OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 46

December 11, 2006
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David B. Greene, Respondent.

Opinion No. 26232
Heard October 31, 2006 – Filed December 4, 2006

DEFINITE SUSPENSION

Henry D. McMaster, Attorney General, and James G. Bogle, Jr., Senior Assistant Attorney General, both of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, the full panel adopted the sub-panel report and the recommendation that respondent, David B. Greene, be suspended from the practice of law for nine months, with conditions, and be required to pay the costs of the proceedings. We agree with the recommended sanction.

FACTS

In 1998, respondent unwittingly became part of an illegal pyramid scheme disguised as an evangelical ministry, known as HISway International Ministries ("HISway" or "HIM"). Respondent's involvement included (1) investing his own money with the ministry; (2) representing Rev. Johnny

Cabe and HIM in a federal criminal investigation and in all other legal matters; and (3) acting as escrow agent for HIM. In the capacity of escrow agent, respondent allowed HIM to use his lawyer's trust account for deposits and disbursements after HIM's American accounts had all been frozen by the government.

Cabe eventually was convicted of 26 counts of wire fraud and money laundering.[1] Cabe's convictions were affirmed by the Fourth Circuit in a written opinion, which was submitted as one of Disciplinary Counsel's exhibits. From that opinion, the following facts are excerpted because they effectively explain the pyramid scheme and provide some background to this disciplinary matter:

> Cabe was pastor of a small independent Baptist church in Rock Hill, South Carolina. Beginning in January 1998 and continuing through October 1998, Cabe and another minister, Shelton Joel Shirley, solicited individuals to invest money in an investment scheme called "high yield trading programs." They promoted the scheme as a charitable venture affiliated with a religious organization, Hisway International Ministries of London, England.… Cabe and Shirley told potential investors that they had contacts with "traders" who would invest their money in European bank debentures. Some solicitations described the investments as charitable "gifts" and the return of investments as "re-gifts" and suggested that because of their charitable nature, there would be no tax consequences.
>
> Cabe portrayed the investment programs as profitable and without risk and claimed that investors typically would double their money within thirty to ninety days of investment.…
>
> Potential investors were given documents describing the lucrative nature of the scheme and prohibiting them from revealing any information relating to it. The documents

[1] The federal district court sentenced Cabe to 109 months' imprisonment. Respondent was not criminally charged.

instructed that if any such disclosure occurred, the investor would forfeit the investment. Investors were also required to pay a three percent "administration gift" fee to Cabe on every transaction.

On January 9, 1998, Cabe began establishing bank accounts in order to aggregate and aid in the transfer of investors' funds. Upon receiving contributions from investors, Cabe wired the funds to various organizations and individuals for alleged investment. The evidence at trial showed that these investments were in fact fictitious and that the money was stolen by the traders. Moreover, the evidence established that $679,317 of investors' contributions were [sic] diverted to Cabe, Shirley, and their families.

In the course of their dealings with investors, Cabe and Shirley recruited "stewards" for the scheme. After making a contribution to Cabe's ministry, the stewards were tasked with recruiting other investors for the programs. In order to recruit stewards, some of whom were already investors, Cabe provided them with literature detailing the success of the programs. In return for recruiting new investors, these stewards expected to receive a portion of the profits from maturing investments.

In meetings with investors, Cabe categorically stated that none of his prior investments had faced any problems. However, beginning in April 1998, Cabe complained to the "traders" that he had not received any return on the investments and was unable to pay any of his contributors. He expressed concern that he would not only lose future potential investors, but that he also might be "sued for fraud." Even with this knowledge, however, Cabe continued to solicit investors with representations that the programs were highly profitable and risk-free.

In July 1998, after certain of the investors demanded payment of the promised return on their investments, Cabe transferred money to some of them. Cabe represented that these

> payments were profits from their investments in the trading programs. However, these funds were in reality from the aggregated funds of new investors. The evidence presented at trial showed that these payments to investors were made to prove the programs profitable and to encourage further investments.
>
> …
>
> Eventually Cabe and Shirley were indicted in the court below. Shirley pleaded guilty and testified for the government at trial. One of the alleged traders, Terence Wingrove, an English art dealer, also testified for the government pursuant to a plea agreement. He admitted that he had received several million dollars in investment money from Cabe.

United States v. Cabe, 57 Fed.Appx. 542, 543-44 (4th Cir. 2003) (footnote omitted).

Respondent was drawn into the scheme through his friend, Dennis Smith, who he had known for 25 years.[2] Smith met Cabe around March 1998; Cabe explained to Smith that HIM planned to "spread goodwill internationally" by raising money through debenture trading. The profits from this international trading would be used for benevolent and religious causes, and the original "donors" would be "re-gifted" or rewarded with substantial returns. More specifically, HIM's pitch was that if a person made a "gift" to the ministry, that person's money would increase by 500%; the donor would receive 200% in return, therefore doubling the money, and the other 300% would be used for the ministry's world wide Christian missionary programs. Smith acted as a steward for HIM and stated he was taken in

[2] Respondent knew Smith through their work with The Gospel Hour, a legitimate, non-profit evangelical ministry started by respondent's father, Dr. Oliver Greene. Originally a radio and tent evangelist, Dr. Greene's ministry grew quite large, and today it continues to be broadcast on the radio and is even broadcast worldwide via the internet. See http://www.thegospelhour.org/index.html. After his father's death in 1976, respondent took over as executive director for The Gospel Hour. He passed the bar and began practicing law in 1977.

"hook, line and sinker." Smith testified that he believed respondent's involvement was based on respondent's trust in him.

Respondent gave $50,000.00 to HISway in May 1998. Respondent testified that his initial involvement resulted completely from his reliance on Smith's verbal representations about HIM.[3]

The Secret Service began to investigate HIM, and in July 1998, the government froze all of HIM's bank accounts. Respondent learned of this in late September 1998 at a meeting in his office attended by Smith and Roy Palmer;[4] Cabe also participated in the meeting via telephone from England. Regarding the frozen accounts, it was represented to respondent that it was all "a big mistake." It was also at this meeting when respondent was asked to legally represent Cabe and HIM in the criminal investigation[5] and to act as escrow agent for HIM by using his law firm's trust account.[6]

According to respondent, Smith and Palmer presented the idea of using his trust account. Smith and Palmer told respondent that several people were owed "re-gifts" of money, but could not be paid because of the frozen accounts, as well as others who "wanted to get in on" the trading. Respondent testified that he told Cabe the following: "I will let these donors donate money to HISway and I'll let you place it in my trust account. We can get some of these other people paid back." According to Smith, however, it was specifically suggested to use respondent's trust account because it was an account that could not be frozen by the government. Smith could not recall who made this suggestion. Respondent denies knowing this was the reason he was asked to use his trust account.

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[3] Disciplinary Counsel submitted HIM's promotional materials which detailed HIM's "unique secured asset high yield programs," and explained "debenture trading programs" as virtually no-risk. Respondent, however, did not see the HIM printed materials prior to his investment with, or representation of, HIM.

[4] Neither Smith nor Palmer was criminally charged in the HISway scheme.

[5] In addition to HIM's accounts being frozen, respondent also knew that Cabe's house had been searched pursuant to a federal search warrant.

[6] Since approximately 1991, respondent has been a solo practitioner.

On October 26, 1998, respondent's legal representation of Cabe and HIM "in all matters necessary" was memorialized in writing with the parties agreeing to a $5,000.00 retainer for respondent. Disciplinary Counsel presented evidence that respondent did not usually do criminal defense work; when questioned about why he took on the case, respondent replied that he believed Cabe was innocent and knew that if necessary, he "could always associate someone."

From September 30, 1998 to November 3, 1998, ten deposits were made into respondent's trust account related to HISway, for a total of $468,280.00. This included a $150,000.00 deposit from attorney John Hagins as well as another $50,000.00 deposit from respondent himself. Approximately 25 payments related to HISway were made from respondent's trust account between October 1, 1998, and March 24, 1999, for a total of $426,957.50 in disbursements. These payments included $5,000.00 and $3,917.50 to respondent himself for attorney fees related to his representation of Cabe and HIM. The other expenditures were paid to various people and companies, including, for example, Cabe's Corner Store.[7] Respondent did not independently investigate who the payees were; however, he believed the money belonged to his clients, Cabe and HISway, and therefore he felt obligated to make disbursements as directed by Cabe and Cabe's designees, Palmer and Smith.

Complainant John Dill explained that Smith told him about HIM, and Dill believed he would double his money within 45 days. Dill made two $50,000.00 investments with HIM – one was made before respondent got involved and one after. The latter investment was wired directly into respondent's trust account. Dill stated that he felt that his money would be safe in an attorney's trust account and that he had a lawyer-client relationship by virtue of the wire transfer and what Smith had told him. Prior to making this second payment, Dill was required to sign a "Reaffirmation Affidavit" wherein he "reaffirmed" that any money given had been an "unsolicited donation" without any promises made.

[7] The remaining HISway money from respondent's trust account, $41,282.50, was contributed by respondent to the federal restitution fund later used to reimburse victims of the scam.

Complainant Ann Barnes also made two payments to HISway – $11,000.00 in the summer of 1998, and $25,000.00 in fall of 1998. When Barnes was asked by Palmer for the second payment, Barnes knew the accounts had been frozen. Palmer explained that respondent, an attorney, would be handling all the money, and so Barnes sent her $25,000 payment to respondent's trust account by cashier's check. Barnes stated that based on what Palmer had told her, she believed that respondent was representing her interests. Barnes also signed a Reaffirmation Affidavit when she made her second payment.

Attorney Johnny Hagins testified that Palmer introduced him to HISway. Hagins invested $100,000.00 in March 1998, and five months later, he received $150,000.00 back. Hagins became aware that the HISway accounts had been frozen, but at a meeting he was told that the trades had been successful, and the money was being held in a European account. In the fall of 1998, Hagins went to a meeting at respondent's office with respondent, Cabe and Shirley, and he learned that respondent would be, in Hagins' words, a "gatekeeper" for the money by using his trust account. After HIM associated with respondent, Hagins made two additional payments of $150,000.00 and $35,000.00 at the beginning of October 1998. By January of 1999, Hagins was upset he had not seen the return on his investment. Respondent, Hagins, Palmer, Smith, and Cabe again met in respondent's office, and Hagins said they told respondent they wanted him "to birddog this thing and make sure it's done right."

In March 1999, respondent began attempting to end his legal representation of Cabe and HIM. He eventually withdrew in May 1999. Although he had had several discussions as Cabe's lawyer with the Secret Service and the Assistant U.S. Attorney, he never made an appearance for Cabe in federal court. Therefore, he unilaterally withdrew as Cabe's lawyer.

Respondent met with Hagins in March 1999, and told him the money was "just about all gone." Respondent also informed Hagins that he had sent out the money as directed by Cabe, Smith, and Palmer.[8]

After Cabe's conviction, the federal district court issued an order regarding the distribution of funds that had been seized by the government to victims of the HIM fraud. Respondent himself sought some reimbursement for his losses from the federal court. He asserted in a November 1999 affidavit that his payments were investments; however, because he initially characterized his payments as gifts during a January 1999 interview with the Secret Service, he was disallowed any monetary recovery. United States v. Cabe, 311 F.Supp.2d 501 (2003).

Mitigating Circumstances

Respondent testified that he never believed Cabe was involved in anything illegal and if he had suspected wrongdoing, he would not have represented Cabe. Once it became clear to him that Cabe was unwilling to assist the government's case and there had been an illegal scheme, he began to withdraw as Cabe's lawyer. In an attempt to explain why he was duped, he told the panel that he believed HIM to be an international ministry governed by a blind trust and the money was going to be used for "eleemosynary purposes and Christian endeavors." He had seen his own father run a legitimate ministry and raise money for a hospital in Africa. He stated he had no criminal intent.

Additionally, respondent's older brother, attorney Tom Greene, testified before the panel. Tom, a former Greenville solicitor and former legislator, stated that his brother is "somewhat gullible." Respondent also presented several witnesses who testified or submitted affidavits regarding his good character and reputation as a lawyer.

[8] As a plaintiff, Hagins (along with Barnes) brought a civil lawsuit against Cabe, respondent, and others, and eventually the matter was settled by respondent's malpractice carrier for $60,000.00.

Finally, respondent has no disciplinary history in almost 30 years as an attorney. He cooperated with the federal investigation after he withdrew as Cabe's lawyer, and also cooperated with disciplinary counsel. He turned over the remaining HIM money in his trust account to the federal restitution fund.

DISCUSSION

The full panel decided respondent had engaged in misconduct and recommended that respondent: (1) be suspended from the practice of law for nine months; (2) pay the costs of the disciplinary proceedings; and (3) be required to take CLE courses regarding the proper use of trust accounts. Respondent raises 18 exceptions to the report.[9] While we agree with respondent that the evidence does not support all the rule violations found in the report,[10] we nonetheless find respondent committed misconduct and impose the recommended sanction.

The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court. In re McFarland, 360 S.C. 101, 600 S.E.2d 537 (2004); In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001). A disciplinary violation must be proven by clear and convincing evidence. E.g., In re Chastain, 340 S.C. 356, 532 S.E.2d 264 (2000). This Court is not bound by the sub-panel's recommendation; instead, after a thorough review of the record, the Court may make its own findings of fact and conclusions of law, and it must impose the sanction it deems appropriate. In re McFarland, supra; In re Strickland, 354 S.C. 169, 172, 580 S.E.2d 126, 127 (2003); In re Chastain, supra.

It is clear to us that respondent committed professional misconduct by allowing Cabe and HIM to utilize his trust account with the knowledge that HIM's American bank accounts had been frozen as part of a federal criminal investigation. This was a serious lapse in professional judgment which

[9] Respondent contends, *inter alia*, the Panel erroneously: (1) applied a "knew or should have known" standard to the facts, and (2) imputed Cabe's intent to use respondent's trust account for illegal purposes to respondent.

[10] Unlike the panel, we do not find respondent violated Rules 1.1, 1.2(d), 1.13(d), 1.16(b), and 8.4(b) & (c), of the Rules of Professional Conduct, Rule 407, SCACR.

amounted to conduct "involving … fraud" as well as conduct that was "prejudicial to the administration of justice." Rules 8.4(d) & (e), of the Rules of Professional Conduct, Rule 407, SCACR; see also Preamble: A Lawyer's Responsibilities, Rule 407, RPC ("A lawyer, being a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

In addition to violations of Rules 8.4(d) & (e), RPC, we find that respondent also violated: Rule 1.8(a), RPC (conflict of interest, by entering into the business transaction with HIM while representing Cabe and HIM without the client's written consent); and Rule 8.4(a), RPC (it is professional misconduct to violate the Rules of Professional Conduct).

Likewise, we find there clearly are grounds for discipline in this matter. See Rules 7(a)(1) & (5), RLDE ("It shall be a ground for discipline for a lawyer to: (1) violate … the Rules of Professional Conduct, Rule 407, SCACR," and "(5) engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law.")

Accordingly, we order that respondent be definitely suspended for nine months and take CLE courses regarding the proper use of trust accounts. In addition, respondent shall pay the costs of these disciplinary proceedings. Within 15 days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., conur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Interest of Johnny Lee W., a minor under the age of seventeen, Appellant.

Appeal from Sumter County
R. Wright Turbeville, Family Court Judge
George M. McFaddin, Jr., Family Court Judge

Opinion No. 26233
Heard October 5, 2006 – Filed December 4, 2006

VACATED IN PART AND REMANDED

Appellate Defender Eleanor Duffy Cleary, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Norman Mark Rapoport, of Columbia; and Cecil Kelly Jackson, of Sumter, for respondent.

JUSTICE MOORE: In this appeal, we are asked whether the trial judge erred by accepting appellant's conditional guilty pleas. We vacate in part and remand.

FACTS

Appellant was charged with disturbing school and threatening a public official in January 2004. He filed a motion to quash the charge based on the unconstitutionality of S.C. Code Ann. § 16-17-420 (Supp. 2005), on the grounds it was unconstitutionally vague and overbroad.[1] The motion was denied by Judge George McFaddin, Jr.

Subsequently, appellant was charged with disturbing school in September 2004, by hitting two students, and disturbing school on the same date by hitting a third student.[2] Appellant filed a motion to quash these two charges on the same constitutional grounds.

Appellant pled guilty to the three charges of disturbing schools. He entered a plea of no contest to the threatening a public official charge. Finding he was bound by Judge McFaddin's earlier ruling on the motion to quash, Judge R. Wright Turbeville found that the statute is not unconstitutional. Judge Turbeville adjudicated appellant a delinquent and accepted his pleas and remanded him to Reception and Evaluation for evaluation.

Appellant later appeared before Judge Turbeville for disposition and was sentenced to commitment to the Department of Juvenile Justice for an indeterminate period not to exceed his twenty-first birthday. The sentence was suspended and appellant was placed on probation for one year.

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[1]We recently held in the opinion of In the Interest of Amir X. S., Op. No. 26219 (S.C. Sup. Ct. filed November 6, 2006) (Shearouse Adv. Sh. No. 42 at 23), that the statute was not unconstitutional.

[2]Appellant was also charged with malicious injury to property. He pled guilty and did not appeal that adjudication.

ISSUE

Are appellant's guilty pleas invalid as conditional guilty pleas?

DISCUSSION

At the adjudicatory hearing, the following exchange occurred:

> COUNSEL: . . . What I'm trying to do here is, in the interest of judicial economy and without putting the State to the task of a trial to prove that we engaged in conduct that would violate the statute if the statute were constitutional, is to simply stipulate to that, but continuing to maintain for and preserve our right to appeal.
>
> THE COURT: To preserve your right to appeal Judge McFaddin's ruling.
>
> COUNSEL: Yes, sir.
>
> THE COURT: Okay. The constitutionality of those statutes.
>
> COUNSEL: That's the only thing we're trying to do today without having to take the court's time to hear conduct we essentially admit to, but just say that it's not illegal.
>
> THE COURT: You stipulate to the fact that if that statute is constitutional, that his conduct violated it?
>
> COUNSEL: Yes, sir.

Thereafter, Judge Turbeville accepted appellant's guilty pleas.

Appellant argues the judge erred by accepting his disturbing schools guilty pleas because they were conditioned on his right to appeal the issue of whether the statute proscribing disturbing schools is unconstitutional. The State conceded at oral argument that appellant's pleas were conditional.[3]

A trial court may not accept a conditional plea. *See* State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982) (conditional plea is a practice not recognized in South Carolina and a practice of which this Court expressly disapproves; if an accused attempts to attach any condition or qualification to a plea, the trial court should direct a plea of not guilty). *See also* State v. Peppers, 346 S.C. 502, 552 S.E.2d 288 (2001) (court could not accept guilty plea where appellant conditioned guilty plea upon right to appeal constitutionality of indictment); State v. O'Leary, 302 S.C. 17, 393 S.E.2d 186 (1990) (court could not accept guilty plea where appellant conditioned guilty plea upon right to appeal constitutionality of statute).

Accordingly, the trial court erred by accepting the conditional pleas to the charges of disturbing school and those pleas are vacated. Appellant argues that because all of his pleas were entered together and the sentence reflects a combination of the pleas, each of his pleas and sentence should be vacated. However, appellant did not appeal his guilty plea to malicious injury to property, therefore, that plea is unaffected by his entering conditional pleas to the disturbing school charges. Further, appellant's *nolo contendere* plea to threatening a public official was not entered as a conditional plea; therefore, it is not vacated.

Although there are two valid guilty pleas, appellant's sentence is vacated because it was a combination sentence for all of the charges against

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[3]The State argues, however, that the issue is not preserved for review because appellant did not raise this issue at the later disposition hearing nor did he move to withdraw his pleas. This contention is without merit. *See* State v. Peppers, 346 S.C. 502, 552 S.E.2d 288 (2001) (conditional plea vacated although appellant had not moved to withdraw the plea); State v. O'Leary, 302 S.C. 17, 393 S.E.2d 186 (1990) (same).

him. On remand, the court may re-sentence appellant on the charges of malicious injury to property and threatening a public official. If appellant chooses to re-plead to the disturbing schools charges without placing conditions on those pleas, then appellant may also be sentenced on those charges at that time, or he may choose to proceed to trial on those charges. Accordingly, the decision of the trial judge is

VACATED IN PART AND REMANDED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Phillip Morris, Petitioner

v.

State of South Carolina, Respondent

ON WRIT OF CERTIORARI

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 26234
Submitted November 15, 2006 – Filed December 11, 2006

REVERSED

Appellate Defender Robert M. Pachak, 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 Christopher L. Newton, all of Columbia, for Respondent.

JUSTICE WALLER: In this post-conviction relief (PCR) case, we granted certiorari to review the PCR court's denial of relief to petitioner, Phillip Morris. We reverse.

FACTS

Petitioner was indicted for assault and battery with intent to kill (ABIK). On July 9, 2002, the scheduled trial date, petitioner arrived at court and signed a sentencing sheet in anticipation of entering a guilty plea to the lesser-included charge of assault and battery of a high and aggravated nature (ABHAN).[1] Petitioner subsequently left the courthouse, and when his case was called, he could not be located. When the State sought to try petitioner *in absentia,* petitioner's counsel told the trial court that she "would prefer not to proceed without" petitioner present. The trial court ruled that by leaving the courthouse, petitioner had forfeited his rights.[2] Petitioner's trial *in absentia* began immediately thereafter.

The trial concluded the next day, and the jury found petitioner guilty of ABIK. The trial court sentenced him to 20 years' imprisonment, suspended upon the service of 15 years, and five years' probation.[3] Petitioner did not directly appeal, but filed for PCR.

At the PCR hearing, trial counsel testified that at some point after signing the plea sheet, petitioner left and could not be found when his case was called for the guilty plea. Counsel denied telling petitioner he could leave the courthouse. She further stated she did not realize she had not moved for a continuance after the State requested a trial *in absentia*.

Petitioner testified that after he signed the plea sheet, he asked counsel if she could get a continuance. According to petitioner, counsel said she would try; after a few minutes in the courtroom, she returned and told him he could go. Petitioner stated that he waited for notification of a sentencing date

[1] In addition, both the solicitor and petitioner's counsel signed the guilty plea sheet.
[2] The trial court noted for the record petitioner's exception to its ruling.
[3] The sealed sentence was opened on October 22, 2002.

and did not know his case had been tried until police picked him up on October 22, 2002.

Petitioner's girlfriend, Jaclyn Cummings, also testified at the PCR hearing. She was with petitioner at the courthouse on the day he signed the plea sheet. Cummings stated she also understood that counsel was going to try to get the "postponement," and therefore, she and petitioner could leave.

The PCR court denied relief, specifically finding that (1) petitioner's testimony and the testimony of Cummings were not credible, while trial counsel's testimony was credible; and (2) trial counsel "tried to postpone the trial, via a Motion for Continuance, but that Motion was denied."

ISSUE

Did petitioner establish that trial counsel was ineffective?

DISCUSSION

Petitioner argues that counsel should have moved for a continuance. Petitioner further contends he was prejudiced by counsel's omission because he would have received a lesser sentence on the lesser charge of ABHAN. We agree.

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Strickland v. Washington, 466 U.S. 668 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, supra; Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002).

In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. E.g., Bannister v. State, 333 S.C. 298, 509

S.E.2d 807 (1998). This Court will uphold the findings of the PCR court if there is any evidence of probative value to support them but will reverse the PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000); Cherry v. State, supra.

Initially, we note there is no evidence to support the PCR court's finding that counsel tried to postpone the trial by moving for a continuance and therefore cannot uphold that finding. Cherry v. State, supra. While the trial transcript clearly shows counsel objected to proceeding with a trial *in absentia*, this is markedly different from counsel making a motion for a continuance so petitioner could plead guilty to ABHAN as had been agreed upon between petitioner and the State. Consequently, we find counsel was deficient for failing to request a continuance.

The State contends, however, that petitioner cannot establish prejudice because the trial court was disinclined to grant a continuance since petitioner had left the courthouse. The State further maintains that because reversals of the denial of a continuance are "about as rare as the proverbial hens' teeth," petitioner failed to meet the prejudice prong. State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). We disagree.

The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant. State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996); Lytchfield, supra. Here, it is clear petitioner would have been prejudiced by the denial of a continuance because the trial *in absentia* subjected him to the ABIK conviction whereas the guilty plea would have been to ABHAN. The difference between these two crimes is significant. ABHAN is a common law misdemeanor punishable by up to ten years in prison, while ABIK is a violent crime felony punishable by up to twenty years in prison. See State v. Fennell, 340 S.C. 266, 274-75, 531 S.E.2d 512, 516 (2000); S.C. Code Ann. §§ 16-1-60, 16-3-620 (2003). Given the drastic distinctions between a conviction of ABIK versus one of ABHAN, we find this is the rare case where the refusal of the continuance would have amounted to an abuse of discretion. See State v. Williams, supra; Lytchfield,

supra. Thus, we find petitioner established prejudice from counsel's deficient performance.

CONCLUSION

We hold counsel did not move for a continuance and that the failure to do so prejudiced petitioner. Accordingly, we reverse the PCR court's denial of relief and remand for a new trial.

REVERSED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ronnie Armstrong and Tillie Armstrong, Petitioners,

v.

Food Lion, Inc., Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Fairfield County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 26235
Heard November 1, 2006 – Filed December 11, 2006

AFFIRMED

Katherine Carruth Link, of West Columbia, and Ross Alan Burton, of Winnsboro, for petitioners.

D. Andrew Williams, and R. Hawthorne Barrett, of Turner, Padget, Graham, & Laney, P.A., of Columbia; and Paul D. Harrill, of McNair Law Firm, P.A., of Columbia, for respondent.

JUSTICE MOORE: Petitioners, who are mother and son, filed suit against respondent (Food Lion), alleging causes of action for assault, battery, outrage, premises liability, negligence, and negligence *per se*. The trial court granted Food Lion's motion for a directed verdict as to most of petitioners' claims. The jury returned a verdict in favor of Food Lion as to the negligence claim. The Court of Appeals affirmed pursuant to Rule 220(b)(2), SCACR. Armstrong v. Food Lion, Inc., Op. No. 2004-UP-366 (S.C. Ct. App. filed June 10, 2004). We affirm.

FACTS

Petitioner Ronnie Armstrong (Ronnie) went to the Winnsboro Food Lion store on December 14, 1998, to purchase groceries with his sister and his mother Tillie Armstrong (Tillie). As Ronnie walked up the aisle of the store, three men in Food Lion uniforms approached him. Ronnie stated that Byron Brown approached and said "What's up?," and Ronnie replied, "Nothing." Ronnie testified that Brown then attacked him with a box cutter. Brown cut Ronnie in the face and neck and a second employee, Marcus Cameron, also began attacking him after he fell on the floor. Cameron cut him with another box cutter on his back.

When Ronnie's mother, Tillie, came to his aid, Cameron punched her in the chest and knocked her to the floor. A witness, Justin Loner, helped Tillie up and pulled Cameron off of Ronnie. Brown then backed off, and Loner called EMS. Ronnie testified that, "I don't know why they cut me. They just attacked me for no reason. I said nothing to provoke anyone." On cross-examination, Ronnie stated he had a confrontation with Brown two years prior to the incident, and Brown had threatened to kill him.

Loner testified that, when he first entered Food Lion, he saw three employees at the front of the store "goofing off" and not working. Two of those employees were Brown and Cameron. He stated that, after Ronnie and the employees approached each other, he saw one employee hit Ronnie causing him to bleed.

The store manager testified regarding the Food Lion employee manual. He read from the manual under the heading "Case Cutters." The manual stated: "Be extremely careful when using case cutters. Case cutters represent one of the major causes of accidents in the supermarket."

Following the presentation of petitioners' case, Food Lion moved for a directed verdict, arguing petitioners had failed to present evidence that Brown and Cameron were acting within the scope of their employment at the time of the assault. During petitioners' argument in response, counsel admitted Brown and Cameron "were goofing off at the time." The trial court granted a directed verdict in Food Lion's favor as to petitioners' causes of action for assault, assault and battery, and outrage[1] based on petitioners' failure to show the assault was committed for the purpose of, or in some way furthering, Food Lion's business.

ISSUE

Did the Court of Appeals err by finding the trial court properly directed a verdict in Food Lion's favor on petitioners' cause of action alleging Food Lion was vicariously liable for the torts committed by its employees?

DISCUSSION

In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. Steinke v. South Carolina Dep't of Labor, Licensing & Reg., 336 S.C. 373, 520 S.E.2d 142 (1999). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should have been denied. Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003). This Court will reverse only where there is no evidence to support the trial

[1]The causes of action for negligence *per se* and premises liability were also dismissed.

court's ruling, or where the ruling was controlled by an error of law. Steinke, *supra*.

Petitioners contend Food Lion is legally responsible to them for the acts of its employees, Brown and Cameron. The doctrine of *respondeat superior* rests upon the relation of master and servant. Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964). A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment. *Id.* An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business. *Id.* These general principles govern in determining whether an employer is liable for the acts of his servant. *Id.*

The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. Lane, *supra*. Under these circumstances the servant alone is liable for the injuries inflicted. *Id.* If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; this is so no matter how short the time, and the master is not liable for his acts during such time. *Id.*

The trial court appropriately granted a directed verdict because petitioners failed to produce any evidence that the Food Lion employees were acting within the scope of their employment or in furtherance of Food Lion's business when they attacked petitioners. The only reasonable inference from the testimony is that Brown and Cameron attacked Ronnie for their own personal reasons and not for any reason related to their employment.[2] They

[2]Petitioners argue that, because the reason for the attack is not gleaned from the testimony, we should look at the evidence in the light most favorable to them and essentially find the attack occurred for a work-related reason and send the case to the jury. However, this argument ignores the fact

were acting "to effect an independent purpose of their own." *See* Lane, *supra* (act of servant done to effect some independent purpose of his own is not within scope of his employment). Food Lion was not legally liable because the employees stepped away from their job of stocking shelves. *See* Lane, *supra* (employer not liable where employee stepped away from the employer's business to play a prank); Hamilton v. Davis, 300 S.C. 411, 389 S.E.2d 297 (Ct. App. 1990) (same).

Two cases that have previously found an employer liable for its employee's assault of another person are distinguishable from the instant case. In Crittenden v. Thompson-Walker Co., Inc., 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986), an employee assaulted another person in an attempt to collect a debt of the business. In Jones v. Elbert, 211 S.C. 553, 34 S.E.2d 796 (1945), a dairy farm's general manager assaulted the owner of a company contracted to provide a refrigerating system. The assault resulted from a dispute arising over problems with the system. The factor that distinguishes these cases from the instant case is that the assaults in Jones and Crittenden occurred, not merely in connection with the master's business, but with the purpose of in some way furthering the master's business. Here, there is no evidence that Brown and Cameron were furthering Food Lion's business in any manner.[3] Accordingly, the trial court properly granted Food Lion's

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that petitioners have the burden of proving the employees were about Food Lion's business and acting within the scope of their employment at the time of the attack. Petitioners failed to meet this burden.

[3]Petitioners argue the evidence was sufficient to establish a presumption that the employees were acting within the scope of their employment because Food Lion had furnished the instrumentalities used in the attack. Where one is found in possession of another's property, apparently using it in the business of such other, he is presumed to be the agent or servant of the owner and acting within the course of his employment. *See* Falconer v. Beard-Laney, Inc., 215 S.C. 321, 54 S.E.2d 904 (1949). However, petitioners failed to show that the employees were using the box cutters in Food Lion's business. Therefore, petitioners are not entitled to any such presumption.

motion for a directed verdict. Therefore, the decision of the Court of Appeals is

AFFIRMED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth L. Edwards, Respondent.

Opinion No. 26236
Submitted November 2, 2006 – Filed December 11, 2006

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Kenneth L. Edwards, of Hollywood, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to imposition of any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and definitely suspend respondent from the practice of law for eighteen months. The facts, as set forth in the agreement, are as follows.

FACTS

In 1986, respondent and his wife were divorced in North Carolina. The order included a requirement that respondent pay

$300.00 per month in child support. Respondent did not appeal the North Carolina order.

In 1987, respondent filed a separate action for divorce in South Carolina. In the South Carolina proceedings, respondent obtained an order that provided for $200.00 per month in child support.

At the time the North Carolina and South Carolina orders were issued, respondent was not an attorney. Even after becoming an attorney, respondent did not fully comply with either the North Carolina or South Carolina support orders, although he did make some payments pursuant to the South Carolina order.[1]

In 2001, the South Carolina Department of Social Services (DSS) filed an action to register and enforce the North Carolina order.[2] The action alleged respondent was in arrears in excess of $94,000.00. Respondent responded to the DSS action by challenging the validity of the North Carolina order. The judge held the North Carolina order was valid and ordered respondent to make payments. The decision was upheld on appeal. Only then did respondent begin to make payments pursuant to the North Carolina order.

In 2004, at the time respondent's appeal in the DSS action was pending, respondent sued his ex-wife in the Court of Common Pleas in South Carolina, contesting the validity of the North Carolina order and requesting termination of child support. The action was dismissed for lack of jurisdiction.

In 2004, respondent also filed a motion to terminate child support on the grounds of his son's emancipation. Respondent attached an affidavit and itemized list to his motion to terminate stating he had

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[1] Respondent was admitted to the South Carolina Bar on June 1, 1992.

[2] By that time, the order had been registered in Michigan, the ex-wife's new place of residence.

already paid, directly and indirectly, over $30,000.00 in support. The itemized list of payments contained a statement that respondent had paid over $14,000.00 in tuition payments to a military school for respondent's son. Although respondent had paid the tuition, the son did not attend the school and respondent obtained a full refund. Respondent was refunded the money more than three years prior to his submission of the affidavit to the court. Respondent did not inform the court that he had received a full refund of the tuition. Respondent admits the judge relied on his affidavit and the itemized list when she considered his motion to terminate his support obligation.

In respondent's motion for termination, respondent used the case caption from his 1987 South Carolina divorce action rather than the case caption for the pending DSS support enforcement action. Respondent served his ex-wife, but not DSS, even though he knew that DSS was assigned the rights to his child support. When the ex-wife did not appear at the hearing on respondent's motion to terminate payments, respondent handed up a proposed order which the judge signed. The order indicated that respondent had paid his child support pursuant to the South Carolina order and terminated support. Respondent did not inform the judge of the North Carolina support order, the pending DSS enforcement action and appeal, or the alleged arrearage to the judge. When the judge learned of the DSS action, she vacated the termination order she had signed for respondent.

On December 6, 2004, respondent filed a civil action against his ex-wife alleging, among other things, malicious prosecution and "misuse of legal procedure." He included a cause of action based, in part, on an ethical grievance his ex-wife had filed against him in 1995. The rules in effect at the time the grievance was filed prohibited lawyers from disclosing disciplinary matters. Respondent neither sought nor obtained permission from this Court to reveal information regarding his ex-wife's grievance. In addition, respondent's claims of malicious prosecution and "misuse of legal procedure" based on the grievance were without merit and in violation of Rule 13, RLDE (formerly Rule 26 of the Rule on Disciplinary Procedure) which provided immunity to complainants in disciplinary matters.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 3.1 (lawyer shall not bring, assert, or controvert an issue in a proceeding unless there is a basis for doing so that is not frivolous); Rule 3.3 (lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting in a fraudulent act); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits his misconduct constitutes grounds for discipline pursuant to Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers), Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law), and Rule 7(a)(7) (lawyer shall not willfully violate a valid court order issued by a court of this state or of another jurisdiction).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for eighteen months. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Benjamin R. Matthews, Respondent.

Opinion No. 26237
Submitted October 31, 2006 – Filed December 11, 2006

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Columbia, for respondent.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to either an admonition or a public reprimand. Respondent further agrees to pay the costs associated with ODC's investigation into this matter. We accept the agreement and issue a public reprimand. Within thirty (30) days of the date of this opinion, respondent shall fully reimburse ODC for its costs associated with its investigation into this matter. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

Respondent represented Buyer in a real estate closing. Seller, who lived out of state, was represented by another attorney for the purposes of deed preparation. Seller's attorney was to have the deed executed and delivered to respondent's non-lawyer assistant for recording at the courthouse after closing.

Prior to the closing, Seller's attorney faxed respondent the signed deed which listed Buyer and his wife "as joint tenants with right of survivorship and not as tenants in common" (Deed #1). This was in accordance with the instructions Seller's attorney received from the broker. Upon review of Deed #1 and at the request of Buyer and his wife, respondent contacted Seller's attorney prior to closing and asked that the grantee be changed to Buyer only. The Seller's attorney then faxed a revised but unsigned deed for respondent's review (Deed #2).

Seller's attorney did not hear back from respondent regarding her fax. Accordingly, Deed #2 was not executed. Instead, Seller's attorney delivered Deed #1 to the courthouse as planned. Deed #1 was recorded on September 21, 2004.

At some time prior to recordation, Deed #1 was altered to strike out Buyer's wife's name, but not the tenancy clause. It is unknown who altered Deed #1; however, there is no evidence that it was done by respondent or Seller's attorney or at their direction. Apparently, it was altered by a staff person attempting to comply with Buyer's request to have the property titled in his name alone.

When Buyer received the recorded deed, he compared it to the copy he had been given by respondent's staff at closing. Apparently, Buyer had been given the first page of the correctly worded deed faxed to respondent prior to closing (Deed #2) with the tenancy clause whited out so as to make it appear that Buyer was the

sole grantee. Although the alteration of the copy provided to Buyer was not done by respondent or at his direction, respondent admits that it was done by a non-lawyer subject to his supervision.

Respondent acknowledges that by accepting more legal work than he and his staff could competently and diligently handle, he created an atmosphere in which his non-lawyer staff believed it was appropriate to attempt to resolve problems, such as the problem with Buyer's deed, without his assistance or review.

Matter II

On June 23, 2004, respondent conducted a real estate closing. As of June 27, 2005, respondent had not provided the lender with the closing documents, including the recorded mortgage, the final title opinion, and the final title opinion. Respondent failed to respond to repeated letters and telephone calls from the lender and its attorney inquiring into the status of the closing documents. It was not until October 2005, after this grievance was filed, that respondent sent the documents to the lender. Although the mortgage had been timely filed, the delay resulted in respondent's untimely issuance of final title opinions and policies.

Respondent admits that, at times, he was more than two years behind in issuing some final title opinions and policies. The backlog involved as many as 700 files and more than $40,000 in premiums.

Respondent has now left private practice. Before closing out his books, he hired staff to assist him in preparation and issuance of all outstanding title insurance opinions and policies.

Matter III

Respondent delegated the responsibility of reconciling his trust accounts to a non-lawyer assistant without providing proper training or supervision. Although the accounts were reconciled every

month, the non-lawyer assistant was not given appropriate instruction about how to recognize potential errors requiring respondent's attention. As a result, for more than seven (7) months respondent was not made aware of three significant deposit errors in October, November, and December 2004. In each of these months, incoming funds were deposited into the wrong account. Disbursements were made from the correct account, causing the balance in that account to drop below the amounts respondent should have maintained for other pending matters. Because the account contained a substantial balance of unpaid title insurance premiums, no checks were returned.

When respondent discovered the errors, he transferred the deposited funds into the correct account. Although no client or third party suffered any loss, respondent acknowledges that he created significant risk of loss to others by failing to adequately manage his trust account.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.15 (lawyer shall safe keep client funds and property); and Rule 5.3 (lawyer having authority over non-lawyer assistant shall make reasonable efforts to ensure person's conduct is compatible with professional obligations). Respondent further admits his conduct violated the recordkeeping provisions of Rule 417, SCACR. Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. Within thirty (30) days of the date of this opinion, respondent shall fully reimburse ODC for its costs associated with its investigation into this matter.

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Hattie E. Boyce, Respondent.

Opinion No. 26238
Submitted October 31, 2006 – Filed December 11, 2006

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Hattie E. Boyce, of Spartanburg, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to either an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent entered into an agreement with Owner to purchase the office building where she practiced law. Pursuant to the agreement, respondent made payments to the bank that held the loan on the building. In April 2006, a lienholder contacted Owner's attorney to collect on its lien. The attorney asked respondent to identify all encumbrances on the property, including what was owed to the bank.

At respondent's instruction, her non-lawyer assistance prepared and served a subpoena for information on the bank.

The subpoena contained the following false and misleading statements and implications:

1. that Owner was a party in a pending civil action when he was not;

2. that the subpoena was issued by the "civil court in the County of Spartanburg" when it was not;

3. that the subpoena was in furtherance of a pending civil case when it was not;

4. that the bank was required by law to produce certain documents and information for inspection and copying when it was not;

5. that a designated official for the bank was required to provide the documents and information at the Spartanburg County Family Court when there was no cause pending in that court and no official for the bank was required to appear;

6. that the subpoena was issued in compliance with Rule 45(c)(1), SCRCP, when it was not; and

7. that respondent was an attorney acting on behalf of the plaintiff in a pending civil action in issuing the subpoena when, in fact, she was not.

Respondent acknowledges it was improper to send the subpoena when no action was pending. Even if the subpoena had been pursuant to a pending action, respondent admits she failed to review it prior to its service upon the bank. Finally, respondent admits that she failed to adequately supervise her non-lawyer assistant in the preparation and service of the subpoena.

LAW

Respondent admits that, by her misconduct, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.3 (lawyer having supervisory authority over non-lawyer shall make reasonable efforts to ensure the person's conduct is compatible with the professional obligations of the lawyer); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent acknowledges that her misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Martha Banda, Appellant.

Appeal from Greenville County
John C. Few, Circuit Court Judge

Opinion No. 26239
Heard October 17, 2006 – Filed December 11, 2006

AFFIRMED

Appellate Defender Robert M. Dudek, of Columbia, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and Solicitor Robert M. Ariail, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: In this case, the trial court denied Appellant Martha Banda's pre-trial motions to suppress evidence and an incriminating statement she gave to police. The trial court subsequently

convicted Banda for trafficking in ten grams or more of methamphetamine and sentenced her to four years imprisonment.

FACTUAL/PROCEDURAL BACKGROUND

In February 2003, Banda, a citizen of Zimbabwe,[1] was a passenger in a car stopped by the City of Greenville (Greenville) police for having stolen Georgia license tags. Earlier that evening, Greenville narcotics officers Detective Mark White (White) and Detective Melissa Lawson (Lawson) were staking out a house that a confidential informant had told them was the residence of a female drug target dealing methamphetamines, and for whom the officers had an arrest warrant. The confidential informant had arranged to purchase an "8-ball of meth" at the target's house. The informant further told police that the drugs came from a supplier in Georgia.

During the stakeout, the narcotics officers observed a car with Georgia license tags pull into the driveway of the target's residence and leave thirty to forty minutes later. Although White's testimony indicates that at this point, the officers were aware of the possibility that the deal between the confidential informant and the target had been called off, they followed the car assuming that the occupants might be going to meet with the informant anyway. As the officers continued to follow the vehicle, they realized there were two occupants: a male driver and a female passenger. White and Lawson testified that at this point, they assumed the female passenger to be their target. After learning from dispatch that the Georgia tags had been reported stolen, White and Lawson had another uniformed Greenville police officer assist them in stopping the car once it entered the city limits. Detective Conroy (Conroy), another narcotics officer assisting in the investigation of the target, also came to the scene.

[1] Banda came to the United States on a basketball scholarship. She first attended a university in Oklahoma and later transferred to the University of South Carolina.

Upon stopping the car, the officers requested that both the driver and passenger step out of the car. Conroy and the uniformed officer attended to the driver and subsequently handcuffed and arrested him for driving with a stolen license plate. Meanwhile, White and Lawson approached Banda on the passenger side. Although the officers immediately realized Banda was not their target when she stepped out of the car, they proceeded to question her at the scene anyway.

Detective White had his gun drawn and pointed at Banda as Lawson asked her if she had any weapons.[2] Banda responded she did not, but Lawson explained to Banda she was going to do a routine pat down for Lawson's own safety. During the pat down, Lawson felt an object in Banda's upper right hand coat pocket. When Lawson asked Banda what it was, Banda explained that it was her ace bandage. At the same time, Banda pulled a "loosely rolled up" bandage out of the pocket and handed it to Lawson. Lawson squeezed the bandage and felt plastic on the inside. She looked at Banda who "dropped her head" and told Lawson it was an ounce of "ice." Lawson read Banda her *Miranda* rights at the scene and after a further search of the vehicle, the officers took Banda back to the station where they read her *Miranda* rights for a second time. After waiving her *Miranda* rights, Banda gave the officers a written statement.

Banda made a pre-trial motion to suppress the drugs found by Lawson on the grounds that Lawson's stop and frisk was an unreasonable search and seizure. After an in camera suppression hearing in which the trial court heard testimony from Banda and Detectives White and Lawson, the court denied Banda's motion to suppress the drugs. The trial court found the police had probable cause to stop the car for the stolen tags; they had the authority to request Banda to get out of the car; and that Banda was properly frisked for

[2] Detective White testified that it is routine police department practice to have guns drawn for car stops related to narcotics investigations. Because the officers initially believed that Banda was their target, they adhered to this practice in approaching Banda during the stop.

weapons given the officers' reasonable suspicion of her involvement in the delivery of drugs.

Banda then made a second pre-trial motion to suppress her written statement made to the police after her arrest. Banda argued she had not been informed of her right to contact Zimbabwe's consular official as required by international treaty. The State did not deny this allegation.

The trial court found that even assuming the Greenville officers had violated the treaty, this violation did not provide adequate legal grounds to consider applying the exclusionary rule to Banda's statement. For this reason, the trial court refused to grant Banda a suppression hearing on the admissibility of her statement and denied her motion to suppress the statement. The trial court subsequently sentenced Banda to four years imprisonment.

This case was certified to this Court from the court of appeals pursuant to Rule 204(b), SCACR. Banda raises the following issues for review:

I. Did the trial court err in refusing to suppress the drugs found on Banda during a frisk for weapons pursuant to an automobile stop for a traffic violation?

II. Did the trial court err in refusing to grant a suppression hearing for Banda's written statement to police when police failed to notify the foreign consulate of Banda's arrest prior to interrogating her?

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only. Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001).

Our review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding. *State v. Butler*, 353 S.C. 383, 389, 577 S.E.2d 498, 500 (2003).

LAW/ANALYSIS

I. Suppression of Drugs

Banda argues that the trial court erred in refusing to suppress the drugs found in her coat during the automobile stop. We disagree.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. Temporary detention of individuals by the police during an automobile stop constitutes a "seizure" of an individual within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Therefore, an automobile stop implicates the Fourth Amendment prohibition against unreasonable searches and seizures, imposing a standard of "reasonableness" upon the exercise of discretion by state law enforcement officials. *See id.* at 654. The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. *Whren v. United States*, 517 U.S. 806, 809-810 (1996). Notwithstanding multiple exceptions, evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

In this case, it is undisputed that Greenville police acted lawfully in stopping the car in which Banda was a passenger. The car displayed a stolen license tag, and the stop occurred within the Greenville city limits, which was within Greenville police jurisdiction.[3] Additionally, both parties

[3] We note that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 814. Evidence that the Greenville officers were more interested in apprehending the drug target does not factor into a probable cause analysis in the otherwise valid stop of a vehicle for stolen license tags.

acknowledge that the Greenville police were entitled to order Banda out of the car. *See Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (holding that a police officer may order both the driver and passenger out of the vehicle pursuant to a valid automobile stop without violating the Fourth Amendment prohibition against unreasonable seizures). However, Banda argues that Detective Lawson did not have reasonable suspicion to search her for weapons. For this reason, Banda contends the drugs recovered during the pat down should be suppressed.

Balancing the potential intrusion on an individual's Fourth Amendment rights with the need for law enforcement officers to protect themselves and other prospective victims of violence, the United States Supreme Court held in *Terry v. Ohio* that a police officer must have a reasonable suspicion that a person is armed and dangerous before conducting a pat down or frisk of that person. 392 U.S. 1, 24 (1968). "Reasonable suspicion" of weapons requires that a reasonably prudent person under the circumstances be warranted in the belief that his safety or that of others is in danger. *Id.* at 27; *Butler*, 353 S.C. at 390, 577 S.E.2d at 501. The Supreme Court extended the *Terry* doctrine to frisks pursuant to valid automobile stops for traffic violations in *Pennsylvania v. Mimms*, 434 U.S. 106, 111-112 (1977).

We hold that under the circumstances of this case, Lawson had reasonable suspicion to frisk Banda for weapons pursuant to a valid automobile stop. This Court has recognized that because of the "indisputable nexus between drugs and guns," where an officer has reasonable suspicion that drugs are present in a vehicle[4] lawfully stopped, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a frisk of both the driver and the passenger in the absence of other factors alleviating the officer's safety concerns. *Butler*, 353 S.C. at 391 (quoting

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[4] "Reasonable suspicion" in this context requires an officer to have "a particularized and objective basis," based on the totality of the circumstances, that would lead one to suspect that drugs are present in the vehicle lawfully stopped. *U.S. v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Lesley*, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997).

U.S. v. Sakyi, 160 F.3d 164, 169-170 (4th Cir. 1998)). In this situation, the police clearly had reasonable suspicion to suspect that drugs were present in the vehicle. The police had observed the car leave the residence of a known drug dealer. Furthermore, the car displayed stolen Georgia license tags and the police knew from their confidential informant that the target's drug shipments came from Georgia. Even though the police shortly realized that Banda was not their target, the fact that the activity observed at the target's house corroborated the informant's statements was enough to give the officers a reasonable suspicion that Banda was in some way involved with the target's drug activity and that drugs might therefore be in the vehicle. *See Cortez*, 449 U.S. at 417. Given the frequent association between drugs and guns, Lawson's safety concerns were justified based on the vehicle's apparent connection to a known drug dealer.

Banda compares her case to *State v. Butler* where this Court granted the defendant's motion to suppress drugs found in a frisk while he was a passenger in a vehicle stopped for having no taillights. 353 S.C. at 385, 577 S.E.2d at 499. We find, however, that *Butler* is distinguished given that the frisk in that case occurred as a part of the officer's continuing investigation of a possible open-container violation. *Id.* at 392; 577 S.E.2d at 503. The Greenville police had what the officer in *Butler* did not; that is, a reasonable suspicion that the suspect was armed and dangerous. Their reasonable suspicion arose directly from the presumption of weapons when there is reasonable suspicion that drugs are present. *See id.* at 391; 577 S.E.2d at 502.

Accordingly, we hold that the trial court properly determined the officer's frisk for weapons was appropriate under *Terry v. Ohio* and did not violate the Fourth Amendment prohibition on unreasonable searches and seizures.

II. Suppression of Appellant's Statement

Banda argues that the trial court erred in refusing to grant a *Jackson v. Denno*[5] hearing on the admissibility of her statement to the police because the statement was taken in violation of an international treaty. This is an incorrect statement of the issue.

At trial, Banda moved for an in camera suppression hearing for her statement to police on the grounds that police obtained the statement in violation of an international treaty. The motion, as Banda presented it, did not involve a determination of the voluntariness of the statement: Banda neither specifically requested a *Jackson v. Denno* hearing, nor did she otherwise support the motion with facts showing that the statement was involuntary.[6] Banda's claim that the trial court erred by refusing to grant her a *Jackson v. Denno* hearing is therefore not properly before the Court on appeal because the grounds now asserted are not supported by the motion made at trial. *See State v. Silver*, 314 S.C. 483, 487, 431 S.E.2d 250, 252 (1993) (holding that the court of appeals improperly treated the trial court's denial of an in camera hearing on the issue of whether defendant was in custody and entitled to *Miranda* warnings as the denial of a *Jackson v. Denno* hearing on the voluntariness of defendant's statement).

A more accurate statement of the issue preserved to this Court is whether the trial court erred by refusing to grant Banda an in camera suppression hearing on the admissibility of her statement to police based upon a violation of a bilateral consular convention between the United States

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[5] *Jackson v. Denno* held that a defendant in a criminal case was entitled to an evidentiary hearing on the voluntariness of statements made by the defendant prior to submission of such statements to a jury. 378 U.S. 368 (1964).

[6] Banda did not dispute the validity of the *Miranda* warnings or her signed waiver. Moreover, the State pointed out that Banda was college-educated and was not intoxicated that evening.

and the United Kingdom[7] (the U.K. Convention) requiring consular notification when foreign nationals are detained.

This is not the first time that South Carolina courts have analyzed the effects of international treaties on South Carolina law. In *State v. Lopez*, the court of appeals addressed the consular notification provision in Article 36 of the Vienna Convention.[8] 352 S.C. 373, 574 S.E.2d 210 (2002). In *Lopez*, the trial court denied the defendant's motion to withdraw his guilty plea where the State did not inform him of his consular notification rights under Article 36. The defendant claimed that had he known of his rights, he would have obtained the services of a translator from the Mexican Consulate to assist him during his guilty plea hearing. Although the Supremacy Clause of the United States Constitution provides that treaties to which the United States is a party take precedence over any state law, the court of appeals noted that the rights created in international treaties did not create rights equivalent to constitutional rights. *Id.* at 381, 574 S.E.2d at 214. Therefore, the defendant had to establish prejudice to prevail on his claim. *Id.* On these principles, the court of appeals affirmed the circuit court, observing that because the defendant had rejected the trial judge's offers to provide him a translator, any prejudice suffered by the defendant from his failure to have a translator's

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[7] Banda based her motion to suppress the statement to police on the alleged violation of a consular notification provision in Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 [hereinafter Vienna Convention]. This contention is incorrect. Domestic law enforcement's obligation to notify Zimbabwe's foreign consulate does not come under the Vienna Convention, but rather, falls under Article 16 of a bilateral consular convention between the United States and the United Kingdom of Great Britain and Northern Ireland [no long-title in original], U.S.-U.K., June 6, 1951, 3 U.S.T. 3426, T.I.A.S. No. 2494 [hereinafter U.K. Convention]. *See also* U.S. DEPARTMENT OF STATE, INFORMATION FOR AMERICANS ABROAD, CONSULAR NOTIFICATION AND ACCESS, PART5: LEGAL MATERIAL, http://travel.state.gov/law/consular /consular_ 744.html.

[8] Art. 36(1)(b), 21 U.S.T. at 101.

assistance during the guilty plea hearing resulted from his own actions. *Id*. at 383, 574 S.E.2d at 215.

Recently, the United States Supreme Court addressed Article 36 of the Vienna Convention and its role in state judicial proceedings with respect to triggering the exclusionary rule. In *Sanchez-Llamas v. Oregon*, 548 U.S. ____, 126 S.Ct. 2669 (2006), the court held that suppression of evidence was not an appropriate remedy for violations of Article 36 of the Vienna Convention for a number of reasons. First, the court observed that the Vienna Convention did not mandate suppression or any other remedy for its violations, but rather left Article 36's implementation to domestic law. 548 U.S. at ___, 126 S.Ct. at 2678 (quoting Art. 36(2), 21 U.S.T. at 101). Furthermore, the court declared that it did not hold a supervisory authority over state courts that would permit it to develop remedies for the enforcement of federal law in state court criminal proceedings. *Id*. at ___; 126 S.Ct. at 2679. Without this power, the court reasoned that it could not direct the state courts to apply the exclusionary rule unless required to do so by the Vienna Convention itself (pursuant to the Supremacy Clause). Lastly, the court stated that even if Article 36 implicitly required some judicial remedy for its violation (as Sanchez-Llamas claimed), the exclusionary rule would not be appropriate. The court noted that the exclusionary rule's primary function was to deter constitutional violations. Article 36, in contrast, only secured the right to *inform* the foreign consulate of an arrest or detention; it did not guarantee any sort of consulate intervention or termination of investigation pending notice to or intervention by the consulate. *Id.* at ___, 126 S.Ct. at 2681. With respect to interrogations, the court specifically stated that there was likely to be little connection between an Article 36 violation and statements obtained by police. *Id.* Suppression, it concluded, "would be a vastly disproportionate remedy for an Article 36 violation." *Id.*

Turning to the instant case, we hold that the trial judge properly refused to grant Banda a suppression hearing on the admissibility of her statements to police. Whenever evidence is introduced that was allegedly obtained by conduct violative of the defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing out of the presence of the jury to establish the circumstances under which the

evidence was seized. *State v. Patton*, 322 S.C. 408, 411, 472 S.E.2d 245, 247 (1996) (citing *Jackson v. Denno*, 378 U.S. 368). To be entitled to a suppression hearing, a defendant must articulate specific factual and legal grounds to support his claim that evidence was obtained by conduct violative of his constitutional rights. *Id.* at 411-412, 472 S.E.2d at 247. In making this determination, the trial court shall take into account the totality of the circumstances and may eliminate those issues not raising a question of constitutionality while confining the hearing to those which have arguable merit. *Id.* at 412, 472 S.E.2d at 247.

Banda's only factual ground for her motion – correctly stated – is that police violated the U.K. Convention by not informing her of her right to notify Zimbabwe's foreign consulate. Federal and state case law indicate this does not provide a valid legal ground on which to base her suppression claim. Because the Vienna Convention's consular notification provision is nearly the same as that in the U.K. Convention, the legal analyses in *Lopez* and *Sanchez-Llamas* apply equally to Article 16 of the U.K. Convention.[9] Like

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[9] Article 16 of the U.K. Convention reads in relevant part:

> (1) A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district. A consular officer shall be permitted to visit without delay, to converse privately with and to arrange legal representation for, any national of the sending state who is so confined or detained. . . .

Art. 16(1), 3 U.S.T. 3426.

> Article 36 of the Vienna Convention reads in relevant part:
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is

the Vienna Convention, the U.K. Convention does not mandate suppression or any other remedy for its violations.[10] Additionally, because international treaties do not create rights equivalent to constitutional rights, *Lopez*, 352 S.C. at 381, 574 S.E.2d at 214, the violation of the consular notification provision does not, on its own, justify applying the exclusionary rule as a remedy. *See Sanchez-Llamas*, 548 U.S. at ___, 126 S.Ct. 2669. Because the U.K. Convention only secures the right to *inform* the foreign consulate of a detention – and not the right to consular *intervention* – the violation of the U.K. Convention's consular notification provision would have little connection with a defendant's statement to police.[11] *See id.* at ___, 126 S.Ct. at 2681.

With no other legal grounds in support of her motion to suppress her statement, applying the exclusionary rule to remedy the treaty violation would be "vastly disproportionate" to any wrong suffered by Banda.

> detained in any other manner. . . . The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; . . . .

Art. 36(1)(b), 21 U.S.T. at 101.

[10] The U.K. Convention does not have a provision analogous to Article 36(2) of the Vienna Convention which specifically leaves implementation of rights in the Vienna Convention to state law. At the same time, it has no provisions that suggest it should be implemented otherwise. *See* 21 U.S.T. 3426.

[11] Interestingly, the *Sanchez-Llamas* opinion made a brief mention of other ways to vindicate a defendant's Vienna Convention rights, including raising an Article 36 claim "as part of a broader challenge to the voluntariness of his statements to police." *Id.* at 2682. We interpret this suggestion as indicating that a defendant may successfully move for a *Jackson v. Denno* hearing to suppress a statement by asserting a violation of the consular notification provisions of a treaty, *along with other factors* indicating the involuntariness of a statement (such as the failure to receive *Miranda* rights).

Accordingly, the trial court did not err in denying Banda a suppression hearing on the admissibility of her statement to police.

CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court.

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

The Supreme Court of South Carolina

Franklin Dennison, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

By order dated August 31, 2006, this post-conviction relief (PCR) matter was dismissed due to petitioner's failure to submit an explanation pursuant to Rule 227(c), SCACR, why the lower court's finding was improper. Counsel for petitioner has now filed a petition for reinstatement and a motion to be relieved as counsel and for the appointment of new counsel.

These motions are a result of counsel's concerns regarding the potential ethical dilemma presented by the requirement for an explanation under Rule 227(c) when a good faith argument or explanation does not exist. We understand counsel's concerns, but find, based on Rule 71.1, SCRCP, Rule 227, SCACR, and the Rules of Professional Conduct, Rule 413,

SCACR, that counsel's duties can be fulfilled without violating the Rules of Professional Conduct.

A final decision entered under the PCR Act shall be reviewed according to the procedure specified by Rule 227, SCACR. Rule 71.1(g), SCRCP. "If an applicant represented by counsel desires to appeal, counsel shall serve and file a Notice of Appeal as required by Rule 227, SCACR, and shall continue to represent the applicant on appeal unless automatically relieved under Rule 602, SCACR, or allowed to withdraw under Rule 235, SCACR." Id. If the applicant is indigent, counsel shall assist the applicant in obtaining representation by the Division of Appellate Defense. Id.

Unlike review of a conviction, which is by direct appeal and is a constitutional right, review of a decision in a PCR matter is discretionary by way of a writ of certiorari. We find it is appointed counsel's duty in PCR matters to serve and file the notice of appeal. Thereafter, if counsel does not have a good faith explanation to provide pursuant to Rule 227(c), counsel shall provide the Court with a letter stating that as an officer of the Court, counsel is unable set forth any arguable basis for asserting the determination by the PCR judge that the PCR application was successive and barred by the

statute of limitations was improper. Counsel shall further advise the petitioner by copy of the letter that the petitioner should notify the Court, no later than twenty (20) days from the date of the letter, of any arguable basis the petitioner may wish to assert that the determination that the PCR application was successive and barred by the limitations was improper. Although, generally, a petitioner would not be allowed in such situations to submit a pro se explanation, see Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002)(counsel cannot serve as a mere conduit for *pro se* documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client) and Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989)(no right to hybrid representation), we will allow a pro se explanation in the situation described above.

In the case at hand, we grant the petition for reinstatement and give petitioner twenty days from the date of this order to submit a pro se explanation pursuant to Rule 227(c). However, we deny the motion to be relieved as counsel and to appoint new counsel. In the event petitioner's pro se explanation is found to be sufficient to allow the appeal to proceed,

counsel will be required to assist petitioner in obtaining representation by the Division of Appellate Defense.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

December 6, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Craig Duval Davis, Respondent.

Appeal From Horry County
Daniel F. Pieper, Circuit Court Judge

Opinion No. 4183
Heard November 6, 2006 – Filed December 11, 2006

REVERSED AND REMANDED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Appellant.

John S. Nichols, of Columbia, for Respondent.

PER CURIAM: The State appeals the grant of Craig Davis' motion to suppress evidence obtained pursuant to a search warrant procured with false information. We reverse and remand.

FACTS

On December 31, 2004, the Conway Police Department received reports of multiple shots fired in a residential area. Off-duty City Police Officer Rodrick Mishoe lived in the area, and one of the shots entered his residence. Officer Mishoe looked out his window and saw a black male running up the street firing a gun, and another black male, wearing a ski mask, standing at the edge of his yard. When police arrived on the scene, Officer Mishoe said from the "lips," "eyes," "facial features," and body structure he believed the person in the ski mask was a man who lived behind him. The man went by the nickname "Chubby." Tyrone Williams, one of the responding officers, knew that Craig Duval Davis went by the nickname "Chubby." Officer Williams shared this information with Detective Sergeant Tammy Staples, who then obtained a photograph of Craig Davis from the J. Rubin Long Detention Center. Staples showed the photograph to Mishoe, who confirmed that the subject was the person he knew as "Chubby."

Police officers proceeded to Davis' residence without an arrest warrant or search warrant. Upon arriving, officers observed Davis and another individual exit a shed located at the back of the property. The men complied with the officers' requests to get down on the ground. As they did so, a handgun protruding from the back of Davis' waistband became clearly visible. A search of the two subjects revealed an additional gun on Davis and two weapons on the other individual. Staples sought a search warrant for the shed and submitted an affidavit in support of her request indicating that "Officer Rodrick [sic] positively identified one of the subjects firing shots in his yard as Graig [sic] Davis . . . ." The search warrant was issued, and a search of the shed revealed another gun, a silencer, cocaine, marijuana, and crack cocaine. Davis was indicted on drugs and weapons charges. At trial, Davis moved to suppress the drug evidence arguing that the search of the shed was based on a falsified affidavit because Mishoe never "positively identified" Craig Davis as a suspect. The trial court granted his motion. The State appeals.

STANDARD OF REVIEW

On appeal from a suppression hearing, the appellate court will give deference to the circuit court's findings and only reverse if there is clear error. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). The appellate court may conduct its own review of the record to ascertain if there is any evidence to support the ruling. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460-61 (2002).

LAW/ANALYSIS

The State contends the court's suppression of the evidence because it was discovered through a search warrant predicated on false information was error. We agree.

In determining whether alleged misstatements in an affidavit render a search warrant invalid, the court must conduct the analysis set forth in Franks v. Delaware, 438 U.S. 154 (1978).

> Franks outlined a two-part test for challenging the warrant affidavit's veracity. First, to mandate an evidentiary hearing, there must be 'allegations of deliberate falsehood or of reckless disregard for the truth . . . and those allegations must be accompanied by an offer of proof.' . . . Second, . . . the court must consider the affidavit's remaining content, with the affidavit's false material set to one side, to determine if it is sufficient to establish probable cause.

State v. Davis, 354 S.C. 348, 359-60, 580 S.E.2d 778, 784 (Ct. App. 2003) (citing State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999)) (internal citations omitted). "There will be no Franks violation if the affidavit . . . still contains sufficient information to establish probable cause." Missouri, at 554, 524 S.E.2d at 397.

In this case, evidence was presented in camera regarding Mishoe's alleged positive identification of Davis as one of the men involved in the

shootout near his property. Officer Mishoe testified that he was "not positively sure" the suspect was Chubby and that his looking at the photograph of Davis was not a positive identification of Davis as the man in the ski mask. After hearing the testimony, the court concluded that Mishoe had not "positively identified" Davis. The statement was therefore false and had been used in the affidavit with reckless disregard for the truth. Because there is evidence in the record to support this finding, we do not disturb it on appeal.

Although the second part of the Franks analysis is not expressly discussed in the record, the trial court indicated that its decision to suppress the evidence was "consistent with Frank [sic] versus Delaware." The parties agree the trial court conducted the second part of the Franks analysis as such an examination would be implicit in a ruling under Franks. Therefore, it necessarily follows the trial court determined the remaining information in the affidavit was insufficient to support probable cause to obtain the search warrant. We disagree and conclude the court erred in its analysis.

In many Franks cases, a false statement in the supporting affidavit will render a search warrant defective. However, the facts of this case are unique. Had an arrest warrant or search warrant for the person of Craig Davis been sought prior to the officers' encounter with the suspects, the false identification in Staples' affidavit would have rendered such a warrant fatally defective and any evidence seized as a result would necessarily have been suppressed. However, the in camera testimony of Mishoe indicated he told police that one of the suspects looked like his neighbor, "Chubby," whom Williams knew to be Craig Davis. That tentative identification was sufficient to justify the officers proceeding to Davis' residence. The sequence of events was logical from an investigative standpoint, and led to the discovery of two individuals emerging from a shed in the rear of the property. The individuals' compliance with the request to get on the ground revealed a handgun protruding from the waistband of one of the men, which then led to the search of their persons. That search then revealed the additional weapons, and the suspects were arrested.[1] After these events transpired,

[1] We make no determination regarding the propriety of Davis' arrest at the scene.

Staples sought the search warrant for the shed. Staples' affidavit revealed that two armed men emerged from the shed in a neighborhood where a shooting had very recently occurred. In reviewing the affidavit, we believe the unfolding circumstances described therein, not the false statement about a positive identification of Craig Davis, was the basis for the issuance of the search warrant, or at least was information sufficient to justify its issuance.[2]

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[2] The relevant portion of the affidavit in its entirety states:

> That on December 31, 2004 Officers with the Conway City Police Department responded to the area of Durant Street for multiple shots fired call. Upon officers arrival, they were met by off duty Conway officer Rodrock [sic] Mishoe who advised that he heard the shots being fired and a single round went into his residence. Officer Rodrick [sic] advised that he saw two black males in his front yard area with guns and then he saw them run down John Street. During the investigation it was learned that two subjects in officers yard were firing shots towards three black males [sic] subjects near the end of Durant Street. It was also discovered that shots fired from two subjects in officers yard, penitrated [sic] a residence on Robin Road. Officer Rodrick [sic] positively identified[2] one of the subjects firing shots in his yard as Graig [sic] Davis (B/M 1775 Hemingway Street, Conway, S.C.). Officer went to residence of 1775 Heningway [sic] Street, to locate Graig [sic] Davis. On officers approach to residence, Graig [sic] Davis along with subject 2 – John Fletcher appeared from a shed located behind the residence of 1725 Hemingway Street. For officers safety, subjects were advised to get on the ground, and protruding from the back pant of subject Graig [sic] Davis was a hand gun. A search of each subject was done and a larger hand gun was located in the waist band of subject – Graig [sic] Davis. A search of subject 2 - John Fletcher- revealed he was in possession of two handguns. It is the belief of the affiant that more weapons

In large measure, therefore, any identification of the suspect contained in the warrant is only coincidental because it was the shed located on the back of the residence that was the subject of the search, not the individual.

Consequently, the decision of the trial court is

REVERSED AND REMANDED.

GOOLSBY, STILWELL, and SHORT, JJ., concur.

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and ammunition for weapons found will be located inside of wooden shed located behind the residence od [sic] 1725 Hemingway Street.