

State of South Carolina
In The Supreme Court
Appeal from Greenville County

RECEIVED

MAY 17 2018

S.C. SUPREME COURT

Douglas Hill
Appellant
vs.

Petition For writ
of Certiorari

State of South Carolina
Respondent

Statute of Limitations

This Court will take Notice that Appellant was delivered his copy of this Conditional Order of Dismissal on March 8, 2018. Appellant's refusal to sign for the order because it was not explained to him by staff, the procedure for receiving this type of legal mail. However it is a factual point that Appellant did not receive the Conditional order until March 8, 2018.

LEGAL MAIL

Lack of Jurisdiction may not be waived even by consent of the parties, and should be taken notice of by the Supreme Court, see State v. Century 610 S.E.2d 494. A defendant may for the first time on Appeal raise the issue of a trial Courts Jurisdiction to try the class of case of which the defendant was convicted, see Brown v. State 540 S.E.2d 846.

Because this issue is about the lack of legal Jurisdiction, (Appellant was never given a notice under S.C. Code Ann. 17-25-45(H)) for the Court to impose a sentence under S.C. Code Ann. 17-25-45(H). The Statute of Limitation does not Apply. Appellant must be granted a hearing on this issue because there has not been a final order or decision in accordance with S.C. Code Ann. 17-27-80 (2014) and S.C. Code Ann. 17-27-100 (2014). Until there is a finding of fact and conclusion of law on each issue raise then this is a final order. "A final Judgment entered under this Chapter may be reviewed by writ of Certiorari; as provided by the South Carolina Appellate Court Rules," Rule 243(a) S.C.A.C.R. Rule 71.1(g), S.C.R. CP Lewis v. State 368 S.C. 630, 630 S.E.2d 464

Because the Court did not make a lawful Order on 98-CF-23-1446, the Court was without jurisdiction to hear any appeal of the P.C.R. Court's Order. And as such the P.C.R. Application are not successive nor does res judicata apply until there is a lawful order by the P.C.R. Court. *Bell v. Bennett* 307 S.C. 286, 414 S.E.2d 784 "A Final Judgment on the Merits in a prior action bars subsequent consideration of those issue in a new action. In Petitioners First P.C.R. Application filed on March 31, 1998, Petitioners alleged subject matter jurisdiction, illegal enhanced sentence. No court even ruled on the merit of this claim.

Pursuant to S.C. Code Ann. 17-27-80 and 17-27-100 only a final order or decision made by the P.C.R. Court can have appellate review, because the P.C.R. Court in the first instance never made a final decision the Supreme Court of South Carolina never had jurisdiction to hear any appeal from the P.C.R. Court, because of this factual and legal specific reason this Application must not be dismissed.

Conclusion

1. It is a factual point that Petitioner in his first P.C.R. Application the issue of subject matter jurisdiction was never ruled on.
2. It is a legal point that pursuant to S.C. Code Ann. 17-27-80 and 17-27-100 only a final decision or judgment may be reviewed by the S.C. Supreme Court.
3. It is a factual and legal point that Petitioner is serving an illegal sentence, where the Court sentenced him under a statute that was not in effect at the time of his offense. The offense occurred on June 7, 1995 and he was sentenced under a statute that went into effect Jan. 1, 1996.

For the above stated factual and legal reason
this Court must not dismiss the case

DATE: ~~March~~ ^{MAY 14} 2018

Respectfully

Douglas Hill, 135153
Broad River Corr. Inst.
4460 Broad River Rd
Columbia, S.C. 29210

4

LEGAL MAIL

State of South Carolina
County of Greenville
Court of Common Pleas
2016-CP-23-04272

Hill
vs
State

Certificate of Service

Petitioner, declares under the penalty of perjury that he mailed a copy of his Motion in Opposition to Conditional Order of Dismissal, To the parties listed below.

Office of the Attorney General
Attn: Deshaun H. Mitchell
P.O. Box 11549
Columbia, S.C. 29211

respectfully
Douglas Hill

cc: file

Dated: ~~MARCH~~ ^{MAY 5} 14 2018

Clerk of Court
Greenville County
305 EAST NORTH ST.
GREENVILLE, S.C. 29601

RECEIVED

MAR 19 2018

BRCI
MAILROOM

LEGAL MAIL

In Richmand v. Lewis 506 U.S. 40 50 1992 the Court held that "sentencing issues are matter of state law unless show to be arbitrary or capricious." Here as previously shown above, the petitioner's crime occurred in 1995 and although he was tried in 1996 the trial effect of the petitioner's crime most certainly was arbitrary and capricious in violation of petitioner's Sixth, Eighth, and Fourteenth Amendment rights protected under the U.S. Constitution. WHEREFORE for the foregoing reason, this Court should deny respondent's motion and grant petitioner habeas relief to serve the interest of Justice,

Subsequent history omitted where a legislative "adjustment" to parole and sentencing procedures violates the federal clause is a matter of degree California Det' of Corrections v. Morales 514 U.S. 499 115 Ct 1597.

3 The statute defining violent crimes S.C. Code Ann 16-1-60 was not enacted until 1986

The relevant language has not been altered in the statutory amendments made between 1986 and 1997 3/1995 Act No. 83 §9.

~~STATE OF SOUTH CAROLINA~~
~~COUNTY OF GREENVILLE~~
~~COURT OF COMMON PLEAS~~
~~2016 CP 23-07872~~

~~CERTIFICATE OF SERVICE~~

STATE V. DAWSON, 740 S.E.2d 501 (SC 2013) (defendant
was properly sentenced under the law in effect at the time
he committed the murder.)

R. p. 129, line 14 - p. 132, line 20. The Appellant never argued that the rape conviction was not a "violent crime" under the three strikes law.⁴

Objections at sentencing must be upon specific grounds. Hudgins, 319 S.C. at 238-39, 460 S.E.2d at 391; State v. Shumate, 276 S.C. 46, 275 S.E.2d 288 (1981). Furthermore, a defendant cannot raise one objection below and raise a different issue on appeal. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989). The Appellant's failure to argue this objection to the sentence enhancement precludes its consideration on direct appeal. State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991); State v. Owen, 275 S.C. 586, 593, 274 S.E.2d 510, 513 (1981). Therefore, this Court should dismiss this exception.⁵

Even if the Appellant properly preserved the issue, he is not entitled to resentencing. Judge Pyle properly considered the 1974 rape conviction in sentencing the Appellant under the three strikes law.

⁴The assistant solicitor argued that the rape conviction was the equivalent of a CSC charge under the three strikes law. The Appellant never challenged this interpretation of the statute. See R. p. 131, line 23 - p. 132, line 20.

⁵The Appellant may argue that his sentence raises a subject matter jurisdiction issue. Owen wholly refutes that argument. In that case, the defendant argued that he was sentenced improperly as a third offender while his second drug offense was under appeal. This Court ruled that the failure to raise the objection below waived the issue for appellate review. Id., 275 S.C. at 593, 274 S.E.2d at 512. Accordingly, the Appellant cannot raise his present objection to his "first strike" for the first time on appeal.

The Appellant contends that the crime of rape is a distinct offense and not synonymous with CSC under State v. Lambert, 276 S.C. 398, 279 S.E.2d 364 (1981). In that case, this Court held that a defendant was not entitled to ten peremptory challenges in a CSC prosecution, although the law previously authorized ten challenges for rape. However, Lambert did not discuss the substantive nature of the offenses or distinguish the charges beyond a defendant's entitlement to peremptory challenges. Furthermore, later case law refutes the Appellant's interpretation of Lambert.

Although penal statutes are construed strictly against the State, the courts should not construe a criminal statute "so strictly as to defeat the obvious intention of the legislature." Barrett v. United States, 423 U.S. 212, 218, 96 S.Ct. 498, 502, 46 L.Ed.2d 450, 455 (1976). This Court has noted that the CSC statutes were intended to "redraft and recodify the statutory law relative to sexual offenses in this State." State v. Summers, 276 S.C. 11, 12-13, 274 S.E.2d 427, 428 (1981).

In 1974, the crime of rape was defined as "the carnal knowledge of a woman by force and against her consent." State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971); S.C. Code § 16-71 (1962). In several cases following Lambert, this Court has ruled that the legislature intended rape to be interchangeable and synonymous with the crime of CSC. State v. Elmore, 279 S.C. 417, 422, 308 S.E.2d 781, 785 (1983);

State v. Stewart, 283 S.C. 104, 109, 320 S.E.2d 447, 450-451 (1984); State v. Middleton, 295 S.C. 318, 323, 368 S.E.2d 457, 460 (1988). Consistent with this legislative intent, rape would be a "violent crime" under section 16-1-60. Therefore, Judge Pyle properly considered the Appellant's rape conviction as "strike one" before sentencing him to life imprisonment. This Court should reject the Appellant's argument on appeal.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Appellant's conviction and sentence.

Respectfully submitted,

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney
General

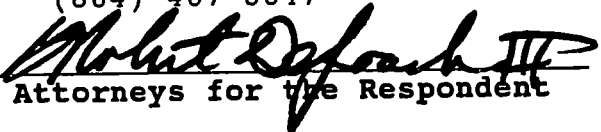
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JOSEPH J. WATSON
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By:


Attorneys for the Respondent

Columbia, South Carolina

July 1, 1997

II. The lower court properly considered the Appellant's rape conviction in sentencing him to life imprisonment under the three strikes law.

On August 30, 1974, the Appellant pled guilty to rape. R. pp. 134-35. Twelve years later, on March 21, 1986, the Appellant waived grand jury presentment and pled guilty to burglary second degree - violent. R. pp. 137-39. Based upon those offenses, the State indicated that it would seek a life sentence under Act No. 462, § 37, 1986 S.C. Acts 2996 ["the three strikes law"] if the Appellant was convicted of ABIK. R. p. 140. That statute³ authorized the Solicitor to seek life imprisonment for a defendant convicted of a third violent crime as defined by S.C. Code Ann. § 16-1-60 (Supp. 1996).

The Appellant now argues that rape is not the equivalent of a criminal sexual conduct ("CSC") conviction, a violent crime under § 16-1-60. Accordingly, the Appellant contends that the lower court improperly sentenced him to life imprisonment under the three strikes law. B.O.A. pp. 7-9. This argument does not require reversal.

First, the Appellant did not raise this argument below. Before sentencing, defense counsel argued that the Appellant's 1974 rape conviction was too remote to be considered, and cited the Rules of Evidence in support of this position. See

³The legislature revised this section effective January 1, 1996. Act No. 83, § 13, 1995 S.C. Acts 565. The present version of the statute did not apply to the Appellant's 1995 ABIK charge. See Act No. 83, § 62, 1995 S.C. Acts 595; S.C. Code Ann. § 17-25-45 (Supp. 1996).

entitled to instruction on lesser included offense unless evidence shows that he was guilty only of the lesser offense]. As shown above, the Appellant did not dispute any of the witnesses' testimony, and claimed only that he did not remember the incident. This assertion is insufficient to reduce the charge to ABHAN. Cf. Scott, 269 S.C. at 451, 237 S.E.2d at 892 [Defendant's statement that he did not intend to kill victim was insufficient to reduce charge to ABHAN]; State v. Rucker, 319 S.C. 95, 459 S.E.2d 858 (Ct. App. 1995) [Simple assault instruction was not required where ABHAN defendant argued that the jury might disbelieve the State's evidence of aggravating circumstances and on the remaining evidence find the lesser offense]. Therefore, this Court should dismiss this exception on appeal.

GROUNDS FOR RELIEF

In his *pro se* Petition for Writ of Habeas Corpus, Petitioner raises the following challenges to his conviction:

- A. The sentencing court did not have subject matter jurisdiction to sentence petitioner to life sentences and section § 17-25-45 life without parole and § 17-25-45(a)(1) which both are in violation of S.C. Const. Art. XII, § 2, and the substantive Due Process Clause and Equal Protection Clauses of S.C. Const. Art. I., § 3 and the Fourteenth Amendment of the United States Constitution, and trial counsel was ineffective in failing to challenge the constitutionality of the life sentence and section § 14-25-45 (a)(1) for these reasons, in violations of Petitioner's guaranteed rig[hts] of S.C. Const. Art. I, § 14 and the Sixth and Fourteenth Amendments of the United States Constitution.
- B. The State of South Carolina has failed to obey its own Constitution Art. 12, § 2 and Art. III, § 17, as well as Art. I, §§ 3& 14, the Sixth and Fourteenth Amendment of the United States of America as follows:

The General Assembly violated the single subject clause of S.C. Const. Art. III, § 17 when it enacted Bill 3096 "Truth-In-Sentencing" when it included within one bill unrelated provisions, and § 17-25-45(a)(1) of that act and Petitioner's life sentence are [sic] unconstitutional, and Applicant was denied Due Process of Law and effective assistance of counsel in violation of S.C. Const. Art. I, §§ 3&14, and the Sixth and Fourteenth Amendments of the United States Constitution and ~~locke~~ subject matter jurisdiction to sentence Petitioner to a life sentence being the statute is unconstitutional.

issue (1)

The legislature revised this Section effective January 1, 1996. Act No 83, 18, 1995 S.C. Acts 565. The present version of the statute did not apply to the appellant's 1995. A.B.K. Charge. See Act No. 83, 62, 1995 S.C. Acts 595 S.C. Code Ann. 17-25-45 (Supp. 1996).

issue (2)

Action Note

1995 Act No. 83, by 62. Provides that the 1995 Amendment to this Section applies prospectively to all crimes committed on or after the Act's effective date of January 1, 1996.

issue (3)

Appellant should receive a new trial and appellant should have his life sentence vacated and remanded for resentencing with a twenty year maximum.

Appellant was indicted for assault and battery with intent to kill in Greenville County. indictment 91-GS-23-7051 He was tried on Tuesday March 19, 1996 at Greenville Court House, before the Honorable, C. Victor Pyle Jr. and jury. He was convicted and sentenced to life without parole, S.C. Code 17-25-45 this appeal follows.

Supporting facts

The Court did not have Subject Matter jurisdiction to try me under Statute 17-25-52. Subsection (H) of said Statute states where the Solicitor is required to seek sentencing of a defendant under this Section, written notice must be given by the Solicitor to the defendant and to the defendant's counsel, not less than ten days before trial.

I was never served by the Solicitors office that the State had determined to seek a life sentence nor did my attorney inform me that the State was seeking a Life Sentence.

CRIMINAL PROCEDURES

Assault and battery with intent to kill
Criminal sexual conduct, First degree
Criminal sexual conduct, Second degree
Criminal sexual conduct with minors, except where evidence is presented at the criminal proceeding and the court, after the conviction, makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct where the victim was younger than the actor, as contained in Section 16-3-655(3)
Assault with intent to commit criminal sexual conduct, First and Second degree
Kidnapping
Conspiracy to commit kidnapping
Carjacking
Arson, First degree
Burglary, First degree
Armed robbery
Attempted armed robbery
Damaging or destroying building, vehicle, or other property by means of explosive incendiary, death results
Taking of a hostage by an inmate
Giving information respecting national or state defense to foreign contacts during war
Gathering information for an enemy
Unlawful removing or damaging of airport facility or equipment when death results
Interference with traffic-control devices or railroad signs or signals prohibited when death results from violation
Obstruction of railroad, death results.

ense" means:

se which is punishable by a maximum term of imprisonment for more which is not referenced in subsection (C)(1);

tics enumerated as follows:

Lynching, Second degree
Engaging child for sexual performance
Acceptance of bribes by officers
Accepting bribes for purpose of procuring public office
Arson, Second degree
Burglary, Second degree
Embezzlement of public funds
Breach of trust with fraudulent intent
Obtaining signature or property by false pretenses
Insurance fraud
Trafficking in controlled substances
Trafficking in ice, crack, or crack cocaine
& (2) Distribute, sell, manufacture, or possess with intent to distribute controlled substances within proximity of school
Causing death by operating vehicle while under influence of drugs or alcohol; and

s enumerated below:

Accessory before the fact for any of the offenses listed in subsections (a) and (b)

JUDGMENT AND EXECUTION

§ 17-25-45

(D) Except as provided in subsection (E), no person sentenced pursuant to this section shall be eligible for early release or discharge in any form, whether by parole, work release, release to ameliorate prison overcrowding, or any other early release program, nor shall they be eligible for earned work credits, education credits, good conduct credits, or any similar program for early release.

(E) For the purpose of this section only, a person sentenced pursuant to this section may be paroled if:

(1) the Department of Corrections requests the Department of Probation, Parole, and Pardon Services to consider the person for parole; and

(2) the Department of Probation, Parole, and Pardon Services determines that due to the person's health or age he is no longer a threat to society; and

(a) the person has served at least thirty years of the sentence imposed pursuant to this section and has reached at least sixty-five years of age; or

(b) the person has served at least twenty years of the sentence imposed pursuant to this section and has reached at least seventy years of age; or

(c) the person is afflicted with a terminal illness where life expectancy is one year or less; or

(d) the person can produce evidence comprising the most extraordinary circumstances.

(F) For the purpose of determining a prior conviction under this section only, a prior conviction shall mean the defendant has been convicted of a most serious or serious offense, as may be applicable, on a separate occasion, prior to the instant adjudication.

(G) The decision to invoke sentencing under Section 17-25-45(E) is in the discretion of the solicitor. The provisions of Section 17-25-45(A) shall be mandatory.

(H) 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 defendant's counsel not less than ten days before trial.

HISTORY: Amended by 1986 Act No. 462, § 37, eff June 3, 1986; 1995 Act No. 85, § 18, eff January 1, 1996; 1997 Act No. 113, § 4, eff June 13, 1997; 1997 Act No. 136, § 4, eff June 11, 1997; 1998 Act No. 402, § 3, eff June 8, 1998.

Editor's Note—

1995 Act No. 83, by § 62, provides that the 1995 amendment to this section applies prospectively to all crimes committed on or after the Act's effective date of January 1, 1996.

Effect of Amendment—

The 1986 amendment made grammatical changes; revised (1)A by substituting "a violent crime as defined in § 16-1-60 except a crime for which a sentence of death has been imposed" for an enumeration of specific crimes, by adding "for such crime", and by substituting "life imprisonment without parole" for "life in prison"; deleted former (1)B; and redesignated former (1)C as (1)B.

The 1995 amendment substantially revised this section.

The first 1997 amendment (by Act No. 113), in subsection (C)(2), inserted a reference to 16-11-110(B).

The second 1997 amendment (by Act No. 136), in subsection (C)(1), inserted a reference to § 24-13-450.

Greenville S.C.



Office of the Clerk of Court
Greenville, South Carolina
Paul B. Wickensimer
Clerk of Court

Circuit Court Division
Greenville County Courthouse
305 East North Street
Greenville, South Carolina 29601
(864) 467-8551 FAX (864) 467-8540

December 7, 2016

Douglas James Hill #135153
Lieber Correctional Inst.
P.O. Box 205
Ridgeville, SC 29472

Dear Mr. Hill:

Thank you for returning your completed information sheet. Enclosed please find the copies you requested for the indictment numbers you provided with the following exception:

- Notice of Intent to Seek Life Sentence Without Possibility of Parole. No such document was filed with the Clerk of Court for General Sessions for the indictment numbers listed on your information sheet.

Sincerely,
Clerk of Court
Greenville County General Sessions

July 1999, the father received only \$7,981.57 from the refinancing, an amount substantially less than the amount he could have obtained had he not executed the mortgages. The father acknowledged he would have had over \$20,000.00 to pay on his HLA obligations had he not executed the mortgages and paid his family members, but reasoned such a contribution would have made little difference in his total obligation. In spite of the court order, the husband did not make any payments to the school.

In addition to failing to reimburse the mother for his share of the HLA expenses or make payments directly to HLA, it is undisputed the father failed to make child support payments in the amounts specified in the May 25, 1999 order. The father was required to make payments of \$951.00 per month until he began making his HLA payments, at which point he was allowed to reduce the child support payments to \$571.00 per month. The father did not begin making his portion of the HLA payments, yet he reduced his child support payments to the wife. Further, not only did he reduce the child support, he did not even pay the \$571.00, but cut the amount back to \$476.00 per month, the amount due under the 1993 order.

Under these facts and circumstances, and giving due deference to the family court's consideration of matters of credibility, we find no error in the court's determination the father's failure to comply with the mandates of the final order was willful in nature.

VII.

The father also contends the family court erred in awarding the mother \$1,000.00 in attorney fees in connection with bringing the contempt action. He asserts the award of these fees should be reversed if the finding of contempt is reversed. Given our affirmation of the family court's finding of contempt, this argument has no merit.

The father further argues, however, the award should be reversed based on the court's failure "to make findings of salient

the father's attorney.

facts and conclusions of law" supporting the award in its order. We agree.

[15, 16] Rule 26(a), SCRFC provides:

An order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision.

When an order from the family court is issued in violation of Rule 26(a), the appellate court may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence. *Griffith v. Griffith*, 332 S.C. 630, 646-47, 506 S.E.2d 526, 535 (Ct.App.1998). However, if there is inadequate evidentiary support for the factors to be considered in making such an award, the appellate court should reverse and remand for the trial court to make specific findings. *Id.* at 646, 506 S.E.2d at 535.

[17] In this case, the family court merely stated the mother "introduced a detailed Affidavit from her attorney" in support of her request for fees, that the hourly rate of \$150.00 was reasonable, and "based on the factors relevant to setting an award of fees" the father should contribute \$1,000.00 toward the mother's attorney fees. Clearly, this does not comply with the mandate of Rule 26(a). Further, there is simply no evidentiary support in the record whatsoever from which this court can make its own findings.⁸ Accordingly, we reverse and remand this issue for the family court to make specific findings of fact.

For the foregoing reasons, the decision of the family court is

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

ANDERSON and SHULER, JJ., concur.



8. There is no indication of the hours spent on the case or even the total amount of the attorney fees incurred by the mother in the contempt action.

347 S.C. 67

The STATE, Appellant,

v.

Roy JOHNSON, Respondent.

No. 3376.

Court of Appeals of South Carolina.

Heard June 5, 2001.

Decided Aug. 6, 2001.

Rehearing Denied Sept. 19, 2001.

Defendant was convicted in the Circuit Court, Richland County, James R. Barber III, J., of armed robbery and was sentenced to 30 years imprisonment. State appealed sentencing decision. The Court of Appeals, Connor, J., held that fact that defendant had actual notice of state's intention to seek a life sentence was not sufficient to meet notice requirements of recidivist sentencing statute.

Affirmed.

Goolshy, J., filed a dissenting opinion.

Sentencing and Punishment §1361

Fact that armed robbery defendant had actual notice of state's intention to seek a life sentence was not sufficient to meet notice requirements of recidivist sentencing statute; under the statute, state was required to provide defendant and his counsel with written notice. Code 1976, § 17-25-45(H).

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Norman Mark Rapoport, and Solicitor Warren B. Giese, all of Columbia, for appellant.

Deputy Chief Attorney Joseph L. Savitz, III, of SC Office of Appellate Defense, of Columbia, for respondent.

CONNOR, J.:

The State appeals the trial court's refusal to sentence Roy Johnson to life imprisonment without the possibility of parole pursu-

ant to South Carolina Code section 17-25-45. We affirm.

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 coun-

requirements of due process are met,³ the State's failure to provide written notice would more appropriately call for sanctioning those responsible for the procedural irregularity rather than allowing a repeat offender to avoid a statutorily required sentence.⁴

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

bility of parole." *Id.* § 17-25-45(A) (emphasis added).

3. The requirement of written notice in section 17-25-45 is a procedural safeguard beyond the requirements of due process. See *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) (holding defendants must receive only reasonable notice and an opportunity to be heard relative to recidivist charges); *State v. Burdette*, 335 S.C. 34, 515 S.E.2d 525 (1999) (stating that, under the South Carolina Constitution, there is no duty to advise a defendant that the State is seeking an enhanced sentence under section 17-25-45); see also *Massey v. State*, 609 So.2d 598 (Fla.1992) (holding the prosecution's failure to serve notice of its intent to have the defendant sentenced as an habitual offender was harmless error in view of the stated purpose of the statutory notice requirement); cf. *Tasco v. Butler*, 835 F.2d 1120 (5th Cir.1988) (remanding for a determination of whether the defendant and his attorney had received sufficient notice to prepare a defense to recidivism charges and, if not, a determination of whether the defendant suffered prejudice as a result of this procedural deficiency).

4. Cf. *State v. Culbreath*, 282 S.C. 38, 316 S.E.2d 681 (1984) (holding the failure of the solicitor to act on a warrant within a certain period of time set by the South Carolina Rules of Criminal Procedure would subject the solicitor to contempt proceedings but would not invalidate the warrant or prevent subsequent prosecution).

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 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

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.

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

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 re-

quires 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.



sel 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 there were no cover letters or other documents in either the solicitor's file or the public defender's file to suggest the State gave defense counsel written notice that it would request a life sentence without parole in the event of a guilty verdict.

ANALYSIS

The State contends that, because defense counsel had actual notice of its intent to seek a life sentence in this case, the trial court erred in finding it did not give sufficient notice under the statute.

South Carolina Code section 17-25-45(A) provides in pertinent part:

Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has one or more prior convictions for:

- (1) a most serious offense; . . .

S.C.Code Ann. § 17-25-45(A) (Supp.2000). Paragraph (C) of the statute includes armed robbery as a "most serious offense." *Id.* § 17-25-45(C).

The General Assembly has made the sentencing provisions of section 17-25-45(A) mandatory. *Id.* § 17-25-45(G). Regarding the notice requirement, the statute 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 defen-*

1. Before Johnson's trial was scheduled to begin, defense counsel unsuccessfully moved for a continuance on the sole basis that he needed more

dant and defendant's counsel not less than ten days before trial.

Id. § 17-25-45(H) (emphasis added).

The South Carolina Supreme Court has laid out the principles of statutory construction as applied to a criminal statute:

It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the 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*, 345 S.C. 183, 547 S.E.2d 494 (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"

time to prepare because Johnson was facing the possibility of a life sentence without parole.

Cite as 552 S.E.2d 339 (S.C.App. 2001)

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 ac-

2. S.C.Code Ann. § 17-25-45(G) (Supp.2000). This subsection also states the solicitor has the discretion to invoke the sentencing provision under paragraph (B), which provides for a life sentence without parole upon conviction of a

tual 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]henver 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.

GOOLSBY, J. (dissenting):

I dissent. I would hold that defense counsel's admission that he was aware of the State's intention to seek a life sentence without parole against his client gave the trial court sufficient reason to sentence Johnson accordingly.

The legislature has made the sentencing provisions of section 17-25-45(A) mandatory.² It would follow that, as long as the

"serious offense" under certain conditions. In addition, South Carolina section 17-25-45(A) provides that a person convicted a third time of a most serious offense "must be sentenced to a term of imprisonment for life without the possi-

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battery with intent to kill (ABWIK). Respondent was sentenced to ten years in prison, suspended upon the service of five years probation. In 1988, respondent pled guilty to voluntary manslaughter and was sentenced to thirty years in prison.

At the time of respondent's 1988 plea, his 1985 prior conviction was not defined as a violent crime and he was eligible for parole.¹ The PCR Judge granted respondent's application for relief and found that the retroactive application of the violent crime definition for purposes of parole eligibility violates the ex post facto clause of the State Constitution. We agree.

A retroactive change in state law which inflicts a greater punishment for a crime than that which applied when the criminal act was committed violates the *ex post facto* clauses of the federal and state constitutions. U.S. Const. Art. I, § 10; S.C. Const. Art. I, § 4. An increase in parole eligibility from ten to twenty years has been found to violate both clauses. State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988) *subsequent history omitted.*

We affirm the circuit court's order finding that retroactive application of § 16-1-60 which would deny respondent parole eligibility violates his *ex post facto* rights, and requiring respondent be reclassified, and that he be afforded a parole hearing in accordance with his reclassification or in the alternative, that respondent be allowed to withdraw his plea.

AFFIRMED.

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

D.H. Douglas
~~_____~~

The statute defining violent crimes, S.C. Code Ann. § 16-1-60 was enacted in 1986.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ronnie L. Phillips,

Respondent,

v.

State of South Carolina,

Petitioner.

ON WRIT OF CERTIORARI

Appeal From Greenville County

Thomas L. Hughston, Jr., Post-Conviction Judge

Frank Eppes, Jr., Trial Judge

Opinion No. 24820

Submitted May 27, 1998 - Filed July 20, 1998

AFFIRMED

Attorney General Charles M. Condon, Deputy
Attorney General John W. McIntosh, and Assistant
Deputy Attorney General Teresa A. Knox, all of
Columbia, for petitioner.

Wanda H. Haile, of South Carolina Office of
Appellate Defense, of Columbia, for respondent.

FINNEY, C.J.: In this post-conviction relief (PCR) action, the circuit court granted respondent relief, finding the retroactive application of a statute denying respondent parole eligibility violated his *ex post facto* rights. The Court granted the State's petition for a writ of certiorari. We affirm.

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In 1986 and 1987, respondent committed numerous crimes, including first degree burglaries. He ultimately pled guilty in 1987 to several charges, including four counts of first degree burglary. Respondent had a 1982 conviction for armed robbery. At the time respondent committed the armed robbery, however, it was not defined as a violent crime.¹ Although the burglaries were defined as violent crimes under § 16-1-60, the parole eligibility statute only denied parole to those "serving a sentence for a second or subsequent conviction, for violent crimes. . . ." § 24-21-640 (Supp. 1997).² Consequently, respondent was parole eligible at the time of the 1987 burglary pleas.

In 1993, the violent crimes statute was amended to provide, among other things, that it had prospective effect only. 1993 Act No. 184, § 8. The first 1995 amendment explicitly continued this policy. 1995 Act No. 7, Part I, § 3. A second 1995 amendment³ eliminated this language, however, and the Department of Probation, Parole, and Pardon Services notified respondent that he was no longer parole eligible since he was deemed to have "a second or subsequent conviction. . . for violent crimes" under § 24-21-640 in light of the 1982 armed robbery plea. Respondent then brought this PCR action challenging the application of the revised violent crimes statute to him, alleging that to do so violated his *ex post facto* rights.

A retroactive change in state law which inflicts a greater punishment for a crime than that which applied when the criminal act was committed violates the *ex post facto* clauses of the federal and state constitutions. U.S. Const. Art. I, § 10; S.C. Const. Art. I, § 4. An increase in parole eligibility from ten to twenty years has been found to violate both clauses. State v. Matthews, 296 S.C. 379, 373 S.E.2d 537 (1988) *subsequent history omitted*. Whether a legislative "adjustment" to parole and sentencing procedures violates the federal clause is a matter of degree. California Dep't of Corrections v. Morales, 514 U.S. 499, 115 S.Ct. 1597,

~~_____~~

~~_____~~ Douglas Hill

¹The statute defining violent crimes, S.C. Code Ann. § 16-1-60, was not enacted until 1986.

²The relevant language has not been altered in the statutory amendments made between 1986 and 1997.

³1995 Act. No. 83, § 9.

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131 L.Ed.2d 588 (1995).

In Morales, the prisoner was eligible for annual parole review at the time he committed his second murder (while on parole for his first). Subsequently, a statute was enacted which permitted the parole board to defer parole hearings for up to three years for prisoners convicted of "more than one offense which involves the taking of a life" if the board "finds that it is not reasonable to expect that the parole would be granted at a hearing during the following years and states the bases for its findings." Cal. Penal Code Ann. § 3041.5 (b)(2)(West 1982). Morales challenged this statutory change which could reduce the frequency of his parole reconsideration hearings.

The United States Supreme Court held the statutory change did not violate Morales' federal constitutional *ex post facto* rights because it "creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment . . ." Morales, 115 S.Ct. at 1603. In reaching this conclusion, the Court noted:

(1) The amendment applied only to a narrow class of prisoners, those serving time for more than one killing, "for whom the likelihood of parole is quite remote";

(2) Prisoners still receive their initial eligibility hearing at the time fixed when they committed the offense;

(3) The parole board's authority is carefully tailored to require it to make particularized findings in altering the frequency of subsequent hearings based on the circumstances of the individual prisoner; and

(4) California procedure allows for expedited hearings and flexible release dates in the event a prisoner becomes "parole-worthy" before the time fixed for his subsequent hearing.

The State argues that in light of Morales, it may constitutionally apply the amended version of § 16-1-60 to respondent. We disagree. The PCR judge held, and we agree, that respondent's circumstances—the complete extinguishment of parole eligibility—clearly distinguished his case from Morales. Nothing in Morales, a very limited decision, suggests that the retroactive elimination of parole altogether

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could survive an *ex post facto* challenge. We affirm the circuit judge's order finding that retroactive application of § 16-1-60 so as to deny respondent parole eligibility violates his *ex post facto* rights, and requiring respondent be reclassified, and that he be afforded parole hearings in accordance with his reclassification.

We note that both the PCR judge and the parties have engaged in a discussion of Morales' impact on cases interpreting state statutes which alter the frequency of parole eligibility hearings. e.g., Griffin v. State, 315 S.C. 285, 433 S.E.2d 862 (1993). We decline to engage in such an analysis, which would clearly be mere *dicta* here, since respondent's case involves an entirely separate statutory change. For the reasons given above, the order granting respondent post-conviction relief is

AFFIRMED.

TOAL, MOORE and WALLER, JJ., concur. Burnett, A.J., not participating.

5. Houston testified Paragraph 5 of the addendum to the lease was specifically negotiated. He testified the following language granted him the authority to perform the electrical upfit, so that he was not required to submit the plans to BG Holding as required by a provision in the lease: "Lessor shall allow Lessee to put Office Trailer in Building. *All Utilities necessary to handle Lessee's equipment shall be paid for by the Lessee including, but not limited to electricity, water, sewer, and gas.*" (emphasis added).²
6. Powder Coaters no longer occupies the property, and BG Holding possibly benefits from the work done.

Viewing the evidence in the light most favorable to F & D, whether BG Holding gave their consent is a close question. However, we agree with the Court of Appeals, that F & D has not presented enough evidence to show: (1) BG Holding gave anything more than general consent to make improvements (as the lease could be interpreted to allow); or (2) BG Holding had anything more than "mere knowledge" that the work was to be done. Powder Coaters asserted the lease's addendum evidenced BG Holding's consent to perform the modifications; however, there is no evidence BG Holding expressly or implicitly agreed that it might be liable for the work. In fact, the lease between Powder Coaters and BG Holding expressly provided Powder Coaters was responsible for any alterations made to the property. Even Powder Coaters acknowledged it was not authorized to bind BG Holding. In addition, the addendum provisions are specific with respect to the partition and a rollup door. Therefore, it is impossible to see how the very general provision requiring Powder Coaters to pay for water, sewer, and gas can be interpreted to authorize Powder Coaters to perform an electrical upgrade. Furthermore, we agree with the Court of Appeals that the mere presence of BG Holding's agent at the work site is not enough to establish consent.

CONCLUSION

We hold consent, as required by the Mechanic's Lien Statute, is something more than mere knowledge work will be or

2. We note that BG Holding denies this interpretation, but insists it just requires the Lessee to pay for all utility bills.

could be done on the property. The landlord/owner must do more than grant the tenant general permission to make repairs or improvements to the leased premises. The landlord/owner or his agent must give either his tenant or the materialman express or implied consent acknowledging he may be held liable for the work.

The Court of Appeals' opinion is **AFFIRM AS MODIFIED**.

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

567 S.E.2d 847

Douglas J. HILL, Respondent,

v.

STATE of South Carolina, Petitioner.

No. 25499.

Supreme Court of South Carolina.

Submitted April 17, 2002.

Decided July 22, 2002.

Rehearing Denied Aug. 20, 2002.

Petitioner sought post-conviction relief (PCR) from his conviction for assault and battery with intent to kill (ABIK). The Circuit Court, Greenville County, Henry F. Floyd, J., granted the petition. State appealed. The Supreme Court, Toal, C.J., held that: (1) trial counsel performed deficiently by failing to object to erroneous instruction on assault and battery of a high and aggravated nature (ABHAN), as lesser included offense of ABIK, but (2) petitioner was not prejudiced by the deficient performance.

Reversed.

1. Criminal Law §1519(3)

For a petitioner to be granted post-conviction relief (PCR) as a result of ineffective assistance of counsel, he must show: (1) counsel's representation fell below an objective standard of reasonableness, and (2) he was prejudiced by that

ineffective assistance, meaning, but for counsel's errors, there is a reasonable probability the result at trial would have been different. U.S.C.A. Const.Amend. 6.

2. Criminal Law \S 1158(1)

The appellate court will uphold the findings of the post-conviction relief (PCR) court if they are supported by any evidence.

3. Assault and Battery \S 54

Legal provocation or absence of malice is not an element of assault and battery of a high and aggravated nature (ABHAN).

4. Criminal Law \S 641.13(7)

Counsel performed deficiently by failing to object to instruction on assault and battery of a high and aggravated nature (ABHAN) as lesser included offense of assault and battery with intent to kill (ABIK), where the instruction, which suggested that legal provocation or absence of malice was an element of ABHAN, was erroneous under a Court of Appeals decision which had been published, and for which the Court of Appeals had denied the petition for rehearing, three to four months before defendant's trial, though the Court of Appeals decision was not affirmed by the Supreme Court before defendant's trial was completed. U.S.C.A. Const. Amend. 6.

5. Criminal Law \S 1172.1(2)

Trial court's error in giving instruction on assault and battery of a high and aggravated nature (ABHAN) as lesser included offense of assault and battery with intent to kill (ABIK), which suggested that legal provocation or absence of malice was an element of ABHAN, was harmless, where the evidence conclusively proved defendant's guilt as to the ABIK charge; eyewitness accounts named defendant as sole aggressor, victim testified at trial, victim's injuries were numerous and severe, and victim had been seven months pregnant at time of attack.

6. Assault and Battery \S 54

Assault and battery of a high and aggravated nature (ABHAN) is an unlawful act of violent injury to the person of another accompanied by circumstances of aggravation.

7. Homicide \S 728

Assault and battery with intent to kill (ABIK) is an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied.

8. Homicide \S 727

Specific intent to kill is not an element of assault and battery with intent to kill (ABIK).

9. Criminal Law \S 20

"Malice" is defined as a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., Assistant Attorney General William Bryan Dukes, all of Columbia, for petitioner.

Assistant Appellate Defender Tara S. Taggart of South Carolina Office of Appellate Defense, of Columbia, for respondent.

Chief Justice TOAL.

Douglas J. Hill ("Hill") filed a petition for post-conviction relief ("PCR") from his conviction for assault and battery with intent to kill ("ABIK"). The PCR court granted his petition for relief, and the State appeals.

FACTUAL/PROCEDURAL BACKGROUND

Hill was indicted for ABIK on November 28, 1995, for attacking his pregnant girlfriend, Sheila Ann Gilliam ("victim"). The victim was stabbed 12 to 14 times in different places all over her body. The treating surgeon testified at trial that the victim lost between 1,000 and 2,000 cubic centimeters of blood from the lacerations, and that her condition was life-threatening when he first examined her at the hospital. The victim was in surgery for several hours to have all of the wounds irrigated and repaired.

The victim testified an altercation began after she told Hill their relationship was over. According to her testimony, Hill

told her, “[w]ell, since we [sic] through then I might as well kill you.” Several witnesses to the attack also testified at trial. One pair of witnesses reported seeing Hill and the victim in a heated verbal argument outside of a convenience store in Fountain Inn, South Carolina that turned physical when Hill began hitting the victim in the face and elsewhere on her body. The same witness testified that the victim eventually fell down, and Hill sat on top of her to pin her to the ground and then began stabbing her with a small knife.

The attack continued until another witness, after calling the police, intervened, first, by yelling at the attacker to put the knife down and, then, when he did not comply, by kicking him in the head, apparently knocking him unconscious. A police officer testified that Hill was lying unconscious in the parking lot of the convenience store when he arrived at the scene. Hill testified that he did not remember fighting with the victim or stabbing her, but remembered someone hitting him in the head and waking up later in the hospital.

Hill was tried and convicted of ABIK and sentenced to life imprisonment without possibility of parole pursuant to S.C.Code Ann. § 17-25-45(a)(1), based on a prior rape conviction and a prior conviction for aggravated assault and battery.¹ Hill appealed his conviction and the Court of Appeals affirmed the conviction and sentence. *State v. Hill*, Op. No. 98-UP-009 (Ct.App. filed January 8, 1998). Hill filed an application for PCR and an evidentiary hearing was held on December 14, 1999. At the hearing, Hill amended his PCR application to include an allegation of ineffective assistance of counsel based on his trial counsel’s failure to object to the jury charge given by the trial judge on assault and battery of a high and aggravated nature (“ABHAN”), a lesser included offense of ABIK. The PCR court found the ABHAN jury instruction was

1. S.C.Code Ann. § 17-25-45 (Supp.1995) provides:

any person who has three convictions under the laws of this State, any other state, or the United States, for a violent crime as defined in § 16-1-60 except a crime for which a sentence of death has been imposed shall, upon the third conviction in this State for such crime, be sentenced to life imprisonment without parole.

This statute was amended in 1995, but the amendment applied prospectively to crimes committed on or after the amendment’s effective date of January 1, 1996, and so does not apply in this case. 1995 Act No. 83, by § 62.

erroneous and that Hill’s counsel was ineffective for failing to object to it. The PCR court granted Hill’s petition for relief on that basis.

The State appeals the following issue:

Did Hill’s trial counsel render ineffective assistance by failing to object to the ABHAN jury instruction and, if so, was Hill prejudiced by his counsel’s ineffective assistance?

LAW/ANALYSIS

The State argues the PCR court erred by holding Hill’s trial counsel was ineffective for failing to object to the trial judge’s ABHAN jury instruction. We disagree.

[1, 2] For a petitioner to be granted PCR as a result of ineffective assistance of counsel, he must show (1) counsel’s representation fell below an objective standard of reasonableness, and (2) he was prejudiced by that ineffective assistance, meaning, but for counsel’s errors there is a reasonable probability the result at trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court will uphold the findings of the PCR court if they are supported by any evidence. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

A. Objective Standard of Reasonableness

At trial, the trial judge charged the jury on ABHAN as a lesser included offense of ABIK, in part, as follows:

Ladies and Gentlemen, assault and battery of a high and aggravated nature is attended by aggravating circumstances such as the use of a deadly weapon, the infliction of serious bodily harm or a great disparity between the ages or physical condition of the parties involved. Now I told you earlier, this is a degree higher than simple assault. It usually occurs by the use of some weapon. An assault and battery, however, might be so aggravated where no weapon is used as to amount to aggravated assault and battery. If a person seriously or violently injures another *without malice or legal excuse but in sudden heat and [sic] passion with sufficient legal provocation* that would constitute assault and battery of a high and aggravated nature....

Hill argues this charge erroneously instructed the jury that the absence of malice (or, conversely, the presence of sufficient provocation) was an element of ABHAN. We agree the charge was erroneous.

[3] Four months before Hill's trial, the Court of Appeals held that absence of malice was not an element of ABHAN, and found a charge including absence of malice as an element of ABHAN to be erroneous. *State v. Pilgrim*, 320 S.C. 409, 465 S.E.2d 108 (Ct.App.1995) ("Pilgrim I"). After Hill's trial and ABIK conviction, this Court granted certiorari to review *Pilgrim I*. This Court affirmed the Court of Appeals, stating explicitly that absence of malice is not an element of ABHAN. *State v. Pilgrim*, 326 S.C. 24, 482 S.E.2d 562 (1997) ("Pilgrim II").² In *Pilgrim II*, this Court explained, "In this case, under the trial judge's instruction, the jury could not have returned with an ABHAN conviction because there was no evidence of provocation, or stated another way there was no evidence of absence of malice. Absence of malice is not an element of ABHAN." *Id.* at 27, 482 S.E.2d at 563.

[4] There is no question that an ABHAN charge, like the one given in this case, including absence of malice or legal provocation as an element would be erroneous if given after this Court's decision in *Pilgrim II*. The State argues, however,

2. In *Pilgrim*, the trial court charged the jury on ABIK and ABHAN by analogizing those offenses to murder and voluntary manslaughter respectively. The defendant objected that defining ABHAN as voluntary manslaughter when the victim does not die, "adds the element of sudden heat of passion upon sufficient legal provocation (i.e., absence of malice)." *Pilgrim II*, at 27, 482 S.E.2d at 563. The *Pilgrim* trial court gave the following charge, in pertinent part:

Voluntary manslaughter is defined as the killing of a human being in sudden heat of passion upon sufficient legal provocation as would be calculated to sway the reason of an ordinary person causing him to become enraged and act upon an impulse rather than cool reflection, thus eliminating the element of actual malice. Now, before the defendant could be found guilty of assault and battery of a high and aggravated nature, the jury must be satisfied beyond a reasonable doubt that if the person assaulted died as a result of the injury sustained the defendant would have been guilty of manslaughter as I defined it for you.

Pilgrim I, 320 S.C. at 414, 465 S.E.2d at 111 (Ct.App.1995). As discussed, both the Court of Appeals and this Court agreed the charge was erroneous, and held absence of malice is not an element of ABHAN.

that the Court of Appeals' *Pilgrim I* decision was not final because it was still subject to further appeal to this Court at the time of Hill's trial. The State claims Hill's trial counsel would not have been on notice that the charge given was erroneous until this Court published its *Pilgrim II* decision, almost a year after Hill's conviction. For support, the State cites the proposition that no attorney is required to anticipate or discover changes in the law or facts which did not exist at the time of trial. See *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993) (finding counsel not ineffective for encouraging defendant to plead guilty although counsel never interviewed the victim (because he had her written statement against defendant), even though victim changed her mind by the time of the PCR hearing and testified for defendant); *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992) (finding counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial).

In our opinion, the cases cited by the State are inapplicable in this situation. Hill was not required to *anticipate* any change in the law in order to object to the ABHAN charge given at trial; the Court of Appeals' *Pilgrim I* decision was published and readily available to trial counsel before Hill's trial began. Rule 226(c), SCACR, states that a Court of Appeals' decision is not final until the petition for rehearing has been acted upon by the Court of Appeals. The Court of Appeals denied the petition for rehearing of *Pilgrim I* on December 21, 1995, and Hill's trial did not begin until March 19, 1996. The *Pilgrim I* decision was final almost three months before Hill's trial and was binding on the trial court at the time of Hill's trial. Accordingly, the failure of Hill's counsel to object to the erroneous ABHAN jury instruction constituted representation below an objective standard of reasonableness.

B. Prejudice

[5] To warrant reversal and granting of a new trial under *Strickland v. Washington*, however, Hill must also show he was prejudiced by counsel's faulty representation. Hill argues that he was prejudiced by the erroneous charge because the definition of ABHAN was central to the jury's verdict, as Hill's trial strategy was based on the hope that the jury would

find him guilty of ABHAN instead of the greater offense, ABIK. We disagree.

In our opinion, Hill was not prejudiced by the erroneous ABHAN charge. In light of the overwhelming evidence presented, including (1) the eyewitness accounts naming Hill as the sole aggressor, (2) the victim's testimony, (3) the number and severity of the victim's injuries, and (4) the victim's physical state (she was seven months pregnant), we find the erroneous ABHAN charge constituted harmless error. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

[6-9] ABHAN is an unlawful act of violent injury to the person of another accompanied by circumstances of aggravation. *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000). ABIK is an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied.³ *Id.* Although the absence of malice is not an element of ABHAN, the presence of malice is a required element of ABIK. Malice is defined as a "formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." *Fennell*, 340 S.C. at 278, 531 S.E.2d at 518.

In this case, the victim testified that Hill told her he was going to kill her. All eyewitnesses testified that Hill pinned the victim on the ground and repeatedly stabbed her despite her profuse bleeding, her cries for help, her attempts to get away from him, and the presence of numerous witnesses. Hill ceased attacking her only when he was knocked unconscious by an eyewitness. There is no evidence to indicate Hill intended anything but to kill the victim, or that he had any legal excuse to do so. In light of the evidence presented, there is no reasonable probability that the jury would have convicted Hill of ABHAN, a lesser included offense of ABIK (for which Hill was indicted), even if the judge had given the correct ABHAN charge. Hill's guilt of ABIK was so conclu-

3. As noted in *Pilgrim II*, specific intent to kill is not an element of ABIK.

sively proven at trial that there is no reasonable probability that the trial judge's faulty ABHAN instruction would have affected the result. As such, counsel's failure to object to the erroneous instruction does not warrant a new trial. *See State v. Bailey*.

Under these circumstances, Hill has not met his burden of proving prejudice, as required by *Strickland v. Washington*. Accordingly, the PCR court erred by granting Hill's application for PCR.

CONCLUSION

For the foregoing reasons, we REVERSE the PCR court's order granting Hill a new trial.

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

567 S.E.2d 851

Lester W. NORTON, Respondent,

v.

NORFOLK SOUTHERN RAILWAY COMPANY, Petitioner.

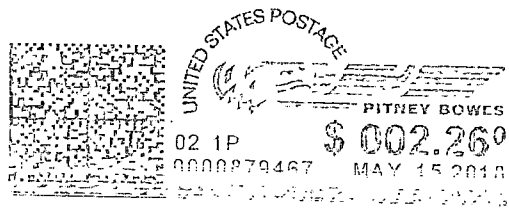
No. 25501.

Supreme Court of South Carolina.

Heard April 16, 2002.

Decided July 22, 2002.

Railroad worker injured on the job brought action against railroad under the Federal Employers' Liability Act (FELA). After jury returned verdict in railroad's favor, the Circuit Court, Spartanburg County, L. Casey Manning, J., granted worker's motion for new trial. Railroad appealed. The Court of Appeals, 341 S.C. 165, 533 S.E.2d 608, affirmed. Railroad petitioned for a writ of certiorari. The Supreme Court, Toal, C.J., held that reversible error occurred when state-law "thirteenth juror doctrine" was applied to motion for new trial,



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