. deceased, and all other unknown person or persons claiming through them or any infant or person under disability or in the Armed Forces of the United States of America and Mary Roe, fictitious person designated to represent the surviving spouse of the parties herein claiming a spousal interest in the herein described real property and John Doe, Richard Roe and Mary Roe, fictitious persons designated as a class to represent all other persons unknown claiming any right, title, interest, or lien upon the real estate described herein, and TO WHOM IT MAY CONCERN, Defendants,

Of whom Ulysses Green is Appellant.

Appellate Case No. 2011-195267

Appeal From Orangeburg County
Olin Davie Burgdorf, Master-in-Equity

Opinion No. 5051
Heard October 18, 2012 – Filed November 21, 2012

REVERSED AND REMANDED

Andrew S. Radeker, Harrison & Radeker, P.A., of Columbia, for Appellant.

Dennis Wayne Catoe, of Columbia, for Respondent.

FEW, C.J.: Willie Riley filed an action to quiet title to a piece of real property the parties refer to as "Lots 11 and 12." He claimed title to the property under a deed from Aurora Loan Services, LLC. Aurora's title was based on a deed it received from the master-in-equity after Aurora successfully prosecuted a mortgage foreclosure action against Harriet Felder. Felder's deed to the property came from Ulysses Green acting as personal representative of his father's estate. Green defended Riley's action on the basis that (1) when he executed the deed to Felder, he intended to convey another piece of property across the street known as "Lot 3," and (2) he had no authority to convey Lots 11 and 12.

The master-in-equity held a trial but did not rule on the merits of the quiet title action. Instead, the master found that "a compromise on the relief would be fairest to the parties" and declared that Riley and Green jointly owned Lot 3 and Lots 11 and 12. The master ordered the parties to sell the land, use the proceeds to reimburse themselves for property taxes and other expenses, and then evenly split any remaining proceeds. Neither Riley nor Green asked for or agreed to the relief the master ordered.

Green appeals, claiming the master did not have the authority to do that. We agree. In an action to quiet title, the court has no authority to impose a compromise on parties who do not agree to it. *See Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 410, 656 S.E.2d 775, 781 (Ct. App. 2008) (stating as to specific performance, "[c]ourts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties.").

We **REVERSE** the master-in-equity's order and **REMAND** for a new trial.

WILLIAMS, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Michael Donahue, Appellant.

Appellate Case No. 2010-157867

Appeal From Lancaster County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 5052
Heard October 4, 2012 – Filed November 21, 2012

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter and Appellate Defender Tristan M. Shaffer, both of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia; and Solicitor Douglas A. Barfield, Jr., of Lancaster, for Respondent.

FEW, C.J.: Michael Donahue pled guilty to burglary in the third degree. He appeals his sentence, arguing the circuit court erred in treating him as a second offender based on his previous burglary conviction in Georgia. We affirm.

Burglary in the third degree is defined in section 16-11-313 of the South Carolina Code (2003). Subsection 16-11-313(B) provides: "Burglary in the third degree is a felony punishable by imprisonment for not more than five years for conviction on a first offense and for not more than ten years for conviction of a second offense according to the discretion of the Court." Before accepting Donahue's plea, the circuit court ruled that his Georgia conviction triggered the enhanced sentencing range in subsection 16-11-313(B). The court sentenced Donahue to ten years in prison, suspended upon service of six years, and two years of probation.

The State argues Donahue waived his right to challenge the circuit court's ruling by pleading guilty. We disagree. A criminal defendant does not give up his right to challenge the circuit court's interpretation of a statute regarding his sentence simply by pleading guilty. *See Easter v. State*, 355 S.C. 79, 81-82, 584 S.E.2d 117, 119 (2003) ("Sentencing, although often combined with the admission of guilt in a hearing, is a separate issue from guilt and a distinct phase of the criminal process. Therefore, when Easter entered his guilty plea but objected to his sentence he did not enter an invalid, conditional guilty plea." (citation omitted)).

The State also argues Donahue waived his challenge when he told the circuit court he was guilty of, and was pleading guilty to, "burglary in the third degree second offense" and that he understood he faced up to ten years in prison. We disagree with this point as well. After Donahue's counsel presented to the circuit court the same arguments he now makes on appeal, counsel made it clear, and the circuit court acknowledged it understood, that Donahue challenged the court's interpretation of the statute and intended to appeal the ruling that he faced ten years. Under the circumstances of this case, we find Donahue did not waive his right to challenge the circuit court's interpretation of subsection 16-11-313(B).

In *State v. Zulfer*, 345 S.C. 258, 547 S.E.2d 885 (Ct. App. 2001), this court faced a similar question under the statute defining burglary in the first degree—subsection 16-11-311(A) of the South Carolina Code (2003). Subsection 16-11-311(A)(2) provides that what would otherwise be a second-degree burglary is elevated to first-degree if "the burglary is committed by a person with a prior record of two or more convictions for burglary . . . ." *See also* S.C. Code Ann. § 16-11-312(A)

(2003) (defining second-degree burglary of a dwelling). We held that "prior record . . . of convictions" included out-of-state convictions:

> Nowhere does the language of the statute limit a prior record of convictions for burglary or housebreaking to only those that occurred within South Carolina. In not so limiting a prior record of convictions, the plain language of our burglary statute permits an enhancement of the offense based on a prior record of out-of-state convictions for burglary . . . .

Zulfer, 345 S.C. at 262, 547 S.E.2d at 887.

Similarly, nothing in the language of subsection 16-11-313(B) limits a circuit court to considering only South Carolina offenses. Therefore, a circuit court must consider an out-of-state burglary conviction in determining the sentencing range for third-degree burglary.[1] 345 S.C. at 262-63, 547 S.E.2d at 887.

Donahue attempts to distinguish *Zulfer* by arguing that the word "offense" in subsection 16-11-313(B) has a different meaning than the word "convictions" in subsection 16-11-311(A)(2). We find no basis for the distinction. In subsection 16-11-311(A)(2), the legislature used the word convictions to refer to prior crimes, which would make a defendant eligible for sentence enhancement only if he had been convicted of the crime. In subsection 16-11-313(B), the legislature was referring to the subsequent crime—a situation in which the legislature and our courts typically use the term offense to describe a second or subsequent crime. Thus, the legislature had a valid reason to use different terms for the same purpose—enhancing a sentence based on prior convictions. *See Zulfer*, 345 S.C. at 263, 547 S.E.2d at 887 (recognizing that a purpose of subsection 16-11-311 is to punish recidivism by imposing "'a stiffened penalty for the latest crime'" (quoting *State v. Washington*, 338 S.C. 392, 396, 526 S.E.2d 709, 711 (2000))). As we stated in *Zulfer*, "had the legislature intended that a prior record of out-of-state convictions for burglary . . . could not be used for purposes of enhancement, it

[1] Donahue argues on appeal that "[a] burglary conviction in Georgia is not the same as burglary third in South Carolina." However, because he did not present this argument to the circuit court, it is not preserved for appellate review. *State v. Bickham*, 381 S.C. 143, 147 n.2, 672 S.E.2d 105, 107 n.2 (2009).

could easily have limited the statute to only South Carolina offenses." 345 S.C. at 262-63, 547 S.E.2d at 887. We find the use of the word offense in subsection 16-11-313(B) does not indicate the intent to limit the circuit court to the use of South Carolina crimes for enhancement. *Cf. State v. Breech*, 308 S.C. 356, 358-59, 417 S.E.2d 873, 875 (1992) (finding statute that defined a prior offense as "the violation of any law or ordinance of this State or any municipality of this State" limited recidivism enhancement to offenders with previous convictions for violations of South Carolina law), *superseded by statute,* Act No. 453, § 14, 1992 S.C. Acts 2402, *as recognized in State v. Tennyson*, 315 S.C. 471, 445 S.E.2d 630 (1994).

Moreover, Donahue's interpretation of subsection 16-11-313(B) would produce absurd results. *See State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention."). His definition of the word offense allows sentence enhancement under subsection 16-11-313(B) only when the defendant has a prior South Carolina conviction for burglary in the third degree. Under his interpretation, therefore, a prior South Carolina conviction for first-degree or second-degree burglary would not trigger the higher maximum sentence. Thus, a defendant with a prior conviction for a more serious burglary would be exposed to a lower maximum sentence than someone with a prior conviction for third-degree burglary. The result Donahue proposes is even more absurd because third-degree burglary is a lesser-included offense of first-degree and second-degree burglary. *See generally State v. Goldenbaum*, 294 S.C. 455, 365 S.E.2d 731 (1988) (recognizing third-degree burglary as a lesser-included offense of first- and second-degree burglary where the facts support it). Therefore, a person previously convicted of the greater offense would be subject to a lesser penalty, even though his prior conviction actually constituted third-degree burglary.

Finally, Donahue's interpretation would create an inconsistency between the first-degree and third-degree burglary statutes, which were enacted contemporaneously. Act No. 159, § 2, 1985 S.C. Acts 603, 604-06; *see Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992) ("In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction."). The legislature could not have intended that an out-of-state burglary conviction could be used to elevate a second-degree burglary to first-

degree burglary, thereby increasing the defendant's exposure from fifteen years to a possible life sentence,[2] but could not be used to enhance a third-degree burglary defendant's sentence by five years. *See Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) ("We should consider . . . not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.").

AFFIRMED.

WILLIAMS and PIEPER, JJ., concur.

[2] *Compare* S.C. Code Ann. § 16-11-312(C) (2003) (providing a fifteen-year maximum prison sentence for second-degree burglary) *with* § 16-11-311(B) (2003) (providing first-degree burglary is punishable by a maximum sentence of life imprisonment and a minimum sentence of fifteen years).