The Supreme Court of South Carolina

RE: Lawyers Suspended by the Commission on Continuing Legal Education and Specialization

The Commission on Continuing Legal Education and Specialization has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(b)(2), SCACR, since April 1, 2008. This list is being published pursuant to Rule 419(d)(2), SCACR. If these lawyers are not reinstated by the Commission by June 1, 2008, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e)(2), SCACR.

Columbia, South Carolina
May 6, 2008

ATTORNEYS SUSPENDED FOR NON-COMPLIANCE
FOR THE 2007-2008 REPORTING PERIOD
AS OF MAY 1, 2008

Jeffrey S. Black
32 Delaware Road
Goose Creek, SC 29445
(SUSPENDED BY BAR 2/1/08)

Carole H. Brown
1413 Highway 17 S., #104
Surfside Beach, SC 29575

Piero Bussani
595 S. Federal Hwy., Ste 600
Boca Raton, FL 33432
(SUSPENDED BY BAR 2/1/08)

Kenneth Lee Cleveland
2330 Highland Avenue
Birmingham AL 35205

Veronica H. Cope
The Rose Law Firm, PLLC
1600 Parkwood Circle, SE, Ste 320
Atlanta, GA 30339

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(INTERIM SUSPENSION 7/13/05)

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Charleston, SC 29418
(INTERIM SUSPENSION 12/19/07)

George M. Fisher
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(SUSPENDED BY BAR 2/1/08)

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(SUPSENDED BY BAR 2/1/08)

Alice Shaw Heard
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Macon, GA 31210
(SUSPENDED BY BAR 2/1/07)

O. Tresslar Hydinger
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Adria Leta Johnson
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Springfield, VA 22152

Kimla C. Johnson
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Nettleton, MS 38858
(SUSPENDED BY BAR 2/1/08)

James R. Jones II
PO Box 5863
Columbia, SC 29250
(INTERIM SUSPENSION 11/27/07)

Michael T. Jordan
PO Box 1107
Beaufort, SC 29901
(INTERIM SUSPENSION 8/8/07)

William O. Key, Jr.
PO Box 15057
Augusta, GA 30919
(SUSPENDED BY BAR 2/1/08)

Linda M. Leslie
PO Box 2544
Greenville, SC 29602

Melissa A. Malarcher
533 Northhampton Drive
Shreveport, LA 71106

1/28/08)

Gena W. McCray
Howard Green & Moye, LLP
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Raleigh, NC 27605

Henry E. McFall
McFall Law Firm
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Columbia, SC 29210
(SUSPENDED BY BAR 2/1/08)

Jane M. Moody
10219 Dunbarton Blvd.
Barnwell, SC 29812
(SUSPENDED BY BAR 2/1/08)

Charles N. Pearman
5050 Sunset Blvd
Lexington, SC 29072
(INTERIM SUSPENSION 11/3/06)

Marvin L. Robertson, Jr.
Robertson Law Firm
1002 Anna Knapp Blvd
Mt. Pleasant, SC 29464
(INTERIM SUSPENSION 2/22/08)

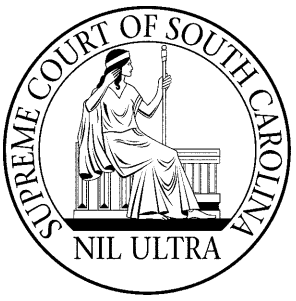
Maxwell G. Schardt
Richland County Public Defender
PO Box 192
Columbia, SC 29202
(SUSPENDED BY BAR 2/1/08)

William R. Sims
PO Box 645
Kershaw, SC 29067

William G. Stewart
824 Queen Charlotte Court
Charlotte, NC 28211

O. Lee Sturkey
203 S. Main Street
McCormick, SC 29835
(9-MTH SUSPENSION BY COURT

William R. Witcraft, Jr.
115-B W. 7th North Street
Summerville, SC 29483
(INTERIM SUSPENSION 3/27/08)



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19

May 12, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

4377-Hoard v. Roper Hospital	Pending
2008-UP-084-First Bank v. Wright	Pending
2008-UP-116-Miller v. Ferrellgas	Pending
2008-UP-122-Ex parte: GuideOne	Pending
2008-UP-131-State v. Jimmy Owens	Pending
2008-UP-140-Palmetto Bay Club v. Brissie	Denied 04/28/08
2008-UP-173-Professional Wiring v. Thomas Sims	Pending
2008-UP-186-State v. Jackson	Pending
2008-UP-187-State v. Marlon Rivera	Pending
2008-UP-192-City of Columbia v. Mamie Jackson	Pending
2008-UP-194-State v. David Dwight Smith	Pending
2008-UP-196-MidFirst Bank v. Marie Brooks	Pending
2008-UP-199-Brayboy v. WorkForce	Pending
2008-UP-200-City of Newberry v. Newberry Electric	Pending
2008-UP-204-White's Mill Colony v. Arthur Williams	Pending
2008-UP-207-Plowden Construction v. Richland	Pending
2008-UP-209-Jamia Hoard v. Roper Hospital	Pending
2008-UP-218-State v. Larry Gene Martin	Pending
2008-UP-223-State v. Clifton Lyles	Pending
2008-UP-224-Roberson v. White	Pending
2008-UP-226-State v. Gerald Smith	Pending
2008-UP-240-Weston v. Weston	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4220-Jamison v. Ford Motor	Pending
4233-State v. W. Fairey	Pending
4235-Collins Holding v. DeFibaugh	Pending
4237-State v. Rebecca Lee-Grigg	Pending
4243-Williamson v. Middleton	Pending
4247-State v. Larry Moore	Pending
4251-State v. Braxton Bell	Pending
4256-Shuler v. Tri-County Electric	Pending
4258-Plott v. Justin Ent. et al.	Pending
4259-State v. J. Avery	Pending
4261-State v. J. Edwards	Pending
4262-Town of Iva v. Holley	Pending
4264-Law Firm of Paul L. Erickson v. Boykin	Pending
4265-Osterneck v. Osterneck	Pending
4267-State v. Terry Davis	Pending
4270-State v. J. Ward	Pending
4271-Mid-South Mngt. v. Sherwood Dev.	Pending
4272-Hilton Head Plantation v. Donald	Pending
4274-Bradley v. Doe	Pending
4275-Neal v. Brown and SCDHEC	Pending

4276-McCrosson v. Tanenbaum	Pending
4277-In the matter of Kenneth J. White	Pending
4279-Linda Mc Co. Inc. v. Shore	Pending
4284-Nash v. Tindall	Pending
4285-State v. Danny Whitten	Pending
4286-R. Brown v. D. Brown	Pending
4289-Floyd v. Morgan	Pending
4291-Robbins v. Walgreens	Pending
4292-SCE&G v. Hartough	Pending
4295-Nationwide Ins. Co. v. James Smith	Pending
4296-Mikell v. County of Charleston	Pending
4298-James Stalk v. State	Pending
4300-State v. Carmen Rice	Pending
4306-Walton v. Mazda of Rock Hill	Pending
4307-State v. Marshall Miller	Pending
4308-Hutto v. State	Pending
4309-Brazell v. Windsor	Pending
4310-State v. John Boyd Frazier	Pending
4312-State v. Vernon Tumbleston	Pending
4314-McGriff v. Worsley	Pending
4315-Todd v. Joyner	Pending
4319-State v. Anthony Woods (2)	Pending

4325-Dixie Belle v. Redd	Pending
4327-State v. J. Odom	Pending
4328-Jones v. Harold Arnold's Sentry	Pending
4335-State v. Lawrence Tucker	Pending
4338-Friends of McLeod v. City of Charleston	Pending
2006-UP-315-Thomas Construction v. Rocketship Prop.	Pending
2007-UP-054-Galbreath-Jenkins v. Jenkins	Pending
2007-UP-125-State v. M. Walker	Pending
2007-UP-151-Lamar Florida v. Li'l Cricket	Pending
2007-UP-172-Austin v. Town of Hilton Head	Pending
2007-UP-187-Salters v. Palmetto Health	Pending
2007-UP-199-CompTrust AGC v. Whitaker's	Pending
2007-UP-202-L. Young v. E. Lock	Pending
2007-UP-249-J. Tedder v. Dixie Lawn Service	Pending
2007-UP-255-Marvin v. Pritchett	Pending
2007-UP-272-Mortgage Electronic v. Suite	Pending
2007-UP-316-Williams v. Gould	Pending
2007-UP-318-State v. Shawn Wiles	Pending
2007-UP-329-Estate of Watson v. Babb	Pending
2007-UP-340-O'Neal v. Pearson	Pending
2007-UP-341-Auto Owners v. Pittman	Pending

2007-UP-350-Alford v. Tamsberg	Pending
2007-UP-351-Eldridge v. SC Dep't of Transportation	Pending
2007-UP-354-Brunson v. Brunson	Pending
2007-UP-358-Ayers v. Freeman	Pending
2007-UP-364-Alexander Land Co. v. M&M&K	Pending
2007-UP-384-Miller v. Unity Group, Inc.	Pending
2007-UP-460-Dawkins v. Dawkins	Pending
2007-UP-493-Babb v. Noble	Pending
2007-UP-498-Gore v. Beneficial Mortgage	Pending
2007-UP-513-Vaughn v. SCDHEC	Pending
2007-UP-528-McSwain v. Little Pee Dee	Pending
2007-UP-530-Garrett v. Lister	Pending
2007-UP-533-R. Harris v. K. Smith	Pending
2007-UP-546-R. Harris v. Penn Warranty	Pending
2007-UP-556-RV Resort & Yacht v. BillyBob's	Pending
2008-UP-048-State v. Edward Cross (#1)	Pending
2008-UP-104-State v. Damon Jackson	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Michael D. Thrift, Appellant.

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 26481
Heard April 16, 2008 – Filed May 12, 2008

AFFIRMED

Chief Appellate Defender Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster; Chief Deputy Attorney General John W. McIntosh; Assistant Deputy Attorney General Salley W. Elliott; Assistant Attorney General Julie M. Thames; all of Columbia; and Solicitor Barbara R. Morgan, of Aiken, for Respondent.

PER CURIAM: Michael D. Thrift appeals from his guilty plea to assault and battery with intent to kill and his sentence of twelve years. He argues the plea judge's comments regarding his right to appeal rendered his plea conditional and that there should be another procedure in place for appeals of non-meritorious guilty pleas. We affirm Thrift's guilty plea and sentence pursuant to Rule 220(b), SCACR, and the following authorities: State v. Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 379-40 (2004) (finding that a plea was not a conditional one where the defendant did not attempt to reserve his right to later deny or qualify his guilt); State v. Passaro, 350 S.C. 499, 505, 567 S.E.2d 862, 866 (2002) (noting that a guilty plea generally acts as a waiver of all non-jurisdictional defects and defenses); Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000) ("To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him."); State v. Munsch, 287 S.C. 313, 314, 338 S.E.2d 329, 330 (1985) (holding a guilty plea admits the elements of the offenses charged and leaves open for review only the sufficiency of the indictment and waives all other defenses); State v. Thomason, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (Ct. App. 2000) (noting that where an appellant seeks to reopen a guilty plea proceeding, the inquiry is generally confined to whether the plea was knowingly and voluntarily entered); Rule 201(a), SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order or decision.").

Further, we take this opportunity to point out to the bench and bar that a new procedure has already been promulgated by this Court to deal with guilty pleas. Effective May 1, 2008, Rule 203, SCACR, was amended to require an explanation of issues be filed with the notice of appeal from a guilty plea:

> (B)(iv) If the appeal is from a guilty plea, an Alford plea or a plea of nolo contendere, a written explanation showing that there is an issue which can be reviewed on appeal. This explanation should identify the issue(s) to be raised on appeal and the factual basis for the issue(s) including how the

> issue(s) was raised below and the ruling of the lower court on that issue(s). If an issue was not raised to and ruled upon by the lower court, the explanation shall include argument and citation to legal authority showing how this issue can be reviewed on appeal. If the appellant fails to make a sufficient showing, the notice of appeal may be dismissed.

AFFIRMED.

TOAL, C.J., MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Gary White, III, Respondent.

Opinion No. 26482
Heard April 1, 2008 – Filed May 12, 2008

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, C. Tex Davis, Jr., Assistant Disciplinary Counsel, both of Columbia; for Office of Disciplinary Counsel.

Irby E. Walker, Jr., of Conway; for Respondent.

PER CURIAM: This is an attorney disciplinary matter involving a Complaint against William Gary White, III (Respondent) for his representation of a client in a personal injury case. After a full investigation by the Office of Disciplinary Counsel (ODC), the Commission on Lawyer Conduct filed formal charges against Respondent. After a hearing before the Commission on Lawyer Conduct Panel (Panel), the hearing panel recommended Respondent be sanctioned to a ninety-day definite suspension from the practice of law and be required to pay the costs of the proceedings. Due to the gravity of Respondent's misconduct, we believe a harsher sanction is warranted. Accordingly, we hereby suspend Respondent for six months and order him to pay the costs of the proceedings.

FACTS

On October 5, 2004, Client was involved in an automobile accident in which she sustained injuries. Three days later, Client sought to retain Respondent to represent her to recover for her injuries and property damage. During the initial meeting, Client signed a retainer agreement which stated in part, "I authorize my attorney to receive settlement checks on my behalf, endorse my name and deposit same for distribution."

In the latter part of July 2005, Respondent negotiated a settlement with GEICO in the amount of $5,500. In a letter dated August 3, 2005, GEICO submitted a Release to Respondent and referenced a settlement check. According to the letter, the settlement check dated August 3, 2005, had been sent under a separate cover. The letter instructed Respondent to hold all funds in escrow until Respondents' clients had signed and returned the Release to GEICO. The Release and settlement check were to be signed by Client and her husband. Client's husband was not represented by Respondent and had never accompanied his wife to any of her meetings with Respondent. Upon receipt of the check, Respondent endorsed it by signing his name, Client's name, and her husband's name. Respondent deposited the check into his trust account and then disbursed his legal fees from the settlement proceeds and transferred the amount into his operating account.

On August 22, 2005, Client met with Respondent who informed her that the case was closed and there was nothing else that could be done despite Client's complaints that she was still in pain and receiving medical treatment. Client expressed dissatisfaction with the settlement and ceased any further contact with Respondent. In December 2005, Respondent's office contacted Client in a failed attempt to get Client to pick up her settlement check.

In May 2006, Client retained another attorney (Attorney) to represent her in a legal malpractice action against Respondent and to further pursue her personal injury claim. During Attorney's investigation of the personal injury case, she discovered from GEICO that a Release had not been signed. Because Respondent had retained the settlement proceeds, Attorney

corresponded in writing with him requesting that he return the proceeds to GEICO in order that she could settle Client's case. In his responses, Respondent claimed that Client had authorized him to settle the case and he was not required to return the funds. Respondent also challenged Attorney's allegation that Client had an additional claim and implied that such a claim would be fraudulent.

Ultimately, Respondent returned the settlement proceeds to GEICO less his fee of $1,879.75. Following the return of the funds, Attorney negotiated a settlement of $15,000 from GEICO less the fees retained by Respondent. Attorney also settled with State Farm, Client's insurance carrier, for $50,000, which represented her underinsured coverage. This settlement took into account the medical bills that Client acquired after she terminated her representation with Respondent, which included a rotator cuff surgery in September 2005 for an injury attributed to the October 2004 automobile accident.

Due to Respondent's conduct, Client filed a Complaint against Respondent with the ODC. On May 25, 2006, ODC notified Respondent regarding the investigation of Client's Complaint. Respondent filed a response to the notice on June 22, 2006. On November 30, 2006, Respondent appeared as the sole witness for a hearing conducted by disciplinary counsel before an investigative panel.

Based on its investigation, the investigative panel authorized formal charges against Respondent. The ODC filed formal charges against Respondent on March 22, 2007. In his Response to the charges, Respondent admitted he: (1) had negotiated the settlement on behalf of Client; and (2) endorsed the settlement check with his name and Client's name. Because he believed that Client had authorized him to settle her case, he denied any misconduct. Although he neither admitted nor denied signing Client's husband's name, he admitted that he deposited the settlement check in his trust account and transferred the amount of his legal fees into his operating account. He further admitted that at the time of the disbursement of the legal fees Client had not signed any type of settlement or disbursement sheet.

At the hearing before the Panel, the following witnesses were presented: Client, Client's husband, Attorney, and another witness (Witness A)[1] who recounted Respondent's actions.

Respondent gave a different account of his representation of Client. Respondent, a sole practitioner, testified he had practiced law for thirty-one years during which time he had handled personal injury cases. In terms of representing Client, Respondent testified he felt Client was "anxious to settle" given she frequently called his office to inquire about a settlement. Because he believed that Client was released from medical treatment on July 8, 2005[2], he pursued a settlement with GEICO in the latter part of July 2005. According to Respondent, Client authorized him to settle her case for $6,000. Respondent claimed he entered into an agreement with GEICO to settle the case after several failed attempts to consult with Client regarding a settlement. He further stated that in all of his years of practice he had never settled a claim without his client's permission.

Respondent admitted that after receiving the settlement check from GEICO he signed Client's name to the check. Although he could not specifically recall signing Client's husband's name to the check, he testified that if he signed the check it was done without a fraudulent intent. Respondent further admitted he deposited the settlement check in his trust account and transferred the amount of his legal fees into his operating account. Respondent believed this conduct was permissible and not in

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[1] Witness A, who worked for Respondent as an administrative assistant during the Client matter, testified she had been present when Respondent returned phone calls to Client. She further testified she spoke with Client several times a week regarding her case. Additionally, she claimed Client had told her that she had been released from her doctor prior to August 2005. However, Witness A stated Client never told her that she wanted to settle her case.

[2] Respondent offered into evidence a message from his office phone log on July 8, 2005, stating that Client was released from the doctor and ready to proceed. Respondent claimed to have Client's medical bills prior to entering into the agreement with GEICO.

violation of GEICO's instructions because he received the settlement check prior to receiving GEICO's letter. Respondent further testified he did not believe any of his conduct, while representing Client, was unethical.

On cross-examination, Respondent admitted he sent a medical release to Client's orthopedist on August 22, 2005, in which he requested Client's medical records from August 1, 2005. Respondent was unable to explain why he made this request after he entered into a settlement agreement with GEICO in July 2005. In terms of endorsing the settlement check, Respondent conceded that he was not authorized to sign for Client's husband; however, he claimed he did so because he was concerned about losing the check before it was properly endorsed.

After the hearing, the Panel found Respondent engaged in misconduct in violation of the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1, RPC (Competence); Rule 1.2, RPC (Scope of Representation; Allocation of Authority between Client and Lawyer); Rule 1.4, RPC (Communication); Rule 1.5 (Fees); Rule 1.15, RPC (Safekeeping Client's Property); and Rules 8.4(d) and (e), RPC (Misconduct). The Panel recommended that Respondent be suspended for a period of ninety days and pay the costs of the proceedings.

DISCUSSION

Although Respondent raises eleven exceptions to the Panel's report, we believe Respondent is essentially challenging the Panel's: (1) factual findings; (2) decision regarding the exclusion of certain testimony; and (3) imposition of a ninety-day suspension.

"This Court has the sole authority to discipline attorneys and to decide the appropriate sanction after a thorough review of the record." In re Thompson, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "Although this Court is not bound by the findings of the Panel and Committee, these findings are entitled to great weight, particularly when the inferences to be drawn from the testimony depend on the credibility of witnesses." In re Marshall, 331 S.C. 514, 519, 498 S.E.2d 869, 871 (1998). "However, this

Court may make its own findings of fact and conclusions of law." Id. Furthermore, a disciplinary violation must be proven by clear and convincing evidence. In re Greene, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006).

I. Factual Findings

In terms of the Panel's factual findings, Respondent contends the Panel erred in: (1) finding that his testimony was not credible; (2) placing emphasis on the fact that he settled the case for less than Client had authorized; (3) finding he violated GEICO's instructions to hold the settlement proceeds in escrow until the Release was signed by Client and her husband; (4) finding he did not have proper authorization from Client to settle her case; (5) finding he failed to present Client with any settlement or disbursement statement; (6) placing emphasis on the fact that he obtained medical releases from Client after the case was settled; and (7) making a statement that Respondent's failure to promptly return the settlement proceeds to GEICO after requested to do so by Attorney caused the Panel "grave concern."

The Panel prefaced its decision with a specific finding that Respondent's testimony was not credible. Because the inferences drawn from testimony in the record depended largely on the credibility of the witnesses, we believe this finding by the Panel is significant in terms of assessing Respondent's exceptions to the Panel's ultimate decision.

Deferring to the Panel on its credibility determination, we find there is evidence to support each of the factual findings challenged by Respondent. First, Client denied ever authorizing Respondent to settle her case for $6,000. Thus, the Panel's emphasis on the fact that Respondent settled Client's claim for less than $6,000 does not establish error on the part of the Panel as argued by Respondent. Instead, the Panel's finding was merely intended to support its determination as to Respondent's credibility.

Secondly, Respondent admitted that he endorsed the settlement check, deposited it into his trust account, and transferred his legal fees to his operating account. Clearly, Respondent's actions were in direct violation of the instructions by GEICO that Respondent retain the settlement proceeds in

his trust account until the parties signed and returned the Release. Even if, as Respondent contends, the settlement check was received prior to the GEICO instruction letter, this would not negate Respondent's misconduct. Once he received the letter, Respondent should have withdrawn his legal fees from the operating account and transferred them back to his trust account. Furthermore, Respondent was aware on August 22, 2005, that Client did not intend to sign the GEICO release. Thus, per GEICO's instruction, Respondent should have returned his legal fees to his trust account until the matter was resolved. As of the date of the Panel hearing on June 27, 2007, Respondent still retained the amount of his legal fees in his operating account.

Thirdly, again deferring to the Panel's credibility determination, there is evidence to support the Panel's finding that Respondent did not have proper authorization to settle Client's case. Respondent's reliance on his retainer agreement to support his decision to settle the case is misplaced. The terms of the retainer agreement only authorized Respondent to receive a settlement check and endorse a client's name if the client agreed to the proposed settlement. Here, Client adamantly denied authorizing Respondent to settle her case.

Fourthly, there is evidence to support the Panel's finding that Client had not signed any settlement or disbursement statement. Respondent admitted that Client never signed a release for the settlement check. Moreover, even at their last meeting on August 22, 2005, Client expressed dissatisfaction with the settlement, did not sign any documents, and ceased all further contact with Respondent.

Fifthly, there is evidence to support the Panel's finding that Respondent sought to obtain medical releases for Client's records after the case was settled. Respondent believes this finding was irrelevant to a determination of misconduct. We believe the Panel's finding was intended to establish that Respondent was not a credible witness. Respondent never adequately explained his decision to seek a medical release to obtain Client's medical records in August 2005 after he had settled the case in July 2005. According to Respondent, he claimed he had in his possession all of Client's medical

records at the time he entered into the settlement agreement. Respondent also testified that he informed Client on August 22, 2005, that the case had been settled and nothing could be done regarding any additional medical treatment for her injuries. Thus, the fact that he requested additional medical records after the settlement and this meeting created a discrepancy in Respondent's testimony and would again draw into question his credibility.

Finally, the Panel was justified in expressing concern over the fact that Respondent declined to promptly return the settlement proceeds to GEICO when requested by Attorney. Respondent admitted that Client never signed a settlement release. He also knew of the correspondence between Attorney and GEICO regarding a potential settlement of Client's claim. Therefore, Respondent was aware that Client's personal injury claim with GEICO had not been finalized. Despite this knowledge, Respondent delayed returning the funds to GEICO. Additionally, Respondent never relinquished the amount of his attorney fees even though he failed to procure a final settlement for Client. Respondent's failure to promptly return the entire amount of the settlement proceeds impeded Attorney's progress in pursuing Client's claim with GEICO.

II. Exclusion of Testimony

Respondent contends the Panel erred in ruling that neither he nor his proposed witness (Witness B) could testify regarding problems Respondent encountered with Attorney prior to his representation of Client.

At the start of the hearing, Respondent's counsel indicated that he intended to call Witness B, a former client of Attorney's and a member of Respondent's office staff who was also his client. According to Respondent's counsel, Witness B was to testify regarding the "bad blood" that existed between Respondent and Attorney prior to the Client matter. Counsel also intended to elicit testimony from Witness B regarding a grievance she had filed against Attorney. Disciplinary counsel objected to the admission of this testimony on the ground it was irrelevant to a determination of Respondent's alleged misconduct. After hearing arguments from counsel, the Panel ruled that Respondent's counsel could not present

any testimony regarding a grievance against Attorney and needed to limit the testimony to only the interactions between Attorney and Respondent regarding the Client matter.

Unless provided otherwise in a specific rule, the South Carolina Rules of Evidence for non-jury civil matters and the South Carolina Rules of Civil Procedure apply to lawyer disciplinary proceedings. Rule 413, SCACR; Rule 9, RLDE. We hold the Panel properly limited the proposed testimony on the ground that it was not relevant. See Rule 401, SCRE ("'Relevant' evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). Because the Panel was only considering the formal charges against Respondent, the testimony presented was properly confined to Respondent's representation of Client. Furthermore, given that Attorney was called as a witness, Respondent's counsel was able to attack her credibility and establish any potential bias or prejudice she may have had against Respondent.

III. Ninety-Day Suspension

Finally, Respondent challenges the Panel's recommendation of a ninety-day suspension. He contends the recommendation was not warranted because: (1) his endorsement of Client's husband's name on the GEICO settlement check was "either harmless error, or such an error as should not cause a suspension of his license;" and (2) the evidence did not support the Panel's findings that he committed several serious breaches of ethical conduct in violation of the Rules of Professional Conduct.

A.

In its report, the Panel concluded that Respondent violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1, RPC ("A lawyer shall provide competent representation to a client. Competent

representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); Rule 1.2, RPC ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter."); Rule 1.4, RPC (providing that a lawyer shall keep the client informed and consult with the client regarding means by which client's objectives are to be accomplished); Rule 1.5, RPC (stating that "[u]pon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination"); Rule 1.15, RPC (providing that a lawyer shall: safeguard client's property; deposit unearned legal fees into client trust account; and render full accounting regarding client's property); Rule 8.4(d), RPC (stating it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); and Rule 8.4(e), RPC (stating it is professional misconduct for a lawyer "engage in conduct that is prejudicial to the administration of justice").

We hold there was clear and convincing evidence that Respondent violated each of the above-listed Rules of Professional Conduct. Deferring to the credibility determination of the Panel, Client testified she never authorized Respondent to settle her case. Yet, Respondent settled Client's claim without her consent and despite the knowledge that she was still receiving medical treatment for her injuries. We find this conduct was in violation of Rule 1.1 (Competence); Rule 1.2 (Scope of Representation; Allocation of Authority between Client and Lawyer); and Rule 1.4 (Communication). Furthermore, Respondent engaged in fraudulent conduct in violation of Rule 8.4(d) when he signed Client's husband's name to the settlement check without his consent and without an agreement to represent him. In terms of Respondent's handling of the settlement proceeds, Respondent's decision to negotiate the settlement check in violation of GEICO's instructions and to disburse his legal fees to his operating account

constitutes a violation of Rule 1.5 (procedure lawyer should follow after conclusion of contingent fee matter) and Rule 1.15 (safekeeping client's property). Finally, Respondent's failure to promptly return the entire amount of the settlement proceeds to GEICO prevented Attorney from expeditiously pursuing Client's personal injury claim; therefore, we find this conduct was in violation of Rule 8.4(e) (conduct which is prejudicial to the administration of justice). Although not listed by the Panel, we also find this conduct violated Rule 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. The lawyer may retain a reasonable nonrefundable retainer.").

B.

With respect to the Panel's recommendation of a ninety-day suspension, there is precedent to establish that this sanction is within the range this Court has imposed in the past where attorneys have engaged in similar misconduct. However, due to Respondent's egregious conduct and the fact that he has been sanctioned by this Court in the past,[3] we find the Panel's recommendation is inadequate and a harsher sanction is warranted. Therefore, we hereby sanction Respondent to a six-month definite suspension and order him to pay the costs of the proceedings. See, e.g., In re Nwangaza, 362 S.C. 208, 608 S.E.2d 132 (2005) (finding public reprimand was warranted, upon submission of agreement, where attorney negotiated personal injury settlement check without client's consent/endorsement; deposited proceeds into trust account; issued a check for client's medical

[3] See In re White, 328 S.C. 88, 492 S.E.2d 82 (1997) (holding public reprimand was warranted for attorney's improperly retaining client file, ex parte communication with the court, and commingling personal funds with client trust funds).

provider and withdrew her contingency fees; and failed to maintain the appropriate balance in her trust account until the dispute over the fees in a domestic matter was resolved); In re Williams, 336 S.C. 578, 521 S.E.2d 497 (1999) (accepting parties' agreement and holding that public reprimand was warranted where attorney: failed to properly safeguard his client's property by neglecting to promptly notify his client of settlement and fraudulently endorsing settlement check; failed to use proper accounting methods; failed to keep his client reasonably informed about status of case; failed to comply with demand for payment; made false statements to the Commission on Lawyer Conduct and other party in suit; and created a false Disbursement Sheet); In re Belding, 356 S.C. 319, 589 S.E.2d 197 (2003) (finding one-year suspension was appropriate sanction where attorney: settled case without first obtaining client's consent; drafted false documents which included names of real lawyers and a judge; failed to inform client regarding status of case; and failed to take steps to protect his client's interest after he attempted to be relieved as counsel following a "charade to conceal his mistakes"); In re Lewis, 344 S.C. 1, 542 S.E.2d 713 (2001) (holding attorney's engaging in improper banking practices, misappropriating client funds, signing clients' names to settlement documents and checks without clients' knowledge or consent, making false statement to disciplinary counsel, and violating financial record keeping warranted disbarment); In re Ring, 320 S.C. 249, 464 S.E.2d 328 (1995) (concluding sanction of disbarment warranted where: attorney settled case without client's authorization; forged client's signature; failed to keep client informed or respond to client's inquiries; misappropriated client funds; terminated representation without taking steps to protect client's interests; issued a bad check; and failed to cooperate in investigation); In re Smith, 310 S.C. 449, 427 S.E.2d 634 (1992) (holding disbarment was appropriate sanction where attorney: entered into settlement without client's consent and negotiated settlement check by forging client's signature; improperly handled client funds; failed to deliver property to client; failed to notify client of receiving funds in which client had an interest; made false statements to third party and Board; failed to cooperate with investigation; failed to competently and diligently represent clients; and improperly disclosed client confidence).

CONCLUSION

In view of the gravity of Respondent's misconduct, we hereby suspend Respondent from the practice of law for six months. Additionally, we order Respondent to pay costs associated with this proceeding within ninety days of the filing of this opinion. Within fifteen days of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Tyrone Shumpert, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Laurens County
Wyatt T. Saunders, Jr., Post-Conviction Relief Judge

Opinion No. 26483
Submitted April 16, 2008 – Filed May 12, 2008

AFFIRMED

Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Julie M. Thames, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The post-conviction relief ("PCR") court denied relief to Petitioner Tyrone Shumpert, and Petitioner requested that this Court issue a writ of certiorari to review the PCR court's decision. This Court issued the writ to review whether the PCR court erred in refusing to admit an affidavit which purportedly contains evidence of jury misconduct. Because we find the PCR court did not err in refusing to admit the affidavit, we affirm.

FACTUAL/PROCEDURAL BACKGROUND

The criminal case that preceded this PCR action arose out of an armed robbery which occurred late one evening in May 2002, in Laurens County, South Carolina. A small band of individuals robbed the two patrons of a local laundromat, and although the total number of criminal participants and the number of participants who were armed is disputed, it is undisputed that at least some of the robbers brandished firearms during the robbery. One of the confessed participants implicated Petitioner in the crime, and the State charged Petitioner with two counts of armed robbery, one count of conspiracy to commit armed robbery, and one count of possession of a firearm or knife during the commission of a violent crime.

The State's case at trial consisted of the testimonies of the victims and the confessed participant. The confessed participant testified to Petitioner's involvement in the crime, but neither of the victims could identify Petitioner as having been involved in the robbery. Believing that the State's case in chief was relatively weak, Petitioner opted not to put up a defense in order to give the last closing argument to the jury. The jury acquitted Petitioner of the possession charge, but convicted him on the armed robbery and conspiracy charges. Petitioner received a total sentence of twenty-two years imprisonment, and his direct appeal was dismissed by the court of appeals pursuant to *Anders v. California*, 386 U.S. 738 (1967).

Petitioner filed a PCR application, and at the PCR hearing, Petitioner sought to admit an affidavit of one of the jurors in his criminal trial as evidence of jury misconduct. In relevant part, the affidavit provides:

> I recall it being discussed in the jury room that if [Petitioner] wasn't guilty [] he would have taken the stand and informed us, and also one of the jurors stated that if he wasn't guilty [] he would have had family members or witnesses take the stand to tell us.
>
> There were a couple of people at least, maybe more, that made these statements. I firmly believe that these comments weighed importantly in the jury deciding to convict [Petitioner]. The tall skinny white lady who kept wanting to talk to [the trial court] seemed very concerned by this and I believe it played a big part in her decisions. She was very confused about it all. Also the preacher's wife, I can't recall her name, was very unsure about it.
>
> I don't recall anybody in the jury room mentioning the judge telling us not to consider that. I do remember the judge saying that we can only "reach a decision based on the evidence presented before you today."
>
> I think when we voted we were ten to two to convict when the ladies asked the judge if they could go home and sleep on it. If I had it to do again, it would have been nine to three because I think I let those comments about him not testifying swing my vote. Deep down inside I think we made a wrong decision and for the wrong reason – basically for the comments that were made in that room about him not getting up to deny it. I also believe that we made those ladies change their vote because of that. I feel that others in that jury, if they are asked, will agree with me, especially those two ladies.

At the PCR hearing, Petitioner argued that the affidavit constituted evidence that some jurors may have considered the fact that Petitioner did not testify at trial in their deliberations. The State argued that the affidavit was inadmissible under the rules of evidence and the relevant jurisprudence, and that the affidavit was based largely on hindsight and speculation. The PCR

court held that the affidavit was inadmissible, and the hearing continued in order to address the remaining claims in Petitioner's PCR application. The PCR court ultimately denied relief.

This Court granted Petitioner's request for a writ of certiorari, and Petitioner presents the following issue for review:

Did the PCR court err in excluding the juror's affidavit?

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings and conclusions. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (*citing McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995)). A PCR court's findings will be upheld on review if there is any evidence of probative value supporting them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Where the PCR court's decision is controlled by an error of law, however, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

LAW/ANALYSIS

Petitioner argues that the PCR court erred in excluding the juror's affidavit. We disagree.

For a considerable period of history, the rule in South Carolina was that a juror's testimony was not admissible to prove either a juror's own misconduct or the misconduct of fellow jurors. *State v. Thomas*, 268 S.C. 343, 348, 234 S.E.2d 16, 18 (1977) (*citing Barsh v. Chrysler Corp.*, 262 S.C. 129, 203 S.E.2d 107 (1974)). Rule 606(b) of the South Carolina Rules of Evidence alters this common law rule by allowing a juror to offer testimony as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." The rule additionally provides:

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, . . . [n]or may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id. Rule 606 thus draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter.

Although Rule 606 expressly prohibits the introduction of juror testimony regarding both the content and the effect of statements occurring during the jury's deliberations, this Court has recognized an exception to that categorical prohibition. In *State v. Hunter*, this Court held that juror testimony involving internal misconduct may be received only when necessary to ensure fundamental fairness. 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995). That case involved allegations by a juror that the verdict was tainted by racial prejudice, and this Court affirmed the rule announced in *Hunter* in the later case *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), which involved allegations that the jury began deliberations prematurely. The Court has instructed that a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial. *Id*. at 314, 509 S.E.2d 814.[1]

[1] Both of these cases were direct appeals from criminal convictions. The parties to the instant case did not argue that the rules for the introduction of juror testimony and the standard for a grant of post-conviction relief based on internal jury misconduct differ from the standard applicable on direct appeal. We therefore assume, but do not decide, that the analysis outlined in our direct appeal precedent applies.

Turning the focus to an analysis of the affidavit offered in the instant case, we find that it was not necessary that the PCR court admit the affidavit in order to ensure fundamental fairness. Though the affidavit is significantly longer than this summary, the affidavit essentially provides that the juror recalls "a couple of people, maybe more" remarking that if Petitioner was not guilty he would have taken the stand or presented a defense; that the juror does not recall anyone mentioning the trial court's instructions not to consider Petitioner's decision not to testify; that if the juror had it to do over again, he would cast his initial vote to acquit; that the juror thinks other jurors changed their vote because of the comments; and that the juror believes the jury made the wrong decision and "think[s] [he] let those comments . . . swing [his] vote." Although this Court has not articulated precise guideposts for judging whether proffered juror testimony raises sufficient questions of fundamental fairness so as to be admissible, a return to our precedent is instructive.

State v. Hunter, the seminal case from this Court on the issue of juror testimony regarding statements and conduct during the deliberative process, involved a juror's allegations that she was coerced through racial intimidation to cast her vote one way. We held "[i]f a juror claims prejudice played a role in determining the guilt or innocence of a defendant, investigation into the matter is necessary." 320 S.C. at 88, 463 S.E.2d at 316. "To hold otherwise," we stated, "would violate 'the plainest principles of justice.'" *Id.* The case *McDonald v. Pless*, a federal decision, similarly recognizes the potential for "instances in which [juror testimony] could not be excluded without violating the plainest principles of justice." 238 U.S. 264, 268-69 (1915) (internal quotation marks omitted). This Court relied on *McDonald* in announcing the limited exception to the exclusion of juror testimony regarding deliberations, *see Hunter*, 320 S.C. at 88, 463 S.E.2d at 316, and other federal precedent echoes *McDonald*'s language that juror testimony must raise significant questions of substantial injustice in order to be admissible. *See, e.g., Downey v. Peyton*, 451 F.2d 236, 239-40 (4th Cir. 1971) (describing evidence that the jury's verdict was based on certain extrinsic information as creating such a probability of prejudice that the verdict was deemed inherently lacking in due process).

Using this jurisprudence as a guide, it is clear, in our view, that this affidavit does not measure up to the high bar that precedent sets for the seriousness of allegations that juror testimony must raise before it may be admitted. We think it is plain that the portion of the affidavit pertaining to what may have confused other jurors or influenced their votes is pure speculation presented without any specific factual support, and the juror's testimony about his own deliberative process is similarly flawed. The generic assertion that a juror would vote the opposite way if given another opportunity too closely resembles a case of buyer's remorse from a guilty verdict to be given much credence. Moreover, although the juror avers that if he had the preliminary vote to do over again, he would cast an initial vote to acquit, this testimony does not relate to the juror's ultimate vote of guilty. The jury returned a unanimous verdict, and the trial court polled the jury after it returned a verdict.

This analysis should not be interpreted as suggesting that more concrete and factually specific allegations regarding a jury's consideration of a defendant's failure to testify might not raise such significant questions that it is necessary to admit the testimony in order to ensure fundamental fairness. In this vein, it is important to point out a subtle flaw in Petitioner's argument. Petitioner argues that the question presented in the instant case is whether consideration of a defendant's failure to testify can potentially implicate fundamental fairness. We disagree. The question we address here is whether the affidavit offered in the instant case suggests that the conduct of Petitioner's jury rendered his trial fundamentally unfair. Because the affidavit at issue does not suggest that Petitioner's trial was fundamentally unfair, we affirm the PCR court's decision excluding the juror's affidavit.[2]

[2] As a housekeeping matter, it is important to note that even if circumstances called for the admission of the affidavit, we have held that a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial. *See Aldret*, 333 S.C. at 314, 509 S.E.2d at 814.

CONCLUSION

The occurrence of a significant degree of jury misconduct calling for the admission of juror testimony has proved to be quite rare. *See State v. Pittman*, 373 S.C. at 554-55, 647 S.E.2d at 158 (suggesting that the mine-run of prejudicial jury misconduct cases involve internal coercion based on race or gender bias). For this reason, we think trial courts are justified in exercising a degree of caution before entertaining such evidence in an attack on a jury's verdict. As the court stated in *McDonald*:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might vindicate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct . . . [and] the result would be to make what was intended to be a private deliberation the constant subject of public investigation. . . . [T]he argument in favor of receiving such evidence is not only very strong, but unanswerable-when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule would open the door to the most pernicious arts and tampering with jurors. The practice would be replete with dangerous consequences. It would lead to the grossest fraud and abuse and no verdict would be safe.

238 U.S. at 267-68. With these principles in mind, we affirm the PCR court's denial of relief.

MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Regina Denise McKnight, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Horry County
James E. Brogdon, Circuit Court Judge
B. Hicks Harwell, Jr., Post-Conviction Relief Judge

Opinion No. 26484
Submitted April 1, 2008 – Filed May 12, 2008

REVERSED

C. Rauch Wise, of Greenwood, Julie M. Carpenter and Matthew Hersh, both of Jenner & Block, of Washington, D.C. for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald Zelenka, and Assistant Attorney General Melody J. Brown, all of Columbia, for Respondent.

Susan King Dunn, of Charleston, Tiloma Jayasinghe and Lynn M. Paltrow, both of National Advocates for Pregnant Women, of New York, New York, Theshia Naidoo and Daniel N. Abrahamson, both of The Drug Policy Alliance, of Berkeley, California, for Amici Curiae.

CHIEF JUSTICE TOAL: In this case, the post-conviction relief (PCR) court denied Petitioner's application alleging numerous grounds for ineffective assistance of counsel. This Court granted certiorari and we reverse the PCR court's denial of relief on several grounds.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner Regina McKnight gave birth to a nearly full-term stillborn baby girl in May 1999. An autopsy revealed inflammations in the placenta and umbilical cord respectively known as chorioamnionitis and funisitis, as well as the presence of benzoylecgonine (BZE), a by-product of cocaine. The autopsy report concluded that death occurred one to two days earlier "secondary to chorioamnionitis, funisitis and cocaine consumption" and labeled the baby's death a homicide. McKnight was subsequently charged with homicide by child abuse pursuant to S.C. Code Ann. § 16-3-85 (2003).

The public defender for Horry County represented McKnight in each of two trials for homicide by child abuse. The first trial in January 2001 ended in a mistrial. At the second trial in May 2001, a jury convicted McKnight of homicide by child abuse. This Court affirmed the jury's verdict on direct appeal. *See State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003).

McKnight filed a petition for PCR alleging ineffective assistance of counsel on numerous grounds. The PCR court held that counsel was not ineffective and denied McKnight relief as to each of her claims. This Court granted certiorari to review the PCR court's decision, and McKnight raises the following issues for review:

I. Did the PCR court err in determining that counsel was not ineffective for failing to prepare an adequate defense?

II. Did the PCR court err in determining that counsel was not ineffective in failing to ensure the trial court gave proper jury instructions?

III. Did the PCR court err in determining that counsel was not ineffective for failing to move to dismiss the charges on the grounds that the disparity between the sentences for criminal abortion and homicide by child abuse violates the Equal Protection Clause?

IV. Did the PCR court err in determining that counsel was not ineffective in failing to introduce the autopsy report into evidence?

V. Did the PCR court err in determining counsel was not ineffective in failing to argue the issue of intent during the closing argument?

VI. Did the PCR court err in excluding expert testimony on the standards of practice for South Carolina defense lawyers?

STANDARD OF REVIEW

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). In reviewing the PCR court's decision, this Court is concerned only with whether any evidence of probative value exists to support the decision. *State v. Smith*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). If no probative evidence exists to support the PCR court's findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

LAW/ANALYSIS

I. Failure to prepare an adequate defense

McKnight argues that counsel was ineffective in her preparation of McKnight's defense through expert testimony and cross-examination. We agree.

The analysis of this issue begins with a summary of the parties' strategies at the first trial. At this trial, the State tendered Dr. Edward Proctor, the pathologist who performed the autopsy, to opine as to the cause of death. Consistent with his autopsy report, Dr. Proctor testified that the chorioamnionitis and the funisitis in conjunction with cocaine caused the fetus to die. The doctor said that he based his finding of cocaine on the presence of the cocaine metabolite BZE in the fetus and attributed his failure to otherwise find any of the typical physiological effects of cocaine on the fetus's central nervous system to post-mortem decomposition. Although Dr. Proctor made general statements on the lethal effects of maternal cocaine consumption on fetuses, he also admitted it was possible for chorioamnionitis or funisitis alone to have caused the death of McKnight's fetus. Dr. Brett Woodard, an expert in pediatric pathology and the State's second witness on the issue, testified that by ruling out other possible causes of death, including syphilis,[1] thyroid problems, or other substance use, it was his opinion that McKnight's cocaine use alone caused the chorioamnionitis and funisitis in the fetus which resulted in fetal death. Dr. Woodard further based his conclusions on studies to which he extensively cited for their conclusions on the harmful effects of cocaine *in utero*.

Counsel for McKnight called two expert witnesses to testify as to possible alternative causes of death. Dr. Steven Karch, a cardiac pathologist and expert in drug-related deaths, opined that although he could not

[1] Although not listed as a cause of death on the autopsy report, McKnight had a history of syphilis, which has been known to result in stillbirth.

determine the underlying cause of the chorioamnionitis and funisitis found in the fetus, these conditions alone were responsible for its death. Dr. Karch explained that in the absence of pure-form cocaine in the fetus, the only conclusion he could make from the presence of BZE was that the mother was a cocaine user. The doctor additionally testified that it was impossible to rule out syphilis as a cause of death.

Dr. Karch also rebutted the State's experts' testimony on the harmful effects of cocaine and the notion of "crack babies" by explaining at great length that although cocaine is a potentially dangerous drug, it is not as dangerous as the medical community once believed. Dr. Karch went on to describe recent studies which had been unable to conclusively link cocaine to stillbirth, and discussed the flaws in earlier studies that had shown otherwise.[2] The doctor further cited this research to supplement his explanation as to why particular natural causes could not be ruled out as having caused fetal death.

Counsel for McKnight also called Dr. Sandra Conradi, a pathologist at MUSC, to testify on the cause of death. Similar to Dr. Karch, Dr. Conradi rebutted the State's testimony on the harmful effects of cocaine by pointing to a published medical study showing fetal exposure to levels of cocaine even higher than McKnight's fetus was no more likely to give rise to an adverse pregnancy than exposure to other harmful conditions. Dr. Conradi also stated that she would have ruled the cause of death "undetermined," rather than a homicide. However, upon further questioning, the doctor eliminated all potential natural causes of death, testifying that it was "unlikely, but possible" that the chorioamnionitis and funisitis led to stillbirth and that her tests for syphilis were negative. On the other hand, Dr. Conradi testified that she could not rule out cocaine as a cause of death.

[2] This is a very general summary of the expert testimony on the issue and we reiterate that neither expert was claiming that cocaine will not harm a fetus. Rather, the thrust of the testimony was to emphasize the doctors' recognition of recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor.

In its closing argument at the first trial, the State initially focused on the testimony of its expert, Dr. Woodard, the sole expert to testify that cocaine alone caused the fetal demise. The State concentrated the remainder of its closing argument on Dr. Conradi's testimony, repeatedly emphasizing that McKnight's own expert had eliminated all potential causes of death except exposure to cocaine. The jury deliberated for over seven hours without reaching a verdict and was sent home for the night. The next morning, upon learning that several jurors had researched medical issues related to the case on the internet overnight, the trial court declared a mistrial.

At the second trial in May 2001, the State again called Dr. Proctor and Dr. Woodard[3] to testify to their belief that cocaine caused baby McKnight's stillbirth. Counsel for McKnight did not call Dr. Karch back to testify and only called Dr. Conradi, who again testified that although she could not precisely determine the cause of death, neither chorioamnionitis, funisitis, nor syphilis caused the fetus to die. Counsel did not examine Dr. Conradi on the published study favorable to McKnight's defense that the doctor had mentioned at the first trial. Furthermore, counsel did not call any other expert to rebut or discredit the medical studies cited by the State's experts as Dr. Karch had done previously, nor did counsel cross-examine the State's experts on the matter.

As in the closing arguments of the first trial, the State began by pointing out Dr. Conradi's failure to eliminate cocaine as a cause of fetal demise and declared that in conjunction with the testimony of Dr. Woodard, Dr. Conradi "really helped us out in figuring out the cause of death in this particular case" by eliminating all other relevant causes of death. The jury returned a guilty verdict in thirty minutes.

[3] Dr. Woodard's testimony was videotaped prior to trial because he was unable appear in person.

a. Expert witnesses

McKnight argues that counsel was ineffective in calling an expert witness whose testimony undermined the defense and in failing to call an expert witness whose testimony supported the defense. We agree.

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). Where trial counsel articulates a valid reason for employing certain trial strategy, counsel will not be deemed ineffective. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995).

In the instant case, upon learning that an extended trip abroad would prevent Dr. Karch from testifying at the second trial, counsel stated at the PCR hearing that she believed at the time of trial that Dr. Conradi's testimony alone would be sufficient. Specifically, counsel testified that at trial, she focused solely on the issue of whether cocaine caused the stillbirth, and therefore, determined that Dr. Conradi's testimony – which never pinned the death on cocaine, but rather, labeled the cause of death as "undetermined" in the absence of pure-form cocaine in the fetus – supported the defense's theory. For this reason, counsel testified that she never thought to request a continuance or elicit Dr. Karch's testimony via videotape as the State had with Dr. Woodard. Counsel also admitted that due to her case load, she did not have time to find another expert who could, as Dr. Karch did, effectively rule out cocaine as the cause of death.[4]

We find that it was unreasonable for counsel to produce a single expert witness at the second trial whose testimony had clearly benefitted the State's case in the first trial, and that her reasons for doing so do not qualify as a

[4] Counsel is the public defender for Horry County. She testified that between the two McKnight trials, she tried a death penalty case in addition to working on about two hundred other cases assigned to the public defender's office.

valid trial strategy.[5] Counsel's case files from the first trial no doubt indicated that the State had based its theory of the case on McKnight's history of cocaine use and being able to rule out all other potential causes of death. Counsel was also certainly aware that Dr. Conradi's process of ruling out all other potential natural causes of death to arrive at an opinion on the actual cause of death mimicked that of the State's expert Dr. Woodard. Although Dr. Conradi ultimately concluded that the cause of death was indeterminable while Dr. Woodard concluded that cocaine caused fetal demise, counsel was certainly cognizant of the fact that the State's closing argument at the first trial used these experts' similar methods of analysis to its advantage. From this, counsel should have reasonably concluded that regardless of Dr. Conradi's ultimate conclusion, her testimony went to the heart of the State's case, and that substitute and/or additional testimony was needed. *See State v. Ingle*, 348 S.C. 467, 560 S.E.2d 401 (2002) (finding ineffective assistance of counsel where defense counsel called a witness whose testimony contradicted the defense's theory of the case).

Furthermore, Petitioner showed that even if Dr. Karch was unavailable, another expert was available to testify that cocaine did not cause the stillbirth. Dr. Kimberly Collins, head of forensic pathology at MUSC and an expert witness in numerous cases, testified at the PCR hearing that she agreed with Dr. Karch's view of the evidence and would have testified on behalf of McKnight at the second trial had she been contacted by counsel. This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable "only to the extent that reasonable professional judgment supports the limitations on the investigation." *See Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (quoting *Wiggins v. Smith*, 539 U.S. 510, 533 (2003)). Although we accept counsel's assertion that she was pressed for time in preparing for the second trial, in light of counsel's familiarity with the first trial and the relative ease with which

[5] Counsel herself admitted at the PCR hearing that Dr. Conradi's testimony had been harmful to McKnight's case and that failing to call back Dr. Karch, who counsel considered "a very effective witness," was pure oversight and not a strategic decision on her part.

counsel could have procured favorable expert testimony at the second trial, we conclude that counsel's decision to call Dr. Conradi alone to testify at the second trial was unreasonable.

We further find that there is a reasonable probability that this deficiency prejudiced McKnight. The methodology used by the *only* expert witness for the defense in determining the cause of fetal death mimicked that of the State's star expert and, in this way, Dr. Conradi's testimony primarily served to bolster the State's theory of the case excluding all other potential causes of death in order to conclude that cocaine caused the stillbirth. In this regard, the Court's own review of the case on direct appeal shows that counsel's deficient performance was in fact prejudicial. On appeal, this Court upheld the jury verdict on numerous grounds, including that sufficient evidence existed to show that cocaine caused fetal demise. In reaching this conclusion, the Court emphasized Dr. Woodard's testimony ruling out other natural causes of death and pointed out that "McKnight's expert . . . also ruled out the possibility of choriamnionitis, funisitis or syphilis as the cause of death." *McKnight*, 352 S.C. at 643-44, 576 S.E.2d at 172.

In our opinion, counsel's two-fold error in calling an expert witness whose testimony was known to have previously been used to bolster the State's case, while neglecting to elicit favorable testimony from other experts when such testimony was known to exist and readily available, represents counsel's inadequate preparation for trial rather than a valid trial strategy. Accordingly, we find that counsel's performance in this regard was deficient. Because we further find that this deficient performance prejudiced McKnight's case, we hold that the PCR court erred in determining that counsel was not ineffective on these grounds.

b. Failure to investigate

McKnight also argues that counsel was ineffective in failing to investigate medical evidence contradicting the State's experts' testimony on the link between cocaine and stillbirth, and in further failing to investigate methods to challenge Dr. Woodard's conclusions ruling out natural causes of death. We agree.

A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State. *Nance v. Ozmint*, 367 S.C. 547, 557 n.8, 626 S.E.2d 878, 883 n.8 (2006) (quoting *Wiggins*, 539 U.S. at 524-25). In this case, counsel testified that her failure to rebut the medical research cited by the State's experts, as well as the State's expert's own methods in arriving at those conclusions – either through the defense's own expert testimony or with a thorough cross-examination – was due to her belief that Dr. Conradi's testimony alone was adequate and that she did not otherwise have time to interview additional experts. Counsel, however, did not attempt to rebut the medical studies she knew the State's experts would cite, nor did she examine Dr. Conradi on the study the doctor cited at the first trial that concluded cocaine is no more harmful to fetuses than other adverse factors during pregnancy. In light of counsel's thorough investigation and examination of witnesses at the first trial, counsel, in our view, was deficient in failing to conduct a reasonable investigation which resulted in a substantially weaker defense at the second trial.

Furthermore, in the absence of testimony from the defense on medical research to the contrary, there is a reasonable probability that the jury used the adverse and apparently outdated scientific studies propounded by the State's witnesses to find additional support for the State's experts' conclusions that cocaine caused the death of the fetus. Accordingly, we hold that the PCR court erred in determining that counsel was not ineffective on these grounds

II. Jury instructions

a. Criminal intent under the Homicide by Child Abuse statute

McKnight argues that counsel was ineffective in failing to object to the trial court's charge on the measure of criminal intent required for conviction under the Homicide by Child Abuse (HCA) statute. We agree.

Under S.C. Code Ann. § 16-3-85(a)(1) (2003), a person is guilty of homicide by child abuse if the person causes the death of a child "while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life." At trial, the trial court began by instructing the jury, in accordance with the HCA statute, that the State must prove beyond a reasonable doubt that "death occurred in circumstances showing extreme indifference to human life." The court continued with the general charge on criminal intent from the Circuit Court Bench Book. Specifically, the court explained:

> In any case in order to establish criminal liability criminal intent is required. For example, the mental state required to be proven by the State for a part[icular] [sic] crime might be purpose, intent, knowledge, recklessness, or criminal negligence. . . . Criminal intent is a mental state, a conscious wrongdoing. It is up to you to determine what the defendant intended to do based on the circumstances shown to have existed. Criminal intent can arise from actions or failure to act. It may arise from negligence, recklessness or indifference to duty or consequences therefore. It is considered by law to be the equivalent of criminal intent.

Ten minutes after dismissing the jury for deliberations, the jury asked, "Can we have a definition of criminal intent? If we do have to confirm criminal intent?" The court then recharged the jury, again using the general charge on criminal intent. Counsel for McKnight did not object to either the primary charge or the supplemental charge.

McKnight argues that trial court improperly charged the jury that it could convict if it found negligence, recklessness, or mere indifference when a conviction for homicide by child abuse requires a finding of extreme indifference to human life. For purposes of the HCA statute, "extreme indifference" has been defined as "a mental state akin to intent characterized by a deliberate act culminating in death." *State v. Jarrell*, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). In a similar vein, this Court has held that "reckless disregard for the safety of others" in reckless homicide cases is "a conscious failure to exercise due care or ordinary care or a conscious

indifference to the rights and safety of others or a reckless disregard thereof." *State v. Tucker*, 273 S.C. 736, 739, 259 S.E.2d 414, 415 (1979). Accordingly, the specification of the *mens rea* in the HCA statute in conjunction with the general charge on criminal intent was proper and counsel was not deficient in failing to object to the primary charge.

However, the propriety of using the general criminal intent charge alone in the supplemental charge is not so clear. The foreman's note appears to question what specific level of criminal intent was required to find McKnight guilty, indicating that the jury was confused on this point. Although the references in the criminal intent charge to recklessness and indifference are consistent with this Court's HCA jurisprudence regarding the meaning of "extreme indifference to human life," we believe that the trial court's recitation of the general criminal intent charge alone in response to the jury's inquiry only served to further confuse the jury by referencing mere negligence and otherwise failing to clarify the particular mental state required for a conviction of homicide by child abuse. *See State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002) ("Instructions that do not fit the facts of the case may serve only to confuse the jury.") *and State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990) ("It is error to give instructions which may confuse or mislead the jury."). Accordingly, we find that counsel was deficient in failing to object to the supplemental charge.

Furthermore, because the erroneous charge occurred in a supplemental instruction and likely attained a special significance in the minds of the jurors, there is a reasonable probability that counsel's deficient performance prejudiced McKnight. *See Lowry v. State*, 376 S.C. 499, 657 S.E.2d 760 (2008) (acknowledging the prominence of an erroneous charge when it arises in a supplemental instruction). That the jury returned a guilty verdict five minutes after the trial court issued the supplemental charge indicates that counsel's failure to object to the erroneous charge was prejudicial in fact. Accordingly, we hold that the PCR court erred in determining that counsel was not ineffective on these grounds.

b. Burden of proving an alternative cause of death

McKnight argues that counsel was ineffective in failing to request that the jury be instructed that the defense did not have the burden to prove an alternative cause of death. We disagree.

This Court has never addressed whether a defendant is entitled, upon request, to a charge that the defense has no burden of proving an alternative cause of death, and McKnight appears to argue that the Court should adopt a rule similar to that applicable to the affirmative defense of self-defense. When self-defense is at issue in a case, the defendant, upon request, is entitled to a charge that the State has the burden of disproving self-defense beyond a reasonable doubt. *State v. Addison*, 343 S.C. 290, 294, 540 S.E.2d 449, 451 (2000). Numerous other jurisdictions ascribe to this rule and the Fourth Circuit has commented that "jury instructions regarding self-defense pose a delicate problem requiring extraordinary caution because the defense admits the accused committed the act but seeks to establish justification or excuse. This is especially true where self-defense is the only defense alleged at trial." *Guthrie v. Warden*, 683 F.2d 820, 825 n.7 (4th Cir. 1982) (citing *United States v. Corrigan*, 548 F.2d 879 (10th Cir. 1977)).

This Court has articulated that the primary reason for entitling a defendant to a self-defense charge upon request in South Carolina is because at one time in our jurisprudence, self-defense was an affirmative defense which the defendant was required to prove beyond a reasonable doubt. *See Addison*, 343 S.C. at 293, 540 S.E.2d at 451. Requesting a self-defense charge on the State's burden of proof therefore ensures that the jury does not proceed on the outdated theory of self-defense as an affirmative defense. Because asserting an alternative theory of death is not, and never has been, an affirmative defense required to be proven by the defendant, we find no similar entitlement to such charge, and therefore, counsel's failure to request such was not unreasonable.

Nor could this Court find that the theoretical concerns underlying a self-defense charge outlined in *Guthrie* are of equal concern where a

defendant asserts an alternative theory of death. For instance, in this particular case, McKnight only admits to child abuse (using cocaine while pregnant). She affirmatively denies the crime of homicide by child abuse for which she is being tried by asserting alternative theories (natural causes) for the cause of the fetus's death. We find the *Guthrie* rationale for a self-defense charge request is not at issue when a defendant asserts an alternative theory of death because the defendant in such cases is not seeking justification or an excuse for committing the crime for which they are being tried; rather, the defendant is saying he or she is innocent.

Even if this Court were to find McKnight was entitled to such a charge upon request, counsel's failure to request the charge must still be evaluated for prejudicial effect. In this case, the trial court's instructions referenced the State's burden to prove McKnight guilty beyond a reasonable doubt on numerous occasions, and reiterated that McKnight was "not required to prove herself innocent." When read as a whole, the instructions adequately conveyed the State's burden of proof beyond a reasonable doubt and the corresponding absence of any such burden for McKnight.[6] *See State v. Burkhart*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002) (noting that failure to give requested jury instructions is not prejudicial error where the instructions given, on the whole, adequately cover the law). Accordingly, we hold that the PCR court correctly found that counsel was not ineffective on these grounds.

[6] "Intervening cause" instructions have been requested in other jurisdictions to address alternative theories of death in child abuse cases. Although no cases are directly on point, other courts have held that in the absence of a specific charge on intervening causes, a jury instruction that, on the whole, adequately conveys the government's burden of proof beyond a reasonable doubt under the applicable criminal statute is not grounds for reversal. *See, e.g., State v. Delgado*, 718 A.2d 437, 445 (Conn. 2003) (finding a jury charge on intervening causes unnecessary in a case involving the death of a child in which the evidence suggests a finding of only one proximate cause of harm as contemplated by the relevant state manslaughter statute).

c. Involuntary manslaughter as a lesser included offense

McKnight argues that counsel was ineffective in failing to request a jury charge on involuntary manslaughter as a lesser included offense of homicide by child abuse. We disagree.

S.C. Code Ann. §16-3-85 (2003) provides that a person is guilty of homicide by child abuse if the person "causes the death of a child under the age of eleven while committing child abuse or neglect . . . under circumstances manifesting an extreme indifference to human life." Involuntary manslaughter is defined as (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. *State v. Pittman*, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007).

The test for determining when an offense is a lesser included offense of another offense is whether the greater of the two offenses includes all the elements of the lesser offense. *State v. Northcutt*, 372 S.C. 207, 215, 641 S.E.2d 873, 877 (2007). If the lesser offense contains an element which is not included in the greater offense, it is not a lesser included offense of the greater offense. *Id.*

Under the elements test, the court of appeals determined in *State v. Mitchell*, 362 S.C. 289, 608 S.E.2d 140 (Ct. App. 2005), that involuntary manslaughter is not a lesser included offense of homicide by child abuse. Although we disagree with the court of appeals' application of the elements test in *Mitchell*, and would accordingly vacate that portion of the opinion, we still find that under the elements test, involuntary manslaughter is not a lesser included offense of homicide by child abuse.

First, and as the court of appeals correctly reasoned, only the "unlawful activity" definition of involuntary manslaughter could potentially apply in the arena of child abuse because child abuse is an unlawful act. However, child

abuse could never be defined as an unlawful activity "not tending to cause death or great bodily harm," and for this reason, the elements of involuntary manslaughter will never be included in the greater offense of homicide by child abuse.

Because involuntary manslaughter is not a lesser included offense of homicide by child abuse, we hold that the PCR court correctly determined that counsel was not ineffective for failing to request a jury charge on involuntary manslaughter.

III. Equal protection

McKnight argues that counsel was ineffective for failing to move to dismiss the charges on the grounds that the disparity between the sentences for criminal abortion and homicide by child abuse violates the Equal Protection Clause. We disagree.

The criminal abortion statute provisions relevant to this case provide that any woman who intentionally procures an illegal abortion will be guilty of a misdemeanor and upon conviction, may be imprisoned for no more than two years. S.C. Code Ann. § 44-41-80(b) (2002). The relevant HCA statute provisions state that a person who causes the death of a child under age eleven while committing child abuse or neglect under circumstances manifesting extreme indifference to human life may be imprisoned for life, and for no less than a term of twenty years. S.C. Code Ann. § 16-3-85 (a)(1) & (c)(1).

The Equal Protection Clause provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1. A classification does not violate the Equal Protection Clause if (1) "similarly situated" members in a class are treated alike; (2) the classification rests on some reasonable basis; and (3) the classification bears a reasonable relation to a legitimate legislative purpose. *See Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dept. of Revenue*, 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003).

In our opinion, the PCR court correctly determined that McKnight has no equal protection claim in the first instance because she is not similarly situated to individuals prosecuted under the criminal abortion statute. *See id.* (rejecting an equal protection claim for failure to show disparate treatment of similarly situated entities in the first instance). McKnight never argued that she intended to cause an abortion through her cocaine use, and therefore, her circumstances are different than those who possess the requisite intent to abort a fetus under the criminal abortion statute.

Next, even if this Court were to consider child abusers similarly situated to illegal abortion seekers, the determination of whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly arbitrary and there is a reasonable hypothesis to support it. *Curtis v. State*, 345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001). Here, the abortion statute does not criminalize all abortions, but rather, only illegal abortions, i.e., those that do not conform to the criteria in the statute. *See* S.C. Code Ann. § 44-41-20 (2002). The HCA, on the other hand, criminalizes homicide as a result of any and all abuse of children between viability and age eleven. In our opinion, there is nothing arbitrary or unreasonable in establishing different sentences for offenders of distinct crimes. *See also Davis v. County of Greenville*, 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994) ("The fact that the classification may result in some inequity does not render it unconstitutional.").

Finally, a legislative history of the statutes is instructive in analyzing whether there is a legitimate legislative purpose for the different sentences. In 1974, the General Assembly amended the criminal abortion statute to its current form in accordance with the United States Supreme Court's decision in *Roe v. Wade*.[7] Our jurisprudence on the applicability of South Carolina criminal law to viable fetuses, on the other hand, did not substantively develop until the 1980's and 1990's,[8] and in 1992, nearly twenty years after

[7] 410 U.S. 113 (1973).

[8] *See, e.g., State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984) (holding that a "person" under the South Carolina murder statute includes viable fetuses);

Roe v. Wade, the General Assembly enacted the HCA statute. This time differential between the enactment of the two statutes, as well as the placement of the HCA statute in the Crimes and Offenses section of the Code in contrast to the placement of the criminal abortion statute in the Health section of the Code, reflects the General Assembly's legitimate interest in the protection of unborn children, separate and distinct from its interest in the health of expectant mothers and their own unborn children.[9]

For these same reasons, we believe that any sentencing differences in the two statutes reflect a valid legislative determination for the need to target a specific societal problem. *See Gary Concrete Products, Inc. v. Riley*, 285 S.C. 498, 505, 331 S.E.2d 335, 339 (1985) ("[T]he judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." (quoting *City of New Orleans v. Dukes*, 427 U.S. 297 (1976))). Accordingly, we hold that the PCR court correctly determined that counsel was not ineffective in failing to argue that the HCA statute violated the Equal Protection Clause.

IV. Autopsy report

McKnight argues that counsel was ineffective for failing to introduce the autopsy report into evidence. We agree.

After introducing the report at the first trial, counsel's only reason for neglecting to introduce the report at the second trial is that she "just forgot." The PCR court found that this error did not prejudice McKnight because the

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Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997) (holding that a "child" under the South Carolina child abuse and endangerment statute includes viable fetuses).

[9] Legislative interest in the protection of unborn children persists in the current 2007-2008 legislative session in a bill which seeks to amend the HCA statute to expressly include the ingestion of certain illegal drugs by a mother during her pregnancy in the statutory definition of "child abuse or neglect."

author of the autopsy report testified to its contents, and therefore, the report itself would have merely been cumulative evidence.

We find that the autopsy was a powerful piece of documentary evidence that was crucial to McKnight's defense because it contradicted the State's theory of the case. The State's own expert authored the autopsy report which listed three causes of death: chorioamnionitis, funisitis, and cocaine. After McKnight's own expert could not rule out cocaine as a cause of death, the autopsy report itself would have served as hard evidence to (1) undermine the conclusion of Dr. Woodard, the only expert who opined that cocaine alone caused the fetal demise, and (2) remind jurors of the inconsistencies in the State's experts' testimony.

For these reasons, we hold that counsel's failure to introduce the autopsy report into evidence was deficient, and that this deficiency, in the absence of otherwise helpful testimony from her own expert, was prejudicial to McKnight. Accordingly, the PCR court erred in determining counsel was not ineffective on these grounds.

V. Intent

McKnight argues that counsel was ineffective in failing to argue that there was no evidence on the record suggesting that McKnight knew that using cocaine risked harming her fetus's life. We disagree.

In *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777, this Court held that a viable fetus was a "child" as used in the child abuse and endangerment statute, S.C. Code Ann. § 20-7-50 (1985), and therefore upheld a mother's conviction under the statute for her cocaine use during the third trimester of her pregnancy. We noted that "[a]lthough the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child." *Id.* at 10, 492 S.E.2d at 782. Therefore, this Court concluded that Whitner's drug use unquestionably violated the child endangerment statute. *Id.* at 11, 492 S.E.2d at 782.

Although the PCR court sanctioned counsel's performance in this regard based on the "highly deferential" review of counsel's strategic position in delivering closing arguments, we find the need to look no further than the prejudice prong of the *Strickland* test in order to resolve the matter. This Court correctly acknowledged in *Whitner* that men of common understanding are familiar with the harmful effects of cocaine. Therefore, a reasonable jury would certainly not be persuaded by the argument that McKnight did not know that her cocaine use posed risks to her unborn child. Accordingly, even if counsel erred in failing to argue that McKnight did not know using cocaine posed risks to her unborn child, this deficient performance was not prejudicial. Therefore, we hold that the PCR court did not err in determining that counsel was not ineffective on these grounds.

VI. Expert testimony at the PCR hearing

McKnight argues that the PCR court erred in excluding testimony on the professional standards of South Carolina defense lawyers. We disagree.

The decision to admit affidavits, depositions, oral testimony, or other evidence at a PCR hearing is within the PCR court's discretion and will not be reversed absent an abuse of discretion resulting in prejudice to a party. *See Simpson v. Moore*, 367 S.C. 587, 607-08, 627 S.E.2d 701, 712 (2006).

In the instant case, the PCR court rejected McKnight's proffer of expert testimony on the prevailing professional standards for South Carolina defense attorneys based on *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002). In *Green*, this Court reviewed a defendant's claim that the PCR court erred in excluding opinion testimony from a criminal defense attorney as to acceptable legal standards of defense practice. *Id.* at 198, 569 S.E.2d at 325. Acknowledging that expert testimony designed to assist the PCR court to understand certain facts was admissible, the Court found that the expert offered no factual evidence, but rather, assumed certain facts in arriving at his conclusion that trial counsel's performance was deficient. *Id.* Accordingly, the Court held that the PCR court properly excluded the testimony because it was merely a legal argument as to how the PCR court should rule on the issue. *Id.*

Turning to the instant case, we hold that the PCR court properly excluded the testimony of McKnight's expert. Although McKnight offered the expert to provide factual testimony on prevailing professional standards of South Carolina defense attorneys, PCR counsel's questions consistently inquired into how a lawyer practicing in accordance with the prevailing standards in South Carolina would handle certain factual scenarios derived directly from this case. As a result, the expert's opinion, amounted to a case-specific application of the *Strickland* test that was not designed to assist the PCR court to understand certain facts, but rather, was a legal argument as to why the PCR court should rule that McKnight's trial counsel was ineffective. Accordingly, the PCR court did not abuse its discretion in excluding the expert testimony in the context that the testimony was offered.

CONCLUSION

For the foregoing reasons, we reverse the PCR court's denial of relief.

MOORE, WALLER and BEATTY, JJ., concur. PLEICONES, J., concurring only in result.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Larry M. Hutchins, Former Spartanburg County Magistrate, Respondent.

Opinion No. 26485
Heard March 4, 2008 – Filed May 12, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, Deborah S. McKeown, Assistant Disciplinary Counsel and Robert E. Bogan, Assistant Attorney General, all of Columbia for Office of Disciplinary Counsel.

C. Rauch Wise, of Greenwood, for Respondent.

PER CURIAM: This judicial discipline case involves several complaints of misconduct which allegedly occurred while respondent served as a magistrate judge. He is currently retired. After a full investigation by the Office of Disciplinary Counsel (ODC) and a hearing before the Commission on Judicial Conduct Panel (Panel), the Panel recommended the following sanctions: (1) public reprimand; (2) respondent be prohibited from seeking or accepting any judicial position in South Carolina without the express permission of the Supreme Court; and (3) respondent be ordered to pay costs of proceedings. Both respondent and ODC object to various findings of the Panel. We agree with the Panel and adopt their findings and sanctions.

FACTS

Respondent became a part-time magistrate in Spartanburg County in 1987 and a full-time magistrate in 1995. In January 2003, respondent was reassigned by the Spartanburg County chief magistrate from respondent's office at the courthouse to the magistrate's office at the county jail. At the office at the jail, the magistrates shared the same desk, and all court employees shared the same restroom. Respondent was unhappy with the transfer.

During the 2003 legislative session, the four-year appointments of the Spartanburg magistrate judges were pending, and there was a disagreement over several reappointments which resulted in a deadlock. As a result, the magistrates were on "holdover" status as of May 1, 2003. The two complaints leading to this disciplinary action occurred around this time.

Matter A

Complainant A worked for respondent as a clerk in respondent's office at the courthouse. When respondent was transferred to the jail at the beginning of 2003, Complainant A stayed at the courthouse office but remained in regular contact with respondent.

Complainant A testified that on May 1, 2003, respondent telephoned her at the courthouse office and asked her to stop by his office at the jail when her shift ended. When Complainant A arrived, respondent asked her how difficult it would be for her to get another Spartanburg County magistrate judge over to her apartment. Complainant A replied flippantly, believing that respondent was joking in a manner consistent with their prior office demeanor. However, according to Complainant A, respondent then asked her to "go all the way" with the other judge, to videotape it, and respondent mentioned the availability of small cameras. Complainant A stated that when she understood respondent to be serious, she became upset and left and subsequently reported the matter to the chief magistrate.

Complainant A's allegation was initially investigated by local law enforcement and SLED. Respondent was asked to take a polygraph examination in connection with that investigation but agreed to do so only if Complainant A, the judge to which respondent referred, and the chief magistrate judge would submit to examination as well. SLED did not conduct polygraph tests on any person, and it concluded its investigation without any criminal prosecution against respondent.[1]

Matter B

Complainant B was the clerk supervisor in the magistrate's office at the county jail. On May 9, 2003, respondent called Complainant B to complain about the work performance of certain magistrate court clerks. During the conversation, respondent commented that one of the clerks was dating "niggers" and that there was "no telling what we might catch using the same bathroom as her." Complainant B reported the conversation to her supervising magistrate and then to the chief magistrate. Complainant B was also instructed by her supervising magistrate to inform the clerk to whom respondent allegedly referred, as well as another African-American clerk. One of the clerks wrote a letter to the NAACP, which resulted in much adverse publicity for respondent and the Spartanburg County magistrate's office.

Both Matter A and Matter B were reported to the Commission on Judicial Conduct (Commission) and were considered by an investigative panel of the Commission. However, those matters were dismissed by the investigative panel, but respondent was not informed of the reasons for dismissal.

Other relevant facts

In December 2003, respondent e-mailed the chief magistrate requesting a meeting with all the Spartanburg County magistrate judges

[1] In a letter dated August 28, 2003 from the Attorney General's office to the SLED investigator, the Attorney General's office informed SLED that there was insufficient evidence to secure a conviction.

to discuss "the clerks that made up stories about me since all have been cleared by judicial standards and the SLED investigation." That meeting took place on January 5, 2004.

During that meeting, several magistrates,[2] including respondent, voiced their concerns and advocated the firing of Complainant A, Complainant B, and the clerk who notified the NAACP. The Panel took testimony from each of the magistrates present at the meeting, and most of them recalled respondent making comments in reference to respondent's having been "cleared by judicial standards and the SLED investigation." The majority of the magistrates also testified that respondent represented in some fashion that he had been willing to submit to a polygraph examination but no one else involved would take one. Respondent denied making these representations but did acknowledge that he presented a copy of the letter reflecting the Attorney General's decision not to pursue prosecution of any charges against respondent. After some discussion, the magistrates voted unanimously to fire Complainant A and the clerk who notified the NAACP; they also voted 6-5 to terminate Complainant B's employment. These votes were recorded on "ballots" prepared before the meeting by one of the judges who met with Respondent the week before the meeting.

After the meeting on January 5, 2004, several magistrates talked amongst themselves and reported having misgivings about the actions taken. It was discussed that respondent may not have accurately described the circumstances surrounding the polygraph test. Furthermore, on January 6, 2004, a state senator sent a letter to the chief magistrate judge indicating his understanding that the reasons given for the magistrates' actions were not justified, and he encouraged the court to take immediate action to reinstate the three employees. The magistrates met again on January 8, 2004, and voted to reinstate all of the employees.

[2] Respondent met with two other magistrate judges the Friday before this meeting, and they discussed the upcoming meeting.

Shortly after the January 8, 2004 meeting, the matter was reported to the Commission on Judicial Conduct for investigation. The Commission reopened its files on Matter A and Matter B, and it also investigated whether respondent had misrepresented the facts surrounding his being "cleared" or "exonerated" by SLED and the Commission, as well as respondent's potential misrepresentation of the polygraph testing.

After receiving notice of the investigation, respondent took and passed a polygraph test administered by a private examiner and submitted the results to ODC as evidence that respondent's denials of misconduct were truthful. The test results were later analyzed by SLED and determined to be inaccurate.[3] Respondent, after being notified of SLED's conclusions, declined to take another polygraph test that would have been administered by SLED. However, throughout the investigation, he has constantly denied the allegations in both matters and has maintained that he did not make any statements at the January 5, 2004 meeting pertaining to being cleared by judicial standards in regards to Matter A and Matter B, the SLED investigation, or a polygraph examination.

On August 10, 2004, ODC petitioned to have respondent placed on interim suspension pending the investigation. In response, respondent informed this Court that he desired to retire on December 31, 2004, in lieu of interim suspension, so that he could have time to file for retirement and Social Security. By order dated August 20, 2004, the Court accepted respondent's offer to retire no later than December 31, 2004, but placed respondent on interim suspension until he retired.[4]

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[3] The private examiner acknowledged at the hearing before the Panel that he changed his mind after meeting with SLED officials and agreed that respondent did not pass the polygraph examination.

[4] Since this order in August 2004, respondent has corresponded with the Court numerous times requesting his retirement and/or suspension be lifted. Respondent is currently retired from the Spartanburg County Magistrate's office.

On May 2, 2005, respondent wrote a letter to Governor Mark Sanford, complaining about the allegations against respondent. Respondent stated in his letter that he had passed a polygraph examination.

LAW/ANALYSIS

ODC filed formal charges in this matter on June 23, 2006, and a hearing was held before the Panel on March 26, 2007. The Panel characterized the charges as centered on five basic allegations:

(1) Allegations by Complainant A that respondent proposed and encouraged her to videotape herself engaged in sexual relations with another magistrate for the purpose of obtaining incriminating evidence to use against the magistrate

(2) Allegations by Complainant B that respondent used the term "niggers" in a conversation with her referring to men that a court clerk was possibly dating

(3) Allegations that respondent orchestrated the firing of three magistrate court clerks (Complainant A, Complainant B, and the clerk who notified the NAACP) in retaliation for their reporting alleged misconduct by respondent

(4) Allegations that respondent falsely related to the other Spartanburg County magistrate judges that he had been cleared of all wrongdoing and had offered and was willing to take a polygraph test in connection with Matter A and Matter B, but that he was not required to take a polygraph test because one or more of his accusers were unwilling to be tested, and

(5) Allegations that respondent falsely represented in a letter to Governor Sanford that he had passed a polygraph examination.

The Panel found that the first two allegations were proven by clear convincing evidence. As to the firing and misrepresentation charges, the Panel found that it had been proven by clear and convincing evidence that respondent had asserted at the January 5, 2004 meeting that he had been cleared by SLED and "judicial standards." However, the Panel held that this assertion alone did not establish misconduct because respondent's statement was reasonable given the action taken by the Commission, SLED, and the attorney general. The Panel also recognized that there was some discussion at the meeting regarding respondent's willingness and/or refusal to take a polygraph examination at the request of SLED investigators, but it was not proven by clear and convincing evidence that respondent made the representations at the meeting with the intention of influencing the magistrates' decisions to terminate the clerks' employment. Finally, the Panel did not find any misconduct from the Sanford complaint because respondent no longer held a judicial office, having resigned December 31, 2004, and because respondent had in fact passed a polygraph test by a private examiner, despite the disputed result.

The Panel concluded that respondent's misconduct under Rule 7(a) of the Rules of Judicial Disciplinary Enforcement violated:

(1) Canon 1 by failing to uphold the integrity of the judiciary;

(2) Canon 1(A) by failing to participate in establishing, maintaining, and enforcing high standards of conduct, and personally observing those standards;

(3) Canon 2 by failing to avoid impropriety and the appearance of impropriety;

(4) Canon 2(A) by failing to act at all times in a manner that promotes public confidence in the judiciary;

(5) Canon 2(B) by allowing his relationships with others to influence the judge's judicial conduct or judgment;

(6) Canon 3 by failing to perform the duties of the judicial office impartially;

(7) Canon 3(B)(4) by failing to be dignified and courteous to those with whom the judge deals in an official capacity and requiring similar conduct of persons subject to the judge's discretion and control;

(8) Canon 3(B)(5) by failing to perform his judicial duties without bias or prejudice and by failing to cooperate with other judges and court officials in the administration of court business; and

(9) Canon 3(C)(2) by failing to require staff, court officials, and others subject to the judge's discretion and control to observe the standards of fidelity that apply to the judge.

Respondent's Objections

Respondent argues that the findings of misconduct by the Panel are not supported by clear and convincing evidence. We disagree.

The Panel found that respondent's testimony in response to most of the material allegations against him was not credible or believable. The findings of the Panel are entitled to great weight, particularly when the inferences drawn from the testimony in the record depend largely on the credibility of the witnesses. In re Yarborough, 327 S.C. 161, 165, 488 S.E.2d 871, 873 (1997). In addition, both complainants testified as to their recollections surrounding the allegations, and their testimony was supported by their supervisors who described their demeanor and corroborated their assertions. After reviewing the record, we believe the findings of misconduct against respondent were established by clear and convincing evidence.

ODC's Objections

ODC raises four exceptions to the Panel's recommendation. First, ODC argues the Panel erred in failing to include a finding that respondent also violated Canon 3(C)(1)[5] or Canon 4(A)(2)[6] due to respondent's use of the racial slur.

Respondent used the derogatory term while on a phone call with Complainant B, and the purpose of the call was to complain about the job performance of two other employees. Respondent's conduct clearly evinced a bigoted animus in the performance of his judicial duties, and the Panel appropriately determined that respondent's misconduct fell under Canon 3(B)(5). We believe it is unnecessary to find separate violations of Canon 3(C)(1) and Canon 4(A)(2).

ODC next argues that the Panel erred in finding respondent did not commit misconduct by asserting in the January 5, 2004 meeting that he had been cleared or exonerated.

The Panel determined that it had been proved that respondent asserted in some form that he had been cleared or exonerated by SLED and the Commission but that respondent's position was reasonable. ODC claims it was not reasonable because it argues there is a difference in being "cleared" or "exonerated" and having prosecution declined due to lack of evidence. ODC contends that by using the words "cleared" or "exonerated", respondent intentionally implied that there had been a factual finding that respondent had not committed the misconduct alleged by Complainant A and Complainant B.

[5] "A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business."
[6] "A judge shall conduct all of the judge's extra-judicial activities so that they do not demean the judicial office."

While it is true that no correspondence from SLED, the attorney general's office, or the Commission use the terms "cleared" or "exonerated", it is undisputed that respondent was not facing any prosecution or investigation from SLED or the Commission at the time of the meeting on January 5, 2004. Respondent's assertion that he had been cleared of misconduct was based on his reasonable belief in light of the earlier proceedings. Accordingly, we decline to find respondent committed misconduct due to this statement made during the January 5, 2004 meeting.

ODC also argues that the Panel erred by finding that respondent misrepresented his willingness to take a polygraph examination.

At the hearing before the Panel, all eleven judges, including respondent, who were present at the January 5th meeting testified. Four of the judges (including respondent) testified that they could not recall any specific representation or mention of the polygraph issue by respondent. The other seven judges testified, in general, that respondent stated he was willing to take a polygraph test but that respondent did not have to take one because his accusers would not take a polygraph test.

We find the Panel was correct in noting there was conflicting testimony concerning the details and context of any discussion surrounding the polygraph examination. As such, ODC did not clearly and convincingly prove its allegation that respondent commented directly on the subject of the polygraph test during the meeting, and that such information influenced the magistrates' decision as respondent intended.

Finally, ODC contends the Panel erred in finding respondent did not commit misconduct because of his representation to Governor Sanford that he had passed a polygraph test. We disagree.

The Panel correctly held respondent's statement that he had passed the polygraph test was reasonably accurate. The private examiner who administered the polygraph test initially determined that

respondent passed, and although this conclusion was later challenged, respondent had been told that he had passed the examination. We find no misconduct for respondent's letter to Governor Sanford.

CONCLUSION

A public reprimand is the most severe sanction that can be imposed against respondent, In re Bethune, 372 S.C. 249, 642 S.E.2d 575 (2007), and we adopt the Panel's conclusions in its entirety. Respondent is to receive the following sanctions: (1) public reprimand; (2) respondent is prohibited from seeking or accepting any judicial position in South Carolina without the express permission of the Supreme Court; and (3) respondent is ordered to pay costs of proceedings.

PUBLIC REPRIMAND.

TOAL, C.J., MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ventures South Carolina, LLC,
d/b/a SunCruz Casinos, Appellant,

v.

South Carolina Department of
Revenue, Respondent.

Appeal From Horry County
Marvin F. Kittrell, Administrative Law Court Judge

Opinion No. 26486
Heard January 23, 2008 – Filed May 12, 2008

REVERSED

Zoe Sanders Nettles, and Dwight F. Drake, both of Nelson, Mullins, Riley & Scarborough, of Columbia, for Appellant.

Harry A. Hancock, of South Carolina Department of Revenue, of Columbia, for Respondent.

JUSTICE BEATTY: The operator of a gambling cruise ship appeals the Administrative Law Court's (the ALC's) finding that section 3-11-400 of the South Carolina Code requires monthly reports of gross proceeds, not just the percentage of winnings to losses. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

The enactment of section 3-11-400 took effect on June 1, 2005. At that time, Appellant Ventures South Carolina, LLC, (hereinafter, "SunCruz") operated a gambling cruise vessel under the name of "SunCruz Casinos" out of Horry County. Pursuant to section 3-11-400, SunCruz submitted reports to the Department of Revenue detailing only the percentage of winnings to losses. Because the Department was required to determine the "form and format" of the monthly report, it developed a form requiring gambling cruise operators to report the amount of money taken in and paid out per machine and the total percentage of wins and losses per machine. On September 15, 2005, the Department wrote a letter to SunCruz informing it that the reports submitted did not meet the statutory requirements because SunCruz did not use the forms developed by the Department. The Department requested that SunCruz complete the required form within ten days or else fines would be imposed up to $41,500 per day for each day the report was late. SunCruz responded, arguing the statute only required it to report the percentage of wins and losses, and not the total amount taken in and paid out. Because the parties could not reach an agreement on the matter, a contested hearing was held before the ALC on May 8, 2006.

After the hearing, the ALC issued an order siding with the Department. The ALC noted that although section 3-11-400(C) stated gambling cruise operators had to report the average daily percentage of winnings to losses per machine, it also required the Department to conduct an annual audit to verify the percentages and allowed the counties to tax the gross proceeds and impose a surcharge per ticket sold. Interpreting these subsections together, the ALC concluded the Department could require the gambling cruise operators to report the amount of money in and amount paid out per machine. Otherwise, the ALC reasoned, the counties could not determine the amount of profits to tax and the Department would not be able to conduct an audit.

Thus, the ALC found SunCruz must include in its report the amount wagered and the amount paid out as prize money for each machine operated. The Department's motion to certify SunCruz's appeal from the Court of Appeals to this Court was granted.

DISCUSSION

SunCruz argues the ALC erred in its interpretation of section 3-11-400(C)(3)(b)(i) because the clear language of the statute requires the reporting of only the average daily percentages of winnings to losses per gambling device, not the total amount wagered and paid out.

The primary purpose in interpreting statutes is to ascertain the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "We cannot construe a statute without regard to its plain and ordinary meaning, and this Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope." New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 310, 649 S.E.2d 28, 29-30 (2007). "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." Hodges, 341 S.C. at 85, 533 S.E.2d at 581. The statute's language is considered the best evidence of legislative intent. Id. However, the Court will reject the plain meaning of the words used in a statute if it would lead to an absurd result and will "construe the statute so as to escape the absurdity and carry the intention into effect." Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998).

Turning to the instant case, section 3-11-400 provides that a county or municipality may assess a surcharge of up to ten percent of each ticket sold per cruise and a surcharge of up to five percent of the gross proceeds of each gambling vessel. S.C. Code Ann. § 3-11-400(C)(2) (Supp. 2007). The section further provides:

> (b)(i) Each gambling vessel must report to the Department of Revenue, on a monthly basis, the average daily percentage of winnings to losses for each gambling device used on a gambling vessel. The report must be delivered to the Department of Revenue on the twentieth day of the month for the preceding month, in a form and format determined by the department. If no gambling devices are used, the gambling vessel must report to the department that no gambling devices were used. The department must perform an annual audit to verify the accuracy of the reports.
>
> . . .
>
> (iii) The department must make this information available, on a quarterly basis, to the governing body of the county or municipality from which the gambling vessel originates and to the general public.
>
> . . .
>
> (iv) The department is authorized to promulgate regulations to implement the provisions of this subsection.

S.C. Code Ann. § 3-11-400(C)(3)(b)(i), (iii), (iv) (Supp. 2007) (emphasis added).[1]

[1] Section 3-11-400 (C)(3)(b)(iv) authorizes the Department to promulgate regulations to implement the provisions of "this subsection," meaning subsection (C) in its entirety. Thus, if the Department promulgated regulations requiring a monthly report of money taken in and paid out per machine, SunCruz must comply.

A clear reading of section 3-11-400(C)(3)(b)(i) only requires the reporting of percentages of daily wins and losses and allows the Department to draft a form for the reporting of this data. Although the statute also allows the Department to obtain information, including the total amount of money taken in and paid out, to confirm the percentages for an annual audit, it does not require monthly reports of this information. Further, although section 3-11-400(C)(3)(b)(iv) authorizes the Department to promulgate regulations to further implement this section, the Department admitted at oral argument that it has not promulgated any regulations requiring monthly reports of total monies paid in and paid out at this time. Thus, the Department is currently exceeding its power to collect information regarding gross proceeds from gambling cruise operators.[2]

Accordingly, the finding of the ALC is

REVERSED.

TOAL, C.J., MOORE and PLEICONES, JJ., concur. WALLER, J., dissenting in a separate opinion.

[2] The Department concedes that absent the requirement to audit, the statute limits the information required to be reported monthly to daily percentages of winnings to losses. On the other hand, SunCruz concedes that the Department is entitled to "gross proceeds" information during its annual audit.

JUSTICE WALLER: In my opinion, the Administrative Law Court properly construed the statute at issue in this appeal. Therefore, I respectfully dissent.

As noted by the majority, the primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature. E.g., Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). Furthermore, "[a] statute should not be construed by concentrating on an isolated phrase." South Carolina State Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

The Gambling Cruise Act (the Act) is found in Chapter 11 of Title 3 of the South Carolina Code. The Legislature explicitly outlined the intent of the Act as follows:

> It is the intent of the General Assembly to delegate to counties and municipalities of this State the authority to prohibit or regulate the operation of gambling vessels that are engaged in voyages that depart from the territorial waters of the State, sail into United States or international waters, and return to the territorial waters of the State without an intervening stop.

2005 Act No. 104 § 1. Before the Act was signed into law, counties and municipalities were not able to prohibit or regulate these gambling cruises, also known as "cruises to nowhere." See Palmetto Princess, LLC v. Town of Edisto Beach, 369 S.C. 50, 53 n.2, 631 S.E.2d 76, 78 n.2 (2006).

With regard to S.C. Code Ann. section 3-11-400(C), the Legislature expressly authorized counties to impose and collect surcharges on (1) gambling vessel ticket sales, and (2) the gross proceeds of the vessels. The entire text of section 3-11-400(C) provides as follows:

(1) **For purposes of this section, "gross proceeds" means the total amount wagered or otherwise paid, in cash or credit, by a passenger or user of a gambling device aboard a gambling vessel.**

(2) If a county or municipality does not adopt an ordinance prohibiting a gambling vessel from operating, or if a gambling vessel other than a passenger cruise liner is permitted to operate because that gambling vessel, on each cruise, makes an intervening stop in another State, possession of the United States, or foreign country, **the county or municipality may assess a surcharge of up to ten percent of each ticket sold per gambling cruise, and a surcharge of up to five percent of the gross proceeds of each gambling vessel.**

(3)(a) **If a county or municipality assesses the surcharges set forth in item (2), then the proceeds of the surcharges are to be paid to the county or municipality from which the gambling vessel originates its cruise.** The county or municipality is responsible for setting forth the procedures by which the proceeds are paid to the county or the municipality.

(b)(i) **Each gambling vessel must report to the Department of Revenue, on a monthly basis, the average daily percentage of winnings to losses for each gambling device used on a gambling vessel.** The report must be delivered to the Department of Revenue on the twentieth day of the month for the preceding month, **in a form and format determined by the department.** If no gambling devices are used, the gambling vessel must report to the department that no gambling devices were used. **The department must perform an annual audit to verify the accuracy of the reports.**

(ii) A gambling vessel that fails to deliver **the report of winnings and losses** to the department may be assessed a civil penalty up to the amount of one hundred dollars per day per gambling device for each day that the report is late.

(iii) **The department must make this information available, on a quarterly basis, to the governing body of the county or municipality from which the gambling vessel originates and to the general public. In addition, quarterly reports must be submitted to the Governor, the President Pro Tempore of the Senate, and the Speaker of the House of Representatives**.

(iv) The department is authorized to promulgate regulations to implement the provisions of this subsection.

S.C. Code Ann. § 3-11-400(C) (Supp. 2007) (emphasis added).

First, it is significant to note the monthly report required by subsection 3-11-400(C)(3)(b)(i) must be filed with respondent "in a form and format determined by" respondent. The form reasonably chosen by respondent requires inclusion of the amounts wagered and the amounts paid out as winnings. I agree with respondent that if the monthly report contained **only** information regarding "the average daily percentage of winnings to losses," there would be no substantive information by which respondent could verify the report. This verification clearly is essential for respondent to be able to conduct its annual audit, and also is necessary so respondent can discharge its duty to provide the mandated quarterly reports. See §§ 3-11-400(C)(3)(b)(i) & (iii).

Moreover, without some kind of reporting on the actual amounts wagered, and the amounts paid out, there would be no data on which the counties and municipalities could compute "gross proceeds." Yet, the counties and municipalities are expressly allowed to tax the gross proceeds of these gambling vessels. See §§ 3-11-400(C)(1), (2) & (3)(a).

In my opinion, "the average daily percentage of winnings to losses" phrase contained in subsection 3-11-400(C)(3)(b)(i) simply cannot be read in isolation. It must be read and harmonized with all the language of section 3-11-400(C), and with the overall intent of the Act which the Legislature has clearly stated. As respondent aptly argues, the result of the majority's

interpretation of the statute would lead to the absurd result that counties and municipalities have the ability to levy a tax on the gross proceeds of a gambling vessel, but the gambling vessel is not required to report these gross proceeds. Such a result is patently absurd, and I reject that this is what the Legislature intended. See, e.g., Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.").

For these reasons, I would affirm the ALC's decision

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sherrie Lazicki-Thomas, Appellant,

v.

South Carolina Budget and Control Board, South Carolina Retirement Systems, Respondent.

Appeal from Richland County
Ralph K. Anderson, III, Administrative Law Court Judge

Opinion No. 26487
Heard March 19, 2008 – Filed May 12, 2008

AFFIRMED

Robert E. Hoskins, of Foster Law Firm, of Greenville, and Robertson H. Wendt, Jr., of North Charleston, for Appellant.

Kelly H. Rainsford, and David K. Avant, both of South Carolina Retirement Systems, of Columbia, for Respondent.

JUSTICE PLEICONES: The issue in this appeal is whether the Administrative Law Court (ALC) correctly interpreted the meaning of the phrase "member in service" in the Police Officers Retirement System

(PORS) disability statute[1] to mean a member who is still an employee. We hold the phrase was properly construed and affirm.

FACTS

Appellant was employed as a City of North Charleston firefighter, accruing five years, three months, and sixteen days of service credit in the PORS. In April 2004, she was allegedly injured on the job, and as of January 28, 2005, her city employment was terminated. Appellant filed an application for disability retirement on August 16, 2005, and respondent promptly notified her that she was ineligible to apply because she was not "in service" when the application was made. Following exhaustion of her administrative remedies and a final determination by respondent, appellant filed a request for a contested case hearing with the ALC.

In August 2006, while appellant's case was pending, the ALC sitting *en banc* issued an order in a case entitled *Anderson v. S.C. Budget & Control Bd., S.C. Retirement Sys.* In *Anderson*, the ALC interpreted the phrase "member in service" in the South Carolina Retirement System (SCRS) disability retirement statute.[2] The ALC held that the phrase "as applied to an employee seeking disability retirement benefits, plainly means a person having the status of an employee…at the time the application for disability benefits is filed, specifically including those on accrued annual leave or sick leave." In reaching this decision, the ALC relied in part on the legislative histories of the PORS disability retirement statute and the Retirement System for Members of the General Assembly disability statute,[3] both of which contain language identical to that in the SCRS statute, i.e., "the application of a member in service." The parties and the ALC agree the *Anderson* order applies to disability applicants under all three retirement systems.

Following the filing of the *Anderson* order, respondent was granted summary judgment. This appeal follows.

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[1] S.C. Code Ann. § 9-11-80 (1985 & Supp. 2007).
[2] S.C. Code Ann. § 9-1-1540 (Supp. 2007).
[3] S.C. Code Ann. § 9-9-65(1) (Supp. 2007).

ISSUE

Whether a disability retirement application is untimely if not filed while the applicant is a member in service?

ANALYSIS

The PORS disability retirement statute contains the following provision:

> On **the application of a member in service** or the member's employer, a member who has five or more completed years of earned service or any contributing member who is disabled as a result of an injury arising out of and in the course of the performance of the member's duties regardless of length of membership may be retired by the retirement board not less than thirty days and not more than nine months next following the date of filing the application on a disability retirement allowance if the system, after a medical examination of the member, certifies that the member is mentally or physically incapacitated for the further performance of duty, that the incapacity is likely to be permanent, and that the member should be retired.
>
> § 9-11-80(1) (emphasis supplied).

The ALC found that there was no need to resort of the rules of statutory construction to determine the meaning of the term "in service" as the language was clear, plain and unambiguous, and meant that the member was an employee at the time the disability application was filed. See Ventures South Carolina, LLC v. S.C. Dep't of Rev., Op No. 26486 (S.C. Sup. Ct. filed May 12, 2008) ("where language is plain and unambiguous … the rules of statutory interpretation are not needed").

Appellant contends the ALC erred in finding the disability retirement statute unambiguous. Her focus is not on the term "member in service," but rather the event to which it applies. She reads the statute to require that the disability arise during employment, and to be silent on the time for filing the application. We disagree.

The PORS disability statute begins with the clause "On the application of a member in service," an unambiguous reference to the application process. The timing of the disabling event is found later in the sentence, with disability retirement available to a member with five or more completed years of earned service who becomes disabled for any reason, or to any contributing member with less than the five years "who is disabled as a result of an injury arising out of and in the course of the performance of the member's duties . . . ." That the disabling event and the application must both occur while the person is still employed is evident from the procedural language at the conclusion of the statute which states the applicant "may be retired…if the system…certifies that the member should be retired." A person who is no longer working for the entity cannot "be retired" from that agency. We find no support for appellant's assertion that the statute's opening phrase "On the application of a member in service" merely qualifies the timing of the disabling event rather than defining the application period.

The disability retirement statutes mandate that the application be filed by a "member in service." Appellant was not in service when her application was filed, and respondent's summary judgment motion was properly granted. Therefore, the order on appeal is

AFFIRMED.

TOAL, C.J., WALLER, BEATTY, JJ. and Acting Justice E. C. Burnett, III, concur.

The Supreme Court of South Carolina

In the Matter of Carroll A. Gantt, Respondent.

ORDER

Respondent was definitely suspended on November 5, 2007, for a period of six months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

May 6, 2008

The Supreme Court of South Carolina

David Wayne Graham, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

Petitioner pled guilty to murder, armed robbery, and criminal conspiracy. No direct appeal was taken.

Petitioner filed an application for post-conviction relief (PCR) in which he alleged his guilty plea was involuntary, counsel was ineffective, and the evidence was insufficient. The application was denied and dismissed. Petitioner's petition for a writ of certiorari was denied by this Court after review pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

Petitioner filed a second PCR application in which the denial of his right to direct appeal was the sole issue raised. The PCR judge found the application was successive and barred by the statute of limitations.

Petitioner has now filed a notice of appeal and an explanation, pursuant to Rule 227(c), SCACR, why the PCR judge's findings were improper. Specifically, petitioner contends his request for a belated review of his direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) and Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) was not successive and was not abandoned by prior proceedings. Petitioner argues further that the memorandum he submitted to the lower court set forth meritorious appellate issues. Accordingly, petitioner maintains he should be allowed his "full bite at the apple."

Initially, we note the PCR judge erred in finding petitioner's second application was barred by the statute of limitations. Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002)(one year statute of limitations for PCR claims does not apply to allegation applicant was denied the right to direct appeal due to the ineffective assistance of counsel). However, he did not err in finding the application was successive.

All applicants are entitled to a full and fair opportunity to present claims in one PCR application. Odom v. State, 337 S.C. 256, 523 S.E.2d 753

(1999). Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than "one bite at the apple as it were." Id. A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, *or raises grounds waived in prior proceedings.* Id. In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application. Id.

In the case at hand, petitioner clearly could have raised the issue of the denial of his right to direct appeal in his first PCR application. Because petitioner failed to raise the issue in his first application, the PCR judge correctly found petitioner was barred from raising it in a successive application. Accordingly, because petitioner has failed to provide a sufficient explanation, as required by Rule 227(c), why the PCR judge's finding that the application was barred as successive was improper, we hereby dismiss petitioner's appeal.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina
May 7, 2008

The Supreme Court of South Carolina

In the Matter of
Robert J. Cantrell, Petitioner.

ORDER

On September 23, 2003, petitioner was placed on interim suspension. In the Matter of Cantrell, 360 S.C. 325, 600 S.E.2d 902 (2003). On August 29, 2005, he was definitely suspended from the practice of law for two years. In the Matter of Cantrell, 365 S.C. 600, 619 S.E.2d 434 (2005). Petitioner has now filed a petition for reinstatement.

The Committee on Character and Fitness (the CCF) recommends the Court grant the petition subject to the condition that petitioner enter into a monitoring contract with Lawyers Helping Lawyers (LHL). Neither the Office of Disciplinary Counsel (ODC) nor petitioner has filed exceptions to the CCF's recommendation.

The Court grants the petition for reinstatement subject to the following conditions:

1. for two years from the date of this order, petitioner shall meet with his psychologist on a monthly basis; the psychologist

shall file quarterly reports with ODC which state petitioner's progress;

2. for two years from the date of this order, petitioner shall be mentored by an active member of the South Carolina Bar; the mentor shall file quarterly reports with ODC which state petitioner's progress in returning to the practice of law;

3. petitioner shall enter in a two year monitoring contract with LHL which shall require petitioner to abstain from the use of alcohol and illegal drugs; further, in addition to any other terms proposed by LHL, the contract shall require that petitioner have weekly contact and monthly face-to-face contact with his monitor; the monitor shall file quarterly reports concerning petitioner's progress with LHL and ODC; and

4. LHL and ODC shall notify the Court if petitioner's psychologist, mentor, or monitor fails to submit the required quarterly reports or if the reports indicate a lack of satisfactory progress by petitioner.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina
May 8, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No.: 2004-CP-21-488

Calvin Ben Collins, Appellant,

v.

Mark Conrad Frasier, Respondent.

Case No.: 2004-CP-21-489

Faye B. Collins, Appellant,

v.

Mark Conrad Frasier, Respondent.

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No. 4385
Submitted May 1, 2008 – Filed May 6, 2008

AFFIRMED

Stephen J. Wukela, of Florence, for Appellants.

Michael Mills Nunn, of Florence, for Respondent.

KITTREDGE, J.: This case arises out of a motor vehicle accident where the vehicle driven by Mark Frasier crossed the centerline and struck Calvin Collins's vehicle. Calvin and his wife, Faye, sued Frasier for the resulting injuries and loss of consortium. The jury returned a verdict for Frasier after finding he suffered a sudden, unforeseeable incapacity to operate his vehicle. The Collinses appeal the trial court's denial of motions for a directed verdict, judgment notwithstanding the verdict, new trial, or to alter or amend the verdict. We affirm.[1]

In Boyleston v. Baxley, 243 S.C. 281, 284-85, 133 S.E.2d 796, 797 (1963), the South Carolina Supreme Court held a vehicle operator is not ordinarily chargeable with negligence when he suddenly losses consciousness due to an unforeseen cause.[2] The court in Boyleston assigned the burden of proving such incapacity to the defendant. 243 S.C. at 285, 133 S.E.2d 797. The appeal before us today turns on whether Frasier presented sufficient evidence to create a jury question as to whether he suffered a sudden, unforeseeable incapacity to operate a vehicle. We hold Frasier presented evidence which removed his sudden, unforeseeable incapacity defense from the realm of conjecture into the field of permissible inference. As a result, the trial court properly presented the defense to the jury and committed no error in refusing to set the verdict aside.

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

[2] The supreme court specifically recognized "the principle that 'the operator of an automobile is not ordinarily chargeable with negligence because he is suddenly stricken by a fainting spell, or loses consciousness from some other unforeseen cause, and is unable to control the vehicle.'" Boyleston, 243 S.C. at 284-85, 133 S.E.2d at 797 (quoting 5A Am. Jur. *Automobiles and Highway Traffic* § 223 (Supp. 1963)).

We find the Collinses' reliance on Howle v. PYA/Monarch, Inc., 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986) unavailing. In Howle, the jury rejected the defendant driver's defense of sudden, unforeseeable incapacity and found for the plaintiff. Id. at 588, 344 S.E.2d at 158. The trial court denied a motion for a judgment notwithstanding the verdict by the defendant driver. Id. at 589, 344 S.E.2d at 158. This Court affirmed the trial court after reviewing the evidence and all inferences reasonably deducible in the light most favorable to the nonmoving party, which is the applicable standard of review. Id. The driver in Howle suffered from diabetes for over thirty years, missed a meal, and appeared to be ill when dealing with a customer prior to the accident. Id. at 589-90, 344 S.E.2d at 158-59. Because a question of fact was presented, the trial court correctly presented the defense of sudden, unforeseeable incapacity to the jury. The point is that in Howle, as in the case before us, a jury question was presented. There will always be examples where claims and defenses prevail in one factual setting but not in another. Juries resolve questions of fact, just as the jury did in Howle and the jury did in the case before us.

In this case, the jury specifically found Frasier experienced "a sudden unforeseeable incapacity to operate his vehicle." The only question we must answer is whether there is any evidence to support this finding. We find the record contains ample support for this finding. Frasier testified he felt fine while driving until suddenly he felt all of his energy drain and saw fuzz. Frasier's family doctor, Dr. Robert Richey, was qualified as an expert in internal medicine. Dr. Richey testified to his knowledge Frasier had not exhibited signs of fainting prior to the accident. Following the accident, Dr. Richey administered a glucose tolerance test. The test indicated Frasier suffered from hypoglycemia. Dr. Richey explained a hypoglycemic event can result in loss of consciousness and the medicine Frasier was taking at the time of the accident could mask hypoglycemia.

We agree with the Collinses that a defendant's own, self-serving testimony is insufficient by itself to create a question of fact as to the defense. However, this is simply not the case here. Frasier did not merely testify he blacked out. In addition to Frasier's testimony regarding the event, the

record includes Dr. Richey's testimony about a likely cause of the incapacity, Frasier's lack of history with this illness, and the potential masking of the symptoms by Frasier's other medications. Further, the Collinses find fault with the jury's assessment of the weight and credibility of the evidence in light of the conflicting testimony. The issue of credibility is for the jury alone. Parsons v. Georgetown Steel, 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995) (stating the credibility and weight of testimony is for the trier of fact).

In sum, Frasier provided sufficient proof of sudden, unforeseeable incapacity to create an issue of fact for the jury. Therefore, no error occurred when the trial court denied the Collinses' motions for directed verdict, judgment notwithstanding the verdict, new trial, and motion to alter or amend. The judgment of the trial court is

AFFIRMED.

ANDERSON and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Richard Philyaw Anderson, Appellant.

Appeal From Horry County
Paula H. Thomas, Circuit Court Judge

Opinion No. 4386
Submitted May 1, 2008 – Filed May 6, 2008

AFFIRMED

Appellate Defender Lanelle C. Durant, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Julie M. Thames, all

of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

HUFF, J.: In this criminal action, Richard P. Anderson appeals his conviction for first-degree burglary and sentence of twenty years in prison. Anderson argues the trial court erred in admitting an unauthenticated rolled ten-print card as maintained in the automated fingerprint identification system (AFIS) into evidence. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On August 15, 2003, Pricilla Ward discovered someone had broken into the home she shared with her husband. The intruder had gained access to the home by breaking a bedroom window. The Wards discovered several items missing from the home, including jewelry and firearms. Officer Hardee of the Horry County Police Department responded to the break-in and lifted two fingerprints from the broken window. Hardee identified State's Exhibit One and Two as the lift cards of fingerprints taken off the window in the bedroom.

The State called Sergeant Gause as an expert in the field of fingerprint analysis. Gause testified he analyzed State's Exhibit One and Two, checking them through AFIS. He explained how the AFIS machine takes a picture from a latent print which is then downloaded into the computer and sent through AFIS, which searches the database. Gause testified AFIS produces twenty to thirty possible matches, and the operator then has to physically review each potential matching print and compare it with the latent print from the crime scene. Gause identified State's Exhibit Three as the enlarged photograph of State's Exhibit One, one of the prints taken from the scene. State's Exhibit Four was identified by Gause as "the known print" from the database that was found to be a match to the latent print. State's Exhibit Four included an identification number of "SC00454508" in the bottom left-hand

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corner, which identified the individual to whom it belonged. When they obtain the identification number of a matching print from AFIS, they then identify the person to whom that individual number is assigned. Gause identified State's Exhibit Seven as a "known rolled ten-print." He explained that once a person is arrested, law enforcement rolls the prints on cards and the cards are retained on file in a database through SLED and the FBI. Gause then identified State's Exhibit Seven as Anderson's ten-print card.

At this point, Anderson objected to testimony regarding State's Exhibit Seven, the rolled ten-print card, arguing the rolled prints from the database had not been properly authenticated pursuant to State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987). The court ruled the ten-print card required authentication. The State indicated it would present evidence of a witness from SLED regarding AFIS. Noting the ten-print card in question originated from Kirkland Correctional Facility, the State proposed, and counsel for Anderson agreed, the witness would identify it as coming from a South Carolina Law Enforcement Agency, apparently to avoid injecting information that it was taken at a correctional facility. However, Anderson maintained the State was required to present testimony regarding the individual who actually took the print, and that information that it was taken by law enforcement would be insufficient for authentication. The court disagreed, ruling the State was not required "to have the officer who actually took [the print]."

The State then presented the testimony of Lieutenant Joseph Means from SLED, who is in charge of the crime information center at SLED and oversees the AFIS system there. Lieutenant Means described SLED's procedures regarding ten-print cards and AFIS. He testified AFIS stores all the digital fingerprint images of every ten-print card in South Carolina. Means explained State's Exhibit Seven was a normal ten-print card, printed from the AFIS system work station. Printed on the card is a state identification number, which Means explained is a unique number assigned to each individual when first arrested that stays unique to the individual no matter how many times that person is arrested. A record is kept of which identification number belongs to which individual. Means testified State's Exhibit Seven bore identification number "South Carolina 00454508," which

belonged to Anderson. He then stated this ten-print fingerprint card of Anderson was taken on April 7, 2004 by a law enforcement agency. He further testified these prints were sent to him and entered into the AFIS by his staff. Means testified he was the custodian of the cards, and that once a fingerprint card is sent into SLED, his office maintains the card in the exact manner in which it arrives. The trial court admitted the rolled ten-print card into evidence over Anderson's objection. Thereafter, Anderson was convicted of first-degree burglary and sentenced to twenty years in prison. This appeal followed.

STANDARD OF REVIEW

The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the decision of the trial court is based upon an error of law or upon factual findings that are without evidentiary support. Id.

LAW/ANALYSIS

Anderson contends the trial court erred in admitting the rolled ten-print card as maintained in AFIS into evidence because the card was not properly authenticated. We disagree.

Properly authenticated fingerprints are admissible against a criminal defendant. State v. Rich, 293 S.C. 172, 173, 359 S.E.2d 281, 281 (1987). Further, under the business records exception or the public records exception, admission of police fingerprint records is generally considered not to violate the prohibition against hearsay. Id. See S.C. Code Ann. § 19-5-510 (1985) (Providing in regard to business records as evidence, "[a] record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its

preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."); Rule 803(8), SCRE (Providing in regard to public records and reports, "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report. . ." are not excluded by the hearsay rule.). However, the party offering fingerprints into evidence must comply with the usual requirements of authentication. Rich, 293 S.C. at 173, 359 S.E.2d at 281.

In Rich, our supreme court cited with approval a North Carolina case, State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973), in determining whether a fingerprint comparison had been properly authenticated. 293 S.C. at 173, 359 S.E.2d at 282. The court noted in Foster, a police officer testified he identified a latent fingerprint with one alleged to be the defendant's which was on a fingerprint card in the master file of the police department. Id. There, the prosecution neither attempted to lay a foundation that the fingerprints on the master file card were in fact those of the defendant, nor sought to introduce the master file card. Id. In conclusion, the North Carolina Supreme Court held: "[W]ithout evidence as to when and by whom the card was made and that the prints on the card were in fact those of this defendant," testimony concerning the fingerprint card from the master file "violated the hearsay rule and should have been excluded." Id. at 174, 359 S.E.2d 282 (emphasis added); Foster, 284 N.C. at 273, 200 S.E.2d at 793 (emphasis added).

Guided by the Foster holding, the South Carolina Supreme Court reversed Rich's conviction and held a witness should not have been allowed to testify regarding fingerprint data contained in an unauthenticated document. Rich, 293 S.C. at 174, 359 S.E.2d at 282. The court found the latent prints which the law enforcement agent had taken himself were properly admitted. Id. at 173, 359 S.E.2d at 281. However, testimony regarding the inked impressions used to compare to the latent prints was improper since the inked impressions were not properly authenticated. Id. at

174, 359 S.E.2d at 282. As in Foster, the State in Rich "neither attempted to lay a foundation that the fingerprints on the master file card were in fact those of the defendant, nor sought to introduce the master file card." Id. at 173, 359 S.E.2d at 282.

In the present case, Anderson contends a proper interpretation of Rich requires the State to present the actual person who took the fingerprint to testify in order to authenticate the fingerprints from the master card as evidence. We do not believe Rich stands for such a strict authentication requirement. Instead, we find the evidence presented by the State, showing when and where the fingerprints were taken and how they were submitted to SLED, and describing the process implemented by law enforcement for taking the fingerprints and maintaining an accurate record of them in AFIS, was sufficient to authenticate the fingerprints as Anderson's known prints. See Rule 901(a) and (b)(9), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "[T]he following [is an example] of authentication or identification conforming with the requirements of this rule: Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.") Accordingly, we find the trial court properly admitted testimony concerning the ten-print card.

AFFIRMED.

ANDERSON and KITTREDGE, JJ., concur.