The Supreme Court of South Carolina

O R D E R

The South Carolina Bar and Commission on Continuing Legal Education and Specialization have furnished the attached lists of lawyers who remain administratively suspended from the practice of law pursuant to Rule 419(c), SCACR. Pursuant to Rule 419(e), SCACR, these lawyers are hereby suspended from the practice of law by this Court. They shall, within twenty (20) days of the date of this order, surrender their certificates to practice law in this State to the Clerk of this Court.

Any petition for reinstatement must be made in the manner specified by Rule 419(f), SCACR. If a lawyer suspended by this order does not seek reinstatement within three (3) years, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name will be

removed from the roll of attorneys in this State. Rule 419(g), SCACR.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

April 17, 2002

SUSPENSIONS-
COMMISSION ON CLE AND SPECIALIZATION
2001 REPORT OF COMPLIANCE
AS OF APRIL 3, 2002

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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

April 22, 2002

ADVANCE SHEET NO. 12

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Susan Jinks as Personal Representative of the Estate of Carl H. Jinks, Respondent,

v.

Richland County and Dr. Charles Eskridge, Defendants,

of whom Richland County is Appellant.

Appeal From Richland County
L. Henry McKellar, Circuit Court Judge

Opinion No. 25446
Heard February 20, 2002 - Filed April 22, 2002

REVERSED

Andrew F. Lindemann, William H. Davidson, II, David L. Morrison, and Alice Price Adams, of Davidson, Morrison and Lindemann, P.A., of Columbia, for appellant.

Bradford P. Simpson, Theile Branham, and John D. Kassel, of Suggs & Kelly Lawyers, P.A.; and James M. Griffin, of Simmons & Griffin, L.L.C., all of Columbia, for respondent.

James E. Parham, Jr., of Irmo, for defendant Dr. Charles Eskridge.

JUSTICE BURNETT: Respondent Susan Jinks brought this wrongful death and survival action on behalf of her husband, Carl H. Jinks (Jinks and his wife are referred to collectively as "Jinks"), who died while incarcerated at Appellant Richland County's (County's) Detention Center. The jury returned an $80,000 verdict in Jinks' favor for wrongful death. County appeals.

FACTS

On October 14, 1994, Jinks was arrested for failure to pay child support, booked, and confined at County's Detention Center. He died at the Detention Center four days later.

In 1996, Jinks brought an action in the United States District Court against County, its detention center director, and the detention center physician alleging the defendants violated 42 U.S.C. § 1983 (1994). In addition, the complaint alleged supplemental state claims of outrage and negligence under the South Carolina Tort Claims Act (the Tort Claims Act). See S.C. Code Ann. §§ 15-78-10 to -200 (Supp. 2001). The district court granted the defendants' motions for summary judgment on the Section 1983 claim,[1] issued an order declining to exercise jurisdiction over the remaining state claims, and dismissed the state claims without prejudice pursuant to 28

[1]The Court of Appeals affirmed the district court. Jinks v. McCaulley, 163 F.3d 598 (4th Cir. 1998).

U.S.C.A. § 1367(C)(3) (1993).

On December 18, 1997, sixteen days after the federal judge issued his order dismissing the state claims, Jinks filed the present wrongful death and survival action alleging various negligent acts by County and its detention center physician. County answered, claiming immunity from suit under the Tort Claims Act, violation of the statute of limitations, collateral estoppel, and other defenses.

ISSUE

Does 28 U.S.C.A. § 1367(d) violate the Tenth Amendment to the United States Constitution?

DISCUSSION

County contends Jinks failed to bring this state court action within the two year statute of limitations provided by the Tort Claims Act and, therefore, the claim is barred. See § 15-78-100(a).[2] Jinks maintains the statute of limitations was tolled pursuant to 28 U.S.C. § 1367(d) (hereafter referred to as "§ 1367(d)") while the original lawsuit was pending in federal court. In response, County asserts in enacting § 1367(d), Congress exceeded its Article III and Necessary and Proper Clause[3] powers, thereby violating the Tenth Amendment to the United States Constitution. Specifically, County claims § 1367(d) infringes on South Carolina's sovereign immunity by extending the length of time in which a person may sue a political subdivision of the State on grounds of negligence. We agree with County.

In relevant part, 28 U.S.C.A. § 1367 provides:

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[2]Jinks filed the current action fourteen months after the statute of limitations expired.

[3]U.S. Const. art. I, § 8, cl. 18.

> (a) . . . in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. . . .
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –
>
> . . .
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, . . .
>
> (d) The period of limitations for any claim asserted under subsection (a) . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.
>
> . . . .

Section 1367 was adopted as part of the Judicial Improvements Act of 1990. Pub.L. 101-650, 104 Stat. 5089 (1990). "The statute . . . gives federal courts supplemental jurisdiction to the limits the case-and-controversy clause of Article III of the [United States] Constitution permits." Charles A. Wright, Arthur R. Miller, Edward H. Cooper, 13 Federal Practice and Procedure § 3523.1 at 143 (2d ed. Supp. 2001).[4]

The Tenth Amendment provides "the powers not delegated to the

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[4]Section § 1367 "codified the doctrines of pendent claim, pendent party, and ancillary jurisdiction under the more general label of 'supplemental jurisdiction'." Brian A. Beckcom, Note, *Pushing the Limits of the Judicial Power: Tolling Statutes of Limitations under 28 U.S.C. § 1367(D)*, 77 TEX. L. REV. 1049, 1051 (1999).

United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. Const. amend X. "In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." New York v. United States, 505 U.S. 144, 156 (1992).

> [W]e ask two questions to determine whether a statute violates [the Tenth Amendment]. First, whether the regulation it embodies is within Congress' power as being within those enumerated in the Constitution. Second, whether, even if so, the means of regulation employed yet impermissibly infringe upon state sovereignty.

United States v. Johnson, 114 F.3d 476, 480 (4th Cir. 1997), referring to New York v. United States, supra.

Article III of the United States Constitution establishes the basis for the judicial power of federal courts. By virtue of Article III and the Necessary and Proper Clause, Congress has power to enact laws that govern the practice and procedure in federal courts. Hanna v. Plumer, 380 U.S. 460 (1965).

The Necessary and Proper Clause, referred to as the "Sweeping Clause," provides that Congress is empowered "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18. "[T]he Sweeping Clause is not a self-contained grant of power. It authorizes Congress only to pass laws that 'carry[] into Execution' powers the Constitution elsewhere vests in one or more institutions of the federal government." Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional*

Interpretation of the Sweeping Clause, 43 DUKE L.J. 267, 274 (1993).

Within the Sweeping Clause, "necessary" does not mean absolutely required but "convenient, or useful, or essential to another." McCulloch v. Maryland, 4 Wheat. 316, 413 (1819). In order for a law to be "proper" within the meaning of the Clause, it must not violate the principles of state sovereignty. Printz v. United States, 521 U.S. 898 (1997).

County maintains § 1367(d) is neither necessary nor proper. First, County asserts since the tolling provision does not apply until after the federal action is dismissed, the statute is not "necessary" to federal practice and procedure. Second, County argues § 1367(d) is not "proper" because it interferes with a state's sovereignty by abrogating the statute of limitations. More particularly, County claims Congress lacks the constitutional authority to extend the statute of limitations governing actions in which the State has waived its sovereign immunity.

County correctly asserts § 1367(d) regulates state court practice and procedure as it tolls the statute of limitations for a state claim asserted in state court. However, the tolling provision also affects federal practice as it allows litigants to pursue actions in federal court without giving up access to state court in the event the federal jurisdictional basis is determined not to exist. It governs federal practice and procedure as it eliminates the need for federal judges to retain supplemental claims which would be dismissed as stale if pursued in state court.[5] Section 1367(d) is a useful "aid to the exercise of federal jurisdiction," and, therefore, is "necessary" within the meaning of the Necessary and Proper Clause. Brief for Petitioner at 27, Raygor v. Regents of the Univ. of Minnesota, 2001 WL 913842 (Case No. 00-1514).

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[5]See Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute - A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 983 (1992) (discussing pre-§ 1367(d) approaches in determining propriety of discretionary dismissal of a supplemental claim).

We conclude, however, that, as applied to the States and their political subdivisions in tort actions, passage of § 1367(d) is not "proper" within the meaning of the Necessary and Proper Clause. In these circumstances, the tolling provision interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit.

> [T]he constitution of the United States, which recognizes and preserves the autonomy and independence of the states, – independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938).

As a matter of sovereignty, the State has the authority to determine *whether* it consents to suit within its own court system. Alden v. Maine, 527 U.S. 706, 749 (1999) (". . . the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself."); Nevada v. Hall, 440 U.S. 410, 414 (1979) ("[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of [its] immunity" from suit). In addition, the State has the authority to determine the *conditions* under which it consents to suit. Alden v. Maine, supra (suggesting state's waiver of immunity is limited to the parameters set forth by the state statute); Beers v. Arkansas, 20 How. 527, 529 (1858) (because waiver of sovereign immunity is "altogether voluntary," "it follows that [the State] may prescribe the terms and conditions on which [the State] consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires."). Most recently,

the United States Supreme Court recognized that "although we have not addressed whether federal tolling of a state statute of limitations constitutes an abrogation of state sovereign immunity with respect to claims against state defendants, we can say that the notion at least raises serious constitutional doubt." Raygor v. Regents of Univ. of Minnesota, ___U.S. ___, ___, 122 S.Ct. 999, ___ , ___ L.Ed.2d ___ , ___(2002); see Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530, 533-34 (1949) (federal court "cannot give [state claim] longer life in the federal court than it would have had in the state court without adding something to the cause of action.").

Under the doctrine of sovereign immunity, governmental entities in South Carolina were protected from suits alleging tortious conduct by their employees until 1985. Town of Duncan v. State Budget and Control Bd., 326 S.C. 6, 482 S.E.2d 768 (1997). In that year, the Court abolished the sovereign immunity of the State and all local governmental subdivisions. McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985). In response, the General Assembly enacted the Tort Claims Act, reinstating sovereign immunity for the State and its political subdivisions with certain exceptions. § 15-78-20. The Tort Claims Act provides a limited waiver of governmental immunity and delineates the conditions upon which a claimant may pursue actions against the State and its political subdivisions. Moore v. Florence School Dist. No. 1, 314 S.C. 335, 444 S.E.2d 498 (1994); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); see § 15-78-40 (the State, its agencies, political subdivisions, and other governmental entities are "liable for their torts in the same manner and to the same extent as a private individual under like circumstances" subject to certain limitations and exemptions in the Tort Claims Act). One of the conditions is that an action must be brought within two years of the date of loss. § 15-78-100(a).

Section 1367(d) potentially exposes political subdivisions to litigation and liability after the limitations period established by the State has expired. Accordingly, in tort actions against political subdivisions, § 1367(d) extends the waiver of the sovereign immunity of political subdivisions, thereby interfering with the State's sovereignty in violation of the Tenth

Amendment and the Necessary and Proper Clause. Lynn v. City of Jackson, 63 S.W.3d 332 (Tenn. 2001) (§ 1367(d) cannot extend statute of limitations in governmental tort claim actions in which State has consented to being sued without abrogating doctrine of sovereign immunity).

As a practical matter, we recognize our decision may affect a plaintiff's decision to pursue a tort action against a political subdivision in federal court. We conclude, however, that a party's ability to choose its forum should not prevail over the State's sovereign authority to establish the terms under which its political subdivisions may be sued. Furthermore, our decision does not limit a plaintiff's ability to prosecute one action joining all federal and state law claims. Should a plaintiff fear the federal court system will be unable to determine her claims within the statute of limitations, she may bring the action in state court.

In summary, Congress exceeded its constitutional authority in enacting § 1367(d) to the extent it interferes with the States' sovereignty to establish the conditions upon which tort actions may be maintained against political subdivisions. Consequently, we conclude the tolling provision does not apply in these circumstances. See Raygor v. Regents of Univ. of Minnesota, supra (§ 1367(d) does not apply to dismissals of claims against nonconsenting States dismissed in federal court on Eleventh Amendment grounds). Accordingly, § 1367(d) did not toll Jinks' tort action against County. Since her complaint was not filed within the two year statute of limitations provided by the Tort Claims Act, her negligence claim against County is barred as untimely. The trial judge erred in holding otherwise.[6]

REVERSED.

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

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[6]In light of our disposition of this issue, it is unnecessary for us to address County's remaining arguments.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

George Rufus Wertz, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Newberry County
William P. Keesley, Post-Conviction Judge

Opinion No. 25447
Submitted March 21, 2002 - Filed April 22, 2002

REVERSED

George Rufus Wertz, Jr., of Turbeville, *pro se*.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General Dave Spencer; all of Columbia, for respondent.

JUSTICE MOORE: We granted this petition for a writ of certiorari to determine if the post-conviction relief (PCR) court erred by denying petitioner's PCR application. We reverse.

PROCEDURAL FACTS

Petitioner was convicted of second degree burglary. He was acquitted of grand larceny and possession of a firearm during the commission of a violent crime. His conviction and sentence were affirmed on direct appeal by the Court of Appeals. State v. Wertz, Op. No. 98-UP-099 (S.C. Ct. App. filed February 19, 1998).

After a hearing, petitioner's PCR application was denied. We granted in part and denied in part petitioner's *pro se* petition for a writ of certiorari.

ISSUE

> Was trial counsel ineffective for failing to request the jury's verdict be clarified with respect to the degree of the burglary conviction?

DISCUSSION

Petitioner's charges arose out of the following facts. A building, housing Carolina Comfort Heating and Air Conditioning, was broken into. The perpetrator entered the building through the bathroom window and allegedly left through a door. When the owner arrived, he found several items missing, including a nine millimeter Beretta hand gun.

During the jury charge, the trial court charged the jury:

> . . . this defendant is charged with burglary, second degree. . . . a person is guilty of burglary in the second degree if a person enters a building without consent with intent to commit a crime therein. When in effect and entry [sic] while in the building or

> immediate flight therefrom be another participant in the crime [sic] is armed with a deadly weapon or explosive. Burglary in the third degree is included in the lesser crime in burglary second degree. . . . a person is guilty of burglary in the third degree if the person enters the building without consent with intent to commit a crime therein. It matters not whether a crime was committed . . . for burglary.[1]

The trial court subsequently charged the jury regarding the forms of the verdict:

> Count One, burglary. You could be guilty or not guilty, depending upon your view of the facts and circumstances, or it could be guilty of burglary in the third degree or not guilty.

The verdict of the jury on Count One was guilty. Trial counsel did not request that the jury be polled or that the verdict be clarified as to whether the verdict was guilty of second degree burglary or guilty of third degree burglary. The trial court issued the maximum sentence for second degree

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[1]While there was the possibility the burglary occurred during the nighttime, the jury was not charged with regard to the element of nighttime. Therefore, the only aggravator charged which would elevate the crime to second degree burglary from third degree burglary was "armed with a deadly weapon."

The fact a hand gun is stolen during a burglary makes the perpetrator "armed" with a deadly weapon. *See* State v. McCaskill, 321 S.C. 283, 468 S.E.2d 81 (Ct. App. 1996) (to be "armed" with a deadly weapon, a person or "another participant in the crime" need only have physical control over a deadly weapon "in effecting entry or while in the dwelling or in the immediate flight therefrom" such that the weapon is readily available for the person to use; it matters not how person acquired deadly weapon or for what purpose person took possession of deadly weapon).

burglary, which was fifteen years imprisonment.

Petitioner claims trial counsel was ineffective for failing to request that the verdict be clarified with respect to the degree of the burglary conviction. Petitioner further asserts, because he was acquitted of the charge of possession of a firearm during the commission of a violent crime and because the trial court did not charge the jury on the aggravating circumstance of burglary being committed in the nighttime, the jury apparently did not find an aggravating circumstance to support a second degree burglary verdict.

Petitioner's trial counsel testified at the PCR hearing that his understanding of the verdict was that petitioner was found guilty of second degree burglary.

The PCR court found counsel did not render ineffective assistance to petitioner. The court read the verdict to be that petitioner was guilty of second degree burglary.

For petitioner to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective assistance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000).

The statute for second degree burglary, S.C. Code Ann. § 16-11-312(B) (Supp. 2001), provides:

> A person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein, and either:
>
> (1) When, in effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:

(a) Is armed with a deadly weapon or explosive . . .

The statute for third degree burglary, S.C. Code Ann. § 16-11-313 (A) (Supp. 2001), provides that, "[a] person is guilty of burglary in the third degree if the person enters a building without consent and with intent to commit a crime therein."

Petitioner asserts that the fact he was acquitted of the charge of possession of a firearm during the commission of a violent crime showed the jury intended to find him guilty of third degree burglary rather than second degree burglary. However, this argument does not aid petitioner.

In State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), we abolished the rule prohibiting inconsistent verdicts. In Alexander, the jury found Alexander guilty of kidnapping and criminal sexual conduct (CSC) in the third degree. Alexander claimed that the fact he had been implicitly acquitted of first degree CSC, which has as one definition of it a sexual battery accompanied by a kidnapping, entitled him to a new trial because the jury had rendered an inconsistent verdict. However, we rejected this claim. Petitioner's claim that the jury could not have found him guilty of second degree burglary because the jury had found him not guilty for the possession of a weapon charge is eviscerated by State v. Alexander.

In any event, the question remains whether the jury's verdict was unclear as to the degree of burglary with which petitioner was convicted, and, if so, whether counsel was ineffective for failing to have the verdict clarified at the time of trial.

"'A verdict should be certain and import a definite meaning free from ambiguity.'" Lorick & Lowrance v. Julius H. Walker & Co., 153 S.C. 309, 319, 150 S.E. 789, 792 (1929) (citation omitted).

If a party believes there is confusion in the wording of a jury's verdict, that party should call it to the attention of the trial court at the time the verdict is rendered so that any confusion in the verdict's language can be easily

cleared up. Howard v. Kirton, 144 S.C. 89, 142 S.E. 39 (1928). It is "the duty of the trial judge to decide what the verdict meant, and, in reaching his conclusion thereabout, it [is] his duty to take into consideration not only the language of the verdict, but all the matters that occurred in the course of the trial." *Id.* at 101, 142 S.E. at 43. *See also* Durst v. Southern Ry. Co., 161 S.C. 498, 159 S.E. 844 (1931) (to determine what jury intended to find construction of verdict can and should depend upon language used by jury and other things occurring in trial).

> A verdict of a jury should be upheld when it is possible to do so, and carry into effect what was clearly the intention of the jury. When a verdict is so confused, however, that it is not absolutely clear what the jury intended to do, the safest and best course for the court to pursue is to order a new trial. Judges and parties should not be required to guess as to what verdict a jury sought to render.

Lorick & Lowrance, *supra* at 320, 150 S.E. at 793.

In State v. Wilson, 162 S.C. 413, 437, 161 S.E. 104, 113 (1931) (quoting State v. Smith, 18 S.C. 149 (1882)) (emphasis added by Wilson court), the Court stated:

> ". . . a general verdict of guilty furnishes . . . no ground for a new trial, *provided the jury have been explicitly instructed that the effect of a general verdict will be to find the party accused guilty of the highest offense charged in the indictment*, and that they have the right to designate in their verdict which one of the particular offenses charged they believed the accused to be guilty of."

See also State v. Johnson, 186 S.C. 202, 195 S.E. 329 (1938) (same).

In the instant case, the trial court's instructions to the jury on how the verdict should be rendered were unclear. The trial court, as noted previously,

instructed the jury regarding the forms of the verdict:

> Count One, burglary. You could be guilty or not guilty, depending upon your view of the facts and circumstances, or it could be guilty of burglary in the third degree or not guilty.

The trial court did not explicitly instruct the jury to specify which degree of burglary for which they were finding petitioner guilty. Further, the jury was not charged that a general verdict had the effect of finding petitioner guilty of the highest offense charged in the indictment. *See* State v. Wilson, *supra*.

Given these unclear instructions and the general verdict rendered by the jury, counsel was deficient for failing to have the verdict clarified as to which degree of burglary the jury was finding petitioner guilty. *See* State v. Wilson, *supra*. Counsel should have called the ambiguous verdict to the trial court's attention at the time it was rendered, and, at that time, the confusion could have been easily cleared up. *See* Howard v. Kirton, *supra*.

We find there is a reasonable probability, but for counsel's error of not requesting that the jury's verdict be clarified, the result of the trial would have been different. *See* Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997) (to show prejudice, applicant must show, but for counsel's errors, there is reasonable probability result of trial would have been different).

Accordingly, the PCR court erred by not granting petitioner a new trial on this ground. *See* Lorick & Lowrance, *supra* (when verdict is so confused, safest and best course for court is to order new trial).

CONCLUSION

We reverse the PCR court on the ground that trial counsel was ineffective for failing to request the jury's verdict be clarified as to the degree of petitioner's burglary conviction. Given our conclusion on this issue, we need not address petitioner's remaining issues.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Theron James Curlin, Respondent.

Opinion No. 25448
Submitted March 26, 2002 - Filed April 22, 2002

DISBARRED

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

Theron James Curlin, of Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel 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.[1] We accept the

[1]Respondent was placed on interim suspension by order dated February 19, 2002.

agreement and disbar respondent. The facts as admitted in the agreement are as follows.

Facts

Respondent was retained by client to represent him at a real estate loan closing. At the time respondent prepared the mortgage and conducted the loan closing, respondent was aware that the property was owned by client's sister, not client. Respondent did not prepare a deed conveying title of the property to client, and client's sister neither signed the mortgage nor attended the closing.

When client failed to comply with the terms of the mortgage and the lender began foreclosure proceedings, it was discovered that client's sister was the record owner of the property. After being contacted by the title insurance company, respondent drafted a quit-claim deed which purported to convey the property from client's sister to client. Respondent forged the signatures of client's sister, the witnesses, and the notary. Respondent then recorded and filed the quit-claim deed. Based on respondent's representations that the deed was valid, the lender proceeded with foreclosure proceedings. As a result of respondent's actions, the property was to be sold at public auction with the proceeds to be paid to the lender. Respondent failed to respond to the complaint filed by client's sister with the Office of Disciplinary Counsel.

During a two or three year period, respondent routinely signed as witness and notarized legal documents outside the presence of the signatory. At the time respondent engaged in this conduct, he was aware that some of the documents were to be provided to lenders and filed with government agencies to be made part of the public record.

In another real estate matter, a client retained respondent to assist her in refinancing her home, including conducting the closing. Respondent failed to discover or inform client about two South Carolina Department of Revenue liens, an Internal Revenue Service lien, and a judgment against the

former owner of the house. The encumbrance on the property exceeded $35,000. When the liens were discovered, the client's new attorney contacted respondent, but respondent did not respond and failed to assist the client in rectifying the matter.

For approximately three years, respondent engaged in a scheme to misappropriate funds from his firm's real estate trust account. Respondent converted approximately $71,598 in law firm or client money to his own use. In order to perpetuate and conceal his scheme, respondent engaged in the routine preparation of false and fraudulent documentation.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (failing to provide competent representation to a client); Rule 1.2 (a lawyer shall consult with the client as to the means by which representation is to be pursued); Rule 1.3 (failing to act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall keep a client reasonably informed about the status of a matter); Rule 1.15 (a lawyer shall hold property of clients that is in a lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 3.3 (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal or offer evidence that the lawyer knows to be false); Rule 8.1 (failure to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); Rule 8.4(c) (engaging in conduct involving moral turpitude); Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in

conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent. Respondent shall not be entitled to seek reinstatement or readmission to the practice of law in this state until he has fully repaid any amounts due and owing his clients, as well as any other parties that may have lost money because of respondent's misconduct, and until he has reimbursed the Lawyer's Fund for Client Protection for any and all amounts paid, including reasonable interest, in connection with this matter. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael
G. Wyman, Respondent.

Opinion No. 25449
Submitted March 22, 2002 - Filed April 22, 2002

DISBARRED

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

Michael G. Wyman, of Hilton Head, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel 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.[1] We accept the

[1]Respondent was placed on interim suspension by order dated February 14, 2002.

agreement and disbar respondent. The facts as admitted in the agreement are as follows.

Facts

Respondent represented a client in a real estate transaction. Respondent accepted $699,210.59, which he was to hold in escrow for the transaction. Instead, respondent deposited a majority of the funds into a personal account and disbursed a portion of the funds to a third party.

Thereafter, respondent, on behalf of his client and relative to the real estate transaction, presented Carolina First Bank with a check for $679,888.49 drawn on an account he maintained with Regions Bank. When Carolina First Bank attempted to negotiate the check, it was returned by Regions Bank due to the fact that the funds in respondent's account were not sufficient to cover the amount of the check. Respondent has not paid Carolina First Bank nor has he returned the funds to his client. Respondent admits he misappropriated the funds given to him to hold in escrow.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (a lawyer shall hold property of clients that is in a lawyer's possession in connection with a representation separate from the lawyer's own property, funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, and complete records of such account funds shall be kept by the lawyer); Rule 8.4 (it is professional misconduct for a lawyer to: violate the Rules of Professional Conduct; commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; engage in conduct involving moral turpitude; engage in conduct involving dishonesty, fraud, deceit or misrepresentation; engage in conduct that is prejudicial to the administration of justice).

Respondent has also violated the following provisions of the

Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state).

Finally, respondent failed to comply with the requirements for financial recordkeeping found in Rule 417, SCACR.

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent. Respondent shall not be entitled to seek reinstatement or readmission to the practice of law in this state until he has fully repaid the client referenced in this matter, as well as any other parties that may have lost money because of respondent's actions in this matter, and until he has reimbursed the Lawyer's Fund for Client Protection for any and all amounts paid, including reasonable interest, in connection with this matter. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William C. Wooden, II, Respondent.

Opinion No. 25450
Submitted March 26, 2002 - Filed April 22, 2002

DISBARRED

Henry B. Richardson, Jr. and Nathan Kaminski, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Stuart M. Axelrod, of Conway, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and Disciplinary Counsel 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 any sanction set forth in Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and disbar respondent.[1]

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[1]Respondent was placed on interim suspension by order of this Court dated April 9, 2001.

Facts

I. Real Estate Matters

A client retained respondent to handle a real estate closing for a construction loan. At the closing, lender wired $33,573.81 to respondent's real estate trust account to enable the client to pay off an existing mortgage and to make a payment to the contractor. However, the checks issued by respondent from his trust account were returned because of insufficient funds. Respondent did not refund the retainer fee he received from the client, nor did he account for how the funds wired to his trust account were used.

The Office of Disciplinary Counsel (ODC) conducted a full investigation and discovered that respondent's real estate trust account reflected a persistent pattern of negative balances. ODC further discovered that respondent consistently disbursed funds deposited in his account for specific real estate closings to make settlement payments for other unrelated closings in order to cover the shortage of funds in his trust account.

In another matter, a client signed a contract to purchase a house and was informed by the mortgage company that it was using respondent as the attorney to handle the closing. Respondent did not meet with or discuss the matter with the client prior to the closing. At the closing, respondent presented the client with a form stating that he represented all parties and that he would withdraw if any conflict arose. However, as the closing proceeded, the client raised many questions about the fees she was required to pay and discovered that the loan origination fee on the settlement statement was higher than what she and the mortgage company had discussed. When asked about the fees, respondent could not provide an adequate explanation and asked the mortgage company representative to explain the fee increase, giving the client the impression that respondent was representing the mortgage company's interest to her detriment. The client inquired about consulting another attorney; however, respondent did not give her a reasonable opportunity to seek other advice or offer to withdraw from representation of the parties. At the conclusion of the closing, the client was

not given copies of any of the documents she had signed. Further, respondent failed to respond to the client's numerous requests for information in the days following the closing.

II. Post Conviction Relief Matter

Respondent was appointed to represent a client in post conviction relief (PCR) proceedings. Respondent failed to inform the client of the status of the PCR or comply with the client's requests for information. Respondent also failed to respond to a request for information from ODC and knowingly made false statements of material fact to ODC.

III. Civil Dispute Matters

Respondent agreed to represent a client in a dispute and met with her three times to discuss the dispute. However, respondent subsequently refused to respond to her requests for information regarding her case. Respondent also failed to enter into a written fee agreement with the client.

In another civil matter, a client hired respondent to resolve a dispute with an automobile repair shop. The parties agreed to a contingency fee; however, the agreement was not reduced to writing. Respondent wrote a letter on behalf of the client to the repair shop, to which the shop responded with a settlement offer. The client instructed respondent to make a counteroffer. However, despite numerous requests for information, respondent failed to communicate any further with the client and did not do any more work on the case. Several months later, respondent sent the client a copy of the file and stated that the client could bring an action against the shop himself or hire another attorney to bring the suit.

IV. Family Court Matters

A client retained respondent to represent her in a family court matter. Although respondent stated that he was securing a court date for the

case, the client discovered that no work had been done when she retrieved her file following respondent's interim suspension. Respondent also failed to account for or refund the retainer fee paid by the client.

In another family court matter, a client retained respondent to represent him in a child custody action and child support action. After sending respondent the retainer fee, the client experienced difficulty in contacting respondent. Respondent told the client that he had filed a petition for a reduction in child support and had drafted the necessary papers for the child custody action. However, the client was served with a summons and complaint alleging that he was delinquent in his child support payments and ordering him to appear in family court. The client, an Ohio resident, traveled to South Carolina for the hearing but was unable to meet with respondent until two days after his arrival. After the hearing, respondent again told the client that the papers for the child custody action had been drafted and would be served on the client's ex-wife within ten days. The client did not receive any papers or communication from respondent until he contacted respondent's office and was told that respondent had been suspended from the practice of law. Further, the client's file revealed that respondent had not drafted a petition or complaint regarding the custody issue.

In a third family court matter, a client retained respondent to represent him; however, respondent failed to respond to requests for information from the client and did not file any pleadings with the family court. Respondent also failed to account for or refund the attorney fee paid by the client.

V. Criminal Matter

A client retained respondent to represent him in a criminal matter. Respondent collected several payments from the client but did not provide any written receipts. Respondent failed to provide copies of documents he prepared for the case, and did not respond to the client's requests for information. Respondent also failed to account for or refund the retainer fee paid by the client.

VI. Bankruptcy Matters

A client retained respondent to file a bankruptcy petition. Respondent prepared the petition which was signed by respondent and the client. The client believed that the petition would be filed immediately thereafter. However, respondent failed to file the petition. The client sent respondent additional information shortly after the petition was signed and received a copy of a "Motion to Amend Bankruptcy Petition." This reinforced the client's belief that the petition had been filed. The client attempted unsuccessfully to contact respondent regarding the court date and informed respondent that the matter needed to be resolved so he could move out of state.

Several months after the petition was signed and after the client moved to Ohio, respondent filed the petition. The client drove to South Carolina to attend the meeting of the creditors. However, respondent failed to attend. Respondent told the client that he would refund part of his legal fee, but never accounted for or made any refund of the fee.

In another matter in which a client retained respondent to file a bankruptcy petition, the client understood that respondent would file the petition upon receipt of an initial fee and that an additional fee would be paid before the completion of the bankruptcy proceedings. Respondent failed to obtain a written fee agreement and failed to communicate to the client that he would take no action until the client paid him the additional fee. The client attempted to discharge respondent and demanded a refund of his legal fee. However, respondent never refunded the fee.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (failing to provide competent representation to a client); Rule 1.2 (failing to abide by a client's decisions concerning the objectives of representation, and failing to

consult with the client as to the means by which they are pursued); Rule 1.3 (failing to act with reasonable diligence and promptness in representing a client); Rule 1.4 (failing to keep a client reasonably informed about the status of a matter and promptly complying with reasonable requests for information); Rule 1.5 (a lawyer's fees shall be reasonable); Rule 1.7 (a lawyer shall not represent a client if the representation of that client will be directly adverse to another client); Rule 1.15 (failing to keep client funds in a separate account); Rule 1.16 (failing to withdraw from representation when the representation will result in a violation of the Rules of Professional Conduct or other law); Rule 3.2 (failing to make reasonable efforts to expedite litigation); Rule 8.1 (failing to respond to a lawful demand for information regarding a disciplinary matter); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(3) (failing to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state). Finally, respondent violated Rule 417, SCACR (failing to maintain current financial records).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state. Respondent is prohibited from seeking reinstatement or readmission to the practice of law until he has fully repaid all funds owed, including reasonable interest, to clients or other parties who have been financially injured due to any misconduct of the respondent, and reimbursed the Lawyers' Fund for Client Protection for any

and all amounts paid in connection with this matter. Further, respondent warrants that he is, and will in the future, fully cooperate with all appropriate authorities if a further audit of respondent's financial records is deemed necessary and is conducted. Respondent also warrants that if any further shortages are found to exist in any funds received in trust by respondent, he will make restitution as stated in this opinion. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina, ex rel., Charlie Condon, Attorney General, Plaintiff,

v.

James H. Hodges, Governor, State of South Carolina; James A. Lander, Comptroller General and Grady L. Patterson, Jr., State Treasurer, Defendants,

and

Glenn F. McConnell, President Pro Tempore of the South Carolina Senate, Hugh K. Leatherman, Sr., Chairman of the Finance Committee of the South Carolina Senate, David H. Wilkins, Speaker of the South Carolina House of Representatives and Robert W. Harrell, Jr., Chairman of the Ways

and Means Committee
of the South Carolina
House of Representatives, Intervenors.

IN THE ORIGINAL JURISDICTION

Opinion No. 25451
Heard February 21, 2002 - Filed April 18, 2002

Attorney General Charles M. Condon, Deputy Attorney General Treva Ashworth, Assistant Deputy Attorney General Robert D. Cook, and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia, for plaintiff.

Dwight F. Drake and C. Mitchell Brown, both of Nelson, Mullins, Riley & Scarborough, of Columbia, and Stephen P. Bates, Chief Legal Counsel to the Governor, of Columbia, for defendants.

H. Pierce McNair, Jr., and Helen Ann S. Thrower, both of Columbia, for Intervenor South Carolina House of Representatives.

Michael R. Hitchcock and Geoffrey R. Penland, both of Columbia, for Intervenor South Carolina Senate.

James E. Smith, Jr., of Smith, Ellis & Stuckey, of Columbia, for *Amici Curiae* Douglas Jennings, Jr., John L. Scott, Jr., J. Anne Parks, Vida O. Miller,

Walton J. McLeod, Herb Kirsh and Mack T. Hines,
Officers for and of the House Democratic Caucus.

JUSTICE MOORE: We accepted this matter in our original jurisdiction to determine whether the Attorney General has the authority to bring an action against the Governor, whether a separation of powers violation has occurred, and whether the Governor is required to return a balanced budget to the General Assembly.

FACTS

This action was commenced by the plaintiff (hereinafter referred to as the Attorney General). Thereafter, a request to intervene by certain Senators and Representatives of the General Assembly was granted. An *amicus curiae* brief on behalf of the Officers of the House Democratic Caucus was permitted to be filed.

The General Assembly passed Act 66, R.147, H.3687, the 2001 General Appropriations Act (Appropriations Act), on June 21, 2001. The General Assembly provided for base-line reductions to the recurring budgets of the State's colleges and universities. In Part 1B, Proviso 72.109 of the Appropriations Act, the General Assembly ordered the State Treasurer to transfer $38,500,000 from the Extended Care Maintenance Fund (Barnwell Fund),[1] in varying amounts, to the colleges and universities. The General

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[1]S.C. Code Ann. § 13-7-10 (11), which is part of the Atomic Energy and Radiation Control Act, provides:

> *"Extended care maintenance fund"* means the "escrow fund for perpetual care" that is used for custodial, surveillance, and maintenance costs during the period of institutional control and any post-closure observation period specified by the Department of Health and Environmental Control, and for activities

Assembly's appropriation from the Barnwell Fund reduced the impact of the base-line reductions on the various colleges and universities.

On June 27, 2001, the Governor delivered his veto message regarding the Appropriations Act. This message contained vetoes of the specific base-line reductions to the recurring budgets of each of the state colleges and universities.[2] The budgets of the colleges and universities were thus returned to their prior year funding level. The effect of the vetoes was to create new expenditures in the approximate amount of $88,000,000. Despite the reduction in spending through other vetoes, the expenditures established by the Governor's vetoes of the base-line reductions to the schools' recurring budgets left the state budget approximately $23,000,000 out of balance.

To remedy this imbalance, the Governor included a statement in his veto message indicating that certain colleges and universities had agreed to return a total of $28,500,000 in funds appropriated pursuant to Proviso 72.109 of the Appropriations Act.[3] The statement reads:

> Since I have vetoed the base budget reductions to higher education, the supplemental appropriations contained in Proviso 72.109 are not necessary to reduce the cuts. These appropriations, however, must be reduced in order to balance the state budget. I have not vetoed these items because the colleges and universities have agreed to return these amounts to the general fund to accomplish this purpose.

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associated with the closure of the site . . .

(Supp. 2001).

[2]The legality of the Governor's vetoes is not being challenged.

[3]The Governor did not request any transfer of money in the case where funds had been specifically designated by the General Assembly to be spent for a certain purpose by a college or university.

Proviso 72.109 was not vetoed by the Governor for the above stated reason.[4]

On June 28, 2001, the South Carolina House of Representatives sustained the Governor's vetoes to the base-line reductions to the budgets of the colleges and universities. The provisions of the Appropriations Act became law, including Proviso 72.109. Pursuant to Proviso 72.109, money was transferred from the Barnwell Fund to the colleges and universities on July 2, 2001. However, previously on June 26th, defendants, through the Commission on Higher Education, had requested the return of the Barnwell funds. Accordingly, on July 2, 2001, a transfer of $28,500,000 was made from the accounts of the colleges and universities to the General Fund in an account in the Governor's office.

ISSUES

I. Whether the Attorney General has authority to bring suit against the governor?

II. Whether a separation of powers violation has occurred?

III. Whether the Governor is required to send a balanced budget to the General Assembly?

ISSUE I

Defendants argue the Attorney General is violating the South Carolina Constitution and the South Carolina Code by suing the Governor in his

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[4]Due to the Governor's veto message, the net result in educational and general operating funding to higher education is that, rather than the schools facing a $38.6 million reduction in operating funds, the schools would share in about a $1.9 million overall increase in operating funds over the previous year's funding level. Also, as a result of the Governor's actions, all higher education operating funds would be in recurring dollars.

official capacity.

S.C. Const. Art. IV, § 15, provides:

> The Governor shall take care that the laws be faithfully executed. To this end, the *Attorney General shall assist and represent the Governor*, *but such power shall not be construed to authorize any action or proceeding against the General Assembly or the Supreme Court.*

(Emphasis added).

The Attorney General argues the only restriction imposed by Art. IV, § 15, is that the Attorney General cannot bring suit against the General Assembly and the Supreme Court. He claims had a restriction been intended for suits against the Governor, such a restriction would have been included in the section. He cites to Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000), for the proposition, "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*," *i.e.*, "to express or include one thing implies the exclusion of another, or of the alternative." The Attorney General misconstrues the constitutional provision. There is no reason for the provision to mention suits against the Governor because it is concerned with the Attorney General, *through his assistance and representation of the Governor*, bringing actions *on the Governor's behalf*, against the other branches of government. In any event, there are other authorities which lead to the conclusion that the Attorney General is not prohibited from bringing an action against the Governor.

The General Assembly has elaborated on the Attorney General's duties in several statutes. First, pursuant to S.C. Code Ann. § 1-7-40 (Supp. 2001), the Attorney General must

> appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes in

> any other court or tribunal when required by the Governor or either branch of the General Assembly.

The State is an interested party in this action. The way in which public funds are handled and whether a violation of the separation of powers doctrine has occurred are clearly questions in which the State has an interest. By bringing the action against the Governor, the Attorney General is simply doing what the statute allows, which is to appear for the State before the Supreme Court in the trial and argument of a cause in which the State is interested.

The General Assembly has also provided that the Attorney General, upon written request of a State officer has a duty to appear and defend that officer when the officer is being prosecuted in a civil or criminal action, or other special proceeding, due to an act done or omitted in good faith in the course of employment. S.C. Code Ann. § 1-7-50 (1986).[5] The Attorney General also must "give his opinion upon questions of law submitted to him by either branch" of the General Assembly or by the Governor. S.C. Code Ann. § 1-7-90 (1986).

There is no provision in the South Carolina Code or Constitution that explicitly prevents the Attorney General from bringing a civil action against the Governor. Further,

> "[a]s the chief law officer of the State, [the Attorney General] may, in the absence of some express legislative restriction to the contrary, exercise all such *power* and *authority as public interests may from time to time require*, and may

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[5]Defendants argue the Attorney General's action of suing the Governor is invalid because the Governor made a written request that the Attorney General dismiss the suit. However, the Governor never requested that the Attorney General represent him in this matter; therefore, the Attorney General has not violated section 1-7-50.

> institute, conduct and maintain all such suits and *proceedings* as *he deems* necessary for *the enforcement of the laws of the State*, the *preservation of order*, and the *protection* of *public rights*."

State ex rel. Daniel v. Broad River Power Co., 157 S.C. 1, 68, 153 S.E. 537, 560 (1929), *aff'd* 282 U.S. 187, 51 S.Ct. 94, 75 L.Ed.2d. 287 (1930) (citation omitted and italics added by Daniel court). *Cf.* State v. Beach Co., 271 S.C. 425, 248 S.E.2d 115 (1978) (while Attorney General has broad statutory authority, and arguably common law authority, to institute actions involving welfare of State, that authority is not unlimited).

The Attorney General has a dual role. He is an attorney for the Governor and he is an attorney for vindicating wrongs against the collective citizens of the State. *See* Porcher v. Cappelmann, 187 S.C. 491, 198 S.E. 8 (1938) (Attorney General represents sovereign power and general public). Allowing the Attorney General to bring an action against the Governor when there is the possibility the Governor is acting illegally is consistent with the duties of this dual role. Further, because the office of attorney general exists to properly ensure the administration of the laws of this State, the Attorney General is merely ensuring that Proviso 72.109 is being administered the way in which the General Assembly intended. *See* Langford v. McLeod, 269 S.C. 466, 238 S.E.2d 161 (1977) (office of attorney general exists to properly ensure administration of laws of this State).

The above precepts lead to the conclusion that the Attorney General can and should bring an action against the Governor if there is the possibility the Governor is acting improperly.[6]

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[6]We agree with the conclusion stated in the concurring opinion that the framers of our state constitution did not intend to make the Attorney General the "arbiter" of whether the Governor is faithfully executing the laws. The Attorney General cannot be the arbiter because that is, in fact, the duty of this Court. However, contrary to the belief stated in the concurring opinion, we conclude the Attorney General can and should bring to our attention alleged

We note that, previously, the Attorney General has sued the Governor in the Governor's capacity as Chairman of the State Budget and Control Board. *See* State ex rel. McLeod v. Riley, 276 S.C. 323, 278 S.E.2d 612 (1981), *overruled on other grounds by* WDW Properties v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000) (action to determine constitutionality of certain bond authorizations); State ex rel. McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977) (action attacking constitutionality of legislation which created State Budget and Control Board). *See also* State ex rel. McLeod v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980) (action brought by Attorney General and Governor challenging legislation creating Court of Appeals). However, the Attorney General's authority to sue the Governor was not raised and remains a novel issue in this State. Subsequently, in State ex rel McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982), the Court noted that the Attorney General's right to bring the action involved in Martin and Edwards was not directly attacked. The McInnis court stated, however, that

> [t]he Attorney General, by bringing this action in the name of the State, speaks for all of its citizens and may, on their behalf, bring to the Court's attention for adjudication charges that there is an infringement in the separation-of-powers area.[7]

From this language and the fact there is no statutory or constitutional prohibition against the Attorney General suing the Governor, we find the Attorney General has the authority to sue the Governor when he is bringing the action in the name of the State for the purpose of asserting that a separation of powers violation has occurred. Moreover, as stated previously, the Attorney General can bring an action against the Governor when it is necessary for the enforcement of the laws of the State, the preservation of

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violations of the separation of powers doctrine.

[7]In McInnis, the Attorney General brought an action against the Joint Appropriation Review Committee, claiming the statute providing for the creation of that committee was unconstitutional because it violated the separation of powers doctrine.

order, and the protection of public rights.

Defendants query whether the Attorney General's action of bringing suit against the Governor violates the Rules of Professional Responsibility. Defendants state the Attorney General and the Governor have an attorney-client relationship, and that the Attorney General has violated Rule 1.7(a) of Rule 407 of the Rules of Professional Responsibility, which states "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: . . . (2) Each client consents after consultation."

Defendants contend if the Governor had requested the Attorney General represent him in this matter, the Attorney General would be required to do so. *See* S.C. Code Ann. § 1-7-50. In that event, the Attorney General would be on both sides of the action which Defendants assert is impermissible. Defendants also assert that because the Attorney General is currently representing the Governor in other legal matters, the Attorney General cannot ethically bring the instant action against the Governor.

We have previously found that an analogous situation did not create a conflict of interest. *Cf.* Langford v. McLeod, *supra* (original proceeding brought for declaratory judgment as to status, responsibility, and duty of Attorney General in representing municipal employees in civil actions; Court held Attorney General may represent public officials in civil suits as well as criminal ones without being subject to imposition of conflicting or unethical duties); State ex rel. McLeod v. Snipes, 266 S.C. 415, 223 S.E.2d 853 (1976) (Attorney General sought declaratory judgment that statute requiring him to represent officers of State in criminal proceedings was in conflict with constitutional provision designating Attorney General as chief prosecutor of State; Court held no conflict of interest arose from two duties of Attorney General as he could appoint members of his staff or solicitors or assistant solicitors to participate in prosecution and defense).

Furthermore, the Attorney General, as noted above, has a dual role of serving the sovereign of the State and the general public. Thus, the Attorney

General is not violating the ethical rule against conflicts of interest by bringing an action against the Governor.

While the Attorney General is required by the Constitution to "assist and represent" the Governor, the Attorney General also has other duties given to him by the General Assembly, and elaborated on by the Court, which indicate the Attorney General can bring an action against the Governor.[8]

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[8]*See, e.g.*, Com. ex rel. Cowan v. Wilkinson, 828 S.W.2d 610 (Ken. 1992) (Attorney General brought action seeking to enjoin governor from being sworn in and acting as member of state university board of trustees pursuant to executive order by which Governor appointed himself to that position; court held Attorney General's motion did not meet requirements of extraordinary remedy for injunctive relief.); In re Com. ex rel. Beshear, 672 S.W.2d 675 (Ken. Ct. App. 1984) (Attorney General, in official capacity and acting on behalf of state's citizens, applied for temporary restraining order and permanent injunction concerning charging of admission to members of public wishing to view publicly furnished private quarters of executive mansion; court held that Governor has discretion to permit nonprofit organization to conduct tours of private quarters of mansion for general public in exchange for monetary fee); Fordice v. Bryan, 651 So.2d 998 (Miss. 1995) (Attorney General had standing in his official capacity to intervene, on behalf of State, in suit seeking declaratory judgment that governor's partial vetoes of 29 legislative bills were unconstitutional); State ex rel. Douglas v. Thone, 286 N.W.2d 249 (Neb. 1979) (Attorney General brought action against Governor to enjoin implementation of statute which authorized plan for development of alcohol plants and facilities in Nebraska); McGraw v. Caperton, 446 S.E.2d 921 (W.Va. 1994) (Attorney General brought declaratory judgment action against Governor seeking determination of his rights and responsibilities under statute requiring him to approve state contracts and ruling as to constitutionality and validity of computer contracts which were basis for computer education program; held Attorney General could not bring declaratory judgment action in official capacity because he was not a "person" for purpose of maintaining declaratory judgment action).

Accordingly, we find the Attorney General is not prohibited from bringing an action against the Governor.

ISSUE II

At issue is whether the combined actions of members of the executive branch violated the separation of powers doctrine by having funds that the General Assembly had specifically appropriated to the schools returned to the General Fund.[9]

Initially, we note because Proviso 72.109 was not vetoed by the Governor, the proviso became law. *See* S.C. Const. Art. IV, § 21 (if Governor shall not approve any one or more of items or sections contained in appropriation bill, but shall approve of residue thereof, residue shall become law in like manner as if Governor had signed it). While the Governor indicated in his veto message he was not vetoing Proviso 72.109 because the schools had agreed to return the appropriated amounts to the general fund, the veto message does not have the effect of law. Drummond v. Beasley, 331 S.C. 559, 503 S.E.2d 455 (1998) (governor's veto message does not have force of law because it is not a legislative act or an Executive Order).

While none of the above cases raised the issue of whether an Attorney General has the power to bring an action against the Governor, we cite them for the proposition that the Attorney General has not been prohibited from bringing an action against the Governor in those jurisdictions.

[9]Defendants argue a justiciable controversy is not presented because the schools "voluntarily remitted funds and the Defendant Treasurer and Comptroller General did nothing but place those funds, as requested in writing by the [schools], into the general fund where they cannot be spent and are under the control of the General Assembly." This issue involves a real and not a hypothetical question. The funds were requested to be returned to the General Fund and they were so returned. The question whether that action was valid remains a viable one.

S.C. Const. Art. I, § 8, provides:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

As stated by the Court in State ex rel. McLeod v. McInnis:

> One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws.

278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

The General Assembly, as part of its law-making responsibilities, has

> the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. This the Assembly traditionally does by way of the annual State Appropriations Bill.

Id. at 313-314, 295 S.E.2d at 637. *See also* Gilstrap v. South Carolina Budget and Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992) (appropriation of public funds is a legislative function); Clarke v. South Carolina Pub. Serv. Auth., 177 S.C. 427, 181 S.E. 481 (1935) (General Assembly has full authority to make such appropriations as it deems wise in absence of any specific constitutional prohibition against such appropriation).

Accordingly, the General Assembly properly appropriated money from the Barnwell Fund to the colleges and universities through Proviso 72.109. The question is whether the concerted efforts of members of the executive branch encroached upon this power by having appropriated funds transferred from the schools to the General Fund. We conclude the General Assembly's power has been encroached upon.

One of the Governor's duties, as chairman of the State Budget and Control Board, is to submit a recommended state budget to the General Assembly. *See* S.C. Code Ann. § 1-11-10 (Supp. 2001) (Governor is chairman of State Budget and Control Board); S.C. Code Ann. § 11-11-15 (Supp. 2001) (functions of State Budget and Control Board in preparation and submission to General Assembly of recommended state budget are devolved upon Governor).

The Governor has the ability, after the General Assembly has passed an appropriation act, of vetoing items or sections contained within the act. S.C. Const. Art. IV, § 21. If he vetoes any items or sections, the General Assembly, within each house, has the ability to override the Governor's vetoes by having the requisite number of votes to do so. *Id.*

However, there is no provision in the South Carolina Code or Constitution which provides that the members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money. In fact, there is clear legislative intent that the ability to transfer appropriated money will lie only with the General Assembly. *See* S.C. Code Ann. § 11-9-10 (1986) ("It shall be unlawful for any moneys to be expended for any purpose or activity except that for which it is specifically appropriated, and *no transfer from one appropriation account to another shall be made unless such transfer be provided for in the annual appropriation act*.") (emphasis added); S.C. Code Ann. § 11-9-20(A) (Supp. 2001) ("It is *unlawful* for an officer, clerk, or other person charged with disbursements of state funds appropriated by the General Assembly to exceed the amounts and purposes stated in the appropriations, or *to change or shift appropriations from one item to another. Transfers may be authorized by the*

General Assembly in the annual appropriation act for the State.") (emphasis added).

Furthermore, the General Assembly cannot delegate this legislative power even if it so desired. *See* Gilstrap v. South Carolina Budget and Control Bd., *supra* (General Assembly may not delegate its power to make laws); State ex rel McLeod v. McInnis, *supra* (General Assembly's attempt to delegate to Joint Appropriations Review Committee power to control expenditure of state and federal funds was found to violate separation of powers because committee was permitted to control expenditures by administration rather than by legislation); Bauer v. South Carolina State Housing Auth., 271 S.C. 219, 246 S.E.2d 869 (1978) (non-delegation doctrine is based on the constitutional requirement that branches of government be forever separate and distinct from each other).

Therefore, the authority to transfer appropriated money lies with the General Assembly and not the executive branch.[10]

Because Proviso 72.109 was not vetoed, the Governor and other

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[10]*See also* Rios v. Symington, 833 P.2d 20 (Ariz. 1992) (governor, in veto message to legislature, instructed various state agencies to revert specified sums of money to general fund for purpose of bringing total budget into balance; court held governor had exceeded his power); Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 1985) (executive branch's action of transferring appropriated funds from particular executive departments to others impermissibly infringed upon General Assembly's plenary power of appropriation; also noting challenged transfers dramatically altered objectives which General Assembly had determined were to be achieved through use of state funds); County of Cook v. Ogilvie, 280 N.E.2d 224 (Ill. 1972) (statute providing that State Department of Public Aid, with consent of governor, may reapportion amounts appropriated under Public Aid Code among several subdivisions of public aid as need arises was an unconstitutional delegation of legislative power to executive branch).

members of the executive branch were required to faithfully execute that proviso. S.C. Const. Art. IV, § 14 (Governor shall take care that the laws be faithfully executed). Instead, the proviso was undermined by the combined actions of certain members of the executive branch by transferring funds that had been appropriated to the schools to the General Fund.

We emphasize that the Governor's simple request to the schools that they return the appropriated funds does not in and of itself violate the separation of powers doctrine. However, given the concerted effort of the Governor, the Comptroller General, and the State Treasurer to transfer the appropriated funds to the General Fund, we find the actions of the executive branch have resulted in a separation of powers violation.[11]

ISSUE III

At issue is whether the Governor has a responsibility either to sign into law a balanced budget passed by the General Assembly or exercise his veto

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[11]The State further argues the Governor has violated S.C. Code Ann. § 11-9-10 (1986), which provides that "no transfer from one appropriation account to another shall be made unless such transfer be provided for in the annual appropriation act." Defendants argue section 11-9-10 was not violated because the returned funds were not placed in an appropriation account but, rather, were placed in a revenue account. Regardless of this fact, the statute has been violated.

From a reading of section 11-9-10 and from S.C. Code Ann. § 11-9-20(a), which provides that it is unlawful for one "charged with disbursements of state funds appropriated by the General Assembly . . . to change or shift appropriations from one item to another," and which provides that "[t]ransfers may be authorized by the General Assembly in annual appropriation act . . .," there is clear legislative intent to ensure that appropriated funds are not expended for any other purpose other than for which the funds were appropriated.

authority in a manner that maintains a balanced budget.

S.C. Const. Art. X, § 7(a), provides: "The General Assembly shall provide by law for a budget process to insure that annual expenditures of state government may not exceed annual state revenue." Therefore, the General Assembly is constitutionally required to ensure that the budget process results in a balanced budget. However, there is no provision in the South Carolina Code or Constitution which states the Governor is required to return a balanced budget to the General Assembly. There is also no requirement that the Governor exercise his veto power in a manner that will ensure a balanced budget. *See, e.g.,* S.C. Const. Art. III, § 36; S.C. Const. Art. IV, § 21; S.C. Const. Art. X, § 7.

Accordingly, we find the Governor is not required to return a balanced budget to the General Assembly.

CONCLUSION

We conclude the Attorney General is not prohibited by the South Carolina Constitution or Code from bringing a legal action against the Governor. Further, we find that the executive branch's actions have resulted in a separation of powers violation. Finally, we find the Governor is not required by the South Carolina Code or Constitution to return a balanced budget to the General Assembly.

TOAL, C.J., and WALLER, J., concur. BURNETT, J., concurring in a separate opinion. PLEICONES, J., concurring in a separate opinion.

JUSTICE BURNETT: (Concurring) I concur with the conclusions reached by the majority opinion. I write separately because the majority bases the separation of powers violation on the "concerted efforts" of members of the executive branch. It is not disputed the events culminating in this constitutional violation were precipitated by a "request" from the Governor.

South Carolina Constitution Article I, § 8, provides:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

The separation of powers mandate is followed by the delineation of powers, authority and functions of each branch of government. Article III, § 1 provides the legislative power of this State shall be vested in ... the "General Assembly of the State of South Carolina."

The majority explains the General Assembly has "the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. This the Assembly traditionally does by way of the annual State Appropriations Bill." State *ex rel.* McLeod v. McInnis, 278 S.C. 312, 313-14, 295 S.E.2d 633, 637 (1982).

Upon passage of an appropriations bill, the authority of the Governor extends to approving or vetoing items or sections of the bill. S.C. Const. art. IV, § 21. The majority acknowledges South Carolina Code Ann. § 11-9-10 (1986) prohibits the expenditure of any monies for any purpose other than that for which the monies were appropriated and "no transfer from one appropriation account to another shall be made unless such transfer be provided for in the annual appropriation act." No authority to transfer the

colleges and universities' funds was authorized in the 2001-2002 Appropriation Act.

Through Article IV, § 1, the "supreme executive authority" of South Carolina is vested in the "Chief Magistrate," the "Governor of the State of South Carolina." A "simple request" from "the supreme executive authority" of South Carolina issued to an agency with the purpose of effecting changes in the appropriations act violates Article I, § 8. The "request" of the Governor is inconsistent with the "right and duty of the legislature to determine the appropriations of agencies and the programs undertaken." State *ex rel.* McLeod v. McInnis, *supra* 278 S.C. at 314, 295 S.E.2d at 637.

The majority's conclusion of a separation of powers violation appears to rest on the "concerted efforts" of members of the executive branch. Although this conclusion is correct, in my view, it is not merely the "concerted effort" of members of the executive branch which effects the violation of Article I, § 8, but it is the act of any member of the executive branch which effects an infringement of the legislative authority and duty to appropriate money. *Id.*

JUSTICE PLEICONES: I agree with the majority that the transfer of funds from the colleges and universities to the state treasurer contravened the budget process. I also agree that the governor is not required to exercise his veto power to effectuate a balanced budget. I write separately because I would pursue a different path in arriving at this result.

I have grave reservations regarding the majority's decision which allows the attorney general to sue the governor, especially where the issue is whether one branch of government has encroached on the powers of another branch. The attorney general is the governor's legal representative, and the office of attorney general is part of the executive branch of government. See S.C. Code Ann. § 1-1-110 (Supp. 2001) (office of attorney general is part of the executive department).

Here, the governor maintains that he has faithfully executed[12] the laws of the state. I do not believe the framers of our state constitution intended to make the attorney general the arbiter of whether his client, the governor, is or is not faithfully executing the law.

This case presents a separation of powers question and should be viewed only in that context. The branch of government aggrieved by the transfer of funds, the General Assembly, is a party to this suit, and is ably represented by its own counsel. In my opinion the Court need not address whether the attorney general may, consonant with the state constitution, ever bring suit against the governor. No one disputes that the General Assembly has the authority to maintain this action. The General Assembly is properly before this Court, and raises the same issues as the attorney general. I would not decide the constitutional issue of the attorney general's authority to initiate an action against the governor because that decision is not necessary to the determination of this dispute.[13]

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[12]The state constitution provides that "[t]he Governor shall take care that the laws be faithfully executed. . . ." S.C. Const. art. IV, § 15.

[13]See State v. Owens, 346 S.C. 637, 552 S.E.2d 727 (2001).

As to the governor's personal involvement in the transfers, the undisputed facts establish that the governor merely requested the colleges and universities return certain funds to the general fund. The schools complied with the request. The governor neither transferred funds, nor ordered any entity to transfer funds. Cf. Drummond v. Beasley, 331 S.C. 559, 503 S.E.2d 455 (1998) (governor's veto message does not have force of law). In my opinion the governor, like the attorney general, should be dismissed from this action.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of M. Eugene Gibbs, Respondent.

Opinion No. 25452
Heard January 14, 2002 - Filed April 22, 2002

DISBARRED

Henry B. Richardson, Jr. and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

M. Eugene Gibbs, of Silver Spring, Maryland, Pro Se.

PER CURIAM: In this attorney disciplinary matter, a full panel of the Commission on Lawyer Conduct ("Commission") recommended M. Eugene Gibbs ("Respondent") be disbarred. We agree and disbar Respondent.

FACTUAL/PROCEDURAL BACKGROUND

Formal charges were filed against Respondent four times between

February 22, 1999, and February 6, 2001. Three hearings were held to address the various charges. In response to the first three sets of formal charges, the sub-panel recommended indefinite suspension. However, after a hearing on the fourth set of charges, the sub-panel recommended disbarment and the full panel adopted that recommendation.

In response to the disciplinary action pending against him, Respondent filed an Emergency Petition for Writ challenging the findings of the Commission below and requesting that this Court find him unable to defend himself in these proceedings, and take action to stop an alleged criminal conspiracy.

First Formal Charges

Formal charges were first brought against Respondent on February 22, 1999.

Patricia A. McDaniel Matter:

On August 1, 1997, Respondent requested a transcript from Patricia A. McDaniel, a circuit court reporter. On December 5, 1997, Ms. McDaniel forwarded the transcript to Respondent with a statement for her services in the amount of $482.45.

Respondent did not pay Ms. McDaniel despite several notices and phone calls from her. After complaining to Court Administration, her complaint was sent to the Commission. On April 16, 1998, the Commission sent Respondent a letter requesting a response to the complaint within fifteen days. Respondent did not reply even after the Commission sent a second letter on May 20, 1998, requesting a response and reminding Respondent that failure to respond could in and of itself constitute grounds for discipline.

On July 7, 1998, Respondent sent a check for the full amount to the Commission, not to Ms. McDaniel, with a letter asking the Commission to pay her if it determined she deserved payment. Notice of Full Investigation was sent

to Respondent on July 24, 1998. The Commission returned the check to Respondent in November 1998, stating that Respondent would have to decide whether Ms. McDaniel's invoice should be paid and reminding Respondent he still had not properly responded to the Commission's inquiry.

Respondent did not respond and, on February 22, 1999, a Notice of Formal Charges was sent to Respondent. Respondent's answer was not received by the Commission until past the deadline on April 1, 1999. In that answer, Respondent stated he believed his contract with Ms. McDaniel was terminated when she did not deliver the transcript within thirty days. He stated he would pay Ms. McDaniel if the Commission determined the transcript had been delivered pursuant to the Rules of Court.

A hearing on this matter was conducted before the sub-panel of the Commission on December 23, 1999.[1] Respondent did not appear at the hearing. Based on the evidence before it, the sub-panel found Respondent committed attorney misconduct, violating Rule 1.1 (competence) and 8.4 (misconduct) by ordering a transcript, receiving it, and failing to pay for it without just cause or excuse.

Second Formal Charges

Before the conclusion of the Patricia McDaniel Matter, on July 6, 1999, notice of a second set of formal charges was sent to Respondent.

Mary McLeod Matter:

These charges arose out of Respondent's representation of Mary McLeod in what began as a routine eviction proceeding against her. Ms. McLeod lived

[1]The hearing on the Patricia McDaniel Matter was heard in conjunction with the hearing on the second set of formal charges against Respondent. The sub-panel's ultimate recommendation for discipline (indefinite suspension) was based on these and the second set of formal charges discussed below.

in a mobile home situated on land in Florence County owned by Sollie and Mary Floyd. Ms. McLeod had a month to month lease with the Floyds requiring her to pay them $150.00 per month. On May 5, 1997, Honda of South Carolina Manufacturing, Inc. purchased the land, and on May 30, 1997, Honda served Ms. McLeod with notice to vacate within thirty days under the terms of her lease. They offered to pay the relocation cost of Ms. McLeod's mobile home and her first month's rent in the new location, but Ms. McLeod did not vacate.

(1) Solicitation of Legal Business

The Commission charged that Respondent improperly solicited legal business from Ms. McLeod by personally telephoning her, and requesting to be her attorney in opposition to any effort to have her evicted.

(2) Improper Financial Assistance to Client

The Commission charged that Respondent paid, or caused a member of his staff to pay, rent payments directly to Ms. Floyd, and/or to others on her behalf.

(3) Frivolous Motion to Dismiss Eviction Action

The County brought an Application for Ejectment against Ms. McLeod. In response, the Commission charged that Respondent filed a frivolous Motion to Dismiss. The Commission alleged that Respondent incorrectly claimed (1) that Ms. McLeod did not receive notice of the termination of her lease and (2) that her lease could not be terminated absent a violation of the lease.

(4) Incompetent Representation

The Commission charged that Respondent acted incompetently numerous times during his representation. First, the Commission claimed he acted incompetently by filing a Notice of Appeal and Petition for Bond with the

Court of Appeals when applications for Bonds should be filed in the lower court. Respondent's mistake resulted in failure to timely file for an Appeal Bond and prevented his client's case from being successfully appealed.

The Commission further charged that Respondent acted incompetently by raising the applicability of certain state and federal statutes for the first time in an Amended Motion for Stay and Bond with the circuit court.

(5) Frivolous Claims in State Suit

Respondent brought suit against Honda, the Town of Timmonsville, Mayor Peoples, and Florence County (by amendment). The Commission charged Respondent's claim for punitive damages against the County for emotional distress was frivolous because the South Carolina Tort Claims Act does not permit claims of intentional infliction of emotional distress.

Eventually, Respondent moved for voluntary dismissal, asserting that the matter was being litigated in federal court. Judge Kittredge dismissed the suit with prejudice. The Commission alleged Respondent acted incompetently by failing to notify Ms. McLeod he was moving for voluntary dismissal and subsequently filing a frivolous Motion for Reconsideration, alleging that Judge Kittredge had conspired with the defendants to deprive Ms. McLeod of her rights and claiming error in the eviction proceeding. Judge Kittredge denied the Motion, noting it (1) rambled and was difficult to follow, (2) claimed error in an entirely different action than the one before him, and (3) was utterly frivolous.

(6) Frivolous Claims and Incompetence in Federal Suit

Respondent filed a suit in federal court against Honda, Florence County, Mayor Peoples, the Floyds, the Department of Housing and Urban Development ("HUD"), and the Secretary of the South Carolina Chamber of Commerce. The federal district court, Judge Currie, dismissed the claims against HUD and the Chamber of Commerce with prejudice and entered

summary judgment for the remaining defendants. The Commission charged that Respondent acted incompetently because the suit was frivolous, and Respondent violated the local federal rules in his filings. Further, the Commission alleged Respondent acted incompetently by pursuing relief for his client under the Uniform Relocation and Real Property Acquisition Act ("URA") when it clearly did not apply to Ms. McLeod.[2] In addition, the Commission charged that Respondent's suit against Honda and many of the other defendants was barred by the doctrine of *res judicata* as the issues had been litigated already in state court. The Commission also charged that Respondent disclosed his client's mental health history in open court without her permission or knowledge. Perhaps most significantly, the Commission charged that Respondent failed to advise his client to accept offers to move her mobile home free of charge and to pay rent for her in a new location.

(7) Retainer Agreement

The Commission also found fault in Respondent's retainer agreement with Ms. McLeod because it did not identify the date the cause of action arose, whether Ms. McLeod would be responsible for costs, and whether Respondent's percentage fee would come off the top, or from the net of any recovery.

(8) Response to the Commission's Inquiry

The Commission sent copies of Ms. McLeod's complaints to Respondent on two occasions, each time requesting a response from Respondent within ten days. Respondent did not reply to either letter. On May 10, 1998, the Commission again requested a response, reminding Respondent that failure to respond could in and of itself constitute grounds for disciplinary action. On May 28, 1998, Respondent replied to the Disciplinary Counsel by stating that

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[2]The URA was inapplicable to Ms. McLeod because she was not a displaced person under the statute, and Respondent failed to first exhaust administrative remedies with HUD as required under the URA.

because the matter was in litigation, he had referred the complaint to the presiding judge. Further, Respondent contended to the Commission that his client had not written the complaints.

On the same day, Respondent wrote U.S. Magistrate Judge Margaret Seymour, assigned to the case, stating that two complaints had been filed against him. The Commission charged that Respondent misrepresented to Judge Seymour that his client had not written the complaints and requested action beyond her jurisdiction by asking her to hold a hearing to rule on Ms. McLeod's allegations of misconduct.

(9) False Statements Regarding Settlement Offers

The Commission charged that Respondent told Ms. McLeod that he could negotiate a settlement with HUD for $45,000 when, in fact, no HUD attorney had told him any such offer would be forthcoming. Respondent also stated Ms. McLeod had been offered $30,000 by another defendant ($20,000 to be paid to her and $10,000 for his fee). The Commission charged no such offer was made although Respondent insists he did receive such an offer from HUD. Also, during the course of his representation, Respondent wrote a demand letter to the S.C. Department of Commerce, requesting $25,000 to replace his client's mobile home and $10,000 to replace items lost, damaged, or stolen when her home was forcibly removed from the land. The Commission charged the demand was improper because Ms. McLeod never gave Respondent any such accounting of lost or damaged items. Therefore, the $10,000 demand had no basis in fact.

Sub-panel's Findings

A hearing on the first and second formal charges against Respondent was conducted by the sub-panel of the Commission on December 23, 1999.

Respondent filed an answer,[3] but was not present at the hearing. The sub-panel found Respondent had committed attorney misconduct, in violation of the Rules of Professional Conduct, Rule 407, SCACR, and Rule 7 of Rule 413, SCACR.

Evidence considered at the hearing consisted of the testimony of Ms. McLeod and her boyfriend and all letters, motions, and other documents referred to in the Notice of Second Formal Charges. Based on this evidence, the sub-panel found violations of numerous provisions of Rule 407, particularly Rule 1.1 (competence), throughout Respondent's representation of Ms. McLeod.[4] Generally, the sub-panel found the Formal Charges against Respondent were supported by the evidence submitted. The sub-panel noted, "a series of events, statements by Respondent, and exhibits submitted into evidence, raised serious concerns about his competence, his ability to accurately grasp the issues, and his willingness to follow the rules of the court and the law."

The sub-panel found Respondent had violated Rule 4.1 (truthfulness in

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[3]In response to the filing of formal charges, Respondent sent a letter, after thirty days had expired, to Ms. Hinson at the Commission in which he answered True, False, or N/A to the charges against him without further explanation. The Attorney General's office filed a Motion to Strike and requested Default Judgment be entered because Respondent's responses did not conform to the South Carolina Rules of Civil Procedure applicable in lawyer discipline cases pursuant to Rule 9 of Rules of Lawyer Disciplinary Enforcement, Rule 413, SCACR. Respondent opposed the motion. The Commission ordered that Respondent make more definite replies to those questions he answered "N/A" and that Respondent's False answers would be interpreted as denied unless he clarified them further. Respondent did not clarify any of his answers in response to the Commission's Order.

[4]Specifically, the sub-panel cited Respondent's failure to advise his client to accept offers for relocation and rent assistance as a basis for finding violation of Rule 1.1. In general, the sub-panel noted that the frivolous motions and the overall manner in which the litigation was pursued by Respondent, viewed cumulatively, amounted to violations of Rule 1.1.

statements to others) and Rule 8.4 (misconduct) on more than one occasion: (1) when he failed to disclose to his client the offers made to him on her behalf and (2) when he demanded the Department of Commerce pay his client $35,000 ($25,000 for damage to her mobile home when moved and $10,000 for items lost in the move) without any factual basis for such a demand from his client. Additionally, the sub-panel found Respondent had violated the statutory provisions on barratry[5] and Rule 8.4 by soliciting Ms. McLeod's business over the telephone, as he had no professional relationship with her before he initiated contact by personal telephone call.

The sub-panel also found Respondent violated Rule 3.3 (false statement of fact made to a tribunal) in a letter to U.S. Magistrate Judge Seymour by describing Ms. McLeod's complaint letters as "allegedly" written by her. Finally, the sub-panel found Respondent's retainer agreement with Ms. McLeod violated Rule 1.5 (fees).

From Rule 7 of Rule 413, Rules for Lawyer Disciplinary Enforcement, SCACR, the sub-panel found Respondent had violated subsections (a)(1) (violating a rule of professional conduct), (a)(3) (knowingly failing to respond to lawful demand from a disciplinary authority), and (a)(5) (conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute or conduct demonstrating an unfitness to practice). Based on this multitude of violations, the sub-panel recommended indefinite suspension, but did not recommend that Respondent be responsible for costs. After the filing of exceptions, the full panel adopted this recommendation on February 21, 2000.

Third Formal Charges

The third set of formal charges filed against Respondent stemmed from his representation of two clients: (1) Christopher Hollowman (on various criminal charges) and (2) Sammy and Louise Abraham (in Mrs. Abraham's

[5]S.C. Code Ann. § 16-17-10 (Supp. 2001).

personal injury action). Formal Notice of the charges was sent to Respondent on December 7, 1999, but Respondent never picked up the complaint and did not file an answer. The Attorney General's Office filed an Affidavit of Default on January 27, 2000. Pursuant to Rule 24 of Rule 413, SCACR, the charges were deemed admitted.

Christopher Hollowman Matter:

(1) Incompetence

Christopher Hollowman's mother hired Respondent to represent her son on several criminal charges related to an armed robbery. She paid Respondent $100 towards a $1200 fee quoted by Respondent. She never paid the balance of the fee. On September 28, 1995, Mr. Hollowman was found guilty of the charges and sentenced. Instead of filing an appeal, Respondent filed a Motion for a New Trial on October 5, 1995. More than a year later, in December 1996, Respondent wrote Mr. Hollowman that he had filed a Motion for New Trial which the court was still considering. Although Respondent failed to move to be relieved as counsel for Mr. Hollowman, Respondent filed a document with the Clerk of Court for Florence County placing the Solicitor on notice that he should not be notified if any of his clients were called to court. Respondent stated he would not notify the client because his doctor would not allow him to practice in General Sessions court.

In April of 1997, Mr. Hollowman requested that a new attorney be appointed to represent him. The Supreme Court responded by letter that Respondent was still counsel of record and a new attorney could not be appointed unless counsel of record was relieved. By the end of the Commission's investigation, Respondent had yet to file a motion to be relieved as counsel or to file an appeal on behalf of Mr. Hollowman.

(2) Failure to Respond to Disciplinary Charges

According to the Attorney General's Affidavit of Default, Notice of Formal Charges in this matter was sent to Respondent by certified mail.

Respondent never picked up the charges from the post office and never replied to the Commission regarding this set of charges.

Sammy and Louise Abraham Matter:

(1) Failure to Communicate

The Abrahams filed a complaint with the Commission alleging that Respondent had failed to communicate with them regarding Mr. Abraham's loss of consortium claim. Respondent settled Mrs. Abraham's personal injury claim and distributed the proceeds to her, but never acted on Mr. Abraham's loss of consortium claim the Abrahams claimed they had hired him to pursue.

(2) Failure to Respond to Disciplinary Charges

Respondent was first notified of Louise Abraham's complaint on April 29, 1999. Respondent initially replied, but ignored a subpoena issued for Mrs. Abraham's file. Respondent also failed to reply to the Notice of Full Investigation, despite its warning that failure to respond could constitute independent grounds for disciplinary action. Respondent did send the Commission notice of his new address in Maryland during the course of the investigation, and all correspondence was sent to the address given. According to the Attorney General's Affidavit of Default, Notice of Formal Charges in this matter was sent to Respondent by certified mail. Respondent never picked up the charges from the post office and never replied to the Commission regarding this set of charges.

Sub-panel's Findings

A hearing on the third formal charges was conducted before a sub-panel of the Commission on March 10, 2000. Respondent was present at the hearing although he never submitted an answer. At the hearing, Respondent claimed an inability to defend himself for mental health reasons. After the Commission

denied Respondent's claim of inability to defend in other proceedings,[6] the sub-panel issued a report on April 25, 2000. The sub-panel found him to be in default, but allowed Respondent to present evidence in mitigation. Evidence presented to the sub-panel included Christopher Hollowman and the Abrahams' testimony and exhibits.

As to the Christopher Hollowman matter, the sub-panel deemed the charges admitted and found Respondent to be in violation of various sections of the Rules of Professional Conduct, Rule 407 and Rule 413, SCACR. From Rule 413, SCACR, the sub-panel found Respondent violated Rule 7(a)(1) (violating a rule of professional conduct), Rule 7(a)(3) (refusal to respond to an inquiry of a disciplinary authority), Rule 7(a)(5) (conduct demonstrating unfitness to practice law), and Rule 7(a)(6) (violating the oath taken upon admission to practice in this State).

From Rule 407, SCACR, the sub-panel found Respondent violated Rule 1.2 (scope of representation) because he did not discuss the Motion for a New Trial sufficiently with his client; Rule 1.3 (diligence) because he failed to pursue his client's Motion for a New Trial; Rule 1.6 (terminating representation) because he did not take steps necessary to protect his client's interests prior to withdrawing from the case by pursuing the Motion for a New Trial or by filing an appeal; and Rule 3.2 (expediting litigation) because he failed to take reasonable efforts to expedite his client's Motion for a New Trial.

As to the Abraham matter, the sub-panel found Respondent did not violate any of the Rules of Professional Conduct in the course of his representation of the Abrahams, but did violate the rules by failing to respond or cooperate with the investigation. Specifically, the sub-panel concluded Respondent violated the Rules of Lawyer Disciplinary Enforcement, Rule 413, SCACR, Rules 7(a)(1) and 7(a)(3) for failing to respond to a lawful demand by a disciplinary authority. The sub-panel recommended Respondent receive indefinite suspension, to run

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[6]Respondent's claim and the proceedings initiated as a result are discussed in the next section.

concurrently with the sanction of indefinite suspension already recommended.

Fourth Formal Charges

The fourth set of formal charges against Respondent stemmed from allegations that Respondent was practicing law after this Court issued an order transferring Respondent to incapacity inactive status. During the disciplinary hearing on the third formal charges, Respondent maintained he was unable to defend himself due to mental incapacity. On April 26, 2000, upon notification from Office of Disciplinary Counsel, this Court ordered Respondent be transferred to incapacity inactive status. This Court appointed Steve Wukela, Jr., Esquire to assume responsibility for Respondent's files. This Court then remanded the matter to the Commission for a determination of the validity of Respondent's claim of inability to defend.

In response, a hearing panel of the Commission ordered initiation of Rule 28(b) proceedings, and appointed W. Haigh Porter as Attorney and Guardian *ad Litem* for Respondent. The Commission ordered Dr. Geoffrey R. McKee to examine Respondent and to report to the Commission regarding Respondent's mental status. Despite numerous attempts by Mr. Porter to contact Respondent and to notify him of his scheduled examination with Dr. McKee and Dr. Donna Schwartz-Watts, Respondent never replied and did not attend the scheduled examination. Without any evidence of Respondent's mental condition, the Commission denied Respondent's claim of inability to defend and resumed the disciplinary proceedings against him. On April 26, 2001, this Court ordered Respondent to remain on incapacity inactive status until the completion of his disciplinary proceedings.

The fourth formal charges against Respondent were filed on February 6, 2001. Respondent failed to respond to these formal charges as required. Therefore, under Rule 24 of Rule 413, SCACR, the charges were deemed admitted.

(1) Unauthorized Practice

Respondent is licensed to practice law only by the Supreme Court of South Carolina. As discussed, Respondent was transferred to inactive status by order of this Court on April 26, 2000. An attorney in inactive status may not practice law. Despite this, Respondent continued to practice law.

Between May 3, 2000 and August 10, 2000, Respondent sent at least six letters on law firm letterhead to the Clerk of Court for the United States Court of Appeals for the Second Circuit. The letters forwarded various motions, requests, and attorney affidavits, signed by Respondent relating to litigation pending before that court.[7] Beginning on June 9, 2000, Respondent's letters to the Second Circuit were sent on Hardnett & Associates[8] stationery.

After he was transferred to inactive status, Respondent continued to maintain a website (www.whjstolenart.com) bearing his Silver Spring, Maryland and Florence, South Carolina addresses. The website displayed the letterhead of Respondent's former law firm "Gibbs & Scott," and incorrectly identified Clifford Scott, Esquire as being associated with Respondent although their

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[7]Respondent represented the heirs of the South Carolina artist, William H. Johnson, in *James H. Johnson, Individually and as Personal Representative of the Distributees of the Estate of William H. Johnson, Deceased v. The Smithsonian Institution and Michael Rosenfeld Gallery, Inc.* to recover works of Johnson's art they claimed were stolen by the Smithsonian and the Michael Rosenfeld Gallery in a criminal conspiracy. Respondent was admitted *pro hac vice* in the United States District Court in New York, but that court revoked his *pro hac vice* status on May 18, 2000, after Respondent was placed on incapacity inactive status by this Court.

[8]After being placed on incapacity inactive status, Respondent claimed to have associated himself with this Maryland law firm although he was not licensed to practice law in Maryland and never sought *pro hac vice* admission in Maryland.

association ended two years before Respondent was placed on inactive status.[9] The website chronicled the litigation in *Johnson v. Smithsonian, et. al*, characterizing the activities of the Smithsonian as fraud, and claiming the defendants were trying to force Plaintiffs to abandon the case by driving them into bankruptcy. To fund the litigation, Respondent solicited funds off the website through the sale of a William H. Johnson video for $30.00 and a set of documents for $25.00. The Commission charged such activity constituted the offense of barratry.

(2) False, Misleading, And/Or Outrageous Statements in the Course of Litigation

Respondent made numerous false and/or misleading statements and a multitude of outrageous allegations in motions, letters, and affidavits he submitted to the Second Circuit during the *Johnson* litigation. Respondent made false statements of fact, including his claim that opposing counsel, Peter Stern, offered him $30,000 and information which could "sink" the other defendant, the Smithsonian, in exchange for release of Stern's client. Mr. Stern flatly denies ever making any offer to Respondent and claims to have no such damaging information about the Smithsonian. Respondent also claimed, in a Motion for Injunction filed in the Second Circuit, that Mr. James R. Bogle, Senior Assistant Attorney General for South Carolina, had offered to drop all disciplinary charges against him in return for ten days of suspension.

Additionally, Respondent accused United States District Judge Constance Baker Motley of being involved in a criminal conspiracy with opposing counsel, accused one of the defendants of murder on more than one occasion, and claimed that the disciplinary action being taken against him in this State was all part of the criminal conspiracy to conceal the theft of the Johnson artwork by the

[9]As of February 1, 2002, this website was in operation, displaying the same Gibbs & Scott letterhead and referring to M. Eugene Gibbs, Esquire as the Johnson family attorney. The website could not be located after Respondent appeared before this Court on February 7, 2002, and may have been taken down.

defendants.

(3) Incompetent Representation

Respondent acted incompetently by filing suit in federal district court in an attempt to set aside a decision of the New York Supreme Court. The only appropriate course of action would have been to file an appeal in the New York appellate court as the federal district court has no jurisdiction to review a decision by a state trial court. Respondent never initiated any such appeal. After the federal district court dismissed the suit, Respondent acted incompetently by continuing to file frivolous motions, unsupported by the record or the facts, that resulted in undue burden, delay, and harassment of the defendants.

(4) Failure to Respond to Disciplinary Charges

Respondent received and accepted the Notice of Full Investigation in this matter by certified mail on April 5, 2000. Respondent failed to respond to the Notice as required.

(5) Improper Trust Account Activity

After Respondent was placed on inactive status, Mr. Wukela, appointed to protect his clients' interests, discovered ongoing activity in an open trust account held by Respondent at BB&T. After this Court's order freezing all trust accounts, Respondent wrote three checks, totaling $2,947.50, to Barbara Gibbs and a fourth check to a mastercard account for over $900.00. Two of the checks to Barbara Gibbs had the notation "for Abraham Hearing" and the third had the notation "for MD-Jurisdiction." The check to mastercard contained no reference to any client file. Respondent did not reply to the Attorney General's request for more information regarding the checks.

Sub-panel's Findings

On June 19, 2001, a third hearing was conducted by a sub-panel of the

Commission to address the fourth set of formal charges against Respondent. Respondent failed to answer the charges and was not present at the hearing. The sub-panel found Respondent to be in default and, under Rule 24, the allegations were deemed to be admitted. Based on the facts alleged and deemed admitted, the sub-panel found Respondent violated Rules 7(a)(1), (3), (5), and (6) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. The sub-panel also found he violated Rules 1.1 (competence), 1.2 (scope of representation), 3.1 (meritorious claims and contentions), 3.3 (candor toward tribunal), 3.4 (fairness to opposing party and counsel), 4.1 (truthfulness in statements to others), 5.5 (unauthorized practice of law), 8.1(b) (failing to respond to lawful demand from disciplinary authority), and 8.4(a), (c), (d), and (e) (misconduct) of the Rules of Professional Conduct, Rule 407, SCACR.

The sub-panel noted much of Respondent's conduct in this case, specifically the frivolous litigation and abuse of process, mirrored the conduct for which Respondent had already, very recently been recommended for sanction. The sub-panel went on to find Respondent guilty of the unauthorized practice of law, citing his continued representation of Johnson and appearances in court after he was placed on incapacity inactive status. The sub-panel also found Respondent guilty of improper trust account activity, of failing to cooperate with the attorney appointed to protect his clients interests, and of failing to respond to disciplinary charges.

Based on these findings, the sub-panel recommended Respondent be disbarred. The full panel adopted that recommendation in September 2001.

Emergency Petition for Writ

On December 17, 2001, Respondent filed a document with this Court entitled "Emergency Petition for Writ." In this document, Respondent takes exception with the panel's findings, arguing under his own version of the facts and ignoring that many of the allegations against him were deemed admitted because of his failure to respond. Although it is entitled "Emergency

Petition for Writ," it appears to be no more than an exception to the panel's findings, as defined in Rule 27(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. Rule 27 provides: "[w]ithin 30 days of the service of the hearing panel report, disciplinary counsel and/or respondent may serve and file a brief setting forth and arguing any exceptions taken to the findings, conclusions, or recommendations made by the hearing panel." Respondent requests that this Court find him incompetent, and goes on to argue both the merits of the charges against him and the merits of the *Johnson* litigation, apparently in hopes that this Court will intervene to stop what he deems to be a "criminal conspiracy." Additionally, Respondent requests that this Court intervene in a declaratory action for a fee that Respondent claims the Bryan, Bahnmuller, Goldman, & McElveen law firm owes him.

We address his requests in reverse order. First, we decline to address the litigation between Respondent and the Bryan, Bahnmuller, Goldman, & McElveen law firm as the matter is properly pending before the circuit court. Similarly, we decline to act on Respondent's allegations of criminal conspiracy involving the *Johnson* litigation, as we have no jurisdiction to interfere with a matter pending in federal court. Second, we believe Respondent's "Petition" is subject to the procedural rules for filing exceptions provided in Rule 27, Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. Under Rule 27, Respondent did not file his exceptions within the 30 days allotted. The full panel's report was certified to the Supreme Court on October 12, 2001, and Respondent's exceptions were not filed until more than two months later. Therefore, we decline to consider Respondent's exceptions to the Commission's findings below.

Finally, we find Respondent's claim that this Court declare him incompetent for purposes of these proceedings comes too late. When he claimed he was unable to defend himself at the disciplinary hearing on the third formal charges in March 2000, the Commission properly initiated proceedings to determine capacity under Rule 28 of the Rules for Lawyer Disciplinary Action, Rule 413, SCACR. Haigh Porter, Esquire was appointed as attorney and guardian *ad Litem* for Respondent and a psychiatric evaluation for Respondent was scheduled with Dr. McKee and Dr. Schwartz-Watts. Respondent failed to

attend the evaluation or to communicate with the attorney appointed to represent him. This Court immediately placed Respondent on incapacity inactive status pursuant to Rule 28(d) and did not reinstate him despite the Commission's finding that Respondent was capable of assisting in his defense. Under Rule 28(d)(1), such a finding by the Commission is interlocutory and may not be appealed before entry of a final order in the proceeding.

In support of his contention that he is unable to assist in his own defense, Respondent has submitted a report from the Department of Labor stating he is not capable of practicing law. This report does not address, however, whether Respondent is incapable of understanding the charges against him and thus is unable to assist in his own defense. Based on the Commission's Rule 28 finding below, and on Respondent's appearance before this Court, we find Respondent is able to assist in his own defense. Respondent gave an articulate presentation of his point of view when he appeared before this Court, illustrating a detailed knowledge of the facts and memory of the events at issue. Respondent stated he has not sought medical treatment since the death of his former psychiatrist in 1999, and he failed to attend the psychiatric evaluation scheduled by the Commission pursuant to Rule 28. We affirm the Commission's finding that Respondent is able to assist in his defense in this attorney disciplinary matter.

LAW/ANALYSIS

This Court may make its own findings of fact and conclusions of law, and is not bound by a panel's recommendation. *In re Larkin,* 336 S.C. 366, 520 S.E.2d 804 (1999). The authority to discipline attorneys and the manner in which the discipline is given rests entirely with this Court. *In re Long*, 346 S.C. 110, 551 S.E.2d 586 (2001). The sanction of disbarment has been imposed by this Court in similar cases involving multiple acts of misconduct. *See, e.g., In re Morris,* 343 S.C. 651, 541 S.E.2d 844 (accepting Agreement for Discipline by Consent to disbar for failure for failing to act with reasonable competence or diligence in representation of clients, failure to keep clients informed, failure to safeguard property of clients, and allowing non-lawyer assistant to engage in unauthorized practice of law (among other violations)); *In re Huskey,* 342 S.C. 409, 537 S.E.2d 276 (2000) (disbarring attorney for failure to act with diligence

and promptness in representing clients, failure to keep clients informed, failure to maintain clients' funds separate from his own, and failure to promptly deliver funds); *In re Godbold*, 336 S.C. 568, 521 S.E.2d 160 (1999) (disbarring attorney for failing to remit settlement funds to clients, failing to remit settlement funds to clients' medical providers, failing to pay bills, and failing to file state and federal tax returns); *In re Glee*, 333 S.C. 9, 507 S.E.2d 326 (1998) (disbarring attorney for converting client funds for his own purposes, failing to provide competent representation, failing to comply with demand for payment, and failing to act with reasonable diligence); *Matter of Smith*, 310 S.C. 449, 427 S.E.2d 634 (1992) (disbarring attorney for commingling client funds with personal and office funds, committing criminal acts reflecting adversely on his fitness as a lawyer, failing to cooperate with the investigation, and engaging in unauthorized practice of law).

The gravity of Respondent's numerous incidences of misconduct, including his flagrant unauthorized practice of law, failure to provide competent representation on so many occasions, repeated failure to respond to the disciplinary charges against him, failure to cooperate with the attorney appointed to protect his clients' interests, lack of candor to the tribunal and to his own clients, and improper use of client trust account funds, more than justifies the full panel's recommendation for disbarment.

CONCLUSION

For the foregoing reasons, we adopt the full panel's recommendation for disbarment and deny Respondent's Emergency Petition for Writ. Additionally, we affirm the Commission's denial of Respondent's claim of inability to defend. **DISBARRED.**

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Audra Simmons,

Appellant,

In the Probate Court
Case No: 97-CP-26-787

Mikayla McCray, a minor by her Guardian ad Litem, Aundreia Chestnut,

Respondent,

v.

Stephanie Bellamy, as Personal Representative of the Estate of Joseph Kendall McCray,

Defendant.

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

Opinion No. 3480
Submitted February 20, 2002 - Filed April 22, 2002

VACATED

Winston D. McIver, of McIver & Graham, of Conway, for appellant.

Louis M. Cook and John C. Belissary, of North Myrtle Beach, for respondent.

PER CURIAM: Audra Simmons appeals the circuit court's order which affirmed the probate court's determination of paternity and grant of subsequent administration. We vacate.[1]

FACTS

Joseph K. McCray died intestate as a result of injuries sustained in an automobile accident. His estate was opened on July 9, 1997, and Stephanie Bellamy, his sister, was appointed personal representative. She brought a wrongful death action which was settled for $30,000.

At the time of his death, McCray had one acknowledged child, Dacia, whose mother is Audra Simmons, McCray's former girlfriend. Of the proceeds from the wrongful death action, $13,975 was placed in a conservatorship for Dacia. McCray's estate was closed on December 14, 1999.

On November 2, 2000, Aundreia Chestnut petitioned the probate court to reopen McCray's estate for the purpose of declaring her daughter, Mikayla, to be the child of McCray and allowing the child to share in the proceeds of the wrongful death settlement.

The probate court granted Chestnut's request to reopen the estate, ruled that Mikayla was McCray's posthumously born child and, as a result, held that the proceeds of the wrongful death action should be split equally between Dacia

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

and Mikayla. Simmons appealed to the circuit court, which affirmed the probate court's ruling in its entirety.

STANDARD OF REVIEW

A claim for money due from an estate is an action at law. McInnis v. Estate of McInnis, Op. No. 3439 (S.C. Ct. App. filed Jan. 28, 2002) (Shearouse Adv. Sh. No. 2 at 74, 76). "In an action at law tried without a jury, the trial judge's factual findings will not be disturbed on appeal unless wholly unsupported by the evidence or controlled by an error of law." Id.; Gordon v. Colonial Ins. Co., 342 S.C. 152, 155, 536 S.E.2d 376, 378 (Ct. App. 2000); Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "However, this court may correct errors of law without deference to the lower court." McInnis at 77; State ex rel. Condon v. City of Columbia, 339 S.C. 8, 13, 528 S.E.2d 408, 410 (2000).

LAW/ANALYSIS

The sole reason the probate court decided to reopen the estate and grant a subsequent administration pursuant to the provisions of S.C. Code Ann. § 62-3-108 (Supp. 2001) was because McCray's child, Mikayla, who was born after McCray's death, was not included as a statutory heir in the initial administration of his estate. The probate court found that paternity was proved by clear and convincing evidence, justifying reopening the estate and dividing the assets appropriately.

However, the probate court does not have subject matter jurisdiction to determine the question of paternity. Section 20-7-420(7) provides the family court has exclusive jurisdiction to determine paternity. S.C. Code Ann. § 20-7-420 (7) (1976 & Supp. 2001).[2] While it is true that this issue was not raised in

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[2] The family court shall have exclusive jurisdiction . . .

(7) To hear and determine actions to determine the paternity of an

either the probate court or the circuit court and has not been relied upon by the appellant, "[l]ack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court." Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998). Since the probate court did not have subject matter jurisdiction to decide paternity, the finding that McCray is the father of Mikayla is a nullity.

Because the probate court lacked subject matter jurisdiction to determine paternity and the order under appeal must be vacated, we do not address the issue of whether it was error to reopen the estate.

VACATED.

HUFF, STILWELL, and SHULER, JJ., concur.

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individual. The action may be brought in the county in which the child or the alleged father resides, or is found, or, if the father is deceased, in the county in which proceedings for probate of his estate have been or could be commenced.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Jacinto Antonio Bull,

Appellant.

Appeal From Darlington County
John M. Milling, Circuit Court Judge

Opinion No. 3481
Submitted March 5, 2002 - Filed April 22, 2002

AFFIRMED

Paul V. Cannarella, of Hartsville, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Attorney General Charles H. Richardson, Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Jay E. Hodge, Jr. of Darlington, for respondent.

HEARN,C.J.: Jacinto Antonio Bull was charged with felony driving under the influence (DUI), reckless homicide, driving under suspension (DUS), and two counts of assault and battery of a high and aggravated nature (ABHAN). The jury found Bull guilty of felony DUI, reckless homicide, DUS,

and one count of ABHAN. Bull appeals arguing the trial court erred in admitting evidence of his blood alcohol test results. We affirm.

FACTS

On the evening of April 5, 1998, a witness driving along Highway 15 toward Hartsville observed Bull's Subaru approaching at a high speed and passing him. The witness stated Bull almost collided with him and he had to use defensive driving to avoid a collision. After Bull passed him, the witness saw Bull proceed at a high speed, swerve to the left, and turn onto Rolling Road. A few minutes later the witness turned onto Rolling Road and observed an Explorer lying in the bottom of a ditch and Bull's Subaru in the brush.

Bull's Subaru collided with an Explorer driven by Michael Redding at the intersection of Rolling Road and Home Avenue. Redding died as a result of injuries from the accident and his wife sustained injuries to her head, neck, sternum, leg, and knee. Additionally, Bull's passenger broke his arm.

Bull was also seriously injured in the accident and was taken to the hospital. Investigator Gregory Chandler went to the hospital and attempted to interview Bull. Chandler testified Bull nodded in the affirmative when asked whether he had been driving and drinking. Chandler then placed Bull under arrest for DUI and asked Bull to submit a blood sample. At this point, Bull was unconscious and the emergency room nurse drew his blood for testing. Bull's blood was drawn at 11:45 p.m., placed in a vial, labeled, and given to Officer Chandler. The blood sample was sent to SLED for testing, and the result of the test indicated a 0.168 percent blood alcohol level.

At trial, Bull moved to suppress the blood test arguing the State failed to comply with S.C. Code Ann. § 56-5-2950(g) (1991)[1] which requires the State to provide a defendant with a written report prior to trial indicating the time the blood test was performed. The State provided Bull with a report listing the time and date that his blood was drawn, but the report did not contain the date on which the analysis of the blood was conducted. The State offered to produce the notes of Dr. Stroman who conducted the blood test. The notes contained the precise time of testing and the court recessed to allow the defense an opportunity to review Stroman's notes. Following the recess, Bull renewed

[1]Subsequent amendments to this statute have not altered the language of this provision. See S.C. Code Ann. § 56-5-2950(d) (Supp. 2001).

his motion to suppress the evidence based on the State's failure to strictly comply with section 56-5-2950.

After Stroman's in camera testimony, the trial court denied Bull's request to suppress and found that the State substantially complied with section 56-5-2950 by providing the defense with the time and date the blood was drawn. The trial court ruled that for purposes of complying with section 56-5-2950 testing began when the blood was drawn, and that by providing that information to Bull before trial, the State satisfied the requirements of the statute.

The jury found Bull guilty of felony DUI, reckless homicide, DUS, and one count of ABHAN. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court reviews errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The trial court has considerable discretion in ruling on the admissibility of evidence. State v. Hughey, 339 S.C. 439, 454, 529 S.E.2d 721, 728-729 (2000). "On appeal, the trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001).

DISCUSSION

Bull contends the blood test results should have been excluded because the written report provided to him prior to trial failed to indicate the time the test was performed. We disagree.

S.C. Code Ann. § 56-5-2950(g) (1991) provided:

> Any person required to submit to tests by the arresting officer must be provided with a written report including the time of arrest, the time of the tests, and the results of the tests, prior to any trial or other proceedings in which the results of the tests are used as evidence. Any person administering a test at the request of the defendant shall record in writing the time, method, and results of the test and promptly furnish a copy to the arresting officer prior to any trial

> or other proceedings in which the results of the test are used as evidence.

"The primary rule of statutory construction is that the Court must ascertain the intention of the legislature." Kerr v. State, 345 S.C. 183, 188, 547 S.E.2d 494, 496 (2001). In interpreting a statute, "the court must give the words their plain and ordinary meaning without resorting to a tortured construction which limits or expands the statute's operation." State v. Dickerson, 339 S.C. 194, 199, 528 S.E.2d 675, 677 (Ct. App. 2000). Furthermore, "a statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993).

Based on our review of section 56-5-2950 as a whole, we find the purpose of the statute is to provide for reciprocal discovery between the State and a defendant as to the time and results of tests conducted to determine the presence of alcohol or drugs in the operator of a motor vehicle. Moreover, it appears from the second sentence of section 56-5-2950 that the time the legislature was concerned with was the time of administration of the test to the defendant, not subsequent lab work.[2] The timing of the administration of these tests is crucial because of the ephemeral nature of blood intoxication levels. In our view, testing for purposes of this section begins when the blood or other sample is taken. Therefore, we find the trial court properly concluded the State complied with the statute by providing Bull with the time the blood was drawn. Accordingly, the trial court did not err in allowing testimony about Bull's blood alcohol test.

AFFIRMED.

CONNOR and SHULER, JJ., concur.

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[2]New Jersey courts also focus on the time of administration. See State v. Ford, 572 A.2d 640, 645 (N.J. Sup. Ct. App. Div. 1990) ("Obviously the time of administration of the tests and the results and all reports and relevant documents signed by defendant or pertaining to his condition of sobriety including blood and urine tests must be supplied.").