OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8

February 27, 2007
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Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

B&A Development, Inc.; Baker-Haynes, LLC; H&C Fishers, Inc.; Charles C. Smith; James P. Mayes, III; Barry C. Haynes; Rachelle H. Hayes; Samuel H. Baker; Jody J. Baker; Andrew D. Smith; G.D. Rogers; Mary G. Collins; Individually and as Class Representative for all those similarly situated, Petitioners,

v.

Georgetown County, a Body Politic; Georgetown County Council; Georgetown County School District; Edna Earle Freeman in her capacity as Georgetown County Auditor; and Loretta D. Washington, in her capacity as Georgetown County Treasurer, Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Georgetown County
Steven H. John, Circuit Court Judge

Opinion No. 26273
Heard January 17, 2007 – Filed February 26, 2007

AFFIRMED AS MODIFIED

Gene M. Connell, Jr., of Kelaher, Connell & Connor, of Surfside Beach, for Petitioners.

David J. Mills, of McNair Law Firm, of Georgetown; David T. Duff, of Duff Turner White & Boykin, of Columbia; and Thomas J. Rubillo, of Georgetown, for Respondents.

JUSTICE WALLER: The Court granted petitioners' request for a writ of certiorari to review the Court of Appeals' opinion in B & A Dev., Inc. v. Georgetown County, 361 S.C. 453, 605 S.E.2d 551 (Ct. App. 2004). We affirm as modified.

FACTS

Petitioners are a group of individual and corporate taxpayers who filed suit in circuit court alleging that Georgetown County had unlawfully imposed excessive taxes on their real and personal property. Petitioners sought relief in the form of a refund or tax credit. Regarding the underlying facts alleged by petitioners, the Court of Appeals appropriately summarized as follows:

> In Georgetown County, the amount of the annual property tax assessment depends to a large degree on the amount of money the School District determines it needs for operations in the coming [] year. The process is straightforward: After the School District prepares its budget, the County auditor sets the tax rate,

> expressed in mills, to provide the necessary revenue to fund School District operations.
>
> [Petitioners] contend the County has levied upon property owners a higher millage rate than was needed to supply the revenue requested by the School District. [Petitioners] allege this excess tax has created an illegal surplus each year from approximately 1991 until the time this lawsuit was filed in 2001. They claim the cumulative amount of the surplus collections exceeds $28 million.

B & A Dev., 361 S.C. at 456, 605 S.E.2d at 552.

Essentially, therefore, petitioners alleged a case of excessive millage; in addition, they captioned the case as a class action. The circuit court dismissed the action, without prejudice, because petitioners had failed to exhaust their administrative remedies under the South Carolina Revenue Procedures Act (the RPA).[1] On appeal, the Court of Appeals found that the RPA applied to petitioners' claims and therefore affirmed the circuit court's dismissal. B & A Dev., supra.

ISSUES

1. Did the Court of Appeals err by affirming the circuit court's decision that petitioners are required to exhaust their administrative remedies under the RPA?

2. Have the rights of the class action plaintiffs been compromised by the Court of Appeals' opinion?

[1] S.C. Code Ann. § 12-60-10 *et seq.* (2000 & Supp. 2006).

DISCUSSION

1. Applicability of the RPA

Petitioners raise the following arguments as to why the Court of Appeals erred in finding the RPA applies to the instant case: (1) their dispute is with the Georgetown County School District, not the Department of Revenue; (2) S.C. Code Ann. section 12-43-285, specifically dealing with excessive millage rates, entitles a taxpayer to bring an action directly in circuit court; and (3) excessive millage claims were not thought to be properly brought under the RPA until the Court's decision in Brackenbrook N. Charleston, LP v. County of Charleston, 360 S.C. 390, 602 S.E.2d 39 (2004). In addition, petitioners claim that the RPA does not provide taxpayers with a clear and certain remedy, and therefore, the Court of Appeals erred in finding that their claim did not challenge the constitutionality of the RPA. Finally, petitioners assert that the law was unclear before Brackenbrook and that the decision should only be applied prospectively. In our opinion, however, the lower courts correctly decided that the RPA applies.

The RPA was enacted in 1995; the express intent of the Act states as follows: "It is the intent of the General Assembly to provide the people of this State with a straightforward procedure to determine any dispute with the Department of Revenue. The [RPA] must be interpreted and construed in accordance with, and in furtherance of, that intent." S.C. Code Ann. § 12-60-20 (Supp. 2006). Furthermore, the RPA clearly states "there is no remedy other than those provided in this chapter **in any case involving the illegal or wrongful collection of taxes**, or attempt to collect taxes." S.C. Code Ann. § 12-60-80(A) (Supp. 2006) (emphasis added). Indeed, the RPA specifies that if a taxpayer brings an action under the Act in circuit court, "the circuit court shall dismiss the case without prejudice." S.C. Code Ann. § 12-60-3390 (Supp. 2006). The only exception to the exclusivity of administrative remedy is that an action for a declaratory judgment may be brought in circuit court "where the sole issue is whether a statute is constitutional;" this exception, however, does not apply to a claim that the statute is unconstitutional "as

applied." Id. § 12-60-80(B); see also Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000) (because an administrative law judge cannot rule on the constitutionality of a statute, a declaratory judgment action seeking to determine whether a statute is constitutional should not be dismissed by the circuit court).

In Brackenbrook, which also involved a claim of excessive millage, this Court stated that although the RPA contains many procedures for taxpayers challenging their property tax assessments, "relief under the Act is not limited to these types of protests." Brackenbrook, 360 S.C. at 398, 602 S.E.2d at 44. Specifically, the Brackenbrook Court noted that the RPA allows a taxpayer to seek a refund of paid taxes under section 12-60-2560;[2] therefore, the Court held that the taxpayers' remedy was not a "direct circuit

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[2] Section 12-60-2560, states as follows in pertinent part:

> (A) Subject to the limitations in Section 12-60-1750, and within the time limitation of Section 12-54-85(F), a property taxpayer may seek a refund of real property taxes assessed by the county assessor and paid, other than taxes paid on property the taxpayer claims is exempt, by filing a claim for refund with the county assessor who made the property tax assessment for the property for which the tax refund is sought. The assessor, upon receipt of a claim for refund, shall immediately notify the county treasurer and the county auditor for the county from which the refund is sought. The majority of these three officials shall determine the taxpayer's refund, if any, and shall notify the taxpayer in writing of their decision.
> (B) Within thirty days after the decision is mailed to the taxpayer on the claim for refund, a property taxpayer may appeal the decision to the county board of assessment appeals. …
> (C) Within thirty days after the board's decision is mailed to the taxpayer, a property taxpayer or county assessor may appeal the decision issued by the board by requesting a contested case hearing before the Administrative Law Judge Division.… If a taxpayer requests a contested case hearing before the Administrative Law Judge Division without exhausting his prehearing remedy…, the Administrative Law Judge shall dismiss the action without prejudice.

court refund suit, but rather an administrative refund" pursuant to section 12-60-2560. Id. at 398-99, 602 S.E.2d at 44.

This case is not distinguishable from Brackenbrook, and thus, the Court of Appeals properly affirmed the circuit court's dismissal of the action pursuant to section 12-60-3390. Petitioners allege that Georgetown County collected both real and personal property taxes based upon an excessive millage rate thereby resulting in an overcollection of taxes allocated to the school district. The RPA provides an administrative remedy in the form of a refund for both real and personal property taxes. See S.C. Code Ann. §§ 12-60-2560, 12-60-2940[3] (2000). Thus, pursuant to both Brackenbrook and the

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[3] Section 12-60-2940, entitled "Claim for refund of personal property tax; request for contested case hearing following denial of claim." states the following, in relevant part:

> (A) Subject to the limitations in Section 12-60-1750, and within the time limitation of Section 12-54-85(F), a property taxpayer may seek a refund of property taxes assessed by the county auditor and paid, other than taxes paid on property the taxpayer claims is exempt unless the exemption is the homestead exemption, by filing a claim for refund with the county auditor who made the personal property tax assessment on the property for which the tax refund is sought. The auditor upon receipt of a claim for refund shall immediately notify the county treasurer and county assessor. A majority of these three officials shall determine the taxpayer's refund, if any, and shall notify the taxpayer in writing of their decision.
> (B) A taxpayer may appeal the decision by requesting a contested case hearing before the Administrative Law Judge Division in accordance with its rules within thirty days of the written denial of the claim for refund.
> (C) If a taxpayer requests a contested case hearing before the Administrative Law Judge Division without exhausting his prehearing remedy because he failed to file a claim for refund, the Administrative Law Judge shall dismiss the action without prejudice.

plain language of the RPA, see §§ 12-60-20 & 12-60-80, petitioners must exhaust their administrative remedies before proceeding to circuit court.

Accordingly, the Court of Appeals properly affirmed the dismissal.

We now turn to petitioners' specific arguments and address them briefly. First, petitioners attempt to distinguish their county-based tax suit from the RPA's language regarding "any dispute with the Department of Revenue." § 12-60-20. With respect to this contention, the Court of Appeals stated the following:

> In 1995, the Legislature adopted the RPA with the express legislative intent "to provide the people of this State with a straightforward procedure to determine **any disputed revenue liability**." S.C. Code Ann. § 12-60-20 (2000) (emphasis added). In 2000, the Legislature substituted the phrase "dispute with the Department of Revenue" for "any disputed revenue liability" in § 12-60-20. See § 12-60-20 (Supp. 2003). Our supreme court has noted that this alteration did not affect the applicability of the RPA to county tax protest procedures:
>
> > Although this amendment could be read as indicative of an intent to limit the Act to tax issues involving the DOR, when amending § 12-60-20 the legislature did not amend or repeal those parts of the Act which deal solely with county tax disputes. In light of this, we hold that a court must look first to the Act when faced with a question of county tax protest procedures.

B & A Dev., 361 S.C. at 457 n.1, 605 S.E.2d at 553 n.1 (quoting Brackenbrook, 360 S.C. at 395, 602 S.E.2d at 42). Looking at the RPA, we find the Act clearly envisions protests to county assessments. See, e.g., S.C. Code Ann. §§ 12-60-30, 12-60-2560, 12-60-2940 (including definitions and references to county auditor, county assessor, and county board of assessment appeals). In addition, as noted by the Court of Appeals, the Brackenbrook

decision itself provides clear support that a county-based excessive millage claim may not be initiated in circuit court.

Second, petitioners argue that because they are basing their lawsuit on S.C. Code Ann. section 12-43-285, the RPA does not apply. This section states in relevant part:

> If a millage rate is in excess of that authorized by law, the county treasurer shall either issue refunds or transfer the total amount in excess of that authorized by law, upon collection, to a separate, segregated fund, which must be credited to taxpayers in the following year as instructed by the governing body of the political subdivision on whose behalf the millage was levied. An entity submitting a millage rate in excess of that authorized by law shall pay the costs of implementing this subsection or a pro rata share of the costs if more than one entity submits an excessive millage rate.

S.C. Code Ann. § 12-43-285(B) (Supp. 2006). While section 12-43-285 clearly would apply to petitioners' lawsuit if they prevail on the merits, this section goes more to the manner of remedy rather than procedure.

Furthermore, we note that section 12-43-285 was enacted in 2001 and applies to property tax years beginning after December 31, 1999. Therefore, the RPA was already in effect at the time this section became law. It is well settled that the law "does not favor the implied repeal of statute," and "[s]tatutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative." Hodges v. Rainey, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) (citing Butler v. Unisun Ins., 323 S.C. 402, 475 S.E.2d 758 (1996)).

Given that the exhaustion of administrative remedy requirement of the RPA covers "any case involving the illegal or wrongful collection of taxes," § 12-60-80(A), and section 12-43-285 deals with excessive millage, these two statutes should be reconciled. Hodges v. Rainey, supra. Therefore, rather than interpreting section 12-43-285 as displacing the exhaustion

requirement of the RPA and replacing that with a right of direct access to the circuit court, we hold the Court of Appeals properly harmonized these two statutes. Put simply, we agree with the Court of Appeals' observation that "[h]ad the Legislature intended to allow for direct action in circuit court – in contravention of the broadly defined scope of the RPA – it could have expressly provided for such immediate judicial review." B & A Dev., 361 S.C. at 460, 605 S.E.2d at 554; see also Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (where a statute's language is plain, unambiguous, and conveys a clear meaning, the court has no right to impose another meaning).

Third, petitioners claim that Brackenbrook was unforeseeable and therefore should be applied prospectively. Because the language of the RPA is so plain, we disagree. As noted above, the original language of the Act stated that the RPA applied to "any disputed revenue liability." S.C. Code Ann. § 12-60-20 (2000). Moreover, the RPA expressly provides that the administrative remedies under the Act are exclusive for "any case involving the illegal or wrongful collection of taxes." § 12-60-80(A).

Additionally, prior to the filing of petitioners' lawsuit, this Court had interpreted the RPA as establishing "administrative procedures for taxpayers who claim a refund of any state tax." Evans v. State, 344 S.C. 60, 65, 543 S.E.2d 547, 549 (2001). In Evans, the Court held that because the class of state retirees was mounting an "as applied" constitutional challenge, the exhaustion of administrative remedies requirement applied. While the Evans case dealt with a state tax issue, rather than a county tax claim, the Brackenbrook decision did not establish any new legal principle, but rather interpreted the plain language of the RPA.

Thus, given the plain language of the statute as well as the case law in effect when petitioners filed their complaint, we reject petitioners' contention that the Brackenbrook decision regarding the exhaustion doctrine should be prospective.

Finally, petitioners claim that the RPA does not provide a constitutionally adequate, "clear and certain" remedy for their claims. See

McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) (where the United States Supreme Court held that due process requires all taxpayers to have a "clear and certain" remedy for taxes collected in violation of law). However, we agree with the Court of Appeals that petitioners have not offered any satisfying reason why the RPA's post-deprivation refund procedures are **constitutionally** inadequate. See S.C. Code Ann. §§ 12-60-2560, 12-60-2940; see also National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 587 (1995) ("the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation").

Petitioners' more specific argument on this point is that the RPA refund sections envision challenges to valuation of property; because this is an excessive millage case, petitioners contend that the RPA does not provide a remedy. As discussed above, however, the Court in Brackenbrook rejected the idea that the RPA covers only valuation issues. Brackenbrook, 360 S.C. at 398, 602 S.E.2d at 44 (although the RPA contains many procedures for taxpayers to challenge their property tax assessments, relief under the RPA "is not limited to these types of protests").

In sum, we hold the Court of Appeals correctly affirmed the circuit court's ruling that petitioners are required to exhaust their administrative remedies before proceeding to circuit court.

2. Class Action Status

Petitioners also argue that the Court of Appeals failed "to protect absent class members" by acknowledging, in a footnote, that the RPA was amended in 2003 to expressly disallow class actions.[4] Petitioners further note the following language in the opinion: "Styling[5] the suit a class action on behalf

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[4] B & A Dev., 361 S.C. at 457 n.2, 605 S.E.2d at 553 n.2 ("We also note that recent amendments to § 12-60-80 provide that "a claim or action for the refund of taxes may not be brought as a class action in the Administrative Law Judge Division or any court of law in this State...." § 12-60-80(C) (Act No. 69, 2003 S.C. Acts 744)).

[5] Based on their briefs, we are assuming petitioners object to the use of the verb "style."

of themselves and others similarly situated, [petitioners] brought this suit against several governing bodies and officers of the County." B & A Dev., 361 S.C. at 455, 605 S.E.2d at 552. More specifically, petitioners contend that because they filed their lawsuit as a putative class action prior to section 12-60-80's amendment, the Court of Appeals erred when it "intimated" that the instant case could not proceed as a class action.

The Court of Appeals, however, did not actually make the ruling which petitioners raise to this Court. It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. See, e.g., Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000). In the instant case, the circuit court neither certified a class nor denied class certification.[6] Moreover, class action status was not presented as an issue to the Court of Appeals. Therefore, the issue, on the merits, is unpreserved for our review. Id.

Nonetheless, we agree with petitioners that certain language in the Court of Appeals' opinion could be construed as commenting on the substance of this issue. Consequently, we **vacate** that portion of the opinion which arguably suggests petitioners cannot maintain this case as a class action. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved."). If and when the class certification issue is argued, the parties can present their arguments and a ruling can be rendered based on the legal authority presented. Only then will the issue become preserved for subsequent appellate review and comment.

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[6] This is in contrast to the situation in Brackenbrook where the circuit court had already certified the class. After this Court concluded that the circuit court should have dismissed the action for failure to exhaust administrative remedies, we directed Charleston County to give notice to all class members of their right to seek an administrative refund. Brackenbrook, however, is factually distinct from this case. Here, no judge has yet addressed the issue of class certification.

CONCLUSION

For the reasons discussed above, we affirm the Court of Appeals' opinion as modified.

AFFIRMED AS MODIFIED.

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

JUSTICE MOORE: I respectfully dissent. I adhere to my dissenting opinion in Brackenbrook N. Charleston, LP v. County of Charleston, 360 S.C. 390, 602 S.E.2d 39 (2004), and would hold that the Revenue Procedures Act does not apply in an action challenging a county's millage rate. Accordingly, I would reverse the Court of Appeals' decision and remand to the circuit court for a trial on the merits.

TOAL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Darrell Williams, Class Representative, et al., Appellants,

v.

South Carolina Department of Corrections and Williams Technologies, Inc., Respondents.

Appeal from Dorchester County
Diane S. Goodstein, Circuit Court Judge

Opinion No. 26274
Heard December 5, 2006 – Filed February 26, 2007

AFFIRMED

Douglas H. Westbrook, of Charleston, for appellants.

Lake E. Summers, of Malone, Thompson & Summers, LLC, of Columbia, for respondent South Carolina Department of Corrections.

Marcus A. Manos and Manton M. Grier, Jr., both of Nexsen Pruet, LLC, of Columbia, for respondent Williams Technologies, Inc.

JUSTICE MOORE: This class action was commenced on behalf of inmates in custody of respondent South Carolina Department of Corrections (DOC). These inmates participated in a prison industry program operated pursuant to DOC's contract with respondent Williams Technologies, Inc. (WTI). Appellants (Inmates) claim they were underpaid for their labor and seek "lost wages." The trial judge dismissed Inmates' complaint with prejudice based on our decision in Adkins v. South Carolina Dep't of Corrections, 360 S.C. 413, 602 S.E.2d 51 (2004). We affirm.

FACTS

In Adkins, we considered a suit by inmates against DOC as the sole defendant. The suit alleged a violation of S.C. Code Ann. § 24-3-430(D) (Supp. 2005) which provides that "no inmate participating in [a prison industries] program may earn less than the prevailing wage for work of similar nature in the private sector." We held there is no private cause of action for a violation of this statute.[1]

Inmates here alleged a cause of action under the South Carolina Payment of Wages Act, S.C. Code § 41-10-20 et seq. (Supp. 2005) claiming lost wages because they were not paid the "prevailing wage" as specified in § 24-3-430(D).[2] They claim the trial judge should not

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[1]In the companion case of Wicker v. South Carolina Dep't of Corrections, 360 S.C. 421, 602 S.E.2d 56 (2004), we further held that inmates may not be deprived of this property interest without due process; accordingly, inmates were directed to file grievances if they wished to protest DOC's failure to pay a prevailing wage.

[2]Inmates concede that DOC was authorized to negotiate wages for inmate labor at less than the prevailing wage pursuant to budget provisos passed by the General Assembly for fiscal years 2001-2002 and 2002-2003. There are similar provisions in each budget passed to the present.

have dismissed this cause of action against WTI.[3]

ISSUE

> Do inmates have a cause of action under the Payment of Wages Act?

DISCUSSION

The Payment of Wages Act requires that every employer "notify each employee in writing at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, and the deductions which will be made. . . ." § 41-10-30. Every employer shall pay wages due at the time and place designated by this notice. § 41-10-40(D). There is no provision regarding the payment of a statutorily required wage.

Whether a private industry sponsor and the inmates in a prison industries program have an employer-employee relationship for purposes of the Payment of Wages Act is a novel issue. Inmates ask us to find such a relationship based on the test for employment set out in Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991). This test includes four factors: (1) the right to, or exercise of, control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. Inmates point to provisions in the contract between DOC and WTI that indicate WTI's right to control inmate workers. For instance, the contract provides that WTI provides worker training and supervisory staff to oversee work product quality, and WTI furnishes the equipment upon which the work is performed. Although DOC screens and selects the inmates who will participate, WTI "reserves the right to have [DOC] remove and replace inmate workers based on job performance."

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[3]In Adkins, we noted § 24-3-430(F) provides that an inmate is not considered an "employee" of the State and therefore no cause of action could be maintained against DOC under the Payment of Wages Act. 360 S.C. at 420, n.7, 602 S.E.2d at 55, n.7.

Inmates contend the contract provisions stating that inmates are not to be considered employees of WTI do not control.

We find the Felts four-part test is not determinative of employer status in the context of the Payment of Wages Act. This Act, by its very title, is concerned specifically with the payment of wages and is directed to the entity responsible for such payment. *See* Williams v. Grimes Aerospace Co., 988 F. Supp. 925, n.13 (D.S.C. 1997) (holding that corporation for whom work was performed was not liable under South Carolina Payment of Wages Act where temporary agency "handled all payment of wages").

Here, the payment of inmate wages is exclusively within the control of DOC and not WTI. The contract provides that WTI will pay DOC a flat rate of $4.00 per hour per inmate and that DOC is responsible to pay inmate workers and handle payroll deductions. Of even greater significance is the fact that the legislature has specifically mandated how inmate wages for prison industry labor are to be handled. Section 24-3-40 (Supp. 2005) provides:

> **Disposition of wages of prisoner allowed to work at paid employment.**
>
> (A) Unless otherwise provided by law, the employer of a prisoner authorized to work at paid employment . . . in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections.

(emphasis added). This section also includes specific deductions from inmate wages that are to be made by the Director of DOC, including restitution to victims, payment to the State Office of Victim Assistance, child support, and state and federal taxes. Clearly, by contract and by statute, DOC is the only entity responsible for the payment of inmate wages.

Other state courts have held for purposes of wage statutes that inmates compensated by the prison are not the employees of prison industry sponsors. *See* Manville v. Bd. of Governors of Wayne State Univ., 272 N.W.2d 162 (Mich. App. 1978) (rate of compensation for prison labor determined under state Correctional Industries Act, not Minimum Wage Law where Department of Corrections unilaterally set wage scale and work hours); Prieur v. D.C.I. Plasma Center of Nevada, Inc., 726 P.2d 1372 (Nev. 1986) (prison laborer barred from pursuing claim against prison industry sponsor under state wage and hour law where Department of Prisons determined rate and method of compensation). Federal courts have come to the same result under the Federal Labor Standards Act. *E.g.,* Henthorn v. Dep't of Navy, 29 F.3d 682 (D.C. Cir. 1994); Harker v. State Use Indus., 990 F.2d 131 (4th Cir. 1993); Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320 (9th Cir. 1991); George v. SC Data Center, Inc., 884 F.Supp. 329 (W.D. Wis. 1995).

In conclusion, Inmates cannot maintain an action against WTI under the Payment of Wages Act since WTI is not the entity responsible for paying their wages. We affirm Inmates' remaining issues under Rule 220(b)(1), SCACR. *See* Adkins, *supra* (prevailing wage statute was not enacted for the special benefit of inmates but was intended to prevent unfair competition and aid the public in general).

AFFIRMED.

TOAL, C.J., WALLER and BURNETT, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. As I explained in my concurring opinion in Adkins v. South Carolina Dep't of Corrections, 360 S.C. 413, 602 S.E.2d 51 (2004), I would hold that the inmates' remedy is found in the South Carolina Payment of Wages Act, S.C. Code Ann. §§ 41-10-10, *et seq*. (Supp. 2005).

To hold that the payment of wages is exclusively within the control of the DOC ignores the language of S.C. Code Ann. § 24-3-40 (Supp. 2005). That statute provides "the employer of a prisoner authorized to work….in a prison industry program….shall pay the prisoner's wages directly to the Department of Corrections" and then requires the DOC to distribute those wages to inmates on behalf of the employer. Thus, the ultimate responsibility for paying wages falls on the prison industry sponsor, while the DOC merely acts as a conduit for payment to the inmates.

Under the Payment of Wages Act, "Employer" is defined as "every person, firm, partnership, association, corporation, receiver, or other officer of a court of this State, the State or any political subdivision thereof, and any agent or officer of the above classes employing any person in this State." S.C. Code Ann. § 41-10-10(1). In my opinion, this definition includes both the employer, WTI, and its agent, the DOC. Accordingly, I would hold that both WTI and the DOC are subject to the inmates' claims made pursuant to the Payment of Wages Act.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Transportation, Appellant,

v.

First Carolina Corporation of S.C., Landowner, and Edisto Farm Credit, ACA, Mortgagee, Other Condemnee(s) of whom First Carolina Corporation of S.C. is Respondent.

Appeal from Jasper County
J. Michael Baxley, Circuit Court Judge

Opinion No. 26275
Heard January 3, 2007 – Filed February 27, 2007

AFFIRMED

B. Michael Brackett, of Moses Koon & Brackett, of Columbia, for Appellant.

Daniel E. Henderson, of Peters Murdaugh Parker Eltzroth & Detrick, of Ridgeland, and Thomas A. Holloway, of Harvey & Battey, of Beaufort, for Respondent.

CHIEF JUSTICE TOAL: This case arises out of a condemnation action by the South Carolina Department of Transportation (SCDOT) and was certified for review from the court of appeals pursuant to Rule 204(b), SCACR. First Carolina Corporation of South Carolina (First Carolina) initiated a suit to determine the value of a piece of condemned property. The trial court submitted the case to the jury with instructions for the jury to utilize a special verdict form provided by the court. The jury returned a verdict in favor of First Carolina and awarded compensation for the land taken and special damages to the remaining property. SCDOT appealed. We affirm.

FACTUAL / PROCEDURAL BACKGROUND

SCDOT condemned approximately eight (8) acres of land belonging to First Carolina. The condemned property was part of a larger, four hundred (400) acre tract of land. First Carolina initiated an action to determine the amount of compensation owed by SCDOT for the condemnation of First Carolina's property.

During trial, First Carolina argued that it should be compensated based on the value of land taken plus any special damages to the remaining property. SCDOT argued that First Carolina's method inflated the value of the condemned property. Instead, SCDOT advocated for the use of the "before and after" appraisal methodology.

First Carolina submitted a special verdict form to the court. After the trial court announced its intention to utilize a modified version of the special verdict form, SCDOT indicated that it would prefer a general verdict form. The trial court denied SCDOT's request to use a general verdict form.

The modified special verdict form utilized by the court asked the jury to 1) unanimously determine just compensation for the land taken, 2)

unanimously determine whether the taking caused any special damage to the remaining property, and 3) determine the amount of the special damages, if any.

Following the charge to the jury, but before the court delivered the trial exhibits and special verdict form to the jury, SCDOT again objected to the use of the special verdict form on the basis that it "emphasizes damages by its bifurcated nature and the Department [didn't] believe that the landowner ha[d] proven its damages to the standards required by the law." The trial court overruled SCDOT's objection and submitted the form to the jury on the basis that the form would simplify an appellate review of the verdict. The jury returned a verdict of $1,990,975.00, of which $640,300.00 was for the land acquired and $1,350,675.00 for the damage to the remaining property.

SCDOT filed several post-trial motions, including a request for a judgment notwithstanding the verdict based upon the argument that the verdict form was unduly suggestive of the appraisal method advocated by First Carolina. The trial court denied the motion and this appeal followed.

SCDOT appeals raising the following issues for review:

I. Did the trial court err in utilizing a special verdict form because the nature of the case, the facts, or the evidence did not warrant a special verdict?

II. Was the special verdict form submitted by the trial court unduly suggestive or misleading as to the appraisal method to be used by the jury in calculating just compensation?[1]

STANDARD OF REVIEW

The determination of whether a special verdict should be submitted to the jury is within the sound discretion of the trial judge, and an appellate

[1] In the interest of clarity, we have reorganized and combined issues II through VII presented by SCDOT for this Court's review.

court will only reverse upon a finding of an abuse of that discretion. *Smoak v. Liebherr-America, Inc.*, 281 S.C. 420, 421, 315 S.E.2d 116, 118 (1984). An abuse of discretion occurs when a ruling is based on an error of law or a factual conclusion without evidentiary support. *Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005).

LAW / ANALYSIS

I. Use of Special Verdict Form

SCDOT argues that the trial court erred in utilizing a special verdict form because the nature of the case, the facts, and the evidence did not warrant a special verdict. We disagree.

The trial judge has the discretion to determine how a case is submitted to the jury. *Smoak*, 281 S.C. at 421, 315 S.E.2d at 118. Rule 49(a), SCRCP, provides in part:

> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.

SCDOT does not dispute the discretionary nature of this decision in its brief. Furthermore, SCDOT does not argue that the trial court abused its discretion by submitting the special verdict form to the jury. The only arguments SCDOT propounds are that the verdict form is misleading and that the use of a general verdict form would have simplified the appeals process.

We find that the trial judge did not abuse his discretion in utilizing a special verdict form. Rule 49, SCRCP, clearly allows the court to use special verdicts in its discretion. Even if a general verdict was more practical given

the circumstances of this case, this fact alone does not amount to an abuse of discretion.

Accordingly, we hold that the trial court did not err in utilizing a special verdict form in this case.

II. Prejudicial Effect of the Special Verdict Form

SCDOT argues that the special verdict form submitted by the trial court was unduly suggestive or misleading as to the appraisal method to be used by the jury in calculating just compensation. We disagree.

At the outset we must address the trial court's ruling that SCDOT waived its objection to the special verdict form.

It is well settled that an issue may not be raised for the first time in a post-trial motion. *McGee v. Bruce Hosp. Syst.*, 321 S.C. 340, 347, 468 S.E.2d 633, 637 (1996). Further, it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error. *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965). Additionally, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002).

During trial, the court announced its intention to use a special verdict form and asked if either party objected to the use of the form. SCDOT stated that "we would just prefer the first verdict form." The court denied the request finding the special verdict form appropriate and in the interest of "judicial economy and appellate court economy." The court then asked if either party wished to include more instructions regarding the use of the

form, and SCDOT replied, "I understand and, your honor, if you are going to use this form then that's fine, either way." After the court charged the jury, but before the court gave the jury the verdict form, SCDOT again objected to the use of the verdict form stating "the Department objects to the verdict form [sic] it emphasizes damages by its bifurcated nature and the Department doesn't believe that the landowner has proven its damages to the standards required by the law in this case." The court overruled SCDOT's objection.

SCDOT filed a motion for judgment notwithstanding the verdict asserting that the verdict form was unduly suggestive. The trial court found that SCDOT did not object to the use of the verdict form on that basis, and therefore, the court found that the objection was waived. SCDOT argues that although it did not use those exact words, it nonetheless objected to the use of the special verdict form on the basis that it emphasized the appraisal method advocated by First Carolina.

We hold that SCDOT made a timely objection to the use of the special verdict form. Although SCDOT did not phrase its objection in the exact terms used in the issues on appeal, SCDOT's objection on the basis that the verdict form "emphasizes damages by its bifurcated nature" provided a meaningful objection with sufficient specificity to allow the trial court to rule on the issue. *State v. Russell*, 345 S.C. 128, 134, 546 S.E.2d 202, 204 (Ct. App. 2001) (holding that a party need not use the exact name of a legal doctrine in order to preserve an argument, but it must be clear that the argument has been presented on that ground). In fact, the trial court denied the motion finding that the form did not emphasize damages because the jury could choose to calculate damages using SCDOT's proposed method and fill in only the first question. Further, SCDOT's initial objection and discussion with the trial court regarding the use of the special verdict form was not a concession to the use of the form. The record reflects that SCDOT's statement, "I understand and, your honor, if you are going to use this form then that's fine, either way," was simply a response to the court's question concerning any requests for additional instructions to the jury on the form.

Turning to the merits, a special verdict question may be so defective in its formulation that its submission results in a prejudicial effect which

constitutes reversible error. 9A Wright & Miller, *Federal Practice and Procedure*, Civil 2d § 2508, p.193. In evaluating the prejudicial effect of a defective special verdict question or special interrogatory, the court must consider the question or interrogatory along with the instructions given to the jury. *Fortune v. Gibson*, 304 S.C. 279, 282, 403 S.E.2d 674, 675 (Ct. App. 1991) (finding that special interrogatories and instructions must be considered together). The prejudicial effect of a defective verdict form may be cured where the trial court provides clear and cogent jury instructions. *See State v. Covert*, 368 S.C. 188, 214, 628 S.E.2d 482, __ (Ct. App. 2006); *State v. Myers*, 344 S.C. 532, 536, 544 S.E.2d 851, 853 (Ct. App. 2001).[2]

The special verdict form submitted to the jury by the court asked three questions: [3]

1) We, the jury, unanimously find just compensation for the landowner for the land actually taken by the Department of Transportation to be ___________________.

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[2] Rule 49, SCRCP, is identical to the federal rule. Under federal case law, it is improper to use a special verdict form which is likely to confuse or mislead the jury. However, such error may be corrected by clear instructions to the jury. *See Sanghvi v. City of Claremont*, 328 F.3d 532, 541-42 (9th Cir. 2003); *Greenleaf v. Garlock, Inc.,* 174 F.3d 352, 363 (3rd Cir. 1999); *Horstmyer v. Black & Decker, Inc.*, 151 F.3d 765, 771-72 (8th Cir. 1998); *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209, 214 (7th Cir. 1995); and *Cutlass Productions, Inc. v. Bregman*, 682 F.2d 323, 327 (2nd Cir. 1982).

[3] The special verdict form used by the trial court closely resembles the measure of just compensation as required in the Eminent Domain Procedure Act. *See* S.C. Code Ann. § 28-2-370 (2005) (providing that "in determining just compensation, only the value of the property to be taken, any diminution in the value of the landowner's remaining property, and any benefits as provided in § 28-2-360 may be considered").

2) Do you, the jury, unanimously find any special damages to the remaining property of the landowner that are a direct and proximate result of the taking? ___ No. If No is chosen, end deliberations and sign verdict form. ___ Yes. If Yes is chosen, go to Question 3.

3) We, the jury, unanimously find special damages to the remaining property of the landowner in the amount of _______________.

During the jury charge, the trial court explained to the jury that it could find just compensation using either of the two methods presented during trial. The court went on to explain fully both the "before and after" method of calculation, and also the appraisal method which requires a finding of the value of land taken plus damage to the remaining property. At the end of the jury charge, the court explained the use of the verdict form. The court further explained that the jury was not required to find any compensation under Question 3, but if it did find compensation under Question 3, that amount would be in addition to the compensation found in Question 1.

Reading the verdict form in conjunction with the jury instructions, we find that any possible confusion or misapprehension caused by the verdict form was remedied by the instructions from the court. The form did not misstate the law or restrict the jury's finding to one method of calculation. Furthermore, although SCDOT argues that the more prudent choice would have been to use a general verdict form, SCDOT presented no evidence that the use of the special verdict form bent the will of the jury or prejudiced SCDOT in any way.

Accordingly, the special verdict form utilized by the trial court was not unduly suggestive or misleading, and did not prejudice SCDOT. Additionally, any perceived defect in the form was cured by the trial court's instructions as to the law and use of the form.

CONCLUSION

For the forgoing reasons, we affirm.

MOORE, BURNETT, JJ., and Acting Justices James W. Johnson, Jr., and L. Casey Manning, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Willie James, Respondent,

v.

The State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Florence County
Joseph J. Watson, Circuit Court Judge
B. Hicks Harwell, Jr., Post Conviction Relief Judge

Opinion No. 26276
Submitted January 18, 2007 – Filed February 27, 2007

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Sabrina C. Todd, all of Columbia, for Petitioner.

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

CHIEF JUSTICE TOAL: In this PCR case, the court of appeals held that the fact that Respondent Willie James ("Respondent") had actual notice of the State's intention to seek a sentence of life without the possibility of parole under South Carolina's recidivist statute did not satisfy the Code's requirement that both Respondent and his counsel receive written notice of the State's intention prior to Respondent's trial. Accordingly, the court of appeals held that Respondent's trial counsel was ineffective for failing to object that Respondent did not receive the required written notification. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Respondent was convicted of armed robbery in April 1998. Because Respondent's criminal record included a previous conviction for armed robbery, Respondent was eligible to be sentenced under South Carolina's "two strikes/three strikes" recidivist statute. *See* S.C. Code Ann. § 17-25-45 (2003). Pursuant to the statute, the trial court sentenced Respondent to imprisonment for life without the possibility of parole ("LWOP"), and this Court upheld the trial court's decision on direct appeal. *State v. James*, Op. No. 2000-MO-101 (S.C. Sup. Ct. filed July 19, 2000).

In 2001, Respondent filed a petition for post-conviction relief. As one of several grounds raised in his petition, Respondent alleged that his trial counsel was ineffective in not objecting to Respondent's sentence on the basis of the State's failure to provide Respondent with written notice of its intention to seek LWOP as required by § 17-25-45(H).

The PCR court denied Respondent relief and offered two principal bases for its decision. First, the court found that both Respondent and his trial counsel were aware of the State's intention to seek LWOP well in advance of Respondent's trial. In light of this Court's precedent providing that § 17-25-45(H) requires only actual notice, *see State v. Washington*, 338 S.C. 392, 526 S.E.2d 709 (2000), the PCR court concluded that the statute had not been violated. The court distinguished the court of appeals case *State*

v. Johnson, 347 S.C. 67, 552 S.E.2d 339 (Ct. App. 2001) (holding that § 17-25-45(H)'s written notice requirement is mandatory), on the grounds that in the instant case, it was Respondent, and not trial counsel, who did not receive written notification. As a second basis for its decision, the PCR court found that providing written notice to Respondent's trial counsel, who was Respondent's agent for service of official documents, would be sufficient to comply with a requirement that written notice be provided to Respondent.

The court of appeals reversed the PCR court's decision. Relying directly on its opinion in *Johnson*, the court held that § 17-25-45(H) was clear and unambiguous in its requirement that both a defendant and his counsel be served with written notice of the State's intention to seek an LWOP sentence prior to trial. *James v. State*, 368 S.C. 323, 325, 628 S.E.2d 892, 893 (Ct. App. 2006). The court held that trial counsel's representation fell below an objective standard of reasonableness given his failure to object to the State's clear non-compliance with the statute, and the court found that this deficiency prejudiced Respondent because Respondent was "sentenced to [LWOP] in violation of the statute." *Id*. at 325-26, 628 S.E.2d at 894.

After the court of appeals remitted the case, we ordered the court of appeals to recall the remittitur and announced our intention to grant a writ of certiorari. The State presents the following issue for review:

> Did the court of appeals err in finding that trial counsel was ineffective for failing to object to Respondent's sentence where Respondent did not receive written notice that the State would be seeking a sentence of life without the possibility of parole?

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings and conclusions. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (citing *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995)). A PCR court's findings will be upheld on review if there is any evidence of probative value supporting them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

To establish a claim of ineffective assistance of counsel, a PCR applicant must establish both that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

LAW/ANALYSIS

The State argues that Respondent's trial counsel was not ineffective for failing to object that Respondent had not been provided with written notice of the State's intention to seek an LWOP sentence prior to trial. We agree.

As an initial matter, the posture in which the issue of Respondent's receipt of notice arose at trial is revealing. During the preliminary motions phase immediately preceding Respondent's trial, the parties engaged in a discussion with the trial court about the issue of notice. At the beginning of this colloquy, both Respondent and Respondent's counsel indicated that each was aware that Respondent was facing the possibility of an LWOP sentence. The court then inquired as to whether the solicitor had given written notice of the State's intention to seek such a sentence, and the solicitor indicated that although a copy of the notice was not filed with the clerk's office, he had provided written notice to Respondent's counsel approximately six months prior to trial. Respondent's counsel then indicated that the defense "had notice" and had "known about this for months." The issue of notice was not raised again until the sentencing phase of Respondent's trial, and during the sentencing proceeding, the solicitor provided the court with a copy of the written notice he had previously given to Respondent's counsel. The court indicated that the parties had agreed that the defense was on notice as to the potential sentence in the case and that "notice was adequate."

As these facts demonstrate, the issue of notice arose first at the pre-trial stage and the discussion concluded when Respondent's counsel stipulated that the defense had received adequate notice. Given this scenario, the proper interpretation of Respondent's PCR claim is that counsel should have objected that Respondent had not been provided with written notice as

required by the statute instead of stipulating that notice was adequate. Respondent's claim may not be interpreted as an assertion that his counsel should have stipulated as he did during the pre-trial phase and then raised this issue again at sentencing. *See Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 475-76, 629 S.E.2d 653, 670 (2006) (providing that generally, a party may not complain about an error induced by his own conduct).

This clarification is important because assuming that Respondent's counsel was deficient for failing to object to the alleged non-compliance with the statute, Respondent cannot demonstrate that this deficiency resulted in any prejudice. As this Court's precedent provides, jeopardy does not attach in a jury trial until the jury is sworn and impaneled. *State v. Rountree*, 127 S.C. 261, 262, 121 S.E. 205, 205 (1924). In the instant case, counsel's stipulation occurred pre-trial and before the jury was sworn. Thus, assuming that competent counsel would have objected based on the lack of written notice instead of stipulating that notice was adequate, upon hearing such an objection, the solicitor could simply have dismissed the indictment, re-indicted Respondent, provided Respondent with written notice, and proceeded to seek an LWOP sentence. Furthermore, leaving jeopardy analysis aside, it would have been entirely proper for the solicitor, upon hearing counsel's objection, to have concluded with the pre-trial motions in the case and postponed Respondent's trial to allow the solicitor to provide Respondent with written notice. Either of these procedures would have resulted in Respondent receiving an LWOP sentence despite the objection that Respondent contends trial counsel should have offered.

The court of appeals was mistaken in characterizing the prejudice in this case as Respondent being sentenced *in violation* of the statute. Instead, the proper characterization of any error is that Respondent agreed to proceed immediately to trial *despite* the violation of the statute. Instructively, there is no authority that would prevent the State, should this Court grant Respondent's request for a new trial, from seeking an LWOP sentence under the recidivist statute on remand.[1]

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[1] Indeed, if Respondent was charged with armed robbery on remand, a "most serious offense" as defined in § 17-25-45(C), the solicitor would, in fact, be

Respondent cannot demonstrate that but for trial counsel's errors, there is a reasonable probability the result of the trial would have been different. Accordingly, the court of appeals erred in determining that Respondent received ineffective assistance from his trial counsel. [2]

The State's argument in favor of reversal goes along different lines.[3] Specifically, the State argues that the court of appeals erred in reversing Respondent's sentence because § 17-25-45(H) requires only actual notice. Again, we agree.

The recidivist statute's notice provision, § 17-25-45(H), provides:

> Where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, written notice must be given by the solicitor to the defendant and the defendant's counsel not less than ten days before trial.

Our decision in *State v. Washington* controls the resolution of this issue. That case involved a prosecution for first degree burglary, and although the solicitor gave the defendant written notice that he would be seeking a sentence under the recidivist statute, due to errors in the original indictment, the solicitor later re-indicted the defendant. 338 S.C. at 398, 526

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required to seek an LWOP sentence under the recidivist statute. *See* S.C. Code Ann. § 17-25-45(G) (2003). Similarly, if Respondent was again found guilty, the trial court would have no choice but to sentence Respondent to LWOP.

[2] Though we express no opinion on how our analysis would differ in the face of such a claim, we note that Respondent has not asserted that receiving written notice would have affected the merits of the defense he presented at trial.

[3] Although the State has not presented the prejudice analysis we have outlined, our appellate rules provide that we may affirm a decision upon any grounds appearing in the record. Rule 220(c), SCACR.

S.E.2d at 711-12. After the re-indictment, the solicitor did not send a second notice to the defendant. *Id.* at 398, 526 S.E.2d at 712.

We held that the failure to send a second notice to the defendant did not prevent the imposition of an LWOP sentence under the recidivist statute. After recounting the fact that South Carolina law has historically not required that a defendant be informed if he is going to be punished more severely on the basis of his previous convictions, we stated "[t]his Court has found that under such notice statutes, the law only requires actual notice." *Id.* at 399, 526 S.E.2d at 712. Ultimately, this Court concluded that since the defendant "had actual notice of the State's intent, a second notice following re-indictment was unnecessary." *Id.*

Despite *Washington*'s clear pronouncement, the court of appeals reached a contrary interpretation of § 17-25-45(H) in *State v. Johnson*, on which the court based its decision in the instant case. In *Johnson*, the court of appeals held:

> By its words in the recidivist statute, the General Assembly has mandated that the solicitor "must" notify the defendant and the defendant's counsel in writing if the solicitor intends to seek a life sentence without the possibility of parole. . . . In our view, actual notice under section 17-25-45(H) is insufficient unless and until the General Assembly decides otherwise and amends the statute itself.

347 S.C. at 70, 552 S.E.2d at 340. The court of appeals distinguished *Washington* on the grounds that, in that case, the defendant had received written notice that the solicitor was seeking to invoke the recidivist statute, albeit before the original indictment was dismissed. *Johnson*, 347 S.C. at 71, 552 S.E.2d at 341. The court opined that *Washington* was decided on the basis that the prior written notice sufficiently satisfied the statute's written notice requirement. *Id.*

The fact that we declined to grant a writ of certiorari to review the court of appeals' decision in *Johnson* is not an impediment to our reviewing the

merits of that decision now. Although there are subtle distinctions in the facts presented in *Washington* and *Johnson*, any attempt to make a meaningful distinction between the cases does not withstand serious scrutiny.[4] Thus, we are faced with a situation in which this Court has made a clear pronouncement on an issue, and the court of appeals has subsequently strayed from adhering to that pronouncement. Either the rule we announced in *Washington* requires revision, or the rule requires restating.

Nothing about our holding in *Washington* was equivocal, and we can discern no sufficient rationale for adopting a rule contrary to the one we there advanced. The purpose of § 17-25-45(H) is to assure that a defendant and his counsel have actual notice that the State is seeking a sentence under the recidivist statute at least ten days prior to trial. Accordingly, so long as the defendant and his counsel, at least ten days prior to trial, possess actual notice of the State's intention to seek a sentence under South Carolina's recidivist statute, the statute has been satisfied. As the court of appeals' decision in *State v. Johnson* is inconsistent with this pronouncement, it is overruled.[5]

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[4] While the scenario in *Washington* dealt with the defendant's receipt of written notice in a re-indictment situation, the issue of notification in *Johnson* dealt with the defendant's attorney, who had not provided with written notice at any time. In light of the actual holdings in these cases, however, this distinction is insignificant.

[5] As a practical matter, the most effective way of assuring that both defendant and counsel receive actual notice in the required time frame is to provide them notice in writing. Though this seems a simple task, the frequency with which this issue has appeared in our jurisprudence reveals that it is overlooked with surprising regularity. This problem ought to be easily identifiable and preventable.

Finally, there is ample evidence to support the PCR court's conclusion that both Respondent and his counsel had actual notice of the State's intentions. Trial counsel testified at the PCR hearing that he had notice several months prior to Respondent's trial, and Respondent indicated on

CONCLUSION

For the foregoing reasons, we reverse the court of appeals' decision.

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

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several occasions, including months in advance of trial, that he knew he was facing an LWOP sentence under "the habitual criminal act."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dwayne Elliott Johnson, Respondent,

v.

The South Carolina Department
of Probation, Parole, and
Pardon Services, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 26277
Heard January 18, 2007 – Filed February 27, 2007

AFFIRMED

Deputy Director for Legal Services Teresa A. Knox, Assistant Chief Legal Counsel J. Benjamin Aplin, and Legal Counsel Tommy Evans, Jr., all of Columbia, for Petitioner.

Deputy Chief Attorney Wanda H. Carter, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this case, the trial court held that the absence of a favorable recommendation from a probation officer did not deprive the court of subject matter jurisdiction to grant early termination of a person's probation. Relying on technical defects in the appeal, the court of appeals affirmed. This Court granted the South Carolina Department of Probation, Parole, & Pardon Services' ("the Department's") petition for a writ of certiorari, and we now affirm.

FACTUAL/PROCEDURAL BACKGROUND

This case arises out of Dwayne Elliott Johnson's ("Johnson's") successful *pro se* motion to have his probation terminated early. In April 1992, Johnson was convicted of first degree burglary and grand larceny. Although Johnson received a sentence of twenty-five years imprisonment, the trial court suspended the sentence conditioned upon the service of eighteen years imprisonment and five years probation for the burglary conviction, and ten years imprisonment for the grand larceny conviction. Johnson was released from prison in 2000 and began probation in April 2001.

Approximately one year after beginning his probation, Johnson filed a *pro se* motion asking the court to terminate his probation early. At a hearing on the motion, the Department argued that the circuit court lacked subject matter jurisdiction to consider Johnson's request because the request was not accompanied by a recommendation from the agent in charge of the responsible county probation office in support of early termination.

The trial court held that subject matter jurisdiction over the issue of early termination of probation was not contingent upon the presence of a recommendation from the Department. After hearing testimony from witnesses offered by Johnson and the Department,[1] the trial court terminated Johnson's probation effective April 2003; exactly two years after Johnson

[1] At the hearing, a Department witness testified that the Department was opposed to early termination of Johnson's probation.

began serving his probation sentence and approximately three years early. The Department appealed.

The court of appeals affirmed the trial court's decision in an unpublished opinion. *See Johnson v. South Carolina Dep't of Probation, Parole, & Pardon Serv.*, Op. No. 04-UP-430 (S.C. Ct. App. filed July 9, 2004). The court noted that the Department failed to include Johnson's original *pro se* motion and the trial court's final order in the record on appeal, and also that the Department failed to place the documents in the record in the proper order. *Id*. The court relied on the fact that, as the appellant, the Department had the burden of presenting an adequate record on appeal. *Id*. The court of appeals thus declined to address the merits of the Department's arguments.

The Department unsuccessfully petitioned the court of appeals to allow the Department to supplement the record on appeal and to grant rehearing in the matter, and this Court granted the Department's petition for a writ of certiorari. The Department presents the following issue for review:

> Did the court of appeals err in affirming the trial court's decision based upon the Department's failure to present an adequate record on appeal?

LAW/ANALYSIS

The Department argues that the court of appeals erred in affirming the trial court's decision based upon the Department's failure to present an adequate record on appeal. We disagree.

Ordinarily, no point will be considered which does not appear in the record on appeal. Rule 210(h), SCACR. Because court rules require the appealing party to prepare the record on appeal, *see* Rule 210(a), SCACR, South Carolina courts have traditionally held the appealing party accountable for failing to present the court with an adequate record on appeal for review.

For example, the case of *Polson v. Burr* arose out of an automobile collision involving three vehicles, and the case originated when the driver of one of the vehicles sued the driver of the second vehicle. 235 S.C. 216, 217-18, 110 S.E.2d 855, 856 (1959). On appeal, the driver of the second vehicle argued that the trial court erred in denying his motion to join both the driver and the owner of the third vehicle as necessary parties to the action. *Id*. at 217, 110 S.E.2d at 856. In dismissing the appeal, this Court stated:

> The record states that the Court below refused this motion, although for some unexplained reason the order is not included in the record. . . . [T]he appeal here is not in such shape as to allow us to properly consider the merits. Owing to the failure to incorporate in the record the order from which the appeal is taken, we are not advised as to the grounds upon which the motion was denied . . . .

Id. at 218-19, 110 S.E.2d at 856.

Although the record on appeal in the instant case contains the full transcript of the hearing before the trial court, including the Department's subject matter jurisdiction argument and the trial court's oral ruling on the issue, the Department failed to include the trial court's final order in the record. As both court rule and this Court's precedent provide, a judgment is effective only when reduced to writing and entered into the record. Rule 58(a)(2), SCRCP; *see also Case v. Case*, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964) (providing that an oral decision "is not a final ruling on the merits nor is it binding on the parties until it has been reduced to writing, signed by the Judge [sic] and delivered for recordation."). Because the Department failed to include the trial court's final order in the record on appeal, the court of appeals properly decided the case without reaching the merits.

To support its argument for reversal, the Department alleges that the Court has an independent obligation to determine the existence of subject matter jurisdiction and that the lower court erred in dismissing the appeal on procedural grounds "without recognizing the potential impact of the [trial court's] decision on South Carolina's unified judicial system." We disagree.

This argument vastly overstates the case. Primarily, the Department misinterprets an appellate court's obligation regarding subject matter jurisdiction. As this Court's precedent expressly provides, *lack* of subject matter jurisdiction in a case may not be waived and ought to be taken notice of by an appellate court. *Amisub of S.C., Inc. v. Passmore*, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994) (citing *Anderson v. Anderson*, 299 S.C. 110, 382 S.E.2d 897 (1989)). Accordingly, the court of appeals was only required to address the issue of subject matter jurisdiction if it appeared that the lower court *did not possess* subject matter jurisdiction.

As we have instructed, subject matter jurisdiction refers to a court's constitutional or statutory power to adjudicate a case. *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005). Stated somewhat differently, "subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *Id.* (citing *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000)).

Article V, § 11 of the South Carolina Constitution provides that "[t]he Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law." Dealing specifically with the issue of probation, the South Carolina Code provides that "the judge of a court of record with criminal jurisdiction at the time of sentence may suspend the imposition . . . of a sentence and place the defendant on probation . . . ." S.C. Code Ann. § 24-21-410 (Supp. 2005).

The Department argues that the circuit court lacked subject matter jurisdiction to consider Johnson's request because the request was not accompanied by a recommendation from the agent in charge of the responsible county probation office in support of early termination. This argument is based upon the language of S.C. Code Ann. § 24-23-130 (Supp. 2005), which provides that "[u]pon the satisfactory fulfillment of the conditions of probation, the court, with the recommendation of the agent in

charge of the responsible county probation office, may terminate the probationer or supervised prisoner from supervision."

Modern notions of subject matter jurisdiction, illustrated by this Court's opinion in *Gentry*, resoundingly reject the Department's position. Clearly, the circuit court's power and authority to hear cases involving probation derives from Article V, § 11 of the South Carolina Constitution and § 24-21-410 of the Code. Accordingly, a recommendation from the probation office has no relevance to the circuit court's subject matter jurisdiction to hear cases involving the early termination of probation.

To support its subject matter jurisdiction argument, the Department relies on several cases dealing with the issue of probation revocation. Specifically, these cases hold that a court does not have subject matter jurisdiction to revoke probation or hear a matter involving a probation violation absent the issuance of an arrest warrant from a probation officer. *See e.g. State v. Felder*, 313 S.C. 55, 56, 437 S.E.2d 42, 43 (1993) ("If a warrant has not been issued, the trial court lacks subject matter jurisdiction to revoke probation . . . ."); *and Gray v. State*, 276 S.C. 634, 636, 281 S.E.2d 226, 226 (1981) ("Failure to comply with the warrant procedures . . . deprives the trial court of subject matter jurisdiction to revoke probation.").

At the outset, this argument is unpersuasive due to the distinctions between the statutes at issue. Section 24-21-300 provides "[t]he issuance of a citation or warrant . . . *gives jurisdiction* to the court . . . at any hearing on the violation." (emphasis added). Similarly, § 24-21-450 provides that a warrant must be issued *before* a probationer may be detained so that he may *then* be brought before a judge. In contrast, § 24-23-130 does not contain the word "jurisdiction," nor is the statute characterized by such process-oriented language as is found in § 24-21-450.[2]

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[2] Because this case does not involve probation revocation, we express no opinion as to the effect this Court's holdings in *Gentry* and *Dove v. Gold Kist*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) may have on the continued validity of prior pronouncements that an arrest warrant affects a court's subject matter jurisdiction.

Furthermore, the phrasing of the statute belies the interpretation the Department offers. Specifically, § 24-23-130 suggests that the recommendation of the probation officer is only necessary *at some stage* before a person's probation may be terminated early. Accordingly, the plainest reading of the statue does not support the proposition that a court only has the power to hear early termination of probation cases after a probation officer has made a favorable recommendation. Instead, the statute contemplates that the trial court (1) has the discretion to call an early termination of probation case, on either the Department's or the probationer's motion, (2) has the power to decide whether it shall conduct a hearing (which is required to include the probation officer's recommendation), and (3) has full discretion in ultimately rendering a decision. Instructively, this is the precise scenario that occurred in the instant case.

CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision.

MOORE, WALLER, and BURNETT, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

James Nathaniel Bryant, III, Appellant.

Appeal from Horry County
Paula H. Thomas, Circuit Court Judge

Opinion No. 26278
Heard January 3, 2007 – Filed February 27, 2007

AFFIRMED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek and Appellate Defender Aileen P. Clare, both of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia, and Solicitor John Gregory Hembree, of Conway, for Respondent.

CHIEF JUSTICE TOAL: This is an appeal from a capital sentencing proceeding in which the trial court sentenced James Nathaniel Bryant, III ("Bryant") to death. Bryant appeals claiming that the trial court erred in 1) failing to require that jurors be physically present during jury selection; 2) failing to order the State to produce Bryant's prison records pursuant to *Brady v. Maryland* and Rule 5, SCRCrimP; and 3) failing to admit the defense expert's opinion testimony that the death penalty was more merciful than a sentence of life without parole. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In June 2000, Cpl. Dennis Lyden of the Horry County Police Department ("Cpl. Lyden") was placing Bryant under arrest for driving with a suspended license when Bryant suddenly turned and wrestled Cpl. Lyden to the ground. During the course of the struggle, Bryant managed to obtain Cpl. Lyden's flashlight and pistol magazine from the officer's duty belt and used them to severely beat Cpl. Lyden about the head. After beating the officer unconscious, Bryant took Cpl. Lyden's pistol from his holster and shot him in the head at close range. Bryant drove off, taking the pistol and the pistol magazine with him and leaving Cpl. Lyden's body where it had fallen. After an extensive manhunt, Horry County law enforcement apprehended Bryant the next day.

A grand jury indicted Bryant for murder and armed robbery. Bryant's first issue on appeal involves the jury selection and capital *voir dire* beginning in September 2004.[1] During jury selection, the parties individually examined a total of sixty-seven jurors divided into thirteen panels. During

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[1] The 2004 jury selection was for Bryant's second trial on these charges. This Court reversed Bryant's 2001 conviction and death sentence in *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003), on the basis that law enforcement's contact with jurors' family members compromised Bryant's right to a fair and impartial jury.

individual *voir dire*, the parties inquired to the court about the method of jury selection. The court replied that jurors would be called for striking in the same order they had been qualified and that jurors would be brought before the parties to view before striking. The trial court eventually qualified forty-three potential jurors for service.

During the selection process, counsel for Bryant requested that the jurors be redrawn before being presented for striking. The trial court agreed to the request, but announced that instead of physically appearing for final jury selection, the parties would note their selections on a paper list of the jurors in the revised order based on their recollections from individual *voir dire* ("paper strikes"). Bryant's counsel objected to this method of jury selection claiming that because they had counted on physically viewing the jurors, counsel had not taken sufficient notes during *voir dire* to adequately exercise paper strikes. The court assured the defense that they would be given a chance to review their notes, juror sheets, and information forms, and reminded counsel that they had extensively interviewed each juror the week before. When counsel continued to object to paper strikes, the court offered them a chance to withdraw their request to have the jurors redrawn and instead conduct jury selection as originally planned. Counsel for Bryant declined this offer and jury selection proceeded with the jurors being redrawn and the parties exercising paper strikes.

The trial court initially addressed the issue in Bryant's second claim on appeal in a pre-trial motion to compel. During the motion hearing, Bryant claimed that the State was withholding certain discoverable documents believed by Bryant to be in the custody of the South Carolina Department of Corrections (SCDC). The court determined that the State had largely complied with Bryant's discovery requests, finding no reason not to believe the State when it claimed that certain documents being requested did not exist. Where the existence of a particular document was unclear, the trial court ordered the State to offer a definitive answer as to whether or not the documents existed.

The issue of document disclosure arose again at the conclusion of the guilt phase of the proceedings. Just prior to the start of the sentencing phase,

the court asked if any matters needed to be further addressed. Neither party requested any further hearing at that point. However, during the sentencing phase of the proceedings, the defense requested an *in camera* hearing on the State's failure to produce the same documents at issue in the pre-guilt phase motion to compel. Reviewing the list of classes of documents Bryant claimed the State had failed to produce, the trial court again found no indication that the State had produced incomplete documents, or failed to produce any documents that in fact existed. The court offered Bryant a chance to make a motion for continuance to which counsel for Bryant responded, "no."

The next day, just before the defense called their last witness, Bryant's counsel moved for a continuance based on the State's failure to turn over the same SCDC records at issue in previous *in camera* discussions. The court denied the motion for a continuance, finding once again that what records existed had been provided, and that even if records the State claimed were non-existent did actually exist, they would not prejudice Bryant's case.

The trial court addressed the SCDC documents a final time when the defense moved for a new trial "based on the State's noncompliance with the discovery rules and the Court's denial of our motion for a continuance." The court denied the motion noting that the issue had been dealt with "extensively" and reiterated its findings made throughout the trial that some of the documents were in the possession of the defense; the alleged contents of other "missing" documents had been stipulated to; and there had been no showing of prejudice due to the absence of the documents.

Bryant's third claim on appeal involves the testimony of Lorita Whitaker ("Whitaker"), an expert in clinical social work and human behavior in prison, who testified for the defense during the sentencing phase on the dismal conditions of prison life. When asked on direct if it was her opinion that prison was a pretty miserable place, she answered, "Some people feel that the death penalty is more merciful than life without parole." The court sustained the State's prompt objection that the expert was "getting into the ultimate issue."

At the conclusion of the sentencing proceeding, the jury recommended Bryant be sentenced to death. This appeal followed and Bryant raises the following issues for review:

I. Did the trial court deny Bryant's constitutional right to a fair trial by an impartial jury by refusing Bryant's request to have the jurors physically present during jury selection?

II. Did the trial court deny Bryant a fair sentencing proceeding by refusing to order the State to produce Bryant's prison records?

III. Did the trial court err in refusing to allow Bryant's expert witness to opine that some people feel the death penalty is more merciful than a sentence of life without parole?

STANDARD OF REVIEW

In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. *State v. Bridges*, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002).

LAW/ANALYSIS

I. Jury selection

Bryant argues that the trial court erred in refusing to allow the jurors to be physically present during jury selection. Bryant claims the alleged error

substantially impaired his ability to exercise peremptory strikes in a meaningful manner and therefore deprived him of his constitutional guarantee of a fair trial by an impartial jury. *See* U.S. Const. Amend. VI; S.C. Const. art. I, § 14. We disagree.

Peremptory strikes are not constitutional rights. They are creatures of statute and "a means to achieve the end of an impartial jury." *State v. Potts*, 347 S.C. 126, 130, 554 S.E.2d 38, 40 (2001) (quoting *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988)). Therefore, a defendant seeking to overturn a guilty verdict based on the way in which peremptory challenges were exercised must show that the statute granting him peremptory challenges was violated or that the jury which tried him was not impartial. *Id.* at 131, 554 S.E.2d at 40.

S.C. Code Ann. § 14-7-1100 (Supp. 2005) provides:

> In impaneling juries in criminal cases, the jurors shall be called, sworn and impaneled anew for the trial of each case, according to the established practice.

Bryant argues that the trial court violated the statute granting him peremptory challenges because striking jurors on paper without physically viewing the jurors was not an "established practice" of jury selection.

Because a trial court is given enormous discretion in conducting a criminal trial, we may logically conclude that "established practice" does not refer to only one method of impaneling a jury. Although not the most common method of jury selection in criminal trials, paper strikes are often used in this jurisdiction and their use has been held to be valid. *See Potts*, 347 S.C. 126, 554 S.E.2d 38 (upholding the use of paper strikes by a criminal defendant in magistrate's court who claimed the use of paper strikes violated his right to personally confront potential jurors). Because § 14-7-1100 is a blanket rule applicable in all criminal cases, this Court will not begin injecting judicial exceptions into the statutory scheme by holding that the paper strike method is only an "established practice" in non-death penalty cases.

Furthermore, there is no evidence that Bryant did not receive a fair trial by an impartial jury. The record reveals a thorough screening process with over 800 pages of capital *voir dire* consisting of individual examination of each juror by defense counsel. Additionally, when counsel for Bryant indicated they were unprepared for the paper strike method, the trial court granted the defense more time to review their notes prior to beginning the striking process and promised to give counsel extra time to decide on a strike during the procedure.

Additionally, the record shows that Bryant affirmatively chose to forego the physical viewing of jurors and proceed with the paper strike method as part of a strategic move to generate a strike list more beneficial to the defense. While the parties initially agreed to view jurors by calling them forward in the order they were qualified, counsel for Bryant later requested that the jurors be redrawn. Although the solicitor did not object to a redraw, the trial court noted a disadvantage to the State in granting Bryant's request. Therefore, the court allowed the jurors to be redrawn, but announced that by proceeding in this manner, the parties would strike the jurors on the paper list instead of viewing the jurors in person. Upon objection by defense counsel to the use of paper strikes, the trial court gave Bryant the opportunity to withdraw his request to have the jurors redrawn and proceed with the original plan to view the jurors in the order they were qualified. Bryant's counsel refused the trial court's offer, indicating to this Court that counsel for Bryant clearly recalled enough about the jurors to know that a redraw would be more beneficial to their strategy than proceeding in the original order. Without more to substantiate a claim of prejudice, Bryant may not now claim that the trial strategy he opted for warrants a new trial. *See State v. Babb*, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) ("[A] party cannot complain of an error which his own conduct has induced.").

Because the use of paper strikes did not deprive Bryant of a fair trial by an impartial jury, we hold that the trial court did not err in refusing to allow jurors to be present during jury selection.

II. Discovery of Bryant's SCDC records

Bryant argues that the trial court's failure to order the State to turn over SCDC documents after hearing Bryant's pre-guilt phase motion to compel denied Bryant a fair sentencing proceeding. Bryant also argues that the trial court's subsequent denial of a motion for continuance and a motion for a new trial, both based on the State's refusal to turn over the SCDC documents, denied Bryant a fair sentencing proceeding. We disagree.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the State must disclose evidence that is favorable to the accused if the evidence is material to either guilt or punishment. Defendants making a claim under *Brady* must demonstrate that 1) the evidence was favorable to the defense; 2) it was in the possession of or known to the prosecution; 3) it was suppressed by the prosecution; and 4) it was material to guilt or punishment. *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Similarly, under Rule 5, SCRCrimP, criminal defendants are entitled to their statements, criminal records, and any documents or tangible objects material to the preparation of their defense or intended for use by the prosecution.

Bryant sent a discovery request to the State requesting that his prison records be handed over as *Brady* and Rule 5 material. These records included: classification reports, behavioral reports, visitation reports, counseling records, work records, "shakedown logs," cell inspection reports, and seminar records. The trial court addressed Bryant's *Brady* and Rule 5 requests a total of four times during the trial – in a pre-guilt phase motion; in an *in camera* hearing during the sentencing phase; in a motion to compel at the close of the defense's argument in the sentencing phase; and in a motion for a new trial. Each of the four times Bryant raised the issue of the "missing" classes of documents supposedly accessible to SCDC and the State, the trial judge conducted a thorough examination into the nature of the requested documents, why the documents were necessary to Bryant's defense, and the State's reasons for not producing the documents.

In the instant case, the trial court's findings and conclusions as to each class of documents are clearly supported by the record and function to negate

one or more of the elements required to make a claim under *Brady*. Specifically, the trial court found that 1) the classification reports, behavioral reports, and counseling records had been handed over to Bryant by the State; 2) the absence of visitation reports, work records, cell inspection reports, and shakedown logs did not prejudice the defense – a finding that the defense acknowledged to be true; and 3) the visitation reports, work records, shakedown logs, and cell inspection reports did not exist. Likewise, these findings negate the substantive requirements of Rule 5, SCRCrimP, which requires that the documents requested be "material" to the preparation of the defense.

Moreover, Bryant's acknowledgment to the trial court that the absence of certain documents would not be prejudicial to the defense goes squarely against Bryant's contention in this appeal. If Bryant conceded that the court's ruling was not prejudicial, he may not later assert that ruling denied him a fair trial. *See State v. Whipple*, 324 S.C. 43, 51, 476 S.E.2d 683, 687 (1996) (by proceeding to trial after affirmatively stating "the defense is ready," a defendant waived his right to complain he was given inadequate time to preview discovery materials).

Bryant's claim is essentially grounded in the last-minute turnover of records by SCDC to Bryant's counsel the night before the trial. We note that this Court does not condone such behavior, and we emphasize the importance of conscientiously honoring the requirements of *Brady* and Rule 5, SCRCrimP.[2] However, the acquisition of requested documents at the last

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[2] Specifically, we are concerned that the solicitor had to resort to subpoenaing SCDC in September 2004 in order to obtain records requested from SCDC pursuant to Bryant's *Brady* and Rule 5 motions filed in June 2004. Furthermore, because SCDC did not promptly and fully comply with the solicitor's subpoenas, the solicitor had to make repeated phone calls and visits to SCDC in order to acquire the requested records. The situation ultimately required a court order directing SCDC to immediately provide the parties with affirmative responses as to the whereabouts and/or existence of certain records requested by Bryant. The record provides no reason for SCDC's delayed handling of the matter and we issue this reminder that state

minute is not uncommon in the practice of law and, in this case, is not grounds for a new trial in light of the trial court's findings and the parties' stipulations with respect to the various documents.

Accordingly, we hold that the trial court did not abuse its discretion in ruling on Bryant's various *Brady* and Rule 5 motions.

III. Expert witness testimony

Bryant argues that the trial court erred in refusing to allow Bryant's expert witness to opine that the death penalty was more merciful than a sentence of life without parole. We disagree.

At trial, Bryant called Lorita Whitaker, an expert in clinical social work and "human behavior in prisons." While testifying on direct examination on the dismal conditions of prison life in general, Whitaker stated that "some people feel that the death penalty is more merciful than life without parole." The State immediately objected to Whitaker's statement and the trial court sustained the objection. Defense counsel immediately proceeded to his final question with no contemporaneous objection to the trial court's ruling. Because the issue was not raised to and ruled on by the trial court, the admissibility of Whitaker's statement is not preserved for appeal. *See State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004).

The circumstances of this case are nearly indistinguishable from those in our recent opinion in *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2006), where although the admissibility of testimony on prison conditions had not been preserved for review, this Court warned:

> We take this opportunity . . . to caution the State and the defense that evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally,

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agencies are no different from the solicitor in their obligations to comply with the requirements of *Brady* and Rule 5.

> questions involving escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison . . . is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

Id. at 498-499, 623 S.E.2d at 385. We reiterate this admonishment in our opinion today and remain firm in our view that testimony seeking to portray life imprisonment as preferable to capital punishment is improper, particularly where, as here, the expert's testimony did not focus specifically on the defendant, but on prison conditions generally.

PROPORTIONALITY REVIEW

As required, we conduct a proportionality review of Bryant's death sentence. S.C. Code Ann. § 16-3-25(C) (2003). The United States Constitution prohibits the imposition of the death penalty when it is either excessive or disproportionate in light of the crime and the defendant. *State v. Copeland*, 278 S.C. 572, 590, 300 S.E.2d 63, 74 (1982). In conducting a proportionality review, we search for similar cases in which the death sentence has been upheld. *Id.*; S.C. Code Ann. § 16-3-25(E) (2003).

After reviewing the entire record, we conclude that the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. *See State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999) (holding that the death penalty was warranted where defendant killed a police officer performing a routine traffic stop); *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (1999) (holding that death penalty was proper where defendant killed the driver of armored van during armed robbery of the vehicle); *and State v. Johnson*, 306 S.C. 119; 410 S.E.2d 547

(1991) (holding that the death penalty was proper where the defendant shot a state trooper six times after being stopped for erratic driving).

CONCLUSION

For the foregoing reasons, we affirm Bryant's conviction and death sentence in accordance with the trial court's decision.

MOORE, BURNETT, JJ., and Acting Justices James W. Johnson, Jr., and L. Casey Manning, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and Treatment of Larry Gene Beaver, Respondent,

v.

The State of South Carolina, Appellant.

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 26279
Heard January 3, 2007 – Filed February 27, 2007

REVERSED AND REMANDED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Deborah R. J. Shupe, and Assistant Attorney General David M. Stumbo, all of Columbia, for appellant.

William Isaac Diggs, of Myrtle Beach, for respondent.

JUSTICE MOORE: Respondent pled guilty to one count of lewd act on a minor. He was sentenced to seven years imprisonment, suspended on nine months confinement and three years probation. The State commenced a civil action seeking respondent's commitment as a sexually violent predator pursuant to the South Carolina Sexually Violent Predator Act (the SVP Act), S.C. Code § 44-48-10 through -170 (Supp. 2006). At the probable cause hearing, the judge found no probable cause to believe respondent is a sexually violent predator and dismissed the action. We certified this case from the Court of Appeals.

ISSUE

> Did the circuit court err by dismissing the State's Sexually Violent Predator petition?

FACTS

In 1993, respondent was charged in Tennessee with four counts of aggravated rape of a child, two counts of aggravated sexual battery, and two counts of incest. The charges were based on the molestation of his ten-year-old and eight-year-old daughters, whom he had forced to perform multiple sex acts with him. Respondent pled guilty to one count of aggravated sexual battery and one count of incest. He was sentenced to eight years imprisonment on the sexual battery charge and six years imprisonment, to be served concurrently, on the incest charge.

In 2003, respondent was residing in South Carolina and was giving piano lessons in his home. The mother of one of his piano students discovered numerous letters and e-mails respondent had written to her daughter, who was ten-years-old, between April and June 2003. When the mother questioned the victim, she reported that between December 2002 and June 2003, respondent had hugged and kissed her, and, on one occasion, he ran his tongue over her lips. The victim also stated respondent put his hand under her shirt and rubbed her chest area with his hands one day when she felt sick.

Respondent was indicted on one count of lewd act on a child under the age of sixteen and one count of communicating obscene messages. In September 2004, he pled guilty to the lewd act charge.

Prior to respondent's release from prison, his case was referred to the Multi-Disciplinary Team, which assesses whether a prisoner should possibly be termed a "sexually violent predator." His case was referred because his conviction of lewd act on a minor is a qualifying offense under the SVP Act. *See* S.C. Code Ann. § 44-48-30(2)(k) (Supp. 2006). The Multi-Disciplinary Team reviewed his case and determined there was probable cause to believe he is a sexually violent predator as defined by the SVP Act. The Prosecutor's Review Committee also determined there was probable cause to believe respondent meets the statutory criteria for civil commitment as a sexually violent predator.

The State then filed a petition seeking respondent's civil commitment to the South Carolina Department of Mental Health for long-term control, care, and treatment as a sexually violent predator. Judge John L. Breeden found the State's petition set forth sufficient facts to establish probable cause to believe respondent meets the statutory criteria for commitment.[1] The case was then called for a probable cause hearing before Judge Edward B. Cottingham.[2]

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[1]*See* S.C. Code Ann. § 44-48-80(A) (Supp. 2006) ("Upon filing of a petition [for a probable cause determination,] the court must determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If the court determines that probable cause exists to believe that the person is a sexually violent predator, the person must be taken into custody if he is not already confined in a secure facility.").

[2]*See* S.C. Code Ann. § 44-48-80(B) (Supp. 2006) (after the initial determination of probable cause by the court, "the person must be provided with notice of the opportunity to appear in person at a hearing to contest probable cause as to whether the detained person is a sexually violent predator."). If the probable cause determination is made at the hearing, then the court must direct that the person be transferred to an appropriate secure

At the hearing, the judge expressed his concern about applying the SVP Act to respondent because respondent "pled to fondling, non-violent [and] now they want to keep him in jail for something that they didn't indict him for."[3] The judge stated he was concerned that respondent pled specifically to a non-violent fondling charge, apparently entered an Alford[4] plea[5] to that charge, and received only nine months of active time. The judge stated it would be appropriate to use the SVP Act if respondent had raped or ravished someone or had intercourse with a young child; however, he did not think the SVP Act was intended for someone who pleads to a non-violent fondling charge. At the conclusion of the hearing, the judge stated, "I can't order this but with his prior record, I would suggest that he quit teaching young children."

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facility for an evaluation as to whether the person is a sexually violent predator. S.C. Code Ann. § 44-48-80(D) (Supp. 2006). After the evaluation, a trial is held to determine whether the person is a sexually violent predator. S.C. Code Ann. § 44-48-90 (Supp. 2006). Therefore, a finding of probable cause at the probable cause hearing does not automatically place the person in confinement and finally decide the question of whether that person is a sexually violent predator.

[3]The judge stated he was concerned that a judge can incarcerate someone and say, "'This is your sentence.' And then they complete the sentence, and you say, 'Wait a minute. We [sic] going to keep you a while longer.'" The judge further commented, "The State had a chance to put him away forever if they chose to, and for reasons good and sufficient for them . . . they did not. So, I'm not going to let you incarcerate him any further on this charge." The judge's comments on this point are in error. *See, e.g.*, In *re* Care and Treatment of Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001), *cert. denied*, 535 U.S. 1062 (2002) (purpose of the SVP Act is civil commitment, which does not implicate retribution).

[4]North Carolina v. Alford, 400 U.S. 25 (1970).

[5]There is no evidence in the record as to whether the lewd act plea was actually an Alford plea.

In his order, the judge found the State had failed to demonstrate that probable cause exists to find respondent to be a sexually violent predator and that the State had failed to provide sufficient evidence that respondent suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined in a secure facility as required by the SVP Act.

DISCUSSION

The lower court was asked to determine whether there was probable cause to believe respondent is a sexually violent predator. A sexually violent predator is defined in the SVP Act as:

> . . . a person who (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

S.C. Code Ann. § 44-48-30(1) (Supp. 2006). "Sexually violent offense" includes committing a lewd act upon a child under sixteen. S.C. Code Ann. § 44-48-30(2)(k) (Supp. 2006). "Mental abnormality" means a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses. S.C. Code Ann. § 44-48-30(3) (Supp. 2006). Finally, "likely to engage in acts of sexual violence" means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others. S.C. Code Ann. § 44-48-30(9) (Supp. 2006).

We find the lower court erred by finding no probable cause to believe respondent meets the definition in the SVP Act. Respondent meets part (a) of the definition because he has been convicted of a sexually violent offense, *i.e.* lewd act upon a child under sixteen. The lower court erred by finding the lewd act charge was "non-violent." The lower court determined that

respondent should not be confined as a sexually violent predator on the basis of a "non-violent" charge. It is true that the lewd act charge is considered non-violent for criminal purposes.[6] However, the Legislature has deemed it appropriate to consider that charge violent for the purposes of the SVP Act. Section 44-48-30(2)(k) includes committing or attempting a lewd act upon a child under sixteen as a sexually violent offense that qualifies a person to be considered a sexually violent predator. Accordingly, the lower court erred by referring to the lewd act charge as a non-violent charge in this civil probable cause hearing.

Further, the lower court erred by finding the State had failed to provide sufficient evidence that respondent suffers from a mental abnormality or personality disorder as required under part (b) of the definition. At the probable cause hearing, the State introduced evidence that respondent suffers from pedophilia. The State also presented sufficient evidence to show that there is probable cause to believe respondent is "likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." This evidence consisted of respondent's guilty pleas to aggravated sexual battery and incest arising out of the molestation of one of his natural daughters. A few years after respondent's release from prison, he performed a lewd act upon a ten-year-old girl. While the first incident involved his own child, the next incident involved a young girl whom he had known only for a short time. His behavior reveals a propensity to commit acts of sexual violence to such a degree as to pose a menace to the health and safety of young girls.

Pursuant to the SVP Act, and particularly S.C. Code Ann. § 44-48-80(D) (Supp. 2006), the State is not able to require a mental examination of the offender until a judge, after a hearing, has found that there is probable

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[6]*See* S.C. Code Ann. § 16-15-140 (2003) (it is unlawful to willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the child); S.C. Code Ann. § 16-1-60 (Supp. 2006) (crime of lewd act not included in listing of offenses deemed violent).

cause to believe the offender is a sexually violent predator. Therefore, the State is generally unable to produce any mental health information at the probable cause hearing because probable cause must first be found by a judge at the hearing before such evidence can be obtained. The State's inability to provide mental health evidence does not prevent a finding of probable cause. Accordingly, the lower court erred by finding the State had failed to provide sufficient evidence that respondent suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined. *Cf.* *In re* Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002) (on review, the appellate court will not disturb the hearing court's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's finding).

As an additional sustaining ground, respondent argues the State's petition should be dismissed because it cannot comply with the statutory requirement that the court must conduct a trial to determine whether the person is a sexually violent predator within sixty days of the completion of the probable cause hearing. *See* S.C. Code Ann. § 44-48-90 (Supp. 2006) ("Within sixty days after the completion of a [probable cause] hearing, the court must conduct a trial to determine whether the person is a sexually violent predatory."). However, because probable cause was not found at the conclusion of the hearing, the time period set out in § 44-48-90 is inapplicable. Therefore, there is no merit to respondent's additional sustaining ground.

CONCLUSION

Because there is no evidence to support the lower court's finding on probable cause, we reverse and remand to the circuit court. On remand, the circuit court shall direct that respondent be transferred to an appropriate secure facility for evaluation as to whether he is a sexually violent predator. Further, on remand, the circuit court shall approve a qualified expert to conduct the evaluation. *See* S.C. Code Ann. § 44-48-80(D) (Supp. 2006).

REVERSED AND REMANDED.

TOAL, C.J., BURNETT, J., and Acting Justices James W. Johnson, Jr., and L. Casey Manning, concur.

The Supreme Court of South Carolina

In the Matter of Kelly Christen Evans, Respondent.

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, 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.

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 Mark S. Sharpe, 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. Sharpe shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Sharpe 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 Mark S. Sharpe, 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 Mark S. Sharpe, 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. Sharpe's office.

Mr. Sharpe's 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
February 26, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Cornelius Govan, Appellant.

Appeal From Beaufort County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 4211
Heard January 9, 2007 – Filed February 26, 2007

AFFIRMED

Appellate Defender Aileen P. Clare, of Columbia, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor I. McDuffie Stone, III, of Beaufort, for Respondent.

SHORT, J.: Cornelius Govan appeals his armed robbery conviction. He argues the trial court erred in denying his motions to suppress both his show-up identification as unduly suggestive and unreliable and the resulting in-court identification as tainted by the prior suggestive show-up. We affirm.[1]

FACTS

On December 29, 2004, the House of Tang Restaurant (Restaurant) was robbed at gunpoint. The owner of the Restaurant, Yin Lin, stated that a "black guy" in a long black jacket and black hat (or rag) entered the Restaurant, held a gun "in my hair," and demanded money from the cash register. Lin put the money from the register into a bag, and the robber fled on a bicycle with one thousand twenty-four dollars.

Yu Chen, a second Restaurant employee, was eating with Lin at the time of the robbery. Chen corroborated the information provided by Lin. When the robber fled on a bicycle, Chen ran outside and followed him in Lin's car. While following the robber, Chen hit the bicycle with the car, and then both the robber and Chen left the scene on foot.

Approximately forty-five minutes after the robbery, the police arrested a man fitting the description provided by the Restaurant employees. This man, later identified as Govan, dropped a brown paper bag when he saw the police and attempted to flee. The police located the bag, which contained the same amount of money as was stolen from the Restaurant, and allowed a police dog to pick up a scent off the bag. The police dog then led the police to Govan who was hiding in a ditch. When the police took Govan into custody, they found a gun in his possession.

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

The police held Govan in custody and brought Lin to identify him as the robber. While Govan stood outside a police vehicle, Lin identified him from inside a second police vehicle.

A Beaufort County grand jury indicted Govan for armed robbery. At trial, the jury convicted Govan of armed robbery, and the trial court sentenced him to twenty-six years imprisonment. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The decision to admit an eyewitness identification is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of that discretion, or the commission of prejudicial legal error. State v. Brown, 356 S.C. 496, 502, 589 S.E.2d 781, 784 (Ct. App. 2003); see also State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000) (admissibility of evidence is within the sound discretion of trial judge; evidentiary rulings of trial court will not be reversed on appeal absent abuse of discretion or commission of legal error prejudicing the defendant).

LAW/ANALYSIS

I. Preservation

We first note Respondent calls into question the preservation of Govan's issue on appeal. Govan's attorney moved in limine to suppress the identifications of his client, and this motion was denied. However, he did not object when the initial witness following opening statements presented the identifications to the jury.

"A defendant must object to an in-court identification to properly preserve the issue for appeal." State v. Carlson, 363 S.C. 586, 597, 611 S.E.2d 283, 288 (Ct. App. 2005). Normally, a motion in limine to exclude evidence made at the beginning of trial does not preserve the

issue for appellate review because a motion in limine is not a final determination. State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). "The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." Id.

"However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." Id. The issue is preserved:

> Because no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling. Thus, . . . [the] motion was not a motion in limine. The trial court's ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal.

Id. (Quoting State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410-11 (Ct. App. 1995).

The circumstances in Forrester are virtually identical to the circumstances in this matter. A motion in limine to exclude evidence was made to and denied by the trial court. Opening arguments followed, and during the testimony of the first witness, the evidence in question was introduced before the jury and no objection was made. The Forrester court found that since no evidence was entered between the trial court's ruling and the admission of the evidence, there was no opportunity for the court to change its ruling. Forrester, 343 S.C. at 642-43, 541 S.E.2d at 840. The Forrester court held Forrester did not need to renew his objection to preserve the issue for appellate review. Id. at 643, 541 S.E.2d at 840. In light of this binding precedent, we find Govan's argument regarding the admission of identifications is preserved for our review.

II. Admission of Evidence

Govan contends the trial court erred in denying his motions to suppress both his show-up identification as unduly suggestive and unreliable and the resulting in-court identification as tainted by the prior suggestive show-up. We disagree.

A criminal defendant may be deprived of due process of law through an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. Brown, 356 S.C. at 502, 589 S.E.2d at 784. The in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a significantly substantial likelihood of irreparable misidentification. Id. at 502-03, 589 S.E.2d at 784.

> The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification.[2] First, a court must ascertain whether the identification process was unduly suggestive. The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed . . . Only if [the procedure] was suggestive need the court consider the second question-whether there was a substantial likelihood of irreparable misidentification.

Id. at 503, 589 S.E.2d at 784 (citations omitted). "The query posited is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure may have been suggestive." Carlson, 363 S.C. at 599, 611 S.E.2d at 290.

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[2] See Neil v. Biggers, 409 U.S. 188 (1972).

Notwithstanding the inherent suggestiveness and general disfavoring of one-on-one show-up identifications, they may be proper where they occur shortly after the alleged crime, near the scene of the crime, as the witness's memory is still fresh, where the suspect has not had time to alter his looks or dispose of evidence, and the show-up may expedite the release of innocent suspects and enable the police to determine whether to continue searching. Brown, 356 S.C. at 503-04, 589 S.E.2d at 785.

In the case at hand, the show-up occurred within forty-five minutes of the robbery and was held near the scene of the crime when the witness's memory was still fresh, and the suspect was wearing clothing consistent with the clothing described by the witnesses at the time of the crime. Since one officer observed Govan drop the paper bag full of money and Govan was still in possession of his gun when he was apprehended, it would appear he had not had enough time to dispose of evidence. We find that although this show-up was suggestive, it was not unduly suggestive under the above noted test.[3]

Even were we to find the show-up to be unduly suggestive, Govan's attempt to exclude the in-court identification would fail under an analysis of the second prong of the test developed by the U.S. Supreme Court in Biggers. The in-court identification is admissible if the state can prove by clear and convincing evidence that the identification is reliable based on information independent of the out-of-court procedure. Carlson, 363 S.C. at 600, 611 S.E.2d at 290.

> To determine whether an identification is reliable, it is necessary to consider the

[3] Lin testified at trial that the police told her that they had caught the man who robbed her, and they needed her to come identify him (though her difficulty with the English language and the use of an interpreter may have played a role in this statement). However, the officer denied making this statement, and we yield to the trial court on issues of credibility.

> following factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the confrontation.

Brown, 356 S.C. at 504, 589 S.E.2d at 785.

The Restaurant employees viewed the robber in a well lit building. Lin was immediately next to and in direct contact with the robber for the duration of the robbery as he held her by the arm and put a gun to her head. Lin had significant opportunity to view the robber at a time when her attention would have been heightened. Govan's appearance at the time of the show-up was consistent with Lin's prior description of him, and Lin stated that she was certain Govan was the man who robbed her. Again, the show-up occurred within forty-five minutes of the robbery. Therefore, we find Lin's in-court identification of Govan was reliable independent of the show-up identification. We find no abuse of discretion by the trial court in it's denial of Govan's motion to exclude both the show-up and in-court identifications.

CONCLUSION

We find Govan's issue on appeal to be preserved for our review, but to be without merit. We find the show-up identification was not unduly suggestive, but even if it were, the in-court identification of Govan would be reliable based on a source independent of the show-up. Based on the foregoing, Govan's conviction is

AFFIRMED.

GOOLSBY, J., and STILWELL, J., concur.