OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7

February 13, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Donald A. Kennedy, Jr., Respondent.

Opinion No. 26111
Submitted December 22, 2005 – Filed February 6, 2006

DISBARRED

Henry B. Richardson, Jr., Disciplinary Counsel, and Susan M. Johnston, Deputy Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

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

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to disbarment pursuant to Rule 7(b), RLDE, Rule 413, SCACR. In addition, respondent agrees to pay restitution to clients, banks, and other persons and entities who have incurred losses as a result of his misconduct. We accept the agreement and disbar respondent from the practice of law in this state. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

Respondent had previously represented Complainant A in a quiet title action involving real property. Thereafter, Complainant A became involved in or was threatened with litigation involving easements related to the real property that was the subject of the previous quiet title action. With respondent's acquiescence, Complainant A delivered his file related to the easement issue to respondent's office for review. Approximately two (2) months went by without Complainant A hearing from respondent on this matter.

Complainant A tried without success to contact respondent about the matter and then launched an intensive campaign to contact respondent at his office. Complainant A also wrote respondent several "heated" letters which respondent found offensive. Thereafter, respondent left a voice message on Complainant A's home answering machine which contained abusive and profane language about the matter. Complainant A stated that this message was heard by his wife and children.

When Complainant A went to retrieve his file from respondent, respondent made a remark which Complainant A interpreted as respondent was going to "create a problem for [Complainant A]" or words of similar import and effect.

Respondent never agreed to undertake the easement matter other than to review the file on the issue. After reviewing the file, considering his relationship with Complainant A, and considering his other workload, respondent decided he did not want to undertake to represent Complainant A in the easement matter and so advised him. Respondent now recognizes he should not have used abusive or profane language in dealing with Complainant A, that he should have been more prompt in deciding whether or not to undertake representation in the easement matter, that his communications with Complainant A about whether or not he would undertake the matter were not as they

should have been, and that the file should have been returned to Complainant A if respondent was not going to undertake representation of Complainant A in the new matter.

Matter II

Complainant B transmitted money to respondent to fund two real estate transactions. The first transaction was closed with a profit to Complainant B. As a result, there should have been approximately $7,000 in one of respondent's trust accounts to be applied toward the closing of the second transaction. In contemplation of closing the second transaction, Complainant B also transmitted additional money to respondent which should have left a balance in respondent's trust account in excess of $20,000 belonging to Complainant B.

Complainant B was later advised by a non-attorney employee on respondent's staff that the second transaction had not been closed, that the file had been turned over to another attorney, and that there were insufficient funds in respondent's trust account to refund the money to Complainant B. The title insurance company involved in this transaction made a partial refund to Complainant B, but denied liability for the balance inasmuch as respondent had not caused an insured closing letter to be issued in connection with the transaction. As a result, Complainant B suffered a loss of approximately $18,000. Respondent acknowledges that the cause of this loss was the fact that he misappropriated all or at least a substantial portion of the funds and/or applied them toward purposes other than intended without the consent or knowledge of Complainant B.

Matter III

Respondent served as a qualified tax intermediary in a Section 1031 Tax Deferred Exchange in connection with a real estate transaction where Complainant C was the initial seller and sought to locate replacement property for a like-kind exchange. As a result, approximately $40,000 was turned over to respondent. This money

was deposited into one of respondent's trust accounts and was supposed to be held by respondent to be expended in connection with that transaction upon direction of the beneficiary for which the funds were being held. Thereafter, respondent misappropriated those funds in their entirety or used the entire amount of those funds for purposes other than intended without the knowledge or consent of Complainant C.

Complainant C made a claim to the Lawyers' Fund for Client Protection (Lawyers' Fund). The Lawyers' Fund approved a payment to Complainant C in the amount of $20,000 (the maximum payment that could be made under the applicable rules to a single complainant) leaving Complainant C with a financial loss as a result of respondent's misconduct.

Matter IV

Complainant D is an attorney who specialized in tax matters. Complainant D and respondent were, for a period of time, law partners operating under as a limited liability company (LLC). This LLC was for the limited purpose of handling Section 1031 tax deferred real estate exchanges. Otherwise, respondent and Complainant D maintained separate law practices. Complainant D terminated his relationship with respondent after he determined respondent had engaged in professional misconduct on several occasions and in the several matters set forth below.

A.

Respondent decided to refinance his personal residence with a bank loan. Respondent requested Complainant D conduct the title search, review the closing documents, and serve as the settlement agent, including executing the HUD-1 Settlement Statement as closing attorney/settlement agent in connection with the refinancing. Complainant D was scheduled to be out of state on the day of the closing of the refinancing transaction. For that reason, Complainant D

and respondent agreed that the loan proceeds would be deposited into one of respondent's trust accounts and disbursed by respondent.

The original HUD-1 Settlement Statement signed by Complainant D showed payoffs to several other lenders who had prior liens on the property and showed very little or no "cash to borrower." Complainant D signed page two of the HUD-1 Settlement Statement as "settlement agent." Thereafter, respondent drafted or caused to be drafted a new page one of the HUD-1 Settlement Statement. This new HUD-1 provided a disbursement to respondent (i.e., "cash to borrower") of approximately $157,266 and omitted the payoffs to the other lenders that were supposed to be paid according to the original HUD-1 signed by Complainant D. Complainant D had not authorized and did not know about the new page one until after the closing and disbursements in connection with the transaction.

Respondent received loan proceeds from the lender in the amount of $280,000 in connection with the refinancing transaction. He did not pay off the holders of the prior liens and, instead, converted and used approximately $157,266 for purposes other than intended by or known to the lender. As a result, these prior liens remained senior in priority to the lien of the refinancing lender.

In connection with the refinancing transaction, respondent asked Complainant D to execute the loan policy of title insurance on behalf of the title insurance company as his "licensee." Respondent assured Complainant D that he could, under respondent's agency agreement with the title insurance company, authorize Complainant D to sign the title insurance policy on behalf of the title company as "licensee" of respondent.[1] In reliance on respondent's assurance,

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[1] Respondent's representation was not authorized by the title insurance company. Complainant D had no authority to sign the policy on behalf of the title insurance company.

Complainant D signed his own name to the loan title insurance policy on behalf of the title insurance company.

Respondent presented the title policy to the lender. The lender questioned certain aspects of the loan policy presented and required that an amended loan policy be issued containing certain additional requirements of the lender. Respondent then redrafted the loan policy, signed or allowed someone else to sign Complainant D's name to the loan policy on behalf of the title insurance company, and then presented this new loan policy to the lender bearing Complainant D's forged signature. In reliance on the provisions of this new loan policy, the lender tendered the loan proceeds to respondent.

The amended loan policy of title insurance reflects that the refinancing lender had a first mortgage lien on the subject property when, in fact, there were several prior and, therefore, superior liens on the subject property (respondent's residence) which was well known to respondent. The lender consummated the refinanced loan transaction in reliance on the information in the amended loan policy of title insurance which falsely certified that the refinancing lender had a first lien on the subject property.

B.

In another matter, respondent represented a client in connection with a Section 1031 exchange. While Complainant D was out of the state, the LLC received a $943,265.08 check in connection with this 1031 exchange. Respondent or someone acting on his behalf or under or subject to his direction and/or supervision endorsed this check "Pay to [Respondent's] Law Office" (not the LLC partnership). This check was then deposited into one of respondent's trust accounts. Respondent then prepared or caused to be prepared a check on that trust account transferring $943,265.08 into another trust account maintained by respondent at another bank.

Respondent ultimately disbursed funds on the 1031 tax deferred exchange, but one check issued in the amount of $77,543.52

by respondent on one of his trust accounts in connection with the exchange was not honored upon presentment due to insufficient funds in the trust account. Respondent admits the check was not honored because he had misappropriated these funds and/or converted the funds for purposes other than intended. The client made a claim for these funds with the title insurance company which made a payment to the client in the amount of $79,787.79.

Matter V

On August 26, 2002, respondent was placed on interim suspension. In the Matter of Kennedy, ___ S.C. ___, 623 S.E.2d 640 (2002). Respondent acknowledges that, at that time, he had shortages in his trust account of approximately $280,000. Respondent further acknowledges that, immediately prior to his interim suspension, he had approximately thirteen bank accounts and that he failed to follow the recordkeeping and money handling requirements of Rule 417, SCACR, in connection with the various trust accounts. From time to time, respondent used money in his trust accounts which belonged to his clients to pay his personal expenses.

Respondent has represented to ODC that the cause of the acknowledged shortage in his trust accounts was the failure of a lender to wire loan proceeds into one of the trust accounts approximately twelve years ago. Respondent stated he incorrectly believed the funds had been wired into the trust account and closed a transaction and disbursed the proceeds reflected in that transaction when he had not actually received the proceeds. However, respondent can neither remember nor identify the name of the lender who failed to wire those loan proceeds to his trust account and he cannot identify the client in that transaction.

ODC has determined and contends that the total shortage in respondent's trust account in fact grew to the approximate sum of $420,000 at the time respondent was placed on interim suspension. For purposes of this agreement, respondent does not contest that contention. However, respondent has represented to ODC that he

suspects someone on his staff embezzled some money out of the trust account, thereby causing the known shortage of approximately $280,000 to increase to the actual amount thereof. Respondent has not been able to provide records to support his suspicion.

As a result of the shortage in his various trust accounts (whether the sum of $280,000 as acknowledged by respondent or the approximate sum of $420,000 as contended by ODC), respondent instituted a scheme of check kiting and/or moving money between his various bank accounts to cover the shortages. On at least one occasion, a bank required respondent to cover shortages in his personal account. Respondent paid the bank with numerous checks written on one or more of his law firm's trust accounts to cover the shortages.

The Lawyers' Fund has paid $68,596 in claims made against respondent as a result of his misconduct. The title insurance company mentioned herein reports that, as of August 19, 2004, it has paid damages in the amount of $836,421 as a result of claims made in connection with the foregoing activities of respondent. For purposes of this agreement, respondent does not dispute the title insurance company's claim.

Matter VI

On or about March 10, 2005, respondent entered a plea of guilty to one count of mail fraud in violation of 18 U.S.C. § 1341 in the United States District Court for the District of South Carolina.

Respondent has cooperated with ODC's investigation into these matters, including submitting to voluntary interviews, joining into a consent order releasing records to auditors, and consenting to being placed on interim suspension. Until this matter, respondent had never been found to have committed professional misconduct in South Carolina.

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 a client); Rule 1.4 (lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall hold property of clients in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 4.1 (in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact to a third person); Rule 5.3 (partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that a non-lawyer employee's conduct is compatible with the professional obligations of the lawyer); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Rule 8.4(c) (it is professional misconduct for lawyer to engage in conduct involving moral turpitude); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent further admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice, bring courts or legal profession into disrepute, or conduct demonstrating an unfitness to practice law), Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate oath of office), and Rule 7(a)(7) (it shall be ground for discipline for lawyer to willfully violate a

court order). In addition, respondent admits his misconduct violated Rule 417, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent. The disbarment shall be retroactive to the date of respondent's interim suspension. Within fifteen (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 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

In addition, within thirty (30) days of the date of this order, ODC and respondent shall file a restitution plan with the Court. In the plan, respondent shall agree to pay restitution to all presently known and/or subsequently identified clients, banks, and other persons and entities who have incurred losses as a result of his misconduct in connection with this matter. Moreover, in the restitution plan, respondent shall agree to reimburse the Lawyers' Fund for any claims paid as a result of his misconduct in connection with this matter.

DISBARRED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, J.J., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Peter L. Murphy, Respondent.

Opinion No. 26112
Submitted January 4, 2006 – Filed February 6, 2006

DISBARRED

Henry B. Richardson, Jr., Disciplinary Counsel, and Susan M. Johnston, Deputy Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

William P. Simpson, of Nelson, Mullins, Riley & Scarborough, LLP, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of an indefinite suspension or disbarment pursuant to Rule 7(b), RLDE, Rule 413, SCACR. The facts, as set forth in the agreement, are as follows.

FACTS

Beginning in 2004, respondent began transferring funds from his trust account to his operating account. These funds were being held in respondent's trust account for a client who was awaiting

final disposition of a workers' compensation and a personal injury claim. Respondent transferred a total of $65,000 and used these funds for his own personal use.

Respondent self-reported his misappropriation to ODC. Two weeks prior to the self-report, respondent had been authorized to release the funds to his client. Respondent represents he has made arrangements to reimburse the client, with interest, in the very near future.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer shall hold property of clients in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); Rule 8.4(c) (it is professional misconduct for lawyer to engage in conduct involving moral turpitude); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent further admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice, bring courts or legal profession into disrepute, or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent. Within fifteen (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 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

In addition, within thirty (30) days of the date of this opinion, ODC and respondent shall file a restitution plan with the Court. In the plan, respondent shall agree to pay restitution to the client who incurred losses as a result of his misconduct in connection with this matter.

DISBARRED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, J.J., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Walter Ray Stone, Deceased,
and Bonnie L. Stone, Respondents,

v.

Roadway Express, Employer,
and Old Republic Insurance
Company, Carrier, Appellants.

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

Opinion No. 26113
Heard December 1, 2005 – Filed February 13, 2006

REVERSED

Duke K. McCall, Jr., of Leatherwood, Walker, Todd & Mann, of Greenville, for Appellants.

Linda Byars McKenzie, of Brown, McKenzie & Bowen, of Greenville, for Respondents.

JUSTICE PLEICONES: The issue in this case is whether the employee's (Stone's) widow (respondent) is entitled to continue receiving workers' compensation benefits after Stone's death due to causes unrelated to his compensable injury. The full commission's appellate panel affirmed a single

commissioner's order granting respondent's request for lump sum benefits, holding that respondent's claim was not barred by S.C. Code Ann. § 42-9-280 (1985), and that *res judicata* and/or collateral estoppel operated so as to bar appellants from contesting respondent's right to receive the money. The circuit court affirmed, citing Rule 59(e), SCRCP, as an additional bar. We reverse.

FACTS

After Stone injured his left foot and leg and his back at work, he brought a workers' compensation claim. Stone subsequently developed a brain tumor. In October 1999, the single commissioner found Stone permanently and totally disabled and awarded him 500 weeks of compensation pursuant to S.C. Code Ann. § 42-9-10 (Supp. 2004). In December 1999, Stone died from complications related to his brain tumor. Following a January 2000 hearing, the full commission's appellate panel issued an order confirming Stone's entitlement to disability payments pursuant to § 42-9-10. The circuit court affirmed and appellants appealed to the Court of Appeals.

On appeal, appellants argued as they had before the commission and the circuit court that Stone's disability should have been apportioned between the injury and the tumor, resulting in a lower compensation award pursuant to S.C. Code Ann. § 42-9-160 (1985). In its first unpublished opinion, the Court of Appeals acknowledged Stone's death, and affirmed the award. The Court of Appeals construed § 42-9-160, upon which appellants based their apportionment argument, to require apportionment only between two compensable injuries, and went on to state:

> For example, S.C. Code Ann. § 42-9-280 (1985 & Supp. 2000) indicates that apportionment is not appropriate when death results from a noncompensable cause.

Appellants filed a petition for rehearing, arguing among other things that S.C. Code Ann. § 42-9-280 did not apply to Stone since he had received

compensation under the first paragraph of § 42-9-10 and therefore "his award ceases with his death and is apportionable."

The Court of Appeals denied rehearing, but issued an amended unpublished opinion in January 2002. In this opinion, the Court of Appeals again affirmed, but altered its reference to § 42-9-280. Appellants' petition for a writ of certiorari was denied by this Court: it did not include any argument that Stone's claim had abated by operation of § 42-9-280, since that section was not at issue in this first appellate proceeding except by virtue of the Court of Appeals' use of it as a comparative. In this first series of appeals, neither respondent nor Stone's estate was ever substituted as a party following Stone's death. See Rule 226, SCACR (substitution of party upon death, etc.).

Following the denial of certiorari, respondent filed a petition with the commission seeking a dependency hearing. Appellants replied by letter that no dependency hearing was necessary as further benefit payments were barred by § 42-9-280. Following the dependency hearing, respondent was awarded lump sum benefits by the single commissioner, an award affirmed by an appellate panel of the full commission and the circuit court. This appeal follows.

ISSUES

1) Are appellants precluded from contesting respondent's entitlement to benefits?

2) If not, does § 42-9-280 preclude respondent's receipt of benefits?

ANALYSIS

A. Preclusion

The commission and circuit court held appellants' defense, that Stone's right to benefits ceased upon his death pursuant to § 42-9-280 and that

respondent therefore had no claim, was barred by the doctrine of *res judicata* and/or the doctrine of collateral estoppel. Appellants contend this was error. We agree.

The *res judicata*/collateral estoppel rulings are based upon appellants' failure to seek dismissal of their first appeal when Stone died following the single commissioner's order awarding Stone benefits. As explained *infra*, appellants did seek to stay the benefits proceedings before the commission while dependency was determined, but respondent's attorney's objection to that procedure was sustained.

Res judicata requires three elements be met: 1) a final, valid judgment on the merits; 2) identity of parties; and 3) the second action must involve matters properly included in the first suit. E.g. Latimer v. Farmer, 360 S.C. 375, 602 S.E.2d 32 (2004). Here, the parties are different, and the issue is not the amount of compensation due but rather whether the right to compensation survives Stone's death. *Res judicata* does not bar appellants' statute-based defense to respondent's dependency claim.

Further, the doctrine of collateral estoppel does not apply. "Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action." Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003). Respondent's entitlement to benefits following Stone's death was neither actually litigated in the first action, nor was the entitlement issue necessary to the resolution of the amount of benefits dispute.

In addition, respondent essentially contends that appellants waived their right to contest respondent's right to benefits at the January 2000 hearing. The record refutes this contention. At the outset of this hearing, the following took place:

> Appellants' attorney: May it please the Chairman and members of the Appellant [sic] Panel. I'm in a little bit of an unusual situation in this case in that Walter Stone is now deceased as of the end of December. And I would

therefore move for a continuance of this Hearing until such time as a dependency or the proper dependents can be determined. Because no benefits can be paid, **if they are in fact payable**, until the dependency of Mr. Stone [sic] has been determined.
(emphasis supplied).

Commissioner Lyndon: If I could hear from [Mr. Stone's attorney] on that, sir?

Mr. Stone's Attorney: May it please the Panel. Of course, that is not even an issue before this Panel today. In the first place, this is an appeal from an Order. The fact that the man subsequently died, you can't have a dependency hearing, what happens to have a dependency hearing [sic] if the Commission were to say well, it's not compensable. And then if you affirm the case, then of course we have a dependency hearing.

Commissioner Lyndon: I understand. And I see it the way---unless my colleagues want---

Commissioner Mickle: I don't think you're prejudiced by it.

Commissioner Lyndon: I don't think you're prejudiced by it. So I'll note your Motion.

Appellants' Attorney: I will admit we're not prejudiced by it. But I would offer that in the Circuit Courts if you have a party that is deceased then the proceedings are stopped and the parties are realigned until you get an Administrator or a personal representation [sic] appointed to come into Court.

Commissioner Atkins: Excuse me, Mr. Chairman, [Appellants' Attorney], that would just hold up the benefits

> at a later time. I mean, we can go ahead and make this decision. This can be appealed wherever it needs to be appealed so that when that situation is taken care of then they would be prejudiced if they've had to not be able to continue or so that they could be paid at the appropriate time once all that was taken care of.

Nothing in this passage can be construed as a waiver of appellants' right to contest respondent's claim to benefits. If anything, this colloquy could be read to estop respondent from claiming any procedural bar to the litigation now, after the first appeals have been concluded, of her right to "benefits…if they are in fact payable…."

Similarly, any contention that appellants could or should have raised the § 42-9-280 issue during the first appeals are refuted by this colloquy. Only issues raised and ruled upon by the commission are cognizable on appeal. E.g., TNS Mills, Inc. v. S.C. Dep't of Rev., 331 S.C. 611, 503 S.E.2d 741 (1998) (on appeal from agency decision, circuit court can only review issues raised to and ruled upon by the commission). At respondent's attorney's insistence, the only issue before the panel in January 2000 was the amount of benefits to which Stone was entitled. In light of the commission's ruling, appellants did not, and could not, litigate the applicability of § 42-9-280.

The circuit court referred to Rule 59(e), SCRCP, in its conclusion that appellants were procedurally barred from denying respondent's entitlement to Stone's benefits. Apparently, the ruling is premised on the misapprehension that once the commission's appellate panel declined to discontinue the appeal pending a dependency hearing as appellants had requested, appellants were obligated to file a Rule 59(e) motion before the appellate panel to preserve the issue. Rule 59(e) is not applicable in proceedings before the commission. See Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 535 S.E.2d 146, fn. 4 (Ct. App. 2000).

Respondent also asserts as a sustaining ground that appellants' invocation of § 42-9-280 should be barred by laches. Given that when

appellants raised the effect of Stone's death at the first available opportunity, that is, the January 2000 hearing before the appellate panel, respondent objected, and that appellants raised the issue at their next opportunity, that is, in response to respondent's request for a dependency hearing, equity will not and should not aid respondent. See e.g., Hemingway v. Mention, 228 S.C. 211, 89 S.E.2d 369 (1955) (laches invoked where appellants were not vigilant). Laches does not bar appellants' defense.

The circuit court erred in upholding the commission's ruling that there was a procedural bar to litigation on the merits of respondent's claim to post-death benefits.

B. Section 42-9-280

Stone was awarded 500 weeks of benefits based on a finding of total disability pursuant to the first paragraph of S.C. Code Ann. § 42-9-10.[1] The statute provides:

> **§ 42-9-10**. Amount of compensation for total disability; what constitutes total disability. (*Title)*
>
> When the incapacity for work resulting from an injury is total, the employer shall pay, or cause to be paid, as provided in this chapter, to the injured employee during the total disability a weekly compensation equal to sixty-six and two-thirds percent of his average weekly wages, but not less than seventy-five dollars a week so long as this amount does not exceed his average weekly salary; if this amount does exceed his average weekly salary, the injured

[1] Respondent argues in her brief that Stone could have been awarded benefits under § 42-9-30(15) and (19) for loss of use of his back and leg. Appellants conceded at oral argument that such an award could have been made, had the commission chosen to utilize that statute. The order, however, unequivocally finds total disability under § 42-9-10, and awards compensation pursuant to that statute alone.

> employee may not be paid, each week, less than his average weekly salary. The injured employee may not be paid more each week than the average weekly wage in this State for the preceding fiscal year. In no case may the period covered by the compensation exceed five hundred weeks except as hereinafter provided. *(1st paragraph)*
>
> The loss of both hands, arms, feet, legs, or vision in both eyes, or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of this section. *(2nd paragraph)*
>
> Notwithstanding the five hundred week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five hundred week limitation and shall receive the benefits for life. *(3rd paragraph)*
>
> Notwithstanding the provisions of § 42-9-301, no total lump sum payment may be ordered by the commission in any case under this section where the injured person is entitled to lifetime benefits. *(4th paragraph)*

Appellants contend the commission and circuit court erred in concluding that the right to Stone's benefits did not terminate upon his death pursuant to § 42-9-280. The statute provides:

> **§ 42-9-280**. Payment of unpaid balance of compensation when employee dies.
>
> When an employee receives or is entitled to compensation under this Title for an injury covered by the second

> paragraph of § 42-9-10 or 42-9-30[2] and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived. But if the death is due to a cause that is compensable under this Title and the dependents of such employee are awarded compensation therefor, all right to unpaid compensation provided by this section shall cease and determine.

Appellants contend that since Stone's benefits were based upon paragraph 1 of § 42-9-10, the right to compensation abated upon his death from the brain tumor. The commission based its decision to continue benefits to respondent despite § 42-9-280 on this reasoning:

> It is inconceivable that the legislature intended to protect the widow and/or dependents who are dependent upon the deceased employee for support only when the deceased employee suffered a schedule loss as set forth in § 42-9-10 or § 42-9-30. This clearly would defeat the beneficent purpose for which the workers' compensation law was passed, that being to protect the injured employee and his dependents. To hold otherwise would deprive the widow in this case of the equal protection of the law.

The commission then cited § 42-9-290 as evidence of "the legislative intent to take care of those dependent upon an employee whose injury is work related." As appellants correctly point out, § 42-9-290 is the applicable statute where the employee dies from the injury or accident which entitled him to workers' compensation benefits. It simply has no application to § 42-9-280, which applies when, as here, the employee dies from an independent cause.

---

[2] This is the "scheduled members" statute, which was not the basis for Stone's 500 week award.

The circuit court upheld the commission's order. It began by reciting numerous cases which stand for the principle that the Workers' Compensation Act must be liberally construed in favor of injured workers and their dependents. It concluded that "if the legislature meant to abrogate the rights of an individual such as [respondent] such would have been set forth in plain language."

The language of § 42-9-280 is plain. The legislature, as is its prerogative, determined that dependent survivors should receive all benefits due an injured worker who lost the use of a scheduled member (§ 42-9-30), or "lost both hands, arms, feet, legs, or vision in both eyes, or any two thereof" (second paragraph of § 42-9-10), i.e., those who suffered a physical loss, while the dependents of a person totally disabled for another reason, i.e., one who suffered a wage loss compensated under the first paragraph of § 42-9-10, should not. The legislative distinction between "physical loss" and "wage loss" appears in other workers' compensation statutes as well. See e.g., §§ 42-9-150; 42-9-160; 42-9-170.

Professor Larson notes that since a compensation award, unlike a tort award, is a personal one based on the employee's need for a substitute for lost wages and earning capacity, in the absence of a special statutory provision, heirs have no claim to unaccrued weekly payments. Larson's Workers' Compensation Law (2000) §§ 89.01; 89.03. In construing a workers' compensation statute, "the words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Adkins v. Comcar Industries, Inc., 323 S.C. 409, 475 S.E.2d 762 (1996) (internal citation omitted). Section 42-9-280 specifically provides for the inheritability of two types of awards only. We reverse the orders permitting respondent to receive unaccrued benefits.

CONCLUSION

Stone was awarded workers' compensation benefits pursuant to the first paragraph of § 42-9-10. Those benefits terminated upon his death from the

tumor. § 42-9-280. The circuit court order affirming the lump sum award to respondent is therefore

REVERSED.

MOORE, BURNETT, J.J., and Acting Justice D. L. Jefferson, concur. TOAL, C.J., dissenting in a separate opinion.

CHIEF JUSTICE TOAL: I respectfully dissent. Appellants contested Walter Stone's workers' compensation award for over two years after his unfortunate death, never once raising S.C. Code Ann. § 42-9-280 (1985) as a bar to the recovery of benefits. In my view, when a workers' compensation claimant dies while his claim is being appealed, an employer may not, after final judgment in the appeal, assert § 42-9-280 in an effort to avoid paying any benefits.

Accordingly, I would affirm the circuit court and find that Respondent is entitled to receive the full amount of Walter Stone's compensation award.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Keith Lasean Simpson, Respondent-Petitioner,

v.

Michael Moore, Commissioner, S.C. Department of Corrections, and Henry Dargan McMaster, Attorney General, State of South Carolina, Petitioner-Respondent.

ON WRIT OF CERTIORARI

Appeal from Spartanburg County
John C. Hayes, III, Circuit Court Judge

Opinion No. 26114
Submitted April 20, 2005 – Filed February 13, 2006

AFFIRMED IN PART; REVERSED IN PART

John H. Blume, III, and Sheri L. Johnson, both of Cornell Law School, of Ithaca, NY; and Russell Ghent, of Leatherwood Walker Todd & Mann, of Greenville, for Respondent-Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney

General Donald J. Zelenka, and Assistant Attorney General S. Creighton Waters, all of Columbia, for Petitioner-Respondent.

CHIEF JUSTICE TOAL: Respondent-Petitioner Keith Lasean Simpson (Simpson) was found guilty of murder and received a death sentence. Simpson appealed and this Court affirmed. *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996). Simpson filed for post-conviction relief (PCR). The PCR court denied relief on all issues related to guilt but granted relief on sentencing. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

Simpson and his accomplice planned to rob a convenience store. Armed with guns, the two men went to a store owned by Joe Harrison. Once there, Simpson went inside the store while his accomplice waited in the parking lot. At the same time, a customer entered the store with his nine-year-old son, Nathan. After making his purchase, the customer went outside to wait for Nathan. Joe Harrison was behind the counter, working the register.

Suddenly, gunshots were fired. A store employee, who was in the back of the store, testified that he saw Harrison walking towards the front door while Simpson shot at Harrison from behind. Nathan testified that he walked towards the front of the store to see what had happened. According to Nathan, Simpson pointed the gun at Nathan's forehead and attempted to fire the gun, but it only made a clicking noise. After this encounter with Simpson, Nathan ran and hid behind a poker machine. Nathan testified that while he was hiding, he saw Simpson go behind the counter and take money from the cash register.

Once the shooting began inside, Simpson's accomplice shot Nathan's father, Tony Scott, outside, in the parking lot. Scott was injured, and Harrison, the owner, died. Simpson and his accomplice fled the scene, pointing their guns and shooting at others in the area, but injuring no one else.

Simpson was indicted for murder, armed robbery, assault and battery with intent to kill, possession of a firearm during commission of a violent crime, and five counts of pointing a firearm.

At trial, Simpson gave a different version of events. He testified that once inside the store, he "chickened out." He claimed that he lifted his shirt, exposing the gun, as a way of signaling to his accomplice that he no longer wanted to rob the store. When Simpson lifted his shirt, Harrison saw the gun, grabbed Simpson by the shirt collar, and the two began to struggle. During the alleged struggle, two shots went off, Harrison began to stagger, and then Simpson fired two additional shots at Harrison. In addition, Simpson testified that he did not take anything from the store when he left.

The jury found Simpson guilty of murder and he was sentenced to death. He was also sentenced to serve consecutive sentences of thirty years for armed robbery, twenty years for assault, and five years for each of the pointing-a-firearm charges. Simpson appealed and this Court affirmed. *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996). Simpson filed for post-conviction relief (PCR), and following a hearing, Simpson was denied relief on guilt but granted relief on sentencing. We granted Simpson's and the State's petitions for certiorari.

Simpson raises the following issues for review:

I. Did the PCR court err in finding counsel was not ineffective for failing to consult an independent forensic pathologist, medical examiner, or homicide-reconstruction expert?

II. Did the PCR court err by denying Simpson relief due to the State's failure to disclose potentially exculpatory evidence related to the armed-robbery charge?

III. Did the PCR court err in finding the State did not engage in prosecutorial misconduct?

IV. Did the PCR court err in finding counsel was not ineffective for failing to call an expert witness to discredit a child witness's testimony?

V. Did the PCR court err in finding counsel was not ineffective for failing to object to the State's use of peremptory challenges against women?

VI. Did the PCR court err in failing to conduct a cumulative-error analysis?

The State raises the following issues for review:

I. Did the PCR court err in finding Simpson was prejudiced by counsel's failure to fully develop Simpson's mitigation case?

II. Did the PCR court err by considering numerous depositions and affidavits in lieu of live testimony?

LAW/ANALYSIS

Standard of Review

This Court gives great deference to the PCR court's findings of fact and conclusions of law. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (citing *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995)). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000) (citing *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996)).

To establish a claim that counsel was ineffective, a PCR applicant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's errors, there is a reasonable

probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 688, 694 (1984); *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

DISCUSSION

ISSUES RAISED BY SIMPSON

I. Failure to Consult a Forensic Expert

Simpson contends that the PCR court erred in finding counsel was not ineffective for failing to consult an independent forensic pathologist, a medical examiner, or a homicide-reconstruction expert. We disagree.

At trial, the State presented the expert testimony of Dr. Wren, the pathologist who performed Harrison's autopsy. Dr. Wren testified that Harrison was shot three times: once through the hand, once through the front abdomen, and once through the back. Dr. Wren stated that all three were distant gunshot wounds, meaning that when fired, the gun was at least twelve inches from the victim.

Defense counsel did not call an expert to rebut Dr. Wren's testimony. Instead, the defense presented Simpson as its sole witness. Simpson testified that the shooting occurred during a struggle over the gun. During closing argument, defense counsel reenacted Simpson's testimony, showing the jury three possible theories regarding the trajectory of the bullets.

At the PCR hearing, defense counsel testified that he did not see a need for calling an expert witness to refute Dr. Wren's testimony. But to show that there was in fact a need for such testimony, PCR counsel called three expert witnesses to the stand. Two of the experts testified that Harrison was shot in the hand while he was gripping the barrel of Simpson's gun, which supported Simpson's testimony that the shots were fired during a struggle. But one expert testified that Harrison could have been shot in the back while

lying on the ground or he could have been shot in the back while standing upright and fleeing.

After considering this testimony, the PCR court found that defense counsel was not deficient in failing to consult an expert. The court viewed the allegations against counsel as relating less with trial strategy and more to the degree that counsel should go in pursuing a defense theory. In addition, the court found that even if counsel was deficient, there was no prejudice. The judge found that the expert testimony presented at the PCR hearing added little either factually or theoretically, and did not negate the fact that all of the elements necessary for a murder conviction were present. Therefore, the PCR court found that there was not a reasonable probability the added testimony would have changed the outcome of the guilt phase of the trial.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* When counsel's performance falls below this standard, a "defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

We agree with the PCR court and find that counsel was not deficient in failing to consult a forensic expert. It is clear from the record that counsel's primary strategy was to prove that the shooting occurred during a struggle, and that this struggle somehow negated or lessened Simpson's criminal liability for Harrison's death. However, evidence that Harrison grabbed Simpson by the shirt collar does nothing to explain how and why the gun was pulled from Simpson's waist. Additionally, Simpson himself testified to intentionally shooting a wounded Harrison *twice* after the alleged struggle concluded, once in Harrison's *back*. Even if Simpson's testimony about the

struggle was corroborated with expert testimony, there is not a reasonable probability that the jury would not have found Simpson guilty of murder.[1]

Accordingly, we hold that the PCR court properly held that counsel was not ineffective in failing to consult an independent forensic pathologist, a medical examiner, or a homicide-reconstruction expert.[2]

II. Brady Violation

Simpson contends that the PCR court erred in denying relief due to the State's failure to disclose potentially exculpatory evidence related to the armed-robbery charge. We agree.

The armed-robbery charge served as an aggravating circumstance that allowed the State to seek the death penalty. *See* S.C. Code Ann. § 16-3-20 (1976). Accordingly, it was essential for the State to prove that Simpson actually robbed the store.

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[1] It is these facts, which remained uncontested in the PCR hearing, that compel our finding that counsel was not deficient. Although there is no doubt that some particulars of the crime are in dispute, there can be no doubt about Simpson's malicious conduct which amounted to gunning down a wounded crime victim and attempting to execute the witnesses. We further find that Simpson was erroneously given a voluntary manslaughter charge at trial. Given Simpson's admission to firing on Harrison multiple times after the alleged struggle, under no circumstance could we conclude that Simpson acted without malice or had sufficient legal provocation to use deadly force.

[2] In a PCR proceeding, Simpson may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective. Judicial scrutiny of counsel's performance is highly deferential and the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 816 (1985) (citing *Strickland*, 466 U.S. at 668). Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a "fancier" case. *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998).

When police arrived at the scene of the crime, they noticed that the cash register drawer was open, and there were bills in every slot except the slot that would normally contain twenty-dollar bills. Police also found a bag of money behind the counter, near the register. Instead of preserving the bag and disclosing its existence to Simpson's counsel, the police gave the bag to the victim's brother, Jack Harrison, who helped run the store.

The PCR court found:

> The turning over of the bag by law enforcement clearly constitutes sloppy police work in an armed robbery investigation and could be considered a tainting of the scene. Clearly the contents of the bag could have been exculpatory. Clearly this evidence should have been preserved and, thus, been subject to discovery by [Simpson].

Despite this finding, the court ruled that the issue about the bag of money was not preserved for review because Simpson did not specifically raise it in his PCR application. We disagree.

At the PCR hearing, two witnesses were called to testify about the money issue. The first witness was Simpson's defense counsel, who testified that he learned about the bag of money only two hours before testifying. The second witness was Jack Harrison, whom the State called for the specific purpose of addressing the money issue. Jack testified that the money was used to cash customers' checks, and it was unusual for money to be taken from the register and put into the bag.

Given this testimony and the PCR court's ruling on the issue relating to the bag of money, we hold that Simpson should have been permitted to amend his PCR application to conform to the evidence presented. *See* Rule 15(b), SCRCP (pleadings may be amended, even after judgment, to conform to issues tried by express or implied consent but not raised in the original pleadings); *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 843 (1992) (amendments must conform to evidence presented at trial, not raise new claims). Moreover, we hold that the State would not be prejudiced by such

an amendment given that the State cross-examined Simpson's defense counsel on the issue and was permitted to present its own witness, Jack Harrison, to contest the issue's relevance. *See Harvey v. Strickland*, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002) (amendments should be liberally allowed when no prejudice to the opposing party will result).

Turning to the merits, we hold that the State's failure to tell the defense that a bag of money was found behind the counter prejudiced Simpson's case in the penalty phase. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. State of Maryland*, 373 U.S. 83, 87 (1963). A *Brady* claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. *Sheppard v. State*, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004). Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 660, 594 S.E.2d at 470.

Armed robbery was both a charge against Simpson in its own right and a statutory aggravating circumstance urged by the State as a ground for imposing the death penalty. There is a reasonable probability that Simpson would not have been found guilty of armed robbery had the evidence about the bag of money been disclosed.[3] Moreover, because the State needed to prove that a robbery occurred in order to seek the death penalty, there is a

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[3] There was also a memo to the file written by one of the solicitors identifying possible weaknesses in the case, including the fact that "no robbery (larceny) occurred" and "[t]here was nothing taken from the store . . . only an attempted robbery occurred." But the PCR court did not consider whether the State's failure to disclose this memo constituted a *Brady* violation nor did PCR counsel raise the issue in the Rule 59(e), SCRCP, motion to alter or amend. Therefore, the issue is not preserved for review. *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991).

reasonable probability that Simpson would not have received a sentence of death had the State failed to prove Simpson robbed the store.

Therefore, we hold that the PCR court erred in denying relief on this basis. Accordingly, Simpson is entitled to a new trial on the armed robbery charge.

III. Prosecutorial Misconduct

Simpson contends that the PCR court erred in finding that the State did not engage in prosecutorial misconduct in its alleged coaching of the child witness, Nathan. We disagree.

A conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment. *U.S. v. Bagley*, 473 U.S. 667, 678 (1985). The knowing use of perjured testimony is subject to the materiality standard of review: "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682.

At trial, Detective Rick Gregory testified that he interviewed nine-year-old Nathan Scott the day after the shooting. During their conversation, which Gregory did not record, Nathan told Gregory that he saw a black man go behind the counter and take money out of the cash register. But twelve days later, Gregory obtained a written statement from Nathan in which Nathan mentioned only that he saw a black man go behind the cash register—not that he saw a man take money from the register.

At some point before trial, the State's investigator, Johnny Dyer, went to Nathan's home to discuss the crime. After talking at the house, Dyer took Nathan to the store so that Nathan could explain what he had witnessed and where he had hidden during the incident. Afterwards, Dyer sent a letter to defense counsel stating "Nathan Scott may testify that he saw the black man in the store, and the man had money in his hand that came from the cash register."

Simpson first contends that the State engineered and introduced materially false and misleading testimony regarding whether Nathan saw Simpson take money from the register. We disagree.

Although there is speculation that Dyer attempted to improperly influence Nathan, there is simply no evidence supporting a finding that such misconduct actually occurred. In fact, the State was uncertain as to how Nathan would testify. In a letter to defense counsel, Dyer stated that Nathan *may* testify that he saw Simpson take money from the register. And later, at the PCR hearing, defense counsel explained that he did not call Dyer to testify because counsel was uncertain as to whether Dyer had improperly coached Nathan.

Moreover, there is no evidence to support a finding that Nathan's testimony was false. Defense counsel was aware that Nathan's story had changed throughout the investigation and cross-examined him accordingly. The jury heard this testimony and was able to evaluate Nathan's credibility based on these inconsistencies.

Simpson also contends that, by not telling defense counsel about the meeting with Nathan at home and at the store, the State withheld exculpatory and impeaching evidence in violation of *Brady*. We disagree. Simpson was unable to show that there was a reasonable probability that the result of the trial would have been different had the defense known about the meeting. Therefore, we find that the State did not violate *Brady*. *See Sheppard*, 357 S.C. at 660, 594 S.E.2d at 470 (withheld evidence must be material to guilt or punishment).

Accordingly, we hold that the PCR court properly found that the State did not engage in prosecutorial conduct.

IV. Expert Witness

Simpson contends that the PCR court erred in finding counsel was not ineffective for failing to call an expert witness to discredit Nathan's testimony. We disagree.

At the PCR hearing, defense counsel testified that he did not think that he needed to call an expert witness to discredit Nathan's testimony. After learning that Nathan's recollection of events had changed, counsel decided that the issue could be addressed on cross-examination, and counsel was in fact able to get Nathan to admit on cross that someone from the solicitor's office "helped" him remember that he saw "a black man taking money out of the cash register." Given this admission, counsel concluded that cross-examination "went very well," and therefore there was no need to consult any sort of expert to discredit Nathan's testimony.

In response, Simpson presented expert testimony at the PCR hearing from a developmental psychologist who identified a number of factors—including Nathan's low I.Q., his young age, and the length of time between when the crime occurred and when Nathan was interviewed by investigators—indicating that Nathan would likely remember false details about the shooting.

The PCR court found that counsel "ably, adequately and thoroughly addressed the false memory/suggestion issue at the source, Nathan Scott." In addition, the court found that the cross-examination of Nathan "clearly exposed his lack of accurate recall and not only his susceptibility to suggestion, but the actual enhancement of his recall by statements to him by others, namely individuals at the Solicitor's office." We agree.

On both direct and cross, Nathan's lack of accurate recall was exposed to the jury. At the PCR hearing, defense counsel explained that he knew Nathan's story had changed, and that he had planned to address this issue on cross-examination. Therefore, we find that counsel was not deficient in failing to call an expert witness to discredit Nathan's testimony. *See Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (counsel may avoid a finding of deficiency if he articulates a valid reason for using a certain strategy).[4]

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[4] The dissent finds that counsel was deficient in failing to consult and present an expert discrediting Nathan's testimony. Again, this conclusion is somewhat confounding given that the PCR court's decisions are reviewed

V. Voir Dire

Simpson contends that the PCR court erred in finding counsel was not ineffective for failing to object to the State's use of peremptory challenges against women. We disagree.

In making this contention, Simpson does not argue that the jury was incompetent or impartial. Instead, Simpson argues that counsel was unaware of the then recent decision of *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 143 (1994), in which the United States Supreme Court held that the gender-based exercise of peremptory challenges violates the equal protection clause of the Constitution.

At the PCR hearing, defense counsel testified that he did not recall considering the possibility of objecting to the State's use of peremptory strikes on the basis that they were gender-based. The PCR court ruled that counsel's failure to challenge the State's strikes on the basis of gender was consistent with objective standards of reasonableness and not prejudicial to the outcome of Simpson's trial. We agree.

Simpson did not present any evidence that potential jurors were struck simply on the basis of their gender. In addition, Simpson failed to show that

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under the "any evidence" standard and there appears to be ample evidence supporting the PCR court's finding. Second, assuming that counsel was deficient, the dissent presents two statements made by jurors citing their doubts as to the credibility of Nathan's testimony. While the dissent finds this is evidence of prejudice, we see this as evidence of a lack of prejudice. The jury in this case returned a unanimous conviction on the armed robbery charge; therefore, it is completely reasonable to assume that any jurors having doubts about Nathan's testimony relied on other evidence in finding Simpson guilty beyond a reasonable doubt. We further note that Nathan's testimony was only relevant to the charge of armed robbery, and Nathan will inevitably have to testify again since we are reversing the armed robbery conviction under *Brady*. Nathan's testimony was not at all relevant to, and had no impact on, Simpson's murder conviction.

he was prejudiced by the jury selected. *See Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) ("a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury"). Therefore, we hold that the PCR court properly denied relief on this basis.

VI. Cumulative-Error Analysis

Simpson contends that the PCR court erred in failing to conduct a cumulative-error analysis. We disagree.

When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice. *Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002). Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina. *Id.* at 197, 569 S.E.2d at 324-25.

Because the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis. The record simply did not contain "several errors" for the judge to cumulatively assess. We hold, therefore, that the PCR court did not err in failing to conduct such an analysis.

ISSUES RAISED BY THE STATE

I. Mitigation Case

The State argues that the PCR court erred in finding that Simpson was prejudiced by counsel's failure to offer sufficient social history evidence in the mitigation case. We agree.

The United States Supreme Court has held that counsel's failure to conduct a reasonable investigation into mitigating circumstances constitutes ineffective assistance. *Wiggins v. Smith*, 539 U.S. 510, 511 (2003). In *Wiggins*, the Court found that counsel's review of a pre-sentence investigation report and records from the Department of Social Services

records did not constitute a reasonable investigation into defendant's background. *Id.* A more in-depth investigation would have revealed the defendant's "severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother," the "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care," the time he spent homeless, and his diminished mental capacity. *Id.* at 535. Instead, only one significant mitigating factor—Wiggins's lack of a criminal history—was before the jury. *Id.*

Similarly, this Court has found counsel ineffective for failing to adequately investigate and prepare expert testimony about a defendant's mental condition. *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004). In *Von Dohlen*, a psychiatrist testified at trial that the defendant suffered from "adjustment reaction disorder," as well as pathological intoxication from the abuse of alcohol and Valium. *Id.* at 604, 602 S.E.2d at 741. He also testified that the defendant did not have a chronic mental illness and did not dispute the solicitor's assertion that defendant's disorder was "pretty small potatoes." *Id.* But later, at the PCR hearing, the psychiatrist testified that, had he been provided with additional medical records that existed and were available at trial, he would have diagnosed defendant as suffering from "major depressive episodes with severe symptoms of anxiety and possible psychotic feature," in addition to alcohol and Valium abuse. *Id.* at 604-05, 602 S.E.2d at 741. The Court held that "[t]he absence of crucial medical records and related information which existed at the time of [the defendant's] trial prevented [the psychiatrist] from conveying an accurate diagnosis and explanation of [the defendant's] mental condition . . . ." *Id.* at 608, 602 S.E.2d 743.

At trial in the present case, defense counsel called several witnesses, including three experts, to offer mitigating evidence in the sentencing phase. Witnesses testified that Simpson's mother used heroin while pregnant with him, Simpson grew up in a drug environment, he had trouble in school, and he experienced several personal tragedies. One expert, a clinical social worker, testified that Simpson's mother abused drugs while pregnant with Simpson and after, Simpson was often abandoned as a child, he suffered chronic headaches, and had been exposed to traumatic life events. A second expert, a clinical psychologist, testified that Simpson's IQ was at the lower end of the normal range, and that Simpson tested "highly abnormal" on the

scales of paranoia, schizophrenia, and mania. Finally, a forensic psychiatrist, Dr. Dupree, testified that Simpson suffered from a mental illness known as dysthymic disorder, which is basically chronic depression that lasts over a period of more than two years. Dr. Dupree also testified that Simpson experienced symptoms associated with attention deficit disorder and post-traumatic stress disorder, but he could not be diagnosed as having these disorders. She also noted his history of drug and alcohol abuse.

But at the PCR hearing, Simpson's counsel presented the testimony of two experts, who gave a more detailed explanation of the relationship between Simpson's traumatic childhood and the likelihood that he would murder someone. PCR counsel also submitted the affidavit of Dr. Dupree, in which she stated that the opinion she gave at the sentencing hearing was not reliable because she did not know that Simpson's mother had used drugs during her pregnancy with Simpson; that Simpson had been sexually abused; that he had witnessed and experienced several acts of violence; and that he had suffered chronic headaches. Based on this "new" information, Dr. Dupree stated she was prepared to testify that neglected and abandoned children are prone to depression, anxiety disorders, substance abuse disorders, and other psychiatric illnesses, and that people who are exposed to traumatic events are more likely to suffer from PTSD.

Based on this evidence, the PCR court found that counsel failed to fully investigate Simpson's medical, mental, social, and familial history, and because of this, the jury did not have the opportunity to consider mitigating factors warranting a life sentence as opposed to the death penalty. We disagree.

Simpson's defense counsel interviewed a number of witnesses about Simpson's childhood and life. Counsel also hired a private investigator to go to New York and gather background information on Simpson. Moreover, counsel called several witnesses, including three experts, to offer mitigating evidence. Counsel testified that information gathered about Simpson's background was available to the experts. Therefore, we find that the PCR judge erred in finding counsel deficient.

Even if the PCR judge correctly found counsel deficient, Simpson failed to show that he was prejudiced during the mitigation case. The jury was aware of Simpson's troubled childhood, traumatic life experiences, and mental condition. Any additional investigation would have merely resulted in a "fancier" mitigation case, having no effect on the outcome of the trial. *See Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) (holding that a "fancier mitigation case" does not render the prior case inadequate).

Therefore, the PCR court erred in finding that Simpson was prejudiced by deficiencies in the mitigation case.

II. Depositions and Affidavits

The State argues that the PCR court erred by considering numerous depositions and affidavits in lieu of live testimony. We disagree.

At a PCR evidentiary hearing, "[t]he court may receive proof by affidavits, depositions, oral testimony, or other evidence . . . ." S.C. Code Ann. § 17-27-80 (1985). Whether to admit such evidence is within the court's discretion. *Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982).

In the present case, the PCR court allowed Simpson to introduce over forty depositions and some twenty-two affidavits into evidence in lieu of live testimony. We find that this decision was within the trial judge's discretion, resulting in no prejudice to the State. Most of the relevant witnesses testified at the PCR hearing and were cross-examined by the State. In addition, the court gave the State the opportunity to submit additional testimony and affidavits countering the evidence presented by Simpson. Therefore, we hold that the PCR court did not err.

CONCLUSION

We affirm the PCR court's decision declining to grant a new trial as to the conviction of murder. As to the conviction of armed robbery, however, we reverse the PCR court's decision declining to grant relief, because we find that the State withheld potentially exculpatory evidence related to the armed

robbery charge. Therefore, Simpson is entitled to a new trial on the armed robbery charge. If the State convicts Simpson of armed robbery on retrial, Simpson will also be entitled to a new trial on the penalty phase of the capital murder charge, given that armed robbery served as the sole aggravating circumstance allowing the State to seek the death penalty.[5]

We also reverse the PCR court's decision finding that the mitigation case was not fully developed. We find that defense counsel presented a thorough mitigation case on Simpson's behalf.

Finally, we affirm the PCR court's decision to consider certain depositions and affidavits in lieu of live testimony.

Therefore, the PCR court's decision is affirmed in part and reversed in part.

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[5] We fail to see how, as the dissent suggests, *Ring v. Arizona*, 536 U.S. 584 (2002), in any way suggests that this form of relief is improper. *Ring* and its companion cases stand simply for the proposition that a sentence may not be enhanced by considering facts that have not been proved beyond a reasonable doubt. *Id.* at 602, 609. In no way can these cases be read to provide that the remedy we grant here is constitutionally deficient.

We are equally unpersuaded that the case of *Oregon v. Gudzek*, 336 Or. 424, 86 P.3d 1106 (Or. 2004) (scheduled for argument before the United States Supreme Court December 7, 2005), is at all relevant in this matter. *Gudzek* deals with the limitations and requirements for mitigation evidence as provided by the due process clause of the Eighth Amendment to the United States Constitution. If Simpson were found guilty of armed robbery on re-trial, it is likely that any "residual doubt" about Simpson's guilt would simply be a collateral attack on the validity of his conviction. Under current Supreme Court jurisprudence, the Eighth Amendment "in no way mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt . . . [s]uch lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or 'circumstance of the offense.'" *Franklin v. Lynaugh*, 487 U.S. 164, 74, 108 S.Ct. 2320, 2327 (1988). Until the Supreme Court directs otherwise, we will continue to apply what appears to be well-reasoned and well-settled precedent.

MOORE, WALLER, and BURNETT, J.J., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: The majority holds the State's Brady[1] violation entitles Simpson to a new trial on the armed robbery charge, with capital resentencing contingent on the outcome of that trial. In my opinion, such a limited remedy would violate Simpson's constitutional rights.

In finding a Brady violation, we have necessarily found the nondisclosed evidence was material. In determining materiality for Brady purposes,

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.
>
> Kyles v. Whitley, 514 U.S. 419, 434 (1995).

I would hold that when, as here, the Brady violation in the guilt phase of a capital trial relates to the aggravating circumstances relied upon by the State in the penalty phase,[2] fundamental fairness requires a new trial.

I am also concerned that to deny Simpson a new sentencing proceeding under these circumstances would violate his Sixth Amendment right to trial by jury. In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court held that this right entitles the capital defendant to "a jury determination of any fact on which the legislature conditions an increase in [his] maximum punishment." Id. at 589. The original jury which sentenced Simpson to death was deprived, by the State's unconstitutional act, of hearing all of the evidence relevant to the aggravating factors. To deny Simpson the right to have his sentence determined by a jury which has heard all the facts, including those which exculpate him, would violate his Sixth Amendment

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[1] Brady v. Maryland, 373 U.S. 83 (1963).

[2] Murder during the commission of armed robbery, S.C. Code Ann. § 16-3-20(c)(a)(1)(d) (2003) and murder for the purpose of receiving money or any thing of value. § 16-3-20(c)(a)(4) (2003).

right to a jury trial. Ring v. Arizona, *supra*; cf. State v. Riddle, 301 S.C. 68, 389 S.E.2d 665 (1990) (capital resentencing reversed where state permitted to prove statutory aggravators merely by introducing defendant's convictions for burglary and armed robbery from the first trial; these convictions were in no way binding on resentencing jury, which had to determine appropriate penalty from the evidence presented to it).

I therefore concur in the majority's determination that the State committed a Brady violation, but dissent from its holding that the error may be remedied by a retrial on the armed robbery charge alone with a contingent new sentencing proceeding. In any case, as explained below, I would hold that counsel were ineffective in failing to present expert testimony to impeach Nathan's credibility, and to dispute the State's forensic evidence.[3]

At trial, Nathan acknowledged that 'someone' had told him what to say, and agreed on cross-examination that the solicitor's office had "helped" him remember. At the PCR hearing, Simpson presented expert testimony that Nathan's low I.Q.[4] and learning disability[5] made him especially susceptible to suggestions about past events, a situation compounded by his young age (nine at the time of the events). Simpson's expert pointed to specific parts of Nathan's testimony that were consistent with false memories. One of Simpson's trial attorneys admitted that while they were aware of the changes in Nathan's testimony, they felt they could deal with it

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[3] I would also find that trial counsel were deficient in failing to be aware of J.E.B. v. Alabama, 511 U.S. 127 (1994), which was decided five months before the capital trial. See Hill v. State, 350 S.C. 465, 567 S.E.2d 847 (2002) (trial counsel rendered deficient performance in failing to be aware of three month old decision). I agree, however, that Simpson failed to demonstrate the requisite prejudice stemming from this deficient performance and thus did not meet his burden of proving this allegation ineffective assistance of counsel. See Williams v. State, 363 S.C. 341, 611 S.E.2d 232 (2005).

[4] Nathan's full scale I.Q. was 71 while his performance I.Q. was 69, placing him in the lowest 3% of children in the United States.

[5] His learning disability included an inability to recall the details of a story while grasping the main theme.

through cross-examination. Simpson's lead counsel echoed this sentiment. Trial counsel did not consult with a memory expert.

The PCR judge found that the attorneys were fully aware before trial of Nathan's belated recollection of having seen Simpson with cash in hand, and was not ineffective in relying only on cross-examination to call Nathan's credibility into question. The majority upholds this ruling. I would reverse.

A PCR applicant claiming trial counsel was ineffective must establish both that counsel's performance was deficient, that is, that it fell below an objective standard of reasonableness, and that the deficient performance prejudiced the applicant's case, that is, but for counsel's deficient performance there is a reasonable probability that the outcome of the proceeding would have been different. Williams v. State, 363 S.C. 341, 611 S.E.2d 232 (2005); Strickland v. Washington, 466 U.S. 668 (1984). On certiorari, this Court will uphold the PCR judge's findings if they are supported by any probative evidence in the record. Williams, *supra*.

The PCR judge found counsel was not ineffective in relying solely on cross-examination to impeach Nathan's credibility. In support of this finding, the PCR judge referred to a juror's affidavit which stated:

> I was concerned about the testimony of the little boy who was in the store. I suspected that he might have some memory problems because I was not sure that I could rely on the boy's testimony about Mr. Simpson taking money out of the register and although I signed the verdict form in the end, I was never certain the [sic] Mr. Simpson really committed armed robbery.

The majority affirms the PCR judge's denial of relief to Simpson on this ground, finding the decision to rely on cross-examination of Nathan was "a valid trial strategy." I disagree. Counsel were well aware of the weakness of the State's armed robbery case, and the letter sent shortly before trial alerted them that Nathan 'may' have suddenly remembered a crucial fact. Without exploring the issue of Nathan's background, trial counsel were not in

a position to make a strategic decision. Had counsel conducted even a cursory review of Nathan's school records, they would have been aware of his low I.Q. and learning disability. Surely knowledge of these facts, combined with Nathan's critical new recollection, would have sufficient to put trial counsel on notice that Nathan's memory was suspect. In my opinion, counsel were deficient in failing to pursue the credibility of Nathan's recalled memory and in relying on cross-examination of a child witness/victim upon whose testimony the armed robbery case largely turned.

As Simpson demonstrated at the PCR hearing, expert testimony would have allowed the jury to understand the special vulnerability of Nathan to suggestions regarding the crucial events. In my opinion, Simpson produced evidence not only of deficient performance in counsels' reliance solely on cross-examination to impeach Nathan's testimony, but also of prejudice. One juror admitted she "suspected that [Nathan] might have some memory problems." While the PCR judge viewed this statement as evidence of counsel's adequate cross-examination performance, I find it is evidence of prejudice. In my opinion, there is a reasonable probability that expert testimony would have confirmed this juror's "suspicion" and resulted in Simpson's acquittal of armed robbery. A finding of 'not guilty' on the armed robbery charge would have negated both aggravators relied upon by the State.

Further, as explained below, if the jury were to find Nathan's story less credible, then the credibility of Simpson's explanation of the events is enhanced. A jury finding Simpson's story credible might return a manslaughter verdict.[6]

Simpson testified that he had decided to withdraw from the planned armed robbery, and that the first shots were fired as he and Harrison struggled over the gun. Simpson explained that he shot at Harrison as Harrison moved rapidly away from the cash register, presumably to use the phone to summon help, only in an attempt to disable him. In contrast, the State theorized that there was no struggle and no shots fired during such, and

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[6] The trial judge charged the jury on voluntary manslaughter based on Simpson's testimony.

that Harrison was shot in the back while prostrate on the ground. The State presented testimony from a pathologist that Harrison's hand wound was 'distant,' and that Harrison had been lying on the ground when he was shot twice in the back.[7]

At trial, counsel relied solely on Simpson's testimony and counsel's own "reenactment" during closing argument to support Simpson's version of events.

At the PCR hearing, Simpson presented three forensic experts. All disputed the State's expert's trial testimony, and opined that the evidence was consistent with the first shots having been fired during a struggle. They testified that Harrison's hand wound was not distant, and that the other wounds indicated Harrison was shot while standing, not while prostrate as the pathologist had testified at trial.

The PCR judge agreed that Simpson's PCR experts supported Simpson's story, but held their evidence was merely cumulative to trial counsel's reenactment in closing argument. I disagree.

Counsel's closing argument is not evidence. E.g., State v. Charping, 333 S.C. 124, S.E.2d 851 (1998). I would hold, therefore, that there is no evidence in the record to support the PCR judge's holding that trial counsel were not deficient in failing to present forensic evidence to support Simpson's version of events.

The PCR judge held that, in any case, Simpson could not establish prejudice in that there was no reasonable probability that the forensic evidence would have changed the result since the jury could still have returned a murder verdict even if a struggle preceded the upright shooting of Harrison. I disagree. Had the jury heard the expert evidence concerning false memories and found that no money was taken, and had it heard forensic evidence that supported Simpson's story of a struggle followed by the

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[7] I note this theory is in part contradicted by the store employee's testimony that he saw Simpson shoot Harrison as Harrison walked rapidly towards the store phone.

shooting of Harrison while he was running away, the jury may have found Simpson's story credible and returned a manslaughter verdict. While it is true Simpson entered the store intending to rob it, he claimed to have changed his mind once there. Further, Simpson's testimony indicated that Harrison lunged for the gun after seeing it in Simpson's waistband, which is one explanation "how and why the gun was initially pulled from Simpson's waistband." Finally, Simpson acknowledges shooting Harrison twice after the struggle ended, but claimed it was in a panicked attempt to stop Harrison from getting help. In my opinion, Simpson demonstrated both deficient performance and prejudice stemming from trial counsels' decision not to present expert testimony supporting Simpson's version of events.

CONCLUSION

The State's Brady violation denied Simpson a fair trial. Kyles v. Whitley, *supra*. Further, Simpson demonstrated both deficient performance on the part of his trial attorneys and resulting prejudice from their failure to pursue and present expert testimony. I would reverse Simpson's murder and armed robbery convictions and sentences, and remand for a new trial.[8]

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[8] Even if the new jury were to convict Simpson of murder and armed robbery, it is conceivable that Simpson would be entitled to argue and/or have his sentencing jury charged on residual doubt. The United States Supreme Court has on its docket for December 7, 2005, Oregon v. Guzek, No. 04-928. The issue in Guzek is:

> Does a capital defendant have a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument in support of a residual-doubt claim – that is, that the jury in a penalty-phase proceeding should consider doubt about the defendant's guilt in deciding whether to impose the death penalty?

Even without a Guzek argument or charge, it is entirely possible that a weaker guilt case would result in a life sentence.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mar-Reece Aldean Hughes, Petitioner,

v.

State of South Carolina, Respondent.

Appeal From York County
Paul M. Burch, Circuit Court Judge

Opinion No. 26115
Heard October 19, 2005 – Filed February 13, 2006

REMANDED

Teresa L. Norris, of the Center for Capital Litigation, of Columbia, for Petitioner.

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

JUSTICE BURNETT: We are asked to decide whether Mar-Reece Aldean Hughes (Petitioner), who has been sentenced to die for the murder of a police officer, is mentally competent to waive his statutory right to pursue post-conviction relief (PCR) and be executed forthwith. We

conclude Petitioner is not mentally competent at this time to waive his right to pursue PCR.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was convicted of murder, armed robbery, criminal conspiracy, possession of a firearm during the commission of a violent crime, and possession of a stolen vehicle at a trial in York County in September 1995. The jury found as an aggravating circumstance that the victim was a local law enforcement officer performing his official duties. Petitioner was sentenced to death. This Court affirmed the convictions and sentence. State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999), cert denied, Hughes v. South Carolina, 529 U.S. 1025 (2000).

The convictions arose from the fatal shooting of police officer Brent McCants on September 25, 1992. Petitioner and Eric Forney, armed with a gun, accosted two college students in the parking lot of a restaurant in Charlotte, North Carolina, and stole their car. The two men then drove to Rock Hill where Officer McCants stopped them for driving without headlights. McCants was shot several times and his police-issue walkie-talkie was taken from his belt as he lay on the side of the road. Petitioner and Forney were apprehended shortly thereafter. Hughes, 336 S.C. at 589, 521 S.E.2d at 502.

The State sought the death penalty against both Petitioner and Forney. They were tried separately. At his trial, Forney claimed Petitioner was the triggerman. Forney was convicted of murder, criminal conspiracy, and armed robbery and was acquitted of possession of a pistol during the commission of a violent crime. Forney was sentenced to life imprisonment after the jury failed to return a unanimous verdict in the sentencing phase, and the convictions and sentences were affirmed on appeal. State v. Forney, 321 S.C. 353, 468 S.E.2d 641 (1996). At Petitioner's trial, Petitioner admitted he participated in the armed robbery of the vehicle and that he was driving at the time McCants stopped them, but claimed Forney shot McCants from the passenger seat and stole the officer's walkie-talkie.

On May 11, 2000, we remanded Petitioner's case to the circuit court for a competency hearing after Petitioner wrote the Attorney General requesting to waive further proceedings and be executed. Petitioner changed his mind before a competency hearing was held and filed a post-conviction relief (PCR) application on September 21, 2000. Less than a week later, Petitioner filed a pro se motion requesting counsel be relieved and he be executed.

After a court-ordered evaluation but before a competency hearing, Petitioner again changed his mind and decided to pursue PCR. A competency hearing began on February 25, 2002, but was continued because Petitioner had been forcibly medicated in violation of a court order. Petitioner indicated to counsel during a recess in the hearing that he wished to waive his right to PCR and be executed. Petitioner's mental status was re-evaluated and a competency hearing was held in April 2002.

Judge Paul E. Short, Jr. on September 18, 2002, ruled Petitioner was competent to waive his right to counsel and PCR and competent to be executed. An appeal of that ruling was pending before us when, acting sua sponte on March 7, 2003, we ordered Petitioner's appeal be held in abeyance pending a decision in Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004). We subsequently held in Council that a mentally incompetent PCR applicant is not entitled to a stay of proceedings pending a determination of his competency to proceed. Instead, a mentally incompetent applicant and his counsel are required to pursue PCR on issues which do not require the applicant's assistance. The applicant will have an opportunity to raise fact-based issues requiring his assistance at a later PCR proceeding if he regains competence. *Id.* at 125-30, 597 S.E.2d at 785-87.

On June 25, 2004, we remanded the case to circuit court for another hearing on whether Petitioner is presently competent to waive his right to pursue PCR and whether that decision is knowing and voluntary pursuant to the standard established in Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993).

A competency hearing was held on September 15, 2004, before Judge Paul M. Burch following two court-ordered evaluations. Judge Burch on September 24, 2004, ruled Petitioner is presently competent under the Singleton standard to waive his right to PCR and his decision was knowing and voluntary.

ISSUE

> Did the circuit court err in ruling that Petitioner is mentally competent to waive his right to pursue PCR with counsel's assistance and that his decision to do so was knowing and voluntary?

STANDARD OF REVIEW

This Court is charged with the responsibility of issuing a notice authorizing the execution of a person who has been duly convicted in a court of law and sentenced to death. The Court will issue an execution notice after that person either has exhausted all appeals and other avenues of post-conviction relief in state and federal courts, or after that person, who is determined by this Court to be mentally competent, knowingly and voluntarily waives such appeals. See In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996); Roberts v. Moore, 332 S.C. 488, 505 S.E.2d 593 (1998); S.C. Code Ann. § 17-25-370 (2003) and § 16-3-25 (2003). When considering a request by an appellant who has been sentenced to death to waive the right to appeal or pursue PCR, and to be executed forthwith, it has been our practice to remand the matter to circuit court for a hearing and ruling on whether the appellant is mentally competent to make such a waiver, and whether any waiver of appellate or PCR rights is knowing and voluntary. We remand such a matter when we deem it necessary to further develop or explore the facts of a case. Following that competency hearing, the parties are required by this Court to file briefs and an appendix containing the testimony and evidence considered by the circuit court. The appellant is required, when directed by the Court, to appear at oral argument and personally respond to questions regarding the waiver of his appellate or PCR rights. See State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002); State v.

Torrence, 317 S.C. 45, 451 S.E.2d 883 (1994) (Torrence II); Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993).

This procedure is necessary and appropriate because it provides the parties an opportunity to fully explore the issues and develop a record for our review. We are not bound by the circuit court's findings or rulings, although we recognize the circuit court judge, who saw and heard the witnesses, is in a better position to evaluate their credibility and assign comparative weight to their testimony. Cf. Cherry v. Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981). This matter is similar to one arising in our original jurisdiction because it is this Court which must finally determine whether a particular appellant is mentally competent to make a knowing and voluntary waiver of his appellate or PCR rights. Passaro, 350 S.C. at 506, 567 S.E.2d at 866 ("Importantly, this Court is the final body to decide whether to grant [an appellant's] waiver."); State v. Torrence, 322 S.C. 475, 477 n.2, 473 S.E.2d 703, 705 n.2 (1996) (Torrence III) (no appeal lies from the remand of case for fact finding on the issue of competency; such a case is similar to one arising in the Court's general jurisdiction in which the Court may provide for fact finding as necessary).

In deciding the issue of an appellant's competency, we carefully and thoroughly review the appellant's history of mental competency; the existence and present status of mental illness or disease suffered by the appellant, if any, as shown in the record of previous proceedings and in the competency hearing; the testimony and opinions of mental health experts who have examined the appellant; the findings of the circuit court which conducted a competency hearing; the arguments of counsel; and the appellant's demeanor and personal responses to our questions at oral argument regarding the waiver of appellate and PCR rights. See Passaro, 350 S.C. at 504-08, 567 S.E.2d at 865-67 (reviewing evidence presented at competency hearing, including testimony of mental health experts, as well as appellant's responses to Court's extensive questioning of him at oral argument, in concluding he was mentally competent to waive right to direct appeal and be executed); Torrence III, 322 S.C. 475, 473 S.E.2d 703 (after reviewing the record of a competency hearing in circuit court which included testimony from mental health experts and the record of the Court's prior

questioning of appellant, Court concluded the record "overwhelmingly supports a determination that [appellant] is indeed competent" to knowingly and voluntarily waive his appellate rights and be executed); Torrence II, 317 S.C. 45, 451 S.E.2d 883 (where appellant wished to waive right to direct appeal, Court remanded case for circuit court to conduct a competency hearing "allowing the introduction of testimony, exhibits, and evidence, to provide a full record for this Court's evaluation"; Court questioned appellant personally about the waiver of his appellate rights and instructed circuit court to do the same); Singleton, 313 S.C. at 84, 437 S.E.2d at 58 (after reviewing record of competency hearing in circuit court which revealed, *inter alia*, the appellant was completely unaware he would die in an electric chair and was able to give only yes-no answers to questions, Court concluded "[t]he record contains a wealth of evidence which supports the PCR judge's finding of incompetence" and thus appellant could not be executed). We necessarily decide each case on an individual basis, and it is within our discretion whether to allow an appellant to waive his appellate or PCR rights. Passaro, 350 S.C. at 506, 567 S.E.2d at 866.

LAW AND ANALYSIS

I. MENTAL COMPETENCY

Petitioner[1] contends the circuit court erred in ruling that he was mentally competent to waive his right to pursue PCR with counsel's assistance and that his waiver was knowing and voluntary. Petitioner argues his history of mental health problems, past and present evaluations by mental health professionals, and evidence at the most recent competency hearing support exactly the opposite conclusion – that he is not mentally competent to make a knowing and voluntary waiver of his right to pursue PCR. We agree.

[1] We recognize Petitioner personally disagrees with the arguments set forth by his attorney. Nevertheless, we will refer only to Petitioner (without distinguishing him from counsel) because he remains represented by counsel and the crucial issue is whether Petitioner has the mental capacity to waive his right to PCR and counsel, and make these decisions for himself.

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

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

Id. at 83, 437 S.E.2d at 58; accord Torrence II, 317 S.C. 45, 451 S.E.2d 883. This standard of competency is the same standard required before a convicted defendant may be executed. Torrence II, 317 S.C. at 47, 451 S.E.2d at 884. The failure of either prong is sufficient to warrant a stay of execution and a denial of the convicted defendant's motion to waive his right to appeal or pursue PCR. Singleton, 313 S.C. at 83, 437 S.E.2d at 58.

The record sets forth Petitioner's mental health history from his arrest in 1992 until a competency hearing in 2002, as well as his pretrial murder of a cellmate by stabbing him to death during a psychotic episode in which he was deemed legally insane. The record shows Petitioner exhibited signs of schizophrenia since at least the murder of Officer McCants in 1992, and perhaps a few years earlier. He was first formally diagnosed with paranoid schizophrenia in 1994. Petitioner has experienced serious mental health problems for years, with sporadic treatment by medication and limited success in resolving them.

Petitioner was deemed legally competent to stand trial in 1994 by one examiner, then deemed incompetent by that same examiner and two others a short while later. He was ruled legally competent by the court to stand trial in 1995 while being forcibly medicated, but stopped voluntarily

taking his medications after he was sentenced to death.[2] Examiners disagreed on whether Petitioner was competent in 2000, but court-appointed examiners found him to be incompetent to waive PCR in 2001. A continued hearing resulted in further disagreement over Petitioner's competence among mental health practitioners, but a finding of competence by the circuit court in 2002.

Petitioner stated he wished to waive PCR in 2000, then changed his mind and filed a PCR application. He again tried to waive PCR later in 2000, but again changed his mind and decided to pursue PCR in 2001. He expressed his wish for PCR at a hearing in 2002, then changed his mind and indicated a renewed desire to waive it.

At the most recent competency hearing in September 2004, held upon order of this Court, the circuit court considered the transcript of two commitment hearings before the probate court in 2003, the testimony and reports of several psychiatrists who examined Petitioner, and the testimony of Petitioner.

At the first probate court hearing in January 2003, the probate judge ordered the South Carolina Department of Corrections (DOC) to treat Petitioner at DOC's Gilliam Psychiatric Hospital instead of housing him at a maximum security prison. The probate court adhered to a previous order by

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[2] The State may not forcibly medicate an inmate solely to facilitate execution. An inmate has a right, grounded in the state constitutional right to privacy and the Fourteenth Amendment's Due Process clause of the federal constitution, to be free from unwanted medical intrusions. The State may forcibly medicate an inmate only when he is dangerous to himself or others, and then only when it is in the inmate's best medical interest. Singleton, 313 S.C. at 89, 437 S.E.2d at 61 (relying in part on Riggins v. Nevada, 504 U.S. 127 (1992) and Washington v. Harper, 494 U.S. 210 (1990)); see also Ford v. Wainwright, 477 U.S. 399, 418-27 (1986) (holding, in plurality opinion, that the execution of an inmate who becomes incompetent or insane after conviction and sentencing is violative of the Eighth Amendment and due process) (Powell, J., concurring).

the circuit court to forcibly medicate Petitioner only when deemed necessary on an emergency basis by DOC doctors and approved by Dr. Donna Schwartz-Watts, a private psychiatrist who has treated Petitioner for several years. Schwartz-Watts and Dr. Richard Ellison, a DOC psychiatrist, testified Petitioner suffers from paranoid schizophrenia. Petitioner has "bizarre thoughts about life and the afterlife," hallucinations, and delusions. Petitioner repeatedly flushed his clothes down the toilet and stood naked in his cell, smeared feces on the walls and himself, and postured bizarrely in his cell like a bodybuilder.

A Gilliam hospital social worker testified Petitioner was delusional. Petitioner stated he had exploded bombs in several rooms, he could tell time by using his pulse, and he planned to be released from prison before Christmas and go to the bus station.

The record is replete with evidence of the love-hate relationship Petitioner has with his appellate attorney, Teresa Norris. For example, Petitioner at this probate court hearing offered a rambling, hateful, profanity-laced diatribe against Norris, his doctors, and the courts. Petitioner accused Norris of representing him only to advance her career and said he has tried to fire her. Petitioner repeatedly denied he was incompetent and said Norris's only goal is to have him declared incompetent to prevent his execution.

At the second probate court hearing in May 2003, the psychiatrists' testimony and result was much the same, with the probate court ordering Petitioner to be transferred again to Gilliam Psychiatric Hospital for treatment. Dr. Schwartz-Watts testified Petitioner was schizophrenic and severely mentally ill. The doctor and a DOC social worker testified Petitioner had stopped eating or bathing, refused medications, torn up several jumpsuits, stayed in a fetal position under his cot, and was generally unable to care for himself. While normally not violent, Petitioner can become extremely agitated and combative. Before the judge entered the courtroom at this hearing, Petitioner picked up the table while in handcuffs and had to be restrained by several officers. Dr. Schwartz-Watts testified Petitioner was trapped in an ever-deteriorating cycle of mental illness, taking medication

and improving slightly, then going off medication and getting progressively worse. Dr. Schwartz-Watts testified that

> [h]e needs medication, but to get him well enough to even know what he would want when he's well, what kinds of medication he would need to be maintained on, we've never gotten to that point. I have never been to the point with [Petitioner] that I have been able to sit down and rationally understand what he wants because he's never been well long enough to be able to do that. He's so ambivalent, which is a symptom of schizophrenia. One week he wants to die. The next week he would want to go on with his legal proceedings.

At the competency hearing in September 2004, Drs. Jeffrey Musick, Pamela Crawford, and Margaret Melikian, psychiatrists employed by the South Carolina Department of Mental Health (DMH), all testified Petitioner was not competent under the Singleton standard.[3] The three psychiatrists diagnosed Petitioner as suffering from undifferentiated schizophrenia, which is believed to be caused by a chemical imbalance in the brain. The characteristic symptoms of this major mental illness are delusions, hallucinations, disorganization of speech and thoughts, and disorganization of behavior.

In applying the Singleton analysis, the three psychiatrists testified Petitioner understands factually that he was tried for the murder of a police officer. Petitioner seemed to understand the reason for the punishment, *i.e.*, that he murdered someone, although he also asserted racial bias and the State's wish to dissect his superior physical body as reasons for his punishment.

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[3] Dr. Pratap Narayan, a DMH psychiatrist, offered similar testimony about Petitioner's statements and actions, but declined to offer an opinion on whether Petitioner was competent under the Singleton standard.

The three psychiatrists testified Petitioner does not understand the nature of a PCR proceeding or the nature of the punishment. In perhaps the most significant and serious deficiency, they concluded Petitioner does not possess sufficient capacity or ability to rationally communicate with his lawyer.

The three psychiatrists testified Petitioner does not believe he is mentally ill, but sane and rational. However, their examinations revealed he is actively psychotic, suffering from visual and auditory hallucinations, delusions, and an inability to engage in organized speech or thought. His conversations usually are incoherent, with occasional, seemingly rational comments dominated by unintelligible, wildly divergent, and irrelevant dialogue peppered with made-up words and references to non-existent places. The psychiatrists offered the following examples of delusions, hallucinations, and disorganized speech, thoughts, and behavior by Petitioner:

- Petitioner discussed something he called "hesitancy," then in an incoherent monologue in which he moved to different topics in rapid succession, he discussed movies; Gandhi; "Tel-Avery," which he said was the world's largest city; the equinox; the Tropic of Cancer; Venus Solaris; the synthetic god; the human god; the flesh god; and the cloth god.

- Petitioner described himself as a world-class athlete who once could run 300 miles a week. One reason the State wants to put him to death is to dissect his body to discover the reason for his athletic prowess.

- Petitioner said he has an intelligence quotient, or IQ, of 172; he also stated this fact to the judge at the 2004 competency hearing.[4]

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[4] An IQ between 90 and 110 is considered average. See http://www.bartleby.com/59/17/intelligence.html.

- Petitioner refused to discuss what happens in a PCR proceeding, saying only that he had waived it and had no further comment. He did, however, assert that the number of hours in his day, of which there are thirty-six or thirty-eight, will affect the PCR proceeding. Other people's days contain only twelve hours.

- Petitioner said there is no afterlife, but then said he would be transformed into an "eternal force."

- Petitioner said some people prepare for death by taking flu shots, although he is not one of them.

- Petitioner said medications are administered by white people to black people, particularly young black males, in order to control or incapacitate them.

- Petitioner has episodes in which he tears up his clothes and blankets, smears feces on the walls of his cell in patterns, bangs on his door, jumps on his bed, refuses to eat, speak, or bathe, and believes the staff is poisoning his food.

- Petitioner said the FBI runs a concentration camp at the prison.

- Petitioner said he passes through time zones. He often is fixated on numbers and the "hundreds of millions" of suns whose sunbeams awake unsuspecting women. He believes "forces" enter and depart from his prison cell. The forces awarded him "black diamonds" in his eyes, but took those away because he did not deserve them. The forces instead gave him "blue rings" in his eyes, which he insisted on asking psychiatrists to examine by leaning forward and asking, "Can you see them?" The forces were responsible for removing a building from the prison grounds. The forces have offered him 100 million years of life, but he turned them down in a respectful manner.

- Petitioner said he wrote to former Secretary of State Madeline Albright at 1600 Pennsylvania Avenue because he must communicate through her in order to convince the Supreme Court he is competent.

- Petitioner stated that a major participant in a PCR proceeding is the "notary republic," which he defined as a "validated clerk that goes state to state and fills different positions." A new "notary republic" must be chosen to serve in his case because the licenses of all "notary republics" around the world will expire this year.

- Petitioner said death means death, but seconds later asserted he has been granted five million years of life.

- Petitioner said Judge Short told him that his mother was a whore during the first competency hearing in 2002.

- Petitioner said he is being punished because he owns the state of South Carolina and the State wants to confiscate his wealth. He further asserted he made $56 million the previous week.

- Petitioner said he is a god and described jousting with other gods.

Petitioner's testimony at the hearing is informative only because it reinforces the psychiatrists' diagnoses and opinions. Petitioner left the courtroom as the hearing began, upset that his usual guardian was not present and railing against "crackers" who are bent on medicating him against his will. He later returned.

Neither the State's attorney nor Judge Burch was able to elicit coherent or rational responses from Petitioner, including repeated questions about the nature of a PCR proceeding. Petitioner brushed aside questions and, in profanity-laced statements, asserted he was a "sane, rational individual" who "you white folks always want to medicate me on drugs down

here." He told examiners "I am no donor and wish to be electrocuted," "you don't like the fact that I'm no donor. I ain't going to be no donor."[5] He stated he wanted to be executed by electrocution, complained that he had done his "legal four hours in chains," and repeatedly asked to be taken back to his cell.

At his appearance before this Court, Petitioner answered most of our questions calmly and politely. Attorneys involved with his case for several years stated they were surprised by Petitioner's restrained demeanor. Petitioner chose not to remain in the courtroom to hear the attorneys' oral arguments, but was returned to Gilliam Psychiatric Hospital, where he has been incarcerated for 2½ years.

Petitioner testified he is not mentally ill, but merely withdrawn or voluntarily silent because he has been isolated in a cell by himself for years. He expressed his wish to die by electrocution and testified that death means the brain and other bodily organs cease to function. Respondent testified he occasionally takes "Geodorn," which he described as a mild sedative which helps him sleep, but he has not taken it in about week.[6]

Petitioner often responded with yes-no answers when asked about the nature of various rights he would be waiving and the consequences of his waiver. When asked to elaborate on an answer in his own words, Petitioner's responses revealed a distinct lack of understanding of the PCR process, substantial confusion about his appellate rights, and disorganized thought patterns. The following exchanges during the questioning of Petitioner by Chief Justice Toal are instructive:

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[5] Melikian testified that by using the term "donor," Petitioner probably was referring to his desire that the State not dissect his body to discover the reasons for his purported athletic prowess.

[6] Petitioner apparently meant "Geodon," the brand name of ziprasidone, an anti-psychotic medication used to treat schizophrenia. See Physicians Desk Reference 2688-89 (2002).

Q: Do you understand what a post conviction relief proceeding is?

A: Yes, I do.

Q: Do you understand what happens in a post conviction relief proceeding?

A: Yes. Yes, I do.

Q: Has your attorney explained to you what happens in a post conviction relief proceeding?

A: She has several times.

Q: And do you understand what your attorney has told you about that?

A: I pretty much have taken it in. I pretty much have taken it in.

Q: Tell me in your own words, Mr. Hughes, what happens in a post conviction relief proceeding.

A: That means that I can take up the terms and the amendments that's being held before me to take and perceive the law, as in perceivance.

. . .

Q: All right, sir. Do you realize that by waiving your right to post conviction relief, you may be jeopardizing any habeas corpus relief that would be available to you in a federal court?

A: Well, I'm not jeopardizing the habeas corpus law because the Mecklenburg County Jail, when they took and gave me ten years for grand theft auto larceny, they took and convened the court then. They took and changed the jurisdiction, so that's under habeas corpus law. They've already taken and did that, so I'm not under habeas corpus law.

The state of North Carolina willingly did take in and get with the legal system down here in that matter of conveyance.
. . .

Q: Now, do you believe you received a fair trial, Mr. Hughes?

A: Well, it's not to my belief in the law or the legal system. As far as to merit, when I took and did my first summary, when I did my procumfactories (phonetic) all the way down to the final summary, in point factory – the case in factory, the court didn't have any evidence against me. When the court didn't have any evidence against me, they showed me what their attitude was all about.

Q: All right, sir.

A: The court showed me, first of all, that on its legal terms, that they did not respect my ability to think. When I took and did my summary, it wasn't that they took in a sorry day of intelligence, it's just the fact that they didn't have any case against me.

As I have stated over the years and stuff, being that I'm a person of my own degree, that means I'm a person of my own understanding, it's not that I have a problem with my conscience because my conscience does not deal with me – deal with me pertaining to this case.

I said when I had went into the courtroom, the court, first of all, made like it was an understanding as far as to what was presented on the record, and what was presented on the record, they could not have found me guilty.

Again as I stated, over the years since I have been incarcerated, I said that to myself, if they did come up, well, the cases in fact raise or misses in point they had to convict me to have a life sentence, I still would have to have did (sic) about 30 or 40 years.

If it had been a migrating (sic) circumstance, it still would have been the points that might have happened inside of this state, but as far as dealing with other people's backgrounds, other people's attitudes, like I said, I have always been a person who did solitary time. I was being in segregated law.

As far as for incarcerated time, I'll always be in segregation, other than the fact that when I had took (sic) and went to North Carolina, they have – you know, being incarcerated, segregated, as I said, they did not take and value what I put down on paper. On those conditions there, I told judge Burch that I was guilty on those conditions there.

Q: I understand. I understand, Mr. Hughes.

A: So it doesn't have anything to do with legal phasing as to innocent or guilt. It didn't have anything to do with that. I'm saying it had went through this court system here about four years ago one time before when I had took and brought the procedure about six years ago to be executed.

As I have stated, I've been waiting over six years now in my own room to be executed. I have been waiting six years to be executed. Do you understand? I haven't been just sitting here

> thinking about being executed for no reason. I've been waiting six years to be executed with finality.
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> Q: All right, sir.
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> A: In the courtroom decision back then, when they took and changed the legal law, the public back then, because she had an expired commission, I think it was every four years. That was the first setback that I had took and went through.
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> Other than that, if I didn't give you a runaround story, it was just to this fact here. When I had went through the courtroom through the preliminary hearings in North – I mean, not North Carolina but in York County close to North Carolina, they did not take and listen to what was presented in the case. They just presented their case.
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> I offered those things right there. I took and formed my own opinion about the state of South Carolina, but I have never came to the courtroom as showing a negative attitude. I never did that, even though my attitude is negative toward the court system.

Petitioner's mention of a "public back then," a "she" who had an "expired commission," appears to be a reference to what he previously has described as a "notary republic," a person whom Petitioner has told psychiatrists is a major participant in a PCR proceeding. In addition, Petitioner twice told us that he has written to former Secretary of State Madeline Albright, whom he previously has indicated wields some influence over our resolution of his case.

We have carefully and thoroughly reviewed Petitioner's history of mental competency, as well as his history of mental illness as shown in the record of previous proceedings and in the last competency hearing. We have considered the testimony of the mental health experts who examined Petitioner. We have reviewed the findings of the circuit court and weighed the arguments of counsel for the parties, and we have considered Petitioner's

demeanor and personal responses to our questions at oral argument regarding the waiver of his rights. We recognize, of course, that questions of mental competence, unlike issues of historical fact, call for a basically subjective judgment. "And unlike the determination of whether the death penalty is appropriate in a particular case, the competency determination depends substantially on expert analysis in a discipline fraught with subtleties and nuances." Ford v. Wainwright, 477 U.S. 399, 426 (1986) (Powell, J., concurring) (quotes omitted).

We acknowledge the issue of Petitioner's mental competence is not immutable. A determination of mental competence may change from one period of time to another, particularly when the administration of medication or treatment, or the lack thereof, may affect a person's mental faculties. See *e.g.* Walton v. Angelone, 321 F.3d 442, 459 (4th Cir. 2003) ("Even if a defendant is mentally competent at the beginning of the trial, the trial court must continually be alert for changes which would suggest that he is no longer competent."); Hunter v. State, 660 So.2d 244, 248 (Fla. 1995) (once a defendant is determined competent to stand trial, a presumption of competence attaches to the defendant in later proceedings; however, another competency hearing is required if a bona fide question about the defendant's competency is raised); see also Drope v. Missouri, 420 U.S. 162, 180 (1975) (information concerning defendant's suicide attempt during trial, when considered with psychiatric information available prior to trial and wife's testimony concerning his "strange behavior" and his attempt to kill her shortly before trial, created sufficient doubt of defendant's competence to stand trial so as to require further inquiry on the issue).

We conclude that, pursuant to the Singleton standard, Petitioner is not mentally competent at this time to waive the right to pursue PCR. Petitioner apparently understands what he was tried for and the reason for his punishment; whether he understands the nature of the punishment is less certain. However, it is clear he does not understand the nature of the PCR proceeding which he wishes to waive the right to pursue. Petitioner was not able to describe, in a reasonably coherent fashion using layman's terms, the basic purposes or procedures available to him in PCR, either in the court

below or in this Court. Thus, the cognitive prong of the Singleton analysis has not been satisfied.

We further conclude the assistance prong is not satisfied on this record. We are not persuaded Petitioner possesses sufficient capacity or ability to rationally communicate with counsel. We agree with the mental health experts who examined Petitioner, and who cited his inability to communicate adequately with counsel as a primary reason for their conclusion he was not mentally competent. Given our conclusions, it is not necessary to reach the issue of whether any waiver was knowing and voluntary.

In a second argument, Petitioner asserts that, even if he were deemed mentally competent, the Eighth Amendment proscription against cruel and unusual punishment and international law prohibit the execution of a chronically mentally ill person. We find it unnecessary to address this argument in light of our disposition of this matter. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issue when resolution of prior issue is dispositive).

CONCLUSION

We conclude Petitioner is not mentally competent, pursuant to the Singleton standard, to waive the right to pursue PCR and be executed forthwith. We remand this case to circuit court for further proceedings pursuant to Council v. Catoe, 359 S.C. 120, 597 S.E.2d 782 (2004).

REMANDED.

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

CHIEF JUSTICE TOAL: I respectfully dissent. In my opinion, Hughes is competent to waive his right to pursue PCR. I disagree with the majority's cherry-picking of the transcript and record. Throughout this proceeding Hughes has demonstrated an ability to understand the impact of his decisions and, in my opinion, did so in his appearance before this Court.

Further, in the interest of judicial economy, I would allow Hughes to waive his right to PCR. In my view, allowing Hughes to waive his right to PCR would result in the case arriving at the exact same procedural posture as is now. Ultimately, the majority's decision will force the case to go full circle and eventually require a thorough evaluation to determine if Hughes is competent to be executed. As a result, after the Order for Execution is issued, counsel for Hughes could apply for subsequent PCR relief pursuant to *Singleton*, which is the final judicial safeguard against executing someone not mentally competent. *Singleton*, 313 S.C. 75, 87, 437 S.E.2d 53, 60 (1993) (stating that apply § 17-27-20 is the final judicial safeguard for a stay of execution to evaluation a defendants competency and immediate review by this Court is permitted if the defendant is found competent by the PCR court); S.C. Code Ann. § 17-27-20(a)(6) (stating that a defendant may apply relief upon any ground of alleged error). The decision of the majority adds an additional step, one that Hughes has requested that he be allowed to waive.

The Supreme Court of South Carolina

In the Matter of Jessica R. Boney, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

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

from respondent’s trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Sammy Diamaduros, Esquire, has been duly appointed by this Court.

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

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

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
February 1, 2006

The Supreme Court of South Carolina

In the Matter of Craig J. Poff, Respondent.

ORDER

Respondent was suspended on December 12, 2005, for a period of sixty days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

February 14, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Natural Resources, Respondent,

v.

Andy McDonald, Jason Martin and Jonathan Corn, Appellants.

Appeal From Abbeville County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4081
Submitted January 1, 2006 – Filed February 13, 2006

REVERSED

James Wofford Bannister, of Greenville, for Appellants.

James Andrew Quinn, of Columbia, for Respondent.

GOOLSBY, J.: Andy McDonald, Jason Martin, and Jonathan Corn (Defendants) were convicted in magistrate's court of hunting deer over bait in Abbeville County. The circuit court affirmed the convictions, rejecting

Defendants' argument that the regulation they allegedly violated was ineffective on the date in question because the statute on which it was based had been repealed. Defendants appeal to this court. We reverse.[1]

FACTS AND PROCEDURAL HISTORY

On May 26, 1995, Regulation 2.9 was published in Volume 19, Issue 5 of the South Carolina State Register. The South Carolina Wildlife and Marine Resources Department (now the South Carolina Department of Natural Resources) enacted Regulation 2.9 as part of 27 S.C. Code Ann. Regs. 123-40 (1982). Specifically, Regulation 2.9 prohibits (1) "baiting or hunting over a baited area or taking wildlife over a baited area" on all wildlife management area lands[2]; and (2) baiting, hunting over bait, or taking over bait "Big Game" on "other lands within the Central Piedmont, Western Piedmont and Mountain Hunt Units."[3]

When the Department promulgated Regulation 2.9, it incorrectly cited only South Carolina Code section 50-9-150 as the enabling statutory authority. Section 50-9-150 granted the Department authority to prescribe methods for taking game; however, this authority was limited to activity on wildlife management areas.[4] Although South Carolina Code section 50-11-310 authorized the Department to regulate deer hunting on land other than

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[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

[2] Regulation 2.9, 27 S.C. Code Ann. Regs. 123-40 (1982).

[3] Id.

[4] See 1993 S.C. Acts 2647-48 (containing the version of section 50-9-150 in effect during the promulgation of Regulation 2.9 and stating in pertinent part: "The department may establish open and closed seasons, bag limits, and methods for taking game on all wildlife management areas.").

wildlife management areas,[5] the Department did not cite this section when it promulgated Regulation 2.9.

The time limit to challenge the procedural validity of Regulation 2.9 expired without incident on May 26, 1996.[6] On May 30, 1996, the South Carolina General Assembly passed Act 372, which amended Chapter 9 of Title 50 of the South Carolina Code.[7] Although section 50-9-150 was not listed among the statutes expressly repealed by Act 372, the legislature significantly revised many of its provisions and incorporated them elsewhere within Title 50.[8] Act 372 took effect July 1, 1996.[9]

On November 10, 2001, Eddie Monts, an officer with the South Carolina Department of Natural Resources observed Defendants hunting deer over bait in Abbeville County. Monts arrested Defendants and charged them under South Carolina Code section 50-11-350 for violating Regulation 2.9.[10]

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[5] See S.C. Code Ann. § 50-11-310(D) (Supp. 2005) ("In Game Zones 1, 2, and 4, the department may promulgate regulations in accordance with the Administrative Procedures Act to establish the methods for hunting and taking of deer and for other restrictions for hunting and taking deer.").

[6] See S.C. Code Ann. § 1-23-110(D) (2005) ("A proceeding to contest a regulation on the ground of compliance with the procedural requirements of this section must be commenced within one year from the effective date of the regulation.").

[7] 1996 S.C. Acts 2269-84.

[8] Section 5 of Act 372 expressly repealed South Carolina Code sections 50-1-150, 50-1-170, 50-1-230, 50-11-2240, and 50-13-1140. Id. at 2284.

[9] Id.

[10] South Carolina Code section 50-11-350 states the penalties for "illegally taking, attempting to take, having in one's possession, or killing deer" in wildlife management area lands and certain other regions.

From the briefs and record on appeal, it appears Defendants were not hunting in a wildlife management area when Monts apprehended them.

After denying a motion by Defendants to dismiss the charges for lack of subject matter jurisdiction, the magistrate conducted a trial and convicted Defendants as charged. Defendants appealed to the Court of Common Pleas for Abbeville County, which heard the matter on March 4, 2004. On April 15, 2004, the circuit court issued an opinion affirming the convictions.

LAW/ANALYSIS

The dispositive issue in this appeal is whether the repeal of a statute given as the authority for the promulgation of an administrative regulation bars a prosecution for a violation of that regulation. We hold it does, notwithstanding the presence of other statutory authority that arguably could have supported the regulation but was not cited when the agency promulgated the regulation.

"An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose."[11] With regard to rulemaking, the South Carolina Administrative Procedures Act requires an agency to give notice of the proposed action in the State Register[12] and to include in the notice "the agency's statutory authority for promulgating the regulation."[13]

"The general rule is that the repeal of a statute operates retrospectively, and has the effect of blotting it out as completely as if it had never existed and of putting an end to all proceedings under it."[14] Although an administrative agency may have the power to enforce a repealed statute, this

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[11] Bazzle v. Huff, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995).

[12] S.C. Code Ann. § 1-23-110(A)(1) (2005).

[13] Id. § 1-23-110(A)(1)(c).

[14] In re Terrence M., 317 S.C. 212, 214, 452 S.E.2d 626, 627 (1994).

authority exists only if there is an applicable savings clause and the violation at issue precedes the expiration date of the statute.[15]

The circuit court characterized the Department's failure to list the correct statutory authority for Regulation 2.9 as "merely a procedural error" and held that, under South Carolina Code section 1-23-110(D), a challenge had to have been made by May 26, 1996, one year after the effective date of the regulation.[16] The court concluded that "the statute of limitations has run on [Regulation 2.9]" and that "[b]ecause statutory authority for the regulation continued to exist after the repeal of S.C. Code § 50-9-150, the regulation remained in force."

We find the circuit court's analysis troubling for a number of reasons.

Initially, we had some concern as to whether section 50-9-150 had in fact been repealed. Although the 2005 supplement to Title 50 of the South Carolina Code indicates section 50-9-150 had been "Repealed by 1996 Act No. 372, § 2, eff. July 1, 1996," it was not among those statutes expressly repealed by this legislation, all of which were listed in section 5 of Act 372. In addition, the general presumption against the legislative intention to repeal a statute when express terms of repeal are not used[17] and the fact that the General Assembly has not yet adopted the 2004 supplement[18] have prompted

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[15] 2 Am. Jur. 2d Administrative Law § 281, at 296 (1994).

[16] See S.C. Code Ann. § 1-23-110(D) (2005) ("A proceeding to contest a regulation on the ground of noncompliance with the procedural requirements of this section must be commenced within one year from the effective date of the regulation.").

[17] See 82 C.J.S. Statutes § 286, at 361 (1999) ("Where express terms of repeal are not used, usually the presumption is against an intention to repeal an earlier statute.").

[18] As the notice at the front of each of the 2005 Cumulative Supplements to the Code of Laws of South Carolina 1976 Annotated states, "The 1987 through 2004 cumulative supplements were not adopted during the 1988

us to review the history of section 50-9-150 for the limited purpose of determining whether, in the present appeal, it can support Defendants' convictions.

Notwithstanding our initial concern, we hold that, for the purpose of deciding this appeal, it was correct to rely on the premise that section 50-9-150 had been repealed, at least to the extent that this statute cannot support the convictions at issue. The preamble to section 2 of Act 372, entitled "Hunting, fishing, and trapping licenses revised," states that the purpose of the section is to "further amend[ ]" Chapter 9, Title 50 of the South Carolina Code to read in a particular way, rather than to simply add or delete certain provisions.[19] Moreover, after examining the specific provisions of the version of section 50-9-150 in effect during the promulgation of Regulation 2.9,[20] we are of the opinion that the only one that has remained intact after the passage of Act 372 was the delegation of authority to the Department to "establish open and closed seasons, bag limits, and methods for hunting and taking wildlife on all wildlife management areas."[21] As the Department appears to have conceded, however, this provision cannot support Regulation

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through the 2005 Sessions [of the General Assembly] and therefore are not official." Each notice also states that, when the corresponding 2005 supplement was published, it was not official. See Paula Gail Benson & Deborah Ann Davis, A Guide to South Carolina Legal Research and Citation 37 (1991) ("It is important to check for a notice on the cover or first page of a supplement to determine if the supplement has been adopted.").

[19] See 73 Am. Jur. 2d Statutes § 291, at 459 (2001) ("If the later act is intended to cover the entire subject and to be a substitute for the earlier act, the omitted parts are deemed to be repealed by implication. This is true of an amendment which declares that the earlier statute will read in a particular way.") (emphasis added).

[20] This version is found at 1993 S.C. Acts 2647-48.

[21] See S.C. Code Ann. § 50-11-2200(A)(3) (Supp. 2005).

2.9 insofar as that regulation governs hunting on lands that are not within wildlife management areas.[22]

Turning to the arguments Defendants have raised on appeal, we first question the significance the circuit court ascribed to the fact that Regulation 2.9 went unchallenged for one year after its publication in the State Register. This controversy does not concern procedural noncompliance in promulgating a regulation; rather, the question is whether the repeal of section 50-9-150, the statute referenced during the promulgation of Regulation 2.9, operates as a repeal of the regulation itself. We hold that it does.[23]

In so holding, we cite with favor In re Terrence M.,[24] on which Defendants rely in their appeals to both the circuit court and to this court. In that case, this court sua sponte vacated an adjudication of delinquency based on the repeal of the statute under which the juvenile was charged.[25]

The circuit court attempted to distinguish Terrence M. from the present controversy, relying on the argument that "Defendants violated a regulation that was backed by several points of statutory authority," reasoning that "[i]f

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[22] Regulation 2.9 provides in pertinent part as follows: "On all [wildlife management area] lands, baiting or hunting over a baited area or taking wildlife over a baited area is prohibited. On all other lands within the Central Piedmont, Western Piedmont and Mountain Hunt Units, Big Game cannot be baited, hunted over bait, or taken over bait."

[23] See Norman J. Singer, Sutherland Statutes and Statutory Construction § 23:34 (6th ed. 2005) ("The effect of the repeal of a statute . . . is to destroy the effectiveness of the repealed act in futuro and to divest the right to proceed under the statute.").

[24] 317 S.C. 212, 452 S.E.2d 626 (Ct. App. 1994).

[25] Id.

separate statutory authority had existed in [Terrence M.], it would have been affirmed."

Irrespective of whether the delinquency adjudication in Terrence M. would have remained valid had there been other statutory authority that could have supported it, we are of the opinion that no court in this State has the authority to uphold a regulation by gratuitously considering statutory authority that the enacting agency apparently failed to consider during the rulemaking process. We base this holding on Global Van Lines, Inc. v. Interstate Commerce Commission,[26] a case Defendants cited in their brief to this court.

In Global Van Lines, the Fifth Circuit Court of Appeals, in construing a provision of the Federal Administrative Procedures Act analogous to section 1-23-110(A)(1)(c), noted that Congress, when enacting the Act, stated that "'[a]gency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto'"[27] and that "'[t]he required specification of legal authority must be done with particularity.'"[28] The court refused to determine whether the regulation at issue in the case could be upheld on the basis of a statute that had not been mentioned in the notice of proposed rulemaking, explaining as follows:

> [The Federal Administrative Procedures Act] . . . at the very least requires that the legal grounds upon which the agency thought it was proceeding appear somewhere in the administrative record. A decision of that magnitude should not be left to the imagination of counsel on appeal, for "[t]he purpose of requiring a statement of the basis and purpose is to enable

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[26] 714 F.2d 1290 (5th Cir. 1983).

[27] Id. at 1298 (quoting the Senate report on the bill).

[28] Id. (quoting the House report, emphasis added by the Fifth Circuit Court of Appeals).

> courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's action." . . . It has, moreover, been settled for at least forty years that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." Speculations about what might have been good reasons had the agency only thought of them do not suffice.[29]

Likewise, we agree with Defendants that their convictions cannot be upheld on the basis of a statute that was never cited in the promulgation of the regulation that they were charged with violating.

CONCLUSION

The prohibition in Regulation 2.9 against hunting over bait on locations outside wildlife management areas is no longer enforceable. The statute cited as the enabling legislation for the regulation is no longer in effect as enacted, and the only intact provision of the statute authorizes the Department of Natural Resources to regulate hunting only on wildlife management area lands. Because the violations at issue here concerned a defunct prohibition, Defendants' convictions were improper.[30]

REVERSED.

ANDERSON and SHORT, JJ., concur.

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[29] Id. at 1298-99 (citations omitted) (last emphasis added).

[30] We do not address Defendants' argument concerning their right to due process. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).