1999. In re Long, 335 S.C. 584, 518 S.E.2d 264 (1999). Respondent did not answer the formal charges and was not present at the hearing. However, in a letter to the Court dated December 5, 2000, he acknowledged the pending disciplinary charges and admitted the infractions alleged against him. In the letter, respondent sought to tender his resignation from the practice of law.

Criminal Conviction

Respondent pled guilty to one count of violating Section 1001 of Title 18 of the United States Code by knowingly and willfully making a false statement of a material fact in a matter within the jurisdiction of a department or agency of the United States. Respondent's plea arose out the federal sting operation "Operation Lost Trust."

Client A Matter

Respondent was retained to represent Client A in a criminal matter. Despite Client A's requests, respondent failed to perfect an appeal as required by Rule 602, SCACR, and In re Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991).[1] Client A also repeatedly requested his file; however, respondent delayed for an unreasonable amount of time before releasing the file. Respondent failed to properly communicate with Client A regarding his conviction and appeal.

Client B Matter

Respondent was retained to represent Client B in a criminal matter. Despite Client B's requests, respondent failed to perfect an appeal as required by Rule 602, SCACR, and In re Anonymous Member of the Bar, 303 S.C. 306,

[1]In the case of In re Anonymous, the issue was whether an attorney, retained for purposes of a criminal trial only, must assist his client in perfecting an appeal. The Court held that where the client desires an appeal, the attorney must serve and file the Notice of Appeal to protect the client's right to appeal.

413, SCACR.

In other disciplinary cases involving criminal convictions stemming from "Operation Lost Trust" we have imposed both a definite and an indefinite suspension. See In re Ferguson, 314 S.C. 278, 443 S.E.2d 905 (1994) (indefinite suspension); In re Limehouse, 307 S.C. 278, 414 S.E.2d 783 (1992) (indefinite suspension); In re Crow, 308 S.C. 128, 417 S.E.2d 534 (1992) (six-month definite suspension). We find that respondent's criminal conviction relating to "Operation Lost Trust" and his misconduct in the two client matters warrant the sanction of a two-year definite suspension.

Accordingly, respondent is definitely suspended from the practice of law for two years, retroactive to the date of his interim suspension. We will reconsider respondent's letter of resignation at the end of the definite suspension. Furthermore, we order respondent to pay the costs of these disciplinary proceedings to the Commission on Lawyer Conduct within 30 days of the date of this opinion. Respondent shall file an affidavit with the Clerk of Court, within 15 days of the date of this opinion, showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Michael Paul Saltz, Appellant.

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

Opinion No. 25337
Heard June 7, 2001 - Filed August 6, 2001

REVERSED

Jack B. Swerling, of Columbia, for appellant.

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

JUSTICE BURNETT: Michael Saltz (appellant) appeals his

conviction for murder. We reverse.

FACTS

Appellant was convicted of the murder of twelve-year-old Joseph Barefoot. Joseph disappeared on Sunday, May 25, 1997. As part of an extensive search for the missing boy, fliers were distributed throughout the community. The fliers described Joseph and indicated he was last seen in a white Chevy truck with a white male, aged fifteen to nineteen, named Mikey. It was inaccurate to state Joseph was "last seen" in the described truck. Two different witnesses described speaking to Joseph on Sunday afternoon, when he was out riding his bicycle. However, investigators later confirmed that seventeen-year-old Michael Saltz had given Joseph and his friend Charlie Mengedoht a ride in his white Chevy truck on Saturday, the day prior to Joseph's disappearance.

Because of his description on the missing person flier, appellant was the brunt of considerable teasing during the summer of 1997, while Joseph remained missing. Appellant reportedly "bragged" about killing Joseph to a number of his teenage friends, in what he describes in his brief to this Court as an "irrational[] and self-destructiv[e]" reaction "to being cast as prime suspect in a highly publicized case." There was testimony appellant said he "did it" "to get everybody off his back."

On September 16, 1997, Joseph's skeletal remains were discovered in a heavily wooded area behind the golf course near Starling Goodson Road. Within days of the discovery of Joseph's remains, three of appellant's friends – Sydney Johnston, Selina Welch, and Todd Ledford – all provided sworn statements to police implicating appellant. Appellant was brought in for questioning and eventually confessed to the murder. Appellant's seven consecutive statements are highly contradictory,[1] and the final statement, in which he incriminates only himself, is factually

[1]The contents of the statements and the circumstances surrounding their making are discussed *infra* in part IV.

trial court erroneously refused to admit testimony concerning a prior consistent statement of a defense witness. We agree the court erred in both instances.

The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995).

Prior consistent statements of a witness are not inadmissible hearsay if

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose.

Rule 801(d)(1)(B), SCRE. Thus, in order for a prior consistent statement to be admissible pursuant to this rule, the following elements must be present:

> (1) the declarant must testify and be subject to cross-examination,
> (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive,
> (3) the statement must be consistent with the declarant's testimony, and
> (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the

impeached with a prior inconsistent statement. See, e.g., Burns v. Clayton, 237 S.C. 316, 336-37, 117 S.E.2d 300, 310 (1960) ("Where the credit of a witness has been impeached by proof or imputation that he has made declarations inconsistent with what he has sworn to, an exception to the hearsay rule permits proof of his declarations, consistent with what he has sworn to, made on other occasions prior to the existence of his relation to the cause."). The State relies on these pre-SCRE cases. Rule 801(d)(1)(B) changed this rule. The plain language of Rule 801(d)(1)(B) only permits evidence of a prior consistent statement when the witness has been charged with recent fabrication or improper motive or influence. Although questioning a witness about a prior inconsistent statement does call the witness's credibility into question, that is not the same as charging the witness with "recent fabrication" or "improper influence or motive." Cf. Tome v. United States, 513 U.S. 150, 157 (1995) ("Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited. . . . The rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told."). Appellant questioned the accuracy of the witness's memory; he did *not* charge her with recent fabrication or improper influence or motive. The State should not have been permitted to introduce hearsay testimony of Sydney's prior consistent statement because appellant's cross-examination of Sydney did not imply recent fabrication or improper influence or motive. The trial court's admission of the testimony pursuant to former evidentiary rules constituted an error of law amounting to an abuse of discretion.

Moreover, the error was not harmless. Erroneously admitted corroboration testimony is not harmless merely because it is cumulative. On the contrary, "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994). Here, Sydney's testimony was weak and not

1997, Charlie told her he and unidentified accomplices killed Joseph as described above. This testimony was consistent with an affidavit Tina had signed on February 23, 1999. On cross-examination, Tina admitted appellant was her boyfriend of four months. However, she testified she did not know appellant in the summer of 1997. The solicitor asked Tina:

> So thirteen days before the jury is going to be deciding Michael Saltz's, whether he's guilty or innocent of this crime, thirteen days prior to that jury being selected you go into your boyfriend that you love's lawyer's office and sign an affidavit indicating somebody else might have been involved in this incident that happened two years ago?

When asked why she did not contact the police right away, Tina testified that she told her father about Charlie's statement, and her father contacted the police.

The defense then called Buddy Hancock, Tina's father. After a discussion of Rule 801(d), the State additionally objected to Hancock testifying because he had been present in the courtroom during his daughter's testimony. The trial court permitted the defense to proffer Hancock's testimony prior to the court ruling on its admissibility. Hancock testified in camera that Tina came to him in the summer of 1997 and told him what Charlie allegedly told her concerning Joseph's death. However, when asked whether he contacted the police concerning the statement, Hancock testified:

> Witness: I told [the police] the little boy, what I heard all around lower Richland there, the little boy was run away from home and he was out in the woods and he was going down to Food Lion, was out in the woods behind Food Lion, going in the Food Lion getting food, sneaking food out of there, going back in the woods.
> Defense Counsel: Did you tell them anything about

> Charlie Mengedoht?
> Witness: I told them Charles was – Charles was – at the time, what I hear around there, Charles was taking him food because he was hiding him out.

The trial court refused to permit Hancock to testify before the jury, but did not state a reason.

This line of questioning is precisely what Rule 801(d)(1)(B) was designed to address. The Solicitor's questions charged the witness with both recent fabrication (coming forward thirteen days before trial) and improper motive (her romantic relationship with defendant). Thus, Rule 801(d)(1)(B) permits appellant to offer evidence of a prior consistent statement made before the alleged fabrication or improper motive arose. The issue here is thus whether the trial court could, in its discretion, nevertheless exclude corroborating testimony for other reasons. Although the judge did not give a reason for his ruling, the State offers two reasons why it was within the court's discretion to disallow the testimony. We may affirm for any reason appearing in the record. Rule 220(c), SCACR.

First, the State asserts Hancock's testimony was tainted by his "*apparent* violation" of the sequestration order (emphasis added). The decision whether to waive a sequestration order for witnesses present during the trial rests in the sound discretion of the trial judge. State v. Cabbagestalk, 281 S.C. 35, 314 S.E.2d 10 (1984). Although it may have been within the trial court's discretion to disallow Hancock's testimony if Hancock had violated the sequestration order, the record is insufficient to support such a finding. Second, the State asserts Hancock's testimony could "possibly lead to unfair prejudice, confusing of the issues [sic]" under Rule 403, SCRE. We do not see any basis for excluding Hancock's testimony under Rule 403. Appellant should have been allowed to answer the State's charge of recent fabrication and improper motive. Since we have already ruled appellant is entitled to a new trial, we need not conduct a harmless error analysis.

Defense Counsel: This is not relevant, Your Honor.
Solicitor: He's making the inference, Your Honor.
The Court: Yes, sir. I'm going to allow her to testify.
Defense Counsel: I mean, I understand that – the bottom line is that how that makes her feel is not relevant to any issue in this case. It doesn't affect credibility. It doesn't affect any issue in this case.
The Court: Your objection is overruled. You may answer the question.

Witness: As I was saying, we had watched a lot of sunsets together, and each time I would say, "God, I hope Joe can see this too," and find some kind of comfort and know that we would not give up and that we loved him. It's just sad that we have to sit here now. And I was –

Defense Counsel: Objection, Your Honor.
The Court: All right, thank you ma'am. That's enough.

The trial court abused its discretion in allowing this testimony over appellant's repeated objections. The witness's thoughts and feelings did not make the existence of any fact of consequence to the case more or less probable. On the contrary, the testimony only served "to arouse the sympathy or prejudice of the jury." Cf. State v. Langley, 334 S.C. 633, 647, 515 S.E.2d 98, 100 (1999) (a photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts).

Additionally, we address the State's contention that this error is unpreserved because appellant did not move to strike the testimony. The

want to ask?
Defense Counsel: Very simple, Your Honor. I want to be allowed to ask the witness that if she had to make a choice between being loyal to her friend and protecting her son, what would it be? That's all. It's a credibility question. It doesn't go to third party guilt. I [sic] not arguing third party guilt, Judge.
The Court: No, sir. She hasn't testified about her son at all. She was called back in reply testimony to rebut your testimony that the victim was playing football in her yard three weeks after he was missing. And I'm not going to let you go back now and start bringing in something else about her son being accused of this crime. That's totally irrelevant.
Defense Counsel: He's not being accused, Your Honor. What was irrelevant was her testimony about how it made her feel to listen to the other testimony. I was not asking her about her son being accused. I've never accused him, Your Honor. The witnesses place him –
The Court: Your objection is overruled [sic]. Sit down.

The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. State v. Aleksey, 343 S.C. 20, 33, 538 S.E.2d 248, 255 (2000). This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. Id.; see also State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981) (a trial court's ruling concerning the scope of cross-examination of a witness to test his credibility should not be disturbed on appeal absent a manifest abuse of discretion). On the contrary, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or

only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

In Van Arsdall, the United States Supreme Court held "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in *otherwise appropriate* cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose the jury to the facts from which jurors . . . could appropriately draw inferences relating to reliability of the witness.'" Id. at 680 (emphasis added) (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)). However, this Court has cautioned the bench that "before a criminal defendant can be prohibited from engaging in [such cross-examination] . . ., the record must clearly show that the cross-examination is somehow inappropriate." State v. Graham, 314 S.C. 383, 385-86, 444 S.E.2d 525, 527 (1994).

The first question, therefore, is whether the proposed cross-examination was inappropriate. A witness may be impeached with evidence of "[b]ias, prejudice or any motive to misrepresent." Rule 608(c), SCRE. We recently held this rule "preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'" State v. Jones, Op. No. 25242 (S.C. Sup. Ct. filed Jan. 24, 2001) (Shearouse Adv. Sh. No.4, at p.48) (quoting State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976)). "On cross-examination, any *fact* may be elicited which tends to show interest, bias, or partiality of the witness." State v. Starnes, 340 S.C. 312, 325, 531 S.E.2d 907, 914-15 (2000) (emphasis added) (also quoting Brewington, 267 S.C. at 101, 226 S.E.2d at 250). Although evidence of Mengedoht's relationship to Charlie would unquestionably be admissible to show Mengedoht's possible bias, the jury was already fully aware Mengedoht was Charlie's mother. Appellant sought to ask Mengedoht what she would do "if she had to make a choice between being loyal to her friend *and* ***protecting*** *her son*." This question did not seek to elicit a **fact** tending to show bias. Starnes, 340 S.C. at 325, 531 S.E.2d at 914-15; cf.

Ultimately, appellant made a series of incriminating statements. In the first statement, appellant told the officers he had bragged about killing Joseph but he did not really do it. Next he told them he had overheard some boys at school, whom he could not identify, talking about killing Joseph. Third, appellant told police he had overheard some people at school say they had killed Joseph. They told appellant where Joseph's body was located. Appellant stated he went to see the body and it was decomposing and the bones were sticking out. Again, appellant was unable or unwilling to identify the speakers.

Between appellant's third and fourth statements, appellant asked Wilson about the different degrees of murder and the penalties for each. Wilson explained that South Carolina does not have degrees of murder, and then explained to appellant the differences among murder, manslaughter, and involuntary manslaughter.

Appellant then changed his story dramatically. In his fourth version, appellant told officers Todd Ledford and Joseph had argued. Joseph rode off on his bicycle and Todd and two other boys chased him, caught him, hog-tied him, and carried him into the woods. After a few minutes, Todd and the other two boys returned to the truck without Joseph and they drove off. Next, appellant told the officers everything in the previous story was true except for the fact that he went into the woods with Todd and the other boys along with Joseph. He stated that Joseph was hog-tied with his feet and hands tied behind him. When they got into the woods, the other boys started hitting and kicking Joseph. Appellant denied hitting Joseph. He said Joseph was crying and whimpering and he felt bad because he could have stopped them, and could have taken Joseph home, but instead he left him there. Appellant also described Joseph's bicycle.

At this point, appellant took a bathroom break. In the bathroom, he asked Williamson, "What if someone else is involved?" Williamson reported appellant's question to Wilson. Wilson told appellant sometimes when people confess to a crime, they implicate others in order to get back at someone they think told on them. Wilson told appellant he should tell the

truth about whether Todd was there, because it would make appellant look worse if he lied about Todd's involvement. Appellant then stated that Todd was not there; he was just mad at Todd for telling on him. Appellant again asked, "What if someone else is involved?" but did not name any other participants.

In his sixth story, appellant said events happened as he had described in versions four and five, except Todd was not there, just appellant and two other boys whom appellant refused to name. Wilson then asked what had happened to Joseph's pants.[3] Appellant reacted physically to the question, became defensive, and then recanted his previous stories and denied all knowledge of Joseph's death.

Concerned that he had put appellant on the defensive by asking about Joseph's pants, Wilson asked Williamson to take over questioning appellant. Williamson took appellant to the canteen for a snack and then asked for a written statement. Appellant then gave his final statement to police, which Williamson recorded and appellant signed and swore to. In this statement, appellant incriminated himself only. He stated he saw Joseph two or three weeks after Joseph was reported missing. Joseph was bad-mouthing appellant so appellant knocked him out. Appellant then carried Joseph to a tree, tied Joseph to it with black nylon cord, and left him there.

The first six statements were recorded in the officers' notes, but not tape recorded or signed by appellant. Wilson corroborated Williamson's testimony regarding the substance of the statements. The officers testified at no time did appellant express a desire to cut off questioning or seek the advice of counsel.

After he had given his written statement, appellant was permitted to meet with his parents and call his girlfriend that evening. The next

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[3]Joseph's shoes, socks, and shirt were found at the scene, but no pants or underwear were found.

morning, after spending the night in jail, Williamson advised appellant of his rights again and began to speak with him further to determine whether others were involved in the crime. Appellant stated everything in his written statement, in which he incriminated only himself, was true. Appellant then asked if his lawyer had arrived. This was the first time appellant mentioned a lawyer. Williamson immediately terminated the interview.

In response to cross-examination, Jones denied that appellant asked him for permission to call his father. Williamson stated appellant asked for his parents during the time they were together, but he did not permit appellant to call them. However, Williamson did try to contact appellant's father around 5:30 that afternoon to let him know where appellant was. Williamson denied telling appellant his mother was under investigation, denied threatening appellant with a "first-degree murder" charge if he did not give a statement, denied promising appellant probation or boys camp in exchange for a statement, and denied promising appellant he could go home if he gave a statement. Wilson, who was present from about 6:00 p.m. on, similarly denied telling appellant his mother was under investigation.

The entire interrogation, including breaks, lasted between six and seven hours.[4] Appellant was given Miranda warnings three times during the interrogation: upon arrival at the police station, before a polygraph was administered, and again prior to signing his written statement. He was advised of his rights a fourth time the following morning and given an opportunity to change his statement again. Appellant asserts his statements should have been excluded from evidence as the involuntary result of his will being overborne by his interrogators.

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966). Dickerson v. United

[4]Appellant signed the first Miranda form just after 3:00 p.m. and gave his final statement around 9:30 p.m.

States, 530 U.S. 428 (2000). If a defendant was advised of his Miranda rights, but nevertheless chose to make a statement, the "burden is on the State to prove by a *preponderance of the evidence* that his rights were voluntarily waived." State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988) (emphasis in original). The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982). If a suspect's will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process. Schneckloth, 412 U.S. at 225. A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise. State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987). The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998). When reviewing a trial court's ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence. See State v. Wilson, Op. No. 25284 (S.C. Sup. Ct. filed April 23, 2001) (Shearouse Adv. Sh. No.15 at p.19, 22).

The trial court here found appellant's statements were freely and voluntarily given, that appellant was accorded all the procedural safeguards required by Miranda, and that appellant knowingly and intelligently waived his rights. We conclude the trial court correctly ruled the statements admissible. There is no evidence in the record whatsoever of any improper conduct on the part of the investigating officers nor of any deficiency on appellant's part which would call his waiver of rights into question. Although some of appellant's attorney's questions of the officers on cross-examination suggested improper coercion (*e.g.*, did they tell appellant his mother was under investigation, did they promise probation or boys camp in exchange for a statement), the officers denied making any such statements.

cause of death can not be determined. Brown v. State, 307 S.C. 465, 467-68, 415 S.E.2d 811, 812 (1992). In Owens, the body of the victim was never found. Nevertheless, we held circumstantial evidence of the victim's personal habits and relationships raised an inference that the victim's sudden disappearance was the result of death by a criminal act and was thus sufficient to establish the *corpus delicti*.

The trial court ruled there was sufficient circumstantial evidence to establish the *corpus delicti*, including Joseph's good health, the rule in his house that he must be home by dark or call immediately, testimony the wooded area where Joseph's body was found was too thick to ride a bicycle, testimony from Joseph's best friend that they never played in that area, and testimony from an officer that it is very unusual for a twelve-year-old boy to be missing for any length of time. Appellant argues these facts are equally consistent with death by accident or sudden illness. However, when ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992). Furthermore, in reviewing the denial of a directed verdict motion, an appellate court must review the evidence in the light most favorable to the State. State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997). Considering the evidence in the light most favorable to the State, we conclude the trial court properly denied appellant's motion for a directed verdict. There is more than adequate circumstantial evidence to prove Joseph did not die a natural death.

CONCLUSION

For the foregoing reasons, we **REVERSE**.

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

Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, all of Columbia, and Solicitor David Price Schwacke, of North Charleston, for respondent.

Lesly A. Bowers, of Columbia, for amicus curiae Protection and Advocacy for People with Disabilities, Inc.

PER CURIAM: This Court granted the petition for a writ of certiorari to review the Court of Appeals' opinion in State v. Hudson, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). After careful consideration, we now dismiss certiorari as improvidently granted.

DISMISSED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

N.E.2d 188 (Ind. Ct. App. 1992), a city sought to enjoin a retail store located in the city's "C-1 Neighborhood Shopping District" from continuing its outdoor display of garden supplies. The city contended the store's practice violated the planned unit development site plan ("PUD") and the ordinance under which the PUD was adopted. The ordinance, in part, read: "The commercial uses included in the plan are limited to those permitted in the C-1 Neighborhood Shopping District." Id. at 191. The ordinance outlined a number of "uses permitted and specified" for a C-1 Neighborhood Shopping District. Id. The only "use" relevant to the parties' dispute was "retail store." Id.

The Indiana Court of Appeals found the PUD was completely silent concerning outside sales and storage. Regarding the ordinance, the court determined it did not reveal any restriction on outside displays by owners of retail stores. Notwithstanding these findings, the city argued "because the ordinance did not specifically permit outside displays, such **use** was therefore prohibited." Id. at 191 (emphasis added).

The court disagreed with the city. Relying upon Harbour Town Associates v. City of Noblesville, 540 N.E.2d 1283, 1285 (Ind. Ct. App. 1989), which defined the term "use," as employed in the context of zoning, as "a word of art denoting 'the purpose for which the building is designed, arranged or intended, or for which it is occupied or maintained,'" the Big Blue Court found: "**We cannot agree with City's inference that the term 'use' in this case should be expanded to regulate the manner in which Big Blue advertises merchandise as it operates its retail store.**" Id. (emphasis added).

Applying the definition of "use" as found within the above-cited authorities, it is apparent the Circuit Court erred in its reversal of the Zoning Board's determination. The "use" for which Heilker purchased and occupied his Beaufort properties is the retail sale of furniture. His outdoor display of furniture — a form of advertisement — is merely an activity or practice incidental to this "use."

This Court recognizes the term "use" has amorphous meanings in the realm of zoning. Municipal Elec. Auth. of Ga. v. 2100 Riveredge Assocs., 348

S.E.2d 890 (Ga. Ct. App. 1986). In addition to the interpretation that "use" describes the actual purpose of a property, the word is also sometimes employed to refer to the types of activities, practices, and operations conducted in connection with the property's purpose. See Recovery House VI v. City of Eugene, 965 P.2d 488, 512 n.2 (Or. Ct. App. 1998) ("We … note … that the word "use" has two different meanings, depending on the context. It sometimes refers to the actual activity that is conducted on or proposed for … property, and sometimes to types of activities and operations that are or are not permissible in an area under zoning regulations."). We decline to integrate the latter meaning into our analysis.

Our examination of the cases that define "use" as referring to the types of activities, practices, and operations conducted in connection with the property's purpose reveal that numerous courts have relied strictly upon a dictionary or cases citing dictionaries when formulating their definitions. See, e.g., Phoenix City Council v. Canyon Ford, Inc., 473 P.2d 797, 801 (Ariz. Ct. App. 1970) (defining "use" as "the act of employing anything, or state of being employed; application; employment" by quoting State ex rel. Mar-Well, Inc. v. Dodge, 177 N.E.2d 515 (1960), which in turn quoted Webster's New International Dictionary).

Dictionaries can be helpful tools during the initial stages of legal research. However, we are reluctant to rely upon either a dictionary or cases that have relied upon a dictionary for a definitive answer as to the definition of "use" when extensive case law exists that provides an accurate and reliable definition for the term. Our disinclination to adopt a dictionary definition is based, in part, upon persuasive commentary found in the literature.

In their recent law review article,[1] Samuel A. Thumma & Jeffrey L. Kirchmeier critique the efficacy of turning to common-usage and law dictionaries as the principal authority for defining legal terms:

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[1] The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries, 47 Buff. L. Rev. 227 (1999).

Regarding common-usage dictionaries, Thumma and Kirchmeier state:

> [**A court cannot] definitively rely on [common-usage] dictionaries as an end point in defining a word**. A descriptive dictionary sets forth definitions showing what a word may mean generally, not what a word does mean in context. Accordingly, although a descriptive dictionary may set forth possible alternative definitions for a term, it cannot provide the definitive definition for what that term actually means in a specific context. Differing definitions for a word in different dictionaries and alternative definitions of a word in the same dictionary would further confound an attempt to use a descriptive dictionary as an end point in defining a word.

47 Buff. L. Rev. at 293 (emphasis added).

The authors additionally caution against a reliance upon a law dictionary as the ultimate source for defining key terms:

> **Definitive reliance** on law dictionaries to define terms suffers from defects similar to such reliance on general usage dictionaries. In addition, many terms in a law dictionary are legal terms and, frequently, terms of art. Thus, the definitions provided in a law dictionary are either: (1) based on case law or usage (such as statutory terms) or (2) created anew by the dictionary's editorial board. If based on case law or usage, the best source for a definition is the decision or usage in context. **Prior decisions and usage, defining the term in context, should be far more instructive than the definitions in a law dictionary, which are general paraphrases that lack any context**. And if, rather than being based on case law or usage, the law dictionary definition was created anew, **one might ask whether that definition should be afforded any weight at all**.

. . . .

The majority relies on Vulcan Materials and Stanton v. Town of Pawleys Island for the proposition that a determination of use is a question of fact. In my view, these cases do not support this contention.

Without question, both Vulcan and Stanton correctly set forth the standard of review to be used in zoning cases. Interestingly, however, in Vulcan this Court affirmed the circuit court's *reversal* of the Greenville County zoning board's decision denying Vulcan a "nonconforming use" certificate to continue mining its land in the face of rezoning restrictions. The County's decision was based on the testimony of Peter Nokimos, the Greenville County Zoning Administrator, who claimed he denied Vulcan's certificate application "because he found no indication of any *mining* or occupancy at the site." See Vulcan, 342 S.C. at 486, 536 S.E.2d at 895 (emphasis added). In affirming the lower court, this Court rejected the zoning board's determination of what constituted "mining," finding Vulcan in fact "mined" its site "as a matter of law." Id. at 496, 536 S.E.2d at 900. In so doing, the Court also affirmed the lower court's reversal of the zoning board's conclusion that Vulcan's activities did not constitute a protected, nonconforming use. Id. at 498, 536 S.E.2d at 901.

Similarly, in Stanton our supreme court reversed the zoning board's determination that the lower level of a beach house "constitute[d] a separate nonconforming use from the single structure of the entire house." Stanton, 317 S.C. at 502, 455 S.E.2d at 173. Thus, the court held the zoning board erred "as a matter of law." Id. at 503, 455 S.E.2d at 173. Accordingly, I believe the dispositions in these two cases lend further support to the conclusion that the determination of use is a question of law.

It is undisputed the City of Beaufort's newly amended ordinance prohibits Heilker's outdoor furniture displays. The only question, therefore, is whether his "practice" of placing indoor furniture outside is a nonconforming use under

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established, however, the application of those facts to the statute or [ordinance] is a question of law."); Brooks v. Hartland Sportsman's Club, Inc., 531 N.W.2d 445, 449 (Wis. Ct. App. 1995) ("[The] determination [of nonconforming use] involves the application of the facts to a legal standard and, consequently, presents a question of law . . . .").

FACTS

On September 1, 1999, a Richland County jury found Johnson guilty of armed robbery. Because Johnson had a prior armed robbery conviction resulting from a 1992 guilty plea, the State asked the trial court to sentence Johnson to life imprisonment without the possibility of parole under section 17-25-45. Defense counsel objected, arguing the State failed to give counsel written notice of its intent to seek a life sentence without parole.

The clerk's file contained a notice of the State's intention to seek a life sentence without parole. The notice was filed May 26, 1999. In addition, the assistant solicitor stated he handed a copy of the notice to Johnson that same day or the day after and included a copy of the notice in the discovery materials provided to defense counsel. In addition, the assistant solicitor stated he told defense counsel in May 1999 that the State would seek a life sentence without parole. In a memorandum submitted after the trial, the assistant solicitor alleged he permitted defense counsel "complete access" to his trial notebook, which contained a copy of the written notice filed with the clerk of court.

Defense counsel admitted "[t]here was a lot of talk by the solicitor before trial that he was going to seek life without parole; however, I was never given any notice that he was going to seek life without parole in a written form." Although defense counsel denied having received a copy of the written notice as part of the discovery material, he acknowledged he had actual notice of the State's intent to have Johnson sentenced to life imprisonment without parole.

The trial court took the matter under advisement. On September 9, 1999, the trial court sentenced Johnson to thirty years imprisonment. In declining to sentence Johnson to life imprisonment without parole, the trial court found: (1) Johnson himself had received written notice of the State's intention to seek a life sentence without parole; (2) the State filed the notice with the clerk of court on May 26, 1999; and (3) defense counsel had actual notice of the State's intent, as evidenced by the fact that he had sought a continuance on that ground.[1] The trial court, however, further noted that, although the assistant solicitor stated he personally served written notice on defense counsel in July 1999, defense counsel stated he never received it. The trial court resolved this disagreement in Johnson's favor, finding

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[1] Before Johnson's trial was scheduled to begin, defense counsel unsuccessfully moved for a continuance on the sole basis that he needed more time to prepare because Johnson was facing the possibility of a life sentence without parole.

> legislature. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.

State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991); accord Kerr v. State, Op. No. 25295 (S.C. Sup. Ct. filed May 29, 2001).

The South Carolina Constitution gives sole legislative power to the General Assembly. S.C. Const. art. III, § 1 ("The legislative power of this State shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'"). 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. For this Court to dismiss the clear and unambiguous language of the statute and merely require the defendant's counsel to have actual notice of the solicitor's intent to seek life without parole would have the effect of amending the statute. 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.

On appeal, the State has attempted to convince this Court of the "obvious purpose" of the notice provision and the "clear intent" of the General Assembly. However, we refuse to delve beyond the clear and unambiguous words of the statute. This notice provision is clearly for the benefit of the defendant. If the General Assembly had not intended for the defendant's counsel to receive written notice, it would not have so provided.

The State also relies on the South Carolina Supreme Court's decision in State v. Washington, 338 S.C. 392, 526 S.E.2d 709 (2000), for the proposition that actual notice is sufficient under section 17-25-45(H). In Washington, when the defendant was initially indicted, he received written notice that the solicitor would seek life imprisonment without parole. Because of errors in the original indictment, the defendant was re-indicted. Upon re-indictment, the solicitor did not send a second written notice to the defendant. Id. at 398, 526 S.E.2d at 712.

The Supreme Court held the State "was not precluded from applying section 17-25-45 because, even without a second notice, Defendant had actual notice that the State would be seeking life without parole." Id. In so holding, the Supreme Court observed, "This Court has found that under such notice statutes, the law only requires actual notice." Id.

We believe there are two reasons the present case is distinguishable from Washington. First, the defendant in Washington did receive written notice of the State's intent to invoke section 17-25-45 at least once. It was only after his re-indictment that the solicitor did not send a second notice to the defendant. In the present case, the trial judge found Johnson's attorney never received written notice of the solicitor's intent to seek life imprisonment without parole as required under section 17-25-45(H). We find the difference between these two scenarios significant. Furthermore, we believe Washington was decided on the basis that the prior written notice sufficiently satisfied the statute's written notice requirement, and therefore actual notice was sufficient under the facts of that particular case.

Secondly, in support of their statement that "under such notice statutes, the law only requires actual notice," the Supreme Court cited State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), and State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995), both of which dealt with notice requirements in death penalty cases. The statute requiring notice in McWee and Young only requires that "[w]henever the solicitor seeks the death penalty he shall notify the defense attorney." S.C. Code Ann. § 16-3-26(A) (Supp. 2000). There is no mention in the statute of the manner in which the notice shall be given by the solicitor. We do not believe the Supreme Court intended to adopt a broad rule that, regardless of the circumstances of the particular case, all notice requirements in criminal statutes are satisfied by actual notice, notwithstanding the General Assembly's legislative mandate to the contrary. Therefore, we have concluded that the holding in Washington is limited to the specific facts set forth in the Supreme Court's opinion.

For these reasons, the trial judge did not err in refusing to sentence Johnson to life imprisonment without the possibility of parole because the solicitor failed to properly notify Johnson's counsel.

AFFIRMED.

HEARN, C.J. concurs and GOOLSBY, J., dissents in separate opinion.

Moreover, in State v. Washington,[5] the South Carolina Supreme Court held section 17-25-45 requires only actual notice. In that case, the State initially sent the defendant written notice that it would seek a life sentence without parole under section 17-25-45. Because of errors in the indictment, the State later re-indicted the defendant, but did not send a second notice.

The supreme court held the State "was not precluded from applying section 17-25-45 because, even without a second notice, Defendant had actual notice that the State would be seeking life without parole."[6] In so holding, the supreme court observed, "This Court has found that under such notice statutes, the law only requires actual notice."[7]

As the majority notes, the defendant in Washington had once received written notice of the State's intent to invoke section 17-25-45. Despite this factual difference, I would hold Washington is applicable to this case.

First, I think it is significant that, although the supreme court could have emphasized the fact that the requirements of section 17-25-45 had already been satisfied, it chose instead to base its holding on the fact that the defendant had actual notice of the State's intent. In other words, the basis for the supreme court's decision was not the State's earlier compliance with the statutory requirement of written notice when it initially indicted the defendant but the inference that the prior notice was sufficient to inform the defendant of the possibility

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[5] 338 S.C. 392, 526 S.E.2d 709 (2000).

[6] Id. at 398, 526 S.E.2d at 712.

[7] Id. (emphases added). In support of this holding, the supreme court cited State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996), and State v. Young, 319 S.C. 33, 459 S.E.2d 84 (1995), both of which dealt with notice requirements in death penalty cases. The majority correctly states that the statute requiring notice in these cases, in contrast to section 17-25-45, does not specify the manner in which the solicitor is to give the notice. In my view, however, the very fact that the supreme court relied on McWee and Young in deciding Washington only strengthens the argument that the focus of 17-25-45 should be on whether the necessary individuals had actual notice rather than on whether notice was given in the manner prescribed in the statute. Certainly, the prospect of a death sentence is at least as serious, if not more so, than that of a life sentence without parole. As the supreme court must have recognized, to allow more leeway in notifying a defendant of the first possibility would be a disturbing incongruity in the administration of justice.

that he could receive a sentence of life imprisonment without the possibility of parole after the second indictment was issued. In addition, as noted in footnote 4 of the opinion, "[t]here would be no duty to inform Defendant about seeking the statute's application if it were not for the statutory provision."[8]

The pivotal inquiry, then, is not whether the statutory procedures were followed, but whether the purpose of the statute has been satisfied. The reasoning used by the supreme court to support its decision in Washington indicates a trial court should avoid a "bright line" approach in deciding whether to sentence a defendant to life imprisonment without parole pursuant to section 17-25-45 when there is a dispute concerning whether the State complied with technical requirements of the statute.

Here, it is undisputed defense counsel had actual notice that the State intended to seek a sentence of life imprisonment without parole. In view of the supreme court's holding in Washington that section 17-25-45 requires only actual notice of such intent, I would hold the trial court erred in declining to sentence Johnson as the State requested. Accordingly, I would reverse Johnson's sentence and remand the case to the trial court for sentencing to life imprisonment without parole.

[8] Washington, 338 S.C. at 398 n.4, 526 S.E.2d at 712 n.4.