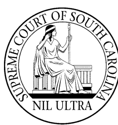

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

NOTICE

In the Matter of Howard B. Hammer

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on April 25, 2018, beginning at 3:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

March 19, 2018

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

In the Matter of Tamara Tucker

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on April 25, 2018, beginning at 4:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

March 19, 2018

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[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

The Supreme Court of South Carolina

In the Matter of Katherine Dunbar Landess, Petitioner.

Appellate Case Nos. 2017-001771 and 2017-1989

ORDER

By order dated March 31, 2015, the Court transferred Petitioner to incapacity inactive status pursuant to Rule 28 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). *In the Matter of Landess*, 412 S.C. 119, 770 S.E.2d 766 (2015). Additionally, on April 23, 2015, the Court issued an order suspending Petitioner pursuant to Rule 419(d)(2) for failing to comply with continuing legal education requirements.

Petitioner is now asking the Court to reinstate her to active status pursuant to Rule 28, SCACR, and to reinstate her from administrative suspension pursuant to Rule 419(e), SCACR. After thorough consideration of the entire record, the Court grants both Petitions for Reinstatement.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
March 9, 2018

The Supreme Court of South Carolina

In the Matter of Steven Robinson Cureton, Petitioner.

Appellate Case Nos. 2017-000981 and 2017-001004

ORDER

By opinion dated April 23, 2007, this Court suspended petitioner from the practice of law for two years. *In re Cureton*, 373 S.C. 1, 644 S.E.2d 661 (2007). He had previously been placed on administrative suspension for failing to meet continuing legal education requirements. Petitioner filed a Petition for Reinstatement pursuant to Rule 33 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR) and Rule 419, SCACR. After referral to the Committee on Character and Fitness (Committee), the Committee has filed a Report and Recommendation recommending the Court reinstate petitioner to the practice of law. We find petitioner has met the requirements of Rule 33(f) and Rule 419(d). Therefore, we grant the petition for reinstatement upon the condition that petitioner enter into a two year monitoring contract with Lawyers Helping Lawyers and file annual reports of his contract compliance with the Commission on Lawyer Conduct.[1]

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

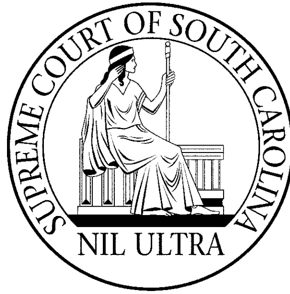
s/ Kaye G. Hearn J.

s/ John Cannon Few J.

[1] We also encourage petitioner to explore any opportunities Lawyers Helping Lawyers may have available for him to assist others seeking services through the program. Petitioner indicated at the hearing on his petition for reinstatement that he would be willing to become involved with Lawyers Helping Lawyers in such a capacity.

s/ George C. James, Jr. J.

Columbia, South Carolina
March 15, 2018



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 12
March 21, 2018
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Yancey Thompson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2014-001611

ON WRIT OF CERTIORARI

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

Opinion No. 27785
Submitted October 16, 2017 – Filed March 21, 2018

REVERSED

Appellate Defender Robert M. Pachak, of Columbia, for Petitioner.

Attorney General Alan M. Wilson and Senior Assistant Attorney General Melody Jane Brown, of Columbia, for Respondent.

JUSTICE JAMES: We granted a writ of certiorari to review the circuit court's denial of Petitioner's application for post-conviction relief (PCR).[1] We reverse the PCR court's denial of relief and remand to the court of general sessions for a new trial.

I.

In 2008, Petitioner Yancey Thompson was convicted of first degree criminal sexual conduct (CSC) with a minor, second degree CSC with a minor, and disseminating obscene material to a minor. He was sentenced to concurrent prison terms of twenty-five years, twenty years, and ten years, respectively. Petitioner appealed and this Court affirmed his convictions. *State v. Thompson*, Op. No. 2010-MO-028 (S.C. Sup. Ct. filed Nov. 8, 2010). Petitioner then sought PCR. The PCR court concluded Petitioner had established his trial counsel was deficient in certain respects but denied relief on the basis that Petitioner had not proven he was prejudiced by these deficiencies.

II.

When Victim was an infant, her mother Monica Gleaton (Mother) sent her to live with her cousin Julia Thompson (Cousin) and Petitioner because Mother was seventeen years old, had four other children, and was therefore unable to care for Victim. When Victim was twelve years old, someone reported to authorities she was being physically abused and neglected by Cousin. While being interviewed by South Carolina Department of Social Services (DSS) caseworker Trina Elfering, Victim denied she was being abused by Cousin but reported Petitioner had sexually abused her from the time she was five years old. Ms. Elfering reported the allegations to the Lexington County Sheriff, resulting in the charges against Petitioner.

III.

Petitioner claims his trial counsel rendered ineffective assistance by failing to object to inadmissible hearsay testimony and by failing to object to testimony that improperly bolstered Victim's credibility.

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

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694).

In a PCR case, this Court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, this Court gives no deference to the PCR court's conclusions of law, and we review those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

A. Deficient Performance

The PCR court's deficiency findings were based upon an analysis of the South Carolina Rules of Evidence governing hearsay and upon the common law barring inadmissible bolstering testimony; because these findings—in this case—are conclusions of law, we review them de novo.

Failure to Object to Inadmissible Hearsay Testimony

In his application and during the PCR hearing, Petitioner claimed trial counsel rendered ineffective assistance by failing to object to inadmissible hearsay testimony given by DSS caseworker Elfering. The PCR court did not address this allegation in its order. Petitioner raised the issue again in his motion for reconsideration made pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. The PCR court again did not address the issue. Petitioner raises the issue again before this Court; therefore, the issue is properly before us.

Ms. Elfering testified at trial that she spoke with Victim about each allegation against Petitioner and that Victim "revealed to me that she was being sexually abused by [Petitioner]." Trial counsel did not object to this testimony. Petitioner contends this testimony was inadmissible hearsay which served to improperly corroborate Victim's testimony.

Petitioner also claims trial counsel was ineffective in failing to object to inadmissible hearsay testimony provided by Dr. Alicia Benedetto, a clinical psychologist who conducted the forensic interview of Victim at the request of law enforcement.[2] Dr. Benedetto was qualified by the trial court as an expert in clinical psychology and child sexual abuse assessment. The solicitor asked Dr. Benedetto if Victim made any disclosures to her during the forensic interview, and Dr. Benedetto testified Victim disclosed chronic sexual abuse by Petitioner in the form of vaginal penetration, anal penetration, and oral sex. Trial counsel did not object to this testimony. Petitioner claims this testimony was inadmissible hearsay which served to improperly corroborate Victim's testimony. The PCR court ruled trial counsel was deficient in not objecting but ruled Petitioner did not prove he was prejudiced by the deficiency. In its brief, the State does not directly contest the PCR court's finding of deficiency and instead concentrates its argument on the prejudice prong. To ensure our analysis is complete, we will address the deficiency prong with respect to both Dr. Benedetto's and Ms. Elfering's hearsay testimony.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay is not admissible except as provided by the South Carolina Rules of Evidence, by other rules prescribed by this Court, or by statute. Rule 802, SCRE. Rule 801(d)(1)(D), SCRE, provides:

> A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony in a criminal sexual conduct case . . . where the declarant is the alleged victim and the statement is *limited to the time and place of the incident.*

(emphasis added). This rule obviously limits corroborating testimony in this case to the time and place of the assault(s); any other details or particulars, including the

[2] The audio and visual recording of Victim's forensic interview was not offered into evidence by the State, presumably because Victim was twelve years old at the time of the interview. *See* S.C. Code Ann. § 17-23-175 (2014) (permitting the admissibility of certain out-of-court statements of a child under the age of twelve).

perpetrator's identity, must be excluded. *See Watson v. State*, 370 S.C. 68, 71–72, 634 S.E.2d 642, 644 (2006).

The foregoing testimony from Ms. Elfering and Dr. Benedetto was clearly inadmissible hearsay. These accounts of their conversations with Victim meet the definition of hearsay under Rule 801(c), and these accounts provided information outside the time and place restriction set forth in Rule 801(d)(1)(D). The State does not contend trial counsel's failure to object was part of a valid trial strategy. *See Watson*, 370 S.C. at 73, 634 S.E.2d at 644 (finding trial counsel was not deficient when his failure to object to inadmissible hearsay testimony was part of a valid trial strategy). Trial counsel was deficient in not objecting.

Failure to Object to Inadmissible Bolstering Testimony

The PCR court ruled trial counsel was deficient in failing to object to testimony of Detective Traci Barr and Dr. Benedetto that impermissibly bolstered the credibility of Victim. We agree.

Detective Barr of the Lexington County Sheriff's Department testified at trial that she investigates child exploitation cases and that she conducted an investigation in this case. Detective Barr testified about her "specialized training" in child exploitation cases and testified she was trained in forensic interviewing of children who claim to be victims of sexual abuse. She did not conduct the forensic interview in this case, but she testified she watched the audio-visual recording of the forensic interview conducted by Dr. Benedetto and reviewed the medical findings of Dr. Susan Luberoff, who conducted a physical examination of Victim after Victim reported she was sexually abused. In the forensic interview, as testified to by Dr. Benedetto, Victim identified Petitioner as the perpetrator of the sexual abuse and provided other details. Detective Barr testified Victim's disclosures in the forensic interview were consistent with her own training and experience, and she testified the physical findings of sexual abuse recorded by Dr. Luberoff corroborated the account given by Victim during the forensic interview. The PCR court correctly ruled trial counsel was deficient in not objecting because this testimony impermissibly bolstered Victim's testimony. The State did not contest the PCR court's finding in its brief to this Court.

As previously noted, Dr. Benedetto conducted the forensic interview of Victim and was qualified by the trial court as an expert in clinical psychology and child sexual abuse assessment. She testified she has conducted perhaps a thousand

forensic interviews of children who are possible victims of physical, sexual, or psychological abuse. She explained the process she follows in conducting a forensic interview and explained what certain terms mean and how she applies them in reaching her conclusions. She testified Victim suffered from post-traumatic stress disorder (PTSD) based upon the significant emotional distress and "genuine, just palpable grief" exhibited by Victim during the interview. When asked by the solicitor to explain her overall findings to the jury, Dr. Benedetto testified that while most interviews conducted of alleged child abuse victims are determined to be "problematic,"[3] less than one-third of these interviews are found to be "compelling" for some form of abuse. She went on to testify that Victim's "interview was ruled compelling for physical abuse, sexual abuse, and psychological abuse." Even more glaringly, she testified:

> But I would feel comfortable in this case saying that *it's among the most compelling interviews that I've conducted,* not only because of the amount of detail that she was able to provide, but also the emotional intensity that she was *clearly experiencing* in the room, in -- in having to provide her disclosure.

(emphasis added).

The State argues the foregoing testimony from Dr. Benedetto was admissible because it was part and parcel of her diagnosis that Victim suffered from PTSD and that while Dr. Benedetto's testimony may have indirectly supported the conclusion that the crimes occurred, the testimony did not directly vouch for Victim's credibility. We disagree. The testimony most certainly served to directly enhance the credibility of Victim. Indeed, while urging the jury to conclude Victim was credible, the State on three occasions during its closing argument cited Dr. Benedetto's finding that Victim's account of sexual abuse was among the most compelling she had encountered in her one thousand child interviews. Further, the previously reviewed inadmissible hearsay testimony from Dr. Benedetto was amplified when, as quoted above, Dr. Benedetto emphasized the "amount of detail that [Victim] was able to provide" in conjunction with the emotional intensity displayed by Victim during the interview.

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[3] Dr. Benedetto did not explain what the term "problematic" means in her profession.

The State alternatively argues that when this case was tried in 2008, trial counsel was without the "pointed guidance" provided by appellate decisions that testimony similar to that provided by Dr. Benedetto was improper bolstering. *See, e.g.*, *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010). We disagree. In *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989), the defendant was charged with sexually assaulting a minor. The victim sought psychiatric treatment; at trial, the solicitor asked the treating psychiatrist, "[A]re you of the impression that [the victim's] symptoms are genuine?" The psychiatrist responded in the affirmative. *Id.* at 393, 377 S.E.2d at 302. Defense counsel objected, the objection was sustained, and the defendant moved for a mistrial. *Id.* Instead of ruling on that motion, the trial judge gave the jury a curative instruction. *Id.* As part of our analysis as to whether the trial court erred in denying the motion for a mistrial, we concluded the solicitor's question improperly invited the psychiatrist to give an opinion as to the victim's credibility. *Id.* at 394, 377 S.E.2d at 302. We recently concluded in *Briggs v. State*, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017), that after *State v. Dawkins* was decided in 1989, the law was "clear that no witness may give an opinion as to whether the victim is telling the truth." More specifically, we held that after *State v. Dawkins* was decided:

> [R]easonably competent trial counsel should know to object—absent a valid trial strategy—when a forensic interviewer gives testimony that indicates the witness believes the victim, but does not serve some other valid purpose. When the testimony directly conveys the witness's opinion that the victim is telling the truth, it is obviously improper bolstering.

Briggs, 421 S.C. at 325, 806 S.E.2d at 718.

Also, *State v. Dempsey*, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000), was decided by the court of appeals eight years before Petitioner's jury trial. Dempsey was charged with first degree CSC with a minor. A child sexual abuse counselor testified he conducted thirteen counseling sessions with the minor victim and that no statements from the victim would lead him to believe the victim was not telling the truth about being sexually abused. *Id.* at 568, 532 S.E.2d at 308. The counselor also testified that when a child says he has been sexually abused, the child is telling the truth approximately 95% of the time. *Id.* at 569, 532 S.E.2d at 308. Dempsey was

convicted and appealed. The *Dempsey* court cited *State v. Dawkins* and concluded the counselor's testimony improperly vouched for the minor victim's credibility. *Id.* at 571, 532 S.E.2d at 309. The *Dempsey* court also quoted with approval this pointed directive from the Supreme Court of Oregon:

> We have said before, and we will say it again, this time with emphasis-no psychotherapist may render an opinion on whether a witness is credible in any trial in this state. The assessment of credibility is for the trier of fact and not for psychotherapists.[4]

Id. (quoting *State v. Milbradt*, 756 P.2d 620, 624 (Or. 1988)).

The PCR court ruled trial counsel was deficient in failing to object. We agree. Well before Petitioner's criminal trial, trial counsel was on notice that it was improper for a witness to vouch for the credibility of another witness. The foregoing testimony of Dr. Benedetto unmistakably conveyed to the jury her belief that Victim was telling the truth about the abuse. Detective Barr's testimony also conveyed to the jury her impression that Victim was telling the truth. This testimony was patently inadmissible, and there was no strategic reason for trial counsel not to object.

B. Prejudice

To satisfy the prejudice prong of *Strickland*, Petitioner must demonstrate a "reasonable probability" that the outcome of the trial would have been different had trial counsel not committed the deficiencies outlined above. *See Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Id.*

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[4] The quotation of the pointed directive from the Supreme Court of Oregon used by the *Dempsey* court was originally quoted in *State v. Morgan*, 326 S.C. 503, 515, 485 S.E.2d 112, 119 (Ct. App. 1997). However, the *Morgan* court made small errors in transcribing the quoted language. These errors carried forward in *Dempsey*. The Supreme Court of Oregon stated in full: "We have said before, and we will say it again, but this time with emphasis-we really mean it-*no psychotherapist may render an opinion on whether a witness is credible in any trial conducted in this state.* The assessment of credibility is for the trier of fact and not for psychotherapists." *Milbradt*, 756 P.2d at 624.

In this case, the State contends—and the PCR court seemingly concluded—that Petitioner was not prejudiced by trial counsel's deficient performance because properly admitted evidence overwhelmingly established Petitioner's guilt. In *Smalls v. State*, Op. No. 27764 (S.C. Sup. Ct. filed Feb. 7, 2018) (Shearouse Adv. Sh. No. 6 at 43), we addressed the question of "overwhelming evidence" in the PCR setting by balancing the individual impact of trial counsel's error(s) against the strength of properly admitted evidence of a PCR applicant's guilt. As we explain below, the overall strength of the properly admitted evidence of Petitioner's guilt does not overcome the individual impact of each instance of trial counsel's deficient performance. Therefore, we conclude Petitioner has established there is a reasonable probability that, absent trial counsel's deficiencies, the outcome of his trial would have been different.

Inadmissible Hearsay Testimony

The timing of Petitioner's criminal trial and his PCR hearing straddled a shift in South Carolina case law governing the prejudice analysis to be employed in sexual assault cases in which a witness provides inadmissible hearsay testimony. In 2008, when Petitioner's criminal case was tried, there was a bright-line rule of finding prejudice when trial counsel failed to object to inadmissible hearsay testimony identifying the defendant as the perpetrator. *See Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994); *Dawkins v. State*, 346 S.C. 151, 156–57, 551 S.E.2d 260, 263 (2001). However, by the time Petitioner's PCR hearing was held in 2013, a majority of this Court agreed the bright-line rule should no longer control and concluded that in a direct appeal, a harmless error analysis should be employed when reviewing the admission of hearsay testimony that improperly corroborates the victim's testimony in a sexual assault case. *See State v. Jennings*, 394 S.C. 473, 482, 716 S.E.2d 91, 95–96 (2011) (Kittredge, J., concurring), *and* 394 S.C. at 483, 716 S.E.2d at 96 (Toal, C.J., dissenting) (collectively overruling *Jolly* and its progeny to the extent those cases impose a categorical or per se rule precluding a finding of harmless error). Similarly, in a PCR case, trial counsel's deficient failure to object to such testimony does not remove an applicant's burden to prove prejudice. As part of the prejudice analysis, the PCR court and the reviewing court must therefore consider the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object.

Citing "the combination of the physical evidence, [Victim's] credible testimony that provided precise details of the offenses, [Mother's] credible

testimony, and the lack of contradictory testimony," the PCR court ruled trial counsel's deficient performance could not reasonably have affected the outcome of the trial. In so finding, the PCR court seems to have concluded these four points constitute overwhelming evidence of Petitioner's guilt. We now address these four factual findings in turn and conclude that none of them, either standing alone or when considered together, constitute overwhelming evidence of Petitioner's guilt.

First, Dr. Luberoff testified there was physical evidence Victim had been sexually abused or had sustained "penetrating vaginal trauma." While Dr. Luberoff's testimony supports a finding that Victim was sexually abused, the physical evidence cited by Dr. Luberoff did not constitute overwhelming evidence—or any evidence at all, for that matter—that *Petitioner* was the perpetrator.

Second, the PCR court found Victim's *trial* testimony was credible. While we defer to the PCR court's credibility findings as to witnesses who testified before the PCR court, we do not defer to the PCR court's credibility findings as to witnesses who did not testify before the PCR court. The PCR court reviewing the trial transcript is in no better position than we are to determine the credibility of trial witnesses or otherwise assess the strength of the State's case; consequently, we give no deference to the PCR court's credibility findings when we review the testimony of such witnesses. *See Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) (stating the reason appellate courts give "great deference to a [PCR court's] findings" is because the PCR court has "the opportunity to directly observe the [PCR] witnesses").

Here, the PCR court's assessment of Victim's credibility was based upon factors the PCR court did not directly observe, namely (1) the trial judge's comment during sentencing that he found Victim's trial testimony credible, (2) Victim's trial testimony which, according to the PCR court, provided "precise detail" of years of sexual abuse at the hands of Petitioner, and (3) Victim's trial testimony describing Petitioner's psychological grooming of Victim. We are compelled to note Victim's credibility was legitimately called into question at trial, as she admitted during cross-examination that after she accused Petitioner of sexually abusing her, she fabricated allegations of three male schoolmates "raping" her. We note this point not to besmirch Victim, but simply to illustrate why an appellate court may legitimately reach a different conclusion as to the credibility of a witness who neither the PCR court nor the appellate court directly observed. The PCR court erred in concluding Victim's testimony constituted overwhelming evidence of Petitioner's guilt.

Third, the PCR court found Mother's *trial* testimony was credible. Again, while we defer to a PCR court's credibility findings as to witnesses who testified at the PCR hearing, our standard of review does not dictate that we defer to credibility findings as to witnesses the PCR court did not directly observe. However, we need not reach any conclusions as to Mother's credibility, because even if Mother were a credible trial witness, her testimony merely corroborated Victim's testimony that Victim had nightmares and sleep disturbances and that Victim would "fret" around men. While Mother's testimony may support the conclusion that Victim was sexually abused, Mother's testimony does not support the conclusion that Petitioner was the perpetrator. There is no probative evidence in the record to support the PCR court's finding that Mother's testimony constituted overwhelming evidence of Petitioner's guilt.

Fourth, the PCR court cited the "absence of contradictory testimony" as part of its basis for concluding there was overwhelming evidence of guilt. The PCR court erred as a matter of law in considering the lack of contradictory testimony, as this finding suggests Petitioner—who neither testified nor introduced any other evidence—had the burden of producing evidence at his criminal trial that would contradict the evidence introduced by the State. At all times during a criminal trial, the State has the burden of proving a defendant's guilt beyond a reasonable doubt. At no time does a defendant assume the burden of either contradicting the State's evidence or proving himself not guilty. *See Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008) (noting the Due Process Clauses of the Fifth and Fourteenth Amendments "protect an accused against conviction unless **the State** supplies proof beyond a reasonable doubt of each element necessary to constitute the crime with which the accused is charged") (emphasis added). Since a criminal defendant does not have the burden of presenting contradictory evidence during his criminal trial, the absence of contradictory testimony should not have been considered by the PCR court in its prejudice analysis.

We conclude Petitioner's jury trial was infected by the type of improper corroborating evidence warned of in *State v. Barrett*, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989). In *Barrett*, as here, there was physical evidence suggesting a child victim was sexually abused. *Id.* A DSS social worker was improperly allowed to testify to the details of the sexual abuse reported to her by the victim. *Id.* at 486, 386 S.E.2d at 243. Other than this testimony, the State relied solely upon the victim's testimony to establish the details of the crime and the identity of Barrett as the perpetrator. *Id.* at 487, 386 S.E.2d at 243. The State asserted that any error was

harmless because the inadmissible testimony was "merely cumulative" to the victim's testimony. *Id.* We held, "[I]t is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Accordingly, admission of the evidence mandates reversal of the conviction." *Id.* Although a direct appeal, *Barrett* is strikingly similar to the instant case. Here, other than the hearsay testimony referenced above (and the inadmissible bolstering testimony discussed herein), the only evidence pointing to Petitioner as the perpetrator was Victim's testimony. As was the case in *Barrett*, the cumulative effect of the hearsay testimony undeniably enhanced its devastating impact. As a whole, the properly admitted evidence of Petitioner's guilt was not strong enough to overcome trial counsel's failure to object to the inadmissible hearsay testimony of Ms. Elfering and Dr. Benedetto. We therefore hold there is no evidentiary support for the PCR court's conclusion that Petitioner was not prejudiced by trial counsel's errors.

Inadmissible Bolstering Testimony

The devastating prejudicial effect of Dr. Benedetto's improper bolstering testimony is likewise clear. We addressed similar circumstances in *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010). PCR applicant Smith was convicted of second degree CSC with a minor. *Id.* at 564, 689 S.E.2d at 630. During Smith's jury trial, the forensic interviewer testified without objection that she found the child victim "believable" and that the victim had no reason "not to be truthful." *Id.* at 564, 689 S.E.2d at 631. The interviewer also provided testimony that exceeded the time and place restrictions set forth in Rule 801(d)(1)(D), SCRE. *Id.* at 568, 689 S.E.2d at 633. During its closing argument, the State emphasized the inadmissible bolstering opinion testimony and the inadmissible hearsay. *Id.* at 569, 689 S.E.2d at 633. We noted the outcome of Smith's jury trial "hinged on the [v]ictim's credibility regarding [the] identification of the perpetrator, and there was otherwise an absence of overwhelming evidence of Smith's guilt." *Id.* We concluded the PCR court's finding of no prejudice was without evidentiary support. *Id.* Here, as in *Smith*, the outcome of Petitioner's jury trial hinged on Victim's credibility, and there was otherwise an absence of overwhelming evidence of guilt. Dr. Benedetto clearly vouched for Victim's credibility when she testified that she considered Victim's account of abuse to be among the most compelling she had encountered in almost one thousand child

interviews. The State emphasized this inadmissible expert testimony three times during its closing argument.[5]

The properly admitted evidence of Petitioner's guilt was not strong enough to overcome trial counsel's failure to object to Dr. Benedetto's inadmissible bolstering testimony. We therefore hold there is no evidentiary support for the PCR court's conclusion that Petitioner was not prejudiced by trial counsel's failure to object.

For the same reason, we conclude there is no evidentiary support for the PCR court's finding that Petitioner was not prejudiced by trial counsel's failure to object to improper bolstering testimony provided by Detective Barr. Detective Barr noted her specialized training in child exploitation cases and testified she was a trained forensic interviewer. While she did not conduct the forensic interview of Victim, Detective Barr testified she watched the audio-visual recording of Dr. Benedetto's interview and reviewed the physical findings of Dr. Luberoff. Victim's credibility was dramatically enhanced by Detective Barr's testimony that Victim's disclosures were consistent with her own training as a forensic interviewer and by Detective Barr's testimony that Dr. Luberoff's physical findings corroborated Victim's disclosure to Dr. Benedetto that she was abused by Petitioner.

IV.

We hold trial counsel was deficient for not objecting to both the inadmissible hearsay testimony and inadmissible testimony which improperly bolstered Victim's credibility. We hold there is no probative evidence in the record to support the PCR court's findings that Petitioner was not prejudiced by these deficiencies. Therefore, we **REVERSE** the PCR court's denial of post-conviction relief and remand to the court of general sessions for a new trial.

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

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[5] As we observed in *Briggs v. State*, 421 S.C. 316, 333, 806 S.E.2d 713, 722 (2017), and in *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013), the impermissible harm arising from improper bolstering is compounded when the witness is qualified as an expert.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: Mickey Ray Carter, Jr. and Nila Collean Carter, Movants,

Of Whom Nila Collean Carter is Petitioner.

In Re:

John Roe and Mary Roe, Respondents,

v.

L.C. and X.C., minors under the age of seven years, Defendants.

Appellate Case No. 2017-000806

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
Edgar H. Long, Jr., Family Court Judge

Opinion No. 27786
Heard January 31, 2018 – Filed March 21, 2018

REVERSED AND REMANDED

A. Mattison Bogan, of Nelson Mullins Riley and Scarborough, LLP, of Columbia, for Petitioner.

K. Jay Anthony, of the Anthony Law Firm, PA, of Spartanburg; Emily McDaniel Barrett and Thomas P. Lowndes, Jr., both of Charleston, for Respondents.

PER CURIAM: In this adoption matter, Petitioner Nila Collean Carter sought to revoke her consent to the adoption of her two biological children. Throughout the resulting procedural morass, Petitioner was never provided an opportunity to be heard on the merits of her claim before the adoption was finalized. We issued a writ of certiorari to review the court of appeals' unpublished decision affirming the family court's denial of Petitioner's motion to set aside the final adoption decree pursuant to Rule 60(b), SCRCP. *Ex Parte Carter*, Op. No. 2017-UP-043 (S.C. Ct. App. filed Jan. 13, 2017). Because Petitioner's Rule 60(b) motion was timely filed and sufficiently alleged extrinsic fraud, we reverse and remand this matter to the family court for further proceedings.

I.

Petitioner and her ex-husband Mickey Ray Carter, Jr.[1] are the biological parents (collectively "the Carters") of two children—a daughter born in 2009 and a son born in 2011. The Carters were married in May 2010, and by early 2014, the couple was experiencing financial and marital stressors. Given the difficult circumstances facing the Carters and the unavailability of extended family support, the Carters began discussing private adoption as an alternative that they believed was preferable to the children being placed in foster care.

Petitioner reached out to attorney Emily McDaniel Barrett, who arranged the adoption on behalf of both couples.[2] From the beginning, Petitioner insisted on

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[1] Although Mr. Carter participated in proceedings below, he did not join the petition for rehearing to the court of appeals and is not a party on certiorari to this Court.

[2] Petitioner's brief indicates that she located Ms. Barrett through her website in the course of an internet search and that Petitioner believed Ms. Barrett represented both the Carters and the Roes.

taking an active part in the adoption process and explained that she wanted an open adoption because that was "the only way this won't destroy me. I need them to know how much I love them."

In April 2014, the Carters each signed a consent to adoption of their two children by Respondents John and Mary Roe ("Adoptive Couple"). Four days later, the adoption action was filed. Notably, the documents signed by the Carters included a provision waiving service and notice of the adoption action.

Eight days after the adoption action was filed, the Carters each executed a notarized document titled "Withdrawal of Parental Consent to Adoption" purporting to revoke consent on the basis of emotional duress. Thereafter, the Carters sought through many avenues to withdraw their consent.[3]

The South Carolina Adoption Act provides that:

> Withdrawal of any consent or relinquishment is not permitted except by order of the court after notice and opportunity to be heard is given to all persons concerned, and except when the court finds that the withdrawal is in the best interests of the child and that the consent or relinquishment was not given voluntarily or was obtained under duress or through coercion. Any person attempting to withdraw consent or relinquishment shall file the reasons for withdrawal with the family court. The entry of the final decree of adoption renders any consent or relinquishment irrevocable.

S.C. Code Ann. § 63-9-350 (2010).

The Carters were initially represented by counsel, who filed on their behalf a motion to intervene in the adoption action, along with supporting affidavits to contest the validity of the consents.[4] At the motion hearing before the family court,

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[3] Once the Carters expressed an intent to challenge the validity of their consents, they were no longer permitted visitation with the children.

[4] It appears the Carters' efforts to intervene were delayed due to confusion over the county in which the (sealed) adoption proceeding was pending; the Carters were

the Carters' counsel explained that the Carters faced difficult life circumstances and felt pressured to sign the consents. In support of his argument, counsel cited this Court's decision in *McCann v. Doe*, 377 S.C. 373, 660 S.E.2d 500 (2008), for the proposition that the confluence of several emotional stressors can render an otherwise validly executed consent to adoption involuntary and revocable.

Counsel for the Adoptive Couple opposed the motion, arguing that because adoption proceedings are private and confidential proceedings, the Carters' recourse was not as intervenors in the adoption action but through a separate action challenging the consents "outside the adoption itself." The family court agreed and denied the Carters' motion to intervene, stating "I don't believe procedurally that's the way that this should be handled." The family court expressly declined to reach the merits of whether the consents should be withdrawn. From this point forward, the Carters proceeded pro se.[5]

At the direction of the family court, a week later, the Carters filed a separate action, along with affidavits supporting their challenge to the validity of the consents, and requested that a hearing be scheduled before the final adoption hearing. Between August 2014 and April 2015, the Carters appeared and asked to be heard at *seven separate hearings* before six different family court judges, each of whom refused to address the merits of the Carters' claim based on perceived procedural abnormalities and gave the Carters inconsistent (and at times incorrect) instructions on the proper procedure through which the Carters should have pursued their claim.[6] In every instance, the Carters timely followed these

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residents of Horry County and the Adoptive Couple resided in Berkeley County, yet the adoption action was filed in Charleston County.

[5] The record reveals the Carters wished to proceed with the assistance of counsel but could not afford additional legal fees following the initial hearing.

[6] Family court judges assigned to hear this matter avoided hearing the Carters' case for a variety of reasons, including the claim of insufficient docket time requested, finding fault with the Carters for doing precisely what other family court judges told them to do, and perhaps the most troubling reason for not hearing the Carters' case was the hearing "should not have been scheduled on a Friday." Mr. Carter eventually abandoned his claim; we find it remarkable that Petitioner did not throw in the towel as well.

instructions. Nevertheless, the Carters' claim was never evaluated on the merits.

Meanwhile, the Adoptive Couple, through counsel, requested a final adoption hearing. The Adoptive Couple's counsel gave no notice to the Carters. On December 15, 2014, a final hearing was held in the adoption case and a final order of adoption was issued on that date by a *seventh* family court judge who, according to the record before us, was unaware of the Carters' pending challenge to the consents. Although counsel for the Adoptive Couple was well aware of the Carters' separate pending challenge, the final adoption hearing transcript includes no reference to this. Rather, when the family court judge asked if there was anything else that needed to be placed on the record before the first witness was sworn, counsel for the Adoptive Couple never mentioned the Carters' pending action and stunningly responded "I think we're good, Your Honor." We are confident the family court judge would not have proceeded with the adoption had he been made aware of the separate pending action. However, without the benefit of this critical information, the family court entered an order approving the adoption.

Armed with the final adoption order, counsel for the Adoptive Couple filed a motion to dismiss the Carters' separate action challenging the validity of their consents, arguing the final adoption order rendered moot the Carters' challenge. The Carters appeared at the hearing on this motion on April 1, 2015, understandably incredulous that the adoption was finalized while their separate action to set aside the consents was pending. The Adoptive Couple, through counsel, recited the last sentence of section 63-9-350—"The entry of the final decree of adoption renders any consent or relinquishment irrevocable"—and argued the Carters' separate action should be dismissed. This family court judge apparently felt constrained to dismiss the Carters' action; the judge, however, instructed the Carters to file a Rule 60, SCRCP motion in the adoption action alleging extrinsic fraud prevented them from having an opportunity to be heard as to the validity of their consents.

The Carters wasted no time in filing the motion suggested by the family court judge. Just six days after the April 1, 2015 hearing, the Carters filed a Rule 60, SCRCP motion in the adoption action, requesting relief from the final adoption order, alleging the consents were involuntary and the product of duress, coercion, and extrinsic fraud in that the Carters' attempts to be heard were systematically

thwarted by the Adoptive Couple's attorneys.[7]

Three days later, a different family court judge summarily denied the Carters' Rule 60(b) motion on the ground that it was untimely. The Carters appealed, arguing the family court erred in denying their Rule 60 motion as untimely and that the validity of the adoption was compromised because the Carters' challenge to their consents was not resolved before the adoption was finalized.

The court of appeals affirmed the family court's denial of the Carters' Rule 60(b) motion. *Ex Parte Carter*, Op. No. 2017-UP-043 (S.C. Ct. App. filed Jan. 13, 2017). Thereafter, this Court issued a writ of certiorari to review the court of appeals' decision.

II.

Petitioner argues the court of appeals erred in finding her Rule 60(b) motion did not allege extrinsic fraud and that the family court erred in finding the motion was not timely filed. We agree.

A.

Once a final adoption decree is entered, a *validly* executed consent to adoption is irrevocable. S.C. Code Ann. § 63-9-350 (emphasis added). However, a court retains its authority to grant collateral relief from an adoption decree on the ground of extrinsic fraud. S.C. Code Ann. § 63-9-770(B) (2010). Extrinsic fraud "is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" *Hagy v. Pruitt*, 339 S.C. 425, 431, 529 S.E.2d 714, 718 (2000) (quoting *Hilton Head Center of S.C. v. Pub. Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)).

In their Rule 60(b) motion, the Carters alleged, "under 63-9-770 there was extrinsic fraud committed . . . by not allowing us the right to be heard on filing multiple

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[7] In response, counsel for the Adoptive Couple filed a motion, along with a supporting memorandum, and affidavits seeking a Rule to Show Cause for why the Carters should not be held in civil and criminal contempt for "proceed[ing] to file a series of motions in an attempt to disrupt the adoption."

motions of intent to contest consents and to attack the merits of the adoption with this Honorable Court." The motion further stated:

> Mickey and Nila Carter have tried repeatedly to withdraw[] consents which [were] illegally obtained and they informed . . . the Adoptive Couple[,] . . . in addition to this Honorable Court yet they have never been heard on this issue[,] and further, [counsel for the Adoptive Couple] and the Law firm she works for have continuously attempted to block our access to the Honorable Court so we may be heard on this matter.

The court of appeals erred in finding the Carters' Rule 60(b) motion did not sufficiently allege extrinsic fraud. The Carters' motion expressly asserted "extrinsic fraud" and specifically cited section 63-9-770, which is the statutory provision addressing the family court's authority to set aside an adoption decree on that basis. The motion further alleged the Carters were misguided and misled into signing the consents and waiving the right to notice of the proceedings and that their subsequent attempts to appear and be heard as to the validity of the consents were repeatedly thwarted by opposing counsel.

Moreover, at the heart of the extrinsic fraud claim is the Adoptive Couple's effort, through counsel, to push through the final adoption hearing knowing full well of the Carters' repeated requests to be heard on their pending separate action. Most troubling is counsel's failure to be candid with the family court when asked if there was "anything else." These specific averments manifestly state a claim for extrinsic fraud. Thus, extrinsic fraud was sufficiently alleged in the Rule 60(b) motion, and the court of appeals erred in affirming the family court's dismissal on that basis. *See Hagy*, 339 S.C. at 431–32, 529 S.E.2d at 718 (holding allegations that fraudulent actions which induced a mother to sign a consent to adoption thereby waiving her right to notice and appearance in the adoption proceeding sufficiently alleged extrinsic fraud); *Greer v. McFadden*, 295 S.C. 14, 17, 366 S.E.2d 263, 265 (Ct. App. 1988) (holding even if a pro se claim is not framed with expert precision, where the point is clear, the issue should be addressed); *cf. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Rhinehart*, 827 N.W.2d 169, 172–74 (2013) (finding an attorney's failure to disclose to the family court the existence of separate pending actions that could potentially impact the family court's division of marital assets constituted extrinsic fraud). We turn now to the issue of whether the

family court erred in finding the Carters' Rule 60(b) motion was untimely.

B.

Rule 60(b), SCRCP, provides that a party may be relieved from a final judgment on the basis of "fraud, misrepresentation, or other misconduct of an adverse party." A motion pursuant to Rule 60(b) "shall be made within a reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken."

The final adoption decree was entered December 15, 2014. At a hearing on April 1, 2015, the family court instructed the Carters to file the Rule 60(b) motion. The Carters did so on April 7, 2015. Because this period of time is both reasonable and not more than one year after the entry of the final adoption decree, we find the family court abused its discretion in finding the Carters' Rule 60(b) motion was untimely. *See Coleman v. Dunlap*, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992) (where Rule 60(b) motion is filed shortly after the movant becomes aware of the basis therefor and there is no evidence of unreasonable delay, the motion is timely). Because the Rule 60(b) motion was timely filed, Petitioner is entitled to an opportunity to be heard on the merits of her claim therein.

III.

In reversing, we have made plain our grave concern for the manner in which this matter was handled in the family court. We, however, emphasize that we express no opinion on the merits of Petitioner's claim that her consent was not validly obtained.

We reverse the court of appeals' decision and remand this matter to the family court for a hearing on the merits of the Rule 60(b) motion. We direct the family court to appoint an attorney to represent Petitioner in the proceedings upon remand within ten (10) days of the date the remittitur is sent to the lower court. We further direct this matter to be heard within ninety (90) days of the date the remittitur is

sent and that an order addressing the merits be issued by the family court within thirty (30) days of the date of the hearing.

REVERSED AND REMANDED.

KITTREDGE, Acting Chief Justice, HEARN, FEW, JAMES, JJ., and Acting Justice Doyet A. Early, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Lawyers Weekly, By and through its principal, Dolan Publishing Company, Appellant,

v.

Scarlett Wilson, Solicitor of the Ninth Judicial Circuit, an elected public official, Respondent.

Appellate Case No. 2016-000555

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5542
Heard October 5, 2017 – Filed March 19, 2018

AFFIRMED

Desa Ballard and Harvey M. Watson, III, both of Ballard & Watson, Attorneys at Law, of West Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, and Deputy Solicitor General J. Emory Smith, Jr., all of Columbia, for Respondent.

LOCKEMY, C.J.: In this action pursuant to the Freedom of Information Act (FOIA), South Carolina Lawyers Weekly (Appellant) asserts the circuit court erred

in refusing to compel Scarlett Wilson, as Solicitor of the Ninth Judicial Circuit, to produce any disciplinary complaints against her. Appellant argues the circuit court erred by: (1) failing to find Wilson is a public officer and her office is a public body subject to FOIA; (2) relying on Rule 12 of the Rules of Lawyer Disciplinary Enforcement to determine the requested documents are not required to be disclosed; (3) finding the documents were exempt from FOIA pursuant to S.C. Code Ann. § 30-4-40(a) (2007 & Supp. 2017); and (4) failing to find Wilson waived her right to confidentiality. We affirm.

FACTS

On July 10, 2015, Phillip Bantz, a staff writer for South Carolina Lawyers Weekly sent a FOIA request to Solicitor Wilson's official email address requesting "any records relating to any disciplinary complaints against you or action taken with respect to you as a member of the bar."

The Ninth Circuit Solicitor's Office (the Solicitor's Office) responded, on official letterhead, and denied Bantz's request. The office noted, "In the last year a number of grievances have been filed against Ms. Wilson by or at the behest of disgruntled criminal defense lawyers . . . . The South Carolina Office of Disciplinary Counsel thoroughly investigated these matters and recommended dismissal of all of these charges."

In denying the FOIA request, the Solicitor's Office noted that "[w]hile the Solicitor's Office is a 'public body' and subject to FOIA, Ms. Wilson is not personally a 'public body.'"

The Solicitor's Office further asserted that, were Solicitor Wilson a 'public body,' the documents requested would be exempt from disclosure under several FOIA exemptions. First, the Solicitor's Office asserted the documents were exempt from disclosure because they are information of a personal nature. *See* S.C. Code Ann. § 30-4-40(a)(2) (Supp. 2017). The Solicitor's Office also claimed the documents were specifically exempted from disclosure by statute or state law by Rule 12 of the South Carolina Rules for Lawyer Disciplinary Enforcement (RLDE), which requires disciplinary complaints remain private. *See* S.C. Code Ann. § 30-4-40(a)(4) (2007). Finally, the Solicitor's Office argued the requested documents

included information protected by the attorney-client relationship. *See* S.C. Code Ann. § 30-4-40(a)(7) (2007).

Appellant subsequently filed a declaratory judgment action requesting the court declare Solicitor Wilson a public body and any documents she possessed pertaining to her disciplinary records must be made available. Appellant asserted Solicitor Wilson is a public official whose only legal services are provided in her capacity as a public official. Accordingly, Appellant argued "Any documents from the Office of Disciplinary Counsel and/or the Commission on Lawyer Conduct received by her relate wholly to her conduct in her capacity as a public official and are thus public documents."

Appellant also asserted the exemptions Solicitor Wilson claimed were inapplicable in this case. According to Appellant, any reliance by the Solicitor's Office on Rule 12, RLDE, is inappropriate in this case because the Rule only dictates that members and staff of the Commission on Lawyer Conduct, disciplinary counsel and its staff, and the members and staff of the Supreme Court should not reveal the existence of a complaint. Appellant also argued the Solicitor's Office revealed the existence and content of some of the complaints against Solicitor Wilson in its response to the FOIA request, waiving Wilson's claim to confidentiality.

After a hearing, the circuit court filed its order granting Solicitor Wilson's motion to dismiss on February 10, 2016. The circuit court did not reach the issue of whether Solicitor Wilson is a public body, but rather found the documents were not 'public records' pursuant to the FOIA. The court found the documents were protected from disclosure under Rule 12, RLDE, and as such were exempted from disclosure under section 30-4-40(a)(4). The court also found Solicitor Wilson had not waived her right to confidentiality of the disciplinary complaints by referring to them generally in her response because "Ms. Wilson's letter had no intent whatsoever to waive confidentiality when she invoked the Rules on Lawyer Disciplinary Enforcement in her response letter and made quite clear she believed, and correctly so, that the documents sought are not public." The circuit court also found the requested documents were exempt from disclosure because of their personal nature. This appeal followed.

LAW

"Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Id*. at 10, 760 S.E.2d at 789 (quoting *Charleston Cty. Sch. Dist. v. State Budget & Control Bd.,* 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id*. at 10-11, 760 S.E.2d at 790 (quoting *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010)).

"What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (quoting *Media Gen.*, 388 S.C. at 148, 694 S.E.2d at 530). "Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting *Media Gen.*, 388 S.C. at 148, 694 S.E.2d at 530).

The legislature, in passing the FOIA statute found, in part, "it 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." S.C. Code Ann. §30-4-15 (2007). In order to achieve its objective, the General Assembly directed, "provisions of [the FOIA] must be construed 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." *Id*. Accordingly, the FOIA should be liberally construed to carry out the General Assembly's purpose. *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003).

The Freedom of Information Act defines a public body as

> any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities,

> townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority.

S.C. Code Ann. § 30-4-20(a) (2007). The FOIA further defines a public record as including "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." § 30-4-20(c) (2007).

"A person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws, in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(A)(1) (Supp. 2017).

There are exceptions, however. "Matters specifically exempted from disclosure by statute or law" may be exempt from disclosure if the public body decides not to produce them. S.C. Code Ann. § 30-4-40(a)(4). Furthermore, "[i]nformation of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy" is also exempted. S.C. Code Ann. § 30-4-40(a)(2).

> Information of a personal nature shall include, but not limited to, information as to gross receipts contained in applications for business licenses, information relating to public records which include the name, address, and telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation of handicapped persons

> solely by virtue of their handicap, and any audio recording of the final statements of a dying victim in a call to 911 emergency services.

S.C. Code Ann. § 30-4-40(a)(2).

ANALYSIS

Initially, Appellant asserts Solicitor Wilson waived her right to confidentiality of the requested documents by referring to their existence in her FOIA response. We disagree.

"Waiver is a question of fact for the finder of fact." *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Id*.

Appellant argues the circuit court erred in deciding Solicitor Wilson had not intended to waive confidentiality because no evidence supports that finding. Appellant claims the evidence supporting waiver included (1) the response to the FOIA request was on official letterhead; (2) the response was prepared using resources of a public office; and (3) the response disclosed the contents of the documents not produced. We do not agree with Appellant that Solicitor Wilson "picked and chose" what content to disclose in her FOIA response. Solicitor Wilson revealed the existence of disciplinary complaints and revealed the source of certain of those complaints. She did not reveal anything further about the content of those complaints; therefore she did not waive any objection to disclosing that content.

Appellant also asserts the circuit court erred in finding Rule 12, RLDE, provides the documents requested were not disclosable under FOIA. Again, we disagree.

"The Supreme Court may . . . prescribe, adopt, promulgate and amend such rules and regulations as it may deem proper . . . (d) prescribing the procedure for disciplining, suspending, disbarring and reinstating attorneys at law . . . ." S.C. Code Ann. § 40-5-20 (2011). "The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted." S.C. Const. Art. V, § 4. When rules promulgated by the Supreme Court pursuant to

section 40-5-20 become effective, "they shall supersede all laws or parts of laws in conflict therewith to the extent of the conflict." S.C. Code Ann. § 40-5-50 (2011).

Rule 12 is a general rule regarding access to attorney disciplinary information. Except as otherwise provided, the members of the Commission on Lawyer Conduct and its staff, the Office of Disciplinary Counsel and its staff, and the Supreme Court and its staff are prohibited from revealing the existence of a complaint while the matter remains confidential. Rule 12(a), RLDE, Rule 413 SCACR. A violation of the rule is punished as a contempt of the Supreme Court. Rule 12(a), RLDE, Rule 413, SCACR.

Rule 12 also provides guidance regarding when attorney disciplinary information becomes public.

> When formal charges are filed regarding allegations of misconduct, the formal charges, any answer, and all other documents related to the proceedings that were filed with or issued by the Commission following the filing of the formal charges shall become public 30 days after the filing of the answer or, if no answer is filed, 30 days after the expiration of the time to answer under Rule 23. Thereafter, except as otherwise provided by these rules or the Supreme Court, all subsequent records and proceedings relating to the misconduct allegations shall be open to the public inclusive of a letter of caution or admonition issued after the filing of formal charges.

Rule 12(b), RLDE, Rule 413, SCACR.

Based on the plain language of Rule 12(b), complaints filed with the Office of Disciplinary Counsel do not become public documents until formal charges are filed and 30 days have passed after the filing of an answer, or in the absence of an answer, 30 days after the time to file an answer has expired. Because Rule 12(b) indicates lawyer disciplinary complaints do not become public until after formal charges are filed, and no formal charges were filed against Solicitor Wilson, any complaints would not be public documents, and Solicitor Wilson would not be required to be disclose them pursuant to FOIA.

Appellant asserts this reading of Rule 12 violates the separation of powers doctrine because it allows a Supreme Court rule to modify a statutory scheme. We disagree. Instead, Rule 12 provides privacy protection for attorney disciplinary complaints, and their disclosure cannot be compelled until formal charges are filed.[1] The General Assembly, through section 40-5-50, provided court rules, including rules regarding lawyer discipline, carry the force of law. S.C. Code Ann. § 40-5-50 ("Upon such rules and regulations becoming effective, they shall supersede all laws or parts of laws in conflict therewith to the extent of the conflict."). We find the General Assembly's decision to allow court rules to carry the force of law satisfies any potential separation of powers issues.

CONCLUSION

Based on the foregoing, the order of the circuit court is

AFFIRMED

HUFF and HILL, JJ., concur.

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[1] Having determined the requested documents are not public records required to be disclosed under the FOIA, we decline to reach Appellant's remaining arguments that Solicitor Wilson is a public body as defined by the statute or that the exception in section 30-4-40(a)(2) should not apply. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not review remaining issues when a determination of prior issues is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Motor Vehicles,
Appellant,

v.

Michelle Dover, Respondent.

Appellate Case No. 2016-001030

Appeal From The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Opinion No. 5544
Heard October 2, 2017 – Filed March 21, 2018

AFFIRMED AS MODIFIED

Frank L. Valenta, Jr., Philip S. Porter, and Brandy Anne Duncan, all of Blythewood, for Appellant.

Michelle Dover, of York, pro se.

KONDUROS, J.: The South Carolina Department of Motor Vehicles (the DMV) appeals the administrative law court's (ALC's) determination that Michelle Dover's reckless driving conviction in Virginia did not constitute a major violation requiring her driver's license to be suspended under the habitual offender statute. We affirm as modified.

FACTS

Dover was convicted in South Carolina for driving under suspension (DUS) on August 14, 2012. Additionally, she pled guilty to driving under the influence (DUI) in South Carolina on August 12, 2014. On May 3, 2015, Dover was ticketed in Virginia for reckless driving. On July 21, 2015, she was convicted of the charge but did not appear before the Virginia court. Virginia reported this violation to the DMV on August 10, 2015, as "RECKLS DRV-SPEEDING EXCESS OF 80MPH-MISD" and with the "ACD Code" of "M84." The American Association of Motor Vehicle Administrators (AAMVA) Violations Exchange Code Dictionary (ACD) provides that M84 is the code for "reckless driving." 23 C.F.R. pt. 1327, app. A (2017). The DMV did not receive a copy of Dover's actual ticket.[1]

The DMV applied the Virginia conviction to Dover's driving record as a conviction for reckless driving, determined this was her third major violation, and suspended her license due to it finding she met the requirements for being a habitual offender. Dover requested a contested case hearing with the Office of Motor Vehicles Hearings (OMVH), contending she should have been charged with speeding, not reckless driving, in Virginia. At the hearing, Dover did not dispute her two prior South Carolina convictions. She indicated that when she received the ticket in Virginia, she was driving ten miles over the speed limit and "was with the flow of traffic."

Following the hearing, the OMVH hearing officer rescinded Dover's suspension. The hearing officer determined because reckless driving was not listed as an offense in section 56-1-650 of the South Carolina Code, section 56-1-320 of the South Carolina Code applied.[2] The hearing officer determined the behavior for

[1] At the hearing in front of the hearing officer, the DMV stated Dover was convicted of section 46.2-862 of the Virginia Code. The DMV also indicated this in its memorandum of law to the hearing officer. The hearing officer found she was charged with that section.

[2] Section 56-1-320(A) of the South Carolina Code (2018) provides the DMV "may, in its discretion, suspend or revoke the license of any resident of this State . . . to drive a motor vehicle in this [s]tate upon receiving notice of the conviction of the

which Dover was convicted in Virginia, if she had committed it in South Carolina, would not have fallen under South Carolina's reckless driving statute. The hearing officer therefore found the DMV erred in using the conviction as a third major conviction to suspend Dover's license.

The DMV appealed to the ALC. The DMV argued the hearing officer erred in finding the DMV had made a discretionary decision to suspend Dover's license under section 56-1-320. It contended Dover's license was required to be suspended pursuant to section 56-5-1030. It also maintained it could rely on Virginia's categorization of the offense using the ACD Code for reckless driving.

The ALC affirmed the hearing officer's ruling as modified. It determined the hearing officer erred in finding the DMV's decision to suspend Dover's license was discretionary. The ALC also found the Virginia conviction was added to Dover's driving record pursuant to section 56-1-790 under a reciprocal agreement. The ALC held South Carolina law requires "an out-of-state offense must be recorded as if it were a conviction under South Carolina law." It determined that because Dover asserted she was only going ten miles per hour over the speed limit, she would have been charged with speeding in South Carolina, not reckless driving. Therefore, it found the hearing officer did not err in determining the DMV incorrectly suspended Dover's license. This appeal followed.

STANDARD OF REVIEW

"The OMVH has exclusive jurisdiction over contested cases involving habitual offenders. Decisions by the OMVH hearing officer must be appealed to the ALC." *Davis v. S.C. Dep't of Motor Vehicles*, 420 S.C. 98, 102, 800 S.E.2d 493, 495 (Ct. App. 2017) (citation omitted). "The [O]MVH is authorized to hear contested cases from the [DMV]. Thus, the [O]MVH is an agency under the Administrative Procedures Act." *S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 144, 705 S.E.2d 425, 429 (2011) (citations omitted). "Section 1-23-610 of the South Carolina Code [(Supp. 2017)] sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an

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person in another state of an offense therein which, if committed in this [s]tate, would be grounds for the suspension or revocation of the South Carolina license."

administrative agency." *S.C. Dep't of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 347, 675 S.E.2d 756, 758 (Ct. App. 2009).

> The review of the [ALC]'s order must be confined to the record. The court may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> > (a) in violation of constitutional or statutory provisions;
> > (b) in excess of the statutory authority of the agency;
> > (c) made upon unlawful procedure;
> > (d) affected by other error of law;
> > (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> > (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2017).

"Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [ALC] and is more than a mere scintilla of evidence." *Davis*, 420 S.C. at 103, 800 S.E.2d at 495 (alteration by court) (quoting *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 605, 670 S.E.2d 674, 676 (Ct. App. 2008)). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Original Blue Ribbon Taxi Corp.*, 380 S.C. at 605, 670 S.E.2d at 677 (quoting *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008)).

LAW/ANALYSIS

The DMV contends the ALC erred in affirming the OMVH hearing officer's reversal of Dover's suspension. The DMV asserts it can rely on Virginia's categorization of Dover's offense as reckless driving and as an ACD Code M84 conviction. Further, it maintains public policy demands Dover's suspension be upheld because the DMV does not have the resources to investigate every M84 conviction from Virginia. We disagree.[3]

"Questions of statutory interpretation are questions of law, which this [c]ourt is free to decide without any deference to the tribunal below." *Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139,

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[3] Initially, the DMV argues the ALC erred in relying on section 56-1-790 of the South Carolina Code, instead of sections 56-1-650 and -320 of the South Carolina Code. "[I]ssues not raised to and ruled on by the AL[C] are not preserved for appellate consideration." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002). Our supreme court has held an appellant's failure "to file a motion for reconsideration or a motion to alter or amend the judgment pursuant to [SCALC] Rules 29 or 68 . . . or Rules 59(e) or 60, SCRCP," renders review of an issue first arising from the ALC's final order unpreserved for the supreme court's review. *Risher v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 198, 208, 712 S.E.2d 428, 433 (2011). The DMV did not file a Rule 59(e), SCRCP, or a SCALC Rule 29(D) motion for reconsideration to call the ALC's attention to its purported improper reliance on section 56-1-790. Additionally, "a party may not complain on appeal of error . . . which his own conduct has induced." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006). The DMV admits it erroneously cited this section as applying in its brief to the ALC. Accordingly, the DMV's argument the ALC incorrectly relied on this section is unpreserved. However, our ruling as to this issue does not preclude our discussing the interplay and applicability of these code sections in our analysis as they are part of the record, and we may affirm for any reason appearing in the record. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision[,] or judgment upon any ground(s) appearing in the Record on Appeal.").

750 S.E.2d 65, 69 (2013) (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). "[W]e must follow the plain and unambiguous language in a statute and have 'no right to impose another meaning.'" *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535-36, 725 S.E.2d 693, 695 (2012) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

"[T]he [O]MVH is an agency under the Administrative Procedures Act." *S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 144, 705 S.E.2d 425, 429 (2011) (citations omitted). "[T]he deference doctrine . . . provides that whe[n] an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014). "We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* at 34-35, 766 S.E.2d at 718 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). "The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence." *S.C. Dep't of Motor Vehicles v. Nelson*, 364 S.C. 514, 519, 613 S.E.2d 544, 547 (Ct. App. 2005).

The South Carolina Code provides that for convictions[4] required to be reported to other states under the Driver License Compact "a member state shall give the same effect to the report as if the conviction had occurred in that state. For a conviction that is not required to be reported under subsection (A), the provisions of [s]ection 56-1-320 shall govern the effect of the reported conviction in this [s]tate." S.C. Code Ann. § 56-1-650(C) (2018).

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[4] The statute requires a state belonging to the Driver License Compact to report to another member state a conviction for (1) manslaughter or homicide resulting from operating of a motor vehicle; (2) DUI; (3) a felony if a motor vehicle is used in the commission; or (4) failure to stop and render aid for a motor vehicle accident resulting in the death or personal injury of another. S.C. Code Ann. § 56-1-650(A) (2006). South Carolina joined the Compact in 1987 and Virginia joined in 1968. *See* National Center for Interstate Compacts, Driver License Compact, Member States, http://apps.csg.org/ncic/Compact.aspx?id=56 (last visited Mar. 12, 2018).

The DMV argues subsection 56-1-320(A) of the South Carolina Code (2018) is relevant to the determination of this case but acknowledges a reckless driving conviction alone does not lead to a license suspension. That subsection allows the DMV the discretion to "suspend or revoke the license . . . upon receiving notice of the conviction of the person in another state of an offense therein which, if committed in this [s]tate, would be grounds for the suspension or revocation of the South Carolina license." § 56-1-320(A). Consequently, it is not determinative of the outcome in this case.

"When a person is convicted of one or more of the offenses listed in [s]ection 56-1-1020[ ]. . . [of the South Carolina Code (2018)], the [DMV] must review its records for that person." S.C. Code Ann. § 56-1-1030(A) (2018). "If the [DMV] [then] determines . . . the person is a[] habitual offender as defined in [s]ection 56-1-1020, the [DMV] must revoke or suspend the person's driver's license." *Id.*

> When a trial judge finds the individual before him is a[] habitual offender, he "shall direct that the person not operate a motor vehicle on the highways of this [s]tate and [that he] surrender to the court his driver's license or permit." S.C. Code [Ann.] § 56-1-1070 (1976). The statute is clear and explicit; it leaves no room for construction. The [c]ourt must therefore apply it literally. Taken literally, the word "shall" is mandatory. We hold therefore that the Habitual Offender Act requires the judge to impose its penalty when . . . he finds the individual before him is a[] habitual offender.

State v. Foster, 277 S.C. 211, 212, 284 S.E.2d 780, 780 (1981) (third alteration by court) (citations omitted).

Section 56-1-1020 defines a habitual offender as "any person whose record as maintained by the [DMV] shows that he has accumulated the convictions for separate and distinct offenses described in subsections (a), (b) and (c) committed during a three-year period." Under subsection (a), to meet the definition of a habitual offender, a person must have three or more convictions for offenses including "(2) [o]perating or attempting to operate a motor vehicle while under the influence of intoxicating liquor, narcotics or drugs; (3) *[d]riving or operating a*

motor vehicle in a reckless manner;" and "(4) [d]riving a motor vehicle while his license, permit, or privilege to drive a motor vehicle has been suspended or revoked, except a conviction for driving under suspension for failure to file proof of financial responsibility." § 56-1-1020(a) (emphasis added). These offenses "include offenses under any federal law, *any law of another state* or any municipal or county ordinance of another state *substantially conforming to the above provisions.*" § 56-1-1020(c) (emphases added).

"The Driver License Compact is a multi-state law under which the participating states exchange information relating to convictions of drivers licensed in member states." *Przybyla v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 116, 118 n.1, 437 S.E.2d 70, 71 n.1 (1993). "[T]he compact provides that the conduct leading to an out-of-state conviction will be treated as if the conduct had occurred in the driver's home state." *Draeger v. Reed*, 82 Cal. Rptr. 2d 378, 381 (Cal. Ct. App. 1999) (quoting *The Driver License Compact and The Vehicle Equipment Safety Compact* (1962) pp. 3-4)). Under the compact, "upon receiving an out-of-state conviction report . . . a home state's responsibility is to determine whether the conduct underlying the conviction requires the imposition of a suspension." *Roselle v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing*, 865 A.2d 308, 311 (Pa. Commw. Ct. 2005).

In an appendix, the Code of Federal Regulations includes an abridged listing of the AAMVA Violations Exchange Code, used by the National Driver Register (NDR) for Recording Driver License Denials, Withdrawals, and Convictions of Motor Vehicle-Related Offenses. 23 C.F.R. pt. 1327, app. A (2017). The ACD "is an interpretive tool" for states participating in the Driver License Compact "to 'translate' the nature of the conviction reported by a sister state." *Hyer v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing*, 957 A.2d 807, 810 (Pa. Commw. Ct. 2008). The ACD "is not a reciprocal agreement, arrangement or declaration . . . . It is a federal regulation promulgated through the federal process . . . ." *Taddei v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing*, 982 A.2d 1249, 1252 (Pa. Commw. Ct. 2009) (citation omitted). The following are included in the ACD: "M80 Reckless, careless, or negligent driving[;] M81 Careless driving[;] M82 Inattentive driving[;] M83 Negligent driving[; and] M84 Reckless driving." 23 C.F.R. pt. 1327, app. A.

In the present case, the ALC found "[a]dministrative codes, such as those used by motor vehicle agencies, are for convenience and are not meant to supersede or replace statutory law." The ALC relied on a case from this court, *State v. Bennett*, 375 S.C. 165, 650 S.E.2d 490 (Ct. App. 2007), as support for that finding. That case looked at codes created as computer shortcuts for criminal statutes, explaining:

> CDR codes are four digit numerical codes [that] represent the criminal offenses created by the South Carolina General Assembly and common law. The codes were developed in the late 1970[]s in a collaborative effort between the South Carolina Justice Department (SCJD), [the Department of Probation, Parole and Pardon Services], and [the South Carolina Department of Corrections]. They were created at a time when computer systems had limited memory and did not have the capacity to maintain references to specific statutes [that] could contain many digits. The shorter CDR codes saved computer space and provided a consistent administrative shortcut to be used by all three departments.

Id. at 172-73, 650 S.E.2d at 494-95 (footnote and citations omitted).

This court determined in *Bennett* the CDR codes could not be relied on over a statute, finding:

> While the codes were developed and are used to provide an administrative shortcut, they were never intended to replace statutory law. The codes are normally listed after the statute on all warrants, indictments, and sentencing sheets. As the SCJD's website explains, the elements of a crime, its penalties and other related matters are governed by the Code of Laws and the common law alone. . . . The website further states in a disclaimer, "[t]he South Carolina Code of Laws is the controlling authority for classifications, definitions and penalties for criminal

> offenses, and **the statute itself should always be consulted.**"

Id. at 173, 650 S.E.2d at 495 (last alteration and emphasis added by court) (citations omitted) (quoting South Carolina Judicial Department, CDR Codes Frequently Asked Questions, http://www.sccourts.org/cdr/userInstructions.htm)

The document Virginia sent to the DMV that reported Dover's conviction includes under the heading "NATIVE CONV CODE" the code A46.2-86. The report also states under Reason for Conviction "RECKLS DRV-SPEEDING EXCESS OF 80MPH-MISD." Presumably, this refers to section 46.2-862 of the Virginia Code. That section of the Virginia Code contains the heading "Exceeding speed limit" and provides:

> A person shall be guilty of reckless driving who drives a motor vehicle on the highways in the Commonwealth (i) at a speed of twenty miles per hour or more in excess of the applicable maximum speed limit or (ii) in excess of eighty miles per hour regardless of the applicable maximum speed limit.

Va. Code Ann. § 46.2-862 (2017).

Article 7, Chapter 8, Subtitle III, of Title 46.2 of the Virginia Code is entitled "Reckless Driving and Improper Driving." This article contains fourteen statutes involving what the Virginia legislature has termed reckless driving. Va. Code Ann. §§ 46.2-852 to -865 (2017). The first of those fourteen statutes is entitled "Reckless driving; general rule" and provides, "Irrespective of the maximum speeds permitted by law, any person who drives a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb, or property of any person shall be guilty of reckless driving." Va. Code Ann. § 46.2-852 (2017).

Section 46.2-868 of the Virginia Code is entitled "Reckless driving; penalties" and provides:

> A. Every person convicted of reckless driving under the provisions of this article is guilty of a Class 1 misdemeanor.
>
> . . . .
>
> C. The punishment for every person convicted of reckless driving under the provisions of this article who, when he committed the offense, was in violation of § 46.2-1078.1 shall include a mandatory minimum fine of $250.

Va. Code Ann. § 46.2-868 (2017).

South Carolina has only one statute defining reckless driving. That statute provides:

> Any person who drives any vehicle in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving. The [DMV], upon receiving satisfactory evidence of the conviction, of the entry of a plea of guilty or the forfeiture of bail of any person charged with a *second* and subsequent offense for the violation of this section shall forthwith suspend the driver's license of any such person for a period of three months. Only those offenses [that] occurred within a period of five years including and immediately preceding the date of the last offense shall constitute prior offenses within the meaning of this section. Any person violating the provisions of this section shall, upon conviction, entry of a plea of guilty or forfeiture of bail, be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars or by imprisonment for not more than thirty days.

S.C. Code Ann. § 56-5-2920 (2018) (emphasis added).

As provided above, reckless driving is not one of the four categories of offenses listed in section 56-1-650(A) that are required to be reported by other states in the Driver License Compact. Therefore, section 56-1-650(C) necessitates we turn to section 56-1-320. Section 56-1-320(A) states the DMV "may, in its discretion, suspend or revoke the license of any resident of this [s]tate . . . to drive a motor vehicle in this [s]tate upon receiving notice of the conviction of the person in another state of an offense therein which, if committed in this [s]tate, would be grounds for the suspension or revocation of the South Carolina license." Even assuming the statute of which Dover was convicted in Virginia was equivalent to our reckless driving statute, section 56-1-320(A)—which the DMV argues should have been applied—does not apply because a reckless driving conviction by itself is not grounds for suspension in South Carolina. Accordingly, these two statutes are not pertinent to the situation here. Instead, we look to section 56-1-1020, which defines a habitual offender. Section 56-1-1020 defines a habitual offender as a driver who has been convicted at least three times in a three-year period of certain offenses, including reckless driving, DUS, and DUI. Dover admits her prior two convictions fall into these categories. Section 56-1-1020 further specifies the offenses provided "include offenses under . . . any law of another state *substantially conforming* to the above provisions." § 56-1-1020(c) (emphasis added)

Section 56-1-1030(A) mandates "[w]hen a person is convicted of one or more of the offenses listed in [s]ection 56-1-1020(a), (b), or (c), the [DMV] must review its records for that person. If the [DMV] determines after review of its records that the person is a[] habitual offender as defined in [s]ection 56-1-1020, the [DMV] must revoke or suspend the person's driver's license." The question presented here is whether Dover's Virginia conviction substantially conforms to any offenses listed in section 56-1-1020(a), thus requiring the DMV to review its records to determine if she meets the definition of a habitual offender. The only offense in section 56-1-1020(a) relevant to the offense here is "driving in a reckless manner." The South Carolina reckless driving statute provides, "Any person who drives any vehicle in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving." § 56-5-2920.

The DMV argues because the offense is titled by Virginia as reckless driving and Virginia reported it to South Carolina using the ACD code for reckless driving, the DMV determined Dover had been convicted of reckless driving, triggering review.

Virginia reported the conviction under ACD code M84, which only states "reckless driving." The only other ACD code that includes the term reckless driving is M80, which is for "Reckless, careless, or negligent driving."

The problem is the difference in the definition of reckless in South Carolina versus Virginia statutory nomenclature. As previously set forth, South Carolina has one reckless statute and Virginia has fourteen. The ALC determined the DMV could not simply rely on the code at face value alone. We find the ALC correctly upheld the hearing officer's rescinding Dover's license suspension because section 46.2-862 of the Virginia Code does not substantially conform to South Carolina's reckless driving statute. While our reckless driving statute requires a willful or wanton disregard for safety, the Virginia statute under which Dover was charged simply requires a driver to be driving over eighty miles per hour to be in violation of that statute. The hearing officer, which is considered the agency in this case, found the offense for which Dover was convicted would not have been considered reckless driving in South Carolina but rather section 56-5-1520(B)(1) of the South Carolina Code, speeding. *See McCarson*, 391 S.C. at 144, 705 S.E.2d at 429 ("[T]he [O]MVH is an agency under the Administrative Procedures Act."). This interpretation was not "arbitrary, capricious, or manifestly contrary to the statute." *See Kiawah Dev. Partners, II*, 411 S.C. at 34-35, 766 S.E.2d at 718 ("[W]he[n] an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" (quoting *Chevron, U.S.A., Inc.*, 467 U.S. at 844)). Therefore, we defer to the hearing officer's interpretation.

As to the DMV's argument that it does not have the resources to research each M84 violation from Virginia to determine which reckless driving statute applies, we note that here, the report from Virginia specifically noted Dover was charged with going over eighty miles per hour, thus no investigation was necessary. Further, this court can only apply the statute as written, and the statute requires the offense substantially conform.[5]

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[5] The DMV also argues the OMVH hearing officer erred in finding the DMV's decision to suspend Dover's license was discretionary. The ALC reversed the OMVH hearing officer's finding the DMV's decision to suspend Dover's license

CONCLUSION

The ALC's order is

AFFIRMED AS MODIFIED.

SHORT and GEATHERS, JJ., concur.

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was discretionary. "'Only a party aggrieved by an order, judgment, sentence[,] or decision may appeal.' If a party prevails on an issue below, the party is not an aggrieved party with respect to those rulings, and thus, the party may not appeal those issues." *Davis v. S.C. Dep't of Motor Vehicles*, 420 S.C. 98, 103-04, 800 S.E.2d 493, 495 (Ct. App. 2017) (alteration by court) (quoting Rule 201(b), SCACR). In *Davis*, this court declined to address an issue on which the ALC had ruled in the DMV's favor because the DMV was not an aggrieved party and thus was not entitled to appeal that issue. *Id.* at 104, 800 S.E.2d at 495-96. In the present case, because the ALC reversed this finding by the hearing officer, the DMV was not aggrieved by it and we do not need to review it.