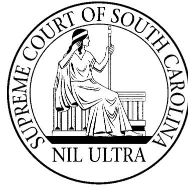

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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CHIEF DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29211
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N O T I C E

IN THE MATTER OF JAMES MARSHALL BIDDLE, PETITIONER

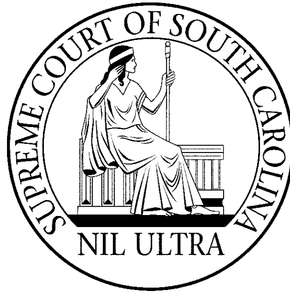
Petitioner was definitely suspended from the practice of law for three (3) years. *In re Biddle*, 412 S.C. 630, 773 S.E.2d 590 (2015). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
May 9, 2018



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19
May 9, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Protection and Advocacy for People with Disabilities, Inc., Petitioner,

v.

Beverly A. H. Buscemi, Ph.D., in her official capacity as State Director, South Carolina Department of Disabilities and Special Needs and The South Carolina Department of Disabilities and Special Needs, and Kelly Hanson Floyd, Nancy Banov, W. Robert Harrell, Rick Huntress, Deborah McPherson and Dr. Otis Speight in their Official Capacities as Members of the Department of Disabilities and Special Needs Commission, Respondents.

Appellate Case No. 2016-001983

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 27795
Heard May 1, 2018 – Filed May 9, 2018

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Anna Maria Darwin, of Greenville, and Thornwell Simons, of Columbia, both of Protection & Advocacy for People with Disabilities, Inc.; Reid T. Sherard, of Greenville, and Phillips Lancaster McWilliams, of Columbia, both of Nelson Mullins Riley & Scarborough, LLP, for Petitioner.

William H. Davidson, II and Kenneth P. Woodington, both of Davidson & Lindemann, PA, of Columbia, for Respondents.

PER CURIAM: We granted Protection and Advocacy for People with Disabilities, Inc.'s petition for a writ of certiorari to review the decision of the Court of Appeals in *Protection and Advocacy for People with Disabilities, Inc. v. Buscemi,* 417 S.C. 267, 789 S.E.2d 756 (Ct. App. 2016). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Samuel Brown Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2016-002537

ON WRIT OF CERTIORARI

Appeal from Berkeley County
Kristi Lea Harrington, Plea Court Judge
Jean Hoefer Toal, Post-Conviction Relief Judge

Opinion No. 27796
Submitted April 19, 2018 – Filed May 9, 2018

REVERSED AND REMANDED

Appellate Defender Laura Ruth Baer, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Rasheeda Cleveland, both of Columbia, for Respondent.

PER CURIAM: Samuel Brown Jr. filed a petition for a writ of certiorari seeking appellate review of an order granting summary judgment to the State in his application for post-conviction relief (PCR). The PCR court dismissed the action on

the ground Brown had completed serving his sentence and did not allege he was suffering collateral consequences of the conviction. We grant the petition, dispense with briefing, reverse, and remand to the PCR court for a hearing on the merits.

Brown pled guilty to possession with intent to distribute marijuana (PWID) on May 20, 2014, and the court sentenced him to three years in prison. At the time of his plea, Brown was already serving a ten-year sentence for trafficking in cocaine. The PWID sentence began on June 25, 2013, due to credit for time served, and was imposed concurrent to the ten-year sentence. Brown did not appeal.

Brown filed an application for PCR on November 20, 2014. No hearing was held until September 16, 2016. By then, Brown had completed his PWID sentence,[1] although he remained incarcerated on the ten-year sentence. At the PCR hearing, the State made a motion for summary judgment, arguing Brown's claim was moot because he had already completed his PWID sentence. The PCR court granted the State's motion for summary judgment, and dismissed the PCR application. We find the circuit court erred.

Post-conviction relief is a statutory remedy in South Carolina. *See* S.C. Code Ann. §§ 17-27-10 to -160 (2014 & Supp. 2017) (Post-Conviction Procedure Act). Therefore, we begin our analysis with the text of the Act, which provides,

> Any person who has been convicted of, or sentenced for, a crime and who claims:
>
> (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
>
> . . . .
>
> may institute . . . a proceeding under this chapter to secure relief.

[1] The PCR court found the PWID sentence "was satisfied in full not later than June 26, 2016."

§17-27-20(A)(1).[2] Under the plain language of this subsection, Brown may prosecute his action seeking PCR. He has been convicted of a crime, and he claims his conviction is invalid due to violations of his constitutional rights to effective counsel under the Sixth Amendment and due process under the Fourteenth Amendment. Under subsection 17-27-20(A)(1), it is not necessary that the PCR applicant demonstrate any collateral consequences to his conviction, even if he has completed serving his sentence.

In dismissing the application, the PCR court stated "this Court grants the State's motion for summary judgment because the applicant failed to demonstrate any prejudicial effects resulting from the collateral consequences of his conviction," citing *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997). The petitioner in *Jackson* had been convicted of possession of marijuana and given only a fine; he never went to jail. 331 S.C. at 488, 489 S.E.2d at 916. He later filed a PCR claim, and the State moved to dismiss. *Id.* The PCR court dismissed the claim, finding "petitioner lacked standing to pursue his claim under [the Post-Conviction Procedure Act] because petitioner was not 'in custody' and never served a prison sentence for his conviction." *Id.*

On appeal, we stated, "Until recently, our cases suggested a PCR applicant must meet the federal habeas corpus 'in custody' requirement in order to have standing." 331 S.C. at 489, 489 S.E.2d at 916. As an example of such a case, we cited *Finklea v. State*, 273 S.C. 157, 255 S.E.2d 447 (1979). The defendant in *Finklea* was convicted in absentia for two speeding violations, as a result of which he accumulated more than twelve points on his driver's license, which in turn required that his license be suspended. 273 S.C. at 157-58, 255 S.E.2d at 447. This Court

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[2] The South Carolina Code contains a scrivener's error in the publication of subsection 17-27-20(A). In the text of Section 1 of the original 1969 Uniform Post-Conviction Relief Procedure Act—which became section 17-27-20 in the 1976 Code—subsection (A)(6) ends with the language ". . . available under any common law, statutory or other writ, motion, petition, proceeding or remedy;" followed by a line break, with the language "may institute . . . a proceeding under this chapter to secure relief" on the next line, in the body of subsection (A). *See* Act No. 164, 1969 S.C. Acts 158-59. The Code Commissioner made the error in the 1970 Code supplement, in which the Act was first published as part of our Code. *See* S.C. Code Ann. § 17-601 (Supp. 1970). Thus, the language "may institute . . . a proceeding" applies to all six subsections of subsection 17-27-20(A).

found his claims were "not within the purview of the Act," stating, "There is a clear distinction between the termination of a driver's license arising out of a series of traffic violations and the loss of liberty or imprisonment, or threat thereof, envisioned by the Post-Conviction Procedure Act." 273 S.C. at 158, 255 S.E.2d at 447. We then cited several habeas corpus cases to support our ruling, invoking what the *Jackson* court later called the "in custody" requirement. 273 S.C. at 158-59, 255 S.E.2d at 447-48.

It was this requirement we effectively overruled in *Jackson*, stating, "The Act does not contain an express 'in custody' requirement." 331 S.C. at 489, 489 S.E.2d at 916 (citing § 17-27-20(A)). The petitioner in *Jackson*, however, specifically "alleged he is prejudiced by persistent effects of his conviction." 331 S.C. at 488, 489 S.E.2d at 916. On the basis of that allegation, we held the petitioner was entitled to a hearing, and reversed. 331 S.C. at 489-90, 489 S.E.2d at 916. It was not necessary in *Jackson* for us to determine whether a PCR applicant can state a claim based solely on his conviction, with no allegation of any "persistent effects" or "collateral consequences."

In this case, however, the PCR court addressed the claim as one in which Brown did not allege he is suffering any persistent effects or collateral consequences of his conviction. This case, therefore, presents the question we were not required to address in *Jackson*. We now extend our holding in *Jackson* that the Act contains no "in custody" requirement, and we hold that in PCR cases brought under subsection 17-27-20(A)(1), the plain language of the Act requires only what the subsection clearly states,

> Any person who has been convicted of, or sentenced for, a crime and who claims: (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State . . . may institute . . . a proceeding under this chapter to secure relief.

Accordingly, the circuit court's decision to grant summary judgment is **REVERSED**. We **REMAND** the case to the PCR court for a hearing on the merits.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Social Services, Respondent,

and

Sherry Powers, Edward Anthony Dalsing and Tammy Gaye Causey Dalsing, Intervenors,

of whom Edward Anthony Dalsing and Tammy Gaye Causey Dalsing, are Petitioners,

v.

Erica Smith and Andrew Jack Myers, Respondents.

In the interest of a minor under the age of eighteen.

Appellate Case No. 2017-000784

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Union County
Rochelle Y. Conits, Family Court Judge

Opinion No. 27797
Heard October 19, 2017 – Filed May 9, 2018

REVERSED

James Fletcher Thompson, of James Fletcher Thompson, LLC, of Spartanburg; and Larry Dale Dove, of Dove Law Group, LLC, of Rock Hill, for Petitioners.

Melinda Inman Butler, of The Butler Law Firm, of Union; Debra A. Matthews, of Debra A. Matthews, Attorney at Law, LLC, and Carol Ann Tolen, of Coleman & Tolen, LLC, both of Winnsboro; David E. Simpson, of Rock Hill, and Shawn L. Reeves, of Columbia, both of South Carolina Department of Social Services; all for Respondents.

Allison Boyd Bullard, of Harling & West, LLC, of Lexington, for Amici Curiae Law Professors and Lecturers James Dwyer, Paulo Barrozo, Elizabeth Bartholet, J. Herbie Difonzo, Jennifer Drobac, Crisanne Hazen, Jennifer Mertus, Deborah Paruch, Iris Sunshine, Lois A. Weithorn, and Crystal Welch.

JUSTICE JAMES: In this matter, Petitioners Edward and Tammy Dalsing (Foster Parents) are seeking to adopt a young girl (Child). Foster Parents' private action for termination of parental rights (TPR) and adoption was consolidated with the South Carolina Department of Social Services' removal action against Erica Smith (Mother) and Andrew Myers (Father). At the final hearing, the family court (1) adopted the permanent plan of TPR and adoption; (2) terminated Mother's parental rights; (3) found Father was not a person whose consent was required for Child's adoption, but as a further sustaining ground, terminated Father's parental rights; and (4) granted Foster Parents' petition for adoption. Father appealed, and the court of appeals vacated in part, reversed in part, and remanded the case to the family court for a new permanency planning hearing. *S.C. Dep't of Soc. Servs. v. Smith*, 419 S.C. 301, 797 S.E.2d 740 (Ct. App. 2017). This Court granted certiorari to review the court of appeals' decision. For the reasons discussed below, we reverse the court of appeals and reinstate the family court's grant of adoption to Foster Parents.

STANDARD OF REVIEW

On appeal from a matter in the family court, this Court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). Although this Court reviews the family court's factual 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 and assign comparative weight to their testimony. *Lewis*, 392 S.C. at 385, 709 S.E.2d at 652. Also, "*de novo* review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the family court." *Id*. at 389, 709 S.E.2d at 654. Because of our de novo standard of review, we will undertake a detailed review of both the facts of this case and its tortuous procedural history.

FACTUAL AND PROCEDURAL HISTORY

Mother and Father were living together, unmarried, at the time Child was conceived in 2012. Mother has a long history of drug addiction and instability, and Father has a troubled history as a teenager and young adult, which includes the use of illegal drugs and other criminal activity. Mother and Father did not have stable housing, and Mother was working to pay the bills at the time Child was conceived. In October 2012, a week or two after learning about the pregnancy, Father voluntarily surrendered to Maryland authorities on outstanding criminal charges. Mother testified she and Father discussed Father's outstanding charges and decided Father should surrender to authorities to timely serve his sentence in order for him to assist Mother in raising Child upon his release. Father remained incarcerated in Maryland until June 2013, when he was transferred to a penal facility in Virginia to serve even more prison time for two contempt of court charges; two fraud, bank notes, or coins charges; and one probation violation. At the time of the final family court hearing in 2015, Father's expected release date was November 1, 2016.

Mother testified that after Father went to prison, "I was just bouncing from here to there, [living] wherever I could." Around Thanksgiving 2012, Mother contacted Sherry Powers (Grandmother),[1] who lived in Virginia, and asked if

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[1] Grandmother is Father's mother. Both paternal grandparents were initially parties in this action; however, Eric Powers, paternal step-grandfather (Step-Grandfather), was dismissed as a party after he and Grandmother separated.

Grandmother could pick her up in South Carolina. Mother was approximately three months pregnant at the time. Grandmother testified Mother called and asked her to come pick her up because Mother had been beaten up, had been in the hospital, and had nowhere to go. Grandmother and Step-Grandfather (collectively, Grandparents) picked up Mother in South Carolina and took her to Virginia to live with them.

Mother lived with Grandparents for approximately four months. During this time, Grandmother provided food, shelter, transportation, and support for Mother. Grandmother purchased items in anticipation of Child's birth and attended Mother's prenatal appointments. Grandmother testified she provided these items for Child on Father's behalf. Grandmother believed that after Child's birth, Child was going to live in her house. Father never sent Mother or Grandmother any money in anticipation of Child's birth. However, according to Mother, Father "frequently" contacted her via phone calls and letters during the time she was living with Grandparents.

In late March or early April 2013—prior to Child's birth—Mother left Grandparents' home, taking some of the items Grandmother purchased for Child. Mother testified she left Grandparents' home after Step-Grandfather made sexual advances toward her on more than one occasion. Mother went to live with her father in South Carolina. Within a week of her moving, Father called and sent Mother a letter. Mother testified that following her receipt of Father's phone call and letter, she never received another call, letter, or offer of support from him. Mother testified she ended her relationship with Father around the time she left Virginia but noted she never prohibited Father from contacting her.

Mother gave birth to Child in South Carolina on May 15, 2013. Grandparents were present and brought the remaining items they had purchased for Child. Mother tested positive for opiates and amphetamines at Child's birth; however, because Child's meconium drug screen was inconclusive, Mother was permitted to take Child home. On May 31, 2013, Child was given a hair strand drug screen, and Child tested positive for cocaine and benzoylecgonine (the main metabolite of cocaine).

On June 6, 2013, law enforcement took emergency protective custody of Child. On the same day, the South Carolina Department of Social Services (DSS) placed her in foster care with Foster Parents and filed an action for removal against Mother and Father. DSS's Affidavit of Reasonable Efforts accompanying its removal complaint noted Mother informed DSS that she did not want Child placed with Grandmother. A probable cause hearing was held on June 10, 2013, and the

family court found probable cause for Child's removal and for DSS to assume legal custody of Child. Grandmother testified she was surprised to hear Child was removed and placed in foster care because she thought DSS would have contacted her first. She explained she had previously contacted DSS and sought Child's placement in her home. However, because Grandparents lived in Virginia, Grandparents were required to complete a home study pursuant to the Interstate Compact on the Placement of Children (ICPC).[2]

At the June 19, 2013 merits hearing, the matter was continued; however, the family court ordered an ICPC home study for Grandparents. The family court also ordered a paternity test for Father and permitted him to file and serve an affidavit attesting he was Child's natural father. On June 27, 2013, Father executed an affidavit acknowledging paternity indicating he was aware of Child's birth and his responsibility to support Child. A September 2013 DNA paternity test confirmed Father's paternity. Grandmother scheduled and paid for the test.

At the required merits hearing on July 18, 2013, the family court adopted the agreement of the parties and made a finding of physical abuse against Mother. The family court's order from the merits hearing—signed August 13, 2013—again ordered an ICPC home study for Grandparents[3] and required Father's child support obligation be held in abeyance, referencing Father's incarceration. On August 20, 2013, Grandparents filed a motion to intervene in DSS's action and sought custody of Child; their motion to intervene was granted in November 2013. Additionally, on August 20, 2013, Grandmother filed an answer, counterclaim, and crossclaim in DSS's action, alleging neither Mother nor Father were "*capable, suitable, fit, or proper persons to be granted custody of Child*." (emphasis added).

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[2] *See* S.C. Code Ann. § 63-9-2200 (2010) (enacting the ICPC into law to ensure placements for children across state lines are safe).

[3] Stacie Eison, a DSS treatment worker and investigator, testified DSS delayed the start of the ICPC home study because it was waiting on the signed family court orders and results of Father's paternity test. Eison also testified she was unfamiliar with the ICPC process and explained it took her some time to complete the required paperwork. Eison testified the ICPC was not completed and submitted by DSS until October 29, 2013. She believed that if Grandmother had resided in South Carolina, Child would have been placed in Grandmother's custody. Eison testified Grandmother never received a negative ICPC home study.

On November 8, 2013, Mother signed a consent and relinquishment of her parental rights, specifying Foster Parents as her desired adoptive parents for Child. Foster Parents filed a private TPR and adoption action on November 19, 2013. In their complaint, Foster Parents alleged Father was Child's natural father and that he was not a person from whom consent was required under section 63-9-310(A) of the South Carolina Code (2010). In December 2013, Father—still in prison—filed an answer contesting Child's adoption by Foster Parents, contesting his TPR, and seeking Child's placement with Grandmother.

In January 2014, Foster Parents filed a motion to intervene and requested dismissal of DSS's action against Mother and Father. Alternatively, Foster Parents asked the family court to change Child's permanent plan to TPR and adoption—identifying themselves as Child's adoptive resource. At the January 8, 2014 hearing, the family court granted shared legal custody of Child to DSS and Foster Parents and granted physical custody of Child to Foster Parents, pending a determination of Father's rights to Child. The family court also consolidated Foster Parents' private action with DSS's action.

In their February 10, 2014 amended complaint, Foster Parents alleged (1) Father had not established parental rights in and to Child pursuant to section 63-9-310(A)(4) of the South Carolina Code, thereby rendering unnecessary his consent to Child's adoption and (2) even if Father had established parental rights, statutory grounds for TPR existed, and TPR was in Child's best interest. Father's answer to Foster Parents' amended complaint was filed on March 12, 2014, objecting to Foster Parents' adoption of Child. On April 9, 2014, Grandparents filed an answer and counterclaim as Intervenors, alleging Foster Parents were not entitled to relief and seeking to adopt Child with Father's consent and Mother's TPR.

On May 2, 2014—almost an entire year after Child was placed with Foster Parents and well into the litigation of this case—Father sent a letter to DSS stating he was unable to visit Child until she was in Grandmother's custody. In the letter, Father explained he asked Grandmother to stop sending him $50 per month for food and to use the money for Child's needs. Father wrote, "I would love nothing more than to see [Child]." Father asked for Foster Parents' phone number so he could call Child. Grandmother admitted Father never paid money for Child's support; however, she confirmed Father directed her in or around May 2014 to stop sending him "food packages" each month and to use the money for Child. Grandmother has consistently traveled from Virginia to South Carolina to visit Child during DSS scheduled visitations, bringing supplies for Child when she visited.

On May 8, 2014, only a few days after Father wrote to DSS, Father wrote a letter to his attorney and enclosed a birthday card for Child. Father's attorney forwarded this card to DSS. Stephanie Kitchens, Child's Guardian ad Litem (GAL), testified she sent Father a "questionnaire-type letter" a couple of months before the July 31, 2014 hearing, and Father responded within a week.

On July 31, 2014, Judge David G. Guyton convened a hearing in Foster Parents' action to determine whether Father was a person who established or maintained parental rights to the extent his consent for Child's adoption was required pursuant to section 63-9-310(A). Although Judge Guyton issued an order finding Father's consent was not necessary for Child's adoption and noting that even if his consent was required, TPR was appropriate, his order was vacated by this Court because, between the time Judge Guyton held his hearing on July 31, 2014, and issued his order on October 7, 2014, former Chief Justice Toal issued an order consolidating the actions and vesting Judge Michelle M. Hurley with exclusive jurisdiction to hear the consolidated cases.

On October 2, 2014, Father signed a consent for Child's adoption by Grandparents. At the end of October 2014, Foster Parents received a certified letter from DSS informing them that DSS intended to remove Child from their home and place her with Grandparents. Subsequently, Foster Parents served DSS and the DSS Appeals Unit with their Notice of Appeal of DSS's decision to remove Child from their home. At the February 20, 2015 permanency planning hearing, Judge Hurley ordered a permanent plan of relative placement concurrent with TPR and adoption to maintain the status quo during the pendency of any appeals.

On April 23, 2015, former Chief Justice Toal issued an order vesting Judge Rochelle Y. Conits with exclusive jurisdiction to hear and dispose of all of the consolidated cases. At the June 4, 2015 pretrial hearing, DSS explained "that if [Grandparents] and [Foster Parents were] both seeking adoption, then DSS would not oppose the plan of adoption with either of them." Step-Grandfather was dismissed as a party to the actions because of his recent separation from Grandmother.

The consolidated cases were tried in July 2015. The family court permitted Foster Parents and Grandmother to intervene in the DSS action and allowed Father and Grandmother to intervene in Foster Parents' action. The deposition of First Sergeant Lori Mabry, a records custodian for New River Valley Regional Jail in Dublin, Virginia, was admitted into evidence by consent. Mabry testified Father

was incarcerated at New River Jail from June 11, 2013 until May 14, 2014, when he was moved to Nottoway Correctional Center. She testified that during the time Father was incarcerated in New River Jail, a total of $1,894.98 was deposited into his commissary account. Mabry noted that even though Father was able to use these funds for child support, $557 of the funds were used to place phone calls and $1,284.05 of the funds were used to purchase commissary items such as food, clothing, hygiene items, stationery, and stamps. No funds were expended from his account for child support. Mabry also described several disciplinary incidents involving Father during his time at New River Jail.

By order dated September 1, 2015, the family court: (1) adopted a permanent plan of TPR and adoption; (2) terminated Mother's parental rights; (3) found Father was not a person whose consent was required for Child's adoption, but as a further sustaining ground, terminated Father's parental rights;[4] and (4) granted Foster Parents' petition for adoption. Father appealed, and the court of appeals vacated in part, reversed in part, and remanded the case to the family court. *S.C. Dep't of Soc. Servs. v. Smith*, 419 S.C. 301, 797 S.E.2d 740 (Ct. App. 2017).

The court of appeals held the family court erred in granting Foster Parents' petition for adoption because the family court had ruled Foster Parents did not have standing to pursue a private adoption action. The court of appeals held that since Foster Parents did not appeal the family court's ruling that they lacked standing to file their adoption action, this unappealed ruling became the law of the case. The court of appeals further ruled the family court properly found Foster Parents lacked standing to file a private adoption petition under the rationale of *Youngblood v. South Carolina Department of Social Services*, 402 S.C. 311, 741 S.E.2d 515 (2013). The court of appeals also ruled that because the issue of Father's consent to adopt was tied to Child's adoption, the issue of consent was not properly before the family court. Thus, the court of appeals vacated both the family court's finding that Father's consent was not required for the adoption and the family court's order granting Foster Parents' adoption of Child.

Additionally, the court of appeals ruled the family court erred in terminating Father's parental rights, finding Foster Parents failed to prove by clear and

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[4] In terminating Father's parental rights, the family court found Father: (1) willfully failed to support Child; (2) willfully failed to visit Child; and (3) abandoned Child. The family court also found TPR was in Child's best interest.

convincing evidence a statutory ground for TPR existed. The court of appeals found the record did not contain clear and convincing evidence to show that Father abandoned Child, willfully failed to visit Child, or willfully failed to support Child. The court of appeals remanded the matter to the family court for a new permanency planning hearing.

This Court granted Foster Parents' petition for a writ of certiorari to review: (1) whether the court of appeals erred in reversing the family court's order terminating Father's parental rights on the statutory grounds of abandonment and willful failure to visit;[5] (2) whether, if the court of appeals did so err, the family court properly found termination of Father's parental rights was in Child's best interest; and (3) whether the court of appeals erred in holding the family court had no authority to determine any adoption issues because it found Foster Parents lacked standing to bring the private adoption action.

DISCUSSION

I. TPR

The United States Constitution requires fundamentally fair procedures when the State seeks to sever the relationship between a natural parent and their child. U.S. CONST. amend. XIV, § 1; *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982). In *Santosky*, the United States Supreme Court provided:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. . . . When the State moves

[5] This Court did not grant certiorari to review the statutory ground of willful failure to support. *See* S.C. Code Ann. § 63-7-2570(4) (Supp. 2017) (stating a statutory ground for TPR is met when "[t]he child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to support the child" because the parent failed to make a material contribution in money or necessities).

> to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

455 U.S. at 753–54.

In South Carolina, the family court may order TPR upon finding one or more of twelve statutory grounds is satisfied and upon finding TPR is in the best interest of the child. S.C. Code Ann. § 63-7-2570 (Supp. 2017). The South Carolina Children's Code provides the TPR statute "must be liberally construed in order to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent-child relationship." S.C. Code Ann. § 63-7-2620 (2010).

In TPR cases, there are often two competing interests: those of a parent and those of a child. *S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. 621, 626, 614 S.E.2d 642, 645 (2005). "Parents have a fundamental interest in the care, custody, and management of their children. Parental rights warrant vigilant protection under the law and due process mandates a fundamentally fair procedure when the state seeks to terminate the parent-child relationship." *Id.* "However, a child has a fundamental interest in [TPR] if the parent-child relationship inhibits establishing secure, stable, and continuous relationships found in a home with proper parental care. In balancing these interests, the best interest of the child is paramount to that of the parent." *Id.* at 626–27, 614 S.E.2d at 645.

In the instant case, Child was removed from Mother's care a few weeks after birth and was placed in Foster Parents' home on June 6, 2013, after Child tested positive for cocaine and benzoylecgonine. Father was incarcerated out-of-state at the time Child was removed. On November 8, 2013, Mother signed a consent and relinquishment of her parental rights and expressed her desire for Foster Parents to adopt Child. Subsequently, on November 19, 2013, Foster Parents brought a private action seeking TPR and adoption. Even if Foster Parents did not have standing to bring their private adoption action, it was well within Foster Parents' statutory right to file their TPR action. *See* S.C. Code Ann. § 63-7-2530(A) (Supp. 2017) (providing "any interested party" may file a TPR petition); S.C. Code Ann. § 63-7-20(17) (Supp. 2017) (including a foster parent as a "[p]arty in interest"); *Dep't of Soc. Servs. v. Pritchett*, 296 S.C. 517, 520–21, 374 S.E.2d 500, 501–02 (Ct. App. 1988) (concluding the Children's Code provides a foster parent standing to petition for TPR). Because it is well-settled that Foster Parents have standing to petition for

TPR, we first address the court of appeals' decision to reverse the family court's termination of Father's parental rights.

A. Statutory Grounds

The grounds for TPR must be proven by clear and convincing evidence. *S.C. Dep't of Soc. Servs. v. Headden*, 354 S.C. 602, 608, 582 S.E.2d 419, 423 (2003). "On appeal, pursuant to its de novo standard of review, the Court can make its own determination from the record of whether the grounds for termination are supported by clear and convincing evidence." *Broom v. Jennifer J.*, 403 S.C. 96, 111, 742 S.E.2d 382, 389 (2013).

1. Abandonment

Foster Parents argue the family court correctly held Father's parental rights should be terminated for abandoning Child. We agree.

A statutory ground for TPR is met when the child has been abandoned. S.C. Code Ann. § 63-7-2570(7) (Supp. 2017). "'Abandonment of a child' means a parent or guardian wilfully deserts a child or wilfully surrenders physical possession of a child without making adequate arrangements for the child's needs or the continuing care of the child." S.C. Code Ann. § 63-7-20(1) (Supp. 2017). Willfulness is a question of intent which requires an analysis of the facts and circumstances of each case. *S.C. Dep't of Soc. Servs. v. Broome*, 307 S.C. 48, 52, 413 S.E.2d 835, 838 (1992). "Conduct of the parent [that] evinces a settled purpose to forgo parental duties may fairly be characterized as 'willful' because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." *Id.* at 53, 413 S.E.2d at 839. In considering whether a parent's conduct was willful, the family court may consider all relevant conduct by the parent and is not limited to considering only the months immediately preceding TPR. *Headden*, 354 S.C. at 611, 582 S.E.2d at 424. The element of willfulness must be established by clear and convincing evidence. *Broome*, 307 S.C. at 52, 413 S.E.2d at 838.

"Terminating the parental rights of an incarcerated parent requires consideration of all of the surrounding facts and circumstances in the determination of wilfulness. The voluntary pursuit of lawless behavior is one factor which may be considered, but generally is not determinative." *S.C. Dep't of Soc. Servs. v. Wilson*, 344 S.C. 332, 340, 543 S.E.2d 580, 584 (Ct. App. 2001). "[I]ncarceration alone is

insufficient to justify [TPR]." *S.C. Dep't of Soc. Servs. v. Ledford*, 357 S.C. 371, 376, 593 S.E.2d 175, 177 (Ct. App. 2004). In *Ledford*, the court of appeals found Ledford, an incarcerated father, abandoned his child because "[i]n addition to 'breathing oxygen,' [Ledford] was required to take the necessary steps to assure that his daughter was being continually cared for." *Id.* The court of appeals noted that aside from unsuccessfully sending a birthday card to child, Ledford admitted he only attempted to locate his daughter one time. *Id.* The court of appeals found Ledford "neither made arrangements for his child's care nor showed concern for the status of her current arrangements." *Id.*

Here, the family court found Father abandoned Child "by and through his omission to make any arrangement whatsoever for [Child]'s needs or the continuing care of [Child] prior to reporting to prison." The family court found Father knew of Mother's "long history of drug abuse and instability, yet he left his unborn child at the mercy of this dysfunctional person." However, the court of appeals disagreed, finding the family court erred in finding Father abandoned Child because Father: (1) voluntarily started his prison sentence early; (2) sent a letter to DSS expressing his desire to visit Child; (3) asked DSS for Foster Parents' phone number to call Child; (4) asked Grandmother to use $50 per month to support Child instead of sending it to him in prison; (5) asked his attorney for an update on the case; (6) voluntarily signed an affidavit acknowledging paternity; (7) obtained a DNA test to prove paternity despite DSS failing to assist with the test; (8) sent a letter to the GAL seeking to pursue a relationship with Child; (9) completed and returned a questionnaire from the GAL within one week, and (10) sent Child a birthday card expressing his love. Although the court of appeals' list of actions taken by Father may appear sufficient to find clear and convincing evidence did not support this statutory ground for TPR, a close analysis of the record reveals otherwise. Several of the actions listed separately by the court of appeals were not actually separate and distinct actions, but rather occurred within a month's time of one another, and approximately one year *after* Child's birth.

We find the record contains clear and convincing evidence that Father abandoned Child. Father emphasizes that he voluntarily turned himself in to Maryland authorities so he could plead guilty to outstanding Maryland charges, serve his prison sentence, and then begin his life with Mother and Child. Of course, after completing the Maryland sentence in 2013, Father was transported back to Virginia to serve prison time for two contempt of court charges, two financial crimes, and a probation violation. While some may consider admirable Father's efforts to

put his troubles behind him, the fact remains that Father was a "wanted man" in both Virginia and Maryland. We are not inclined to give him credit for voluntarily surrendering his status as a fugitive from justice, as it was incumbent upon him to do so. Even if Father were entitled to some dispensation from this Court for surrendering to Maryland authorities, he did nothing to prepare for and provide the proper care of Mother and Child during his period of incarceration. *See Ledford*, 357 S.C. at 376, 593 S.E.2d at 177 (finding evidence that an incarcerated father abandoned his child because he failed to take the necessary steps to ensure his daughter was being *continually* cared for). When Mother was asked where she lived after Father went to prison, Mother replied, "I was just bouncing from here to there, wherever I could." Mother had a history of drug abuse and instability; nevertheless, Father left pregnant Mother without money or evidence of a plan for her or Child's well-being. Further, Father had money in his prison account but did not send any money for Mother's prenatal care or Child's care following her birth.[6] Even though Grandmother provided for Mother for several months while Mother was pregnant, it was *Mother* who reached out to Grandmother for assistance—not *Father*. Mother called and asked Grandmother to come pick her up because Mother had been beaten up, had been in the hospital, and had nowhere to go.

Further, Father's belated efforts to establish contact with Child in May 2014 were only a miniscule attempt to remain a part of Child's life. *See Ledford*, 357 S.C. at 376, 593 S.E.2d at 177 (finding there was evidence an incarcerated father abandoned his child when he "made only a miniscule attempt to remain a part of his daughter's life"). Despite his incarceration throughout this litigation, Father had the ability to place phone calls and write letters. Father demonstrated this ability by calling and writing Mother up until approximately one month before Child's birth. However, after Mother broke off her relationship with Father prior to Child's birth, there is no evidence Father ever placed a phone call to Mother, DSS, or Foster

[6] We acknowledge the family court's order signed August 13, 2013, held Father's child support obligation in abeyance; however, no monetary support was paid to Mother by Father during her pregnancy and during the three months following Child's birth. The record indicates that between June 12, 2013, and August 13, 2013, Father's prison accounts received deposits of $264.98, $97.00, and $100.00. None of this money was sent for Child's care. Father's earlier prison account records are not included in the record.

Parents to inquire about Child.[7] However, the record does indicate that Father spent over $557 on other phone calls during the first year of Child's life.

It was not until May 2, 2014—almost an entire year after Child's birth and several months after litigation had commenced—when Father finally wrote a letter to DSS: (1) explaining he was unable to visit Child until she was placed in Grandmother's custody, (2) noting he would like to see Child, (3) explaining he directed Grandmother to stop sending him $50 per month for food and to use the money for Child's needs, and (4) asking for Foster Parents' phone number to speak with Child.[8] A few days later on May 8, 2014, Father sent a letter to his attorney inquiring about possible court dates and enclosing a birthday card for Child. There is no evidence in the record explaining why Father failed to reach out to Child sooner, and there is no evidence in the record that Father made any other attempts to contact Child prior to the family court's final hearing in July 2015.

We find additional clear and convincing evidence of Father's abandonment of Child through his relinquishment of his parental rights in conjunction with his October 2, 2014 consent to Grandparents adopting Child. Although Father argues this was a tactical move for him to maintain a relationship with Child, this maneuver clearly and convincingly establishes Father's settled purpose to forgo his parental duties. *See Broome*, 307 S.C. at 53, 413 S.E.2d at 839 (providing "[c]onduct of the parent [that] evinces a settled purpose to forgo parental duties may fairly be characterized as 'willful'"). By relinquishing his parental rights in his consent for Grandparents to adopt Child, Father confirmed he had considered the alternatives to placing Child for adoption and believed adoption was in Child's best interest. There is no evidence in the record that Father has ever sought to withdraw his consent. We find clear and convincing evidence supports a finding that TPR is appropriate on the ground of abandonment.

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[7] Mother testified that after she broke up with Father, she did not prohibit Father from contacting her.

[8] The record does not indicate Father was given Foster Parents' phone number. However, the record does indicate Grandmother had Foster Parents' phone number. At oral argument, DSS admitted Father *could have* and *should have* obtained Foster Parents' phone number from Grandmother. DSS acknowledged Father "should have done more."

2. Failure to Visit

Foster Parents argue the family court correctly held Father's parental rights should be terminated for willfully failing to visit Child. We agree.

A statutory ground for TPR is satisfied when:

> The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to visit the child. The court may attach little or no weight to incidental visitations, but it must be shown that the parent was not prevented from visiting by the party having custody or by court order. The distance of child's placement from the parent's home must be taken into consideration when determining the ability to visit.

S.C. Code Ann. § 63-7-2570(3) (Supp. 2017). Here, it is clear Child has "lived outside the home of either parent" for much longer than six months as she was removed from Mother's home on June 6, 2013. Child has not since been returned to live with Mother or Father. Thus, the narrow question before this Court is whether there is clear and convincing evidence Father willfully failed to visit Child.

"Whether a parent's failure to visit . . . a child is 'willful' within the meaning of the statute is a question of intent to be determined in each case from all the facts and circumstances." *Broome*, 307 S.C. at 52, 413 S.E.2d at 838. "Conduct of the parent [that] evinces a settled purpose to forego parental duties may fairly be characterized as 'willful' because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." *Id.* at 53, 413 S.E.2d at 839. "Willfulness does not mean that the parent must have some ill-intent towards the child or a conscious desire not to visit; it only means that the parent must not have visited due to [his] own decisions, rather than being prevented from doing so by someone else." *Broom*, 403 S.C. at 114, 742 S.E.2d at 391.

Here, the family court found Father willfully failed to visit Child for six months and was not prevented from visiting or having meaningful interaction with Child by DSS and Foster Parents. The family court found Father's incarceration was the result of his own willful misconduct and determined Father's conduct indicated he failed to take advantage of his ability to initiate and have contact with Child, DSS,

or Foster Parents. The family court noted the few actions that were taken by Father demonstrated both his ability to initiate and have contact with Child and Foster Parents, as well as his failure to do so in a timely manner.

The court of appeals disagreed, finding there was not clear and convincing evidence that Father willfully failed to visit Child. The court of appeals noted Father: (1) voluntarily started his prison sentence early; (2) sent a letter to DSS expressing his desire to visit Child; (3) asked DSS for Foster Parents' phone number to call Child; (4) asked his attorney for an update on the case; (5) voluntarily signed an affidavit acknowledging paternity; (6) obtained a DNA test to prove paternity despite DSS failing to assist with the test; (7) sent a letter to the GAL seeking to pursue a relationship with Child; (8) completed and returned a questionnaire from the GAL within one week; and (9) sent Child a birthday card expressing his love.[9] Also, the court of appeals noted Eison's testimony that DSS would not have allowed Child to visit Father because he was imprisoned in another state and further noted there was no evidence in the record that DSS ever provided Father with Foster Parents' phone number. Further, the court of appeals found Father repeatedly expressed his desire for Child to be placed with Grandmother so she could facilitate visitation and communication with Child. The court of appeals stated, "[If not] for Foster Parents' administrative appeal, DSS could have placed Child with Grandmother in November 2014, which would have facilitated visitation and communication between Father and Child."

We find clear and convincing evidence establishes Father willfully failed to visit Child. Father's unlawful conduct contributing to his incarceration is a factor that must be considered by this Court when determining whether he willfully failed to visit Child; however, we choose to not give it substantial weight in this situation because Father's unlawful conduct occurred *before* Child was conceived. After learning of Mother's pregnancy, Father voluntarily surrendered to authorities in order to raise Child with Mother upon his release. Although Father's incarceration

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[9] Again, although the court of appeals' list of actions taken by Father may appear sufficient to find clear and convincing evidence did not support this statutory ground for TPR, a close analysis of the record reveals otherwise. Several of the actions listed separately by the court of appeals are not actually separate and distinct actions, but rather occurred within a month's time of one another, approximately one year after Child's birth.

alone is insufficient to create a ground for TPR, his incarceration does not insulate him from performing his parental duty of visiting Child within his ability.

Father has not visited with Child face-to-face, and the record does not indicate he ever requested DSS to allow Child to visit him. However, Eison testified that she did not believe Child would have been permitted to travel out of state to visit with Father in prison. Father could possibly have had face-to-face visitation if Child was placed with Grandmother; however, Grandmother was required to go through the ICPC process because she did not live in South Carolina. The record indicates there was a delay on DSS's side in beginning the ICPC process. Although the family court first ordered an ICPC home study at the June 19, 2013 merits hearing, the ICPC home study was not submitted until October 29, 2013. However, when Grandmother first received a positive home study in February 2014, Mother had not consented to Child living with Grandparents, and Foster Parents had already filed for adoption. Therefore, we do not penalize Father for his failure to visit with Child face-to-face.

Nevertheless, Father's failure to even attempt to make contact with Child for almost an entire year constitutes clear and convincing evidence that Father willfully failed to visit Child. *See* § 63-7-2570(3) (stating a statutory ground for TPR is met when "[t]he child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to visit the child"). Despite any inconveniences in visitation due to Father's incarceration, Father's disregard in reaching out to Child for almost an entire year evinces a conscious indifference to the rights of Child to receive much-needed communication and consortium from Father. This is particularly noteworthy considering Father spent $557 of his commissary funds on phone calls alone during this time. Further, prior to the final family court hearing in July 2015, Father made no attempt to contact Child other than his May 2014 communications.

We find the facts that Father (1) voluntarily started his prison sentence early; (2) voluntarily signed an affidavit acknowledging paternity; and (3) obtained a DNA test to prove paternity relied upon by the court of appeals in its analysis do not rescue Father from a finding that he willfully failed to visit Child. We also find Father's communication with the GAL and his legal filings contesting Foster Parents' adoption to be nothing more than Father participating in the ongoing litigation. Further, we find the relevant actions Father did take were judicially motivated and insufficient to cure his willful failure to visit. *See S.C. Dep't of Soc. Servs. v. Cummings*, 345 S.C. 288, 296, 547 S.E.2d 506, 510–11 (Ct. App. 2001) ("A parent's

curative conduct after the initiation of TPR proceedings may be considered by the court on the issue of intent; however, it must be considered in light of the timeliness in which it occurred."); *id.* at 296, 547 S.E.2d at 511 ("Rarely does judicially-motivated repentance, standing alone, warrant a finding of curative conduct. It must be considered together with all the relevant facts and circumstances."). DSS removed Child from Mother's care and placed her with Foster Parents on June 6, 2013. Subsequently, Mother signed a consent for Foster Parents to adopt on November 8, 2013, and Foster Parents filed their private adoption/TPR action on November 19, 2013. Although Father attempted to communicate with Child and inquire about her well-being by writing letters to (1) DSS on May 2, 2014, and (2) his attorney on May 8, 2014, these communications occurred approximately one year after Child was removed from Mother's care and occurred over five months after Foster Parents had filed their adoption/TPR petition. We find it particularly noteworthy that Father's first and only attempts to communicate with Child occurred *after* Foster Parents filed their amended complaint alleging TPR was appropriate pursuant to statutory grounds including Father's abandonment and willful failure to visit Child. We conclude this evidence clearly and convincingly establishes these communications were judicially motivated. We find Father's actions insufficient to be curative of his willful failure to visit Child.

For the foregoing reasons, we hold clear and convincing evidence establishes Father willfully failed to visit Child. Therefore, TPR is warranted on this ground.

B. Best Interest

The family court determined TPR was in Child's "absolute best interest." The family court noted Father was not a person on whom Child could rely for her permanent care, custody, protection, or security. Because the court of appeals found there was not clear and convincing evidence to support any statutory ground for TPR, it did not address the issue of whether TPR was in Child's best interest. *See* S.C. Code Ann. § 63-7-2570 (Supp. 2017) (providing TPR is appropriate upon finding one or more of twelve statutory grounds is satisfied *and* also finding TPR is in the child's best interest). However, since we find clear and convincing evidence supports more than one statutory ground for TPR, a best interest analysis is necessary. We hold TPR is in Child's best interest.

In a TPR case, the best interest of the child 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). "The [interest] of the child shall prevail if the child's interest and the parental rights conflict." S.C. Code Ann. § 63-7-2620 (2010). "The purpose of [the TPR statute] is to establish procedures for the reasonable and compassionate [TPR] where children are abused, neglected, or abandoned in order to protect the health and welfare of these children and make them eligible for adoption . . . ." S.C. Code Ann. § 63-7-2510 (2010). "Appellate courts must consider the child's perspective, and not the parent's, as the primary concern when determining whether TPR is appropriate." *S.C. Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. 324, 343, 741 S.E.2d 739, 749–50 (2013).

Viewed from Child's perspective, we find TPR is in Child's best interest. Child was placed in foster care shortly after her birth, and at the time the family court issued the order challenged by Father, she had lived with Foster Parents for over two years. She has now lived with Foster Parents for over four years. Father has never met Child, and no bond has formed between them. *See Charleston Cty. Dep't of Soc. Servs. v. King*, 369 S.C. 96, 104–06, 631 S.E.2d 239, 243–44 (2006) (holding TPR was in the child's best interest because child had bonded with his foster family and did not remember his biological family); *S.C. Dep't of Soc. Servs. v. Cameron N.F.L.*, 403 S.C. 323, 329, 742 S.E.2d 697, 700 (Ct. App. 2013) ("The Supreme Court of South Carolina has considered bonding when determining whether TPR is in a child's best interest."). Father has willfully failed to play a meaningful role in Child's life, despite his ability to write and place phone calls while in prison. It is important to delineate Grandmother's efforts from Father's lack of effort. It was Grandmother who stepped up and provided for Mother during the pregnancy when Mother reached out to her for help—not Father. It was Grandmother who maintained contact with Child and continued to provide support for Child—not Father. Clearly, Grandmother has shown an interest in Child's well-being; unfortunately, we cannot say the same for Father.

Child has lived with Foster Parents for her entire life, and Grandmother visits with Child regularly. Both Foster Parents and Grandmother want to adopt Child and would provide her with permanency and stability as compared to Father. *See Cameron N.F.L.*, 403 S.C. at 329, 742 S.E.2d at 700 (considering future stability when determining whether TPR is in a child's best interest).

We disagree with DSS's and the GAL's recommendation of relative placement with Grandmother. At the time of the final hearing before the family court, relative placement would have had Grandmother serving as a placeholder for Father until he finished his prison sentence, and the uncertainty of Father's desire and ability to

parent weighs heavily against Child's stability and permanency. As noted above, Grandmother admitted in her pleadings that Father—her own son—was not a "capable, suitable, fit, or proper person[] to be granted custody of Child." This is hardly a ringing endorsement of the prospect of a stable and suitable permanent environment for Child should Child be placed with Grandmother. This Court cannot and will not prolong the uncertainty of Child's stability and permanency any longer. *See* S.C. Code Ann. § 63-1-20(D) (2010) ("When children must be permanently removed from their homes, they *shall be placed in adoptive homes* so that they may become members of a family by legal adoption or, absent that possibility, other permanent settings.") (emphasis added). Therefore, we find TPR is in Child's best interest.[10]

II. Foster Parents' Standing

Foster Parents argue the court of appeals erred in holding the family court had no authority to determine any adoption issues. We agree.

The court of appeals found the family court concluded Foster Parents did not have standing to file an adoption action. The court of appeals found Foster Parents failed to appeal the family court's determination that they lacked standing to file their adoption petition; therefore, the court of appeals held, this unappealed ruling became the law of the case. DSS and Father both urge this Court to apply this procedural bar in affirming the court of appeals' conclusion. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

The parties disagree as to whether the family court's order concluded Foster Parents did not have standing to bring their private adoption action. Regardless of whether the family court held Foster Parents lacked standing to bring their private adoption action—arguably making this unappealed ruling the law of the case—this Court has the power to refuse to allow such a procedural bar from prohibiting our ability to address this issue on appeal because the rights of a minor child are involved. *See Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 107, 536 S.E.2d 372, 374

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[10] Because we hold TPR was appropriate and dispositive of the issue, we decline to address the family court's finding that Father's consent for Child's adoption was unnecessary. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

(2000) ("[P]rocedural rules are subservient to the court's duty to zealously guard the rights of minors."); *Galloway v. Galloway*, 249 S.C. 157, 160, 153 S.E.2d 326, 327 (1967) ("The duty to protect the rights of minors has precedence over procedural rules otherwise limiting the scope of review and matters affecting the rights of minors can be considered by this court."). Therefore, because Child's rights are heavily involved, we choose to address the merits of whether Foster Parents have standing to bring their private adoption action.[11]

Regarding the merits, the court of appeals found, under the rationale of *Youngblood v. South Carolina Department of Social Services*, 402 S.C. 311, 741 S.E.2d 515 (2013), Foster Parents did not have standing to file their adoption petition. We disagree, and hold Foster Parents have standing to bring their private adoption action.

"Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right" and is a fundamental prerequisite to instituting an action. *See Michael P. v. Greenville Cty. Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009). "As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation." *Ex parte Morris*, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006). Standing "may exist by statute, through the principles of constitutional standing, or through the public importance exception." *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518. Statutory standing exists "when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Id.*

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[11] Further, if the family court did hold Foster Parents lacked standing to bring their private adoption action, we find Foster Parents were not aggrieved by the family court's ruling and were not required to appeal its decision. *See* Rule 201, SCACR (providing "[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal"); *Bivens v. Knight*, 254 S.C. 10, 13, 173 S.E.2d 150, 152 (1970) (defining an aggrieved party as "a person who is aggrieved by the judgment or decree when it operates on his rights of property or bears directly upon his interest"). Foster Parents clearly benefited from the family court's ultimate decision. Foster Parents desired to adopt Child, and the family court granted them Child's adoption. Nevertheless, the court of appeals uses the law of the case doctrine to effectively nullify Foster Parents' adoption.

Adoption proceedings are conducted pursuant to the South Carolina Adoption Act. *See* S.C. Code Ann. §§ 63-9-10 to -2290 (2010 & Supp. 2017). Importantly, section 63-9-60 provides:

> (A)(1) Any South Carolina resident may petition the court to adopt a child.
>
> . . . .
>
> (B) This section does not apply to a child placed by the State Department of Social Services or any agency under contract with the department for purposes of placing that child for adoption.

S.C. Code Ann. § 63-9-60 (2010 & Supp. 2017). Because "the right of adoption in South Carolina is not a natural right but wholly statutory, it must be strictly construed." *Hucks v. Dolan*, 288 S.C. 468, 470, 343 S.E.2d 613, 614 (1986).

This Court recently addressed the issue of a foster parent's standing to bring a private adoption action in *South Carolina Department of Social Services v. Boulware*, 422 S.C. 1, 809 S.E.2d 223 (2018). In *Boulware*, we held the foster parents had standing to pursue a private adoption action pursuant to a plain reading of section 63-9-60 because the foster parents were residents of South Carolina and because, at the time the foster parents commenced their adoption action, the child had not yet been placed for adoption by DSS. *Id.* at 14, 809 S.E.2d at 229. We concluded our interpretation of section 63-9-60 did not produce an absurd result and was appropriate under the overarching policies of the South Carolina Children's Code. *Id.* at 13, 809 S.E.2d at 229.

Boulware compels a simple analysis in the instant case. Foster Parents are South Carolina residents and filed their private adoption action on November 19, 2013. At the time Foster Parents filed their private adoption action, Child had not been placed for adoption by DSS—Child was only placed by DSS in Foster Parents' home for "fostering." Therefore, we hold Foster Parents have statutory standing to bring their private adoption action.

III. Adoption

Because we hold the court of appeals erred in not considering the issue of adoption, in the interest of providing much-needed stability and permanency for

Child, we will review the family court's decision to grant Child's adoption by Foster Parents. The family court noted both Foster Parents and Grandmother were viable adoptive placements for DSS to have considered.[12] The family court ultimately determined it was in Child's best interest to be adopted by Foster Parents. We agree.

During trial, Dr. Cheryl Fortner-Wood, an expert in the field of psychology, specifically child development and attachment, testified before the family court that Child was "securely attached" to Foster Parents. She believed Child's removal from Foster Parents' home would be traumatic for Child and would more likely than not have permanent implications. Dr. Fortner-Wood opined Child had not spent a sufficient amount of time with Grandmother to develop an "attachment relationship." Dr. Fortner-Wood believed Child's attachment to Foster Parents "trumps biology."

Grandmother believed it was in Child's best interest to be in her home—whether through relative placement or adoption. Grandmother testified she came to all of the DSS scheduled visitations with Child. Grandmother testified she was forty-one years old and had three children of her own. Grandmother stated she had a bachelor's degree in psychology and expressed a desire to become a school counselor. Grandmother explained her household consisted of herself, a twenty-year-old son, and a sixteen-year-old daughter. Grandmother admitted she had moved approximately thirty times since 1990 and explained she was currently living in a three bedroom, one bathroom home. She testified to working several different jobs over the past few years. Grandmother noted she had been married three different times and her third marriage was to Step-Grandfather. Grandmother admitted she allowed Step-Grandfather, who she knew in high school, to move into her house after two months of reconnecting with him online. She testified they were currently separated. Grandmother testified a man that she met online had recently come with her on some of her visitations, but Grandmother denied any romantic involvement with that man.

The family court admitted into evidence "sexually provocative" Facebook pictures of Grandmother's daughter in "suggestive and profane" shirts. Grandmother explained her other son had his GED and had previously experienced depression. Grandmother stated Father (twenty-four years old at the time of the final family court

[12] We also note that at the pretrial hearing, DSS stated "that if [Grandmother] and [Foster Parents were] both seeking adoption, then DSS would not oppose the plan of adoption with either of them."

hearing) was first arrested when he was fifteen years old. She explained she pressed charges against Father for an altercation involving her other son. She also noted Father was arrested for stealing and using credit cards when he was sixteen years old, possession of crack cocaine when he was nineteen years old, and was subsequently arrested for a probation violation and a counterfeiting charge. She stated the plan was for Father to live with her after his release from prison. She admitted she alleged in her pleadings that Father was an unfit father; however, she testified she believed he would be an excellent father if given the chance. Grandmother admitted Father has another child with a different woman and that Father does not pay any support to that child.

Grandmother's financial declaration showed she had a monthly net income of $1,640.13, which included the earnings from her two part-time jobs and $500 of child support for her daughter. Grandmother acknowledged her daughter would turn eighteen years old the following year. Grandmother's financial declaration also showed monthly expenses of $1,453. Grandmother testified she had approximately $66,000 in student loan debt she will have to start repaying once she obtains gainful employment. She stated she had spent approximately $15,000 in attorney and expert fees for this case. She testified she was considering opening an in-home daycare if she received custody of Child. Grandmother noted she had the support of family members and Father's release date was November 1, 2016. She testified she had never received any negative ICPC home studies.

Dr. Jane Freeman, a certified adoption investigator, testified that if Child was placed with Grandmother at the time of the final hearing, Grandmother would fall below the poverty guidelines provided by the United States government. She stated Foster Parents, given their level of income and number of people in their home, were above the poverty guidelines. Dr. Freeman "strongly recommended" Foster Parents be approved for Child's adoption.

Tammy Dalsing (Foster Mother) testified she was forty-eight years old and married to Edward Dalsing (Foster Father). Foster Mother noted they had a current foster and adoptive license. She stated a total of ten people lived in their home: her and Foster Father; three biological children (ages twenty-two, twenty, and eighteen); two adopted children (ages five and four); and three foster children (including Child and her half-sister) (ages two, two, and one). Foster Mother testified she and Foster Father were currently in the process of a contested adoption regarding Child's half-sister. She testified she and Foster Father had both been previously married. Foster Mother testified she and Foster Father met in 1992 and married shortly thereafter.

She noted her family started fostering children to help and "give back to the community." Foster Mother testified she, Foster Father, and their children had never been arrested. She testified she wants her children to have a relationship with God and be successful.

Foster Mother testified Foster Father was retired from the military and had been employed at Snyder's-Lance for the past five years. She testified she previously worked as a legal secretary but was currently a "full-time homemaker" and homeschooled all of their school-aged children. She noted they converted a dining room into a playroom/schoolroom. Foster Mother stated she was unable to get approval or permission for Child to have a special helmet to address Child's cranial issue and droopy eye through DSS until she and Foster Father were granted custody of Child. She stated that once they were awarded custody, they were able to pay for the medical care Child needed.

Foster Mother believed adoption by her and Foster Father was in Child's best interest. Foster Mother noted she and Foster Father supported Mother's attempts to complete her treatment plan and had Mother's consent to adopt Child. Foster Mother testified she loved Child and believed it would be "devastating" for Child and the rest of her family if Child were removed from their home. She noted she was open to Mother, Grandmother, and Father having a relationship with Child if Foster Parents were granted Child's adoption.

The GAL testified she believed Child was attached to both Grandmother and Foster Parents. In her report, the GAL stated Child was "doing wonderfully in [Foster Parents'] home and ha[d] bonded with [Foster Parents] and foster siblings." The GAL reported Grandmother was "loving" and "very protective" of Child. She explained Child had bonded with Grandmother during the short periods of time they had spent together. The GAL believed Grandmother financially demonstrated an ability to "meet every day needs." She recommended Child be placed with Grandmother so Father could have the opportunity to know Child. DSS also believed relative placement with Grandmother was in Child's best interest.

"It is the policy of this State to reunite the child with his family in a timely manner, whether or not the child has been placed in the care of the State voluntarily." S.C. Code Ann. § 63-1-20(D) (2010). But, "[w]hen children must be permanently removed from their homes, they shall be placed in adoptive homes so that they may become members of a family by legal adoption or, absent that possibility, other permanent settings." *Id.* Section 63-7-1700(G) (Supp. 2017) requires DSS to

"assess[] the viability of adoption" and to "demonstrate[] that [TPR] is not in the child's best interests" before the family court can award "custody or legal guardianship, or both, to a suitable, fit, and willing relative or nonrelative."

In an adoption proceeding, the best interest of the child is the paramount consideration. *Chandler v. Merrell*, 291 S.C. 227, 228, 353 S.E.2d 135, 136 (1987). In *McCutcheon v. Charleston County Department of Social Services*, 302 S.C. 338, 339, 396 S.E.2d 115, 116 (Ct. App. 1990), paternal grandparents filed a petition for adoption, and DSS requested denial of the petition and TPR. The child's foster parents intervened and petitioned for adoption and TPR. *Id.* The child was placed with foster parents when she was less than four months old, and she had lived with foster parents for approximately two years. *Id.* at 347, 396 S.E.2d at 120. The evidence showed the child was bonded with her foster family. *Id.* Although grandparents' home was not "unsuitable," the court of appeals concluded the child's "best interests would be served by staying with the family she has known as such for nearly all her life." *Id.* The court of appeals noted grandparents were not entitled to any preferences—"[t]heir status, as blood relatives, is but one factor in determining the child's best interests." *Id.*

Importantly, Child has lived with Foster Parents since being removed from Mother's home on June 6, 2013. Foster Parents are the only parent figures Child has known, and Dr. Fortner-Wood, an expert in child development and attachment, testified Child was "securely attached" to Foster Parents and believed Child's removal from Foster Parents' home would be traumatic for her and would have permanent implications. Because Child is strongly bonded with Foster Parents, it is not in her best interest to be removed from their home. Although Grandmother has consistently visited Child, we agree with Dr. Fortner-Wood's assessment that Child has not spent a sufficient amount of time with Grandmother to develop an "attachment relationship."

We find the biological relationship between Grandmother and Child is relevant to this Court's consideration; however, this factor is not determinative. *See Dunn v. Dunn*, 298 S.C. 365, 367–68, 380 S.E.2d 836, 838 (1989) (recognizing the "grandparent-status" is but one of the factors used in determining a child's best interest). We acknowledge and admire Grandmother's strong sense of family and the fact that she will go to extraordinary lengths to preserve and protect her family unit. But, adoption by Foster Parents would not necessarily sever all connections Child has with her biological family. At the time of the final hearing, Foster Parents were in the middle of a contested adoption proceeding to adopt Child's half-sister.

Additionally, Foster Mother testified she was open to Mother, Grandmother, and Father having a relationship with Child if Foster Parents were granted Child's adoption.

Although we do not find Grandmother's home is unsuitable for Child, we do have concerns regarding her ability to serve as Child's adoptive parent. Our concerns focus on Grandmother's prior parenting history, financial situation, and unhealthy relationship with Father. Grandmother's most recent ICPC approval in this Court's record was rescinded because the Virginia ICPC was unable to verify Grandmother's income information. Further, the record does not indicate an adoptive placement home study has ever been performed on Grandmother's home. Nevertheless, even if Grandmother's home is suitable for Child's adoption, we find adoption by Foster Parents is in Child's best interest. *See McCutcheon*, 302 S.C. at 347, 396 S.E.2d at 120 (finding adoption by foster parents was in the child's best interest despite her grandparents' home being suitable). We cannot possibly find it to be in Child's best interest for her to be removed from the only home she has ever known—especially when that home is safe and suitable for Child. The justification for severing this developed attachment relationship simply does not exist under the facts of this case.

Both Foster Parents and Grandmother love Child and would be viable adoptive placements. Foster Parents and Grandmother have dedicated tremendous amounts of time and energy to this litigation and have worked hard to ensure Child's needs have continuously been met. However, after thoroughly considering the evidence in the record and Child's best interest, we conclude Foster Parents' petition to adopt Child should be granted. *See Chandler*, 291 S.C. at 228, 353 S.E.2d at 136 (providing the child's best interest is paramount in an adoption proceeding).

CONCLUSION

We hold: (1) clear and convincing evidence establishes that Father abandoned and willfully failed to visit Child; (2) TPR is in Child's best interest; and (3) based on the facts of this case, Foster Parents have standing to bring their private adoption action. We also hold the family court properly granted Child's adoption to Foster Parents. Therefore, the court of appeals' decision is **REVERSED**, and the family court's order granting adoption to Foster Parents is reinstated.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jonathan Xavier Miller, Petitioner.

Appellate Case No. 2016-000862

ON WRIT OF CERTIOARI TO THE COURT OF APPEALS

Appeal from Richland County
Doyet A. Early III, Trial Court Judge

Opinion No. 27798
Heard April 12, 2017 – Filed May 9, 2018

AFFIRMED

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

Attorney General Alan Wilson, Senior Assistant Deputy Attorney General J. Benjamin Aplin, Solicitor Daniel E. Johnson, of Columbia, and Brent H. Arant, of North Charleston, all for Respondent.

JUSTICE FEW: Jonathan Xavier Miller appeals his conviction for possession of crack cocaine. He argues the trial court erred in denying his motion to suppress drug evidence seized during an inventory search of his vehicle after he was arrested for driving with a suspended license. We find the trial court correctly denied the motion, and affirm.

I. Facts and Procedural History

In January 2013, Columbia Police Department Officers James Westbury and Shaun McDonald were in the Rosewood area of Columbia investigating criminal activity unrelated to this case. During their investigation, a resident of the area informed the officers that an older-model, silver and green Chevrolet with large rims had been making frequent stops at a location known for drug activity.

Later that day, Officer Westbury and Officer McDonald—driving separately—observed a vehicle fitting that description pull into a gas station parking lot. Both officers turned their vehicles around and followed the silver and green Chevrolet as it left the gas station and traveled along several streets. The officers did not activate their blue lights or sirens. The Chevrolet came to a stop in the private driveway of an apartment complex, so the officers parked on the street and exited their vehicles.

After Miller got out of the driver's seat, the officers approached him to ask for identification. Miller told the officers he did not have his driver's license with him, but gave them his name and date of birth. When the officers provided Miller's information to the Department of Motor Vehicles, they discovered his license was suspended, so they arrested Miller for driving with a suspended license in violation of section 56-1-460 of the South Carolina Code (2018). The officers searched Miller incident to his arrest and found an electronic scale in one of his pockets. They asked for consent to search the Chevrolet, but Miller refused.

While the officers were arresting Miller, his girlfriend—Nikea Berry—came out of one of the apartments. She told the officers she lived there, and Miller was visiting her. The officers also learned the owner of the Chevrolet was Cassandra Jones, who did not live at the apartment complex and was not present at the scene.

Columbia Police Department's standard procedures permit its officers to tow vehicles when the driver is arrested away from his residence and there is no responsible party present at the scene. The Department's written policy requires

police officers to conduct an inventory search of the passenger compartment of a towed vehicle. Because Miller was arrested away from his residence, and because Jones was not present at the scene, the officers called a towing company to tow the Chevrolet. Before the tow truck arrived, the officers conducted an inventory search and found just under five grams of crack cocaine beneath the driver's seat.

A grand jury indicted Miller for possession with intent to distribute crack cocaine. Prior to his trial, Miller moved to suppress the drug evidence arguing the officers did not have authority to tow the Chevrolet from the private driveway, they were not authorized to conduct the inventory search, and thus the seizure of the drugs violated the Fourth Amendment. The trial court denied the motion to suppress.

At trial, the jury found Miller not guilty of possession with intent to distribute, but convicted him of simple possession of crack cocaine, which was his third offense. The trial court sentenced Miller to nine years in prison. *See* S.C. Code Ann. § 44-53-375(A) (2018) ("For a third or subsequent offense [of possession of cocaine base], the offender is guilty of a felony and, upon conviction, must be imprisoned not more than ten years . . . ."). Miller appealed to the court of appeals, which affirmed his conviction in an unpublished opinion. *State v. Miller*, Op. No. 2016-UP-040 (S.C. Ct. App. filed Jan. 20, 2016). Miller filed a petition for a writ of certiorari, which we granted.

II. Analysis

The issue on appeal is whether it was reasonable under the Fourth Amendment for the officers—acting pursuant to their department policy—to seize, search, and then tow the vehicle Miller was driving when he was arrested on private property away from his residence and the owner of the vehicle was not present. The facts relevant to this appeal are not in dispute, so we address the issue as a question of law, which we review de novo. *See State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (stating "this Court reviews questions of law de novo").

A. The Fourth Amendment and Inventory Searches

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. "The ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady v. Dombrowski*, 413 U.S. 433, 439, 93 S. Ct. 2523, 2527, 37

L. Ed. 2d 706, 713 (1973). "Whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case." *S. Dakota v. Opperman*, 428 U.S. 364, 375, 96 S. Ct. 3092, 3100, 49 L. Ed. 2d 1000, 1009 (1976). In most circumstances, evidence seized in violation of the Fourth Amendment's reasonableness standard must be excluded from trial. *State v. Weaver*, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007).

"Generally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." *Id.* However, a warrantless search can be reasonable if it falls under one of the exceptions to the warrant requirement. *Id.* One of those exceptions is an inventory search conducted according to standard police procedures. *Robinson v. State*, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014) (stating "if police officers are following their standard procedures, they may inventory impounded property without obtaining a warrant" (citing *Colorado v. Bertine*, 479 U.S. 367, 374, 107 S. Ct. 738, 742, 93 L. Ed. 2d 739, 747 (1987))).

"For an inventory search to be valid, the vehicle searched should first be in the valid custody of the law enforcement officers conducting the inventory." *United States v. Brown*, 787 F.2d 929, 931-32 (4th Cir. 1986) (citing *Opperman*, 428 U.S. at 374, 96 S. Ct. at 3099, 49 L. Ed. 2d at 1008). "The question . . . is . . . whether the police officer's decision to impound was reasonable under the circumstances." *Brown*, 787 F.2d at 932; *see also United States v. Bullette*, 854 F.3d 261, 265 (4th Cir. 2017) ("An inventory search of an automobile is lawful (1) where the circumstances reasonably justified seizure or impoundment, and (2) law enforcement conducts the inventory search according to routine and standard procedures designed to secure the vehicle or its contents.") (citing *Bertine*, 479 U.S. at 371-76, 107 S. Ct. at 741-43, 93 L. Ed. 2d. at 745-48).

B. Reasonableness of the Impoundment

The first step in our analysis is to determine whether Officers Westbury and McDonald's decision to seize Miller's vehicle violated the Fourth Amendment. We find the decision was reasonable under the circumstances, and thus there was no violation.

We begin our explanation with the fact the officers seized and towed the vehicle pursuant to lawful authority. They acted in accordance with the requirements set

forth in a written police department policy, which was adopted pursuant to a City of Columbia ordinance, which was passed under authority of a state statute, which the General Assembly enacted pursuant to the Home Rule provisions of the Constitution of South Carolina.

Article VIII, section 9 of our Constitution provides, "The structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law," and article VIII, section 17 provides, "The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution." Pursuant to the authority granted it in article VIII, section 9, our General Assembly enacted section 5-7-30 of the South Carolina Code (Supp. 2017), which provides,

> Each municipality of the State . . . may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, . . . law enforcement, . . . and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving . . . peace, order, and good government in it . . . .

Pursuant to section 5-7-30, the City of Columbia enacted section 10-31 of its Code of Ordinances granting the chief of police broad powers over law enforcement in the City. Section 10-31 provides,

> The chief of police, subject to the city manager, shall have administrative supervision over the police department. He shall be responsible for the enforcement of state laws and city ordinances, . . . establish training programs, . . . [and] establish departmental rules and regulations . . . .

In turn, the chief of the Columbia Police Department adopted the Columbia Police Department's Policy Manual, which provides in section 7.2 of the Auxiliary Traffic Services chapter,

> Departmental personnel may also tow the following vehicles:
>
> - Any vehicle from which an officer makes an arrest and there is no responsible party to whom the arrestee can turn over the possession of the vehicle.

During a hearing on the motion to suppress, the State presented the testimony of the arresting officers to further explain the department policy and their decision to seize and tow the vehicle. Officer McDonald testified, "The vehicle needs to be towed . . . to make sure that nothing happens to the vehicle to cover our end." The trial court asked Officer McDonald, "What authority did you . . . rely upon in removing [the Chevrolet] from the private driveway?" McDonald replied, "Like I said, sir, to my knowledge, it wasn't his residence, and I was trained from day one that if the person gets arrested and it's not their residence that the vehicle gets towed." The solicitor asked Officer Westbury, "When discerning the responsible party to . . . possibly leave the car with, what factors do you look at?" Westbury replied, "It's . . . going to come up to the actual vehicle owner where the vehicle owner is on the scene or whether it's something to where I'm given information as far as where they want it left." When the trial court asked Officer Westbury why the Chevrolet was towed, he said, "Due to the fact that he wasn't the vehicle owner, and the owner wasn't on the scene." Officer Westbury also testified, "It's per the policy."

We read the towing provision of the policy to include three requirements that must be met before the vehicle may be towed: (1) the officer makes the arrest from the vehicle, (2) the arrest occurs away from the arrestee's residence, and (3) the owner is not present at the scene and no other person is present who is authorized to take responsibility for the vehicle. Because all three of these requirements were met in this case, we find the officers complied with the governing policy, and the seizure was reasonable under the Fourth Amendment.

Our decision is consistent with other decisions addressing the legality of police seizure of a vehicle on private property. In *Brown*, for example, a police officer pulled the defendant's vehicle after observing the vehicle "weaving down the highway." 787 F.2d at 930. Brown pulled into a private parking lot used by several nearby businesses and apartments. *Id.* The police officer determined Brown was intoxicated, and arrested him for driving under the influence of alcohol. *Id.* The police officer impounded the car, and then conducted an inventory search during

which he found an unregistered firearm with an illegal silencer. 787 F.2d at 931. The district court denied Brown's motion to suppress the evidence seized as a result of the inventory search. *Id.*

The facts of *Brown* are similar to this case in several important respects. First, both arrests were made from the vehicle after the officer observed the suspect driving in a manner the officer later determined to be illegal—driving with a suspended license in this case, and driving under the influence in *Brown*. Second, both arrests were made away from the suspect's residence, in a private parking lot. The facts of *Brown* are also similar to this case in that Brown's "girlfriend lived in an apartment over one of the businesses adjoining the parking lot," and there were no other passengers in the car who could drive it.[1] *Id.* The facts of *Brown* are dissimilar in that Brown owned his vehicle, and thus could give permission to the officer to leave it there, and—more importantly—the officer in *Brown* did not base his decision to tow Brown's vehicle on any police procedure that set forth standardized criteria governing when to tow a vehicle.[2] These dissimilarities make *Brown* a weaker case for a reasonable seizure under the Fourth Amendment than this case. Nevertheless, the Fourth Circuit found the officer's decision to seize and tow the vehicle was reasonable, stating,

> we are of opinion that the police officer in this case could reasonably have impounded Brown's vehicle either because there was no known individual immediately available to take custody of the car, or because the car could have constituted a nuisance in the area in which it was parked. Therefore, we are of opinion that the police were in lawful custody of Brown's car at the time of their inventory of its contents.

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[1] There were three passengers in Brown's vehicle, but the court noted "everyone in Brown's car had been drinking." *Id.*

[2] Although the Fourth Circuit stated the police had an "official policy for the inventory of impounded vehicles," 787 F.2d at 931 n.2, there is no reference to any policy governing the impoundment itself.

787 F.2d at 932-33 (citation omitted). Rejecting Brown's argument that the officers could have left the car with Brown's girlfriend, the Fourth Circuit stated, "The police could have done so. That they did not, however, does not render their impoundment of Brown's car unreasonable." 787 F.2d at 932 (citing *Illinois v. Lafayette*, 462 U.S. 640, 647, 103 S. Ct. 2605, 2610, 77 L. Ed. 2d 65, 72 (1983)).

Turning our attention back to this case, the limitations imposed on an officer's discretion to seize and tow a vehicle by the three requirements of section 7.2 of the Auxiliary Traffic Services chapter of the Columbia Police Department's Policy Manual are precisely the sort of "standardized criteria" courts have consistently looked to in determining whether the seizure and towing of a vehicle is reasonable under the Fourth Amendment. *See Bertine*, 479 U.S. at 376, 107 S. Ct. at 743, 93 L. Ed. 2d at 748 (recognizing the validity of police discretion to impound a vehicle "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity"); *Florida v. Wells*, 495 U.S. 1, 4, 110 S. Ct. 1632, 1635, 109 L. Ed. 2d 1, 6 (1990) (explaining that the requirement of standardized criteria "is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence").

In *United States v. Sanders*, 796 F.3d 1241 (10th Cir. 2015), for example, the Tenth Circuit explained the necessity "that standardized criteria generally must confine officer discretion to impound vehicles" before a seizure may be found reasonable under the Fourth Amendment. 796 F.3d at 1247. The *Sanders* court affirmed the suppression of evidence seized from an impounded vehicle in part because the applicable municipal code did not authorize "impoundment from *private* lots," even though it "explicitly authorizes the impoundment of vehicles from *public* property." 796 F.3d at 1250.

In *State v. Pogue*, 868 N.W.2d 522 (N.D. 2015), a case relied on by the dissent, the Supreme Court of North Dakota stated,

> The impounding of a vehicle passes constitutional muster so long as the decision to impound is guided by a standard policy—even a policy that provides officers with discretion as to the proper course of action to take—and the decision is made "on the basis of something other than suspicion of evidence of criminal activity."

868 N.W.2d at 528 (quoting *United States v. Le*, 474 F.3d 511, 514 (8th Cir. 2007), which quoted *Bertine*, 479 U.S. at 375, 107 S. Ct. at 743, 93 L.Ed.2d at 748). The *Pogue* court found the impoundment of the vehicle in that case violated the Fourth Amendment as an unreasonable seizure because there were no limitations on the officer's discretion to seize and tow the vehicle, and "the State has failed to meet its burden of establishing the reasons for impounding a vehicle were anything other than for an investigative function." 868 N.W.2d at 531. The court specifically noted, "The State offered no evidence on when officers are authorized to impound a vehicle." 868 N.W.2d at 530.

In this case, by contrast to *Sanders* and *Pogue*, the City of Columbia policy specifically limits an officer's discretion to seize and tow a vehicle to situations in which the three requirements discussed above are met. These three requirements place appropriate limits on police discretion to tow a vehicle, and the officers' compliance with the requirements renders the decision to tow it reasonable under the Fourth Amendment. *See Le*, 474 F.3d at 514-15 (holding the officer "acted according to standard procedures when he decided to impound the SUV" and thus "the decision to impound the SUV passes constitutional muster").

The dissent argues the towing provisions of section 7.2 of the policy do not contemplate towing a vehicle from private property. The argument is based in part on the fact that other sections of the policy specifically limit their application, and do not apply on private property. For example, section 7.1 of the policy permits officers to tow a vehicle only from a street or highway.[3] However, the fact other

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[3] Section 7.1 provides,

> Members of the Department may tow a vehicle meeting the following criteria:
> - Any unattended vehicle outside a business or residential area parked on a paved or main traveled part of the highway . . . .
> - Any vehicle left so as to prevent an unobstructed width of highway . . . .
> - Any vehicle left so that it cannot be seen clearly from a distance of two hundred feet . . . .

sections limit an officer's authority to tow to circumstances involving public property, while section 7.2 does not, supports a finding that the towing provisions in section 7.2 were intended to apply to vehicles on private property. *See supra* § 7.2 (stating "[d]epartment personnel may *also* tow . . ." (emphasis added)); *see also United States v. Marshall*, 168 F. Supp. 3d 846, 855 (D.S.C. 2016) (finding section 7.2 of the of the Auxiliary Traffic Services chapter in the Columbia Police Department's Policy Manual permits officers to tow a vehicle from a private driveway). If Officers Westbury and McDonald had towed Miller's vehicle pursuant section 7.1 of the policy, the dissent would be correct because none of the section 7.1 criteria were met in this case. However, the officers towed Miller's vehicle pursuant to section 7.2, which applies to vehicles on private property.

Miller argues sections 56-5-2520 and 56-5-5635 of the South Carolina Code (2018) do not permit the police to tow vehicles from private property. We disagree with Miller's argument for two reasons. First, it is not necessary that more than one state law authorize the towing of a vehicle. As we have explained, state law authorized the local ordinance and police department policy that permitted the officers to tow Miller's vehicle.

Second, the important question regarding sections 56-5-2520 or 56-5-5635 is not whether they grant the police authority to tow vehicles from private property. Rather, the question regarding these sections is whether the Columbia Police Department policy conflicts with these provisions of state law. *See* § 5-7-30 (providing regulations and ordinances must not be "inconsistent with the Constitution and general law of this State"); *see also City of N. Charleston v. Harper*, 306 S.C. 153, 156, 410 S.E.2d 569, 571 (1991) (stating "the grant of power is given to local governments with the proviso that the local law not conflict with state law" (citing *City of Charleston v. Jenkins*, 243 S.C. 205, 208, 133 S.E.2d 242, 243 (1963))).

- Any unattended vehicle illegally left standing upon any highway, . . . or under such circumstances as to obstruct the normal movement of traffic . . . .
- Any vehicle left unattended in a metered parking space for a period of twenty-four hours . . . .

We find no conflict between the Columbia Police Department policy and these or any other state statutes. Subsection 56-5-2520(c)(3) provides,

> Any police officer may remove or cause to be removed to the nearest garage or other place of safety any vehicle found upon a highway when . . . [t]he person driving or in control of the vehicle is arrested for an alleged offense for which the officer is required by law to take such person before a magistrate or other judicial official without unnecessary delay.

While this subsection may not specifically authorize police officers to tow a vehicle from private property, it does not prohibit police officers from doing so. *See Marshall*, 168 F. Supp. 3d at 855 (finding section 56-5-2520 does not "exclude private driveways").

Miller also relies on subsection 56-5-5635(A), which provides,

> Notwithstanding another provision of law, a law enforcement officer who directs that a vehicle be towed for any reason, whether on public or private property, must use the established towing procedure for his jurisdiction. A request by a law enforcement officer resulting from a law enforcement action including, but not limited to, a vehicle collision, vehicle breakdown, or vehicle recovery incident to an arrest, is considered a law enforcement towing for purposes of recovering costs associated with the towing and storage of the vehicle unless the request for towing is made by a law enforcement officer at the direct request of the owner or operator of the vehicle.

This subsection likewise does not prohibit police officers from towing a vehicle from private property. In fact, this subsection contemplates that local law enforcement agencies will adopt standard towing procedures, and explicitly provides that police officers must use those established towing procedures when towing vehicles incident to arrest from private property. That is exactly what Officers Westbury and McDonald did in this case.

C. Reasonableness of the Inventory Search

Having determined it was reasonable for the officers to seize and tow Miller's vehicle, we turn to the question of whether the inventory search the police officers conducted in this case was reasonable under the Fourth Amendment.

In *Opperman*, the Supreme Court of the United States explained that inventory searches serve "three distinct needs: the protection of the owner's property while it remains in police custody; the protection [of] the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger." 428 U.S. at 369, 96 S. Ct. at 3097, 49 L. Ed. 2d at 1005. In *Bertine*, the Supreme Court analyzed its jurisprudence on inventory searches in light of the facts of that case and held, "We conclude that . . . reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment . . . ." 479 U.S. at 374, 107 S. Ct. at 742, 93 L. Ed. 2d at 747. In *United States v. Matthews*, 591 F.3d 230 (4th Cir. 2009), the Fourth Circuit stated, "For the inventory search exception to apply, the search must have 'be[en] conducted according to standardized criteria,' such as a uniform police department policy, and performed in good faith." 591 F.3d at 235 (quoting *Bertine*, 479 U.S. at 374 n.6, 107 S. Ct. at 742 n.6, 93 L. Ed. 2d at 747 n.6, and then citing *United States v. Banks*, 482 F.3d 733, 739 (4th Cir. 2007)); *see also Opperman*, 428 U.S. at 372, 96 S. Ct. at 3098-99, 49 L. Ed. 2d at 1007 ("The decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable.").

Miller does not argue the officers acted in bad faith, so "our analysis focuses only on whether the search was conducted pursuant to standardized criteria," *Matthews*, 591 F.3d at 235, and "pursuant to standard police procedures," *Opperman*, 428 U.S. at 372, 96 S. Ct. at 3098-99, 49 L. Ed. 2d at 1007. We also must determine whether the criteria set forth in the policy serve the "needs" an inventory search may legitimately address as explained in *Opperman*. 428 U.S. at 369, 96 S. Ct. at 3097, 49 L. Ed. 2d at 1005.

Section 7.2 of the policy states,

> Any officer towing a vehicle according to any provision in Sections 7.1 or 7.2 will complete a "Record of Stored Vehicle" . . . .

> The officer shall ensure the security of all items of value obtained in the passenger compartment of the vehicle. If possible, the officer shall store all items of value in the trunk of the vehicle. The vehicle's trunk key will be stored in the Property Room under the owner's name. If the vehicle does not have separate ignition and trunk keys, all items of value shall be stored in the Property Room under the owner's name. The officer should identify each item and its storage location on the "Record of Stored Vehicle."

In *Matthews*, the Fourth Circuit stated, "The existence of . . . a [standardized criteria] may be proven by reference to either written rules and regulations or testimony regarding standard practices." 591 F.3d at 235 (quoting *United States v. Thompson,* 29 F.3d 62, 65 (2d Cir. 1994));[4] *see also United States v. Clarke*, 842 F.3d 288, 294 (4th Cir. 2016) (same). During the suppression hearing, the officers testified they conducted the inventory search pursuant to their training in accordance with the written policy.

Based on the Policy Manual and the officers' testimony regarding the Department's standard practices described above, we conclude the inventory search of the Chevrolet was conducted pursuant to a valid standardized procedure. The policy requires an inventory search to be conducted every time a vehicle is towed. This is evident by the language of the policy: "The officer *shall* ensure the security of all items of value obtained in the passenger compartment of the vehicle." The policy also specifies how the inventory search should be conducted, including where to search, where to store items of value, and how to make a record of what items of value are found. Officer McDonald explained why it is standard procedure to conduct an inventory search of vehicles that are towed, "Pretty much we inventory vehicles to make sure that they can't say something was in the vehicle that wasn't so

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[4] *Matthews* substituted "standardized criteria" for the phrase "valid procedure" in *Thompson*. *Thompson* used "such a valid procedure" to represent the language "standardized criteria . . . or established routine," 29 F.3d at 65, which it quoted from *Wells*, 495 U.S. at 4, 110 S. Ct. at 1635, 109 L. Ed. 2d at 6. *Thompson* quotes *Wells* as part of its explanation of what is "a valid procedure" for an inventory search. 29 F.3d at 65-66.

we're not held responsible." When asked what he was looking for, he testified, "Just valuables."

We find the Columbia Police Department policy as explained by the officers contains the "standard police procedures" and "standardized criteria" that serve legitimate needs as required by *Opperman*, *Bertine*, and *Matthews*. We have found no evidence the officers did not follow the policy while conducting the inventory search of the Chevrolet.[5] Therefore the inventory search was reasonable under the Fourth Amendment, and the trial court was correct to deny the motion to suppress.

III. Conclusion

For the reasons explained above, the trial court's decision to deny the motion to suppress and Miller's conviction for possession of crack cocaine are **AFFIRMED.**

KITTREDGE, JAMES, JJ., and Acting Justice James E. Moore, concur. BEATTY, C.J., dissenting in a separate opinion.

[5] During the suppression hearing, there was a brief exchange between Miller's counsel and Officer McDonald in which Officer McDonald stated he did not complete the written inventory list as required by the policy. During redirect, however, Officer McDonald clarified that the inventory list requirement applies only to items of value, and because no items of value were found, it was not necessary to complete an inventory list.

CHIEF JUSTICE BEATTY: I respectfully dissent as I believe the circumstances did not reasonably justify the seizure, which precipitated the inventory search. Initially, other than a citizen's "tip" about a vehicle making frequent stops in a location known for drug activity, the officers offered no objective justification for pursuing Miller's vehicle, asking for his information, and consent to search the vehicle. Further, because the Columbia Police Department's policy did not provide the requisite authority to seize Miller's vehicle from the private driveway, the ultimate seizure was unlawful and, in turn, the resultant inventory search violated the Fourth Amendment. Consequently, I would find the Court of Appeals erred in affirming the trial judge's denial of Miller's motion to suppress.

The Fourth Amendment to the United States Constitution protects a person's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." *State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (citation omitted). The State bears the burden of establishing "the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures." *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013).

The inventory search exception to the Fourth Amendment is well-established. *Robinson v. State*, 407 S.C. 169, 754 S.E.2d 862 (2014) (recognizing that police officers may conduct a warrantless inventory search, pursuant to their standard procedures, after a vehicle is lawfully impounded (citing *Colorado v. Bertine*, 479 U.S. 367, 374 (1987))). However, prior to analyzing the reasonableness of an inventory search, a threshold question must be answered. Specifically, the Court must first determine whether the predicate seizure was lawful as the inventory search is contingent on the seizure of the vehicle.

While our appellate courts have implicitly recognized that an inventory search is dependent upon a lawful seizure,[6] other jurisdictions have expressly identified this prerequisite. *See, e.g.*, *People v. Spencer*, 948 N.E.2d 196, 203 (Ill. App. Ct. 2011) ("The threshold question in determining whether the search of an individual's vehicle qualifies as a valid inventory search is whether the prior impoundment was proper,

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[6] *See State v. Lemacks*, 275 S.C. 181, 183, 268 S.E.2d 285, 286 (1980) (concluding police officers were justified in conducting an inventory search, which was "incident to [the vehicle's] lawful impoundment and removal to police headquarters because [the vehicle's] presence in the highway created a serious traffic hazard").

since the need and justification for the inventory arise from the impoundment."); *Commonwealth v. Brinson*, 800 N.E.2d 1032, 1035 (Mass. 2003) ("A lawful inventory search is contingent on the propriety of the impoundment of the car."); *State v. Pogue*, 868 N.W.2d 522, 528 (N.D. 2015) ("The Fourth Amendment examination of an inventory search, therefore, turns not on the issue of probable cause, which is the traditional basis for the warrantless search of vehicles, but on the issues of whether the vehicle was *properly impounded* and the search was carried out in accordance with standard police procedures." (citation omitted)). *See Generally* Emile F. Short, Annotation, *Lawfulness of "inventory search" of motor vehicle impounded by police*, 48 A.L.R.3d 537 (1973 & Supp. 2018) (collecting state and federal cases discussing issues related to the propriety of inventory searches of impounded vehicles).

In my view, the analysis of whether Miller's vehicle was lawfully impounded necessarily begins with a discussion of the facts and circumstances that preceded Miller's arrest for driving under suspension. During the suppression hearing, Officer Westbury testified that, while investigating criminal activity unrelated to the instant case, he received a citizen's complaint and description of a vehicle seen "going multiple times" to a location known for drug activity. Shortly thereafter, Officers Westbury and McDonald observed a vehicle matching the description pull into a gas station parking lot. Officers Westbury and McDonald, driving separate vehicles, followed the vehicle after it left the gas station, drove down several residential streets, and then pulled into and parked in the private driveway of an apartment complex. It was later determined that Miller's girlfriend resided at the apartment complex.

After Miller voluntarily exited the vehicle, Officer Westbury requested his information and then asked Miller for consent to search the vehicle. Miller refused to consent. While Officer Westbury continued to talk to Miller, Officer McDonald checked Miller's information and discovered that he was driving with a suspended license. The officers then arrested Miller for this offense.

Notably, during the suppression hearing, Officer Westbury acknowledged that this was not a traffic stop and Miller was not suspected of any crime at the time he parked in the private driveway.[7] Officer McDonald also admitted that they "did not

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[7] Significantly, unlike the defendant in *United States v. Brown*, 787 F.2d 929 (4th Cir. 1986), a case relied on by the majority, the officers did not stop Miller's vehicle after observing a traffic violation on a highway.

pull [Miller] over for a traffic violation." Yet, Officer Westbury asked Miller for consent to search the vehicle.

Given this evidence, I would find the officers' decision to tow Miller's vehicle from a private driveway was improper as it was based solely on a suspicion of drug activity. *See Florida v. Wells*, 495 U.S. 1, 4 (1990) (recognizing that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence"); *Bertine*, 479 U.S. at 375 ("Nothing in *Opperman* or [*Illinois v.*] *Layfayette*, [462 U.S. 640 (1983)] prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria *and on the basis of something other than suspicion of evidence of criminal activity*." (emphasis added)); *cf. S. Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (upholding inventory search where "there [was] no suggestion whatever that this standard procedure . . . was a pretext concealing an investigatory police motive").

However, even accepting that the initial stop was justified and the decision to impound the vehicle was not pretext for searching Miller's vehicle without a warrant, I believe the mere existence of a police department policy is insufficient to satisfy the State's burden of proving the applicability of the inventory search exception to the Fourth Amendment. *See Spencer*, 948 N.E.2d at 203 ("[T]he existence of a police regulation cannot be used as a predicate to determine the lawfulness or reasonableness of an inventory search of a vehicle."). "To hold otherwise would grant the police an unlimited ability to evade the requirements of the fourth amendment by promulgating regulations that authorize the use of inventory searches following every arrest." *Id*. Unlike the majority, I do not believe the Columbia Police Department's policy authorized the officers to seize Miller's vehicle from a private driveway.

When Section 6 of Chapter 5 of the "Auxiliary Traffic Services" is read as a whole, it is evident the purpose of the policy is to protect the public from potential dangers on roadways and highways.[8] In fact, much of Section 6 is devoted to

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[8] Section 1.0 entitled "Directive" provides in pertinent part:

> The Columbia Police Department recognizes the responsibility for the safety of the public using the roads and highways within the City of Columbia. The Department recognizes the responsibility to assist

procedures addressing "Abandoned or Derelict" vehicles.[9] In view of this "caretaking" purpose, it is difficult to justify the seizure of Miller's vehicle, which was parked in a private driveway, when it posed no risk to the public. *See United States v. Duguay*, 93 F.3d 346, 353 (7th Cir. 1996) ("The policy of impounding [a] car without regard to whether the defendant can provide for its removal is patently unreasonable if the ostensible purpose for impoundment is for the 'caretaking' of the streets.").

Moreover, Section 7.2, the specific provision relied on by the State to support the lawfulness of the initial seizure, references a South Carolina code section that authorizes police officers to tow vehicles "found upon a highway." Section 7.2 authorizes Columbia City police officers to tow:

- Any vehicle from which an officer makes an arrest and there is no responsible party to whom the arrestee can turn over the possession of the vehicle (§ 56-5-2520 S.C. Code).[10]

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motorists in non-emergency and emergency situations that may develop on the city's streets and highways.

[9] *See, e.g.*, Section 5.0 ("An abandoned vehicle is defined as . . . a motor vehicle that has remained illegally on private or public property for a period of more than seven (7) days without the consent of the owner or person in control of the property (§ 56-5-5810 S.C. Code)."); Section 7.1 (identifying criteria for which an officer may tow "improperly stopped, standing or parked vehicles" on the highway).

[10] Section 56-5-2520 provides in relevant part:

> (c) Any police officer may remove or cause to be removed to the nearest garage or other place of safety any vehicle *found upon a highway* when:
>
> > . . . .
> >
> > (3) The person driving or in control of the vehicle is arrested for an alleged offense for which the officer is required by law to take such person before a magistrate or other judicial official without unnecessary delay.

Notably, section 56-5-2520 is contained within Chapter 5, which is entitled "Uniform Act Regulating Traffic on *Highways*." S.C. Code Ann. §§ 56-5-10 to -6565 (2018) (emphasis added). The provisions of Chapter 5 "relating to the operation of vehicles refer *exclusively* to the operation of vehicles upon highways" except: (1) "[w]hen a different place is specifically referred to in a given section; and (2) [t]hat the provisions of Articles 9[11] and 23[12] shall apply upon highways and elsewhere throughout the State." S.C. Code Ann. § 56-5-20 (2018) (emphasis added). Neither of these exceptions is present in the instant case.

Further, I believe section 56-5-5635(A) is inapposite. This section states:

> Notwithstanding another provision of law, a law enforcement officer who directs that a vehicle be towed for any reason, whether on public or private property, must use the established towing procedure for his jurisdiction. A request by a law enforcement officer resulting from a law enforcement action including, but not limited to, a vehicle collision, vehicle breakdown, or vehicle recovery incident to an arrest, is considered a law enforcement towing for purposes of recovering costs associated with the towing and storage of the vehicle unless the request for towing is made by a law enforcement officer at the direct request of the owner or operator of the vehicle.

S.C. Code Ann. § 56-5-5635(A) (2018). While the statute indicates that law enforcement may tow a vehicle from private property, this single reference cannot be construed as an authorization to do so. Rather, the section mandates that law enforcement follow established towing procedures, which presupposes a lawful seizure. Therefore, I disagree with the majority's attempt to glean affirmative

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S.C. Code Ann. § 56-5-2520(c)(3) (2018) (emphasis added).

[11] Article 9 provides for the duties and reporting procedures following vehicular accidents. S.C. Code Ann. §§ 56-5-1210 to -1360 (2018).

[12] Article 23 provides for the offenses of reckless homicide, reckless driving, and driving under the influence. S.C. Code Ann. §§ 56-5-2910 to -2995 (2018).

authority from sections 56-5-2520 and 56-5-5635 simply because they do not prohibit police officers from towing a vehicle from private property.

Additionally, given the express authorization in section 56-5-2520(c)(3) for officers to tow vehicles from highways and the absence of a reference to private property, I would find the Columbia Police Department's policy conflicts with state law and is, therefore, void. *See Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 553, 397 S.E.2d 662, 664 (1990) ("[I]n order for there to be a conflict between a state statute and a municipal ordinance both must contain either express or implied conditions which are inconsistent or irreconcilable with each other." (citation and internal quotations marks omitted)); *City of N. Charleston v. Harper*, 306 S.C. 153, 156, 410 S.E.2d 569, 571 (1991) ("Where there is a conflict between a state statute and a city ordinance, the ordinance is void.").

Finally, even accepting the majority's conclusion that the Columbia Police Department's policy authorized the officers to tow Miller's vehicle from private property, I would find the officers failed to comply with the procedure outlined in Section 7.2. In relevant part, Section 7.2 states: "Department personnel may also tow the following vehicles: Any vehicle from which an officer makes an arrest *and there is no responsible party to whom the arrestee can turn over the possession of the vehicle* (§56-5-2520 S.C. Code)." (Emphasis added.) Contrary to the majority's interpretation, this provision does not require the responsible party be "present" at the location of the vehicle about to be towed. Here, Officer McDonald admitted that he did not check to determine if there was a responsible party despite the requirement in the policy.

Based on the foregoing, I would conclude that the seizure and the subsequent inventory search were unreasonable. As a result, I would find the Court of Appeals erred in affirming the trial judge's decision to deny Miller's motion to suppress the drug evidence.

The Supreme Court of South Carolina

South Carolina Insurance Reserve Fund, Respondent,

v.

East Richland County Public Service District and Coley Brown, Defendants,

Of whom East Richland County Public Service District is the Petitioner,

and Coley Brown is a Respondent.

Appellate Case No. 2016-001932

ORDER

The parties have filed a joint motion to dismiss this matter and to vacate the opinion of the Court of Appeals in *S.C. Ins. Reserve Fund v. E. Richland Cty. Pub. Serv. Dist.*, 417 S.C. 149, 789 S.E.2d 63 (Ct. App. 2016). The motion is granted. We hereby vacate the opinion of the Court of Appeals and dismiss the petition for a writ of certiorari.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina

May 2, 2018