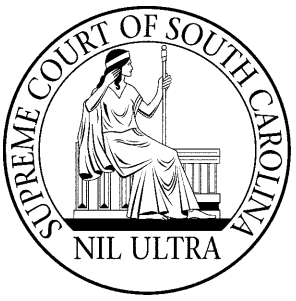

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 1
January 5, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Michael Vernon Beaty, Jr., Appellant.

Appellate Case No. 2015-000718

Appeal from Laurens County
W. Jeffrey Young, Circuit Court Judge

Opinion No. 27693
Heard October 19, 2016 – Filed December 29, 2016

AFFIRMED

Clarence Rauch Wise and E. Charles Grose, Jr., both of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Susannah Rawl Cole, all of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, for Respondent.

CHIEF JUSTICE PLEICONES: Appellant was convicted of murdering his girlfriend and received a life sentence. While we affirm his conviction and

sentence, we find two of the issues he raises require discussion.[1] Those two issues involve the trial judge's use of certain terms in his opening remarks to the jury, and the content requirements of a divided closing argument.

A. Opening Remarks

After the jury was sworn the trial judge gave preliminary remarks. These remarks began with a warning that a real trial was not like television, and outlined the roles, duties, and responsibilities of the lawyers and the jury. This was followed by a "non-charge," further advice about the proper role of the jury, and an explanation of trial procedure. During those remarks, the judge said:

> This . . . trial . . . is a search for the truth in an effort to make sure that justice is done. In searching for the truth and ensuring that justice is done is [sic] often slow, deliberate, and repetitive.
>
> [The attorneys] are sworn to uphold the integrity and the fairness of our judicial system and to help you as jurors to search for the truth.
>
> [Y]ou also just took an oath to listen to the evidence in this case and reach a fair and just verdict and you are expected to be professional, reasonable and ethical.
>
> [Y]ou the jurors find [the facts] from the testimony from a witness from the witness stand or any other evidence, and after hearing that evidence you will deliberate and render a true and just verdict under the solemn oath that you just took as jurors.
>
> [I]n determining what the true facts are in this case you must decide whether or not the testimony of a witness is believable.

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[1] The remaining issues are affirmed pursuant to Rule 220, SCACR. *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989); *State v. Phillips*, 416 S.C. 184, 785 S.E.2d 448 (2016); *State v. Sterling*, 396 S.C. 599, 723 S.E.2d 176 (2012); *State v. Scott*, 414 S.C. 482, 779 S.E.2d 529 (2015); *State v. Martin*, 415 S.C. 475, 783 S.E.2d 808 (2016); *State v. Smith*, 230 S.C. 164, 94 S.E.2d 886 (1956); *State v. Vang*, 353 S.C. 78, 577 S.E.2d 225 (Ct. App. 2003).

> [A]fter argument of counsel and the charge on the law by me, you will then be in a position to determine what the true facts are and apply those facts to the law and thus surrender [sic] a true and just verdict.

Following this statement, appellant requested a sidebar, and his objection was later put on the record.

At trial, appellant objected to the use of the terms "search[ing] for the truth," "true facts," and "just verdict." Appellant complained these terms were especially concerning when linked with the Solicitor's "misstatement" of circumstantial evidence and reasonable doubt in his opening statement,[2] and because the Solicitor had informed the jury that it would have to pick between two competing theories. The Solicitor acknowledged to the trial judge that the "search for the truth" language is disfavored but argued that its use here was not reversible error. The trial judge denied appellant's request for a curative instruction, holding that his remarks were merely an opening comment and not a jury instruction.

Appellant relies upon *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), which held that jury instructions on reasonable doubt which also charge the jury to "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant. The *Aleksey* court found there was no reversible error in the charge given there because the "seek the truth" language was given in conjunction with the credibility charge, and not with either the reasonable doubt or circumstantial evidence charge. *Cf. State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012) (instructing discontinuance of charge that jury's duty is to return a verdict just and fair to all parties).

It is true, as the trial judge noted, that the comments here can be distinguished from *Aleksey* in that his was a "statement" and not a jury charge. Further, the remarks were not linked to either reasonable doubt or circumstantial evidence as was condemned in *Aleksey*. However, we agree with appellant that a trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury,

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[2] Appellant did not contemporaneously object to these alleged misstatements.

independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal. *Compare State v. Coggins*, 210 S.C. 242, 42 S.E.2d 240 (1947) (trial court's choice of words and comments, while not "happy," did not require reversal).

B. Closing Argument

Appellant also contends the trial court erred in failing to require the State to open fully on the law and facts in its closing argument, and to limit the State's reply to matters raised by appellant's counsel in his "middle" closing argument.[3] Appellant argues that without such a rule, his procedural due process rights are offended. *State v. Legg*, 416 S.C. 9, 785 S.E.2d 369 (2016) (procedural due process requires a fair hearing). We agree in part, and hold that in a criminal trial where the party with the "middle" argument requests, the party with the right to the first and last closing argument must open in full on the law and the facts, and in reply may respond in full to the other party's argument but may not raise new matter.[4] *Cf.*

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[3] This is, in fact, the issue raised by appellant to the trial judge **prior** to the closing arguments by both oral and written motion. Justice Few confuses appellant's arguments concerning prejudice made after those arguments with the actual issue before the Court today.

[4] Justice Few does not grasp that the common law rule we adopt today is **not** the rule we proposed to the General Assembly and that, as is its prerogative under the Constitution, it rejected. That rule would have required that the State open and close **in every case**. Today, we preserve the common law rule that the defendant has the right to open and close if he presents no evidence adopted in *State v. Brisbane*, 2 S.C.L. (2 Bay) 451, 452-4 (1802), the rule that would have been changed had Rule 21 been adopted. Moreover, in restoring the requirement that the party with the first argument open in full and raise no new matters in reply we exercise our **authority** and our **duty** to alter, and in this case restore, the common

Rule 43(j), SCRCP; *compare Bailey v. State*, 440 A.2d 997 (Del. 1982) (due process offended when State permitted to "sandbag" by making perfunctory opening statement and then argue in full in reply, thereby depriving defendant the opportunity to counter State's arguments).

With the adoption of this rule governing the contents of closing arguments, we restore what had been, largely by court rule, the practice in this state for many years until 1971. *Compare State v. Huckie*, 22 S.C. 298 (1885) (identifying rule as having been "in existence" since 1796) *with State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971), *overruled in part on different grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (stating open in full practice altered with replacement of Circuit Court Rule 59 by Rule 58). In this case, we have reviewed the State's opening argument and its reply, and find that appellant is not entitled to a new trial as any error in the trial court's denial of his motion to require the State to open in full and limit its reply was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967) (harmless constitutional violation standard).

C. Conclusion

We instruct trial judges to omit any language, whether in remarks to the jury or in an instruction, which might have the effect of lessening the State's burden of proof in a criminal case. Further, we hold that in criminal cases tried after this opinion becomes final, if requested by the party with the right to second argument, the party with the right to open and close will be required to open in full on the law and the facts, and be limited in reply to addressing the other party's argument and not permitted to raise new matters.

After review of the record in this matter, appellant's conviction and sentence are

AFFIRMED.

BEATTY, KITTREDGE and HEARN, JJ., concur. FEW, J., concurring in part and dissenting in part in a separate opinion.

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law rule. *E.g.*, *Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d 85 (2007); *State v. Huckie*, *supra*.

JUSTICE FEW: I concur in section A, the majority's comments regarding the trial court's opening remarks to the jury. It is only fair to the trial court, however, and the other trial judges in South Carolina who have been using similar charges to introduce a jury to its responsibilities in a criminal trial, that we acknowledge our own responsibility in regard to the trial court's remarks. While "we have urged trial courts to avoid using any 'seek' language when charging jurors on either reasonable doubt or circumstantial evidence," *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (citing *State v. Needs,* 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)), that is not what the trial court did in this case. The trial court's "search for the truth" charge in this case was not connected to its charge on reasonable doubt or circumstantial evidence. What the trial court did do in this case is to use language almost identical to a "Preliminary Charge" this Court has continued to maintain for circuit judges on the judicial department intranet. Thus, we have been recommending that circuit judges use the very charge we now forbid.

I do not agree with section B, the majority's decision to change the rules of procedure regarding closing arguments for future criminal trials. As to the substance of the majority's new rule, the new rule is a better rule that will uphold the due process rights of defendants while adequately preserving the right of the State to present and argue its cases to the jury. But this Court does not have the power to promulgate new rules of procedure for future trials by writing opinions to decide cases. Rather, when we decide an appeal from a criminal conviction—as we do here—our power is limited to correcting errors of law.[5] The majority's decision today exceeds that power.[6]

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[5] *See* S.C. CONST. art. V, § 5 ("The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe."); *State v. Asbury*, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("This Court's scope of review is determined by our State constitution which limits our scope of review in law cases to the correction of errors of law." (citing S.C. CONST. art. V, § 5)); *State v. Francis*, 152 S.C. 17, 149 S.E. 348, 364 (1929) ("We think it not out of place to once again call attention to the fact that in criminal cases, even in those where men have been sentenced to death, this court, under the Constitution of this state, is absolutely limited to the correction of errors of law."). In *Asbury* and *Francis*, we cited the article V, section 5 limitation on our power to demonstrate we do not have the power to reach questions of fact. The limitation is

The Supreme Court does have the power to promulgate rules of procedure, but that power must be exercised pursuant to article V, section 4A of the South Carolina Constitution, which provides,

> All rules and amendments to rules governing practice and procedure in all courts of this State promulgated by the Supreme Court must be submitted by the Supreme Court to the Judiciary Committee of each House of the General Assembly . . . .

S.C. CONST. art. V, § 4A.

It is particularly inappropriate that this Court would write this new rule in this case. On January 28, 2016, the Supreme Court proposed an amendment to the South Carolina Rules of Criminal Procedure to add new Rule 21, which would have changed the law precisely as the majority changes the law today. *Re: Amendments to the S.C. Rules of Criminal Procedure*, 2014-002673 (S.C. Sup. Ct. Order dated Jan. 28, 2016). The proposed rule provided, "Closing arguments in all non-capital cases shall proceed in the following order: (a) the prosecution shall open the argument in full; (b) the defense shall be permitted to reply; and (c) the prosecution shall then be permitted to reply in rebuttal." *Id.* The January 28 order proposing the rule specifically stated, "These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution." *Id.* Article V, section 4A provides the General Assembly may reject proposed rules. "Such rules or amendments shall become effective ninety calendar days after submission unless disapproved by concurrent resolution of the General Assembly, with the concurrence of three-fifths of the members of each House present and voting." S.C. CONST. art. V, § 4A. On April 26, 2016, the General Assembly rejected Rule 21 by concurrent resolution, stating:

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even more important when the constitution specifically provides the manner in which we may act. *See* S.C. CONST. art. V, § 4A.

[6] In most cases, of course, our decision to correct an error of law becomes precedent that is binding on courts in the future. *See, e.g.*, *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (finding an error of law in the use of the inferred malice jury charge, reversing the conviction, and noting the ruling is binding in future cases).

> Be it resolved by the Senate, the House of Representatives concurring:
>
> That the amendments to the South Carolina Rules of Criminal Procedure, as promulgated by the Supreme Court of South Carolina and submitted to the General Assembly on January 28, 2016, pursuant to the provisions of Article V of the South Carolina Constitution are disapproved.

S. Con. Res. 1191, 121st Gen. Sess. (S.C. 2016).

Having attempted to change the rules of criminal procedure by following the requirements of the constitution, but having the changes rejected by the General Assembly (as the constitution provides it may do), this Court now makes an end-run around the constitution to change the rules anyway. While I respect the majority's determination to write rules of procedure that protect the due process rights of our citizens, we must do so within the constitutional limitations on judicial power.

In this case, Beaty's trial counsel raised a narrow issue that we could address without changing the rules of procedure for future trials. After the solicitor made his final closing argument, Beaty's counsel told the trial court the solicitor had "sandbagged his entire argument" and argued it was "a gross violation of due process." Counsel then requested the opportunity to "go through a list of things that we would like to have had the opportunity to refute" if given the opportunity to reply to the State's argument. As to one specific point, counsel argued the State presented a factual scenario for the first time in its final argument. Counsel then argued he could not have anticipated such an argument, and Beaty deserved the right to reply to it. Counsel then listed numerous other points in the State's final argument he argued were misleading, and explained in detail how he would have structured his own closing argument to respond if he had the opportunity. Finally, counsel specifically requested he be allowed "to reargue before the jury" to protect Beaty's due process rights. The trial court stated, "I'm not going to do that."

Beaty raised this limited issue on appeal. The majority finds "any error in the trial court's [ruling] was harmless beyond a reasonable doubt." Presumably, the

majority finds the error harmless because it finds Beaty's due process rights were not actually violated in this case. This limited ruling on this limited issue is sufficient to resolve this appeal. I therefore dissent from section B in which the majority adopts new rules regarding closing argument in all future criminal trials.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Charles Allen Cain, Petitioner.

Appellate Case No. 2015-001983

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
R. Lawton McIntosh, Circuit Court Judge

Opinion No. 27694
Heard October 20, 2016 – Filed January 5, 2017

REVERSED

Thomas J. Rode, of Thurmond Kirchner & Timbes, P.A., of Charleston; and Chief Appellate Defender Robert Dudek, of Columbia, both for Petitioner.

Attorney General Alan Wilson and Senior Assistant Attorney General David Spencer, both of Columbia; and Solicitor Barry J. Barnette, of Spartanburg, all for Respondent.

JUSTICE FEW: Charles Allen Cain appeals his conviction for trafficking in methamphetamine. He argues the State produced insufficient evidence as to the quantity of drugs required for trafficking, and thus the trial court erred when it denied his motion for a directed verdict. The court of appeals found the core of

Cain's argument was not preserved for appellate review, and affirmed. We find Cain's argument is preserved, and the court of appeals erred by affirming the denial of the directed verdict motion. We reverse.

I. Facts and Procedural History

In January 2012, deputies of the Spartanburg County Sheriff's Office went to 371 Dakota Street near the City of Spartanburg to serve a bench warrant on Travis Kirby. Charles Cain and Tiphani Parkhurst were renting a bedroom in the house and answered the door. After some discussion, Cain gave the deputies permission to enter. While searching for Kirby, the deputies discovered equipment used to manufacture methamphetamine. The deputies called Beth Stuart, a forensic chemist employed by the Sheriff's Office, to investigate the scene. Although Stuart did not find any methamphetamine, she did find evidence of ingredients used to manufacture methamphetamine. This evidence included empty packages of Sudafed, which Stuart determined once contained 19.2 grams of pseudoephedrine. Using a scientific theory known as stoichiometry,[1] Stuart calculated that 19.2 grams of pseudoephedrine could theoretically produce 17.67 grams of methamphetamine, if Cain manufactured the methamphetamine with maximum efficiency. Based on Stuart's analysis, the State charged Cain and Parkhurst with trafficking in methamphetamine under subsection 44-53-375(C) of the South Carolina Code (Supp. 2016). Under that subsection, a defendant is guilty of trafficking if the State proves the defendant "knowingly . . . attempts . . . to . . . manufacture . . . ten grams or more of methamphetamine." *Id.*

Cain made a pretrial motion to dismiss, a directed verdict motion, and he renewed the directed verdict motion at the close of the evidence, all on the basis that the State did not present sufficient evidence to prove the required quantity of methamphetamine to establish trafficking under subsection 44-53-375(C). The trial court denied the motions. The jury found Cain and Parkhurst guilty of trafficking in methamphetamine.

Cain appealed to the court of appeals raising three issues. He argued (1) the trial court erred in admitting Stuart's testimony into evidence; (2) the trial court erred in denying Cain's directed verdict motion because the State did not prove Cain had custody and control of the means of manufacturing the methamphetamine; and (3)

[1] Stoichiometry is "the study of *quantitative* relationships involving the substances in chemical reactions." Daniel L. Reger, Scott R. Goode & David W. Ball, *Chemistry: Principles and Practice* 92 (3rd ed. 2010).

the trial court erred in denying Cain's directed verdict motion because the State did not present sufficient evidence of the requisite quantity of methamphetamine for a conviction for trafficking. The court of appeals reached the merits of the first two issues, and affirmed. *State v. Cain*, 413 S.C. 508, 527, 533, 776 S.E.2d 374, 384, 387 (Ct. App. 2015). The central issue of Cain's appeal was the sufficiency of the State's evidence of quantity—the third issue—which Cain described in his brief to the court of appeals as "whether an attempted trafficking conviction may be based solely on expert testimony that it was 'theoretically' possible that the accused could have committed the offense." The court of appeals found this issue was not preserved for appellate review. 413 S.C. at 530-31, 776 S.E.2d at 385-86. We granted certiorari only to review the court of appeals' decision as to the third issue.[2]

II. Evidence of Quantity

Subsection 44-53-375(C) permits the State to prove trafficking based on a variety of factual scenarios. One element the State must prove in all scenarios is the quantity of "ten grams or more." *Id.* Commonly, the State meets its burden on this element by proving the quantity of the methamphetamine itself. In this case, however, the sheriff's deputies found no methamphetamine. Therefore, to prove Cain guilty of trafficking the State was required to prove he attempted to manufacture the requisite quantity. The State relied exclusively on Stuart to prove the element of quantity, as there is no other evidence in the record of the quantity of methamphetamine Cain attempted to manufacture.

Cain argues Stuart's testimony is insufficient because it proves only the theoretical quantity of drugs a person could have produced at maximum efficiency; it does not prove the quantity Cain could realistically have intended to manufacture. Without evidence showing Cain could actually have produced ten grams or more of methamphetamine with the equipment and ingredients he had at his disposal, Cain argues, the trial court erred in denying his motion for directed verdict. We agree.

As background to her testimony about quantity, Stuart described the equipment and ingredients found at the scene, and how Cain would have used them in the "one pot" method of manufacturing methamphetamine. As Stuart explained, a person using the one pot method fills a two-liter drink bottle with various ingredients until a chemical reaction takes place. The bottle Cain used was an

[2] The issues we identify as the second and third correspond to subparts B and A of section II of the court of appeals' opinion. 413 S.C. at 528-33, 776 S.E.2d at 384-87.

empty liquor bottle. The first step of the one pot method is to crush Sudafed pills and put the pseudoephedrine into the bottle. Then, Cain would have dumped ammonia, lighter fluid, lithium strips from batteries, and water into the liquor bottle and waited for a chemical reaction. Stuart explained that after an hour or so, Cain would have poured the liquid out of the liquor bottle into a separate bottle. That liquid is methamphetamine base. To produce the end product, Cain would have dumped muriatic acid, which is commonly found in drain cleaners, and salt into another bottle to produce acid gas. When the acid gas is mixed with the liquid base, it forms a white powder that is the end product—methamphetamine. Stuart testified Cain's method did not take place under laboratory conditions, and admitted that calling his operation a "meth lab" was a "misuse of the word lab."

As to the quantity of methamphetamine that could be produced from this method, Stuart and the solicitor had the following exchange:

> Q: Now, if you take the 19,200 milligrams of either the Sudafed you found or the empty Sudafed that had been there . . . and you were going to attempt to manufacture methamphetamine, and you got a one hundred percent yield . . . how much methamphetamine could you manufacture?
>
> A: 17.67 grams.
>
> . . . .
>
> Q: And that's under laboratory conditions?
>
> A: Yes.
>
> Q: Let's say you only got an 80 percent yield . . . [h]ow much could you manufacture?
>
> A: 14.13 grams.
>
> Q: How about a 75 percent yield?
>
> A: 13.25 grams.
>
> Q: How about a 70 percent yield?

A: 12.36 grams.

Q: What about a 65 percent yield?

A: 11.48 grams.

Q: Still more than ten grams?

A: Yes, sir.

Q: So . . . if you were going to get at least a two-thirds return on what you put in, you would still manufacture more than ten grams?

A: Yes.

This testimony was the only evidence the State offered as to the quantity involved in Cain's alleged trafficking in methamphetamine.

"It is a fundamental concept of criminal law that the State must prove beyond a reasonable doubt all the elements of the offense charged against the defendant." *State v. Brown*, 360 S.C. 581, 590, 602 S.E.2d 392, 397 (2004). The State may not obtain a conviction when its proof as to any one element requires the jury to speculate or guess whether the defendant engaged in the conduct the legislature sought to criminalize. *State v. Brown*, 267 S.C. 311, 316, 227 S.E.2d 674, 677 (1976) (stating "the motion for a directed verdict should be granted where evidence . . . is such as to permit the jury to merely conjecture or to speculate"); *see also Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997) (stating "verdicts may not be permitted to rest upon surmise, conjecture, or speculation"); *State v. Hyder*, 242 S.C. 372, 379, 131 S.E.2d 96, 100 (1963) ("We have held that suspicion, however strong, does not suffice to sustain a conviction."). The "attempt[] . . . to manufacture . . . methamphetamine" is criminalized under subsection 44-53-375(B) of the South Carolina Code (Supp. 2016) without regard to quantity. Subsection 44-53-375(C) criminalizes such an attempt as "trafficking" only when the State proves the quantity he attempted to manufacture was "ten grams or more." However, subsection 44-53-375(C) does not criminalize the theoretical possibility of manufacturing ten grams or more of methamphetamine.

Stuart's testimony proves it was theoretically possible to manufacture 17.67 grams of methamphetamine from 19.2 grams of pseudoephedrine if the process was conducted at one hundred percent efficiency. However, Stuart specifically acknowledged the quantity of 17.67 grams was calculated on the assumptions of "ideal laboratory conditions" with "pure products" used by a "trained chemist." Stuart admitted Cain did not have ideal laboratory conditions, and the State offered no evidence Cain even knew how to manufacture methamphetamine. There is no other evidence in the record to support the validity of Stuart's assumptions. Stuart's testimony also proves the quantity of methamphetamine Cain could have manufactured at various lower levels of efficiency. However, Stuart's testimony provides no basis for calculating the level of efficiency Cain could actually have reached under the circumstances that existed in the house. In fact, Cain's counsel specifically asked Stuart on cross examination, "There's no way to tell, from what you had there, how much [the defendants] were actually getting from their work?" Stuart replied, "No, sir."

This answer left the jury in the position of having to speculate as to Cain's efficiency at making methamphetamine, and therefore having to guess at how much of the drug he attempted to manufacture. As we stated in *Brown*, "the motion for a directed verdict should be granted where evidence . . . is such as to permit the jury to merely conjecture or to speculate." 267 S.C. at 316, 227 S.E.2d at 677. Because the State offered no evidentiary basis on which the jury could have determined—without speculating—the quantity of methamphetamine Cain attempted to manufacture, the trial court was required to grant Cain's motion for a directed verdict, and the court of appeals erred by affirming.

Courts in other jurisdictions have also found that evidence of a theoretical amount produced at maximum efficiency is insufficient proof of the quantity element. In *United States v. Eide*, 297 F.3d 701 (8th Cir. 2002), the defendant was convicted of attempting to manufacture five grams or more of methamphetamine. 297 F.3d at 702. On appeal, he argued the government's evidence was not sufficient as to quantity, and thus "he should be resentenced on the included offense of simple attempted manufacturing." 297 F.3d at 704. As in Cain's case, the government in *Eide* did not find any methamphetamine in the defendant's residence, but it did find pseudoephedrine and equipment commonly used to manufacture methamphetamine. 297 F.3d at 702-03. Therefore, the government relied on expert testimony to establish the quantity of methamphetamine the defendant attempted to manufacture. 297 F.3d at 703-04.

The government's expert was Patricia Krahn, a chemist from the Iowa Division of Criminal Investigation. 297 F.3d at 703. She testified the 27.6 grams of pseudoephedrine found at the defendant's residence could theoretically produce "the highest possible yield" of 25.39 grams of methamphetamine. 297 F.3d at 703-04. The Eighth Circuit found this evidence insufficient, stating, "Quantity yield figures should not be calculated without regard for the particular capabilities of a defendant and the drug manufacturing site." 297 F.3d at 705. *See also United States v. Anderson*, 236 F.3d 427, 430 (8th Cir. 2001) (stating "the relevant inquiry is not what a theoretical maximum yield would be, or even what an average methamphetamine cook would produce, but what appellants themselves could produce"); *United States v. Eschman*, 227 F.3d 886, 890 (7th Cir. 2000) (holding "courts cannot quantify yield figures without regard for a particular defendant's capabilities when viewed in light of the drug laboratory involved"); *Buelna v. State*, 20 N.E.3d 137, 146 (Ind. 2014) (holding testimony must be "accurately tailored to the specific manufacturing conditions, ingredients, and skill of the accused").

In *Eide*, after rejecting the government's evidence of theoretical maximum yield, the Eighth Circuit focused on the expert's explanation of "the particular methamphetamine manufacturing processes" the defendant used, and her testimony "that his lithium ammonia reduction process was capable of producing a 40 to 50 percent yield." 297 F.3d at 705. The court stated, "This yield would have resulted in producing 10.1 to 12.6 grams of actual methamphetamine." 297 F.3d at 704. The court affirmed the conviction because it found, "The particularized nature of Krahn's testimony, combined with additional evidence suggesting that Eide was experienced in the manufacture of methamphetamine, were sufficient for a jury to find beyond a reasonable doubt that Eide was a good cook capable of producing a 40 to 50 percent yield." 297 F.3d at 705.

Unlike the expert testimony in *Eide*, Stuart's testimony provided the jury no basis on which to determine how much methamphetamine Cain could actually have produced. If Cain were a "good cook" like Eide, "capable of producing a . . . 50 percent yield," he would have manufactured 8.83 grams of methamphetamine, and thus, he could not be guilty of trafficking.

We review the denial of a directed verdict motion in a criminal case under the any evidence standard of review. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *State v. Harris*, 413 S.C. 454, 457, 776 S.E.2d 365, 366 (2015) (quoting *State v. Brandt,* 393 S.C. 526,

542, 713 S.E.2d 591, 599 (2011)). In this case, the State presented some evidence of quantity. As we have explained, however, subsection 44-53-375(C) does not criminalize the theoretical possibility of manufacturing "ten grams or more" of methamphetamine. Because the State did not establish the level of efficiency Cain could have actually achieved in his attempt to manufacture methamphetamine, the jury was forced to speculate as to whether Cain could have actually produced the requisite quantity. Under this circumstance, we find the State presented "no evidence" that Cain attempted to manufacture ten grams or more of methamphetamine. The trial court erred in not granting Cain's directed verdict motion.

III. Issue Preservation

We now turn to the court of appeals' holding that Cain's argument was not preserved for appellate review. Our appellate courts have consistently found issues preserved for review when the issue was raised to and ruled upon by the trial court. *See, e.g.*, *State v. Williams*, 417 S.C. 209, 228 n.10, 789 S.E.2d 582, 592 n.10 (Ct. App. 2016) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." (quoting *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003))). While a party may not argue one ground at trial and another ground on appeal, *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989), we do not require a party to use the same language on appeal as it did at trial, *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). We find Cain's argument at trial and his argument on appeal were the same: that Stuart's testimony was not sufficient to prove the quantity element of "ten grams or more." Thus, the argument before us now is preserved for appeal because it was raised to and ruled upon by the trial court. *See Williams*, 417 S.C. at 228 n.10, 789 S.E.2d at 592 n.10.

Cain repeatedly argued at trial the State's evidence as to quantity was not sufficient. In a pretrial motion to dismiss, Cain argued, "I don't think there's anything in [subsection 44-53-375(C)] or in South Carolina law that says you can take a theoretical yield[3] based on the evidence found and make it into a trafficking case." Cain continued, "I just think that if the case would go forward it would go forward as a manufacturing as opposed to trafficking case." In drawing this

[3] Theoretical yield is "the maximum quantity of product that can be obtained from a chemical reaction, based on the amounts of starting materials." Reger, Goode & Ball, *supra* note 1, at 118. However, the amount actually produced "is always less than the theoretical yield." *Id.* at 123.

distinction between trafficking and simple manufacturing, which under subsection 44-53-375(B) contains no element of quantity, Cain necessarily focused the trial court's attention on the sufficiency of the State's evidence on the quantity element. The solicitor clearly understood the argument to relate to quantity, stating "we would argue that [Cain and Parkhurst] are attempting to manufactur[e] methamphetamine and the attempt to manufacture [is] more than, the theoretical yield of more than 10 grams in this case, the maximum theoretical yield is just about 17 grams." The trial court took the motion to dismiss under advisement.

Cain also focused on quantity when he made his motion for a directed verdict. He argued,

> Your Honor, we'd make a motion for directed verdict. The testimony has been presented that there is some type of something going on in this house, some ingredient in this house that has been identified as a meth lab with some yield. In optimal conditions, maybe, to be a little over 17 grams.

He continued his argument by drawing the same distinction between simple manufacturing and trafficking. He stated,

> I think the evidence that has been presented is, at this point . . . not sufficient for at least trafficking . . . [b]ut it's certainly the—it's too speculative to present the trafficking. So, if we don't have—if we have enough to present to the jury, I submit we have—it would be for manufacturing as opposed to trafficking.

In denying the motion, the trial court specifically referred back to the previous discussion about "theoretical yield," indicating the trial court understood the directed verdict motion to address the sufficiency of the State's evidence on the element of quantity. *See State v. Kromah*, 401 S.C. 340, 353, 737 S.E.2d 490, 497 (2013) (holding the issue was preserved when the trial court immediately appeared to understand the objection was a renewal of a previous argument); *State v. Hendricks*, 408 S.C. 525, 531, 759 S.E.2d 434, 437 (Ct. App. 2014) (holding an issue was preserved in part because the trial court immediately understood the basis of the objection).

After all the evidence had been presented, the parties began another discussion of the quantity element. The trial court stated,

> I think you're protected on the record, but I am denying the motion based on the plain reading of the statute, and based on the case of persuasive authority[4] that was handed in by [the solicitor]. I think theoretical yield would be an appropriate analysis in this case.

At first glance, the ruling appears to relate only to the motion to dismiss. However, later in the transcript the trial court clarified it understood Cain to have renewed his directed verdict motion—on the basis of quantity—and that when it ruled, the trial court denied the motion to dismiss and the renewed directed verdict motion.

On appeal, Cain made the same argument—theoretical yield is not sufficient evidence of quantity—but he complimented the argument by describing what evidence would be sufficient. In doing so, he used a term he had not used at trial—"potential yield." Cain used the term potential yield to describe for the court of appeals the quantity of methamphetamine a person could *actually* produce given his level of expertise in light of all the conditions present at the time. He used the term to draw a contrast between evidence that would be sufficient and the

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[4] The "persuasive authority" to which the trial court referred was an unpublished opinion from the Iowa court of appeals, *State v. Knapp*, No. 08-1918 (Iowa Ct. App. Dec. 17, 2009). The solicitor earlier relied on *Knapp* to support the State's argument that theoretical yield evidence is sufficient to prove the quantity element. *Knapp* supports neither the State's argument nor the trial court's ruling. While it is true the State relied on theoretical yield evidence in *Knapp*, the Iowa court of appeals affirmed based on the expert's testimony of what actual yield the defendant could have achieved. *Knapp*, slip op. at 8. The defendant in *Knapp* possessed enough pseudoephedrine to produce a "theoretical yield of 15.4 grams of methamphetamine." *Knapp*, slip op. at 3. However, the expert estimated the defendant could "actually produce between six and seven grams of pure methamphetamine." *Id.*

theoretical yield evidence offered by the State, which he argued was not sufficient.[5] This was the same argument Cain made in his pre-trial motion to dismiss, his directed verdict motion, and his renewed directed verdict motion. Regardless of the labels used by Cain, his argument on appeal was the same argument repeatedly raised to and ruled upon by the trial court. Thus, we find the court of appeals erred in holding Cain's argument is not preserved for review.

IV. Conclusion

We find the State produced insufficient evidence as to the quantity of drugs involved in Cain's alleged trafficking in methamphetamine. Accordingly, the court of appeals' decision—and Cain's conviction for trafficking—are **REVERSED**.

BEATTY, C.J., KITTREDGE, HEARN, JJ., and Acting Justice Costa M. Pleicones, concur.

[5] Other courts have used the terms "theoretical yield" and "potential yield" to draw the same contrast between the quantity of drugs that can be manufactured at maximum efficiency (theoretical yield) and the quantity that could actually be produced given the limitations of the system used and the expertise of the person making the drugs (potential yield). *Compare United States v. Weaver*, 425 F. App'x 267, 268-69 (4th Cir. 2011) (discussing "theoretical yield"), *and United States v. Chase*, 499 F.3d 1061, 1069 (9th Cir. 2007) (same), *and State v. Hooks*, 777 S.E.2d 133, 136 (N.C. Ct. App. 2015) (same), *with Knapp*, No. 08-1918, slip op. at 8 (discussing "potential yield"). We suggest the term "potential yield" is confusing, and if it is necessary to label the concept Cain sought to describe, a term such as "actual yield" would be more useful.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael Gonzales, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-001553

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
Roger L. Couch, Post-Conviction Relief Judge

Opinion No. 27695
Heard September 21, 2016 – Filed January 5, 2017

REVERSED

Appellate Defender Susan Barber Hackett of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Alicia A. Olive, both of Columbia, for Respondent.

ACTING JUSTICE PLEICONES: Petitioner was convicted of trafficking in 400 grams or more of methamphetamine. He was sentenced to thirty years'

imprisonment, and his conviction and sentence were affirmed on direct appeal. *State v. Gonzales*, 360 S.C. 263, 600 S.E.2d 122 (Ct. App. 2004).[1] Petitioner then filed this post-conviction relief ("PCR") action, arguing his trial counsel had a conflict of interest which adversely affected trial counsel's performance. The PCR judge denied relief, and in a split decision, the Court of Appeals affirmed the PCR judge's order. *Gonzales v. State*, 412 S.C. 478, 772 S.E.2d 557 (Ct. App. 2015). Because we find the Court of Appeals erred in affirming the PCR judge's order denying petitioner relief, we reverse the denial of petitioner's application for PCR.

FACTS

Petitioner, who was a juvenile, lived with his mother and her longtime boyfriend, Dino Perez. In 2001, at the request of petitioner's mother, trial counsel successfully represented Perez in a drug related forfeiture action. Less than a year later, in January 2002, petitioner was arrested for trafficking in marijuana over one thousand pounds. At the request of petitioner's mother, trial counsel agreed to represent petitioner on the trafficking charge. Three months later, in April 2002, Perez was also arrested for trafficking in marijuana in excess of one thousand pounds. At the request of petitioner's mother, trial counsel agreed to also represent Perez on his trafficking charge.

In June 2002, petitioner was arrested on the charge of trafficking in methamphetamine—the conviction which petitioner challenged at the PCR proceeding leading to the case now before this Court. Trial counsel agreed to represent petitioner on the trafficking in methamphetamine charge. Thus, as of June 2002, trial counsel was simultaneously representing petitioner on his trafficking in marijuana and trafficking in methamphetamine charges, as well as representing Perez on his trafficking in marijuana charge.

One month later, in July 2002, while petitioner's and Perez's respective trafficking in marijuana charges were still pending, petitioner was tried and convicted on his trafficking in methamphetamine charge. Petitioner received a thirty year sentence, and hired a different attorney to represent him on his direct appeal ("appellate counsel").

[1] Later overruled in part by *State v. Gentry*, 363 S.C 93, 610 S.E.2d 494 (2005).

It is uncontroverted that prior to petitioner's July 2002 trial for trafficking in methamphetamine, trial counsel knew: (1) petitioner was a juvenile; (2) petitioner's mother had approached him twice to represent petitioner, and twice to represent Perez; (3) petitioner and Perez had each been arrested on separate charges—trafficking in marijuana in excess of one thousand pounds—in the same geographical area within a three month period; (3) petitioner's mother had paid the $50,000 attorney's fees for representation of both petitioner's and Perez's trafficking in marijuana charges; (4) when petitioner's mother was "trying to find money" to pay the additional $25,000 attorney's fee for petitioner's trafficking in methamphetamine charge, trial counsel discussed with petitioner's mother using the money he had assisted Perez in recovering in his 2001 forfeiture action; (5) a check written from Perez's account for $3,220 was used to pay part of the attorney's fee in petitioner's trafficking in methamphetamine case; and (6) the remainder was paid by J&M Contractors.[2]

Despite all such indicators, trial counsel testified he never recognized the potential for a conflict of interest. Therefore, prior to petitioner's July 2002 methamphetamine trial, trial counsel never discussed with petitioner or Perez the potential for a conflict of interest or sought a waiver by either client. Trial counsel also never discussed with petitioner that his attorney's fees were being paid for by a third-party, and particularly a third-party who may have an adverse interest in petitioner's case.

In 2003, under the advisement of appellate counsel, petitioner agreed to provide federal authorities with substantial information as to Perez's wide-scale trafficking operation in exchange for complete protection from federal prosecution. Subsequently—after petitioner's methamphetamine trial, but while petitioner's and Perez's marijuana charges were still pending—trial counsel was contacted by the United States Attorney's Office regarding his representation of both petitioner and Perez. Specifically, Perez's trafficking charge had become the subject of federal jurisdiction, and trial counsel was contacted by several Assistant United States Attorneys who warned there were allegations of a conspiracy between Perez and petitioner in regards to the pending trafficking charges, and that petitioner was a potential witness in the federal government's case against Perez. The United States

[2] At the PCR hearing, trial counsel testified he could not remember if J&M Contractors was affiliated with Perez, petitioner, or petitioner's mother; however, petitioner testified J&M Contractors was affiliated with Perez.

Attorney's Office informed trial counsel that based on the alleged conspiracy, his common representation of Perez and petitioner created a conflict of interest.

Trial counsel withdrew from representation of Perez a short time thereafter. Trial counsel then met with petitioner and explained that if petitioner were cooperating with the federal government on the Perez marijuana investigation, it created a conflict of interest for trial counsel, and petitioner needed to sign a waiver in order for trial counsel to continue representing him. Petitioner denied any dealings with Perez, or meeting with federal agents, but stated he needed to think about signing a waiver.[3] Trial counsel never heard from petitioner again. From Spring 2003 until his formal withdrawal in 2004, the only information trial counsel received as to petitioner was from appellate counsel, who was representing petitioner on a federal material witness warrant in the case against Perez.

In July 2004, trial counsel filed a motion to be relieved as counsel in petitioner's trafficking in marijuana case based on "certain actions undertaken by [petitioner] in his own behalf," causing trial counsel a conflict of interest by "engaging in negotiations . . . interviews, et cetera" with the federal government without consulting with or informing trial counsel. By the time trial counsel confronted petitioner about alleged cooperation with the federal government, petitioner had already provided significant information to federal authorities regarding Perez's business of trafficking in illicit drugs. Perez pleaded guilty to the federal trafficking in marijuana charge.

Appellate counsel was appointed to represent petitioner on the state marijuana charge. She negotiated on petitioner's behalf a five-year concurrent sentence on the reduced charge of trafficking in marijuana 10–100 pounds. Petitioner was sentenced to five years' imprisonment to run concurrently with the sentence for

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[3] At the PCR hearing, petitioner admitted to "lying" when he told trial counsel after his conviction on the methamphetamine charge that he did not have any connection with Perez; petitioner claims he was not forthcoming because prior to his trafficking in methamphetamine trial, he attempted to inform trial counsel of his connection to Perez, and trial counsel refused to listen. Petitioner further admitted that he was untruthful when he told trial counsel he was not cooperating with the federal government in the case against Perez. Petitioner claims he withheld his cooperation from trial counsel because, in part, he knew trial counsel still represented Perez, and petitioner was scared of Perez both for his sake and his mother's sake.

trafficking in methamphetamine. Petitioner then brought this PCR action claiming trial counsel had a conflict of interest in representing both petitioner and Perez.

At the PCR hearing, trial counsel was asked whether, once made aware of the conflict of interest, he attempted to file any type of motion on behalf of petitioner to inform the circuit court there may have been a conflict of interest at the time of petitioner's methamphetamine trial. Trial counsel responded that his remedy was to move to be relieved as counsel on petitioner's marijuana charge. Trial counsel further explained he did not seek a new trial on the methamphetamine conviction because he did not believe he had a conflict of interest until petitioner became a material witness against Perez, which occurred only after petitioner's methamphetamine trial.

The PCR judge found trial counsel's testimony—that he was unaware of any conflict of interest prior to petitioner's methamphetamine trial—was credible and "supports Counsel's claims that he was not operating under a conflict of interest." Accordingly, the PCR judge found petitioner failed to meet his burden of proving there was a conflict of interest. The Court of Appeals disagreed with the PCR judge's finding that there was not an actual conflict of interest; however, the Court of Appeals' majority affirmed the PCR judge's denial of relief, concluding petitioner failed to prove trial counsel recognized the conflict, and, therefore, petitioner could not prove he was adversely affected by trial counsel's performance. *Gonzales v. State*, 412 S.C. 478, 772 S.E.2d 557 (Ct. App. 2015). We granted petitioner's petition for a writ of certiorari to review the decision of the Court of Appeals.

ISSUE

Did the Court of Appeals err in holding that in order to prevail on his claim of ineffective assistance of counsel, petitioner was required to prove trial counsel recognized an actual conflict of interest?

ANALYSIS

Petitioner contends the Court of Appeals erred in holding that in order to succeed on his claim of ineffective assistance of counsel, he had to prove trial counsel recognized the existence of an actual conflict of interest. We agree.

A criminal defendant's Sixth Amendment right to effective assistance of counsel includes a right to counsel "unhindered by a conflict of interest." *Cuyler v. Sullivan,* 446 U.S. 335, 345–50, 355 (1980) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 483 n. 5 (1978)). When counsel is burdened by an actual conflict of interest, he "breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Due to the seriousness of the breach and the difficulty in "measure[ing] the precise effect on the defense of representation corrupted by conflicting interests," the *Strickland* ineffective assistance of counsel standard is modified in actual conflict of interest cases in that the defendant is not required to show prejudice. *Strickland*, 466 U.S. at 692; *see also Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting *Cuyler*, 446 U.S. at 348). In other words, a defendant is not required to show prejudice in the traditional *Strickland* sense, i.e., that there is a reasonable probability the result of the proceeding would have been different. *Strickland*, 466 U.S. at 692–94 (citing *Cuyler*, 446 U.S. at 345–50). Rather, "prejudice is presumed" if the defendant demonstrates that counsel "'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692 (quoting *Cuyler*, 446 U.S. at 350); *see also Duncan*, 281 S.C. at 438, 315 S.E.2d at 811 (quoting *Cuyler*, 446 U.S. at 348)); *Lomax v. State*, 379 S.C. 93, 102, 665 S.E.2d 164, 168 (2008). An actual conflict of interest arises where:

> a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (quoting *Duncan*, 281 S.C. at 438, 315 S.E.2d at 811 (quoting *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979))). In a PCR proceeding, the applicant bears the burden of proving her attorney had a conflict of interest necessitating relief. *Jordan*, 406 S.C. at 449, 752 S.E.2d at 541.

Generally, this Court gives great deference to the PCR court's findings of fact and conclusions of law. *Miller v. State*, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008). However, this Court will reverse the decision of the PCR court when it is controlled by an error of law. *Terry v. State*, 383 S.C. 361, 371, 680 S.E.2d 277, 282 (2009) (citation omitted).

A majority of the Court of Appeals held an actual conflict of interest existed prior to petitioner's trafficking in methamphetamine trial; we agree, and the State does not challenge this assertion.

Notably, several events occurred between trial counsel's representation of petitioner on the trafficking in marijuana charge beginning in January 2002, and petitioner's trafficking in methamphetamine trial in July 2002, that, collectively, demonstrate an actual conflict of interest existed. Those indicators are, *inter alia*: Perez exhibiting an interest in petitioner's case when he paid, at least in part, if not in full, petitioner's attorney's fees; a clear, close connection between petitioner's mother and Perez; petitioner and Perez's arrests for trafficking in marijuana over one thousand pounds in a very short time frame in the same geographical area; and the unlikelihood that a juvenile would act independently when engaging in trafficking over one thousand pounds of marijuana. We find particularly troubling the fact that trial counsel admitted to discussing with petitioner's mother ways in which she could come up with the money to pay petitioner's attorney's fees on the methamphetamine charge, and one of the ways discussed was using the funds recovered in Perez's forfeiture action in which he was represented by trial counsel. *See Wood v. Georgia*, 450 U.S. 261, 268–69 (1981) (finding "inherent dangers [] arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise."). Accordingly, we find the Court of Appeals correctly held an actual conflict of interest existed due to trial counsel's representation of both petitioner and Perez.

However, the Court of Appeals' majority then held, "Although an actual conflict existed, *because trial counsel did not recognize the conflict*, Gonzales cannot demonstrate the conflict affected trial counsel's performance." *Gonzales*, 412 S.C. at 498, 772 S.E.2d at 567–68 (emphasis supplied). We find this assertion—which suggests that only an attorney who intentionally violates his duty of loyalty has a conflict of interest—amounts to an error of law. Stated another way, the Court of Appeals' majority opinion is tantamount to holding that regardless of how

egregious the evidence may be that an actual conflict of interest exists, unless the attorney acknowledges the conflict, it cannot be shown the conflict adversely affected the attorney's performance. We find that such a holding is contrary to this Court's precedent. *See, e.g.*, *Jordan*, 406 S.C. 443, 752 S.E.2d 538 (2013) (demonstrating trial counsel's testimony stopped short of acknowledging the existence of an actual conflict of interest); *cf. State v. Gregory*, 364 S.C. 150, 153, 612 S.E.2d 449, 450–51 (2005); *Duncan*, 281 S.C. 435, 315 S.E.2d 809 (1984).

While trial counsel's failure to recognize the actual conflict may have resulted in his inability to provide effective assistance of counsel, his recognition of the conflict is not required to show it adversely affected trial counsel's performance. *See Duncan*, 281 S.C. at 438, 315 S.E.2d at 811 (holding in conflict of interest inquires, prejudice is presumed where the defendant demonstrates counsel "actively represented conflicting interests" and that an "actual conflict of interest adversely affected his lawyer's performance" (citations omitted)); *cf. Cuyler*, 446 U.S. at 347 (finding an attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or may develop in the course of a trial (citing *Holloway*, 435 U.S. at 485 (quoting *State v. Davis*, 110 Ariz. 29, 31 (1973)))).

Evidence that the actual conflict of interest adversely affected trial counsel's performance is demonstrated by his failure to advise petitioner as to favorable options he may have otherwise exercised—favorable options appellate counsel successfully negotiated in both the federal and state context. *Cf. Strickland*, 466 U.S. at 692 (noting the difficulty in "measure[ing] the precise effect on the defense of representation corrupted by conflicting interests."); *United States v. Almany*, 621 F.Supp.2d 561, 569–70 (E.D. Tenn. 2008) (finding where an attorney represents two members of a drug distribution conspiracy, the lack of effort by the attorney to explore his client's potential for a plea agreement or cooperate with the "Government" was, "in itself, strong evidence of a conflict," and noting, "Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client, and this part is easily precluded by a conflict of interest" (citing *United States v. Hall*, 200 F.3d 962, 965 (6th Cir. 2000); *United States v. McLain*, 823 F.2d 1457, 1464 (11th Cir. 1987) (citing *Holloway*, 435 U.S. at 490); *Newman v. United States*, 1998 WL 553048, at *3 (6th Cir. 1998); *Mannhalt v. Reed*, 847 F.2d 576, 582 (9th Cir. 1988); *United States v. Lopez*, 989 F.2d 1032, 1043, *amended and superseded by United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993); *United States v. Tatum*, 943 F.2d 370, 376 (4th Cir. 1991); *United*

States v. Balsirov, 2005 WL 1185810 (E.D. Va. 2005)). Indeed, a lieutenant involved in the state investigations of petitioner and Perez testified at the PCR hearing that the conflict of interest "absolutely" hindered law enforcement's ability to secure cooperation from petitioner prior to Perez being transferred to federal jurisdiction. And an Assistant United States Attorney testified there was "no question" had petitioner been available for cooperation before his methamphetamine trial, their office would have appealed to state prosecutors advocating petitioner receive favorable treatment for his extensive cooperation in the Perez investigation.

In conclusion, we hold that regardless whether an attorney recognizes an actual conflict of interest, if the conflict adversely affected the attorney's performance, the applicant has established his entitlement to relief. Accordingly, we find the Court of Appeals erred as a matter of law in determining that because trial counsel failed to recognize the actual conflict of interest, petitioner could not show he was adversely affected, and that he therefore failed to meet his burden of proof.

CONCLUSION

For the foregoing reasons, we reverse the decision of the Court of Appeals.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ruben Ramirez, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-002063

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
The Honorable G. Edward Welmaker, Post-Conviction Relief Judge

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Opinion No. 27696
Heard November 7, 2016 – Filed January 5, 2017

AFFIRMED IN PART AND REVERSED IN PART

Appellate Defender Wanda H. Carter, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Attorney General James Clayton Mitchell, III, and Senior Assistant Attorney General Karen Christine Ratigan, all of Columbia, for Respondent.

JUSTICE HEARN: The issue before us is whether a severely mentally retarded individual should be afforded post-conviction relief (PCR) where his plea counsel failed to request an independent competency evaluation prior to his guilty plea. The PCR court denied relief, finding plea counsel was not deficient nor was Ramirez prejudiced by counsel's representation. Although the court of appeals disagreed that plea counsel was not deficient, the court affirmed based on its application of the "any evidence" standard to the PCR court's prejudice finding. We now affirm in part and reverse in part, upholding the court of appeals' finding of deficiency but reversing its finding as to lack of prejudice to Ramirez.

FACTUAL/PROCEDURAL BACKGROUND

Ramirez was sixteen years old when he was indicted for assault and battery with intent to kill, kidnapping, first-degree criminal sexual conduct with a minor, first-degree burglary, and lewd act upon a child. Upon an order from the circuit judge, Ramirez was sent to the Department of Mental Health for an evaluation of his competency to stand trial.[1]

Dr. Mayank H. Dalal conducted the examination, basing his finding of competency on an hour and a half forensic interview with Ramirez and a review of victim statements, police reports, photographs, and Department of Juvenile Justice (DJJ) records. According to Dr. Dalal's report, Ramirez denied having any history of medical or psychological problems. Additionally, Ramirez indicated he was only in the eighth grade and received mostly C's and D's. Dr. Dalal also noted

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[1] The record does not reflect why the circuit judge ordered the examination. However, we note Section 44-23-410(A) of the South Carolina Code (Supp. 2016) states:

> (A) Whenever a judge of the circuit court . . . has reason to believe that a person on trial before him . . . is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall:
>
> (1) order examination of the person by two examiners designated by the Department of Mental Health if the person is suspected of having a mental illness or . . .
>
> (2) order the person committed for examination and observation to an appropriate facility at the Department of Mental Health . . . .

Ramirez exhibited certain speech difficulties, had difficulty reading the words "solicitor," "evaluation," and "competency," and struggled to remember the name of his attorney. Moreover, despite acknowledging the serious nature of the charges against him, Ramirez believed he was only facing "up to a few years in [DJJ]."[2] Nevertheless, Dr. Dalal concluded Ramirez had "sufficient factual and rational understanding of the charges against him," and was therefore competent to stand trial. In reaching this conclusion, Dr. Dalal did not review any collateral sources, nor did he perform any psychological testing or consider a psychological diagnosis.

Following his review of Dr. Dalal's report, plea counsel requested that Ramirez undergo a psychological examination with Dr. Stephen M. Gedo. According to plea counsel, he sought a second opinion because he was concerned Ramirez did not fully understand the gravity of his offenses or the charges he faced. Dr. Gedo met with Ramirez five times, with each appointment lasting between three and four hours. In addition to a clinical interview, Dr. Gedo based his conclusions on a number of psychological tests, Ramirez's medical records, and collateral interviews conducted with Ramirez's family to obtain historical information Ramirez may not have been able to accurately convey due to his intellectual limitations. In particular, Dr. Gedo noted Ramirez had been mentally retarded from birth, did not begin speaking until he was seven years old, was diagnosed with Attention Deficit-Hyperactivity Disorder (ADHD) when he was nine, and had only completed eighth grade by the time he was sixteen.

Based on his observations, Dr. Gedo concluded Ramirez had poor judgment and an impaired ability to regulate his impulses. Dr. Gedo also found Ramirez to be highly malleable, easily confused, and suffering limitations across the entire range of cognitive function, resulting in severely limited language and reading comprehension skills. Furthermore, Dr. Gedo determined Ramirez had a general IQ level between thirty-one and forty-four, falling within the range of Severe Mental Retardation,[3] and was functioning at the intellectual level of a four to seven

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[2] In fact, Ramirez had been charged as an adult, and was facing anywhere from fifteen years to life without parole in the Department of Corrections.

[3] For reference, "an IQ of approximately [seventy] or below" indicates "[s]ignificantly subaverage intellectual functioning." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 49 (4th ed. 2000) [hereinafter DSM-IV].

year old child. In conclusion, Dr. Gedo diagnosed Ramirez with an adjustment disorder with mixed disturbance of emotions and conduct, severe mental retardation, and a Global Assessment of Functioning (GAF) score of thirty-five out of one hundred.[4] However, Dr. Gedo rendered no opinion as to Ramirez's competency to stand trial.

Ultimately, Ramirez pled guilty but mentally ill to all the charges. Both the Dalal evaluation and the Gedo report were submitted into evidence on the issue of whether Ramirez was mentally ill at the time the crimes were committed, but there was no request for a further competency evaluation. The circuit judge accepted Ramirez's plea, noting his "IQ level [was] as low as any [the judge had] ever seen." Ramirez was sentenced to concurrent twenty-year terms for all charges, except the lewd act on a minor for which the circuit judge imposed a consecutive fifteen year sentence suspended upon five years' probation for mental health counseling.

Ramirez did not appeal his conviction, but applied for PCR, arguing his plea counsel was deficient in failing to obtain an independent mental examination. At the PCR hearing, plea counsel testified that Ramirez was very naïve and he questioned whether Ramirez fully understood what was going on prior to and at the plea hearing. Plea counsel further admitted he should have moved to have Ramirez's competency reevaluated after comparing the Gedo and Dalal evaluations; however, he gave no explanation for his failure to do so. In addition to plea counsel's testimony, Ramirez presented the Dalal and Gedo reports and a few pages from the DSM-IV.

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[4] The GAF score is a "judgment of the individual's overall level of functioning." DSM-IV, *supra* note 5, at 32. "The GAF scale is divided into [ten] ranges of functioning," and each range has two components: symptom severity and functioning. *Id.* "The GAF rating is within a particular decile if **either** the symptom severity **or** the level of functioning falls within the range." *Id.* (emphasis in original). However, "in situations where the individual's symptom severity and level of functioning are discordant, the final GAF rating always reflects the worse of the two." *Id.* at 33. Ramirez's GAF score of thirty-five indicates he has "major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., . . . child frequently beats up younger children, is defiant at home, and is failing at school)." *Id.* at 34.

The PCR court dismissed Ramirez's application, finding plea counsel was not deficient and Ramirez was not prejudiced by counsel's representation. On review, the court of appeals found the record established at least a reasonable probability Ramirez was incompetent at the time of his plea and held the PCR court's finding of no deficiency was unsupported by the evidence. *Ramirez v. State*, 413 S.C. 351, 369–73, 776 S.E.2d 101, 111–13 (Ct. App. 2015). Nevertheless, the court held it was constrained by the "any evidence" standard to affirm the PCR court's order because the Dalal report was probative evidence supporting the PCR court's finding as to prejudice. *Id.* at 372, 776 S.E.2d at 113.

This Court granted certiorari to review the court of appeals.

ISSUE PRESENTED

Did the court of appeals err in applying the "any evidence" standard to affirm the PCR court's finding that Ramirez was not prejudiced as a result of plea counsel's failure to request an additional competency evaluation?

STANDARD OF REVIEW

In reviewing a PCR court's decision, this Court will uphold the PCR court's findings if there is any evidence of probative value to support them. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). However, if the PCR court's conclusions are controlled by an error of law or are unsupported by the evidence, this Court must reverse the decision. *Edwards v. State*, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011).

When alleging ineffective assistance of counsel, a PCR applicant must satisfy the two-prong *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the applicant must establish plea counsel's performance was deficient. *Edwards*, 392 S.C. at 456, 710 S.E.2d at 64. Second, generally the applicant must demonstrate plea counsel's "deficient performance prejudiced the [applicant] to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*, 466 U.S. at 694). *But see Sellner v. State*, 416 S.C. 606, 612, 787 S.E.2d 525, 528 (2016) (holding petitioner was entitled to relief without needing to establish prejudice where plea counsel advised petitioner to plead guilty to an offense unsupported by the facts); *Jordan v. State*, 406 S.C. 443, 449, 752 S.E.2d

538, 541 (2013) (quoting *Staggs v. State*, 372 S.C. 549, 551–52, 643 S.E.2d 690, 692 (2007)) ("'[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain [post-conviction] relief.'"); *Lomax v. State*, 379 S.C. 93, 103, 665 S.E.2d 164, 169 (2008) (holding once petitioner demonstrated an actual conflict of interest she did not have to show prejudice, but was entitled to PCR).

When a PCR applicant raises issues of competency in the context of a plea proceeding, the two-prong *Strickland* analysis still applies; however, because of the nature of the claim, proof of deficiency of counsel is intertwined with prejudice. Specifically, when establishing *Strickland* prejudice in the context of plea counsel's failure to request a mental competency evaluation, "the [applicant] need only show a 'reasonable probability' that he was . . . incompetent at the time of the plea." *Jeter v. State*, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992); *see also Matthews v. State*, 358 S.C. 456, 458–60, 596 S.E.2d 49, 50–51 (2004) (expanding the reasonable probability standard as the burden for proving both the deficiency of counsel and the prejudice prongs).

LAW/ANALYSIS

Ramirez argues the court of appeals erred in affirming the PCR court's order pursuant to the "any evidence" standard of review. Specifically, Ramirez contends he presented sufficient evidence at the PCR hearing to establish a reasonable probability that he was incompetent at the time of his plea, and the PCR court erred in denying his application for relief.[5] Therefore, Ramirez argues the court of

[5] Ramirez attempts to bolster this argument by further asserting that the Dalal report was incomplete and lacked probative value to support the PCR court's conclusion with respect to prejudice. Thus, Ramirez contends the court of appeals misapplied the "any evidence" standard by relying on improper evidence to affirm the PCR court's order. We disagree with this portion of Ramirez's argument and find that, had an "any evidence" analysis been appropriate in this case, Dr. Dalal's evaluation would have been probative evidence to support the PCR court's order on the issue of prejudice.

appeals should have reversed without performing an "any evidence" analysis. We agree.[6]

The court of appeals held Ramirez's plea counsel was deficient in failing to obtain an independent competency evaluation, finding that the evidence did not support the PCR court's finding of no deficiency.[7] *Ramirez*, 413 S.C. at 369–70, 776 S.E.2d at 111. In particular, the court noted the Gedo report and plea counsel's own awareness of Ramirez's communicative and intellectual limitations should have prompted plea counsel to seek an additional competency examination. *Id.* Additionally, the court of appeals held plea counsel's decision to pursue pleas of guilty but mentally ill, as opposed to requesting another competency evaluation, was not a valid strategy. *Id*. at 370, 776 S.E.2d at 111–12. Moreover, the court held "there was *at least* a reasonable probability Ramirez was incompetent at the time of his pleas," based upon Dr. Gedo's report and plea counsel's testimony at the PCR hearing. *Id.* at 371, 776 S.E.2d at 112 (emphasis added).

Once a PCR applicant has established his counsel was deficient in failing to obtain a mental competency evaluation, he is entitled to relief if he demonstrates a reasonable probability that he was incompetent at the time he pled guilty. *Jeter*, 308 S.C. at 233, 417 S.E.2d at 596; *Matthews*, 385 S.C. at 459, 596 S.E.2d at 51; *see also Sellner*, 416 S.C. at 611, 787 S.E.2d at 527 (holding a PCR applicant demonstrates prejudice by showing "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty") (internal quotations

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[6] Initially we note there are no findings of fact contained within the PCR court's order to support its conclusion that Ramirez was not prejudiced by plea counsel's representation. As such, the court of appeals erred in upholding the prejudice finding under the "any evidence" standard of review. *See, e.g.*, *Marlar v. State*, 375 S.C. 407, 408–09, 653 S.E.2d 266, 266 (2007) ("[T]he PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The failure to specifically rule on the issues precludes appellate review of the issues."). However, Ramirez has not argued this issue on appeal.

[7] Since neither party appealed the court's holding on this issue, it is the law of the case. *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119–20, 754 S.E.2d 486, 490 (2014) (holding that if a party fails to timely appeal a ruling by a lower court, that ruling becomes the law of the case).

omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Gallman v. State*, 307 S.C. 273, 276, 414 S.E.2d 780, 782 (1992).

Plea counsel was clearly on notice, not only from the Gedo report, but from his own interactions with Ramirez, that Ramirez suffered from severe mental retardation, was functioning at the level of a four- to seven-year-old, and had difficulty in comprehending the legal proceedings. Accordingly, we affirm the court of appeals' holding that Ramirez's plea counsel was deficient in not requesting an additional competency evaluation.

However, the court of appeals erred in affirming the PCR court's finding of no prejudice under the "any evidence" standard. As the court of appeals correctly noted, Dr. Gedo's report and plea counsel's testimony at the PCR hearing clearly established a reasonable, if not strong, likelihood that Ramirez was incompetent to plead guilty. Our opinions in *Jeter* and *Matthews* make it clear that when competency to enter a plea is at issue, a PCR applicant need only show there was a reasonable probability he was incompetent at the time of his plea. 308 S.C. at 233, 417 S.E.2d at 596; 385 S.C. at 459, 596 S.E.2d at 51. Once such a reasonable probability has been established, prejudice is also demonstrated. *See Matthews*, 385 S.C. at 459–60, 596 S.E.2d at 51. Therefore, since Ramirez has satisfied both prongs of the *Strickland* test, he is entitled to relief.

CONCLUSION

We affirm the court of appeals' finding of deficient performance by plea counsel and reverse its holding that Ramirez was not prejudiced by that deficiency. Accordingly, Ramirez's plea is vacated and this matter is remanded to the court of general sessions.

BEATTY, C.J., KITTREDGE and FEW, JJ., concur. Acting Justice Costa M. Pleicones, dissenting in a separate opinion.

ACTING JUSTICE PLEICONES: I regret that I am unable to join the majority opinion as I believe that our scope of review requires that we uphold the decision of the Court of Appeals' majority: Dr. Dalal's finding that petitioner was competent is evidence of probative value that supports the PCR judge's finding that petitioner was not prejudiced by counsel's failure to obtain an independent competency evaluation. *Jeter v. State*, 308 S.C. 230, 417 S.E.2d 594 (1992). In my opinion, however, it is shocking to the universal sense of justice to allow this severely mentally disabled individual's plea to stand, and I believe that were relief sought pursuant to *Butler v. State*, 302 S.C. 466, 397 S.E.2d 87 (1990), this Court would likely issue a writ of habeas corpus.

In light of our scope of review, I reluctantly dissent.

The Supreme Court of South Carolina

In the Matter of Jacob Leon Parrott, Respondent.

Appellate Case No. 2016-002543

ORDER

The Office of Disciplinary Counsel (ODC) asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Respondent filed a return on December 29, 2016, opposing ODC's request.

IT IS ORDERED, after consideration of ODC's petition and respondent's return, that respondent's license to practice law in this state is suspended until further order of this Court.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

Within fifteen (15) days of the date of this order, respondent shall serve and file the affidavit required by Rule 30, RLDE. Should respondent fail to timely file the required affidavit, respondent may be held in civil and/or criminal contempt of this Court as provided by Rule 30, RLDE.

s/ Costa M. Pleicones C.J.
FOR THE COURT

Columbia, South Carolina
December 29, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,
Respondent,

v.

Tiada Nelson, Mark Peace, and John Doe, Defendants,

Of whom Tiada Nelson is the Appellant.

In the interest of minors under the age of eighteen.

Appellate Case No. 2016-000457

Appeal From Dillon County
Michael S. Holt, Family Court Judge

Opinion No. 5463
Submitted November 30, 2016 – Filed December 30, 2016

REVERSED AND REMANDED

Carla Faye Grabert-Lowenstein, of Law Office of Carla Faye Grabert-Lowenstein LLC, of Conway, for Appellant.

Scarlet Bell Moore, of Greenville, for Respondent.

Laurel Ammons Hayes, of Dillon, for Guardian ad Litem.

PER CURIAM: Tiada Nelson (Mother) appeals the family court's order terminating her parental rights to her three minor children. On appeal, Mother

argues the family court erred in (1) denying her motion for a continuance, (2) finding clear and convincing evidence supported the statutory grounds for termination of parental rights (TPR), and (3) finding TPR was in the children's best interest. We reverse and remand for a new permanency planning hearing.[1]

FACTS/PROCEDURAL HISTORY

Mother's three minor children were born in 2001, 2008, and 2012. In September 2013, the children were removed from Mother's care. At the time of removal, Mother and the children resided with Mother's sister in a roach-infested home without running water, lights, or food. The family court held a merits hearing on October 24, 2013. Following the hearing, the family court ordered Mother to complete a placement plan; however, the record does not indicate what the placement plan required Mother to do.

On July 9, 2015, the family court held a TPR hearing. Prior to the hearing, Mother requested a continuance, arguing she was "making strides" and "in a short amount of time[,] this would not end up being a TPR case." However, the family court denied her request because the children had been in the Department of Social Services' (DSS) care for approximately twenty-two months.

At the TPR hearing, Robert Thompson, the DSS caseworker, testified Mother completed some of her placement plan but had not maintained stable housing and verifiable employment. Thompson did not explain the other requirements of Mother's treatment plan or specify which requirements Mother had completed.

Thompson testified the children were placed at Crosswell Children's Home following the removal and they lived there at the time of the TPR hearing. He stated Mother visited the children and occasionally brought them items when she visited. He claimed the children "constantly ask[ed] [Mother] if she [was] complying with [DSS], and they [were] aware of the possibility of what may happen if [Mother] d[id] not comply." Additionally, Thompson testified the children had another sibling who was born after the removal. Although Thompson believed the sibling initially stayed with an alternative caregiver, he stated the sibling lived with Mother at the time of the TPR hearing. Thompson believed the children were adoptable, and he testified that a relative had been approved to adopt

[1] The record on appeal from the TPR hearing is only forty-one pages. The learned family court judge was presented with a record too sparse to allow him to make a full decision to a clear and convincing standard.

two of the children. Thompson believed TPR was in the best interest of the children. He did not otherwise elaborate on the children's current condition or their relationship with Mother.

The Guardian ad Litem (GAL) did not testify or submit a report into evidence.[2] It was only the statement of her attorney to the family court that provided the GAL's belief that TPR was in the children's best interest.

In its final order, the family court found clear and convincing evidence supported TPR on the following grounds: (1) failure to remedy the conditions that caused the removal; (2) the children were harmed, and due to the severity or repetition of the abuse or neglect, it was not reasonably likely Mother's home could be made safe within twelve months; (3) failure to support; and (4) the children had been in foster care for fifteen of the most recent twenty-two months. Additionally, the family court found TPR was in the children's best interest. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, this [c]ourt reviews factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility. *Lewis v. Lewis*, 392 S.C. 381, 384-85, 709 S.E.2d 650, 651-52 (2011).

LAW/ANALYSIS

I. Statutory Grounds

Mother argues the family court erred in finding clear and convincing evidence supported the statutory grounds for TPR. We disagree.

The family court may order TPR upon finding one or more of twelve statutory grounds is satisfied and TPR is in the best interest of the child. S.C. Code Ann.

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[2] The only GAL report included in the record was dated April 7, 2016; this report was submitted at a permanency planning hearing after Mother's rights were terminated. After this court requested a copy of the GAL report submitted at the TPR hearing, Mother's attorney indicated, "There is no new GAL su[pple]mental report to share."

§ 63-7-2570 (Supp. 2016). "Because terminating the legal relationship between natural parents and a child is one of the most difficult issues an appellate court has to decide, great caution must be exercised in reviewing termination proceedings and termination is proper only when the evidence clearly and convincingly mandates such a result." *S.C. Dep't of Soc. Servs. v. Roe*, 371 S.C. 450, 455, 639 S.E.2d 165, 168 (Ct. App. 2006).

We find DSS presented clear and convincing evidence to prove at least one statutory ground for TPR. A statutory ground for TPR is met when a child has been in the State's care for fifteen of the most recent twenty-two months. § 63-7-2570(8). Here, the children were removed in September 2013 and remained in DSS's care through the date of the TPR hearing, July 9, 2015—approximately twenty-two months. Further, the evidence does not show, and Mother does not claim, the delay was caused by DSS. *See S.C. Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. 324, 336, 741 S.E.2d 739, 746 (2013) ("[S]ection 63-7-2570(8) may not be used to sever parental rights based solely on the fact that the child has spent fifteen of the past twenty-two months in foster care. The family court must find that severance is in the best interests of the child, and that the delay in reunification of the family unit is attributable not to mistakes by the government, but to the parent's inability to provide an environment where the child will be nourished and protected."). Thus, we find DSS proved a statutory ground for TPR.[3]

II. Best Interest

Mother argues the family court erred in finding TPR was in the children's best interest. We agree this limited record does not support such a finding.

"In a [TPR] case, the best interest[] of the children [is] the paramount consideration." *S.C. Dep't of Soc. Servs. v. Smith*, 343 S.C. 129, 133, 538 S.E.2d 285, 287 (Ct. App. 2000). Although Thompson testified he believed TPR was in the children's best interest, he did not elaborate on their current condition or their relationship with Mother. Even more troubling, however, is the fact that the GAL—the individual responsible for conducting an independent investigation and protecting the interests of the child—did not testify or submit a report. *See* S.C.

[3] We decline to address whether clear and convincing evidence supports the remaining statutory grounds. *See Dep't of Soc. Servs. v. Headden*, 354 S.C. 602, 613, 582 S.E.2d 419, 425 (2003) (stating when the record contains clear and convincing evidence to affirm TPR on one ground, the appellate courts may decline to address any remaining TPR grounds on appeal).

Code Ann. § 63-11-510 (2010) (stating the responsibilities and duties of a guardian ad litem include (1) representing a child's best interest; (2) advocating for the welfare and rights of a child in an abuse or neglect proceeding; (3) conducting an independent assessment of the facts, the needs of the child, and the available resources within the family and community to meet those needs; (4) maintaining a case record; (5) providing the family court with a written report, which includes an evaluation and assessment of the issues and recommendations for the case plan, the wishes of the child, if appropriate, and subsequent disposition of the case; (6) monitoring the compliance with family court orders and making motions to enforce the orders if necessary; and (7) protecting and promoting the best interest of a child). In *Patel v. Patel*, our supreme court explained, "The GAL functions as a representative of the court, appointed to assist the court in making its determination of custody by advocating for the best interest of the children and providing the court with an objective view." 347 S.C. 281, 287, 555 S.E.2d 386, 389 (2001). Without testimony from the GAL or a GAL report, the family court did not have an independent assessment of the children's needs or their bonding with Mother. The only evidence in the record regarding the children's bond with Mother was the DSS caseworker's testimony that the children "constantly ask[ed] whether [Mother] was complying with [DSS], and they [were] aware of the possibility of what may happen if [Mother] did not comply." The children's interest in Mother's progress coupled with the fact they were in a group home and not a preadoptive home suggests TPR may not be in their best interest. Finally, Mother had another child in the home, and evidence did not show she was unable to care for that child. Thus, we find the record before us does not support finding TPR was in children's best interest.[4]

CONCLUSION

We reverse the family court's TPR as to Mother and remand this case to the family court for a permanency planning hearing in conformity with section 63-7-1700 of the South Carolina Code (Supp. 2016). A permanency planning hearing will allow the parties and the GAL to update the family court on what has occurred since the TPR hearing. We urge the family court to conduct a hearing as expeditiously as possible, including presentation of a new GAL report and an updated home evaluation of Mother's home. If necessary, the family court may change custody,

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[4] Because this finding is dispositive, we decline to address Mother's issue regarding the denial of her request for a continuance. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues when decision regarding a prior issue is dispositive).

modify visitation, and approve a treatment plan offering additional services to Mother.

REVERSED AND REMANDED.[5]

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.

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