THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2018-002155

The Housing Authority of the
City of Charleston,

Respondent,

v.

Katrina Brown,

Appellant.

FINAL BRIEF OF APPELLANT

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QUESTIONS PRESENTED

I. Did the Circuit Court err in applying U.S. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002), to the instant case?

II. Did the Circuit Court err in affirming the Magistrate's Order to eject Katrina Brown and her daughter where (1) there was no drug-related criminal activity, and (2) Respondent Housing Authority of the City of Charleston failed to demonstrate that Anthony Cobb's off-premises conduct presented a threshold threat to the health, safety or right to peaceful enjoyment of other residents on the premises, or to those living in the immediate vicinity?

III. Did the Circuit Court err in affirming the Magistrate's Order where Respondent Housing Authority of the City of Charleston abused its discretion in seeking to evict Katrina Brown and her daughter, thereby rendering its action arbitrary, capricious, and in violation of Brown's right to substantive due process?

STATEMENT OF THE CASE

On December 16, 2015, Katrina Brown ("Brown") entered into a lease agreement with the Housing Authority of the City of Charleston (hereinafter "CHA" or "Housing Authority"). This lease agreement provided for Brown, her son Anthony Cobb, then seventeen-years-old, her daughter J.R., then thirteen-years-old, and Rashauna Brown to occupy a public housing apartment located at 2214-A Sunnyside Drive, Charleston, SC 29403. (R. pp. 94, 105-106).

By letter dated January 29, 2016, CHA notified Brown that she was in violation of the terms of her lease for "violent criminal/drug related activity" and contended that Brown had violated Sections 5(c), 5(d), 5(e), 5(f), 16(n), and 16(u) of the December 16, 2015 lease. (R. p. 102). On March 1, 2016, CHA filed an Application for Ejectment with the Charleston County Magistrate Court seeking the ejectment of Brown and her children. (R. p. 29). On March 2, 2016, the Magistrate issued a Rule to Vacate or Show Cause ordering Brown and all others residing at 2214-A Sunnyside Drive to, within 10 days after service, vacate their home or contact the Charleston City Magistrate Court for the purpose of showing why all residents should not be ejected. (R. p. 2). Brown was served with the Rule to Vacate or Show Cause on March 4, 2016 and timely requested a hearing to show cause. (R. p. 105).

The Magistrate conducted a bench trial on March 16, 2016. (R. p. 105). On March 31, 2016, the Magistrate issued an order denying CHA's application to eject Brown and her daughter, however, the Magistrate authorized CHA to remove Anthony Cobb, who was then incarcerated and awaiting trial, as an authorized resident. (R. p. 3-4).

On April 29, 2016, CHA appealed the Magistrate's March 31st order to the Charleston County Court of Common Pleas. (R. p. 30). The Magistrate issued a Return of the Magistrate on May 19, 2016. (R. p. 105). On December 13, 2016, the Circuit Court heard CHA's appeal. (R. p. 58). On January 11, 2017, the Circuit Court issued an order remanding the case for a ruling consistent with United States Department of Housing and Urban Development, v. Rucker, 535 U.S. 125 (2002). (R. p. 5).

On January 30, 2017, the Magistrate filed an Order Upon Remand, in which the Court reversed its March 31, 2016 Order denying Brown's family's ejectment and, instead, granted CHA's application for ejectment of Brown and her daughter. (R. p. 11). On February 10, 2017, in response to Brown's Motion to Alter, Amend, or Clarify its Judgment, the Magistrate vacated the Order Upon Remand and offered the parties an opportunity to brief specified issues. (R. p. 12).

Subsequently, the Magistrate received briefing from the parties and issued a Final Order Upon Remand on May 15, 2017 reversing the Court's earlier decision and granting CHA's application to eject Brown and her family from their home. (R. p. 15-18).[1]

[1] In the interim, Brown appealed the Circuit Court's January 11, 2017 order to the South Carolina Court of Appeals. (R. p. 33). Along with her Notice of Appeal, Brown filed a motion asking that the Court of Appeals hold her appeal in abeyance and remand the case for further proceedings before the Magistrate. (R. p. 34). On March 31, 2017, the Court of Appeals dismissed Brown's appeal holding that the Circuit Court's January 11, 2017 order was not immediately appealable. (R. p. 13). On April 7, 2017, the Magistrate issued a Second Amended Order revising the briefing schedule in light of Brown's appeal. (R. p. 14).

On May 30, 2017, Brown appealed the Magistrate's May 15, 2017 Final Order Upon Remand to the Charleston County Court of Common Pleas. (R. p. 49). On July 31, 2107, the Magistrate filed a Second Return. (R. p. 108).

On September 5, 2017, the Circuit Court heard Brown's appeal and issued an order on April 17, 2018 affirming the Magistrate's May 15, 2017 Final Order Upon Remand. (R. p. 19-25). Brown timely moved to alter or amend the Circuit Court's order. (R. p. 54). Thereafter, the Circuit Court denied Brown's motion by order filed November 7, 2018. (R. p. 26).

Brown filed and served notice of appeal from the Circuit Court's April 17, 2018 and November 7, 2018 orders on December 5, 2018. (R. p. 57).

STATEMENT OF FACTS

At the March 16, 2016 bench trial before the Magistrate, Detective Jason Jarrell of the Charleston County Police Department testified that Brown's son, Anthony Cobb, was arrested on January 13, 2016 for unlawfully carrying a pistol and that Cobb gave a post-Miranda confession to being involved in a recent attempted armed robbery in the area of his arrest. (R. p. 4). Cobb was arrested approximately one mile from Brown's home. (R. p. 21).

Brown testified that Cobb's arrest and the attempted armed robbery had both taken place off CHA property. (R. p. 106). Brown also testified that Cobb was incarcerated awaiting trial at that time and that if Cobb posted bail prior to his trial, she would not allow him to return to the home she shares with her daughter. Instead, she testified he could live at his grandmother's home,

which is not located on CHA property. (R. p. 106). She also testified that she had no knowledge of the alleged incidents until Cobb was arrested. (R. p. 106).

The Magistrate found in favor of Brown, stating

> It is this court's opinion that evictions based on the criminal activity provisions of the housing lease agreements must be determined on a case-by-case basis. Pursuant to the testimony presented in court, 24 C.F.R. §966.4, as well as the distinguishable facts from the United States Supreme Court's decision in [Rucker], I do not find for an eviction against Katrina Brown under these facts as presented. The City of Charleston Housing Authority may take measures to require removal of Mr. Cobb as a household member, pursuant to their policies and applicable law.

(R. p. 4 (emphasis in original). On April 29, 2016, CHA appealed the Magistrate's March 31st order asserting that she erred in applying Rucker. (R. p. 30).

On appeal, the Circuit Court found that Rucker was the "controlling case" in this matter and that, it could not "find how the instant case is substantively dissimilar from the factual pattern in Rucker." (R. pp. 8-9). The Circuit Court noted that "the Order of the Magistrate references distinguishable facts" from Rucker but fails to articulate what those distinguishing characteristics may be." (R. p. 9). Immediately upon remand, the Magistrate issued a two-sentence order reversing the Court's earlier decision "[b]ased on the higher court's analysis of [Rucker]". (R. p. 11).

On February 8, 2017, Brown requested that the Magistrate vacate the January 30th order, allow the parties to file briefs and, if necessary, hold an evidentiary hearing. (R. p. 31). The Magistrate granted Brown's request in part and agreed to receive briefs from the parties

"specifically limited to Circuit Court's Order regarding 'distinguishable facts' between the [Rucker] case." (R. p. 12). After receiving briefs from the parties, the Magistrate issued a Final Order Upon Remand in which she found that CHA "became well aware of the underlying criminal matter before determining to pursue eviction proceedings against Ms. Brown" and held that she "must follow binding precedent and find for an eviction." (R. p. 18).

On May 30, 2017, Brown appealed the Magistrate's Final Order Upon Remand to Circuit Court on two grounds. (R. p. 49). First, Brown argued that there was no evidentiary support for a finding that the alleged criminal activity threatened the health, safety, or right to peaceful enjoyment of other residents or of those residing in the immediate vicinity of the housing complex. (R. p. 51) Second, Brown argued that CHA abused the discretion conferred on it by Congress by failing to consider the circumstances of the case and any alternatives to eviction. (R. p. 51-52).

The Circuit Court heard Brown's appeal on September 5, 2017 and issued an order on April 17, 2018 affirming the Magistrate. (R. p. 19, 58). The Circuit Court found that the lease granted CHA the authority to terminate Brown's tenancy "for a serious violation of the terms of the lease such as violent criminal activity performed by a member of the household or a person under the resident's control occurring on or off the premises." (R. p. 23). The Circuit Court found that Cobb's conduct "occurred about a mile off [CHA] premises but it involved acts, from which it can be inferred, created a threat to the health, safety and right to peaceful enjoyment by residents in the vicinity of [CHA's] property." (R. p. 23).

Brown timely moved to alter or amend the Circuit Court's April 17, 2018 order and sought rulings on two issues which were presented for consideration but were not ruled upon. (R. p. 54).

First, Brown sought a ruling on her argument that CHA had abused its discretion in pursuing the eviction of Brown and her daughter under the circumstances. (R. p. 55). Second, Brown sought a ruling on her argument that CHA's authority to seek eviction for non-drug-related criminal activity extends only to activity which presents a current or ongoing threat to the health, safety, or right to quiet enjoyment of other residents of the public housing complex or those living in the immediate vicinity. (R. p. 56). On November 1, 2018, the Circuit Court issued an Order on Reconsideration declining to reverse its earlier decision. (R. p. 26). With respect to Brown's first argument, the Circuit Court found that CHA did exercise its discretion and proceeded with an eviction. The Court distinguished the North Carolina Supreme Court's decision in E. Carolina Reg. Hous. Auth. v. Lofton, 789 S.E.2d 449 (N.C. 2016), finding that eviction in Brown's case did not occur automatically with an alleged violation as it did in Lofton and that, here, CHA has to make the choice to proceed with an eviction. (R. p. 27). As to Brown's second argument, the Court found that Brown's reading of the applicable statute and regulation to require a current or ongoing threat in order to justify eviction "reads additional words into the statute and the lease." (R. p. 28). This appeal timely followed. (R. p. 57).

STANDARD OF REVIEW

In reviewing the Circuit Court's adjudication of an appeal of an ejectment proceeding in magistrate's court, findings of fact are to be upheld if there is any supporting evidence. McNair v. United Energy Distribs., 390 S.C. 44, 699 S.E.2d 723 (Ct. App. 2010). However, in such cases "the Court of Appeals still retains *de novo* review of whether the facts show the circuit court's affirmance was controlled or affected by errors of law." Bowers v. Thomas, 373 S.C. 240, 644

S.E.2d 751 (Ct. App. 2007) (*citing* Hadfield v. Gilchrist, 343 S.C. 88, 538 S.E.2d 268 (Ct. App. 2000)). Accordingly, because the Circuit Court's affirmance of the Magistrate was controlled or affected by errors of law, that affirmance is subject to *de novo* review.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN APPLYING UNITED STATES DEP'T OF HOUS. & URBAN DEV. V. RUCKER, 535 U.S. 125 (2002), TO THE INSTANT CASE

A key issue in this case and one that must be addressed at the outset is whether, and to what extent, the United States Supreme Court's decision in Rucker is relevant to the instant case. Rucker arose out of four separate ejectment actions brought by the Oakland Housing Authority against public housing tenants whose guests or household members had engaged in drug-related criminal activity at a public housing complex. 535 U.S. at 128. The tenants challenged HUD's interpretation of 42 U.S.C. § 1437d(l)(6) arguing that the statute did not require lease terms authorizing the eviction of innocent tenants and, if it did, the statute was unconstitutional. The United States Supreme Court rejected the tenants' arguments and held that the statute at issue unambiguously requires lease terms vesting housing authorities with the discretion to evict tenants for the drug-related criminal activity of guests or household members regardless of whether the tenant knew or should have known of the activity. 535 U.S. at 130. Rucker's core holding is that there is no "innocent tenant" defense to an eviction based on drug-related criminal activity by a guest or household member.

Rucker is not controlling here because Brown does not rely on an "innocent tenant" defense in this case and the eviction at issue was not based on drug-related activity. Instead, Brown argues that CHA has failed to establish that Cobb's conduct met the threshold requirements for termination of a public housing tenancy for non-drug-related criminal activity and that, even if Cobb's conduct did meet those requirements, CHA abused its discretion in seeking to terminate Brown's tenancy. The Rucker Court was not presented with and did not address either of these arguments. As a result, Rucker is not controlling in this case.

In an initial decision, the Magistrate found in favor of Brown based upon "the testimony presented in court, 24 C.F.R. § 966.4, as well as the distinguishable facts from the United States Supreme Court's decision in [Rucker]". (R. p. 4). While the Magistrate did not specify what facts distinguished the instant case from Rucker, one obvious distinction is the fact that Rucker did not address the statutory and regulatory requirement that a housing authority prove that non-drug-related criminal activity present a threshold threat.

In its appeal of the Magistrate's decision in favor of Brown, CHA asserted that the Magistrate's sole error was the misapplication of Rucker. (R. p. 30). After hearing CHA's appeal, the Circuit Court issued an order finding that Rucker was the "controlling case" in this matter, that "this Court cannot find how the instant case is substantively dissimilar from the factual pattern in Rucker", and remanding the case to the Magistrate for a ruling consistent with Rucker. (R. p. 8-9). Upon remand, the Magistrate reversed the earlier decision in favor of Brown "based upon the [circuit] court's analysis of [Rucker]" and found that Rucker was "binding precedent" in this case. (R. p. 11, 18). The Magistrate reversed the earlier decision "without making any new findings of

fact or considering any additional evidence". (R. p. 21). During Brown's appeal, the Circuit Court found that the Magistrate "properly applied the legal standard set forth in Rucker." (R. p. 24).

The Circuit Court's interpretation of Rucker as dispositive in this case during CHA's initial appeal was erroneous. It is evident that the Magistrate relied upon this erroneous interpretation in reversing her earlier decision in favor of Brown. During Brown's subsequent appeal, the Circuit Court's holding that the Magistrate properly applied Rucker was erroneous because Rucker's core holding does not apply to this case and does not control the result here.

The facts of Rucker are pertinent to the instant case only in the limited sense that they demonstrate a housing authority's judicious exercise of its discretion. While CHA points to Rucker as justification for seeking to evict Brown and her daughter in this case, the named respondent in Rucker, Pearlie Rucker, was not actually evicted despite the fact that a member of her household engaged in drug-related criminal activity on public housing property. Instead, as the Supreme Court noted, the housing authority dismissed its eviction action against Ms. Rucker after the offending household member was incarcerated and, thus, no longer posed a threat to other tenants. 535 U.S. at 128 fn 1. The incarceration of the offending household member and mitigation of any real or perceived threat is an important factual similarity between the instant case and Rucker. Aside from that, however, Rucker sheds very little light on the questions presented here.

For these reasons, Rucker is not controlling and the lower courts' reliance on it was misplaced. Under the law which is applicable to this case the decision below must be reversed.

II. THE CIRCUIT COURT ERRED IN AFFIRMING THE MAGISTRATE WHERE RESPONDENT HOUSING AUTHORITY OF THE CITY OF CHARLESTON FAILED TO DEMONSTRATE THAT ANTHONY COBB'S OFF-PREMISES CONDUCT PRESENTED A THRESHOLD THREAT TO THE HEALTH, SAFETY, OR RIGHT TO PEACEFUL ENJOYMENT OF OTHER RESIDENTS ON THE PREMISES, OR TO THOSE LIVING IN THE IMMEDIATE VICINITY.

The public housing program at issue in this case is governed by the United States Housing Act of 1937 ("USHA") which requires CHA to utilize leases which

> provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control shall be cause for termination of tenancy.

42 U.S.C. § 1437d(l)(6) (2018). The USHA distinguishes between criminal activity which is "drug-related" and that which otherwise threatens the health, safety, or right to peaceful enjoyment of other tenants (hereinafter "other criminal activity"). Pursuant to statutory authority, the United States Department of Housing and Urban Development ("HUD") has promulgated regulations which elaborate on this distinction. With respect to drug-related criminal activity, HUD regulations provide that

> The [public housing] lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy.

24 C.F.R. § 966.4(l)(5)(i)(B) (2018). HUD has defined drug-related criminal activity as "the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug." 24 C.F.R. § 5.100 (2018). With respect to other criminal activity, HUD regulations provide that

> The [public housing] lease must provide that any criminal activity by a covered person that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including PHA management staff residing on the premises) or threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises is grounds for termination of tenancy.

24 C.F.R. § 966.4(l)(5)(ii)(A) (2018). "Covered person" means a tenant, any member of the tenant's household, a guest or another person under the tenant's control. 24 C.F.R § 5.100 (2018).

The statutory and regulatory language at issue here creates an important distinction between drug-related criminal activity and other criminal activity. Drug-related criminal activity by certain individuals is grounds for termination of tenancy, regardless of where it occurred, and CHA is not required to show that the activity in question had any particular effect on the public housing complex or those living nearby. In essence, Congress and HUD appear to have determined that drug-related criminal activity by certain individuals is *per se* a threat to the community and have deemed it cause for termination of tenancy regardless of the particulars of the underlying offense.

In contrast, in order for non-drug-related criminal activity to be grounds for termination of a public housing tenancy, three distinct requirements must be met. First, the activity must create a threat to health, safety, or the right to peaceful enjoyment. Second, the activity must create the

threat with respect to other residents of the public housing complex or those living in the immediate vicinity. Finally, the activity must constitute a current or ongoing threat. 42 U.S.C. § 1437d(l)(6) (2018); 24 C.F.R. § 966.4(l)(5)(ii)(A) (2018). Because this case involves non-drug-related criminal activity, CHA's failure to satisfy any one of these requirements would mean that it had no authority to terminate Brown's tenancy.

For the following reasons, CHA has failed to demonstrate that Cobb's off-premises conduct created the requisite threat. As a result, the decision below must be reversed.

A. The Circuit Court Erred in Relying on Language in the Lease which Purports to Grant CHA Authority to Evict without Proving the Requisite Threat.

CHA has attempted to avoid the statutory and regulatory requirement that it prove Cobb's conduct presented the requisite threat. The lease in this case prohibits violent criminal activity on or off the premises, not just on or near the premises. (R. pp. 94, 96). CHA has argued that, as a result, it has the discretion to seek eviction without proving the existence of a threat to health, safety, or peaceful enjoyment.

The Circuit Court accepted this argument both during CHA's appeal of the Magistrate's initial order finding for Brown and later during Brown's appeal of the Magistrate's reversal. During CHA's appeal, the Circuit Court found that Cobb's conduct was "a breach of the Dwelling Lease Agreement and Mrs. Brown was rightfully subject to eviction." (R. p. 8). During Brown's appeal, the Circuit Court found that CHA "had the right to terminate the lease based upon both Paragraphs 5f and 16n" which provide, respectively, that "neither the Resident nor any household

member, guest, or other persons under the Resident's control shall engage in any violent or drug-related criminal activity on or off the premises" and that "any violent or drug-related criminal activity performed by any household members, guest or other persons under the Resident's control on or off the premises, not just on or near the premises" constitutes a violation of the lease. (R. p. 22). The Circuit Court later reiterated this finding stating that "[p]ursuant to the lease, [CHA] had the authority to terminate the lease for a serious violation of the terms of the lease such as violent criminal activity performed by a member of the household or a person under the resident's control occurring on or off the premises." (R. p. 23 (emphasis added)). The Circuit Court erred in relying on this language in the lease for two reasons.

First, the plain language of applicable regulations provides that CHA may terminate a public housing tenancy only for 1) drug-related criminal activity on or off the public housing premises, and 2) other criminal activity which poses a threat to the community as discussed above. 24 C.F.R. § 966.4(l)(2)(iii)(A) (2018). CHA's authority to terminate a public housing tenancy is limited to the enumerated circumstances. The language in Paragraphs 5f and 16n that both CHA and the Circuit Court relied upon is an attempt to equate non-drug-related criminal activity with drug-related criminal activity. The two are not equivalent. By including the language "not just on or near the premises" in its lease, CHA simultaneously recognizes the regulatory limits on its authority to terminate Brown's tenancy and attempts to evade them.

The United States District Court for the Southern District of Indiana addressed a similar situation in Hill v. Richardson. 740 F. Supp. 1393 (S.D. Ind. 1990) *rev'd and remanded on other grounds*, 7 F.3d 656 (7th Cir. 1993). There, the plaintiff class challenged the defendant's authority

to deny or terminate housing assistance to families for reasons other than those listed in the applicable regulation. In reviewing and ultimately approving the parties proposed settlement, the Court agreed with the parties' stipulation that the reasons for denial or termination of assistance specified in the applicable regulation were the sole grounds for such action. 740 F. Supp. 1397. In reaching this conclusion, the court noted the absence of any language in the regulations which explicitly granted discretionary authority to impose additional grounds for denying or terminating housing assistance. 740 F. Supp. 1398. Here, the regulation at issue clearly does not expressly grant CHA discretionary authority to exceed its bounds. Instead, the regulation expressly limits the grounds upon which CHA can base a termination of tenancy by stating that CHA may do so only for the enumerated reasons. 24 C.F.R. § 966.4(l)(2)(iii)(A) (2018).

Other courts have found similar attempts to exceed the authority granted by HUD to be unavailing. For example, in Holly v. Hous. Auth. of New Orleans, 684 F. Supp. 1363 (E.D. La. 1988), the United States District Court for the Eastern District of Louisiana held that the Housing Authority of New Orleans violated 42 U.S.C. § 1983 (2018) by terminating an individual's participation in a housing program for allegedly failing to report a change in her marital status where neither the applicable statute nor implementing regulations imposed such a duty. Similarly, in Cain v. Allegheny Hous. Auth., 986 A.2d 947 (Pa. Commw. Ct., 2009), the Commonwealth Court of Pennsylvania held that a housing authority could not terminate an individual's participation in a housing program for failure to obtain the housing authority's approval before she moved to a new unit. There, applicable regulations did not require such approval and the court held that the housing authority could not expand the basis for terminating assistance beyond those enumerated in the regulations. 986 A.2d 951.

Second, CHA's more expansive prohibition of criminal activity is unenforceable because it is not rationally related to a legitimate housing purpose. In Richmond Tenant's Org. v. Richmond Redev. and Hous. Auth., 751 F. Supp. 1204 at 1205 (E.D.Va., 1990), *aff'd.* 947 F.2d 942 (4th Cir. 1991), the United States District Court for the Eastern District of Virginia, in an opinion which was subsequently affirmed by the Fourth Circuit Court of Appeals, held that public housing lease provisions must be "rationally related to a legitimate housing purpose" in order to avoid running afoul of the prohibition against unreasonable terms in such leases contained in 42 U.S.C. § 1437d(l)(1). In that case, the housing authority had a lease provision which made misdemeanor alcohol or marijuana convictions a material breach of the lease, even if they occurred off the public housing premises. 751 F. Supp. at 1210. The district court held that the lease term was unreasonable in violation of 42 U.S.C. § 1437d(l)(1) because it could be used to evict a tenant for an offense that bore no relation to the housing development. 751 F. Supp. at 1206. The instant case is similar because CHA has produced no evidence that Cobb's conduct created a threat to the public housing complex or to those living in the immediate vicinity. Lease terms to the contrary should be rejected as unreasonable in violation of 42 U.S.C. § 1437d(l)(1).

Numerous courts have recognized that the occurrence of a non-drug-related criminal act, by itself, is insufficient to establish grounds for a housing authority to seek eviction. For example, in Kolio v. Hawai'i Pub. Hous. Auth., 349 P.3d 374 (Haw. 2015), the Hawai'i Supreme Court recognized that "the mere showing of some criminal activity" is not enough to violate the prohibition on other criminal activity contained in the public housing regulations, 349 P.3d at 381, and that "[t]he phrase 'that threatens the health, safety, or peaceful enjoyment of the premises' clearly qualifies the kind of criminal activity that violates the provision." 349 P.3d at 379 (citing

D.C. Hous. Auth. v. Whitfield, No. 04-LT-410, 2004 WL 1789912, at *6 (D.C. Super. Ct. Aug. 11, 2004); 24 C.F.R. 966.4(f)(12)(i)(A) (2018) (establishing a public housing tenant's obligation to ensure that they, their household members, and their guests refrain from certain kinds of criminal activity)). *See also* Boston Hous. Auth. v. Bryant, 693 N.E.2d 1060 (Mass. App. Ct. 1998) (tenant's credit card fraud against property manager did not have the required health and safety effect to support eviction); Cabrini–Green Local Advisory Council v. Chicago Hous. Auth., No. 96–C–6949, 2007 WL 294253, 2007 U.S. Dist. LEXIS 6520 (N.D.Ill. Jan. 29, 2007) (striking a public housing lease provision which permitted eviction upon any felony conviction as an unreasonable lease term prohibited by 42 U.S.C. § 1437d(l)(2)); Hous. Auth. of Bangor v. Bush, 2001 Me. Super. LEXIS 17 (Me. Super. Ct. Feb. 1, 2001) (holding tenant's removal of stop sign near his residence did not threaten health, safety, or peaceful enjoyment because there was no evidence that removal of that particular sign caused such a threat).

The Circuit Court's reliance on language in CHA's lease which purports to empower CHA to terminate a public housing tenancy for reasons not enumerated in applicable regulations is misplaced. CHA may not terminate Brown's public housing tenancy absent proof of the requisite threat.

B. The Circuit Court Erred in Holding that Cobb's Conduct Constituted a Threat where the Record Contains no Evidence to Support such a Finding.

In order for CHA to have authority to terminate a public housing lease and seek eviction for non-drug-related criminal activity, CHA must demonstrate that the alleged activity constitutes a threat to the health, safety, or right to quiet enjoyment of other residents or of those living in the

immediate vicinity. The record does not disclose that CHA even attempted to prove the existence of such a threat. The magistrate failed to find such a threat either after trial or upon remand from the Circuit Court. (R. pp. 3, 15, 105, 108). Despite the lack of any finding by the magistrate that a threat existed and despite the absence of evidence upon which such a finding could be based, the Circuit Court held that Cobb's activity "involved acts, from which it can be inferred, created a threat to the health, safety and right to peaceful enjoyment by residents in the vicinity of [CHA's] property." (R. p. 23). The Circuit Court erred in making this unsupported inference.

Whether Cobb's conduct constituted a threat to other residents or those living in the immediate vicinity is a question of fact which must be supported by some evidence in the record in order for the Circuit Court's order to be affirmed. Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp., 280 S.C. 232, 233, 312 S.E.2d 20, 21 (Ct. App. 1984) ("[i]n ejectment proceedings first heard in magistrate's court, the Court of Appeals is without jurisdiction to reverse the findings of fact of the circuit court if there is any supporting evidence."). Here, the magistrate failed to find that such a threat existed despite having had the opportunity to hear the case at trial and to review it again on remand with the benefit of briefing from the parties. (R. pp. 3, 15). In addition, neither of the magistrate's returns disclose facts upon which such a finding could be based. CHA failed to prove the existence of a threshold threat and the decision below should be reversed.

The need to prove the existence of the requisite threat is supported by the decisions of other courts. For example, in Hous. Auth. of Decatur v. Brown, 349 S.E.2d 501 (Ga. App. 1986), the Court of Appeals of Georgia addressed a public housing eviction case where the Housing Authority was permitted to terminate the tenant's lease on ten days' notice in cases where the

tenant created or maintained a threat to the health or safety of other tenants. 349 S.E.2d at 502. There, the Court noted "a conspicuous absence of any evidence that any neighbor of [the tenant] complained of a threat to or experienced a lack of peaceable enjoyment of their accommodation" and held that "the bare occurrence of a violation of law alone which does not manifest the creation or maintenance of a threat to the safety of other tenants does not pose the threat which warrants the issuance of a ten-day notice." 349 S.E.2d at 503.

Similarly, in Boston Housing Authority v. Bryant, 693 N.E.2d 1060 (Ma. App. 1998), the Appeals Court of Massachusetts reviewed a public housing eviction case where the tenant had fraudulently incurred credit card charges in the name of a housing authority employee. The lease at issue in Bryant prohibited "[a]ny criminal or other activity which threatens the health, safety, or right to peaceful enjoyment of public housing premises by other residents, or [housing authority] employees". 693 N.E.2d at 1061. In finding that the tenant's conduct did not warrant eviction under the terms of the lease, the Bryant Court pointed to the lower court's reliance on "a chain of conjecture about hypothetical facts" to establish that the tenant's conduct could have an effect on health and safety. 693 N.E.2d at 1062. Here, the Circuit Court's "inference" of a threat is no different from the "chain of conjecture about hypothetical facts" that the Bryant Court condemned as inadequate. Here, as in Bryant, inference and conjecture do not suffice to establish the existence of a threat to health, safety, or peaceful enjoyment sufficient to justify evicting a family from public housing. In the absence of evidence to support a finding that Cobb's conduct created the requisite threat, the decision below must be reversed.

C. CHA Failed to Show that Cobb's Conduct Occurred in or Affected residents of the Immediate Vicinity of the Public Housing Complex.

It is not enough for CHA to simply prove that Cobb's conduct creates a generalized threat to someone's health, safety, or right to peaceful enjoyment. The USHA and applicable regulations require that CHA show a threat to other residents of the public housing complex or to those living in the immediate vicinity. The record contains no evidence to support such a finding.

The conduct at issue in this case occurred at 1 Cool-Blow Street, a location approximately one mile from Brown's home. (R. p. 21). HUD has not defined the term "immediate vicinity" in this context and, to the undersigned's knowledge, there is no controlling precedent directly on point. However, several courts have considered the meaning of the term "immediate vicinity" and their analyses should prove persuasive. For example, in Bailey v. U.S., 568 U.S. 186 (2013), the United States Supreme Court considered whether the accused had been detained within the immediate vicinity of premises subject to a search warrant when he was detained "almost a mile" away. The Court refused to define immediate vicinity in detail, but found that the accused "was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question". 568 U.S. at 201. In Powell v. Hous. Auth., 760 A.2d 473 (Pa. Commw. Ct. 2000) *rev'd on other grounds*, 812 A.2d 1201 (Pa. 2002), the Pennsylvania Commonwealth Court considered whether a carjacking committed by a subsidized housing tenant's son within one mile of the leased unit threatened the health, safety, or right to peaceful enjoyment of residents in the immediate vicinity. There, in finding that the carjacking did not constitute grounds for eviction, the Court interpreted immediate vicinity to mean "on the premises or next door". 760 A.2d at 482.

While one court has held that criminal activity which occurred "about a mile" from a public housing complex constituted a threat to the health and safety of the public housing community, the instant case is plainly distinguishable. In Lowell Hous. Auth. v. Melendez, 865 N.E.2d 741 (Mass. 2007), the Supreme Judicial Court of Massachusetts held that a housing authority did have grounds to eject a tenant who assaulted and attempted to rob a patron of a convenience store approximately one mile from the housing complex while armed with an eight-inch kitchen knife. However, the Court's holding in Lowell was grounded in the fact that it was the tenant himself who had committed the criminal act and not, as in the instant case, a person who would be removed from the household and not permitted to return. The Lowell Court noted that "continued tenancy at the housing authority by someone capable of such aggressive and violent behavior constituted a real and continuing danger to other tenants" and that "[t]enants forced to live in close proximity to such a person would be justified in having serious fear for their own safety and that of family members." 865 N.E.2d at 744. It was the ongoing threat posed by the tenant himself, as evidenced by his prior conduct, rather than the simple occurrence of a criminal act which justified the Court's holding that "certain criminal activity, such as assault by means of a dangerous weapon and armed robbery, is so physically violent, or associated with violence, that one who engaged in it normally would pose a threat to, or reasonably inspire a significant level of fear on the part of, tenants forced to live in close proximity to the offending tenant." 865 N.E.2d at 745. In the instant case, Cobb was incarcerated at the time of the eviction trial. (R. p. 4). Had Cobb been released, Brown testified without contradiction that she would not allow him to return to her household. (R. p. 4). Both applicable regulations, at 24 C.F.R. § 966.4(l)(5)(vii)(C), and the Magistrate's initial order

permitted CHA to take measures to require Cobb's removal as a household member. Cobb presented no threat to the community and the holding in Lowell is inapplicable here.

CHA has failed to show that Cobb's conduct currently has, or ever had, any adverse effect on the health, safety, or right to peaceful enjoyment of other residents of the public housing complex or of those living in the immediate vicinity. Regardless of any language in CHA's lease which suggests otherwise, establishing such a threat is a prerequisite to CHA's right to seek eviction in this case. As a result, the decision below must be reversed.

D. CHA has Failed to Show that Cobb's Conduct Presents a Current Threat to Other Residents or those Living in the Immediate Vicinity of the Public Housing Complex.

Both the statutory and regulatory language authorizing eviction for other criminal activity require that the activity "threaten" the health, safety, or peaceful enjoyment of the community. 42 U.S.C. § 1437d(l)(6) (2018); 24 C.F.R. § 966.4(l)(5)(ii) (2018). The use of present-tense language indicates that it was Congress' and HUD's intention to authorize housing authorities to address only current threats and not threats which no longer exist. It is well established that "[w]here language is unambiguous, the Court's inquiry is over, and the statute must be applied according to its plain meaning." Jennings v. Jennings, 401 S.C. 1, 4; 736 S.E.2d 242, 244 (2012). Further, "phrases and sentences are to be construed according to the rules of grammar." Poole v. Saxon Mills, 192 S.C. 339, 347; 6 S.E.2d 761 (1939). Thus, because 1) being incarcerated, Cobb did not pose a current threat to the community, 2) because it is clearly within CHA's authority to remove Cobb from Brown's lease pursuant to 24 C.F.R. § 966.4(l)(5)(vii)(C) and 3) because it is undisputed that Brown has made arrangements for Cobb to reside elsewhere; CHA cannot establish

a current threat to the community arising out of Cobb's conduct. As a result, the decision below must be reversed.

III. THE CIRCUIT COURT ERRED IN AFFIRMING THE MAGISTRATE WHERE RESPONDENT HOUSING AUTHORITY OF THE CITY OF CHARLESTON ABUSED ITS DISCRETION IN SEEKING TO EVICT KATRINA BROWN AND HER DAUGHTER, THEREBY RENDERING ITS ACTION ARBITRARY, CAPRICIOUS, AND IN VIOLATION OF BROWN'S RIGHT TO SUBSTANTIVE DUE PROCESS.

While the USHA permits eviction for other criminal activity which presents the requisite threat, it does not require it. Instead, as the Rucker Court noted, the USHA "entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from rampant drug-related or violent crime, the seriousness of the offending action, and 'the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action." 535 U.S. at 133-34 (internal citations and quotations omitted).

HUD regulations also provide that, in deciding what action to take after determining that a tenant, guest, or household member has engaged in criminal activity, CHA may consider:

> all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

24 C.F.R. Part 966.4(l)(5)(vii)(B) (2018). Further, CHA may consider allowing the exclusion of the offending household member rather than seeking to evict an entire household for the actions of one member. 24 C.F.R. Part 966.4(l)(5)(vii)(C) (2018). Thus, while CHA may evict an entire household for certain criminal actions by a single member, it is not required to do so. 535 U.S. at 128-29. Instead, CHA is entrusted with making a decision after consideration of a number of relevant factors.

While HUD has seen fit to confer broad discretion upon housing authorities, they are not at liberty to abuse that discretion, refuse to exercise it, or act arbitrarily. As the United States Supreme Court held in Thorpe v. Hous. Auth. of Durham, 386 U.S. 670 (1967), "[t]he government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process." 386 U.S. at 678. In addition, CHA's discretion is neither boundless nor immune from judicial review. In Greenville Hous. Auth. v. Salters, 281 S.C. 604, 316 S.E.2d 718 (1984), the South Carolina Supreme Court held that judicial interference with the discretion accorded the Housing Authority is warranted where "a review of its actions reveals by clear and convincing evidence some arbitrary action outside the boundaries of the federal laws and regulations." 281 S.C. at 608. Recently, the North Carolina Supreme Court reviewed a case similar in many respects to the instant case. In E. Carolina Reg'l Hous. Auth. v. Lofton, 789 S.E.2d 449, (N.C. 2016), a public-housing tenant admitted that her guest left marijuana in various places in her apartment and that her lease with the housing authority made her responsible for the conduct of her guests. 789 S.E.2d at 451. The housing authority sought to evict the tenant but failed to exercise its discretion apparently believing that the criminal activity at issue mandated eviction. Id. The Lofton Court recognized that while

Rucker held "no-fault" evictions were authorized by statute, the Rucker Court also emphasized the importance of housing authorities exercising discretion before pursuing such evictions. 789 S.E.2d at 453. The court held that federal law required the housing authority to exercise its discretion before pursuing eviction and that doing so was a prerequisite to its right to evict. 789 S.E.2d at 454.

Other courts have reached similar results. For example, in Oakwood Plaza, 800 A.2d 265 (N.J. Super. Ct. App. Div., 2002), a landlord participating in a housing assistance program under Section 8 of the USHA sought to evict a tenant's entire household based on the tenant's arrest for drug related criminal activity. While Oakwood Plaza involved housing benefits under Section 8 of the USHA, rather than the public housing program at issue here, the regulations for each of these programs contain identical language authorizing evictions for criminal activity that affects the health, safety, or right to peaceful enjoyment of the premises by other residents or those living nearby. *Compare* 24 C.F.R. Part 966.4(l)(5)(ii)(A) (2018) (public housing regulation) and 24 C.F.R. Part 982.310(c)(2)(i)(A) (2018) (Section 8 regulation). The Court held that Federal statutes do not permit a Section 8 landlord to act in an arbitrary or capricious fashion. 800 A.2d at 270. Critically, the Court also noted that, because a tenant does not have access to an administrative process to challenge an eviction, as is also the case here, it is the court's responsibility to determine whether the landlord has exercised its discretion in a manner consistent with the Federal statutes. Id.. The Vermont Supreme Court reached a similar result in Bennington Hous. Auth. v. Bush. 933 A.2d 207 (Vt., 2007). There, a housing authority sought eviction based on alleged misrepresentations by a tenant's boyfriend on an application. The court found that the housing authority had abused its discretion by failing to consider other alternatives to eviction. "In the end,

it is still [the housing authority's] decision, but that decision must not be made arbitrarily or without apparent consideration of the alternatives laid out in the regulations." 933 A.2d at 213. The Appellate Court of Illinois reached a similar decision in Gaston v. Chac, Inc., 872 N.E.2d 38 (Ill. App., 2007), albeit for a different reason. There, as here, applicable regulations made termination of housing benefits mandatory in a few circumstances and discretionary in others. *Compare* 24 C.F.R. § 982.552(b) and (c) (2018) (stating grounds for mandatory and discretionary termination, respectively, from the Section 8 housing choice voucher program at issue in Gaston) *with*, e.g. 24 C.F.R. § 966.4(l)(5)(i) (2018) (requiring termination for one particular type of drug-related criminal activity) *and* 24 C.F.R. § 966.4(l)(5)(vii)(B) – (D) (2018) (listing circumstances for consideration and options in lieu of eviction). The Gaston Court held that the housing authority was not limited to consideration of the circumstances listed in the regulations, but that it "must consider some circumstances particular to the individual case, otherwise [the regulatory] distinction between mandatory and discretionary terminations becomes meaningless." 872 N.E.2d at 45.

The North Carolina Supreme Court's decision in Lofton is also important because of where it places the burden of proof regarding the exercise, or abuse, of discretion. The trial court in Lofton found that the housing authority "did not produce evidence that it considered any mitigating factors or used any discretion in making its decision to terminate Defendant's lease." 789 S.E.2d at 451-52. In placing the burden on the housing authority to produce evidence that it actually exercised the broad discretion it had been granted, the Lofton Court followed Rucker's lead in highlighting the need for housing authorities to consider options other than eviction. Here, as in Lofton, there is no evidence in the record to show that CHA considered any mitigating factors or

options other than eviction. Here, as in Lofton, the burden is on CHA to show that it exercised the discretion it has been granted. Here, as in Lofton, eviction is improper because the housing authority abused its discretion.

While the Lofton Court held that a housing authority's duty to exercise its discretion arises out of federal law, 789 S.E.2d at 454, South Carolina case law supports this proposition as well. While South Carolina Courts have not spoken on the use of discretion as it applies to housing authorities, our courts have consistently held that the failure to exercise discretion, once it is conferred, constitutes abuse of that discretion. "The exercise of discretion implies conscientious judgment, not arbitrary action, and takes account of the law and particular circumstances of the case, being directed by the reason and conscience of the judge to a just result." State v. Hill, 266 S.C. 49, 51; 221 S.E.2d 398, 399 (1976). "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." State v. Smith, 276 S.C. 494, 498; 280 S.E.2d 200, 202 (1981) (Noting also that the mere recital of a discretionary decision is insufficient to show discretion was exercised. It must be stated on what basis the discretion was exercised.). *See also* Balloon Plantation v. Head Balloons, Inc., 303 S.C. 152; 399 S.E.2d 439 (Ct. App. 1990); Arrow Bonding Co. v. Warren, 399 S.C. 603; 732 S.E.2d 622 (2012). CHA's failure to exercise its discretion in this case constitutes an abuse of that discretion and renders its decision to seek Brown's eviction arbitrary.

Sitting in appellate review, the Circuit Court found that CHA did exercise its discretion in the instant case because it "was aware of the applicable regulations" and that "[e]viction here did not occur automatically with an alleged violation as it did in *E. Carolina Reg. Hous. Auth. v.*

Lofton." (R. p. 27). The Circuit Court erred in this finding for two reasons. First, CHA's awareness of applicable regulations has no bearing on whether CHA actually considered the circumstances particular to Brown's case as it is required to do. Second, both in Lofton and the instant case, the housing authority had to take some action in order to proceed with eviction. Both North Carolina and South Carolina law provide for judicial evictions which require the landlord or housing authority to file an action in court. *See* N.C.G.S.A. § 42-26 and 42-27 (2018); S.C. Code Ann. § 27-37-10 (2018) . Neither the eviction here nor that in Lofton was automatic in any meaningful sense and, in any event, the Circuit Court's finding that CHA made a choice to proceed with this eviction is not dispositive of whether CHA used or abused the discretion it has been entrusted with. As a result, the Circuit Court erred in finding that CHA did not abuse its discretion both because it misapplied the law regarding abuse of discretion and because there was no evidence presented that CHA actually considered any circumstances particular to Brown's case. As a result, the decision below must be reversed.

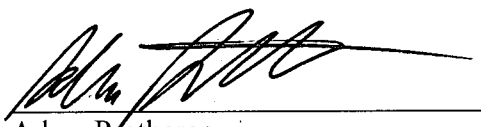
In a letter to Public Housing directors written shortly after the Rucker decision was issued, then-Secretary of HUD Mel Martinez urged PHAs "to be guided by compassion and common sense in responding to cases involving the use of illegal drugs" and emphasized that "[e]viction should be the last option explored, after all others have been exhausted." (R. p. 44). Rather than engage in such an analysis, CHA approaches this case as one in which eviction is automatic or mandatory. Indeed, CHA's appeal of the Magistrate's initial decision – which denied CHA's request to evict Brown and her then 13 year old daughter, but specifically authorized CHA to remove Cobb from Brown's household – illustrates CHA's arbitrary and heavy-handed approach. Rather than accept the Magistrate's order, which directly addressed and thoroughly mitigated any

perceived threat posed by anyone in Brown's household, CHA has engaged in a protracted effort to solve a problem which no longer exists. The relief that CHA seeks in this case is now, as it has been since Cobb's arrest and effective removal from Brown's household, entirely punitive and would serve no purpose except to deprive Brown and her daughter of a home. Such an approach is an abuse of the discretion conferred on CHA and arbitrary action in violation of Brown's right to substantive due process.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2018-002155

The Housing Authority of the City of Charleston

Respondent

v.

Katrina Brown

Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

May 28, 2019

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