The Supreme Court of South Carolina

In the Matter of Daniel John Wiley, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 17, 2008, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated March 3, 2011, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Daniel John Wiley shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

March 17, 2011

The Supreme Court of South Carolina

In the Matter of
Mahlon E. Padgett, IV, Deceased.

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition advising the Court that Mr. Padgett passed away on March 15, 2011, and requesting the appointment of an attorney to protect Mr. Padgett's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that Delton W. Powers, Jr., Esquire, is hereby appointed to assume responsibility for Mr. Padgett's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Padgett maintained. Mr. Powers shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Padgett's clients. Mr. Powers may make disbursements from Mr. Padgett's trust account(s), escrow account(s), operating

account(s), and any other law office account(s) Mr. Padgett maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Padgett, shall serve as notice to the bank or other financial institution that Delton W. Powers, Jr., Esquire, has been duly appointed by this Court.

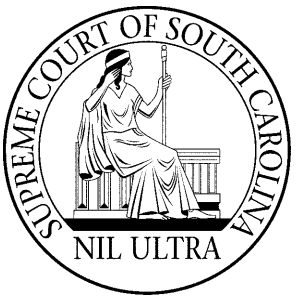
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Delton W. Powers, Jr., Esquire, has been duly appointed by this Court and has the authority to receive Mr. Padgett's mail and the authority to direct that Mr. Padgett's mail be delivered to Mr. Powers'office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

March 18, 2011



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10
March 21, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David Hart Breen, Respondent.

Opinion No. 26942
Heard March 2, 2011 – Filed March 21, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

David Hart Breen, of Myrtle Beach, pro se respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and consents to the imposition of an admonition or a public reprimand, along with law office management requirements. We accept the agreement, and issue a public reprimand and impose law office management requirements as detailed later in this opinion. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

In 2002 and 2003, respondent filed several bankruptcy petitions well after his clients had completed payment for his services and, in some cases, well after they had completed their paperwork. In June of 2003, the United States Bankruptcy Court for the District of South Carolina ordered respondent to refund the fees paid by four of his clients. After the Assistant United States Trustee filed a second complaint, respondent and the United States Trustee's Office entered into consent orders which addressed the concerns of the Trustee's Office and in which respondent agreed to return the fees paid by four additional clients. These consent orders were approved by the Bankruptcy Court in October of 2003.

Respondent represents he has resolved the issues giving rise to these complaints. He states he now ensures bankruptcy petitions are filed in a timely manner. In addition to changes in his office practices, respondent represents he has resolved staff supervision issues that resulted in some of the delays.

Matter II

Complainant retained respondent in October 2002 to represent her in a worker's compensation claim against a federal agency. Respondent represents he informed the client he was not experienced in handling matters governed by the Federal Employees' Compensation Act, but would review her records and seek experienced co-counsel.

In August of 2003, respondent wrote Complainant indicating he had not succeeded in finding co-counsel. In the letter, respondent informed Complainant she would need to find counsel and file a claim within twenty-five (25) days. Respondent asserts he did

communicate with Complainant after being retained and before the August 2003 letter.

After receipt of the complaint from ODC, respondent learned Complainant had previously preserved her claim against a defense that it was not timely filed and he was in error in advising her she only had twenty-five (25) days to file her claim.

Matter III

Respondent acknowledges he failed to properly maintain his trust account and maintain the records required by Rule 417, SCACR. In particular, he admits that: 1) on some occasions he failed to record credits and debits on his check stubs, 2) on numerous occasions he failed to record the client or file associated with the credits and debits, 3) he made cash withdrawals from his trust account, and 4) failed to reconcile his trust account. Respondent represents he relied on his memory to keep track of whose money he held in his trust account at any given time.

Respondent admits that, on two occasions in 2005, respondent's law office telephone bill was paid from his trust account. Respondent does not know whether the funds from the trust account were ever replaced.

In November 2006, respondent deposited $12,822.21 into his law office trust account. These funds were loaned to him from a trust fund belonging to his wife. Respondent submits he deposited these funds to cover a shortfall he caused in his trust account by withdrawing accumulated costs payable to his office. He explains that he accidently withdrew too much money from the trust account because he was relying on his memory. Respondent cannot identify the withdrawal or withdrawals that triggered his November 2006 deposit. Additionally, upon learning that he had deposited more funds than were necessary to cover the excess withdrawal(s), respondent then left the funds in his account and paid the funds back to his wife on a piecemeal

basis. Respondent concedes that failing to timely withdraw costs, depositing the funds from his wife's trust, and failing to return the excess funds all constituted impermissible comingling of funds.

In 2008, respondent began working with a bookkeeper to reconcile his trust account. He represents he provides the bookkeeper with his check stubs and bank statements so that she can reconcile the account. Although respondent is not providing the bookkeeper with client ledgers, he asserts he has been reviewing the bookkeeper's reconciliations line by line.

Additionally, during 2008, respondent made a series of electronic transfers from his law office trust account to his operating account to remove funds he asserts belonged to him rather than to his clients. Respondent explains these transfers were made as part of his efforts to ensure that the funds he held in trust were those of his clients alone and that he relied on his memory to determine the sums that needed to be removed.

Respondent asserts that none of his clients lost any money as a result of his failure to properly maintain his trust account. ODC has no information to dispute this assertion.

In addition to trust account irregularities, respondent collected fees in workers' compensation matters before the fee petitions were approved by the Workers' Compensation Commission.

In remediation, respondent completed the South Carolina Bar's Legal Ethics and Practice Program Ethics School on October 15, 2009, which included two hours of trust account instruction. Since completing the program, respondent believes he has a better understanding of his responsibilities for managing his trust account and maintaining his financial records. For example, respondent is now insuring his disbursement sheets, which he uses as client ledgers, are compared with his bank statements during the monthly reconciliations of his accounts.

Respondent has been fully cooperative throughout ODC's investigation.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence and competence in representing client); Rule 1.4 (lawyer shall provide reasonable communication to client); Rule 1.15 (lawyer shall hold funds of client separately from lawyer's own funds); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client); Rule 3.4(c) (lawyer shall not knowingly disobey obligation under rules of tribunal); and Rule 5.3 (lawyer having supervisory authority over non-lawyer shall make reasonable efforts to insure that person's conduct is compatible with professional obligations of lawyer). Further, respondent admits that he has violated the financial recordkeeping provisions of Rule 417, SCACR. Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for a lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

Within forty-five (45) days of the date of this opinion, respondent shall retain a law office management advisor acceptable to the Commission on Lawyer Conduct (the Commission). Within sixty (60) days of the date of this opinion, respondent shall meet with the advisor to conduct a thorough review of respondent's law office management practices, including, but not limited to, respondent's law office accounting. Within ninety (90) days of this opinion, the law

office management advisor shall file a complete report of respondent's office management practices with the Commission. The report shall also include the advisor's review, analysis, and recommendations concerning respondent's law office management practices.

In addition, for two (2) years from the date of this opinion, respondent shall meet with his law office management advisor at least once every six (6) months and the advisor shall submit a complete report to the Commission within thirty (30) days of the end of each six (6) month period. The law office management advisor's final report shall include a complete assessment of respondent's law office management practices, specifically addressing respondent's compliance with his advisor's recommendations. Respondent shall be responsible for payment of the advisor and timely submission of the advisor's reports.

Finally, respondent's failure to comply with the provisions regarding the retention of a law office management advisor, submission of the advisor's reports, and compliance with the advisor's recommendations, shall constitute misconduct under Rule 8.4(e), RPC, Rule 407, SCACR, and shall be grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Nancy Holland Mayer, Respondent.

Opinion No. 26943
Submitted February 22, 2011 – Filed March 21, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and
Barbara M. Seymour, Deputy Disciplinary Counsel,
both of Columbia, for Office of Disciplinary Counsel.

David D. Armstrong, of Greenville, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a definite suspension of nine months and the imposition of other requirements. Respondent also requests that the suspension be made retroactive to the date of her interim suspension.[1] ODC does not oppose that request. However, the Agreement is not conditioned upon the suspension being retroactive to the date of interim suspension. We accept the Agreement, suspend respondent from the practice of law in this state for nine

[1] Respondent was placed on interim suspension on April 30, 2009. In re Mayer, 382 S.C. 276, 676 S.E.2d 690 (2009).

months, not retroactive, and impose other requirements. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

Respondent, along with Clyde Pennington, agreed to represent a client on a number of bad check charges. Mr. Pennington was subsequently suspended from the practice of law. The attorney appointed to protect the interests of Mr. Pennington's clients was informed respondent had received $693 on the client's behalf and placed it in Mr. Pennington's trust account; however, at the time of Mr. Pennington's suspension, those funds were no longer in the trust account and were unaccounted for. Moreover, the client executed a power of attorney allowing respondent to obtain the client's social security payments for the purposes of paying attorney's fees and paying off the bad checks. The client alleges respondent negotiated several of the client's social security checks. Respondent admits she negotiated at least one of the client's checks, but cannot remember whether she handled any other funds for the client. However, respondent and Mr. Pennington have no record of the receipt and disbursement of funds on behalf of the client, and they made no payments on the bad checks on behalf of the client nor did they represent the client at trial.

Matter II

On June 3, 2008, respondent deposited $2,050 in settlement funds into her trust account on behalf of a client. Respondent issued a check to herself in the amount of $734.54 for fees and costs, and issued a check to the client for $432.06, leaving a balance of $883.40 in the account. Between September 2008 and March 2009, respondent issued three checks payable to herself, totaling $6,350, and two checks payable to her husband, totaling $12,000. Neither respondent nor her husband was entitled to the funds. The misappropriation of these funds left a balance of $42.60 in respondent's trust

account, which was not sufficient to cover the amount that should have been in trust for the client on whose behalf the settlement funds were received.

Matter III

On August 15, 2008, respondent deposited $23,000 in settlement funds into her trust account on behalf of a client. Over the next couple of weeks, respondent issued two checks payable to herself, totaling $5,500, for fees. She also issued three checks to the client totaling $4,500. Respondent retained the balance of the funds for the purpose of negotiating and paying medical liens, which she failed to do. When the client learned his bills had not been paid, he attempted to contact respondent; however, she did not respond. When respondent misappropriated the funds in Matter II, the balance of $42.60 remaining in her trust account was not sufficient to cover the amount that should have been in trust for the client in Matter III.

Failure to Cooperate

Respondent did not respond to the notice of full investigation issued in Matter I. Although she self-reported Matters II and III, she failed to respond to the notice of full investigation issued in those matters. While respondent did appear for a Rule 19, RLDE, interview in May 2009, she failed to comply with a subpoena for her client files and her financial records. When the interview was reconvened in December 2010, following a determination that respondent was capable of participating in the defense of the pending grievances, respondent failed to appear.

LAW

Respondent admits that by her conduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation and consult with the client as to the means by which they are to be pursued; a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation); Rule 1.3 (a

lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished, keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information); Rule 1.5 (placing limitations on when a fee may be divided between lawyers); Rule 1.15(a) (a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property; funds shall be kept in a separate account; complete records of such account funds and other property shall be kept by the lawyer and the lawyer shall comply with the financial recordkeeping requirements of Rule 417, SCACR); Rule 1.15(d) (upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person, except as stated in Rule 1.15 or otherwise permitted by law or by agreement with the client, promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, promptly render a full accounting regarding such property); Rule 8.1(b) (a lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent also admits she failed to comply with the recordkeeping requirements of Rule 417, SCACR. She concedes these violations constitute grounds for discipline under Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (It shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers.).

Mitigation

In 2008, respondent was diagnosed with chemical dependency, post-traumatic stress disorder, depression, and adult residual attention deficit disorder, resulting in problems with concentration, alertness, memory loss,

and impaired judgment. Respondent commenced treatment for her conditions in November 2008 and continues in treatment.

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for nine months from the date of this opinion. We deny respondent's request that the suspension be made retroactive to the date of her interim suspension. In addition, within thirty days of the date of this opinion, respondent shall (1) enter into a payment plan with the Commission on Lawyer Conduct for reimbursement of the costs incurred in the investigation of these matters; and (2) enter into a restitution agreement with the Commission on Lawyer Conduct pursuant to which she will pay $693 to Lena Harris, $883.40 to Bryson Teal, and $13,000 to Jerry Springfield.[2] Finally, prior to applying for reinstatement, respondent shall complete the South Carolina Bar's Legal Ethics and Practice Program Ethics School and Trust Accounting School. As another condition of reinstatement, respondent shall enter into a monitoring contract with the South Carolina Bar's Lawyers Helping Lawyers Program which includes, at a minimum, the requirements that respondent abstain from the use of alcohol or illegal drugs and continue with psychiatric and/or psychological counseling for a period of two years. Following reinstatement, respondent shall report her treatment and compliance status to the Commission on Lawyer Conduct no less than quarterly for two years.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR.

[2] If the Lawyers' Fund for Client Protection has paid any money to any of these clients, respondent shall repay the Fund the total amount paid on her behalf.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of
Michael Davis Moore, Respondent.

Opinion No. 26944
Submitted February 17, 2011 – Filed March 21, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and
Erika M. Williams, Assistant Disciplinary Counsel,
of Columbia, for Office of Disciplinary Counsel.

Michael Davis Moore, of Ridgeville, pro se,
Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a confidential admonition, a public reprimand, or a definite suspension not to exceed six months. Respondent also requests that any suspension be made retroactive to the date of his interim suspension.[1] ODC does not oppose that request. However, the Agreement is not conditioned upon any suspension being retroactive to the date of interim suspension. We

[1] Respondent was placed on interim suspension on July 16, 2010. In re Moore, 388 S.C. 278, 695 S.E.2d 853 (2010).

accept the Agreement, suspend respondent from the practice of law in this state for six months, not retroactive, and impose other requirements. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

A client retained respondent to assist with the probate of her deceased husband's estate. The employment contract signed by respondent and the client on November 9, 2009, provided that fees would not be less than $25,000 as a retainer. The contract also provided that respondent's time would be billed at $250 per hour, but the total fees connected with the representation would be capped at $30,000. Shortly after the estate was opened, the client terminated the representation and retained new counsel. By letter to respondent dated January 29, 2010, new counsel requested a full accounting and that a refund of the unearned portion of the retainer paid by the client be issued no later than February 15, 2010. The client also requested a refund on two separate occasions. Respondent failed to return that portion of the fee not earned by respondent, failed to provide a full and complete accounting, and failed to safely keep the client's funds in escrow until the funds were earned by respondent.

In addition, respondent failed to respond to a Notice of Investigation or a Treacy letter from ODC,[2] failed to appear to respond to questions under oath as directed by ODC in a Notice to Appear, and failed to comply with a subpoena for documents.

Matter II

Respondent was retained by a client in February 2007 to file an action on the client's behalf as a result of a land dispute. Respondent was not

[2] In re Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982)(A Treacy letter points out that the failure to respond to ODC constitutes sanctionable conduct.)

diligent in filing the suit and failed to keep the client reasonably informed of the status of the case.[3] The case was ultimately settled. On April 22, 2010, the client sent respondent a written request for his files and related documents; however, respondent failed to deliver the files as requested. The client was able to retrieve the files from the Attorney to Protect Clients' Interests after respondent was placed on interim suspension.

Matter III

On August 18, 2011, respondent served a subpoena on a party in a case. The subpoena was signed by respondent as plaintiff, pro se. Respondent served the subpoena without the assistance of the clerk. See Rule 45(a)(3), SCRCP ("The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of a court in which the attorney is authorized to practice."). However, at the time respondent served the subpoena, he was on interim suspension and not allowed to practice law.

LAW

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information); Rule 1.15 (a lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred; a lawyer shall promptly deliver to a client any funds or other property the client is entitled to receive and, upon request by the client, promptly render a full accounting); Rule 1.16(d) (upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, including surrendering papers and property to

[3] The suit was not filed until April 2008.

which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred); Rule 8.1(b) (a lawyer, in connection with a disciplinary matter, shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits he has violated Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR (It shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers.).

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for six months from the date of this opinion. We deny respondent's request that the suspension be made retroactive to the date of his interim suspension. In addition, within thirty days of the date of this opinion, respondent shall (1) enter into a restitution agreement with ODC which provides for respondent's payment of restitution in the amount of $22,500 to the client in Matter I above and (2) enter into an agreement to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct. Finally, respondent shall complete the South Carolina Bar's Legal Ethics and Practice Program Ethics School and Trust Accounting School within one year of the date of this opinion. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Sheryl Sisk Schelin, Respondent.

Opinion No. 26945
Submitted February 22, 2011 – Filed March 21, 2011

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Erika M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Cynthia Barrier Patterson, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to disbarment. We accept the Agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent was retained by ten clients to file bankruptcy actions on their behalf. Respondent accepted payments from the clients, including, in many cases, court filing fees, in excess of $15,000, but failed to perform any meaningful work on the cases or to diligently represent the clients and pursue their actions. Indeed, respondent never actually filed a bankruptcy action on behalf of any of the clients. Respondent failed to respond to telephone calls and emails from clients and failed to keep them reasonably informed of the status of their cases. Respondent also failed to refund to the clients that portion of the fees and costs that was not yet earned or incurred because respondent had converted the funds for her personal use. Finally, respondent failed to return the clients' documents and other materials in their files.

Matter II

A client endorsed and returned to respondent a settlement check in the amount of $2,000. Respondent cashed the check but failed to disburse any proceeds to the client. Respondent also failed to communicate with the client about the status of the settlement proceeds or about the client's pending case.

Matter III

On July 10, 2008, respondent was retained to represent a client in a civil action. Respondent agreed to represent the client on a contingency basis in addition to a $1,000 fee. The client also paid respondent $350 for filing fees. Respondent failed to keep the client informed regarding the status of her case and failed to respond to the client's emails, faxes, text messages or telephone calls. Respondent informed the client that an additional $1,200 to

$1,500 may be required for personal service. The client requested a written explanation of the additional fees. However, respondent failed to send the client a letter of explanation regarding the additional fees. Respondent failed to refund the client that portion of her fees and costs that was not yet earned or incurred because respondent had converted the funds for her personal use. Respondent failed to diligently represent the client in the civil action.

Matter IV

Respondent was paid $500 by a client to represent the client in a wrongful termination action. Thereafter, respondent informed the client that due to the loss of respondent's electronically-stored information, respondent may have miscalculated the filing date for one of the client's statutory claims. Respondent also informed the client that due to the miscalculation error, respondent would represent the client free of charge and pay all costs of litigation. However, respondent failed to file any actions on respondent's behalf regarding the wrongful termination claim. She also failed to refund the $500 retainer fee, as she had agreed to do. Respondent failed to diligently represent the client in the action and failed to perform any meaningful work on the case. Respondent also failed to timely respond to the client's telephone calls and faxes and failed to keep the client reasonably informed of the status of the case.

Failure to Respond

Respondent was served with notices of full investigation in each of these matters, but failed to respond or otherwise communicate with ODC in response to the notices.

Law

Respondent admits that, by her misconduct, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means

by which they are to be pursued); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished, keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall hold client funds in the lawyer's possession in connection with a representation in a separate trust account to be withdrawn by the lawyer only as fees are earned or expenses incurred); Rule 1.16 (upon termination of representation, a lawyer shall surrender papers and property to which the client is entitled and refund any advance payment of fees or expenses that has not been earned or incurred; the lawyer may retain papers relating to the client to the extent permitted by other law and may retain a reasonable nonrefundable retainer); Rule 8.1(b) (a lawyer, in connection with a disciplinary matter, shall not knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent further admits her misconduct constitutes grounds for discipline under the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for lawyer to violate the Rules of Professional Conduct); Rule 7(a)(3) (it shall be a ground for discipline for a lawyer to knowingly fail to respond to a lawful demand from a disciplinary authority to include a request for a response); and (Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice, bring the courts or legal profession into disrepute, or demonstrating an unfitness to practice law).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR, and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court. Within thirty (30) days of the date of this opinion, respondent shall enter into a restitution agreement with ODC in the amount of $17,945.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William
Barney Weems, III, Respondent.

Opinion No. 26946
Submitted February 17, 2011 – Filed March 21, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and
Barbara M. Seymour, Deputy Disciplinary Counsel,
both of Columbia, for Office of Disciplinary Counsel.

S. Jahue Moore, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a definite suspension of up to two years, an indefinite suspension, or disbarment, with conditions. We accept the Agreement and suspend respondent from the practice of law in this state for one year, order restitution, and place conditions on his resumption of the practice of law. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent operated a solo practice with an emphasis on real estate closings. He contracted with Alan and Teren Pruitt, of North American Title Company (NATC), as agent for First American Title Insurance Company, to write title insurance for his closings and do clerical work. Neither of the Pruitts was licensed to practice law. NATC leased office space adjoining respondent's office and its administrative staff prepared settlement statements and other closing documents for respondent's clients under respondent's supervision.

Respondent also delegated to NATC the responsibility of disbursing funds from his trust account. The trust account checks were prepared by NATC employees, who were given authority to sign them with respondent's signature stamp. Although it was the practice that only respondent's signature would be used on trust account checks, the Pruitts were both given signatory authority on respondent's trust account. In addition, Mr. Pruitt served as bookkeeper for respondent's law practice. Respondent did not personally conduct monthly reconciliations, nor did he adequately review monthly bank statements and reconciliations of his trust account.

In November 2007, respondent closed his law office as a result of the impact of the failing economy on the real estate industry. At the time, there was approximately $121,000 in one client trust account (BB&T account) and approximately $8,000 in another (Wachovia account). Respondent had an accounting of the funds in the Wachovia account, but did not have an accurate accounting of the funds in the BB&T account. In 2008, respondent changed his South Carolina Bar membership status to inactive and moved out of state to obtain his LLM degree.

When respondent closed his law office, he left his client files, trust account records, blank checks, and signature stamp with NATC. He delegated to the Pruitts the responsibility of disbursing the funds remaining in

the trust accounts and issuing the remaining title insurance policies. Although respondent was in frequent telephone contact with Mr. Pruitt, he did not review disbursement checks, trust account records, or financial reports.

In November 2007, over 1,000 checks were written from the BB&T account payable to respondent's law firm and marked in the memo line as excess recording fees. The checks totaled approximately $21,500, which represented the positive balances on most of respondent's client ledgers at the time; however, there is no documentation to show respondent was entitled to those funds as excess recording fees or for any other purposes. After deposit of those funds into respondent's law firm operating account, three checks totaling that same amount were issued from the account to NATC. This was done with respondent's signature stamp, but not with his permission.

In April 2008, someone on behalf of NATC used respondent's signature stamp to withdraw $110,000 from the BB&T account and deposit into an account outside respondent's control or access. At the time the funds were removed from the BB&T account, respondent had approximately $59,000 in outstanding checks dated between January 24, 2005, and April 10, 2008. As a result of the removal of the $110,000 from the BB&T account and the subsequent presentment of several outstanding checks, the account was overdrawn and an insufficient balance remained to cover the other outstanding checks.

Because respondent failed to conduct monthly reconciliations or adequately review monthly bank statements and reconciliations of the BB&T account, he did not discover the removal of the $21,500 in November 2007 or the removal of the $110,000 in April 2008. Likewise, respondent did not discover the shortfall that these transactions left in the account until notice of overdraft was sent to the Commission on Lawyer Conduct by BB&T.

Respondent has taken legal action and other steps to obtain documentation from Mr. Pruitt regarding disbursement of the funds removed

from the account and the identity of the remaining funds. However, Mr. Pruitt has not provided sufficient documentation to verify that disbursed funds have been delivered to the appropriate payees or to account for undisbursed funds.[1] At the time of the execution of the Agreement, there remained outstanding checks written on the BB&T account, with insufficient funds on deposit to cover them. Respondent lacks the financial resources to make his account whole, but acknowledges it is his responsibility to do so, regardless of whether he can secure those funds from NATC or Mr. Pruitt.

At the time of the execution of the Agreement, respondent also remained unable to account for the portion of the funds removed from the BB&T account that are not associated with outstanding checks. Respondent acknowledges it is his responsibility to identify the clients and/or third parties to whom those funds belong and to ensure those funds are paid, regardless of whether he can secure those funds from NATC or Mr. Pruitt.

Respondent further acknowledges it is his responsibility to account for the $21,500 removed from the BB&T account in November 2007 as excess recording fees and that he is required to reconcile the account, including a complete review of his settlement statements and disbursement records, to determine what portion of those funds, if any, must be reimbursed to clients.

Finally, respondent acknowledges it is his responsibility to locate or reconstruct the accounting of the approximately $80,000 remaining in the Wachovia account and that he is required to secure those funds or replace them and ensure they are appropriately disbursed. If, after due diligence, respondent is unable to locate the payees for identified funds, he understands he must deliver those funds in accordance with the Uniform Unclaimed Property Act, S.C. Code Ann. § 27-18-10, et seq (2007 & Supp. 2010). If, after due diligence, respondent is unable to identify the proper payee of funds, he understands he must deliver those funds to the Lawyers' Fund for Client Protection.

[1] Respondent has resolved his civil lawsuit against Mr. Pruitt with an agreement that Mr. Pruitt will provide a complete and accurate accounting of funds.

LAW

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.15 (a lawyer shall hold property of clients that is in a lawyer's possession in connection with a representation separate from the lawyer's own property, in a separate account maintained in the state where the lawyer's office is situated, and the property shall be identified as such and appropriately safeguarded; complete records of such account funds and other property shall be kept by the lawyer; a lawyer shall comply with Rule 417, SCACR; a lawyer shall deposit into a client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred); Rule 1.16 (a lawyer may withdraw from representation of a client in certain situations, but must take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred); and Rule 5.3 (a lawyer who possesses managerial authority in a law firm must take reasonable efforts to ensure the firm has in effect measures giving reasonable assurance a non-lawyer's conduct is compatible with the professional obligations of the lawyer, must make reasonable efforts to ensure the non-lawyer's conduct is compatible with the professional obligations of the lawyer, and shall be responsible for conduct of the non-lawyer in violation of the Rules of Professional Conduct if the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct or knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action).

Respondent also admits he has violated Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) of the Rules for Lawyer Disciplinary Enforcement, Rule 413,

SCACR. Finally, respondent acknowledges he failed to comply with the financial recordkeeping requirements of Rule 417, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law in this state for one year from the date of this opinion. Within sixty days of the date of this opinion, respondent shall enter into a restitution plan with the Commission on Lawyer Conduct to repay the $131,500 removed from the BB&T account.[2] If, by the date of this opinion, respondent has not been able to identify the clients for whom funds were held in trust, he will make his payments to the Lawyers' Fund for Client Protection. Should respondent return to the active practice of law, he must notify the Commission on Lawyer Conduct in writing and begin quarterly reporting of his trust account(s) with the Commission for a period of two years.[3]

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

[2] The parties agree that some portion of these funds may have been properly paid by North American Title Company or Mr. Pruitt. Any such funds may be deducted from the restitution amount upon respondent's delivery of complete and adequate documentation to the Commission on Lawyer Conduct.

[3] Respondent has completed the Legal Ethics and Practice Program Ethics School, which, at the time he attended, included two hours of training on trust account management.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jeffrey Brian Motts, Appellant.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge
D. Garrison Hill, Circuit Court Judge

Opinion No. 26947
Heard January 5, 2011 – Filed March 21, 2011

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General J. Anthony Mabry, of Columbia, Solicitor Robert Mills Ariail, of Greenville, for Respondent.

JUSTICE BEATTY: In this capital case, a jury convicted Jeffrey Brian Motts of murdering his cell-mate at Perry Correctional Institution. Shortly after his appellate counsel filed a notice of appeal, Motts wrote to this Court indicating his desire to abandon his direct appeal and to waive all

appellate review of his conviction and death sentence. In response, this Court remanded the case to the circuit court to conduct a competency hearing. Following a hearing, the circuit court found Motts competent to waive his appeals.

After conducting an extensive review of the record in this case and thoroughly questioning Motts during oral arguments before this Court, we conclude Motts is competent to waive his right to a direct appeal and that his waiver is knowing and voluntary. Additionally, we find that Motts's sentence of death is neither excessive nor disproportionate with his crime. Finally, we hold that neither the circuit court nor this Court is required to issue an order for a court-appointed psychiatrist to interview Motts, in the absence of some indicia of incompetency, immediately prior to his execution to assure that he has remained competent.

I. Factual/Procedural Background

In 1997, a Spartanburg County jury convicted Motts of the armed robbery and murder of his great-aunt and great-uncle. The trial judge sentenced Motts to life imprisonment for each murder conviction and twenty-five years' imprisonment for the armed robbery conviction.

While Motts was serving his sentences at Perry Correctional Institution in Greenville County, his cell-mate, Charles Martin, was found dead on December 8, 2005. Motts confessed to the killing. Subsequently, a Greenville County grand jury indicted Motts for Martin's murder. Based on Motts's prior murder convictions, the State sought the death penalty.

Several witnesses at trial, including Motts, testified regarding the events surrounding Martin's murder. Angered that Martin had lied to another inmate about Motts's involvement in "planting" a knife in the inmate's cell, Motts confronted Martin during the early morning hours of December 8, 2005. According to Motts, the verbal exchange escalated to a physical altercation with Motts hitting Martin in the head. Martin fell against the wall and started shaking. Motts then picked up Martin and bound his hands and feet using strips of cloth from his bed sheets. When Martin regained consciousness, he begged Motts not to hurt him. Motts responded by

choking Martin to death. Because Martin continued to make what Motts described as a "death rattle," Motts proceeded to tie some sheets around Martin's neck to stop this noise. Martin died as the result of asphyxia due to strangulation. Motts then pushed the body under his bed in the cell.

After killing Martin, Motts smoked a cigarette, ate breakfast, smoked another cigarette, and watched television. Motts then dragged Martin's body to a common area known as "the rock." Before placing Martin's body on "the rock," he kicked Martin and stated "this is what snitches get."

Motts then reported to prison guards that he had killed Martin. After the guards found Martin's lifeless body, officers with the South Carolina Law Enforcement Division initiated an investigation by questioning Motts. During the questioning, Motts waived his Miranda[1] rights and then confessed to the murder.

After the jury found Motts guilty of murder, the State sought to establish the statutory aggravating circumstance that "[t]he murder was committed by a person with a prior conviction for murder." S.C. Code Ann. § 16-3-20(C)(a)(2) (2003). Accordingly, the State presented evidence regarding Motts's 1997 convictions for the murder of his great-aunt and great-uncle.

Ultimately, the jury found beyond a reasonable doubt that the murder of Martin was committed by a person with a prior conviction for murder. As a result, the jury recommended that Motts be put to death. The trial judge denied all of Motts's post-trial motions and ordered on June 4, 2008 that Motts be put to death as a result of the conviction.

The day after sentencing, Motts's trial counsel filed a notice of intent to appeal Motts's conviction and sentence. Before any briefs were filed, Motts personally wrote to this Court requesting that his execution proceed as scheduled. Specifically, Motts expressed his desire to relieve his appellate defender, represent himself, and waive his direct appeal.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Subsequently, this Court issued an order remanding the matter to the trial judge, Circuit Court Judge Larry R. Patterson, and directing him to conduct a full hearing to determine whether Motts was competent to waive his direct appeal and whether his decision to waive his right to direct appeal was knowing and voluntary.

Judge Patterson ordered that Motts be examined by two qualified examiners designated by the South Carolina Department of Mental Health. Pursuant to the order, the examiners were to determine whether Motts was competent under the standard enunciated in Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993),[2] and followed in State v. Torrence, 317 S.C. 45, 451 S.E.2d 883 (1994).[3]

The court-appointed examiners included: Dr. Richard Frierson, a Professor of Clinical Psychiatry for the University of South Carolina School of Medicine (USCSM); Dr. Amanda (Gowans) Salas, Fellow in Forensic Psychiatry for the USCSM; and Dr. Michael Gassen, Chief Psychologist for the Department of Mental Health. The examiners evaluated thirty-four-year old Motts on October 8, 2009, November 12, 2009, and December 16, 2009.

On January 5, 2010, the court-appointed examiners submitted a joint, fifteen-page report explaining their ultimate conclusion that Motts was competent to waive his direct appeal under the standard set forth in Singleton and followed in Torrence.

On April 29, 2010, Circuit Court Judge D. Garrison Hill[4] held an evidentiary hearing. During the hearing, Judge Hill heard testimony from

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[2] See Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993) (adopting two-prong analysis for determining a defendant's competency to be executed).

[3] See State v. Torrence, 317 S.C. 45, 451 S.E.2d 883 (1994) (recognizing that the Singleton test was to be applied to a determination of whether a capital defendant was competent to waive appellate proceedings).

[4] While the examination was being conducted, Judge Patterson retired from the bench. Pursuant to the State's request, this Court issued an order naming Circuit Court Judge D. Garrison Hill as the replacement judge and granted him the authority to perform those duties specified in the original remand order.

two court-appointed psychiatrists,[5] the two trial attorneys who represented Motts in his 2007 capital trial, and Motts.

According to Dr. Frierson, the examiners reviewed the following documents: Motts's medical records dating from his childhood, transcripts from Motts's criminal trials, Motts's employment records, and Motts's records from the South Carolina Department of Corrections. In addition, the examiners compiled a "social history" by interviewing Motts, his mother, and an individual with a prison ministry who had visited Motts on death row. The examiners definitively concluded that Motts was competent to waive his right to appeal and to be executed as required under Singleton.

Motts's counsel called the two attorneys who represented Motts in his 2007 capital trial. Christopher Scalzo testified that Motts expressed "early on" that he did not wish for the jury to return a life sentence. In fact, Scalzo had Motts evaluated to determine whether he was competent to stand trial "because of [Motts's] initial desire to get the death penalty." However, Scalzo acknowledged that there were times when Motts was "supportive of the idea of a life sentence." Scalzo recounted Motts's closing statement to the jury in which Motts asked "the jury to give him life for his family."

Stephen Henry, the lead counsel appointed to Motts, testified Motts was cooperative "to the point where he thought that we might have a chance of getting a life sentence." Henry stated that Motts's "decision to die was made early and never waivered." As to Motts's closing statement to the jury, Henry claimed Motts was "asking for his life to be spared for his parents[']sake, not for his own." According to Henry, Motts expressed that "he deserved the death penalty for what he did."

Finally, Judge Hill personally questioned Motts. During this colloquy, Motts answered questions regarding his understanding of the competency proceedings, the appellate proceedings, post-conviction relief proceedings, and the death sentence. Motts also stated that he deserved the death penalty and did not want to remain incarcerated for another thirty to forty years.

[5] Neither the State nor Motts's counsel called Dr. Michael Gassen. The written report and the testimony, however, established that Dr. Gassen concurred with the opinions of the two testifying examiners.

Motts explained that he was "100 percent" firm in his commitment to waive his appeals and that no one had threatened or coerced him to reach this decision.

On June 8, 2010, Judge Hill issued a lengthy written order in which he concluded that Motts's "decision to waive his rights to direct appeal meets the standards set forth in Singleton v. State and that his decision is one that has been knowingly, voluntarily, and intelligently made after careful and thoughtful consideration."

Upon receipt of Judge Hill's order, this Court directed Motts's appellate counsel to file a brief addressing the issue of whether Motts is competent to waive his right to direct appeal and whether his waiver is knowing and intelligent. After the parties filed their briefs, Motts wrote to this Court again expressing his "desire to waive all of [his] appeals, and sentence review, and not delay this any further."

II. Discussion

A.

Our review of this case involves a three-part analysis. Initially, we must assess whether Motts is competent to waive his direct appeal and whether this decision is knowing and voluntary. If these questions are answered in the affirmative, the question becomes whether Motts's waiver includes this Court's proportionality review of his sentence of death. Finally, we must determine whether the circuit court or this Court has a continuing duty to assure that Motts is competent to be executed. Specifically, we must consider whether Motts should be evaluated by a court-appointed psychiatrist immediately prior to his execution.

B.

"This Court is charged with the responsibility of issuing a notice authorizing the execution of a person who has been duly convicted in a court of law and sentenced to death." Hill v. State, 377 S.C. 462, 467, 661 S.E.2d 92, 95 (2008). "We will issue an execution notice after the defendant has

exhausted all appeals and other avenues of PCR in state and federal courts, or after that person, who is determined by this Court to be mentally competent, knowingly and voluntarily waives such appeals." Id.

"When considering a request by an appellant who has been sentenced to death to waive the right to appeal or pursue PCR, and to be executed forthwith, it has been our practice to remand the matter to circuit court for a hearing and ruling on whether the appellant is mentally competent to make such a waiver, and whether any waiver of appellate or PCR rights is knowing and voluntary." Hughes v. State, 367 S.C. 389, 395, 626 S.E.2d 805, 808 (2006). "We remand such a matter when we deem it necessary to further develop or explore the facts of a case." Id. "Following that competency hearing, the parties are required by this Court to file briefs and an appendix containing the testimony and evidence considered by the circuit court." Id. "The appellant is required, when directed by the Court, to appear at oral argument and personally respond to questions regarding the waiver of his appellate or PCR rights." Id.

"In making a determination on the competency of a convicted defendant to waive his appellate or PCR rights, we are not bound by the circuit court's findings or rulings, although we recognize the circuit court judge, who saw and heard the witnesses, is in a better position to evaluate their credibility and assign comparative weight to their testimony." State v. Downs, 369 S.C. 55, 66, 631 S.E.2d 79, 84 (2006).

In deciding the issue of a capital defendant's competency, this Court carefully and thoroughly reviews the following: the defendant's history of mental competency; the existence and present status of mental illness or disease suffered by the defendant, if any, as shown in the record of previous proceedings and in the competency hearing; the testimony and opinions of mental health experts who have examined the defendant; the findings of the circuit court that conducted a competency hearing; the arguments of counsel; and the capital defendant's demeanor and personal responses to the Court's questions at oral argument regarding the waiver of appellate or PCR rights. Reed v. Ozmint, 374 S.C. 19, 24, 647 S.E.2d 209, 211-12 (2007). "We necessarily decide each case on an individual basis, and it is within our

discretion whether to allow an appellant to waive his appellate or PCR rights." Hughes, 367 S.C. at 397, 626 S.E.2d at 809.

The standard for determining whether an appellant or PCR applicant is mentally competent to waive the right to a direct appeal or PCR is set forth in Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993). Singleton provides in relevant part:

> The first prong is the cognitive prong which can be defined as: whether a convicted defendant can understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. The second prong is the assistance prong which can be defined as: whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel.

Id. at 84, 437 S.E.2d at 58. "This standard of competency is the same standard required before a convicted defendant may be executed." Hughes, 367 S.C. at 397-98, 626 S.E.2d at 809. "The failure of either prong is sufficient to warrant a stay of execution and a denial of the convicted defendant's motion to waive his right to appeal or pursue PCR." Id. at 398, 626 S.E.2d at 809.

Applying the foregoing to the facts of the instant case, we conclude the evidence in the record fully supports Judge Hill's decision finding that Motts is competent to waive his right to direct appeal and this waiver has been made knowingly and voluntarily.

Notably, the three court-appointed examiners unanimously agreed that Motts met the Singleton standard. In their written report, the experts found Motts understood that a jury had convicted him for the death of Martin and that a judge had sentenced him to death. According to the experts, Motts also "verbalized a basic understanding" of the appellate process and PCR. The experts further opined that Motts "possesses sufficient capacity or ability to rationally communicate with counsel."

Despite Motts's lifelong mental health issues, the experts concluded that "Motts is not evidencing current symptoms of mental illness or other deficits that would significantly compromise his present capacity to understand the nature of the proceedings, the reason or nature of the punishment, or his ability to rationally communicate with counsel." Although Motts experienced bouts of major depression, Dr. Frierson found that he was currently in "full remission." Neither Dr. Frierson nor Dr. Salas believed that Motts's decision to waive his direct appeal was a product of depression or that it constituted a desire to commit suicide.

At the competency hearing, Drs. Frierson and Salas testified that their opinion regarding Motts's competency had not changed even after interviewing Motts the day of the hearing. Drs. Frierson and Salas also informed Judge Hill that the medications Motts was currently taking did not affect his cognitive abilities.

Judge Hill and this Court also thoroughly questioned Motts. In response to these questions, Motts was able to articulate his understanding of his murder conviction and death sentence, the competency proceedings, the appellate proceedings, and the PCR proceedings. Motts also stated that he deserved the death penalty and explained that he did not want to remain incarcerated for the next thirty to forty years. Finally, Motts explained that he was firm in his commitment to waive his appeals and that no one had threatened or coerced him to reach this decision.

C.

Having affirmed Judge Hill's ruling, the next step in our analysis is to review Motts's sentence of death.

Because there is a conflict in our jurisprudence as to whether a capital defendant may waive this Court's review of his sentence, we take this opportunity to definitively resolve this issue.

In State v. Torrence, 322 S.C. 475, 473 S.E.2d 703 (1996) (Torrence III), this Court found Torrence was competent and his decision to waive his

direct appeal of a capital re-sentencing was knowing and voluntary.[6] The Court then considered the question of "whether the [sentence] review provisions of S.C. Code Ann. § 16-3-25 (1985)" could also be waived by Torrence. Id. at 479, 473 S.E.2d at 706. Recognizing that both constitutional and statutory rights may be waived, the Court concluded that Torrence could waive the review provisions of section 16-3-25. Id.

Six years after Torrence III, this Court reached a different conclusion. In State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002), the defendant pleaded guilty to capital murder and was sentenced to death. Subsequently, Passaro sought to waive his appeal. After concluding that Passaro could waive his right to general appellate review, this Court proceeded to review his sentence under section 16-3-25(C). In a footnote, the Court stated "[w]e have never directly addressed whether a defendant may waive sentence review under section 16-3-25(C) (1976)." Id. at 508 n.11, 567 S.E.2d at 867 n.11. The Court, however, declined to address this issue as it was neither raised nor briefed by either party. Id.

Section 16-3-25, the provision that addresses capital-sentencing proceedings, provides in pertinent part: "The sentence review **shall** be in addition to direct appeal, **if taken**, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence." S.C. Code Ann. § 16-3-25(F) (2003) (emphasis added).

As we interpret section 16-3-25, the General Assembly contemplated a defendant's waiver of a direct appeal; however, it made no such provision as to this Court's mandatory sentence review. Although Motts is entitled to waive his personal right to a direct appeal, we hold that he cannot waive this

[6] Torrence was the third opinion in a series of appeals. In State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (Torrence I), this Court affirmed Torrence's convictions but reversed his sentence of death and remanded for a new sentencing proceeding. After Torrence was re-sentenced to death, he sought to waive his appeal. Subsequently, this Court remanded to the circuit court for a competency hearing and development of a full record. State v. Torrence, 317 S.C. 45, 451 S.E.2d 883 (1994) (Torrence II). Torrence then moved to dismiss the appeal of the circuit court's decision finding him competent to waive his appeal.

Court's statutorily-imposed duty to review his capital sentence. See State v. Shaw, 273 S.C. 194, 209, 255 S.E.2d 799, 806 (1979) (holding South Carolina's statutory death-penalty procedure is constitutional and recognizing that "[t]he duty falls to this Court" to ensure that a sentence of death must conform to the statutory requirements), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Based on our conclusion that it is this Court's statutorily-imposed duty to conduct a proportionality review of a capital sentence, we turn now to a review of Motts's sentence.[7]

"The United States Constitution prohibits the imposition of the death penalty when it is either excessive or disproportionate in light of the crime and the defendant." State v. Wise, 359 S.C. 14, 28, 596 S.E.2d 475, 482 (2004). In conducting a proportionality review, we search for similar cases in which the sentence of death has been upheld. Id.; S.C. Code Ann. § 16-3-25(E) (2003) (providing that in conducting a sentence review the Supreme Court "shall include in its decision a reference to those similar cases which it took into consideration").

After reviewing the entire record, we find the sentence of death was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of a statutory aggravating circumstance for the murder is supported by the evidence. As evidenced by Motts's own testimony and confession, Motts violently murdered Martin and appeared to have little remorse for his actions. Despite Martin's pleas for his life, Motts strangled Martin to death. Seemingly unaffected by the heinousness of his actions, Motts smoked cigarettes, ate breakfast, and watched television after he killed Martin. Motts then callously displayed Martin's lifeless body in a common area in order to send a message to the other inmates.

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[7] See S.C. Code Ann. § 16-3-25(C) (2003) (providing that Supreme Court shall determine whether: (1) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; and (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant).

Furthermore, a review of prior cases establishes that the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. See State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007) (holding death sentence based on single aggravating circumstance and single victim was not disproportionate to penalty imposed in other death penalty cases); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990) (affirming defendant's murder convictions and sentence of death where jury found sole statutory aggravating circumstance that victim's murder was committed by a person with a prior conviction of murder).

D.

Finally, we consider the issues raised by Motts's appellate counsel. In his brief, Motts's counsel argues that the circuit court and this Court have a continuing duty to assure that Motts remains competent once Motts is served with a notice of execution. Because Motts has suffered from major depression, counsel contends that Motts's competency is not static. If Motts's mental health issues return, counsel is concerned that Motts will no longer maintain an attorney-client relationship. In the event that scenario occurs, counsel asserts he will not be able to assess whether Motts has remained competent prior to execution. Given the claimed fluidity of Motts's competency, counsel argues that Judge Hill erred in ruling he did not have authority to order that a court-appointed psychiatrist examine Motts prior to his execution. In the alternative, counsel claims this Court should order the evaluation.

At the competency hearing, Motts's counsel raised this issue through his arguments to the court and questioning of Drs. Frierson and Salas. During cross-examination, Dr. Frierson acknowledged that "competency can change over time." He explained that he could not guarantee that Motts's depressive symptoms would not return within a few months and believed that such a change was "always possible." Dr. Frierson admitted that Motts should be evaluated by a psychiatrist prior to his execution in order to ensure that Motts remained competent.

Dr. Salas agreed with Dr. Frierson's opinion. She also believed it would be a "good idea" for a psychiatrist to evaluate Motts after the notice of

execution because "competency can change and there are some factors that we know have an impact over competency such as a mood component where . . . major depressive disorder . . . can come back in time." She further stated that "it would be important for competency to be [evaluated] as close to the time" of execution.

In his order, Judge Hill denied Motts's counsel's request to have Motts re-evaluated immediately prior to his execution. Judge Hill explained that the request was "beyond the scope of the matter this court was directed to address by the Supreme Court in the remand order." However, he noted that counsel could present this request to this Court.

After careful consideration, we find that neither the circuit court nor this Court is required to issue an order for a court-appointed psychiatrist to interview Motts, in the absence of some indicia of incompetency, immediately prior to his execution to assure that he has remained competent.

Initially, we find that Judge Hill did not err in declining to order the requested evaluation as this was clearly outside the parameters of our remand order. As will be discussed, we find this Court's competency proceedings and the general procedural avenue of section 17-27-20 of the South Carolina Code should effectively alleviate Motts's counsel's concern that an incompetent inmate will be executed.

The Eighth Amendment prohibits the State from executing an incompetent individual. Ford v. Wainwright, 477 U.S. 399 (1986); Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004); Singleton, 313 S.C. at 79, 437 S.E.2d at 56. In Panetti v. Quarterman, 551 U.S. 930 (2007), the United States Supreme Court reiterated the holding in Ford and explained:

> The prohibition applies despite a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it. Prior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition. Under Ford, once a prisoner makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amendment, applicable to the

> States under the Due Process Clause of the Fourteenth Amendment, entitles him to an adjudication to determine his condition. These determinations are governed by the substantive federal baseline for competency set down in Ford.

Id. at 934-35.

In assessing a defendant's competency, this Court has recognized that there is a presumption of continued competency once a judicial determination of a defendant's competency has been established. See State v. Drayton, 270 S.C. 582, 243 S.E.2d 458 (1978) (holding failure of trial judge to order further examination and a hearing to determine defendant's competency to stand trial did not violate statute authorizing trial judge to order such examinations nor deprive defendant of due process where previous presiding judge had found, about two and a half months prior, that defendant was fit to stand trial and there were no additional facts to warrant further examination or hearing).[8]

Although Drayton involved a determination of a defendant's competency to stand trial, we believe it provides guidance in the instant case regarding Motts's competency to be executed. Cf. State v. Finklea, 388 S.C. 379, 384 n.2, 697 S.E.2d 543, 546 n.2 (2010) (distinguishing Singleton standard for competency from standard required to stand trial; stating Singleton standard "requires only that a party understand they have been sentenced to death for murder and be able to communicate rationally with counsel" (emphasis added) (citation omitted)); Lonchar v. Thomas, 58 F.3d 588, 589 (11th Cir. 1995) (concluding "next friend" lacked standing to bring petition for habeas corpus on behalf of prisoner facing execution and

[8] In his brief, Motts's counsel cites Drope v. Missouri, 420 U.S. 162 (1975) and Pate v. Robinson, 383 U.S. 375 (1966), for the proposition that the circuit court "had the inherent authority to order any steps it found necessary to assure [Motts] was competent prior to his execution." The Court in Drayton found Drope and Pate were inapposite given the defendants in those cases had never received a mental examination to determine competency. Drayton, 270 S.C. at 585, 243 S.E.2d at 459. Here, as in Drayton, Motts has received a judicial determination of competency. Thus, we find that neither Drope nor Pate support counsel's argument.

recognizing that "a presumption of continued competency arises from a prior finding of competency").

Because this Court is responsible for the final determination of an inmate's competency to be executed, it has consistently questioned each inmate personally with respect to their continued competency and decision to waive any further appellate proceedings regarding their conviction and capital sentence. Hill v. State, 377 S.C. 462, 661 S.E.2d 92 (2008); Reed v. Ozmint, 374 S.C. 19, 647 S.E.2d 209 (2007); Hughes v. State, 367 S.C. 389, 626 S.E.2d 805 (2006); State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002); State v. Torrence, 317 S.C. 45, 451 S.E.2d 883 (1994).

If the Court determines that the inmate is competent, it can affirm the circuit court's ruling and order that the inmate's execution be carried out in accordance with section 17-25-370 of the South Carolina Code, which provides that a death sentence be carried out on the fourth Friday after the Commissioner of the prison system is notified of the final disposition. S.C. Code Ann. § 17-25-370 (2003). Thus, there is a relatively short delay between the Court's determination that an inmate is competent to be executed and the actual date of execution.

In the event an inmate alleges he is incompetent after an order of execution is issued by this Court, the inmate may apply for PCR on the basis of competency, pursuant to section 17-27-20(a)(6) of the South Carolina Code.[9] Subsequently, an evidentiary hearing would be held at which the inmate would be required to show by a preponderance of the evidence that he lacks the requisite competency for execution. If the PCR court finds the applicant incompetent, and this Court agrees, a stay of execution would be

[9] S.C. Code Ann. § 17-27-20(a)(6) (2003) ("Any person who has been convicted of, or sentenced for, a crime and who claims . . . [t]hat the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. *Provided, however,* that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction."); Singleton, 313 S.C. at 87, 437 S.E.2d at 60.

issued. If the inmate becomes competent, then the State would have to move for a hearing before the PCR judge in order to lift the stay of execution.

Additionally, if the Court has reason to believe that the inmate is incompetent, it can then issue a stay of execution pursuant to a "Singleton writ." See Singleton, 313 S.C. at 84, 437 S.E.2d at 58 (finding failure of either prong of the two-part competency test is sufficient to warrant a stay of execution).

As a final note, if Motts's counsel's argument is taken to its logical extreme, it would mean that a defendant's competency must continue to be evaluated up to the moment of execution. Not only is an application of this interpretation impractical, it has been rejected by a few jurisdictions. See John E. Theuman, Annotation, Propriety of Carrying Out Death Sentences Against Mentally Ill Individuals, 111 A.L.R.5th 491, § 5 (2003 & Supp. 2010) (discussing cases that have adjudicated whether the Federal Constitution's Eighth Amendment rule prohibiting execution of the insane requires a determination of sanity at the exact time of execution).

The Sixth Circuit Court of Appeals has provided a well-reasoned explanation for rejecting this interpretation. In Coe v. Bell, 209 F.3d 815 (6th Cir. 2000), the Sixth Circuit Court of Appeals assessed whether the procedures followed by Tennessee state courts in determining whether a capital defendant's competency to be executed satisfied due process. In that case, Coe's murder conviction and sentence of death were affirmed on direct appeal. Subsequently, the Tennessee Supreme Court upheld a determination that Coe was competent to be executed. In his habeas corpus petition, Coe argued that "the Tennessee courts erred in deciding his competency to be executed because they evaluated his present competency rather than determining his future competency at the moment of execution." Id. at 824. Because Coe suffered from Dissociative Identity Disorder, which caused him to dissociate under stress, he claimed he would dissociate as his execution approached and would not have the requisite competency at the time of his execution. Id.

In rejecting Coe's argument, the Sixth Circuit reiterated the United States Supreme Court's holding in Ford and stated:

> We do not believe that the Supreme Court in *Ford* meant to require a state to determine a prisoner's competency at the exact time of his execution. It would be impossible to follow the procedural protections identified in the opinions of Justice Marshall and Justice Powell in a meaningful way in the moments before execution; a state could not make a sound decision in accordance with due process regarding a prisoner's competency to be executed at this time. Nevertheless, a state must make its determination when execution is imminent. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45, 118 S. Ct. 1618, 140 L.Ed.2d 849 (1998). Whether the competency determination is made in the week or the month before the prisoner's scheduled execution, the state is entitled to exercise discretion in creating its own procedures "[a]s long as basic fairness is observed." *Ford*, 477 U.S. at 427, 106 S. Ct. 2595 (Powell, J., concurring).

Id. at 824-25.

Based on the foregoing, we believe this Court's procedures concerning an inmate's competency to be executed comply with the intent of Ford. By remanding to the circuit court for a competency hearing, this Court acquires an extensive evidentiary record regarding an inmate's mental health history as well as a judicial determination as to an inmate's competency. If the Court then personally questions an inmate, it is able to evaluate an inmate's competency shortly before the execution date. In the event an inmate becomes incompetent prior to execution, there is a PCR avenue available that could potentially result in a stay of execution.

III. Conclusion

In conclusion, we affirm the circuit court's decision finding Motts competent to waive his direct appeal and that this waiver is knowing and voluntary. After conducting our statutorily-imposed duty to review Motts's capital sentence, we also affirm the sentence of death. Finally, given this Court's procedures and the PCR avenues available to Motts, we conclude that neither the circuit court nor this Court is required to order that a court-

appointed psychiatrist interview Motts immediately prior to his execution in the absence of some indicia of incompetency.

AFFIRMED.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Nearin Blackwell-Selim, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 26948
Submitted March 15, 2011 – Filed March 21, 2011

VACATED and REMANDED

Appellate Defender M. Celia Robinson, South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney

General Salley Elliott, Assistant Attorney General Christina J. Catoe, all of Columbia; John Gregory Hembree, 15th Circuit Solicitor's Office, of Conway, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in State v. Blackwell-Selim, 385 S.C. 394, 684 S.E.2d 208 (Ct. App. 2009). We grant the petition for a writ of certiorari, dispense with further briefing, vacate the opinion of the Court of Appeals, and remand to the circuit court to make specific findings of fact.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner pled guilty to voluntary manslaughter in the stabbing death of her live-in boyfriend. She was sentenced to twenty years' imprisonment. During sentencing, petitioner presented evidence seeking to show a history of criminal domestic violence suffered by her at the hands of the decedent, entitling her to early parole eligibility pursuant to S.C. Code Ann. § 16-25-90 (Supp. 2010). After sentencing petitioner to twenty years' imprisonment, the plea judge stated, "There is no finding of parole eligibility pursuant to § 16-25-90;" however, he made no specific findings of fact as to why petitioner was ineligible for early parole.

The Court of Appeals affirmed the plea judge's finding as to early parole eligibility. The Court of Appeals concluded the record supported a determination that petitioner failed to produce credible evidence of a history of criminal domestic violence at the hands of the decedent and failed to satisfy the preponderance of the evidence standard.

ISSUE

Did the Court of Appeals err in affirming the plea judge's finding that petitioner was ineligible for early parole?

LAW/ANALYSIS

In criminal cases, the appellate court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown. State v. Laney, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006). The appellate court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010).

Pursuant to § 16-25-90, a person who is convicted of or pleads guilty to an offense against a household member is eligible for parole after serving one-fourth of his or her prison term if the person presents credible evidence of a history of criminal domestic violence, as defined in S.C. Code Ann. § 16-25-20 (2003), suffered at the hands of the household member. Such a history must be proven by a preponderance of the evidence. State v. Grooms, 343 S.C. 248, 254, 540 S.E.2d 99, 102 (2000). Therefore, mere production of evidence does not automatically result in earlier parole eligibility; instead, the defendant must persuade the judge by presenting proof which leads the trier of fact to find that the existence of the contested fact is more probable than its nonexistence. Id. at 253-54, 540 S.E.2d at 101-02 (citing 2 McCormick on Evidence § 339 (5th ed. 1999)). Moreover, use of the term "credible evidence" indicates the legislature intended the defendant's evidence to be, in fact, trustworthy, not simply plausible. Id. at 253, 540 S.E.2d at 101. The defendant must persuade the judge her evidence is reliable. Id.

We find the Court of Appeals erred in reviewing the plea judge's finding petitioner was not eligible for early parole under § 16-25-90 because the plea judge failed to make specific findings of fact to support his ruling. Thus, there was nothing for the Court of Appeals to review. Winkler, 388 S.C. at 583, 698 S.E.2d at 601; Laney, 367 S.C. at 643, 627 S.E.2d at 729. The circuit court must make specific findings in ruling on parole eligibility or ineligibility under § 16-25-90. See e.g. Grooms, 343 S.C. 248, 540 S.E.2d

99. Therefore, we vacate the opinion of the Court of Appeals and remand the matter to the circuit court to make specific findings of fact regarding the ruling that petitioner was not entitled to early parole eligibility pursuant to § 16-25-90.

CONCLUSION

Because the plea judge failed to make specific findings of fact with regard to his ruling that petitioner was not entitled to early parole eligibility pursuant to § 16-25-90, we grant the petition for a writ of certiorari, dispense with further briefing, vacate the Court of Appeals' opinion, and remand the case to circuit court to make such findings.

VACATED and REMANDED.

TOAL, C.J., PLEICONES, BEATTY, and KITTREDGE JJ., concur. HEARN, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Evening Post Publishing Company, d/b/a The Post and Courier, Appellant,

v.

Berkeley County School District, Respondent.

Appeal From Berkeley County
Roger M. Young, Circuit Court Judge

Opinion No. 26949
Heard February 16, 2011, Filed March 21, 2011

REVERSED AND REMANDED

John J. Kerr and Charles J. Baker, Buist, Moore, Smythe & McGee, both of Charleston, for Appellant.

Kenneth L. Childs, Kathryn Long Mahoney, and John M. Reagle, Childs & Halligan, P.A., all of Columbia, for Respondent.

Jay Bender, Baker, Ravenel & Bender, of Columbia for Amicus Curiae Osteen Publishing, New York Times, Landmark, et al.

JUSTICE HEARN: The issue before the Court is whether the circuit court erred in granting summary judgment to Berkeley County School District (School District) based on the attorney-client privilege exception to the Freedom of Information Act (FOIA) and in denying Evening Post Publishing Company's (Evening Post) motion to compel the production of documents. We find the circuit court erred in both respects and reverse.

FACTUAL BACKGROUND

School District is governed by a nine-member Board of Education (Board) elected by residents of Berkeley County. In 1997, Dr. J. Chester Floyd was hired by the Board as Superintendent for School District. Pursuant to a Professional Employment Agreement executed in 2005 between Floyd and School District, Floyd was hired through June 2010. A provision of this contract required the Board to evaluate Floyd at least once a year. This evaluation was the basis for determining, among other things, whether Floyd received a 5% increase in his compensation.

In 2006, the composition of the Board changed after an election resulting in the defeat of three longtime incumbents. After this election, the Board became more critical of the Superintendent, with most decisions being rendered 5 to 4. It was in the midst of this contentious environment that the present action was filed by Evening Post to obtain information about the Board.

During Floyd's evaluation for the 2006-2007 school year, the law firm of Childs and Halligan, PA, became involved at the request of Frank Wright, Chairman of the Board. Childs and Halligan prepared a summary of each individual Board member's answers to both a written questionnaire and a telephone interview concerning Floyd's performance. The Board met in executive session to discuss Floyd's performance under the agreement, and after the session, Wright publicly announced the Board found Floyd's performance to be satisfactory, entitling Floyd to the 5% pay increase.

Evening Post, after discovering information regarding the written questionnaire and telephone interview, wrote to Floyd on two separate occasions requesting access to certain documents pursuant to FOIA. Floyd denied both requests, stating the evaluations were exempt from disclosure under FOIA pursuant to the attorney-client privilege. Shortly thereafter, Evening Post requested access to these items a third time, but directed its request to the Board. Wright responded to this third request, denying it on the same grounds as Floyd, but adding that the personal privacy exemption under FOIA also applied to the evaluations.

Evening Post filed a lawsuit pursuant to the Uniform Declaratory Judgment Act, alleging that the evaluations were public records, the School District's denial of access to the public records violated FOIA, and School District should be enjoined from violating FOIA. Evening Post asked, in the alternative, that the circuit court review the evaluations *in camera* to determine if they were public records and whether the exemptions claimed by School District were applicable. School District filed a timely answer, asserting as an affirmative defense that the records sought were exempt from disclosure under FOIA, specifically Section 30-4-40(a)(7) of the South Carolina Code (2007) and attaching the affidavits of Wright and Kathryn Long Mahoney, a Childs and Halligan attorney. In conjunction with its answer, School District filed a motion for judgment on the pleadings.

During the pendency of School District's motion, Evening Post submitted interrogatories and document production requests to School District. While School District responded to the interrogatories, School

District objected to the production request for a blank copy of the questionnaire referenced in Wright's affidavit on the ground of attorney-client privilege. Evening Post filed a motion to compel pursuant to Rule 37, SCRCP, in order to gain access to the questionnaire. Both Evening Post's Rule 37 motion and School District's Rule 12(c) motion were scheduled to be heard the same day.

Prior to the hearing, School District submitted a set of sealed documents to the circuit court for an *in camera* review, which the circuit court accepted. The documents submitted were: (1) Correspondence from Daryl T. Hawkins (Floyd's lawyer) to Wright; (2) a memorandum from Childs and Halligan to Board Members; (3) a blank copy of the written questionnaire attached to the above memorandum; and (4) a compilation prepared by Childs and Halligan of information from questionnaires and telephone interviews. School District did not submit the completed questionnaires to the circuit court. Because the circuit court considered matters outside the pleadings in conjunction with School District's Rule 12(c) motion, the circuit court treated the matter as a motion for summary judgment under Rule 56, SCRCP. After taking the matter under advisement, the circuit court granted summary judgment to School District and denied Evening Post's motion to compel. Evening Post appealed to the court of appeals and the case was certified to this Court pursuant to Rule 204, SCACR.

ISSUES

Evening Post raises two issues on appeal:

1. Did the circuit court err in granting summary judgment to School District on the FOIA claim?

2. Did the circuit court err in denying Evening Post's motion to compel production of the blank questionnaire?

LAW/ANALYSIS

I. Summary Judgment Motion

Evening Post contends summary judgment was erroneously granted because the attorneys were only hired as a means to insulate the Board from FOIA compliance, and the circuit court should have allowed Evening Post an adequate opportunity to conduct discovery. School District argues in response that it met its burden to prove the exemption applies. We hold the circuit court erred in granting summary judgment in favor of School District.

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the circuit court. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56(c), SCRCP; *see also Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333.

FOIA is remedial in nature and should be liberally construed to carry out its purpose. *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 161, 547 S.E.2d 862, 864-65 (2001). As the General Assembly stated,

> [I]t is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15 (2007).

FOIA's basic premise is to give "any person has a right to inspect or copy any public record of a public body." *Id.* § 30-4-30(a). This right is not without some exceptions, enumerated under section 30-4-40, the following being the one at issue in this case: "Correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships." *Id.* § 30-4-40(a)(7). The determination of whether documents or portions thereof are exempt from FOIA must be made on a case-by-case basis, and the exempt and non-exempt material shall be separated and the nonexempt material disclosed. *City of Columbia v. ACLU*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996); *see also Beattie v. Aiken County Dep't of Social Servs.*, 319 S.C. 449, 453, 462 S.E.2d 276, 279 (1995); *Newberry Publ'g Co., Inc. v. Newberry County Comm'n on Alcohol & Drug Abuse*, 308 S.C. 352, 354, 417 S.E.2d 870, 872 (1992). However, the exemptions should be narrowly construed to not provide a blanket prohibition of disclosure in order to "guarantee the public reasonable access to certain activities of the government." *See Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996); *see also* S.C. Code Ann. § 30-4-15 (2007). The burden of proving that an exemption exists lies with the government. *Evening Post Publ'g Co. v. City of North Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005).

The circuit court stated in its order that an *in camera* review was held, but for only three out of the five items the circuit court claimed Evening Post requested.[1] No indication is given in the order or the record why only three of the items were reviewed by the circuit court. In addition, the circuit court did not even see the documents ultimately sought by Evening Post in the lawsuit—the Board Members' completed questionnaires. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333. We find it troublesome that the circuit court did not look at the documents ultimately sought by Evening Post before granting School District's summary judgment motion.

Additionally, School District's attorney admitted at the motions hearing that the evaluations were within the normal course of events, and that attorney involvement was not necessary to the process. During oral argument before this Court, School District's attorney clarified his statement by noting that while attorney involvement normally is not required, it was necessary in this particular instance. Thus, two reasonable inferences regarding the necessity of attorney involvement can be drawn: (1) The Board's annual review of the superintendent, required by Floyd's contract was within the normal course of events, or (2) attorney involvement was required because of

[1] In its order, the circuit court stated that Evening Post requested five different documents: (1) A memorandum from Childs and Halligan to Board members regarding telephone interviews and written questionnaires; (2) Board member interview questions attached to the above memorandum; (3) confidential questionnaires completed by Board members; (4) Mahoney's notes from telephone interviews conducted with Board members; and (5) a memorandum from Childs and Halligan containing a summary of the completed questionnaires. However, our reading of the record indicates Evening Post's complaint and attachments only sought access to the individual Board members' completed questionnaires and a summary of the completed evaluations. Although the circuit court examined the letter from Hawkins to Wright, we note the record contains no indication that Evening Post ever requested this specific document. Regardless, this apparent ambiguity in the circuit court order does not change our analysis.

the contentious environment surrounding the Board. "Summary judgment should not be granted . . . if there is dispute as to the conclusion to be drawn from those facts." *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) (citing *Gilliland v. Elmwood Props.*, 301 S.C. 295, 391 S.E.2d 577 (1990)).

Finally, we note the policy considerations involved in this case support our decision that summary judgment was improper at this early stage in the proceedings. The General Assembly, by the clear language of the statute, believes FOIA should be broadly construed to allow the public to gain access to public records. The interest in confidentiality expressed through the attorney-client privilege should not trump the public's right to know at this juncture. More development of the facts surrounding the hiring of Childs and Halligan as well as court review of the actual completed questionnaire is necessary to explore these competing interests before rendering judgment as a matter of law.

II. Motion to Compel

Evening Post contends the blank questionnaire's production is important to the development of its theory regarding applicability of the attorney-client privilege. School District argues that the discovery sought by Evening Post is the relief and subject matter of the lawsuit itself, and its production is controlled by *City of Columbia*. We disagree with School District.

In *City of Columbia*, the ACLU brought an action under FOIA, seeking access to an internal police report. 323 S.C. at 384, 475 S.E.2d at 747. The City of Columbia denied the initial FOIA request, arguing that the report was subject to an exemption. *Id.* at 386, 475 S.E.2d at 748. The ACLU brought a motion to compel seeking the report itself, which the circuit court denied. *Id.* This Court upheld the circuit court's order denying the motion because the document requested in the ACLU's motion to compel was the subject matter of the case itself. *Id.* at 388, 475 S.E.2d at 759.

The holding in *City of Columbia* is inapposite to this case. Here, Evening Post's motion to compel seeks only the blank questionnaire, which is different from what Evening Post seeks in the lawsuit itself—the Board Members' completed questionnaires. Further, there is no evidence to show the attorney-client privilege applies to the blank questionnaire. Moreover, there appears to be no reason why the circuit court could not have separated the blank questionnaire from the attorney memorandum to which it was attached. *See Beattie,* 319 S.C. at 453, 462 S.E.2d at 279 (finding that exempt and nonexempt material shall be separated and nonexempt material disclosed). School District, in the motions hearing, conceded that the evaluation questions were not secret, but were routine evaluation questions. "The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion. . . . An abuse of discretion occurs when there is no evidence to support the trial judge's factual conclusion or when the ruling is based upon an error of law." *Bayle v. S.C. Dep't of Transp*., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001) (internal citations omitted). Therefore, we find the circuit court erred in denying Evening Post's motion to compel.

CONCLUSION

We hold the circuit court erred in granting School District's motion for summary judgment and in denying Evening Post's motion to compel. Accordingly, we reverse and remand for further proceedings consistent with this decision.

BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Ricky L. Hatcher, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Marlboro County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 26950
Heard February 16, 2011 – Filed March 21, 2011

REVERSED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor William Benjamin Rogers, Jr., of Bennettsville, for Petitioner.

Appellate Defender Elizabeth A. Franklin-Best, of South Carolina Commission on Indigent Defense, of Columbia, for Respondent.

JUSTICE BEATTY: This Court granted the State's petition for a writ of certiorari to review State v. Hatcher, 384 S.C. 372, 681 S.E.2d 925 (Ct. App. 2009), in which the Court of Appeals reversed the conviction and sentence of Ricky L. Hatcher on drug charges on the ground the State failed to establish a sufficient chain of custody for the drug evidence. We reverse.

I. FACTS

Hatcher was indicted for distribution of crack cocaine and distribution of crack cocaine within one-half mile of a public park for selling crack to an undercover informant ("Buyer") working with the Marlboro County Sheriff's Office on October 6, 2006.

At trial, the Buyer testified that he met with two officers on October 6, 2006 in downtown McColl. They searched the Buyer before providing him with $40.00 to make a drug purchase and fitting him with a concealed wire. The Buyer went to Hatcher's residence and purchased two pieces of crack cocaine from Hatcher. The two pieces were individually wrapped inside small pieces of plastic cut from the corners of a sandwich bag. The ends of the plastic were tied into knots. The Buyer estimated he was in Hatcher's residence for about three to five minutes before he left and delivered the crack to the officers, who were waiting nearby. The Buyer identified State's Exhibit 1, which included the crack and two baggies, as being the items that he received from Hatcher.

Sergeant Jeffrey Locklear of the Marlboro County Sheriff's Office testified that he and another officer, investigator Brittany English, met the Buyer at 12:25 p.m. on October 6, 2006. Locklear confirmed all of the details testified to by the Buyer.

Regarding the receipt of the drug evidence, Sergeant Locklear testified that the Buyer gave him the crack, which was contained in "two tiny plastic corners" cut from sandwich bags and tied into knots. Locklear placed the crack (still tied in their original packages) inside a plastic evidence bag and "sealed [it] with a glue-type seal." He stated the only way the bag could be opened is by cutting it open. Locklear put identifying information on the bag, including the case number, the date of 10/06/06, the time of 12:39 p.m. when he retrieved the drugs from the Buyer, the approximate weight of the drugs, and that the purchase was made at Second Street in McColl from Ricky Hatcher. Locklear sealed this package inside a second bag produced by the South Carolina Law Enforcement Division (SLED) specifically for the transportation of items to the SLED laboratory for testing. Locklear stated he personally transported the sealed evidence to SLED.

Locklear testified that after the drugs were tested, the SLED agent processing the case repackaged the drugs in a heat-sealed bag (that must be cut open) and marked the bag with blue writing. SLED returned the heat-sealed bag to the sheriff's office. Locklear identified the heat-sealed bag presented at trial as the same one that he had personally transported to the court that day.

A forensic scientist with SLED, Marjorie Wilson, testified as an expert in the analysis of controlled substances and stated that she was the person responsible for processing and testing the drug evidence in this case at SLED. Wilson stated she retrieved the evidence from the Log-In Department at SLED and that it was still sealed in a Best Evidence Kit (or bag).[1] Wilson testified she broke the seal on the evidence bag and inside she found a second bag from the Marlboro County Sheriff's Department that contained "two clear

[1] Wilson explained that when an officer receives drug evidence, the officer places it in what is called a "Best Evidence Kit" on which is printed, "SLED Drug Analysis Security Envelope," and the seal on this envelope "is tamper evident," meaning any attempt to open that bag will be evident to anyone looking at it. Wilson stated officers bring evidence to SLED in the sealed containers, and it is logged in by SLED's Log-In Department, which gives evidence a unique SLED laboratory case number.

plastic corner bags." Both of the plastic corner bags were still knotted, with a rock-like substance inside them.

Wilson removed the substances from the corner bags and analyzed them before re-packaging the contents into two Ziploc bags. She placed the repackaged evidence into a heat-sealed pouch and wrote her initials on it and the date it was sealed of "5/04/07." She returned the pouch to SLED's Log-In Department, which then gave the evidence back to the Marlboro County Sheriff's Department. Wilson identified the SLED heat-sealed bag, which was still sealed and bore her initials, as the one she had returned to the SLED Log-In Department. She confirmed that it was in the same condition as when she had sealed it.

The State moved for the admission of State's Exhibit 1, and defense counsel objected on the basis the chain of custody had not been sufficiently established. The trial judge overruled the objection and admitted the drug evidence. Wilson then further testified that she had performed preliminary and confirmatory testing on the rock-like substances in State's Exhibit 1 and concluded that crack cocaine was in each of the two packages. Wilson confirmed that she performed her testing on May 4, 2007, and that she sealed the evidence with the notation, "MW, L0706559, Seal Intact," and the date, "05/04/07." She also placed identifying marking on the individual corner bags and on the Ziploc bags with the repackaged evidence.

A jury found Hatcher guilty as charged, and the trial judge sentenced him to concurrent terms of fifteen years in prison. Hatcher appealed his conviction and sentence, and the Court of Appeals reversed on the basis the State failed to establish a sufficient chain of custody for the drug evidence. State v. Hatcher, 384 S.C. 372, 681 S.E.2d 925 (Ct. App. 2009). This Court granted the State's petition for a writ of certiorari.

II. STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369

S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

III. LAW/ANALYSIS

"[T]his Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007); see also Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957) (stating "it is generally held that the party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence").

"Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." Benton, 232 S.C. at 33-34, 100 S.E.2d at 537 (citation omitted). "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." Sweet, 374 S.C. at 7, 647 S.E.2d at 206 (citing State v. Taylor, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct. App. 2004)). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." Id.

"Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the [substance] was not established at least as far as practicable." Id. (emphasis added).

In finding the chain of custody insufficient in Hatcher's case, the Court of Appeals stated that "Officer Locklear and [SLED] Agent Wilson both

acted as custodians of the evidence," but "neither is directly linked to the other by testimony or documentary evidence." Hatcher, 384 S.C. at 376, 681 S.E.2d at 927-28. Specifically, the court stated that the person who received the evidence at SLED is not personally identified and there were no details presented about how the evidence was handled while in Officer Locklear's possession or once it was surrendered at SLED. Id. at 376-77, 681 S.E.2d at 928.

The Court of Appeals acknowledged that South Carolina case law provides that the chain of custody need be established only "as far as is reasonably practicable" and that each person who handled the evidence is not required to testify, but nevertheless stated that "South Carolina courts have consistently held that all persons in the chain of custody must be identified and the manner of handling the evidence must be demonstrated." Id. at 377, 681 S.E.2d at 928 (emphasis added).

The Court of Appeals relied in large part upon its opinion in State v. Chisolm, 355 S.C. 175, 584 S.E.2d 401 (Ct. App. 2003), in which it effectively held South Carolina law requires every individual who handled the evidence to be specifically identified, either by providing testimony under oath or producing sworn statements pursuant to Rule 6(b), SCRCrimP. The Court of Appeals, sitting en banc, subsequently overruled Chisolm in State v. Taylor, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct. App. 2004), stating that, "[t]o the extent [Chisolm] can be read to require the testimony of each person in the chain of custody under all circumstances, it is inconsistent with the precedent established by our supreme court, and is hereby overruled."

Although Hatcher asserts our cases hold all individuals must be identified without exception, this appears to be an extrapolation of the general observation that where all individuals in the chain are, in fact, identified and the manner of handling is reasonably demonstrated, it is not an abuse of discretion for the trial judge to admit the evidence in the absence of proof of tampering, bad faith, or ill-motive. See, e.g., Sweet, 374 S.C. at 6, 647 S.E.2d at 205-06; Taylor, 360 S.C. at 25, 598 S.E.2d at 738.

In a case involving the chain of custody of a blood sample in a paternity case, we reiterated the standard set forth in Benton v. Pellum that the chain of custody must be established as far as practicable, and we specifically stated that "we have never held the chain of custody rule requires every person associated with the procedure be available to testify or identified personally, depending on the facts of the case." South Carolina Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 629, 614 S.E.2d 642, 646 (2005).

In Cochran, this Court found the chain of custody was sufficient even though the courier who transported the samples from the collection site to the testing facility was never identified, where "the samples arrived at the testing facility sealed and intact":

> The testimony presented by DSS indicates the blood samples were secure when Kejales took the samples at the collection site. The testimony also indicates the samples arrived at the testing facility sealed and intact. Additionally, each person involved in the actual testing procedure once the samples arrived at the facility, testified as to their handling of each respective sample and the chain of custody. Generally, we will uphold the chain of custody if the safeguards instituted ensure the integrity of the evidence, even if every person associated with the procedure is not personally identified. Other courts are in accord.

Id. at 629, 614 S.E.2d at 646 (emphasis added) (footnote omitted); see also State v. Kahan, 268 S.C. 240, 244-45, 233 S.E.2d 293, 294 (1977) (holding the standard stated in Benton v. Pellum had been met where the evidence was transported in accordance with normal protocol, even though every person who may have handled it was not personally identified and there was no testimony regarding the care and handling of the item for an interval when it was being stored).

In Cochran, this Court noted that "[w]hether the chain of custody has been established as far as practicable clearly depends on the unique factual

circumstances of each case." Cochran, 364 S.C. at 629 n.1, 614 S.E.2d at 646 n.1. In examining issues regarding the chain of custody, a mere suggestion that substitution could possibly have occurred is not enough to establish a break in the chain of custody. Turner v. State, 3 So. 3d 742 (Miss. 2009); see also State v. Tester, 968 A.2d 895 (Vt. 2009) (finding the State provided a sufficient chain of custody for DNA swab samples, even though the nurse failed to keep records of each step in collecting and storing the evidence, where the nurse testified that she took the samples according to rape kit instructions and established protocols and sealed and labeled them).

"It is unnecessary . . . that the police account for 'every hand-to-hand transfer' of the item; it is sufficient if the evidence demonstrates a reasonable assurance the condition of the item remains the same from the time it was obtained until its introduction at trial." State v. Price, 731 S.W.2d 287, 290 (Mo. Ct. App. 1987) (citation omitted); accord Commonwealth v. Kaufman, 452 A.2d 1039, 1042 (Pa. Super. Ct. 1982). "To expect the [prosecuting authority] to produce every possible individual who may have had fleeting contact with the evidence would cause unnecessary logistical problems concerning chain of custody." Commonwealth v. Herman, 431 A.2d 1016, 1019 (Pa. Super. Ct. 1981) (holding the absence of testimony from a crime lab custodian who merely logged in the seized marijuana was not fatal to the chain of custody where the officers who seized the drugs and the chemist who tested them did testify at trial).

Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts. United States v. De Larosa, 450 F.2d 1057, 1068 (3d Cir. 1971). "The trial judge's exercise of discretion must be reviewed in the light of the following factors: '. . . the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.' " Id. (citation omitted). "If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence." Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960).

Considering those factors here, we find no abuse of discretion in the trial judge's admission of the drug evidence in Hatcher's case. We agree with the Court of Appeals that the mere fact that evidence is sealed upon presentation for testing does not, in itself, establish a sufficient chain of custody. Evidence is still required as to how the item was obtained and how it was handled to ensure that it is, in fact, what it is purported to be. However, we have consistently held that the chain of custody need be established only as far as practicable, and we reiterate that every person handling the evidence need not be identified in all cases.

In this case, the Buyer who purchased the drugs from Hatcher, the police officer who received the drugs from the Buyer and transported them to SLED in two sealed, tamper-evident bags (one inside the other), and the SLED agent who retrieved the drugs from the Log-In Department at SLED (still double-sealed) and tested them, all testified about the chain of custody and their handling of the drugs and the fact that there was no evidence of tampering. The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be. The record here indicates the drugs received for testing were in fact, those taken from Hatcher without any alteration, tampering, or substitution.

IV. CONCLUSION

The State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable. This determination will necessarily depend on the unique factual circumstances of each case. We conclude the trial judge did not abuse his discretion in finding a sufficient chain of custody existed to allow admission of the drug evidence. Consequently, we reverse the decision of the Court of Appeals.

REVERSED.[2]

KITTREDGE, J., and Acting Justices James E. Moore and John H. Waller, Jr., concur. PLEICONES, ACTING CHIEF JUSTICE, concurring in result only.

[2] An issue concerning the trial judge's charge on reasonable doubt was also raised in the briefs. The Court of Appeals did not reach this issue due to its reversal based on the chain of custody. Counsel for Hatcher conceded at oral argument that the trial transcript reveals no objection was made at trial to preserve the jury charge issue for our review. We agree based on our review of the record, and we appreciate counsel's candor in this regard.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David Arthur Braghirol, Respondent.

Opinion No. 26951
Heard March 3, 2011 – Filed March 21, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

David Arthur Braghirol, of Inman, pro se Respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) filed formal charges with the Commission on Lawyer Conduct alleging David Arthur Braghirol (Respondent) engaged in the practice of law by accepting legal fees while his license to practice law in South Carolina was suspended. Following a hearing, a Hearing Panel of the Commission on Lawyer Conduct (the Panel) found Respondent committed misconduct and recommended his suspension from the practice of law for a definite period of fifteen months, retroactive to the end of the nine month

suspension that was imposed in July 2009.[1] Neither the ODC nor Respondent took exception to the Panel Report.[2] We accept the Panel's recommendation and order Respondent's definite suspension from the practice of law for a period of fifteen months, retroactive to the end of Respondent's nine month suspension, in addition to the other requirements recommended by the Panel.

FACTS/PROCEDURAL BACKGROUND

On March 4, 2010, the ODC filed Formal Charges against Respondent alleging that Respondent engaged in the practice of law while his law license was suspended. Respondent did not file an Answer to the Formal Charges within the requisite time period, and therefore, the Panel issued a Default Order on May 5, 2010. Pursuant to that order, the factual allegations contained in the Formal Charges were deemed admitted according to Rule 24(a), RLDE. On June 29, 2010, a public hearing was held for the sole purpose of determining a recommended sanction. Respondent appeared pro se.

The following facts were stipulated: Client's mother retained Respondent's services in March 2007 to seek a sentence reduction for her son, Client. She paid Respondent $10,000 in advance for the representation, but Respondent failed to keep her and Client reasonably informed regarding the status of the case. Respondent was placed on interim suspension by this Court on June 24, 2008. *In re Braghirol*, 378 S.C. 592, 663 S.E.2d 480 (2008). While under suspension, on August 25, 2008, Respondent accepted $2,000 from Client's mother to

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[1] *In re Braghirol*, 383 S.C. 379, 680 S.E.2d 284 (2009).

[2] Neither party filed briefs with this Court. Therefore, the parties are deemed to have accepted the Panel's findings of fact, conclusions of law, and recommendations. *See* Rule 27(a), RLDE, Rule 413, SCACR ("The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.").

do additional work on Client's case, and signed a receipt acknowledging this fee on that same day.

According to the mother's testimony, she filed a complaint against Respondent because once Respondent began experiencing personal problems, he ceased communicating with her and Client, would not return phone calls, and to her knowledge, did not work on the case. She stated there was a lack of communication while Respondent was suspended, but then Respondent informed her $2,000 was needed to pay an informant. Client's mother testified Respondent informed her he was suspended, but she nevertheless paid him the money, and he issued her a receipt. Client's mother was able to recover the $12,000 she paid Respondent through the South Carolina Bar Lawyers' Fund for Client Protection (Lawyers' Fund).

Ultimately, the Panel found Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR:

- Rule 1.4 (Communication)
- Rule 5.5 (Unauthorized Practice of Law)
- Rule 8.4(a) (Violation of RPC)
- Rule 8.4(e) (Conduct Prejudicial to the Administration of Justice)

Additionally, the Panel found Respondent violated Rule 7(a)(1), RLDE, Rule 413, SCACR, and Rule 7(a)(5), RLDE, Rule 413, SCACR.

The Panel considered as an aggravating circumstance Respondent's disciplinary history. On two occasions, in February 2004 and April 2008, Respondent was briefly suspended by the South Carolina Commission on Continuing Legal Education and Specialization for failure to acquire the requisite Continuing Legal Education (CLE) hours. On June 24, 2008, Respondent was placed on interim suspension. *Braghirol*, 378 S.C. at 592, 663 S.E.2d at 480. On January 16, 2009, Respondent received a confidential Admonition citing Rules of Professional Conduct 1.4 (Communication), 8.1 (Bar Admission Matter), and 8.4 (Misconduct) of Rule 407, SCACR. Shortly thereafter, on April 2, 2009, Respondent was again suspended

by the CLE Commission, which resulted in a suspension by this Court on June 11, 2009 for failure to comply with CLE requirements. Then on July 13, 2009, this Court suspended Respondent for a period of nine months, with conditions. *Braghirol*, 383 S.C. at 379, 680 S.E.2d at 284. That proceeding involved five separate instances of misconduct, for the most part involving failures to communicate with clients or to work diligently on those clients' cases. *Id.* Respondent did not comply with the conditions of the Court's order in that matter, and this Court directed Respondent to personally appear before the Court on September 1, 2010, to show cause why he should not be held in criminal or civil contempt of court. Respondent appeared at that hearing and admitted his failure to comply with the order. This Court issued an order finding Respondent in civil contempt, but stating he could purge himself of incarceration by taking certain specified actions. Respondent complied with this order.

After considering the facts of the case and Respondent's disciplinary history, the Panel recommended his suspension from the practice of law for a period of fifteen months, retroactive to the end of the nine month suspension that was imposed by this Court on July 13, 2009. Additionally, the Panel recommended Respondent pay a fine, to be determined by this Court, within thirty days of the Court's order, Respondent pay the costs of these proceedings, and Respondent be required to complete the South Carolina Bar's Legal Ethics and Practice Program Ethics School as a condition for reinstatement.

STANDARD OF REVIEW

The sole authority to discipline attorneys and decide appropriate sanctions after a thorough review of the record rests with this Court. *In re Thompson*, 343 S.C. 1, 10–11, 539 S.E.2d 396, 401 (2000). In such matters, this Court may draw its own conclusions and make its own findings of fact. *Id.* Nonetheless, the findings and conclusions of the Panel are entitled much respect and consideration. *Id.*

ANALYSIS

The parties, by not filing briefs, have accepted the findings of fact, conclusions of law, and recommendations of the Hearing Panel. Respondent admits that he knowingly accepted a $2,000 fee for legal services while his license to practice law was under suspension. Rule 5.5 of the Rules of Professional Conduct, found under Rule 407 of the South Carolina Appellate Court Rules, prohibits a lawyer who is not admitted to practice in a jurisdiction from representing that he is admitted to practice law. Although Client's mother testified Respondent informed her that his license to practice law was suspended, he nevertheless requested and then accepted $2,000 on behalf of Client for legal services. His flagrant disregard of this Court's suspension is reprehensible. However, in mitigation, this Court considers that the majority of Respondent's disciplinary history stems from events occurring in 2008, a time when Respondent candidly admits he experienced a series of personal crises and ultimately had a mental breakdown. The recommendation of a fifteen month suspension, retroactive to the expiration of the previously imposed nine month suspension, cumulatively results in a two year suspension from the practice of law. In hopes this extended period will allow Respondent to order his life and law practice to better align with the high standards expected of a practicing attorney, we follow the Panel's recommendation. The Panel additionally recommended this Court impose a fine to be paid within thirty days of this opinion. Because Respondent accepted $2,000 in legal fees, which was refunded to Client's mother through the Lawyers' Fund, we require Respondent reimburse the Lawyers' Fund that amount within thirty days of the date of this opinion, if he has not already done so. Lastly, we follow the Panel's recommendation that Respondent pay the costs of these disciplinary proceedings and complete ethics training before petitioning this Court for reinstatement to the practice of law.

CONCLUSION

For the foregoing reasons, this Court accepts the recommendations of the Panel, and additionally requires Respondent reimburse the Lawyers' Fund in the amount of $2,000 within thirty days of the date of this opinion.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

In the Matter of James Michael Brown, Petitioner.

ORDER

Respondent was suspended on April 12, 2010, for a period of six (6) months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

March 21, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William James Biggins, Appellant,

v.

Karen Lee Burdette, f/k/a
Karen Burdette Biggins, Respondent.

Appeal From Kershaw County
James F. Fraley, Jr., Family Court Judge

Opinion No. 4808
Submitted November 1, 2010 – Filed March 16, 2011

AFFIRMED

Charles D. Lee, III, of Columbia, for Appellant.

Victoria L. Eslinger and Russell T. Burke, both of Columbia, for Respondent.

KONDUROS, J.: William James Biggins filed this action seeking to terminate alimony payments to his ex-wife, Karen Lee Burdette, based on Burdette's relationship with a paramour. The family court denied Biggins

motion to terminate and awarded Burdette attorney's fees of approximately $126,000. We affirm.[1]

FACTS

Biggins and Burdette were divorced in December 2004 after a twenty-seven-year marriage on the grounds of Husband's adultery. Burdette admittedly began having a sexual relationship with a man (Boyfriend) in June of 2005. According to Burdette's testimony, she kept her relationship with Boyfriend a secret because she did not want an elderly aunt who lived in the same neighborhood or her daughter to be aware of her and Boyfriend's spending the night together. Generally, Burdette picked Boyfriend up in her vehicle, brought him to her home, and returned him to his residence the following morning if they spent the night together. Burdette and Boyfriend testified they spent approximately sixty nights together during their relationship which ended in September of the same year. Burdette testified regarding several occasions she and Boyfriend spent the night apart including a time when her son and his family came to visit, when she went out of town to care for her ailing mother, when her aunt came to visit, when her daughter visited, and when her former mother-in-law came to visit. Burdette and Boyfriend testified they did not reside together. According to Burdette and Boyfriend, with the exception of a few toiletries and items of clothing, Boyfriend did not keep his belongings at her home, and he only had a substantial amount of clothing at her home on the few occasions he did laundry there.

The deposition testimony of Boyfriend's roommate, Danny McCaskill, was admitted at trial over Burdette's hearsay objection. Casting some doubt on the veracity of Burdette's and Boyfriend's testimonies, McCaskill testified to coming home and finding Boyfriend's "clothes and luggage and things of that nature" on the couch. McCaskill asked Boyfriend if "Karen [Burdette] kicked [him] out" and Boyfriend responded she didn't want his belongings at her house when she had guests visiting.

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

Biggins had Burdette followed by three private investigators. Paul Blackburn testified he conducted surveillance on Burdette and Boyfriend on twelve occasions from June 7, 2005 through August 24, 2005. He observed Boyfriend leaving Burdette's home on the morning of June 14 and observed Boyfriend and Burdette leave her residence together in the morning four other times. David Vinson testified he observed Burdette and Boyfriend on seventeen occasions and saw them together leaving her home seven times. Brian Stillinger testified he conducted surveillance on Burdette's home twenty-six times and observed her and Boyfriend together in the morning nine times.

The family court determined Boyfriend and Burdette did not continually cohabitate as contemplated by section 20-3-130 of the South Carolina Code. The family court noted the pair spent no more than sixty to seventy-two nights together, although they may have been in a relationship for more than ninety days, and those nights were not consecutive. The family court also noted Boyfriend maintained his own residence during the relationship and did not receive mail at Burdette's home or use that as his address. The family court concluded the pair had not continually cohabitated and separated only to circumvent the statute but had lived apart and met for romantic rendezvous. The family court awarded Burdette attorney's fees in the amount of $126,797.30. This appeal followed.

LAW/ANALYSIS

I. Continued Cohabitation

Biggins argues the family court erred in finding Burdette and Boyfriend did not continually cohabitate so as to warrant termination of alimony. We disagree.

Payment of permanent, periodic alimony by a payor spouse will terminate "upon the remarriage or continued cohabitation of the supported spouse . . . ." S.C. Code Ann. § 20-3-150 (Supp. 2010). According to statute, continued cohabitation occurs when "the supported spouse resides with another person in a romantic relationship for a period of ninety or more

consecutive days." S.C. Code Ann. § 20-3-150(B). The family court can terminate alimony if it determines the supported spouse was cohabitating with someone in a romantic relationship for less than ninety days if the pair separated periodically for purposes of circumventing the ninety-day requirement. Id.

The South Carolina Supreme Court discussed and defined "continued cohabitation" in Strickland v. Strickland, 375 S.C. 76, 650 S.E.2d 465 (2007). "We find that the phrase 'resides with' in the context of [section] 20-3-150 sets forth a requirement that the supported spouse live under the same roof as the person with whom they are romantically involved for at least ninety consecutive days. Any other interpretation essentially takes the 'cohabitation' out of 'continued cohabitation.'" Id. at 89, 650 S.E.2d at 472.

Since Strickland, the South Carolina Supreme Court and Court of Appeals have applied the rationale in Strickland in four other cases. In each case, the moving party failed to establish the supported spouse had continually cohabitated with another person as contemplated by the statute. See Eason v. Eason, 384 S.C. 473, 482, 682 S.E.2d 804, 808 (2009) (finding no bar to alimony when ex-wife and boyfriend may have resided together for periods of two to four weeks but never for a continuous period of ninety days); Fiddie v. Fiddie, 384 S.C. 120, 126, 681 S.E.2d 42, 45 (Ct. App. 2009) (holding ex-wife did not continually cohabitate with a man when she lived with him sometimes but also stayed with her sister and friend several days each month so as to not "wear out her welcome"); Feldman v. Feldman, 380 S.C. 538, 544, 670 S.E.2d 669, 671-72 (Ct. App. 2008) (affirming family court's finding of no continued cohabitation when ex-wife and boyfriend were not observed living together for ninety days and when ex-wife's friends and family testified she lived alone); Semken v. Semken, 379 S.C. 71, 77, 664 S.E.2d 493, 497 (Ct. App. 2008) (reversing family court's termination of alimony because evidence did not demonstrate ex-wife and boyfriend lived under the same roof for ninety consecutive days).

The evidence in the record supports the family court's decision. The parties admittedly were in a romantic relationship for just over ninety days.

However, that alone does not satisfy the statute. According to Strickland, the parties must "live together under the same roof." Burdette and Boyfriend testified they did not intend to live together and that they did not spend ninety consecutive nights together. They further testified that Boyfriend maintained his own residence and kept most of his personal items there. The observations of the private investigators do not refute this testimony but merely confirm that Burdette and Boyfriend were spending the night together at Burdette's home on a recurring basis. Whether to believe the parties' testimony is a credibility determination and we defer to the family court's judgment in that regard. See Terwilliger v. Terwilliger, 298 S.C. 144, 147, 378 S.E.2d 609, 611 (Ct. App. 1989) ("Resolving questions of credibility is a function of the family court judge who heard the testimony.").

Furthermore, even if the parties did reside together for certain periods of time, according to McCaskill's testimony, Burdette "kicked him out" when she had visitors and he took all his things with him. Under Eason and Fiddie, no continued cohabitation occurs even if the parties lived together but separated before the ninety days passed for reasons other than to circumvent the statute. The evidence shows the parties separated to protect Burdette's reputation, not to circumvent the statute. Therefore, the family court did not abuse its discretion in denying Biggins's motion to terminate alimony based on continued cohabitation.

II. Attorney's Fees

Biggins further argues the family court erred in awarding attorney's fees to Burdette and in not awarding attorney's fees to him. We disagree.

"In family court, the award of attorney's fees is left to the discretion of the judge and will only be disturbed upon a showing of abuse of that discretion." High v. High, 389 S.C. 226, 249, 697 S.E.2d 680, 702 (Ct. App. 2010).

First, Biggins maintains the attorney's fees award to Burdette was in error because the underlying decision regarding the termination of alimony

was incorrect. As we have affirmed the family court's determination of that point, this argument is unavailing. Second, Biggins argues the family court failed to make specific findings of fact regarding each of the Glasscock[2] factors. However, this issue was not raised to or ruled upon by the trial court and is therefore not preserved for our review. Smith v. Smith, 386 S.C. 251, 273, 687 S.E.2d 720, 732 (Ct. App. 2009) (stating to preserve an issue for appellate review, it must be raised to and ruled upon by the trial court).

Lastly, Biggins argues the attorney's fees award was excessive and unduly punitive. While Biggins failed to challenge the attorney's fees affidavit presented by Burdette's counsel at trial, he did raise a general argument in a subsequent Rule 59(e), SCRCP, motion that the amount of attorney's fees was "excessive under the facts and circumstances presented." Because the point is arguably preserved, we will address it. See Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005) (holding appellant failed to preserve issue regarding amount of attorney's fees award when he made no challenge to fee affidavit at hearing and did not file a Rule 59(e), SCRCP, motion).

Biggins's argument is not based on a specific challenge to any of the Glasscock factors, which the family court considers in awarding fees, but is based on a general theory that Biggins had reason to believe Burdette was cohabitating with Boyfriend and was therefore justified in bringing the action. With no authority to support this argument and because the family court's order demonstrates it considered the Glasscock factors and rendered a decision based on an unchallenged attorney's fees affidavit, we discern no abuse of discretion in the family court's award of attorney's fees.

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[2] Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991), sets forth the following factors to be considered in determining the amount of attorney's fees to be awarded: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) counsel's professional standing; (4) the contingency of compensation; (5) the beneficial results obtained; and (5) the customary legal fees for similar services.

Based on all of the foregoing, the order of the family court is

AFFIRMED.

HUFF and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

King Smallwood, Appellant,

v.

Queen Smallwood, Respondent.

Appeal From Aiken County
Peter R. Nuessle, Family Court Judge

Opinion No. 4809
Heard December 9, 2010 – Filed March 16, 2011

AFFIRMED IN PART AND REVERSED IN PART

Brian Austin Katonak, of Aiken, for Appellant.

Wendy Pauling Levine, of Columbia, for Respondent.

LOCKEMY, J.: In this divorce action, King Smallwood (Husband) appeals the family court's final order and decree of divorce, arguing the family court erred in (1) finding three rental properties were marital property, (2) equitably dividing the Southern Union Revolving Fund account, and (3) including a portion of Husband's retirement relocation benefit in the marital estate. We affirm in part and reverse in part.

FACTS

Husband and Queen Smallwood (Wife) were married in March 1993, and no children were born as a result of the marriage. Husband was employed as a pastor in the Seventh Day Adventist Church (the Church) for forty-two years before his retirement in 2006. Wife was unable to work full-time after suffering a brain hemorrhage in 1991, but held part-time jobs caring for children and the elderly.

In 1992, prior to the parties' marriage, Husband purchased three rental properties located at 106 Roberta Drive, 122 Roberta Drive, and 150 Braly Drive (the rental properties) in Summerville, South Carolina. According to Husband's testimony, the rental properties were operated under his company, Smallwood Properties, Inc., and their mortgages were paid with rental income.[1] During their marriage, Husband and Wife lived briefly in both the 106 Roberta Drive property and the Langley Drive property, another rental property purchased by Husband prior to the parties' marriage.[2] According to Wife's testimony, she assisted Husband in managing the rental properties by cleaning, checking tenant references, filing evictions, and handling tenant disputes until the parties moved to Charlotte, North Carolina in 1998. After Husband and Wife moved to Charlotte, the rental properties were managed by property management companies. The mortgages on the rental properties were fully paid at the time of the final hearing.

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[1] The family court determined, based upon Husband's financial declaration statement, Husband's total monthly income from the rental properties and two Atlanta rental properties purchased after the parties separated was $8,525.

[2] The Langley property was sold during the marriage.

Husband had a Southern Union Revolving Fund account (SURF account) through the Church. At the time this action was filed, the SURF account had a $28,582.63 balance and was in both Husband's and Wife's names. According to Husband, he deposited $12,000 from the sale of the Langley property into the SURF account during the marriage. Additionally, Husband deposited $60 a month of his Church income into the account.[3] Husband also used funds from the SURF account to support the rental properties. Husband testified Wife did not make any contributions to the SURF account. After his retirement, Husband received a $15,080 relocation benefit from the Church. Husband and Wife testified this lump sum payment was given to retiring Church pastors to assist with their relocation expenses.

In December 2005, Husband initiated this action by petitioning the family court for an order of separate maintenance. In July 2008, the family court granted Husband a divorce based on one year's continuous separation.[4] The family court determined the marital estate should be distributed fifty percent to Wife and fifty percent to Husband. It valued the three rental properties at $125,000 each and awarded Wife the 150 Braly Drive property and Husband the 106 Roberta Drive property. The family court determined the remaining rental property, 122 Roberta Drive, was to be included in the equitable distribution of the marital assets. The family court also found the SURF account and thirty-one percent, or $4,674.80, of Husband's $15,080 relocation benefit were marital assets. Additionally, the family court awarded Wife permanent, periodic alimony and attorney's fees. Husband's motion for reconsideration was denied. This appeal followed.

STANDARD OF REVIEW

In appeals from the family court this court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005). Despite this broad scope of review, this court is not required to disregard the findings

[3] Husband's $60 a month payroll deduction began in 2002 and continued until his retirement in 2006.

[4] Husband amended his initial pleading at the start of trial to include an action for divorce.

of the family court. Id. We are mindful 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. Id.

LAW/ANALYSIS

I. Rental Properties

Husband argues the family court erred in including the rental properties in the marital estate. Specifically, Husband maintains he purchased the rental properties prior to the parties' marriage and they were never transmuted into marital property. We agree.

The family court determined that although Husband made the down payments on the rental properties prior to the parties' marriage, they were transmuted into marital property "by virtue of the intention of the parties as expressed in their actions." The family court found Wife was a manager of the rental properties and commingled funds were used to support the rental properties. The family court noted Husband and Wife lived in the 106 Roberta Drive and the Langley Drive properties during their marriage and the properties were paid in full during the marriage from rental income, the parties' jointly titled bank account, and Husband's earnings during the marriage. The family court also found the insurance bill for the 106 Roberta Drive property was held in the name of both parties.

Husband argues the rental income from the properties was deposited into his Smallwood Properties account and no marital funds were used to support the rental properties. Husband also maintains the mortgages on the rental properties were paid with rental income. Husband acknowledges Wife assisted with the rental properties by painting, cleaning, and taking lease applications; however, he contends the rental properties were not transmuted into marital property because he never intended to treat them as marital property.

Wife contends the rental properties were transmuted into marital property. She argues the record contains no evidence Husband intended to treat the rental properties as non-marital, and Husband failed to identify the

account in which he deposited the rental income prior to 2005. Wife also argues she assisted Husband with managing the rental properties, and marital funds were used to pay the debt on the rental properties.

"Transmutation is a matter of intent to be gleaned from the facts of each case." Jenkins v. Jenkins, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001). "The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." Johnson v. Johnson, 296 S.C. 289, 295, 372 S.E.2d 107, 110-11 (Ct. App. 1988). "Such evidence may include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property, using marital funds to build equity in the property, or exchanging the property for marital property." Id. at 295, 372 S.E.2d at 111. "The mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." Id. at 295-96, 372 S.E.2d at 111.

We find the family court erred in determining the rental properties were transmuted into marital property. Wife failed to carry her burden of producing objective evidence showing Husband regarded the rental properties as the common property of the marriage. Husband purchased the rental properties prior to parties' marriage and testified at trial they were his property and did not belong to Wife. The record contains no evidence Husband ever placed the rental properties in Wife's name or transferred the properties to Wife as a gift. Although Husband and Wife lived in the 106 Roberta Drive property for several months at the beginning of their marriage, Wife failed to present any evidence Husband intended to treat that property, or any of the other rental properties, as marital. See id. (holding "the mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation").

Furthermore, we do not agree with Wife's argument that the assistance she provided Husband in managing the rental properties was evidence of the parties' intent to treat the properties as marital. According to Wife's

testimony, she helped manage the rental properties by cleaning and handling tenant matters until the parties moved to Charlotte in 1998. However, Husband testified Wife only assisted him for a few months after they married and before she returned to work. Thereafter, according to Husband, he employed other individuals and property management companies to manage the rental properties. After 1998, the rental properties were managed by property management companies. While we recognize Wife's contributions of time and labor during the parties first five years of marriage, they are insufficient to prove transmutation. See Murray v. Murray, 312 S.C. 154, 158, 439 S.E.2d 312, 315 (Ct. App. 1993) (holding Wife's contributions of time and labor in maintaining the marital home and rental properties did not prove transmutation).

Additionally, the record included no evidence Husband commingled the rental properties with marital property, used the rental properties exclusively for marital purposes, or used marital funds to build equity in the rental properties. Husband testified he paid the mortgages on the rental properties with rental income. No evidence is in the record that marital funds were ever used to pay the mortgages. Husband also testified property management companies deposited the income from the rental properties into his Smallwood Properties bank account. The record does not reflect that rental income was ever deposited into the parties' joint bank accounts. Furthermore, Husband's admission he used funds from the parties' joint SURF account to support his business is insufficient evidence of intent to treat the rental properties as marital. Husband did not testify as to how much money was used from the SURF account or how the money was used to support the rental properties. Thus, based on the preponderance of the evidence, we find Husband did not intend to treat the rental properties as marital property, and, therefore, they were not transmuted. Accordingly, we reverse the family court's determination that the rental properties were transmuted into marital property and subject to equitable distribution.

II. SURF Account

Husband argues the family court erred in equitably dividing the proceeds of the SURF account. We disagree.

The SURF account was valued at $28,582.62 at the time of the divorce. The family court determined the SURF account was marital property and, as part of the equitable distribution of the marital estate, Husband and Wife were each entitled to $14,291.31. Husband argues the SURF account was non-marital property and was never transmuted into marital property. He asserts the SURF account was funded primarily with the proceeds from the sale of the Langley Drive property, which he maintains was non-marital. Husband also contends he never expressed any intent to treat the SURF account as marital property and Wife did not make any contributions to the account. Husband acknowledges the $60 a month he deposited into the SURF account through payroll deduction could be considered marital property.

Wife argues the SURF account was transmuted into marital property. She asserts the SURF account was jointly titled and contained funds deposited by Husband during the marriage commingled with Husband's salary. Wife contends that while Husband maintains he deposited the proceeds from the sale of the Langley Drive property into the account, he failed to produce any evidence the funds he deposited were non-marital.

We find the family court properly determined the SURF account was marital property. Pursuant to section 20-3-630(A) of the South Carolina Code (Supp. 2010), "marital property" is "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held . . . ." At trial, Husband acknowledged the money held in the jointly titled SURF account was acquired during the parties' marriage. Husband testified he deposited $60 a month of his salary as well as the proceeds from the sale of the Langley Drive property into the account. Furthermore, the record contains evidence of the parties' intent to treat the SURF account as marital property. Both parties testified the SURF account was used to save money for the parties' trip to Hawaii. Husband also testified he made investments in his and Wife's names using funds from the

SURF account. Accordingly, we affirm the family court's determination that the SURF account was marital property subject to equitable distribution.[5]

III. Relocation Benefit

Husband argues the family court erred in finding a portion of the $15,080 relocation benefit he received after his retirement from the Church was marital property. Specifically, Husband argues the relocation benefit was non-marital property because it was not part of his retirement pay and he received it after the divorce proceeding was commenced. This argument is not preserved for our review.

At trial, Husband argued a portion of the relocation benefit was marital property subject to equitable distribution. Husband testified the relocation benefit was "based on [forty-two] years of service" to the Church and Wife was entitled to an equitable share based on the length of the parties' marriage. Husband even attempted to submit his own calculations of Wife's share based on the parties' thirteen-year marriage to the court. The family court agreed with Husband that Wife was entitled to a portion of the relocation benefit. It determined, based on the parties' thirteen-year marriage, thirty-one percent of the relocation benefit was marital property subject to equitable distribution.

In his Rule 59(e), SCRCP motion, Husband raised for the first time his argument that Wife was not entitled to a portion of the relocation benefit.

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[5] Husband argues that if this court finds the SURF account was marital property, he should receive credit for the $9,000 he withdrew from SURF account to satisfy a marital debt owed to Metropolitan Life, and for the $2,250 he contends he gave Wife from the SURF account after this divorce proceeding was commenced. These arguments are not preserved for our review. See Feldman v. Feldman, 380 S.C. 538, 545, 670 S.E.2d 669, 672 (Ct. App. 2008) (holding for an issue to be preserved for appeal it must have been raised to and ruled upon by the trial court); see also Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding when a trial court fails to address a specific argument raised by the appellant, the appellant must make a motion to alter or amend pursuant to Rule 59(e), SCRCP, to obtain a ruling on the argument or the matter is not preserved for appellate review).

Husband asserted the benefit was given to him "for purposes of relocating upon his retirement" and therefore it "should not be part of the marital estate." Furthermore, on appeal, Husband contends Wife was not entitled to a portion of the benefit because it was not considered part of his retirement pay and he received it after the divorce proceeding was commenced. Because Husband failed to raise the argument that the relocation benefit was non-marital property at trial, it is not preserved for our review. See Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."); see also Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a post-trial motion is not preserved for appellate review); Susan R. v. Donald R., 389 S.C. 107, 118, 697 S.E.2d 634, 640 (Ct. App. 2010) (holding Husband's argument that Wife's attorney's fees award was excessive was not preserved for appellate review because Husband raised that argument for the first time in a Rule 59(e) motion). Accordingly, we affirm the family court's decision to include thirty-one percent of the relocation benefit in the marital estate.

CONCLUSION

We find the family court erred in determining the rental properties were transmuted into marital property. Additionally, we find the family court did not err in equitably dividing the SURF account and the marital portion of Husband's relocation benefit. Accordingly, the family court's order is

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and KONDUROS, JJ., concur.