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PARITY IN SOUTH CAROLINA RECIDIVIST SENTENCING: *STATE V. GORDON*

I. INTRODUCTION

Should a court sentence an offender with multiple convictions stemming from offenses committed close in time as a recidivist? Two provisions of the South Carolina Code, when read together, answer this question in the negative. The state's recidivist statute, section 17-25-45, imposes a sentence of life in prison without the possibly of parole, under certain circumstances, on a repeat offender who has committed a "serious" or "most serious" offense.[1] The second provision, section 17-25-50, ostensibly governs counting a defendant's offenses for the purpose of imposing a recidivist sentence. Section 17-25-50 tells courts to treat offenses committed close in time as one offense.[2] Despite the clear relation of these two statutory sections, South Carolina courts have not always read them together.

In *State v. Benjamin*, the South Carolina Supreme Court held that section 17-25-50's "close in time" rule did not apply to the recidivist statute, and therefore, multiple offenses should always count separately for sentencing purposes, no matter how closely in time they may have occurred.[3] Only a few months later, however, the supreme court overruled *Benjamin* in *State v. Gordon*, holding that sections 17-25-45 and 17-25-50 must be construed together, so that crimes committed at points close in time might count as a single offense for purposes of sentencing under the recidivist statute.[4]

Part II of this Note explains *State v. Benjamin*, the applicable authority prior to *Gordon*. Part III explores the *Gordon* decision and the current South Carolina law—offenses committed closely in time will be treated as one offense for recidivist sentencing purposes. Part IV argues that the court's holding in *Gordon* is correct because it implements the intent of the South Carolina General Assembly, effectuates sound public policy, and follows established expectations regarding the law. Part V discusses imprecision in section 17-25-50, while Part VI provides a solution that addresses the ambiguous language of section 17-25-50 and clarifies its relation to the recidivist statute.

II. *STATE V. BENJAMIN*

The facts of *Benjamin* are straightforward, but raise a critical issue regarding the relation between section 17-25-50 and South Carolina's recidivist statute. In May 1997, Franklin Benjamin robbed a Citgo convenience store.[5] During the commission of the robbery, he shot and killed one of the Citgo employees.[6] Approximately four hours later, Benjamin robbed a Dodge's convenience store.[7] His trials were separate for each incident.[8] A jury convicted him of murder and armed robbery for the Citgo

1. S.C. CODE ANN. § 17-25-45 (West 2003 & Supp. 2004).
2. S.C. CODE ANN. § 17-25-50 (West 2003).
3. State v. Benjamin, 353 S.C. 441, 445, 579 S.E.2d 289, 291 (2003).
4. State v. Gordon, 356 S.C. 143, 154, 588 S.E.2d 105, 111 (2003).
5. State v. Benjamin, 345 S.C. 470, 473, 549 S.E.2d 258, 260 (2001).
6. *Id.*
7. *Benjamin*, 353 S.C. at 442, 579 S.E.2d at 289; State v. Benjamin, 341 S.C. 160, 162, 533 S.E.2d 606, 607 (Ct. App. 2000).
8. *Benjamin*, 353 S.C. at 443, 579 S.E.2d at 290.

incident.[9] Approximately one month later, a jury convicted him of armed robbery for the Dodge's incident.[10] At the end of his second trial, the court took into account Benjamin's prior conviction for the Citgo incident and sentenced him to life in prison without the possibility of parole under the recidivist statute.[11]

Benjamin appealed his sentence, contending that the legislature did not intend to impose recidivist sentencing under section 17-25-45 upon an individual who had engaged in one continuous course of criminal conduct.[12] Benjamin supported his contention by arguing that the court should read section 17-25-45 in light of section 17-25-50. The court of appeals rejected this argument and affirmed the trial court's decision, and the South Carolina Supreme Court subsequently affirmed that holding.[13]

The supreme court based its holding on the precise language of section 17-25-45, subsections (A), (B), and (F):

> (A) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has one or more prior convictions for:
> (1) a most serious offense;
> (2) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section; or
> (3) any combination of the offenses listed in items (1) and (2) above.
>
> (B) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more prior convictions for:
> (1) a serious offense;
> (2) a most serious offense;
> (3) a federal or out-of-state offense that would be classified as a serious offense or most serious offense under this section; or
> (4) any combination of the offenses listed in items (1), (2), and (3) above. . . .
>
> (F) For the purpose of determining a prior conviction under this section only, a prior conviction shall mean the defendant has been convicted of a most serious or serious offense, as may be applicable, on a separate occasion, prior to the instant adjudication.[14]

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9. *Benjamin*, 345 S.C. at 473, 549 S.E.2d at 260.
10. *Benjamin*, 341 S.C. at 162, 533 S.E.2d at 607.
11. *Id.*
12. *Benjamin*, 353 S.C. at 443, 579 S.E.2d at 290.
13. *Id.* at 443–45, 579 S.E.2d at 290–91.
14. S.C. CODE ANN. § 17-25-45 (West 2003 & Supp. 2004).

Benjamin argued that the court should read section 17-25-45(F) to require separate, temporally distinct offenses—rather than merely separate, temporally distinct convictions—to trigger the recidivist statute with respect to a given offender.[15] The court disagreed, noting that subsection (F) speaks clearly in terms of convictions.[16] Also, the court stated that the legislature did not intend for courts to read section 17-25-45 with section 17-25-50 so as to permit offenses committed closely in time to count as a single offense.[17] Prior to the adoption of section 17-25-45, section 17-25-40, a substantially similar recidivist sentencing provision, was in effect.[18] According to precedent, courts read section 17-25-40 in light of section 17-25-50.[19] The *Benjamin* court noted, however, a critical difference between section 17-25-45 and its predecessor, section 17-25-40. The newer provision, unlike its predecessor, began with the words "'[n]otwithstanding any other provision of law.'"[20] The court reasoned that the legislature did not intend for courts to read the newer provision in conjunction with any other provision, including section 17-25-50.[21] The court buttressed its holding by referring to subsections (E) and (F) of section 17-25-45. Both begin with similar language limiting references to other provisions.[22] As a result, the majority concluded that the court properly sentenced Benjamin to life in prison without the possibility of parole, based on the separate convictions arising from his 1997 crime spree.[23]

A strong *Benjamin* dissent mirrored the holding in *State v. Woody*,[24] a 2001 court of appeals' decision that stated that the legislature did not intend to subject individuals convicted of offenses stemming from one crime spree to recidivist sentencing.[25] First, the *Benjamin* dissent argued that the purpose of recidivist sentencing is to punish only repeat offenders.[26] Section 17-25-45, on its own, could cover perpetrators of single crime sprees, who are not true repeat offenders, and thus expand the intended scope of recidivist sentencing.[27] Second, the dissent argued that, because courts read the predecessor to section 17-25-45 in light of section 17-25-50, and because *Woody* did not find anything to suggest that section 17-25-45(F) abrogated section 17-25-50, courts should also read section 17-25-45 in light of section 17-25-50.[28] Finally, the dissent argued that the majority's reading of the statute would allow the solicitor unfettered discretion to treat defendants differently by electing to try charges together or separately.[29] The dissent would have held Benjamin ineligible for an enhanced sentence under the recidivist statute.[30]

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15. *Benjamin*, 353 S.C. at 444, 579 S.E.2d at 290.
16. State v. Benjamin, 353 S.C. 441, 444, 579 S.E.2d 289, 290 (2003).
17. *Id.* at 445, 579 S.E.2d at 291.
18. S.C. CODE ANN. § 17-25-40 (repealed 1982).
19. State v. Stewart, 275 S.C. 447, 452–53 n.2, 272 S.E.2d 628, 631 n.2 (1980).
20. *Benjamin*, 353 S.C. at 445, 579 S.E.2d at 291 (quoting S.C. CODE ANN. § 17-25-45).
21. *Id.*
22. *Id.* Section 17-25-45(E) begins "[f]or the purpose of this section only, ..." Similarly section 17-25-45(F) states "[f]or the purpose of determining a prior conviction under this section only, ..."
23. *Id.*
24. 345 S.C. 34, 545 S.E.2d 521 (Ct. App. 2001).
25. State v. Benjamin, 353 S.C. 441, 445–49, 579 S.E.2d 289, 291–93 (2003) (Waller, J., dissenting).
26. *Id.* at 446, 579 S.E.2d at 291.
27. *Id.* at 446, 579 S.E.2d at 291–92.
28. *Id.* at 447, 579 S.E.2d at 292.
29. *Id.* at 448–49, 579 S.E.2d at 292–93.
30. *Id.* at 449, 579 S.E.2d at 293.

III. *STATE V. GORDON*

Most recently, the South Carolina Supreme Court overruled *Benjamin* in *State v. Gordon*, holding that courts must construe sections 17-25-45 and 17-25-50 together so that crimes committed closely in time count as only one offense for purposes of recidivist sentencing.[31] Like *Benjamin*, the facts of *Gordon* are straightforward but raise the critical issue regarding the relationship of section 17-25-45 to section 17-25-50. In 1997, a jury convicted Willie Gordon of trafficking crack cocaine.[32] The bases for his conviction were acts he performed "on or about September 21st through September 23rd, 1996."[33] Again in 2000, the state issued an indictment charging Gordon with trafficking crack cocaine.[34] The 2000 indictment included a conspiracy allegation, which was substantially similar to a count that Gordon's 1997 indictment originally included.[35] The earlier count was "nol prossed with the right to restore."[36] A jury convicted Gordon on the conspiracy charge in February 2001.[37] The State moved for an enhanced sentence of life in prison without the possibility of parole under section 17-25-45.[38] The trial court, however, held that Gordon was not subject to the recidivist statute, because the crimes underlying his two convictions were "so closely connected" in time that they should count as only one conviction for sentencing purposes, in accordance with section 17-25-50.[39] Thus, the court declined to impose life in prison without the possibility of parole.[40] The State appealed this decision to the South Carolina Supreme Court. The South Carolina Supreme Court overruled *Benjamin* and upheld the trial court's application of section 17-25-50 to Gordon's case.[41] In overruling *Benjamin*, the court explained that the earlier decision contravened legislative intent, prior precedent, and the purpose of recidivist sentencing.[42]

The *Gordon* majority stated that the rule from *Benjamin* was contrary to legislative intent, because courts usually construe penal statutes in the defendant's favor, and section 17-25-50 would be a nullity if it were not applicable in conjunction with section 17-25-45.[43] The court relied on two additional reasons from the *Benjamin* dissenters. First, the court noted that the purpose of recidivist sentencing is to punish only repeat offenders, and section 17-25-45, on its own, would cover perpetrators of continuing crimes, who are not true repeat offenders, and thus expand the intended scope of recidivist sentencing.[44] Second, the court explained that since courts read the predecessor to section 17-25-45 in light of

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31. State v. Gordon, 356 S.C. 143, 154–55, 588 S.E.2d 105, 111 (2003).
32. *Id.* at 147, 588 S.E.2d at 107.
33. *Id.*
34. *Id.*
35. *Id.* at 148, 588 S.E.2d at 107.
36. *Id.* at 148 n.2, 588 S.E.2d at 107 n.2.
37. State v. Gordon, 356 S.C. 143, 148, 588 S.E.2d 105, 107 (2003).
38. *Id.*
39. *Id.* at 148, 588 S.E.2d at 107–08.
40. *Id.* at 148–49, 588 S.E.2d at 108.
41. *Id.* at 154–55, 588 S.E.2d at 111. The relevant statute provides:

> In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses.

S.C. CODE ANN. § 17-25-50 (West 2003).

42. *Gordon*, 356 S.C. at 146–56, 588 S.E.2d at 106–12.
43. State v. Gordon, 356 S.C. 143, 153, 588 S.E.2d 105, 110 (2003).
44. *Id.* at 154–55, 588 S.E.2d at 110–11.

section 17-25-50, and nothing in the newer version abrogated section 17-25-50, courts should read section 17-25-45 in light of section 17-25-50.[45]

The strong dissent in *Gordon* noted two reasons why section 17-25-50 should not apply to recidivist sentencing under section 17-25-45. First, the dissent argued that the language—"'[n]otwithstanding any other provision of law'"—unambiguously represents the legislature's intent to prohibit the application of section 17-25-50 to section 17-25-45.[46] Second, the dissent urged that stare decisis required the *Gordon* court to follow *Benjamin*.[47]

In light of the court's quick reversal of itself and the strong dissents in both cases, the following question is left unanswered: Was *Gordon* or *Benjamin* the better decision?

IV. *STATE V. GORDON* WAS THE BETTER DECISION

The *Gordon* court correctly overruled *Benjamin* and thus placed the ideals of *Woody* back into effect; two offenses committed closely in time should be treated as one offense for sentencing purposes. This proposition finds support in legislative intent, public policy, and prior expectations regarding the law.

A. *Legislative Intent*

The legislature intended for courts to read section 17-25-45 in light of section 17-25-50. This conclusion follows from an examination of the purpose of the recidivist statute, the historical treatment and changes in the language of these code sections, and the treatment of offenses committed closely in time in other provisions of the South Carolina Code.

The intended purpose of section 17-25-45 indicates that courts should read it in conjunction with section 17-25-50. Section 17-25-45 is a recidivist statute. The *Gordon* court defined a recidivist statute in the following way: "Recidivist legislation attempts to encourage offenders to stay out of trouble and punishes those who refuse to be deterred even after a conviction."[48] The purpose of a recidivist statute is to punish only repeat offenders who make "'a trade of crime.'"[49] One way to ensure the fulfillment of this legislative purpose is to avoid punishing offenders who courts may have convicted of multiple offenses that arose from a single crime spree. Indeed, the *Gordon* court reasoned that the recidivist sentencing provision should apply only to an offender who has "participated in multiple criminal trials and, despite these opportunities to understand the gravity of his behavior and abide by the law, has continued to engage in criminal conduct."[50]

Thus, if recidivist sentencing did not factor in section 17-25-50, then offenders such as Benjamin and Gordon, who have multiple convictions from one incident, could receive recidivist sentences, even though they are not true repeat offenders in

45. *Id.* at 153, 588 S.E.2d at 110.

46. *Id.* at 155, 588 S.E.2d at 111 (quoting S.C. CODE ANN. § 17-25-45) (Burnett, J., dissenting in part).

47. *Id.* at 155–56, 588 S.E.2d at 111–12.

48. *Id.* at 154, 588 S.E.2d at 110 (quoting State v. Benjamin, 353 S.C. 441, 446, 579 S.E.2d 289, 291 (2003)) (Waller, J., dissenting).

49. State v. Gordon, 356 S.C. 143, 154, 588 S.E.2d 105, 111 (2003) (quoting *Benjamin*, 353 S.C. at 446, 579 S.E.2d at 291) (Waller, J., dissenting) (internal citations omitted).

50. *Id.* at 154, 588 S.E.2d at 111 (quoting *Benjamin*, 353 S.C. at 446, 579 S.E.2d at 291) (Waller, J., dissenting).

the sense of having returned to crime after a conviction. The legislature could not have intended such a possible overreaching result.

In addition, legislative history indicates that courts should read section 17-25-45 in light of section 17-25-50. The predecessor to section 17-25-45 was section 17-25-40. In *State v. Stewart*, the South Carolina Supreme Court stated that courts must read sections 17-25-40 and 17-25-50 together, because two offenses committed closely in time should count as one for sentencing purposes.[51] Since courts had to read section 17-25-45's predecessor in conjunction with section 17-25-50, and since the adoption of section 17-25-45 did not repeal section 17-25-50, the logical conclusion is that courts must read section 17-25-45 in conjunction with section 17-25-50 as well.

The changes made from section 17-25-40 to section 17-25-45 do not warrant an alteration of this relationship. Section 17-25-40 stated:

> In case anyone whose combined convictions under the law of any state, including this State, or of the United States, of the crime of murder, voluntary manslaughter, rape, armed robbery, highway robbery, assault with intent to ravish, bank robbery, arson, burglary or safecracking, or its intent, amount to as many as three, be convicted under the laws of this State of one of the above crimes, he shall be subjected to the maximum sentence provided for such crime. The maximum sentence shall be life for any person convicted for the fourth time of any such crime.[52]

Section 17-25-45 made several changes from section 17-25-40. First, section 17-25-45 lists "serious" offenses and "most serious" offenses and details the number and type of prior convictions needed to trigger this statute.[53] For example, if a court convicts an offender of murder, which according to section 17-25-45 is a "most serious" offense, and the State wants to enhance the offender's sentence under the recidivist statute, section 17-25-45 requires that this offender have a prior conviction for (1) another "most serious" offense, "(2) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section," or (3) "any combination of the offenses listed in items (1) or (2) above."[54] Section 17-25-40 did not divide its listed offenses into categories but simply provided for the imposition of an enhanced sentence for a fourth conviction of a listed offense.[55] Second, section 17-25-45 decreases the number of convictions needed to trigger a heightened sentence, thus easing the burden on prosecutors seeking to obtain such sentences.[56] Third, subparagraphs (D) and (E) of section 17-25-45 detail particular circumstances when an offender sentenced to life in prison without the possibility of parole is eligible for consideration of parole.[57] Section 17-25-40 contained only one sentence concerning the possibility of parole: "Nothing herein contained shall prohibit a review of a life sentence by the Probation, Parole and Pardon Board as

51. State v. Stewart, 275 S.C. 447, 452–53 n.2, 272 S.E.2d 628, 631 n.2 (1980).
52. *Id.* at 452, 272 S.E.2d at 630 (referencing S.C. CODE ANN. § 17-25-40 (Law. Co-op. 1976), *repealed by* 1982 S.C. Acts 358 § 3).
53. S.C. CODE ANN. § 17-25-45 (West 2003 & Supp. 2004).
54. S.C. CODE ANN. § 17-25-45(A) (West 2003).
55. S.C. CODE ANN. § 17-25-40 (Law. Co-op. 1976) (repealed 1982).
56. S.C. CODE ANN. § 17-25-45 (West 2003 & Supp. 2004).
57. *Id.*

now provided by law."[58] Fourth, section 17-25-45(F) provides a definition of prior conviction; section 17-25-40 did not define this term.[59] Finally, section 17-25-45 includes the language "[n]otwithstanding any other provision . . ." in subsections (A) and (B).[60]

The first three changes described above do not implicate any change in the application of section 17-25-50 to recidivist sentencing. A possible interpretation of changes four and five is that they abrogate the application of section 17-25-50, much like the interpretation in *Benjamin*. Subsection (F) states that the only requirement for a recidivist sentence is a conviction that occurred on a separate, prior occasion.[61] Thus, in a case such as *Benjamin*, the Citgo conviction would count as a prior conviction even though Benjamin committed the underlying offenses closely in time. Section 17-25-40 had no such provision, thus, the "close in time" rule from section 17-25-50 did not conflict with the language of section 17-25-40 the way it conflicts with the language of section 17-25-45(F). Next, the plain meaning of "notwithstanding any other provision . . ." in (A) and (B) prevents the application of any other provision in conjunction with section 17-25-45.[62] Nevertheless, the legislature could not have intended for courts to apply these last two modifications literally.

Subsection 17-25-45(F) simply defines which convictions are prior to the current conviction for purposes of subsections (A) and (B).[63] Section 17-25-50 specifies which convictions count together as one conviction for recidivist sentencing purposes.[64] This interpretation of subsection (F) and section 17-25-50 helps a defendant just convicted of a "serious" offense and potentially facing a recidivist sentence under section 17-25-45(B) because he has two prior convictions. If these two prior convictions arose from offenses committed closely in time, they would be "prior" under section 17-25-45(F) but would count as only one conviction under section 17-25-50. Because section 17-25-45(B) requires an offender to have two prior convictions, this defendant could escape recidivist sentencing. On the other hand, this interpretation would not help a defendant like Benjamin or Gordon whom courts sentenced under section 17-25-45(A). That subsection requires only one prior conviction, so past convictions cannot be combined. If, in such a case, a defendant tried to combine a single prior conviction with his current conviction so as to count them as a single conviction under section 17-25-50, then section 17-25-45(F), which defines prior convictions, would be meaningless. This scenario demonstrates that the legislature could not have intended a literal interpretation of subsection (F). Such an interpretation would punish defendants as recidivists even though they never committed any crimes after a conviction. According to the court in *Gordon*, "Courts will reject the plain and ordinary meaning of statutory language when to accept it

58. S.C. CODE ANN. § 17-25-40 (repealed 1982).
59. S.C. CODE ANN. § 17-25-45(F) (West 2003).
60. S.C. CODE ANN. § 17-25-45(A) & (B) (West 2003).
61. S.C. CODE ANN. § 17-25-45(F) (West 2003).
62. S.C. CODE ANN. § 17-25-45(A) & (B) (West 2003).
63. S.C. CODE ANN. § 17-25-45(F) (West 2003).
64. S.C. CODE ANN. § 17-25-50 (West 2003) speaks in terms of "offenses." In contrast, section 17-25-45 speaks in terms of "convictions." Nevertheless, one can read the two sections together. The older statute, section 17-25-40, also spoke in terms of convictions, but South Carolina courts had no difficulty meshing that provision with the offenses language of section 17-25-50. *See* S.C. CODE ANN. § 17-25-45 (West 2003 & Supp. 2004); S.C. CODE ANN. § 17-25-50 (West 2003); State v. Stewart, 275 S.C. 447, 452, 272 S.E.2d 628, 630 (1980); S.C. CODE ANN. § 17-25-40 (repealed 1982).

would lead to a result so absurd that it could not possibly have been intended by [the l]egislature, or would defeat plain legislative intention . . . ."[65]

In addition, another South Carolina Code section reveals that the legislature must have intended for courts to read sections 17-25-45 and 17-25-50 together. Section 24-21-640 governs the parole-granting process.[66] Under this section, a parole board may not grant parole to a "prisoner serving a sentence for a second or subsequent conviction" for certain violent crimes.[67] The provision, however, goes on to impose its own "close in time" rule which states that "where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses shall be treated for purposes of this section as one offense."[68] The legislature could not have intended for the parole board to treat offenses close in time as one offense but for courts not to do so when imposing a sentence.

In conclusion, the legislature could not possibly have intended to punish a person as a recidivist if the person participated in only a single crime spree. The legislature surely intended to punish as recidivists only incorrigible criminals who perpetrate crimes, get convicted, and then go out and perpetrate more crimes.

B. Public Policy and Expectations

Beyond legislative intent, public policy and established expectations regarding the law support the contention that courts should read sections 17-25-45 and 17-25-50 together. Reading 17-25-45 independently of section 17-25-50 allows for different treatment of similarly situated defendants, thus giving rise to possible equal protection issues. Whether a defendant is eligible for a sentence of life in prison without the possibility of parole could depend solely on prosecutorial discretion. Prosecutorial discretion, though expansive, is not limitless. The judiciary can contravene the exercise of prosecutorial discretion when exercise of the discretion violates a defendant's constitutional rights. "For example, the judiciary may infringe on prosecutorial discretion [when] the prosecutor bases the decision to prosecute on unjustifiable standards such as race, religion, or other arbitrary factors."[69]

Assume two defendants commit armed robbery, murder, and rape in one night, and neither has a past criminal record. However, the prosecutor decides with respect to the first defendant to try each of his offenses separately. On the other hand, the prosecutor chooses to try the second defendant's offenses jointly. Following a conviction of the first defendant for armed robbery and subsequent convictions for murder and rape, the state could move for life in prison without the possibility of parole upon his conviction for rape, because he has two prior convictions under section 17-25-45(F). However, the state cannot move for an enhanced sentence for the second defendant because, even given convictions on all three offenses, he will not have any prior convictions under section 17-25-45(F). Thus, the prosecutor has direct control over the eligibility of each defendant for a recidivist sentence. The legislature could not have intended the availability of recidivist sentencing to hinge solely on prosecutorial bias. If the "close in time" rule of section 17-25-50 applied to both defendants' cases, neither defendant would be eligible for a recidivist

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65. State v. Gordon, 356 S.C. 143, 152–53, 588 S.E.2d 105, 110 (2003) (citing Joseph v. State, 351 S.C. 551, 562, 571 S.E.2d 280, 285 (2002)).
66. S.C. CODE ANN. § 24-21-640 (Law. Co-op. 1989 & West Supp. 2004).
67. *Id.*
68. *Id.*
69. *Ex parte* Littlefield, 343 S.C. 212, 219, 540 S.E.2d 81, 84 (2000).

sentence, and the prosecutor could not manipulate the timing of the trials to make either one of them eligible. Thus, applying section 17-25-50 ensures similar treatment of similarly situated defendants.

In addition, applying section 17-25-50 preserves expectations regarding the law. *State v. Woody* was the first relevant case after the adoption of section 17-25-45.[70] In that case, the court of appeals vacated the defendant's sentence of life in prison without the possibility of parole, because section 17-25-50, as applied to his convictions, required the court to count his convictions, which were closely connected in time, as one conviction.[71] Following *Woody* and prior to *Benjamin*, courts, prosecutors, and defendants, through the aid of their attorneys, had an expectation that section 17-25-50 applied in conjunction with the new recidivist statute, just as it had with the prior recidivist statute. Quite certainly, parties relied on these expectations. For example, assume that an attorney represented a client who had committed two armed robberies. The incidents occurred within a couple of hours of one another but at two different locations. The prosecutor tried the defendant separately for each offense. After the defendant's conviction for the first armed robbery, his attorney counseled him to plead guilty to the second armed robbery, believing that these two offenses would count as one for sentencing purposes and his client would thus not be subject to recidivist sentencing. In advising his client this way, the attorney rejected another option: plea bargaining for a sentence short of life imprisonment without the possibility of parole—the sentence that the recidivist statute mandated. The rejection of this option made sense after *Woody*, in which the court of appeals held that recidivist sentencing would not apply to a case involving offenses committed closely in time. However, when the supreme court overruled *Woody* in the *Benjamin* case, it upset this strategy. In the example above, if section 17-25-50 was not applicable, as the *Benjamin* court ruled, the court could sentence the client to life in prison without the possibility of parole, while he could have avoided this sentence by taking the plea bargain if he had known that the law would suddenly change course.[72]

Gordon was correct in that it adhered to the established expectations under the old recidivist statute, section 17-25-40, and the established expectations under *Woody*.[73] This does not mean that a court can never overrule a previous decision or change a rule of law because doing so would infringe on the expectations of others. However, the court should have a reason for doing so. For example, if the legislature repealed section 17-25-50 when it adopted section 17-25-45, this action would clearly indicate that courts should ignore prior expectations about recidivist sentencing. This may be a reason for the court to overrule *Woody* and establish new expectations regarding recidivist sentencing. However, the legislature did not repeal section 17-25-50, and expectations concerning its application were still in effect.

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70. State v. Woody, 345 S.C. 34, 34, 545 S.E.2d 521, 521 (Ct. App. 2001), *aff'd*, 359 S.C. 1, 596 S.E.2d 907 (2004).

71. *Id.* at 37–38, 545 S.E.2d at 522.

72. In addition to the type of harm just described, each time the law changes and an attorney is not aware of the change, a flood of post conviction relief actions is possible based on a Sixth Amendment claim of ineffective assistance of counsel. Generally, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland v. Washington, 466 U.S. 668, 691 (1984). In the context of recidivist sentencing, courts may view an error by counsel on whether offenses will count as one or two could be seen as having an effect on the judgment, thus increasing the number of post conviction relief actions.

73. *See* State v. Gordon, 356 S.C. 143, 143, 588 S.E.2d 105, 105 (2003); *see also* State v. Woody, 359 S.C. 1, 596 S.E.2d 907 (2004), *aff'g*, 345 S.C. 34, 545 S.E.2d 521 (Ct. App. 2001).

In conclusion, the *Gordon* holding, which construed sections 17-25-45 and 17-25-50 together, ensures that similarly situated defendants receive similar treatment and follows the expectations of courts, prosecutors, defense attorneys, and other individuals.

V. A PROBLEM REMAINS AFTER *GORDON*: SECTION 17-25-50 IS AMBIGUOUS

Even if courts read sections 17-25-45 and 17-25-50 together, one problem remains. The "close in time" standard that section 17-25-50 imposes is ambiguous.[74] The statute never defines "close in time." The South Carolina Supreme Court characterized the term as referring to a "single chain of circumstances"[75] and to events that are "related in detail and continuity."[76] Even these refinements are ambiguous, however. For example, suppose John is tailgating at a football game when he and another man get into an argument. John assaults the man and leaves the game. Much later that evening, after John had gone home and calmed down, he goes to a bar to meet friends. John runs into the man from the football game, and they again start to argue. John then goes to his car, grabs his gun, shoots, and kills the other man. First, a grand jury indicts John for assault and battery with the intent to kill, stemming from the football game incident. The grand jury also indicts John for murder. If the courts try John separately for these offenses, whether they are so close in time to constitute one offense for the purposes of sentencing is unclear. This question is difficult for a judge to answer, and others will not easily predict the answer to the question. One judge may treat John's offenses as one because the two offenses stemmed from the defendant's issues with a single man on the same day. On the other hand, another judge may treat John's offenses separately, because John had time to cool off in between the incidents.

VI. AN AMENDMENT COULD RESOLVE THE AMBIGUITY OF SECTION 17-25-50

The following amendment to section 17-25-45(F) would both clarify the relation of sections 17-25-45 and 17-25-50 and resolve the ambiguity of section 17-25-50:

> For purposes of subsections (A) and (B), a conviction may count as a second prior conviction only if the defendant committed the underlying offense after having pled guilty to or having been convicted of a previous offense, notwithstanding under the law they constitute separate and distinct offenses. For purposes of subsection (A), a prior conviction will count toward a recidivist sentence only if the defendant's current conviction arises from an offense committed after having pled guilty to or having been convicted of the prior conviction.

74. S.C. CODE ANN. § 17-25-50 (West 2003).
75. State v. Middleton, 288 S.C. 21, 23, 339 S.E.2d 692, 693 (1986).
76. State v. Bikle, 180 S.C. 400, 410, 185 S.E. 753, 758 (1936).

Other states, such as North Carolina[77] and Georgia,[78] provide similar standards. These states count offenses toward life in prison without the possibility of parole only if the defendants committed the offenses after a conviction for or a guilty plea to a prior offense. In addition to amending section 17-25-45(F), repealing section 17-25-50 would avoid confusion concerning its relation to section 17-25-45. Also, section 17-25-50 does not address anything that the amendment to section 17-25-45(F) does not clarify. First, amending section 17-25-45(F) addresses the language in section 17-25-50, "[i]n determining the number of offenses for the purposes of imposition of sentence,"[79] because section 17-25-45 as a whole deals with the imposition of a sentence, and subsection (F) deals with which offenses count as prior convictions. The amending language in section 17-25-45(F), "only if the defendant committed the underlying offense after having pled guilty to or having been convicted of a previous offense" resolves the next phrase in section 17-25-50, "the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense."[80] The amending language delineates verbatim the final phrase in section 17-25-50, "notwithstanding under the law they constitute separate and distinct offenses."[81]

This amendment allows offenses to count separately for recidivist sentencing purposes only in the event of an intervening conviction. In so doing, it replaces the ambiguous "close in time" standard with a bright-line rule that effectuates the same purpose.

The proposed amendment, if adopted, would ease a court's analysis of a multi-offense scenario. For example, on November 1, 1995, John breaks into a house and takes some jewelry. A week later, John remembers that he left one of his gloves in the house and decides that, since the owners are still on vacation, he will return and burn down the house to destroy the evidence. John burns down the house on November 10, 1995. The following week, a grand jury indicts John for second-degree burglary as well as second-degree arson. The prosecutor tries the two offenses separately. A court convicts John of second-degree burglary on January 1, 1996 and of second-degree arson on March 1, 1996. In 2004, a court tries John again for second-degree burglary based on a separate, later incident, and the prosecution seeks, under section 17-25-45, a sentence of life in prison without the possibility of parole.

In this case, the court must first ascertain whether the offense John is currently being convicted of a "serious" or "most serious" offense. Under section 17-25-45(C)(2)(b), second-degree burglary is a "serious" offense. The court then must determine what combination of prior convictions warrants imposing the harsh sentence of life in prison without the possibility of parole. Under section 17-25-

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77. The North Carolina statute provides:

> The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony. The commission of a third felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the second felony.

N.C. GEN. STAT. § 14-7.1 (2003).

78. The Georgia statute requires that a person "who after such first conviction subsequently commits and is convicted of a serious violent felony for which such person is not sentenced to death shall be sentenced to imprisonment for life without parole." GA. CODE ANN. § 17-10-7(b)(2) (2004).

79. S.C. CODE ANN. § 17-25-50 (West 2003).

80. *Id.*

81. *Id.*

45(B), to impose life in prison without the possibility of parole, John must have "two or more prior convictions for: (1) a serious offense; (2) a most serious offense; (3) a federal or out-of-state offense that would be classified as a serious offense or most serious offense . . .; or (4) any combination of the offenses . . . above."[82] John has two prior convictions for "serious" offenses. However, before determining a sentence, the court must look to amended subsection (F) to determine how to count these two prior convictions. John committed the second offense before he pled guilty to or was convicted of the first offense; thus, John's prior offenses will count as one offense. Since John has only one prior conviction of a serious offense, he cannot be subject to an enhanced sentence under subsection (B), which requires two or more prior convictions.

The analysis of a scenario applying section 17-25-45(A) would be similar to the analysis employed above. For example, one evening John commits two murders within hours of each other in two different locations. The prosecutor elects to try these two murders separately. A court convicts John for the first murder. Subsequently, a court tries John for the second murder, and the prosecutor asks for a recidivist sentence upon conviction. Under section 17-25-45(C)(1), murder is a most serious offense; thus, section 17-25-45(A) is applicable. According to section 17-25-45(A), a court may impose a recidivist sentence if that person has "one or more prior convictions for: (1) a most serious offense; (2) a federal or out-of-state conviction for an offense that would be classified as a most serious offense under this section; or (3) any combination of the offenses listed in items (1) and (2) above."[83] John has a prior conviction for a most serious offense, but before determining a sentence, the court must look to amended subsection (F) to determine if this prior conviction can count toward a recidivist sentence. John committed the second murder before he pled guilty to or was convicted of the first murder. Thus, according to amended subsection (F), John's prior conviction for the first murder cannot count toward a recidivist sentence. The court cannot impose a recidivist sentence of life in prison without the possibility of parole in this situation.

VII. CONCLUSION

In *State v. Gordon*, the South Carolina Supreme Court correctly held that courts should read sections 17-25-45 and 17-25-50 in conjunction with one another. This holding effectuates the legislature's intent. Reading these sections separately would frustrate the purpose of the recidivist statute, allow for differing treatment of similarly situated defendants, and contravene expectations regarding the law.

Whether to read these sections together is not the only problem concerning the application of recidivist principles. Section 17-25-50 is also ambiguous. Fortunately, a simple amendment to subsection (F) of section 17-25-45 would resolve both of these issues. The proposed amendment would impose a concrete timing standard to eliminate the ambiguity in section 17-25-50. Framing this standard as a proposed amendment to section 17-25-45(F), not a separate code section, would eliminate any question as to whether courts should read this standard in light of section 17-25-45.

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82. S.C. CODE ANN. § 17-25-45(B) (West 2003).
83. S.C. CODE ANN. § 17-25-45(A) (West 2003).