Judicial Merit Selection Commission

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M E D I A R E L E A S E
February 8, 2002

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the commission in writing of the seat for which the prospective candidate intends to apply. Correspondence and questions must be directed to the Judicial Merit Selection Commission as follows:

Michael N. Couick, Chief Counsel
Post Office Box 142, Columbia, South Carolina 29202
(803) 212-6610

The commission will not accept applications after **12:00 noon on Monday, March 11, 2002**.

A vacancy will exist in the office currently held by the Honorable Joseph J. Watson, Judge of the Circuit Court, At-Large Seat 4, upon Judge Watson's retirement on September 2, 2002.

A vacancy will exist in the office currently held by the Honorable A. Victor Rawl, Judge of the Circuit Court for the Ninth Judicial Circuit, Seat 3, upon Judge Rawl's retirement on or before June 30, 2003.

A vacancy will exist in the office currently held by the Honorable Haskell T. Abbott, III, Judge of the Family Court for the Fifteenth Judicial Circuit, Seat 3, whose term will expire on June 30, 2002.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/judmerit.htm.

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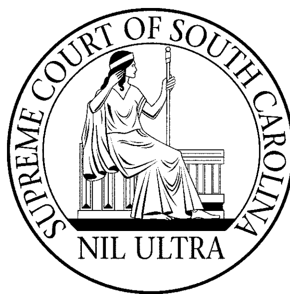

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

February 11, 2002

ADVANCE SHEET NO. 3

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

Gerald D. Wade, Jr., Respondent,

v.

Berkeley County, South Carolina, and John Doe, of whom Berkeley County, South Carolina, is Petitioner,

and John Doe is Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25406
Heard October 24, 2001 - Filed February 4, 2002

AFFIRMED IN PART, REVERSED IN PART

Stephen P. Groves, Sr., Joseph E. DaPore, and

Stephen L. Brown of Young, Clement, Rivers, & Tisdale, LLP, of Charleston, for petitioner.

George J. Kefalos, of North Charleston, for Respondent Gerald D. Wade, Jr.

Bonum S. Wilson, III, of Wilson & Heyward, of Charleston, for Respondent John Doe.

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JUSTICE BURNETT: The Court granted a writ of certiorari to review the decision of the Court of Appeals in Wade v. Berkeley County, 339 S.C. 513, 529 S.E.2d 743 (Ct. App. 2000). We affirm in part and reverse in part.

FACTS

Respondent Gerald D. Wade (Wade) brought this negligence action against Bobby Joe Pierce (Pierce) and an unknown driver, Respondent John Doe, alleging injury as a result of an automobile accident. At his deposition, Pierce testified that at the time of the accident, he was working for his employer, Petitioner Berkeley County (County). Thereafter, Wade and Pierce executed a "Covenant Not to Execute Judgment." In essence, Wade agreed not to execute any judgment obtained against Pierce and his personal insurer in exchange for $13,000.

Wade then amended his complaint, deleting Pierce as a defendant and naming County as the party defendant. Wade alleged Pierce was acting within the scope of his employment at the time of the accident and County, as his employer, was liable under the South Carolina Tort Claims Act.

County filed a motion for summary judgment, claiming execution of Wade and Pierce's Covenant Not to Execute Judgment barred the tort

action against it. The trial judge granted County's motion.[1] The Court of Appeals reversed. Wade v. Berkeley County, 339 S.C. 495, 529 S.E.2d 734 (Ct. App. 1999) (Wade II). On rehearing en banc, the plurality affirmed the panel's decision holding the Covenant Not to Execute was not a settlement as contemplated by the South Carolina Tort Claims Act and, therefore, Wade was not barred from pursuing its action against County. Three judges concurred; two dissented. Wade v. Berkeley County, supra (Wade III).

ISSUE

> Did the Court of Appeals err by holding Wade and Pierce's "Covenant Not to Execute Judgment" did not constitute a settlement and, therefore, did not bar further action by Wade against County under the South Carolina Tort Claims Act?

DISCUSSION

Section 15-78-70(d) of the South Carolina Tort Claims Act (the Act)[2] provides:

> A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by

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[1]County had previously filed another motion for summary judgment arguing Wade was precluded from asserting Pierce was its employee after the Workers' Compensation Commission concluded Pierce was not acting within the scope of his employment at the time of the accident. The trial judge granted the motion. Wade appealed. Regarding this issue, the Court of Appeals held Wade was not collaterally estopped and "[t]he facts of this case create a jury question as to whether Pierce was acting within the scope of his employment when he collided with Wade." Wade v. Berkeley County, 330 S.C. 311, 320, 498 S.E.2d 684, 689 (Ct. App. 1998) (Wade I).

[2]See S.C. Code Ann. §§ 15-78-10 to -200 (Supp. 2000).

reason of the same occurrence.

The Court of Appeals held A) Wade and Pierce's "Covenant Not to Execute Judgment" was not a settlement and B) even if the document was a settlement, it was not a settlement "under this chapter," and, therefore, Wade was not barred from pursuing his action against County.

A.

Initially, the Court of Appeals' opinion states:

> Without a jury verdict, order of judgment, or confession of judgment, cases are disposed of by way of amicable disposition under the aegis and ambit of three recognizable legal documents effectuating the *settlement:* (1) general release; (2) covenant not to sue; and (3) covenant not to execute.

Wade III 339 S.C. at 518-19, 529 S.E.2d at 746 (italic in original).

Thereafter, the Court of Appeals discusses the three enumerated forms of settlement, ultimately concluding Wade and Pierce's document was a "covenant not to execute as opposed to a settlement agreement, release, or covenant not to sue." Id. 339 S.C. at 523, 529 S.E.2d at 748 (emphasis added).

Under South Carolina law, a covenant not to execute is one type of settlement agreement. Poston by Poston v. Barnes, 294 S.C. 261, 363 S.E.2d 888 (1987). It is a "promise not to enforce a right of action or execute a judgment when one had such a right at the time of entering into agreement." Id. at 264, S.E.2d at 890. It is "*normally executed when a settlement occurs* after the filing of a lawsuit." Id. (italic added). While a covenant not to execute is not a release, it is nonetheless a settlement between the parties to the agreement. See Ackerman v. Travelers Indem. Co., 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995); 76 C.J.S. Release § 4 (1994) (release is a present abandonment or relinquishment of a right or claim; a covenant not to execute

is a promise not to enforce a right of action or execute a judgment when one had such a right at the time of entering into the agreement).

The Court of Appeals erred by holding Wade and Pierce's covenant not to execute was not a settlement. Not only is the holding contrary to established law, but the opinion contains an internal inconsistency - that a covenant not to execute is a legal document which effectuates a settlement but does not constitute a settlement.

B.

County asserts the Court of Appeals erred by holding § 15-78-70(d) does not bar Wade's action because Wade and Pierce's settlement did not arise "under this chapter." Instead, County argues the phrase "under this chapter" only modifies "settlement of a claim," not "a settlement or judgment in an action" and, therefore, the lack of an action "under this chapter" is not dispositive. County further contends that because Wade was aware of its potential claim against County as Pierce's employer at the time it settled with Pierce, § 15-78-70(d) precludes Wade from maintaining its current action. We disagree.

As noted above, § 15-78-70(d) provides:

> A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

"This chapter" is defined as the "South Carolina Tort Claims Act." § 15-78-10. Accordingly, "under this chapter" means within the South Carolina Tort Claims Act.

The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996). The first

question of statutory interpretation is whether the statute's meaning is clear on its face. Kennedy v. South Carolina Retirement Sys., 345 S.C. 339, 549 S.E.2d 243 (2001). "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Paschal v. State Election Comm'n, 317 S.C. 434, 436, 545 S.E.2d 890, 892 (1995). On the other hand, where a statute is ambiguous, the Court must construe the terms of the statute. Lester v. South Carolina Workers' Compensation Comm'n, 334 S.C. 557, 514 S.E.2d 751 (1999). The Act provides that it "must be liberally construed in favor of limiting liability of the governmental entity." § 15-78-200; see § 15-78-20(f) (Act must be liberally construed in favor of limiting the liability of the State).[3]

Section 15-78-70(d) is ambiguous because it is unclear what phrase "under this chapter" modifies. "Under this chapter" either modifies both "[a] settlement or judgment in an action" and "a settlement of a claim" or, as County asserts, only modifies "a settlement of a claim." We conclude the General Assembly intended "under this chapter" to modify both a "settlement or judgment in an action" and a "settlement of a claim."

In its original bill form § 15-78-70(d) provided "a settlement or judgment in an action under this chapter constitutes a complete bar." See 1986 Senate Journal April 8, 1986, p.1476; 1986 Senate Journal April 10, 1986, p.1569. The phrase "settlement of a claim" was added later so that the bill which was passed, and as it currently reads, states "[a] settlement or judgment in an action or settlement of a claim under this chapter constitutes a complete bar." See 1986 Senate Journal May 22, 1986, p.2315 (language

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[3]The Court of Appeals asserts "[a]ny ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Wade III, supra 339 S.C. at 525, 529 S.E.2d at 749. While this is generally true, the Act specifically states it is to be interpreted to limit the governmental entity's liability. § 15-78-200.

added after the report of the Committee of Free Conference); 1986 House Journal May 22, 2986, p.3282 (same). The insertion of "settlement of a claim" into the original proposal, "[a] settlement or judgment in an action under this chapter," indicates the legislature intended "under this chapter" to modify both "[a] settlement or judgment in an action" and "a settlement of a claim." Consequently, to invoke the provisions of § 15-78-70(d), there must be a settlement or judgment in an action under the Act or a settlement of a claim under the Act. While this construction may not limit County's liability as required under the Act,[4] we cannot ignore the clear legislative history of § 15-78-70(d).

Even though Wade was aware he might have an action against County under the Act when he and Pierce executed the covenant not to execute, no action had been initiated, nor had any claim been filed, against County. At the time of the settlement, Wade had only initiated an action against Pierce in his individual capacity, not against County as Pierce's employer.[5] Accordingly, at the time Wade and Pierce executed the settlement document, there were no actions "under this chapter." Wade and Pierce's settlement did not invoke the provisions of § 15-78-70(d) barring Wade from further action against County.

As illustrated by the facts of this case, § 15-78-70(d) permits a plaintiff to maintain an action against a governmental employee in his individual capacity, settle, and then pursue an action against the governmental employer for the tort of his employee allegedly committed while in the scope of employment.[6] This result circumvents that policy of the Act which is to

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[4]See §15-78-200; § 15-78-20(f)

[5]Similarly, Wade had not brought an action against Pierce in his official capacity. See § 15-78-70(c) (discussing limited situations in which employee may be named as party under Act).

[6]We note Wade conceded any recovery against County would be offset by his settlement with Pierce.

protect employees from personal liability for torts committed while acting within the scope of employment. Section 15-78-20(b) (Act is exclusive civil remedy available for tort committed by governmental employees). Nevertheless, our construction of the statute is limited by its legislative history.

The decision of the Court of Appeals is **AFFIRMED IN PART AND REVERSED IN PART.**

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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In the Matter of Ernest E. Yarborough, Respondent.

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Opinion No. 25407
Heard November 28, 2001 - Filed February 11, 2002

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INDEFINITE SUSPENSION

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Attorney General Charles M. Condon and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

Ernest E. Yarborough, pro se.

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PER CURIAM: In this attorney disciplinary matter, the sub-panel and the full panel recommended respondent Ernest E. Yarborough be definitely suspended for 18 months. We impose an indefinite suspension.

FACTS

The Commission on Lawyer Conduct filed formal charges against respondent regarding four matters. Respondent answered the formal charges and appeared pro se at the hearing. Respondent cross-examined the State's

witnesses but did not present any evidence of his own and did not testify in his own defense. The sub-panel issued its report which made findings of misconduct and recommended a definite suspension of 18 months. The full panel adopted the sub-panel's report.

Disciplinary History

Upon being convicted of obstruction of justice,[1] respondent was placed on interim suspension on April 3, 1997. In re Yarborough, 326 S.C. 62, 483 S.E.2d 473 (1997). That conviction is not yet final.[2]

Respondent was suspended from practice for six months on August 4, 1997. In re Yarborough, 327 S.C. 161, 488 S.E.2d 871 (1997). In this matter, the Court found misconduct based on respondent utilizing criminal charges to

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[1]In brief, the facts of the obstruction of justice are as follows. Respondent represented John Glenn who was suspected of stalking his former girlfriend (Girlfriend). Upon finding Glenn armed with a gun in Girlfriend's bedroom closet, the police arrested him and charged him with burglary. Respondent contacted Girlfriend and asked her to drop the charges. He told her Glenn would pay her $500 to drop the warrant; Girlfriend refused. At trial, respondent's private investigator, Tony Kennedy, testified that respondent asked Kennedy to see if he could get Girlfriend to drop the charges and to remind her of the $500 offer. Girlfriend eventually acquiesced, and Kennedy got an affidavit from her stating she did not want to continue the case and that she had given Glenn permission to enter her house. At trial, Girlfriend testified the affidavit was false and she never received any money. Respondent testified that his offer to Girlfriend was in the form of restitution for property damage. Respondent denied directing Kennedy to talk to Girlfriend about the money.

[2]The Court of Appeals affirmed the conviction on the merits, but remanded the matter to the trial court on respondent's issue regarding jury misconduct. State v. Yarborough, Op. No. 2000-UP-059 (S.C. Ct. App. filed Feb. 8, 2000). Respondent petitioned for certiorari, but this Court denied the petition.

gain advantage in a civil matter. See Rule 4.5, RPC, of Rule 407, SCACR.

On June 7, 1999, respondent was publicly reprimanded for his improper conduct – making an unwanted sexual advance and inappropriate sexual comments – towards his female client. In re Yarborough, 337 S.C. 245, 524 S.E.2d 100 (1999).

Child Support Matter

James B. Loggins is an attorney who represents his client (Mother) in a family court matter against respondent. Respondent and Mother have a child together, and respondent is under a family court order to make child support payments to Mother. Shortly after respondent's interim suspension in April 1997, respondent began falling behind in his child support payments. Initially, he was not held in contempt for his failure to pay. In October 1998, however, the family court found respondent had willfully and intentionally failed to pay at least some of his child support obligation and held respondent in contempt of court.

Following the October 1998 family court order, respondent continued to fall behind in his child support payments. In June 1999, the parties reached an agreement wherein Mother would dismiss the Rule to Show Cause provided that respondent pay $400 to the family court in Richland County by June 15, 1999, and an additional $1,000 by June 28, 1999. Respondent delivered to Loggins a $400 personal check[3] made out to the family court, and Loggins forwarded the check. However, the check was returned to respondent's wife because the Richland County Family Court does not accept personal checks. Loggins testified that the $400 check was never replaced or repaid. Moreover, the $1,000 payment agreed to in the consent order was never paid.

Linda Taylor, the family court records custodian, testified that as of January 2001, respondent had an arrearage of $29,237.76. Taylor stated that the

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[3]The personal check was drawn on the account of respondent's wife.

last payment made to the family court was in October 1998. Although respondent implied through cross-examination that he had made payments directly to Mother, respondent did not present her as a witness.

Tony Kennedy Matter

As noted above, respondent was convicted of obstruction of justice in 1997. One of the witnesses who testified against respondent was Lemeul "Tony" Kennedy, who worked as a private investigator for respondent. On May 20, 1998, while State v. Yarborough was on appeal, respondent wrote Kennedy a letter. The letter begins as follows: "The time has come for you to face me in a civil trial for the false allegations that you made against me." Respondent states in the letter that Kennedy "conspired with others to do great economic harm to me and my firm." Stating that Kennedy would spend "at least $10,000.00 to defend this lawsuit regardless of the outcome," respondent wrote that the purpose of the letter was to give Kennedy, and his lawyer, "an opportunity to avoid a lawsuit through negotiations." Respondent then gave Kennedy a June 15th deadline to negotiate, otherwise he would file a civil suit seeking $50 million in damages.

Kennedy testified he was initially angry about the letter and that he then became scared because he felt as if respondent was threatening him in order to get him to somehow recant his story or "maybe lie for [respondent] regarding the criminal trial." Kennedy felt that this was the only possible thing that respondent meant by suggesting that they "negotiate."

Respondent, through cross-examination and his closing argument, suggested that he was merely trying to help Kennedy "settle out" of the lawsuit he intends to file. No lawsuit was ever filed by respondent.

The panel was "unpersuaded" by respondent's characterizations of the letter as an attempt to enter into negotiations. The panel found the letter was patently shocking, outrageous, and an attempt to intimidate a witness for the prosecution in the criminal case against respondent. Moreover, the panel found

respondent had failed to respond to Disciplinary Counsel's initial inquiry about the letter. Respondent answered subsequent inquiries by Disciplinary Counsel by asserting the Fifth Amendment because he felt he was being accused of a crime. The panel found that respondent, in effect, failed to respond to the notice of full investigation.

Jasper Boykin and Mary White Matters

These two matters involve separate lawsuits brought by Jasper Boykin and Mary White against Allstate Insurance Company. The lawsuits were similar factually, both involved issues of wrongful termination, and Boykin and White knew and had worked with each other. White began her lawsuit pro se but eventually hired respondent as her attorney in late 1996; Boykin retained respondent in or about February 1997. Boykin paid the retainer fees for both lawsuits. The main issue in these matters involves respondent's participation in the lawsuits **after** he was placed on interim suspension in April 1997.

Respondent and his associate, James Galmore, prepared complaints in the actions, which were filed in state court but removed to federal court. The initial discovery was to be filed by July 1997 and had not been filed when respondent was placed on interim suspension in April 1997. White learned of respondent's suspension from an article in the newspaper. She contacted respondent's office but did not receive a letter from respondent regarding his suspension.

Meanwhile, Galmore filed a motion to be relieved from the Boykin case in July 1997. Galmore asserted, inter alia, that respondent was primary counsel and had been suspended and that he (Galmore) was not competent to handle the issues involved in the cases. Galmore was relieved as counsel. However, in August 1997, Galmore moved to reappear as counsel in the Boykin

case because "arrangements" had been made to continue representation.[4]

On August 1, 1997, Boykin, White, Galmore, and respondent met in Galmore's office. White and Boykin were upset with how their cases had been handled so far. Galmore was hesitant to continue representing them, but respondent was encouraging Galmore to continue to handle their cases. According to the testimony of Galmore, Boykin, and White, respondent stated that he would help Galmore and work "behind the scenes" on the cases.

On that same day, Boykin wrote a check to Galmore for $2,300. He testified that on August 13, he went to respondent's home to complete discovery on his case. Respondent told Boykin the discovery would be promptly finalized and filed with the federal court. Boykin wrote two additional checks that day – one for $1,300 made out to respondent and another to Galmore for $1,000. Respondent also executed promissory notes in favor of Boykin in the amounts of $2,300 and $1,300. Boykin testified that the amounts paid to respondent were not loans, but were legal fees, and the promissory notes were supposed to be respondent's guarantee to perform the work properly.

White's case was dismissed with prejudice in November 1997 for failure to file discovery. After she learned of the dismissal, she telephoned respondent and told him how dissatisfied she was with his handling of the case. When White informed respondent she was going to write a letter to the South Carolina Bar complaining about him, respondent offered to pay White $30,000 to not write the letter.

In December 1997, Galmore again withdrew as counsel in the Boykin case. Boykin eventually retained other attorneys and reluctantly settled

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[4]Galmore has been sanctioned by this Court for his conduct in the Boykin and White matters, as well as some other unrelated matters. See In re Galmore, 340 S.C. 46, 530 S.E.2d 378 (2000) (agreement for public reprimand accepted). As to the Boykin case, we found that Galmore failed to report respondent's offer to practice law while under suspension to the Disciplinary Commission.

his case in April 1998. After Boykin wrote a letter regarding the settlement to federal judge Joe Anderson, Judge Anderson convened a hearing at which many of the details regarding respondent's actions were testified to by Boykin.

DISCUSSION

The panel recommended an 18-month definite suspension and that respondent pay the costs of the proceedings. Neither party filed exceptions to the report. "The failure of a party to file a brief taking exceptions to the report constitutes an acceptance to the findings of fact, conclusions of law, and recommendations." Rule 27, RLDE, of Rule 413, SCACR.

Although this Court is not bound by the findings of the panel, these findings are entitled to great weight, particularly when the inferences to be drawn from the testimony depend on the credibility of the witnesses. E.g., In re Chastain, 340 S.C. 356, 532 S.E.2d 264 (2000); In re Marshall, 331 S.C. 514, 498 S.E.2d 869 (1998). The Court, however, may make its own findings of fact and conclusions of law, and it is not bound by the panel's recommendation. Id. Indeed, the authority to discipline attorneys and the manner in which the discipline is given rests entirely with the Supreme Court. In re Marshall, supra; In re Hines, 275 S.C. 271, 269 S.E.2d 766 (1980). Finally, a disciplinary violation must be proven by clear and convincing evidence. Id.

In our opinion, the clear and convincing evidence supports the above facts. By his actions, respondent has committed numerous acts of misconduct. Specifically, we find respondent violated the following Rules of Professional Conduct: Rule 4.4, RPC, of Rule 407, SCACR, (failure to respect the rights of third persons); Rule 5.5, RPC (engaging in the unauthorized practice of law); Rule 8.1(b), RPC (failure to respond to lawful demand of a disciplinary authority); and Rule 8.4(e), RPC (engaging in conduct that is prejudicial to the administration of justice).

In addition, respondent violated the following Rules for Lawyer Disciplinary Enforcement: Rule 7(a)(1), RLDE, of Rule 413, SCACR (violating the Rules of Professional Conduct); Rule 7(a)(3), RLDE (knowingly failing to

respond to a lawful demand from the Commission); Rule 7(a)(5), RLDE (engaging in conduct tending to pollute the administration of justice or bring the courts or legal profession into disrepute or conduct demonstrating an unfitness to practice law); Rule 7(a)(6), RLDE (conduct violating the oath of office taken upon the admission to practice law in this State); Rule 7(a)(7), RLDE, (willfully violating an order issued by a court of this State).

Furthermore, with regard to the Kennedy matter, we believe respondent has violated the spirit of Rule 4.5, RPC, which states: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." In the instant case, however, it appears respondent attempted to utilize **the civil system** to gain advantage in **his own criminal matter**.

In our opinion, respondent's actions in the instant case, as well as in the past, "reflect a pattern of unprofessional conduct and demonstrate [respondent's] present unfitness to practice law." In re Gaines, 293 S.C. 314, 315, 360 S.E.2d 313, 314 (1987). In Gaines, the Court indefinitely suspended the respondent where he committed various acts of misconduct including contacting a witness in a criminal matter and offering her money to drop criminal charges against his client, notarizing a forged signature on a verification form and filing it with the circuit court, and failing to properly account for the funds of a client. The Court noted the respondent's prior public reprimand and indefinitely suspended him.

The Court also imposed an indefinite suspension in the case of In re Moore, 345 S.C. 144, 546 S.E.2d 651 (2001). Like respondent in the instant case, Moore's misconduct included, *inter alia*, practicing law while under suspension, failure to cooperate with the Commission, and violations of family court orders regarding child support.

Finally, in the case of In re Hall, 333 S.C. 247, 509 S.E.2d 266 (1998), Hall was found to have committed misconduct in two matters with one involving the willful violation of a child support order. Hall previously had been publicly reprimanded and also had his license suspended for failure to pay

Bar dues. The Court imposed the sanction of indefinite suspension.

We find respondent's conduct in this case is egregious and outrageous in many respects. He practiced law while under suspension, threatened civil action against a State witness in his own ongoing criminal case, and willfully failed to pay child support. His past disciplinary matters are likewise not mild in nature. Although the panel recommended an 18-month definite suspension, we believe an indefinite suspension is the more appropriate sanction. See In re Moore, supra; In re Hall, supra; In re Gaines, supra; see also In re Marshall, supra (the authority to discipline attorneys and the manner in which the discipline is given rests entirely with the Supreme Court).

Accordingly, we indefinitely suspend respondent and order him to pay the costs of these disciplinary proceedings. 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 the Rules for Lawyer Disciplinary Enforcement.

INDEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Khalill Rafsanjoni,	Petitioner,

v.

John Doe and Christopher D. Wood,	Defendants,
Of Whom Christopher D. Wood is	Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

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Opinion No. 25408
Heard October 24, 2001 - Filed February 11, 2002

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REVERSED

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J. Marvin Mullis, Jr. of Mullis Law Firm, of Columbia, and Frank A. Barton, of West Columbia, for petitioner.

David S. Cobb of Turner, Padget, Graham & Laney, of Charleston, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' unpublished opinion in Rafsanjoni v. Doe, 2000-UP-096 (S.C. Ct. App. filed Feb. 15, 2000). We reverse.

FACTS

Petitioner, Khalill Rafsanjoni, was hit by two automobiles while crossing Harden Street in Columbia on January 7, 1995. One of the automobiles was driven by Respondent, Christopher Wood, and the other by an unknown driver, John Doe.[1] Rafsanjoni filed a summons and complaint (S&C) on Jan. 2, 1998 (5 days prior to expiration of the three year statute of limitations), with the Richland County Clerk of Court, and simultaneously delivered the S&C to the Horry County Sheriff for service on Wood.[2] An affidavit of non-service was returned by the Sheriff on January 30, 1998; the affidavit stated Wood had moved to an address in Lexington, Kentucky. Thereafter, Wood was served on Feb. 12, 1998, by certified mail, restricted delivery, return receipt requested. Wood's motion to dismiss the complaint based upon the statute of limitations (SOL) was granted. The Court of Appeals affirmed.

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[1] It appears service was never perfected upon Doe; however, that matter is not before the Court.

[2] At the time of the accident, Wood was a student at the University of South Carolina residing in Cayce, but the address listed on his driver's license was his parents' address in Myrtle Beach. Wood established residency in Columbia upon his graduation in May, 1996. His driver's license was changed to reflect the Columbia address, and he remained in Columbia until Dec. 26, 1997, when he moved to Lexington, Kentucky.

ISSUE[3]

Was the statute of limitations tolled when Wood moved out of state on December 26, 1997?

DISCUSSION

Rafsanjoni contends the statute of limitations was tolled pursuant to S.C. Code Ann. § 15-3-30 (1976), when Wood moved out of the state on December 26, 1997, twelve days prior to the expiration of the limitations period. We agree.

Section 15-3-30 provides:

> If when a cause of action shall accrue against any person he shall be out of the State, such action may be commenced within the terms in this chapter respectively limited after the return of such person into this State. And if, after such cause of action shall have accrued, such person shall depart from and reside out of this State or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

In Meyer v. Paschal, 330 S.C. 175, 498 S.E.2d 635 (1998), we held the tolling provisions of § 15-3-30 are inapplicable in situations in which the defendant is amenable to personal service of process and can be brought with the personal jurisdiction of South Carolina courts. However, Meyer is limited to situations in which the name and location of the defendant is known to the plaintiff; the limitations period may be tolled when that information is not known to the plaintiff. Id. at 184, 498 S.E.2d at 639. In Tiralango v. Balfry, 335 S.C. 359, 517 S.E.2d 430 (1999), we interpreted Meyer as requiring an

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[3] In light of our holding, we need not address Rafsanjoni's remaining issue.

objective test of knowledge, i.e., the statute is tolled when the plaintiff did not, and could not reasonably have known the whereabouts of the defendant.

On the facts before us, we hold Rafsanjoni was not reasonably required to have known the Kentucky address prior to expiration of the SOL, such that the statute was tolled upon Wood's departure from the state.[4]

It is undisputed that, at the time of the accident, Wood's permanent address was his parents' home in Myrtle Beach. Thereafter, he moved to Richland County in May 1996, where he remained until December 26, 1997, twelve days prior to the expiration of the SOL. Although the Sheriff's return dated January 30, 1998 indicates a Lexington, Kentucky address, there is no indication in the appendix at to the exact date on which Wood established residency there. Under these circumstances, we find Rafsanjoni was not reasonably required to know Wood's Kentucky address prior to expiration of the statute of limitations; indeed, to hold otherwise would defeat the purpose of the tolling provisions of S.C. Code Ann. § 15-3-30.[5] Accordingly, the Court of Appeals opinion is

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[4] Although it appears Wood was subject to service pursuant to the long-arm statute, the critical inquiry is whether Rafsanjoni knew or should have known Wood's Kentucky address.

[5] We note that both the trial court and Court of Appeals were troubled by the fact that Rafsanjoni filed his S&C only 5 days prior to the expiration of the statute of limitations. This is simply irrelevant. Rafsanjoni had three full years in which to file suit, and the fact that Woods moved out of state immediately prior to the statute running cannot be deemed to somehow shorten that period. Cf Carras v. Johnson, 892 P.2d 780 (Wash. App. 1995)(plaintiff has full period of statute of limitation within which to attempt to effect service; waiting until days before statute runs does not militate against finding of due diligence).

REVERSED.[6]

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

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[6] We also reject Wood's claim that section 15-3-30 is inapplicable because he had not resided outside South Carolina for more than one year. Contrary to Wood's contention, the statute clearly creates two different categories of absent defendants: those who depart and reside out of state at any time prior to expiration of the SOL, and those who leave the state for a period of one year or more, with the intent to return.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stacy Wade, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Dillon County
James E. Lockemy, Trial Judge,
Daniel F. Pieper, Post-Conviction Judge

Opinion No. 25409
Submitted November 28, 2001 - Filed February 11, 2002

REVERSED

Senior Assistant Appellate Defender Wanda H. Haile, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General David Spencer, all of

Columbia, for respondent.

JUSTICE BURNETT: Stacy Wade ("Wade") appeals the PCR court's recommendation to revoke his inmate credits for falsely testifying under S.C. Code Ann. § 24-27-200 (Supp. 2000). We reverse.

FACTUAL/PROCEDURAL HISTORY

Wade originally pled guilty, as part of a plea bargain, to various charges including distribution of crack cocaine. Wade did not appeal, but ultimately filed for post-conviction relief ("PCR").

Wade asserts he is entitled to relief because he was coerced into pleading guilty. Wade insists he pled guilty after his attorney instructed him to do so or he would lose the plea bargain. Both of Wade's attorneys contradicted his testimony suggesting they induced him to lie.

The State moved, pursuant to S.C. Code Ann. § 24-27-200 (Supp. 2000), to revoke Wade's inmate credits for testifying falsely at the PCR hearing. The PCR court denied Wade's petition, but granted the motion to revoke Wade's credits.

ISSUE

> Did the PCR court err in recommending forfeiture of Wade's inmate credits under S.C. Code Ann. § 24-27-200 (Supp. 2000) for testifying falsely?

DISCUSSION

Deciding whether the PCR court erred this Court must first address whether § 24-27-200 applies to PCR hearings. We hold it does not.

I

The relevant portion of the statute provides:

> A prisoner shall forfeit all or part of his earned work, education or good conduct credits in an amount to be determined by the Department of Corrections upon recommendation of the court if the court finds that the prisoner has done any of the following **in a case pertaining to his incarceration or apprehension filed by him in state or federal court or in an administrative proceeding while incarcerated**:
>
> ...
>
> **(2) testified falsely or otherwise presented false evidence or information to the court;**
>
> ...
>
> The court may make such findings on its own motion, on motion of counsel for the defendant, or on motion of the Attorney General, who is authorized to appear in the proceeding, if he elects, in order to move for the findings in a case in which the State or any public entity or official is a defendant.

S.C. Code Ann. § 24-27-200 (Supp. 2000)(emphasis added).

This case presents an issue of first impression. Previously this Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), mentioned § 24-27-200 twice in dicta.[1] This case appears to be the first

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[1] This Court in Thompson v. State, 325 S.C. 58, 479 S.E.2d 808 (1997), dealt with the filing fee requirements in the Inmate Litigation Act. See S.C. Code Ann. §24-27-100, et seq. (Supp. 2000). We found the statute was inapplicable to PCR petitions because S.C. Code Ann. § 17-27-20 (1985), "specifically states that an action for post-conviction relief may be instituted without the payment of a filing fee, regardless of a person's

instance where the Attorney General's office has used the revocation statute.

This Court in Al-Shabazz v. State, supra, held an inmate may raise inmate credit issues or conditions of imprisonment under the Administrative Procedures Act ("APA") and not through PCR. This Court cited § 24-27-200 both times in discussing an inmate's challenge to credit issues within the APA. See Al-Shabazz, 338 S.C. at 381-82, 527 S.E.2d at 756-57. Al-Shabazz does not control the disposition of this case.

The cardinal rule of statutory construction is for a court to give effect to the Legislature's intent. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992). A court must apply the plain meaning of a statute where its language is unambiguous and conveys a clear meaning. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

The statute seemingly includes PCR hearings as cases instituted by an inmate, filed in a state court, relating to his incarceration. See 17 S.C. Jur. § 2 (1993) ("State post-conviction relief is a civil action by which a person convicted of, or sentenced for, a crime, and who is either detained or faces a possibility of detention, institutes a proceeding to challenge a court's conviction or sentence on constitutional grounds."). However, a court must reject a statute's interpretation leading to absurd results not intended by the Legislature. Ray Bell Constr. Co. v. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998).

Additionally, courts are not confined to the literal meaning of a statute where the literal import of the words contradicts the real purpose and intent of the lawmakers. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). To obtain the real purpose and intent of the lawmakers a

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financial status." Thompson, 325 S.C. at 59, 479 S.E.2d at 808.

court must not look to the "phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose." City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1957). All provisions of a statute must be given full force and effect. Nucor Steel v. South Carolina Pub. Serv. Com'n, 310 S.C. 539, 426 S.E.2d 319 (1992). Applying § 24-27-200 to PCR actions results in absurd and disparate results not intended by the Legislature.

II

The Legislature passed the revocation statute within the Inmate Litigation Act ("ILA"). See S.C. Code Ann. § 24-27-100, et seq. (Supp. 2000); 1996 Act No. 455. The primary problem with applying § 24-27-200 to PCR actions is it creates disparity between non-incarcerated and incarcerated applicants.[2]

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[2] While our decision does not rest on federal law, we note the Legislature may have modeled the ILA on the federal Prison Litigation Reform Act ("PLRA"), Title VIII of the Omnibus Consolidated Recisions and Appropriations Act of 1996, Pub.L. No. 104-134, 110 Stat. 1321 (1996). The ILA does not expressly reference the PLRA, but numerous provisions virtually mirror each other. Compare PLRA, Pub.L. 104-134, 110 Stat. 1321-73 § 804 (a)(codified at 28 U.S.C. § 1915 (a)(2)) with S.C. Code Ann. § 24-27-100 (both requiring a prisoner filing a civil action to submit a certified copy of their trust fund account statement); and PLRA, Pub.L. 104-134, 110 Stat. 1321-73 § 804 (a)(codified at 28 U.S.C. § 1915 (b)(1)) with S.C. Code Ann. § 24-27-100 (both requiring prisoner filing a civil action to pay partial filing fee); and PLRA, Pub.L. 104-134, 110 Stat. 1321-73, § 804 (a)(codified at 28 U.S.C. § 1915 (b)(2)) with S.C. Code Ann. § 24-27-100 (both requiring prisoner after paying partial filing fee to make subsequent monthly payments until the full fee is paid); and PLRA, Pub.L. 104-134, 110 Stat. 1321-74, § 804 (c)(codified at 28 U.S.C. §

The chief problem with applying the ILA to PCR is the disparity between non-incarcerated and incarcerated applicants. The ILA applies only to prisoners "defined as a person who has been convicted of a crime and is incarcerated for that crime or is being held in custody for trial or sentencing." S.C. Code Ann. § 24-27-140 (Supp. 2000). However, an individual may apply for PCR if they are in custody or can demonstrate prejudice from the persistent results of their conviction. See Jackson v. State, 331 S.C. 489, S.E.2d 915 (1997). Applying the ILA to PCR proceedings gives the State the power to punish prisoners for asserting constitutional rights while non-incarcerated applicants can assert those rights without fear of retribution. The State does not proffer any justification for such disparate treatment.

1915(f)(2)(A)) with S.C. Code Ann. § 24-27-110 (both dealing with prisoner paying court costs); and PLRA, Pub.L. 104-134, 110 Stat. 1321-74, § 804 (d)(codified at 28 U.S.C. § 1915 (g)) with S.C. Code Ann. § 24-27-300 (both dealing with prisoners who bring three or more frivolous claims and both including an imminent danger exception); and PLRA, Pub.L. 104-134, 110 Stat. 1321-75, § 804 (e)(codified at 28 U.S.C. § 1915 (h)) with S.C. Code Ann. § 24-27-140 (both giving similar definitions of "prisoner"); and PLRA, Pub.L. 104-134, 110 Stat. 1321-76, § 809 (a)(codified at 28 U.S.C. § 1932) with S.C. Code Ann. § 24-27-200 (both dealing with revocation of inmate credits).

The federal equivalent to § 24-27-200 is 28 U.S.C. § 1932. PLRA, Pub.L. 104-134, 110 Stat. 1321-76, § 809 (a). Neither have been interpreted by a court. However, all federal courts to consider the issue limit the application of the PLRA to suits challenging prison conditions and not petitions challenging the actual confinement under 28 U.S.C. §§ 2254 or 2255 (federal habeas corpus statutes). See United States v. Ortiz, 136 F.3d 161 (D.C. Cir. 1998); Smith v. Angelone, 111 F.3d 1126 (4th Cir.), cert. denied, 521 U.S. 1131, 118 S.Ct. 2, 138 L.Ed.2d 1036 (1997); Anderson v. Singletary, 111 F.3d 801 (11th Cir. 1997); United States v. Simmonds, 111 F.3d 737 (10th Cir. 1997); Naddi v. Hill, 106 F.3d 275 (9th Cir. 1997); United States v. Cole, 101 F.3d 1076 (5th Cir. 1996); Santana v. United States, 98 F.3d 752 (3rd Cir. 1996); Martin v. United States, 96 F.3d 853 (7th Cir. 1996); Reyes v. Keane, 90 F.3d 676 (2nd Cir. 1996).

We note this disparity increases when applying other provisions of the ILA to PCR actions. A court under § 24-27-300 may hold a prisoner for contempt of court for a period of not exceeding one year if it finds:

> the prisoner has, on three or more prior occasions, while incarcerated, brought in a court of this State a civil action or appeal pertaining to his incarceration or apprehension that was dismissed prior to a hearing on the merits on the grounds that the action or appeal was frivolous, malicious, or meritless.

S.C. Code Ann. § 24-27-300 (Supp. 2000).

If the provisions of the ILA applied to PCR actions, a court could hold an incarcerated applicant who previously filed two frivolous lawsuits in contempt upon finding the subsequent PCR application frivolous. The incarcerated applicant may suffer a revocation of inmate credits and serve additional prison time. The non-incarcerated applicant suffers no such infirmities.[3]

Section 24-27-300 also creates an exception to the three strikes contempt if "the court finds the prisoner was under imminent danger of great bodily injury...at the time of the filing of the present action." Id. This exception is logical only if one reads the statute as creating an exception for prisoners filing suit challenging dangerous prison living conditions causing an imminent danger to them. A PCR applicant would never fall under this "dangerous conditions" exception since the purpose of a PCR is to challenge a conviction not living conditions. See Al-Shabazz v. State, supra; Tutt v. State, 277 S.C. 525, 290 S.E.2d 414 (1982). The placement of the exception suggests the Legislature intended the ILA to apply to non-PCR inmate litigation.

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[3] We do not rule on the application of the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, et seq. (Supp. 2000), to PCR hearings.

Further, applying the three strikes provision to PCR would change this Court's tradition of giving prisoners access to PCR with minimal burdens. Section 24-27-300 allows the judge to hold the prisoner in contempt and to incarcerate the inmate for an additional year. This measure may not stop a prisoner from utilizing the PCR structure, but it would assuredly chill a prisoner's exercise of a constitutional right. Such a result is contrary to the long tradition of giving prisoners ready access to PCR mechanism.[4]

The presence of a complex fee structure evidences the Legislature's intent to use the ILA to curb the abuses of inmate litigation dealing with prison conditions. One way for the Legislature to curtail inmate litigation dealing with prison conditions is to require inmates to pay filing fees and court costs. However, a PCR applicant is not required to pay a filing fee or meet the complex payment structure of the ILA.[5] See Thompson v. State, 325 S.C. 58, 479 S.E.2d 808 (1997). If the Legislature intended for the ILA to apply to PCR actions it seems the Legislature would first mandate a filing fee for PCR applications.

The Legislature limits the application of the ILA to civil cases.

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[4] Cf. Smith v. Angelone, 111 F.3d at 1131 quoting Martin, 96 F.3d at 855-56 (The Fourth Circuit, construing the Federal three strikes provision, reasoned Congress intended to apply the section to lawsuits in tort not habeas petitions because the result "would be contrary to the long tradition of ready access of prisoners to federal habeas corpus, as distinct from their access to tort remedies.").

[5] Cf Smith v. Angelone, supra. The Fourth Circuit reasoned if Congress intended for the PLRA to apply to habeas petitions it would change the habeas filing fee from $5 to an amount equal to the filing fee of $120 for all other civil complaints. The court found Congress would not create a complex payment structure to ensure payment of $5, but instead created the structure to ensure indigent inmates would not use the legal system to file frivolous claims regarding prison conditions.

See S.C. Code Ann. §§ 24-27-100-110, 130, 150, 300 (Supp. 2000). While PCR action is considered a "civil case," it is, like its federal equivalent,[6] categorized as such to differentiate it from criminal proceedings which are intended to punish thus requiring special constitutional protections. See Ex parte Tom Tong, 108 U.S. 556, 559, 2 S.Ct. 871, 872, 27 L.Ed. 826 (1883) (Habeas corpus review is a civil proceeding because "[p]roceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings.")

Courts treat PCR differently than traditional civil cases. For example, PCR actions are the only type of case which this Court mandates appellate counsel must brief all arguable issues, despite counsel's belief the appeal is frivolous. See Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991); Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988); Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). A lawyer knowingly filing a frivolous claim in any other civil case violates Rule 11, SCRCP.[7] Additionally, a PCR applicant who is granted a hearing has a statutory right to be represented by a court-appointed attorney. S.C. Code Ann. § 17-27-60 (1985); Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992). This right does not generally exist for plaintiffs in civil cases.

In addition to these concerns, we note the legislative and judicial

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[6] The Fourth Circuit in Smith v. Angelone, supra, wrote: "(H)abeas corpus cases are, in effect, hybrid actions whose nature is not adequately captured by the phrase 'civil action'; they are independent civil dispositions of completed criminal proceedings. The 'civil' label is attached to habeas proceedings in order to distinguish them from 'criminal' proceedings, which are intended to punish and require various constitutional guarantees." Smith, 111 F.3d at 1130 (quoting Santana, 98 F.3d at 754-55).

[7] Attorney's signature on a pleading or motion "constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." See Rule 11 (a), SCRCP.

systems already place limitations to deter inmate litigation abuse in the PCR process. First, a petitioner must raise all available grounds for relief in the first PCR application since successive applications are usually barred. S.C. Code Ann. § 17-27-90 (1985); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Second, an applicant must file the PCR application within one year of the final resolution of the criminal conviction. S.C. Code Ann. § 17-27-45 (A) (Supp. 2000). Third, a petitioner faces a one-year deadline to file an application asserting a newly created standard or right, and to raise newly discovered material facts. S.C. Code Ann. § 17-27-45 (C)(Supp. 2000).

An individual under PCR effectively is granted one chance to argue for relief and must do so within a year of his final appeal. These limitations adequately prevent inmates from abusing the PCR process.

CONCLUSION

Section 24-27-200 does not apply to PCR hearings. The PCR court's recommendation to revoke Wade's inmate credits is **REVERSED**.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Evelyn H. Conner, Respondent,

v.

City of Forest Acres, J.C. Rowe, and Lewis Langley, Petitioners.

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ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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Appeal From Richland County
Joseph M. Strickland, Special Circuit Court Judge

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Opinion No. 25410
Heard January 9, 2002 - Filed February 11, 2002

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AFFIRMED IN PART; REVERSED IN PART.

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Kathryn Thomas, of Gignilliat, Savitz & Bettis, of Columbia, for petitioners.

Henry Hammer and Howard Hammer, of Hammer,

Hammer, Carrigg & Potterfield, and Scott Elliott, of Elliott & Elliott, P.A., all of Columbia, for respondent.

JUSTICE WALLER: This is a wrongful discharge action. The trial court granted petitioners summary judgment on all claims. The Court of Appeals reversed and remanded. Conner v. City of Forest Acres, Op. No. 99-UP-433 (S.C. Ct. App. filed August 18, 1999). This Court granted certiorari to review the Court of Appeals' decision. We affirm in part, and reverse in part.

FACTS

Respondent Evelyn Conner worked for the City of Forest Acres ("the City") as a police dispatcher. She was hired in July 1984 and was terminated in October 1993. At the time of her termination, J.C. Rowe was the Chief of Police, and Corporal Lewis Langley was her immediate supervisor. Beginning in November 1992, Conner received numerous reprimands for such things as violating the dress code, tardiness, performing poor work, leaving work without permission, and using abusive language. In July 1993, Conner was evaluated as unsatisfactory[1] and placed on a 90-day probation. She was reprimanded twice in August 1993, and her October 1993 evaluation showed only slight improvement; therefore, the City terminated her on October 7, 1993.

Conner filed a grievance, and at the hearing before the grievance committee, she disputed many of the reprimands.[2] The grievance committee

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[1]In a statement written by Langley and attached to her evaluation, Langley stated that Conner's performance had declined since her last annual evaluation. He specifically noted that Conner was unable to stay at her work station because of numerous visits to the restroom.

[2]For example, Conner was reprimanded for using abusive language toward a coworker. The reprimand stated she called the coworker "stupid" for doing a certain task requested by an officer. At the grievance hearing, Conner presented testimony from Jane Lowe, another dispatcher, who stated she

voted 2-1 to reinstate Conner. The City Council, however, rejected the grievance committee's decision and voted to uphold Conner's termination.

During her employment, Conner received two employee handbooks. After receiving each one, Conner signed an acknowledgment form. The 1993 acknowledgment[3] stated as follows:

> I acknowledge that I have received a copy of the City of Forest Acres Personnel Policy and Procedures Manual (Adopted July 1, 1993). I understand that I am responsible for reading, understanding, and abiding by the contents of these policies and procedures. I further understand that all the policies contained herein are subject to change as the need arises. I further understand that nothing in these policies and procedures creates a contract of employment for any term, that I am an employee at-will and nothing herein limits the City of Forest Acres's rights for dismissal.

On page 1 of the handbook, entitled INTRODUCTION, there is the following language:

> IMPORTANT NOTICE
>
> MANY OF THE POLICIES CONTAINED IN THIS HANDBOOK ARE BASED ON LEGAL PROVISIONS, INTERPRETATIONS OF LAW, AND EMPLOYEE RELATIONS PRINCIPLES, ALL OF WHICH ARE SUBJECT TO CHANGE. FOR THIS REASON, THIS HANDBOOK IS CONSIDERED TO BE A GUIDELINE AND IS SUBJECT TO CHANGE WITH LITTLE NOTICE. THE HANDBOOK DOES NOT CONSTITUTE A

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called the coworker stupid.

[3]The 1987 acknowledgment is essentially the same, except it does not contain the last clause of the last sentence of the 1993 acknowledgment.

> CONTRACT OF EMPLOYMENT FOR ANY TERM.
>
> NOTHING IN THIS HANDBOOK SHALL BE CONSTRUED TO CONSTITUTE A CONTRACT. THE CITY HAS THE RIGHT, AT ITS DISCRETION, TO MODIFY THIS HANDBOOK AT ANY TIME. NOTHING HEREIN LIMITS THE CITY'S RIGHTS TO TERMINATE EMPLOYMENT. ALL EMPLOYEES OF THE CITY ARE AT-WILL EMPLOYEES. NO ONE EXCEPT THE CITY ADMINISTRATOR HAS THE AUTHORITY TO WAIVE ANY OF THE PROVISIONS OF THIS HANDBOOK, OR MAKE REPRESENTATIONS CONTRARY TO THE PROVISIONS OF THIS HANDBOOK.

This same language appears on the last page of the handbook.

The handbook contained a section entitled "Code of Conduct." In this section, the handbook states that conduct "reflecting unfavorably upon the reputation of the City, the Department, or the employee will not be tolerated." Furthermore, this section advises that:

> This code of conduct is designed to guide all employees in their relationship with the City.
>
> The following is a non-exclusive list of acts which are considered a violation of the Code of Conduct expected of a City employee, and such conduct will be disciplined in accords with its seriousness, recurrence, and circumstances. Degrees of discipline are given under the section entitled "Discipline" in this manual.

The list enumerates 23 different acts.

The Disciplinary Procedures section of the handbook states that it is the "duty of all employees to comply with, and to assist in carrying into effect

the provisions of the personnel policy and procedures." Additionally, he handbook states the following:

> Ordinarily, discipline shall be of an increasingly progressive nature, the step of progression being (1) oral or written reprimand, (2) suspension, and (3) dismissal. Discipline should correspond to the offense and therefore NO REQUIREMENT EXISTS FOR DISCIPLINE TO BE PROGRESSIVE. FIRST VIOLATIONS CAN RESULT IN IMMEDIATE DISMISSAL WITHOUT REPRIMAND OR SUSPENSION.

Furthermore, this section states that violations of the code of conduct "**are declared**" to be grounds for discipline and that discipline "**will be used** to enforce the City's Code of Conduct." (Emphasis added). Finally, the grievance procedure is outlined in detail. In this section, the handbook states "[i]t is the policy of the City of Forest Acres that all employees shall be treated fairly and consistently in all matters related to their employment."

After Conner was terminated, she brought suit against the City, Rowe and Langley. In her original complaint, she alleged five causes of action; an amended complaint contained nine causes of action. After the case was removed to federal court, and then eventually remanded back to state court, only three causes of action remained: breach of contract, breach of contract accompanied by a fraudulent act, and bad faith discharge.

The trial court granted petitioners' motions for summary judgment. The Court of Appeals reversed finding that a jury question existed regarding whether the handbook altered Conner's at-will employment status with the City. The Court of Appeals further found that there was a jury issue as to whether Conner was terminated for cause.

ISSUES

1. Were Rowe and Langley improperly added as respondents to the appeal when the Notice of Appeal only named the City?

2. Did the Court of Appeals err in reversing summary judgment on the breach of contract and bad faith discharge claims?

3. Did the Court of Appeals err in reversing summary judgment on the claim for breach of contract accompanied by a fraudulent act?

DISCUSSION

1. Conner's Appeal Against Rowe and Langley

Petitioners Rowe and Langley argue that the appeal against them should be dismissed because Conner failed to timely serve them a Notice of Appeal. We agree.

When Conner appealed the trial court's decision, she filed a Notice of Appeal which named only "City of Forest Acres" as respondent. The Notice is dated January 12, 1998. In a letter dated January 14, 1998, the Court of Appeals advised Conner's attorney that the caption should read differently, i.e., that the City, Rowe and Langley should be listed as defendants, and the City separately named as respondent.

After several extensions were granted to Conner for filing her initial brief, the brief and designation of matter were filed in late May 1998. Thereafter, and in response to the Court of Appeals' request, Conner filed a "corrected" Notice of Appeal and Proof of Service which now named Rowe and Langley as respondents. Rowe and Langley objected. Conner filed a motion to correct the record which Rowe and Langley opposed. The Court of Appeals granted the motion and accepted the backdated Notice of Appeal.

Rowe and Langley argue that the Court of Appeals erred in allowing this "correction" because this was not a typographical error or mere oversight. Instead, they contend Conner initially pursued an appeal against the City only, and this was confirmed by the subsequent correspondence between Conner and the Court of Appeals.

Service of the notice of intent to appeal is a jurisdictional requirement, and the Court has no authority to extend or expand the time in which the notice of intent to appeal must be served. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985).

Clearly, Rowe and Langley were not served with a Notice of Appeal naming them as respondents within the 30-day time period prescribed by Rule 203(b)(1), SCACR. Nonetheless, citing Moody v. Dickinson, 54 S.C. 526, 32 S.E. 563 (1899), Conner argues that clerical errors on a Notice of Appeal will not defeat the appeal.

In Moody, the defendant filed a Notice of Appeal naming "H.J. Moody" as plaintiff. However, "defendant's counsel, having **soon** afterwards discovered the mistake in the title of his notice of appeal, gave notice to plaintiffs' counsel that he would move . . . to amend the notice of appeal by . . . adding the names" of the other plaintiffs. Id. at 531, 32 S.E. at 562-63 (emphasis added). This motion was granted, and plaintiffs appealed. The Court held that there was no error "in allowing the defendant to correct **a mere clerical error** in the title of his notice of intention to appeal, whereby it is not even claimed that plaintiffs were misled or in any way prejudiced. . . ." Id. at 534, 32 S.E. at 566 (emphasis added).

We find the instant case is factually distinguishable from Moody. Here, the facts indicate that the Notice of Appeal did not contain a mere clerical error. First, Conner did not "soon" after filing the Notice discover any mistake. Second, the Court of Appeals' first correspondence with Conner advising her of the way the caption should read (i.e., with only the City named as respondent and Rowe and Langley named as defendants) should have alerted Conner to this "mistake." It was not until the Court of Appeals invited Conner to "correct" the

Notice that Conner took any action. Indeed, the rule of Moody compels us under these facts to find Rowe and Langley were misled into believing they were not part of this appeal by the almost five-month delay in amending the Notice, and therefore, they clearly were prejudiced by the amendment.

Accordingly, we hold that the Court of Appeals erred in granting Conner's motion to correct the record and accepting the backdated Notice of Appeal. See Mears, supra. Petitioners Rowe and Langley are dismissed from this action.

2. Breach of Contract and Bad Faith Discharge Claims

The City argues the Court of Appeals erred in reversing summary judgment because Conner failed to produce evidence of the existence of a contract with the City (other than at-will employment) or that the City breached such a contract. We hold the Court of Appeals correctly reversed.

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. E.g., Koester v. Carolina Rental Center, Inc., 313 S.C. 490, 443 S.E.2d 392 (1994); Rule 56(c), SCRCP. In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Id. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

The City argues there was no contract created by the handbook because: (1) the procedures in the employee handbook did not alter Conner's at-will status, (2) the disclaimers in the handbook were conspicuous and therefore effective, and (3) Conner signed acknowledgments of her at-will status. Additionally, the City contends that even if the handbook did create a contract, it did not breach the contract because it followed the prescribed procedures.

The general rule is that termination of an at-will employee normally does not give rise to a cause of action for breach of contract. Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979). However, where the at-will status of the employee is altered by the terms of an employee handbook, an employer's discharge of an employee may give rise to a cause of action for wrongful discharge. Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987). Because an employee handbook may create a contract, the issue of the existence of an employment contract is proper for a jury when its existence is questioned and the evidence is either conflicting or admits of more than one inference. See id. at 483, 357 S.E.2d at 454; Kumpf v. United Tel. Co. of Carolinas, Inc., 311 S.C. 533, 536, 429 S.E.2d 869, 871 (Ct. App. 1993).

The Court in Small stated that "[i]t is patently unjust to allow an employer to couch a handbook, bulletin, or other similar material in mandatory terms and then allow him to ignore these very policies as 'a gratuitous, nonbinding statement of general policy' whenever it works to his disadvantage." Small, 292 S.C. at 485, 357 S.E.2d at 455. The Small Court instructed that if an employer wishes to issue written policies, but intends to continue at-will employment, the employer must insert a conspicuous disclaimer into the handbook. Id. However, in Fleming v. Borden, 316 S.C. 452, 450 S.E.2d 589 (1994), the Court indicated that whether the disclaimer is conspicuous is generally a question for the jury. Id. at 464, 450 S.E.2d at 596 ("'the disclaimer is merely one factor to consider in ascertaining whether the handbook as a whole conveys credible promises that should be enforced.'") (quoting Stephen F. Befort, Employee Handbooks and the Legal Effect of Disclaimers, 13 Indus.Rel.L.J. 326, 375-76 (1991-92)). Specifically, the Fleming Court stated that "[i]n most instances, summary judgment is inappropriate when the handbook contains both a disclaimer and promises." Id.

Relying primarily on Fleming, the Court of Appeals in the instant case found that summary judgment was inappropriate. We agree. While the City argues that its handbook contained disclaimers which were effective as a matter of law and that Conner signed acknowledgments of her at-will status, the fact remains that the handbook outlines numerous procedures concerning progressive discipline, discharge, and subsequent grievance. The language in

the handbook is mandatory in nature[4] and therefore a genuine issue of material fact exists as to whether Conner's at-will status was modified by the policies in the handbook. See id. (summary judgment is not appropriate where disclaimers and mandatory promises are both found in handbook).

The City also argues that if a contract exists, then as a matter of law, it did not breach the contract because it followed the procedures outlined in the handbook. The Court of Appeals found that because "Conner disputes the City's version of the events resulting in her reprimands and subsequent termination," summary judgment was not proper "on the issue of whether Conner was fired for cause."

Although this is a closer question, we agree with the Court of Appeals that there is a genuine issue of material fact as to whether Conner was wrongfully terminated. The appropriate test on the issue of breach is as follows: "If the fact finder finds a contract to terminate only for cause, he must determine whether the employer had **a reasonable good faith belief** that sufficient cause existed for termination." Prescott v. Farmers Telephone Co-op, Inc., 328 S.C. 379, 393, 491 S.E.2d 698, 705 (Ct. App. 1997), rev'd on other grounds, 335 S.C. 330, 516 S.E.2d 923 (1999).[5] We note that the fact finder must not focus on whether the employee actually committed misconduct; instead, the focus

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[4]For example, the handbook states that: (1) violations of the Code of Conduct "**will be** disciplined," (2) "discipline **shall be** of an increasingly progressive nature," and (3) "all employees **shall be** treated fairly and consistently in all matters related to their employment." (Emphasis added.)

[5]Cf. Small, 292 S.C. at 483-84, 357 S.E.2d at 454. The Court in Small noted that where the jury found that a handbook created an employment contract, it was for the jury to decide whether the employer "reasonably could have determined that Small's actions" warranted immediate discharge as a "serious offense." Therefore, it is generally a jury question as to whether the employer acted reasonably pursuant to the employment contract. See id; see also Jones v. General Electric Co., 331 S.C. 351, 371, 503 S.E.2d 173, 184 (Ct. App. 1998) (finding material issue of fact as to whether G.E. had followed its handbook procedures in terminating Jones).

must be on whether the employer reasonably determined it had cause to terminate. Id.; see also Small, 292 S.C. at 483-84, 357 S.E.2d at 454.

Conner's basic argument is there was no just cause for her termination. Although it appears that the City followed its handbook procedures in effectuating Conner's termination, the grievance committee voted to reinstate Conner; i.e., the committee found no just cause for Conner's firing. Subsequently, the City Council overturned the committee's decision. While the committee and City Council both could have reached their respective conclusions reasonably and in good faith, it nonetheless appears that reasonable minds can differ as to whether just cause existed to support Conner's termination. Thus, there remains the ultimate question of whether the City had a reasonable good faith belief that sufficient cause existed for termination. Id. This is a question that generally should not be resolved on summary judgment, and therefore, the Court of Appeals correctly reversed the trial court's grant of summary judgment in favor of the City. See Baughman v. American Tel. and Tel. Co., supra (summary judgment is a drastic remedy which should be cautiously invoked to ensure a litigant will not be improperly deprived of trial on disputed factual issues).

3. Breach of Contract Accompanied by a Fraudulent Act Claim

Finally, the City argues that summary judgment on Conner's claim for breach of contract accompanied by a fraudulent act was proper because Conner failed to establish fraudulent intent and a fraudulent act. Therefore, the City maintains the Court of Appeals erred in reversing summary judgment. We disagree.

In order to have a claim for breach of contract accompanied by a fraudulent act, the plaintiff must establish three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986). The fraudulent act is any act characterized by dishonesty in fact or unfair dealing. Id. "Fraud," in this sense, "assumes so many hues and forms, that courts are compelled to

content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence." Sullivan v. Calhoun, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921) (citation omitted).

Conner contends that the City and its agents committed numerous fraudulent acts in connection with her termination. Primarily, however, Conner's claim is that the City fabricated pretextual reasons for Conner's termination knowing the reasons were false and did not justify termination for cause. Viewing the evidence in the light most favorable to Conner, as we must, we find there is a genuine issue of material fact as to whether the City fraudulently breached its contract. See Harper, supra (the fraudulent act is any act characterized by dishonesty in fact or unfair dealing); Sullivan, supra (fraud may assume "many hues and forms").

Accordingly, the Court of Appeals did not err in reversing summary judgment on this claim.

CONCLUSION

We reverse the Court of Appeals' decision to allow petitioners Rowe and Langley to be added months after the Notice of Appeal was filed. As for the Court of Appeals' decision to reverse summary judgment on all claims pertaining to the City, we affirm.

AFFIRMED IN PART, REVERSED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Karl L. Kenyon, Respondent.

Opinion No. 25411
Submitted January 15, 2002 - Filed February 11, 2002

DISBARRED

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

Karl L. Kenyon, of Anderson, Pro Se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to disbarment. We accept the agreement and disbar respondent.

Facts

Respondent is serving a life sentence after pleading guilty in the United States District Court for the District of South Carolina to operating a racketeering enterprise, possession of a firearm with an obliterated serial number, and two counts of money laundering. The racketeering acts were

specified as being two counts of wire fraud, three counts of money laundering, and two counts of murder. Respondent has been sanctioned by this Court on two prior occasions. See In re Kenyon, 342 S.C. 623, 538 S.E.2d 655 (2000) (definite suspension); In re Kenyon, 327 S.C. 307, 491 S.E.2d 252 (1997) (indefinite suspension).

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(b) (committing a criminal act reflecting adversely on his honesty, trustworthiness, or fitness as a lawyer); Rule 8.4(c) (engaging in conduct involving moral turpitude); and Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

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)(4) (being convicted of serious crimes and crimes of moral turpitude); Rule 7(a)(5) (engaging in conduct tending to bring the legal profession into disrepute and 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 find that respondent's misconduct warrants disbarment. Accordingly, we accept the Agreement for Discipline by Consent.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of R. Michael Munden, Respondent.

Opinion No. 25412
Submitted January 15, 2002 - Filed February 11, 2002

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Reynolds Williams, of Florence, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of 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 of the sanctions set forth in Rule 7(b), RLDE, Rule 413. We accept the agreement and publicly reprimand respondent.

Facts

From 1990 through late 1995 or early 1996, respondent performed legal work for a client and the client's spouse. Respondent represents he never charged a legal fee for the work. Respondent also

consulted with the client's spouse on a legal issue in January 1998. Shortly thereafter, respondent entered into an adulterous relationship with the client's spouse. Respondent acknowledges that there was no formal termination of the legal representation of the client, the client's spouse or of any of the client's businesses before or after the relationship with the client's spouse began.

Law

Respondent admits that he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.7(b)(a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests); Rule 1.16(a)(1)(a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law); Rule 8.4(a)(it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(e)(it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). He also admits violating the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(it shall be grounds for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers); Rule 7(a)(5)(it shall be grounds for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the court or the legal profession into disrepute); and Rule 7(a)(6)(it shall be grounds for discipline for a lawyer to violate the oath of office taken upon admission to practice law in this state).

Conclusion

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Rodman C. Tullis, Respondent.

Opinion No. 25413
Heard January 10, 2002 - Filed February 11, 2002

DEFINITE SUSPENSION

Attorney General Charles M. Condon and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for Office of Disciplinary Counsel, for petitioner.

Rodman C. Tullis, of Spartanburg, pro se.

PER CURIAM: Formal charges were filed against Rodman C. Tullis ("Respondent") on July 11, 2000.[1] Respondent failed to respond to the charges

[1]Respondent has previously received a Public Reprimand from this Court for misconduct in failing to competently represent client, failing to timely provide information about case to client or to client's employers, who had paid attorney to represent client, failing to promptly deliver funds paid on client's behalf to state of Florida to resolve matter of client's probation violation, and failing to reply promptly to inquiries by the Commission on Lawyer Conduct. *In the Matter of Tullis*, 330 S.C. 502, 499 S.E.2d 811 (1998).

and an Affidavit of Default was filed on September 12, 2000. Therefore, under Rule 24 of Rule 413, SCACR, the charges were deemed admitted. The following charges were filed against Respondent.

I. Failure to Respond to Disciplinary Charges

On September 15, 1999, the Commission on Lawyer Conduct ("Commission") received a complaint about Respondent from Judge Hall, Chief Magistrate for Spartanburg County. The Commission wrote Respondent on September 21 and requested a response within fifteen days. Respondent did not reply. The Commission wrote Respondent again on October 22, 1999, requesting a response to Judge Hall's complaint and informing Respondent that failure to reply to an inquiry was, in itself, grounds for discipline. Again, Respondent failed to reply.

The matter was referred to the Attorney General's Office. On January 17, 2000, a Notice of Full Investigation was served upon Respondent by certified mail. Respondent failed to respond within thirty days. A Subpoena Duces Tecum was also sent on January 17, requiring Respondent to present bank statements from his trust account at Carolina Southern Bank for the period January 1, 1999, through January 1, 2000. Respondent did provide some statements, but failed to provide the statements for the months of February, May, and October 1999. A follow-up Subpoena Duces Tecum was faxed to Respondent on July 13, 2000, requesting the missing statements as well as bank statements from Respondent's management account at the same bank for the same period. Respondent failed to send the missing statements from his trust account, and, while he did send the statements from his management account, Respondent did not send the statement from that account for May 1999.[2]

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[2]There appears to be some confusion about whether the November and December 1999 statements were received for either or both accounts. They do not appear in the exhibits. However, Mr. Bogle stated at the hearing before the Commission that there was "an error in the formal charges" and moved to amend the formal charges to delete the reference to the November and

II. Bank Account Irregularities

A review of Respondent's trust account statements supplied to the Commission, which did not include February, May, October, November, and December 1999[3] showed the following: two (2) NSF service charges, six (6) service charges, one (1) daily overdraft charge, and three (3) negative balances. The check which lead to the complaint from Judge Hall (to be discussed in Section III) came from another account, Respondent's management account. On a review of that account (for which the May 1999 statement was missing) showed the following: twenty-three (23) NSF service charges, eight (8) service charges, eight (8) daily overdraft charges, and twenty-four (24) negative balances.

III. The Judge Hall Complaint

A client of Respondent, Lawrence Ware ("Ware"), was arrested by the police in Wellford, South Carolina on two charges. A court date was set for February 16, 1999, in front of the Wellford Municipal Court. Respondent represented Ware regarding these charges. Respondent did not request a postponement of the hearing, nor did he request a jury trial. Neither Ware nor Respondent appeared on February 16, and Ware was tried in his absence. A Bench Warrant was issued for Ware, showing fines for the two tickets in the amount of $759.00 and $548.00 for a total of $1,307.00. Ware was picked up on the Bench Warrant, and since the Town of Wellford does not have a detention facility, Ware was confined at the Spartanburg County Jail.

December 1999 statements since "we did get those." In the Panel Report, the reference to the November and December 1999 statements were deleted with respect to the trust account, but not with respect to the management account.

[3]Again, there is confusion on which statements were received. The Panel Report refers to the November and December statements as missing here, although earlier in the report, the Panel states only the February, May, and October statements were missing.

After receiving notice of the situation, Respondent wrote a check for Ware's fines. The check was written on the Tullis management account at Carolina Southern Bank, in the amount of $1,307.00 payable to the Spartanburg Magistrate Court. The Magistrate Court deposited the check into its account and then wrote a check to the Town of Wellford. Respondent's check was returned for non-sufficient funds on June 29, 1999. Thereafter, there were repeated attempts by the Magistrate Court staff to contact Respondent in an effort to get him to make the check good, but without success. On one occasion, Respondent or a member of his staff brought to the Magistrate Court a cashier's check, but it was for the wrong amount and the court's accounting system could not accept it. Furthermore, the Magistrate Court Clerk and Judge Hall himself made repeated attempts, without success, to contact Respondent via telephone.

On September 13, 1999, Judge Hall wrote a letter of complaint to the Commission on Lawyer Conduct since there had been no payment by Respondent. Thereafter, in October 1999, Judge Hall made two more attempts to contact Respondent by telephone. In November of 1999, Judge Hall personally traveled to Respondent's office. However, Respondent was away attending a seminar. On December 10, 1999, Respondent finally paid the Spartanburg Magistrate Court $1,307.00.

A hearing before a Subpanel of the Commission was conducted on October 25, 2000. Respondent was present and represented himself. Respondent did admit the factual allegations, but presented "evidence" in mitigation. The Subpanel's Report, adopted by the Full Panel, found Respondent had committed misconduct. Specifically, the Panel found Respondent violated the following <u>Rules for Layer Disciplinary Enforcement</u>, Rule 413, SCACR: Rule 7(a)(1), violating a Rule of Professional Conduct; Rule 7(a)(3), knowingly 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 legal profession into disrepute or conduct demonstrating an unfitness to practice law; and Rule 7(a)(6), violation of the oath of office taken upon admission to the practice of law in this state. Furthermore, the Panel found violations of the <u>Rules of Professional Conduct</u>, Rule 407, SCACR. The following violations regarding the Judge Hall Matter

were cited by the Panel: Rule 1.2, scope of representation; Rule 1.3, failing to act with reasonable diligence and promptness in representing a client; Rule 1.4(a), failing to keep a client reasonably informed about the status of a matter; Rule 3.3, candor towards a tribunal; and Rule 4.1, truthfulness in statements to others. With regards to the bank account irregularities, the Panel found a violation of Rule 1.15, safekeeping of property. Regarding the failure to respond to an inquiry, the Panel found a violation of Rule 8.1(b), knowing failure to respond to a lawful demand for information from a disciplinary authority. Regarding all matters, the Panel found violations of Rule 8.4; specifically subsections (a), violating a Rule of Professional Conduct, (d), conduct involving dishonesty, fraud, deceit, or misrepresentation, and (e), engaging in conduct prejudicial to the administration of justice.

After finding all of these violations, however, the Panel made the following statements regarding mitigating circumstances:

> Notwithstanding the Respondent's default in responding to the formal charges, he did, in fact, appear at the Hearing and did offer to the panel, by way of mitigation, a history of unfortunate events which both preceded and overlapped the conduct complained of, which events included death within the Respondent's immediate family, severe domestic difficulties, involving and incurring by the Respondent of child custodial demands and responsibilities with which he was not confronted during happier times in the marriage which conflicted with his professional responsibilities. He also acknowledged that, during this time, his wife made unauthorized transaction in his trust account, without his knowledge, thereby resulting in a negative balance in his account.[4]

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[4]We note that wife changed the address on the account so the statements were sent to her address. However, Respondent did not notice until several months had passed and only after the bank called him concerning a check.

> It is also clear to the panel from what the Respondent implied, if not outright stated, that he, as a result of these stressful events suffered from depression which left him in the state of paralysis with a limited ability to timely act or act appropriately, notwithstanding his intellectual understanding as to what, but for the depression and paralysis, he needed to do in order to appropriately discharge his responsibilities to the Court and to the Bar.

Based on the evidence presented in mitigation, the Panel recommended that Respondent pay the cost of the proceedings and receive an Admonition. We disagree with the Panel's recommended sanction.

First, Respondent personally appeared before the Subpanel, and presented extensive details concerning a death in the family and other difficulties that impacted upon his personal life. Respondent stated that he had been seeing a medical doctor once a month, but had recently been told not to come back for two months. The medical doctor had placed Respondent on anti-depressants. Respondent stated he was seeing a psychologist weekly for six months, and was now seeing him on an "as needed" basis. Respondent presented no medical evidence or medical testimony to support his claim. A member of the Subpanel even asked Respondent, "I don't understand with the responsibilities you have for your children, why some kind of medical evidence or testimony wasn't brought in here today with regard to your illness?" Respondent replied that "if I place those medical records into evidence before this Panel, I don't know where I will be ten years from now, or fifteen years from now, or five years from now, or next year, and if I were here representing a lawyer, or if it was in another forum and I was representing someone, I would think long and hard

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Respondent was responsible for his trust accounts and those who have access to it, and he was negligent in failing to correct the problem for several months. Although he claims he had no knowledge his wife had changed the address, he should have become aware of the problem when he did not receive the monthly statements from the bank for several months in a row.

about placing medical records into a public record."

We find the Panel lacked sufficient credible evidence to make a positive finding that Respondent suffered from clinical depression such that Respondent's ability to function and practice law was impaired. Respondent violated many Rules of Professional Conduct, and to mitigate the sanction, Respondent should have been required to present actual evidence of his illness. Respondent did not so much as offer an Affidavit from one of his doctors. While we do consider mental illness as a mitigating circumstance, medical evidence of an actual diagnosis must be presented in order to have the issue considered.

Secondly, Respondent has previously been sanctioned by this Court. *In the Matter of Tullis*, 330 S.C. 502, 499 S.E.2d 811 (1998). In that matter, the owners of a video rental store retained Respondent to clear up an outstanding warrant and driver's license problem of one of their employees. Respondent was paid a fee to handle the problem. Respondent contacted the Salvation Army in Florida about the employee's case, and agreed to send them money for probation supervision fees and the fine, together with proof that the employee had performed community service. However, Respondent never sent the money or the documentation. The Florida probation violation warrant against the employee remained outstanding. The Commission received a complaint from Respondent's client. However, Respondent failed to reply to two letters, numerous telephone messages, and a fax from the Attorney to Assist assigned to investigate the matter. This Court found Respondent's conduct warranted a Public Reprimand. In the instant case, Respondent has violated many of the same rules as he did in the first matter. In addition, Respondent has violated several more rules. Respondent's present conduct exceeds the gravity of that reflected in this Court's 1998 opinion where a public reprimand was issued.

CONCLUSION

Based on the foregoing, we suspend Respondent from the practice of law for ninety (90) days for his conduct in this matter. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Paragraph 30 of Rule 413, SCACR. Further,

Respondent is hereby ordered to pay the costs associated with this proceeding.

DEFINITE SUSPENSION.

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 Supreme Court

The State, Respondent,

v.

Angelo Muldrow, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Williamsburg County
M. Duane Shuler, Circuit Court Judge

Opinion No. 25414
Heard November 15, 2001 - Filed February 11, 2002

REVERSED AND REMANDED

Chief Attorney Daniel T. Stacey and Assistant Appellate Defender Katherine Carruth Link, both of S.C. Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy

Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Cecil Kelly Jackson, of Sumter, for respondent.

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ACTING CHIEF JUSTICE MOORE: Petitioner was indicted for the armed robbery of a convenience store. The trial judge denied his motion for a directed verdict. Both armed robbery and the lesser included offense of common law, or strong arm, robbery were submitted to the jury. Petitioner was convicted of armed robbery and sentenced to thirty years. The Court of Appeals affirmed. State v. Muldrow, 340 S.C. 450, 531 S.E.2d 541 (Ct. App. 2000). We reverse and remand for resentencing.

FACTS

At trial, the State produced evidence that petitioner entered the store, asked the clerk for a pack of cigarettes, then handed her a note that read: "Give me all your cash or I'll shoot you." When the clerk asked if he was serious, petitioner responded "yes" and told her to hurry up before he shot her.

On appeal, petitioner argued his motion for a directed verdict should have been granted because there was no evidence he was armed with a deadly weapon or that he used a representation of a deadly weapon as required under S.C. Code Ann. § 16-1-330(A) (Supp. 2000). This section provides:

> (A) A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony. . . .

(emphasis added).

The Court of Appeals's majority construed the underscored portion of the statute and held that the phrase "representation of a deadly weapon" includes "words that convey to a victim the thought that a robber possesses a deadly weapon." Accordingly, it concluded the note saying "I'll shoot you" was sufficient evidence to submit the charge of armed robbery to the jury.

DISCUSSION

Under § 16-11-330(A), the State may prove armed robbery by establishing the commission of a robbery and either one of two additional elements: (1) that the robber was armed with a deadly weapon or (2) that the robber alleged he was armed with a deadly weapon, either by action or words, while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. *See* State v. Jones, 342 S.C. 248, 536 S.E.2d 396 (Ct. App. 2000). The second prong of this statute was added by amendment in 1996.[1]

Under the first prong of § 16-11-330(A), the presence of a weapon may be inferred from circumstantial evidence. *See* State v. Williams, 266 S.C. 325, 223 S.E. 2d 38 (1976). We have never had occasion, however, to consider whether words alone are sufficient to establish the element of a deadly weapon. Other courts have held words unaccompanied by any corroborating action are not sufficient. *See, e.g.,* People v. Parker, 339 N.W.2d 455 (Mich. 1983); People v. Jenkins, 461 N.Y.S.2d 699 (1983); State v. Scherz, 27 P.3d 252 (Wash. App. 2001). We concur with this general rule and hold words alone are not sufficient under the first prong of the statute.

The question then becomes whether words alone are sufficient under

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[1]1996 S.C. Act No. 362, § 1, effective May 29, 1996.

the recently added second prong of § 16-11-330(A) as held by the Court of Appeals. The resolution of this issue turns on the meaning of the phrase "while using a representation of a deadly weapon."

Under our general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Grooms, 343 S.C. 248, 540 S.E.2d 99 (2000). Further, we are bound to construe a penal statute strictly against the State and in favor of the defendant. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001).

If the phrase " representation of a deadly weapon" includes the use of words, as the Court of Appeals held, this portion of the statute would read: "while alleging, either by action or words, he was armed while using words conveying the thought that he has a deadly weapon." This construction creates a redundancy which essentially eliminates the additional element of a "representation" of a weapon, thus improperly expanding the statute's operation to embrace conduct not clearly within its terms. Had the legislature intended armed robbery to include simply an allegation of being armed, it would have stopped after the phrase "while alleging, either by action or words, he was armed."[2] A plain reading of the statute indicates words alone are not sufficient under the second prong to support a conviction for armed robbery.

Further, we find it was not the intent of the legislature in adding the second prong of § 16-11-330(A) to preclude the need for evidence corroborating the allegation of being armed. Before the second prong was

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[2]*Cf.* Ala. Code § 13A-8-41 (1975) ("any verbal or other representation by the defendant that he is then and there so armed is prima facie evidence" of first degree robbery); Colo. R.S.A. § 18-4-302 (1999) (possesses an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or represents verbally or otherwise that he is then and there so armed).

added, evidence the object used in a robbery was in actuality not a deadly weapon created a jury issue and entitled the defendant to a charge on the lesser included offense of strong arm robbery. State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996); *see also* State v. Tasco, 292 S.C. 270, 356 S.E.2d 117 (1987). The legislature's amendment to § 16-11-330(A) simply ensures that the use of a object which is in fact not a deadly weapon will support a conviction for armed robbery. Under this prong, the State must still show evidence corroborating the allegation of being armed *i.e.,* the use of a physical representation of a deadly weapon, to establish armed robbery.

In conclusion, the Court of Appeals erred in finding the evidence in this case meets all the elements of armed robbery under § 16-11-330(A) since there is no evidence of a deadly weapon or a physical representation of a deadly weapon. Accordingly, the Court of Appeals's decision affirming petitioner's conviction for armed robbery is reversed.

We find the evidence is legally sufficient, however, to sustain a conviction on the lesser offense of strong arm robbery. Armed robbery includes all the elements of strong arm robbery. State v. Keith, 283 S.C. 597, 325 S.E.2d 325 (1985) (armed robbery is commission of common law robbery while armed with a deadly weapon). Our finding that the evidence is insufficient in this case goes only to the element requiring the use of a deadly weapon, an element not relevant to the lesser offense of strong arm robbery. Where the evidence is insufficient to sustain a conviction on the greater offense but is legally sufficient to support a conviction on the lesser, the Court on appeal may direct the entry of judgment on the lesser offense. *See, e.g.,* Caton v. State, 479 S.W.2d 537 (Ark. 1972); Till v. People, 581 P.2d 299 (Colo. 1978); State v. Scielzo, 460 A.2d 951 (Conn. 1983); People v. Jones, 404 N.Y.S.2d 622 (1978); State v. Nulph, 572 P.2d 642 (Or. App. 1977); State v. Janisch, 290 N.W.2d 473 (S.D. 1980); State v. Tutton, 875 S.W.2d 295 (Tenn. Crim. App. 1994).

Accordingly, the case is remanded to the trial court for entry of judgment on the charge of strong arm robbery and sentencing on that charge.

REVERSED AND REMANDED.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice George T. Gregory, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

William C. McKennedy, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Greenville County
Joseph J. Watson, Circuit Court Judge

Opinion No. 25415
Heard November 28, 2001 - Filed February 11, 2002

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant

Deputy Attorney General Donald J. Zelenka, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General Tracey C. Green, all of Columbia; and Solicitor Robert M. Ariail of Greenville, all , for respondent.

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CHIEF JUSTICE TOAL: William C. McKennedy[1] ("Appellant") appeals his conviction for distribution of crack cocaine. We affirm Appellant's conviction.

Factual/Procedural Background

Appellant was indicted by the Greenville County Grand Jury for distributing crack cocaine to an undercover officer. The police captured the March 17, 1998, sale on videotape. The case was set for trial on February 3, 1999. Appellant had other charges pending, and he and his attorney initially believed he was going to be tried for a March 3, 1998, sale of drugs, also captured on video surveillance, at the February 3, 1999, trial. Appellant's attorney claimed he was not notified Appellant would be tried for the March 17, 1998, incident until January 6, 1999. On that day, the State hand-delivered discovery to Appellant's counsel and made clear Appellant would be tried for the March 17, 1998, offense on the February 3, 1999, trial date.

At trial, Appellant's counsel moved for a continuance on grounds Appellant had not been able to determine whether there were any witnesses that could testify on his behalf or as an alibi due to his incarceration. Appellant's counsel did not indicate why he could not have investigated this on Appellant's behalf. Appellant's counsel claimed they were prepared on the March 3rd charge, but had not had time to prepare adequately for trial on the March 17th

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[1]In a hand written document Appellant submitted to the Court of Appeals, Appellant spelled his own name McKinnedy, not McKennedy, as it is spelled in the briefs and the record.

charge. In response, the State noted that the March 17th charge had been placed on the docket four to five times previously. The trial court then denied Appellant's motion for a continuance.

Appellant's counsel next moved to suppress any identification of Appellant as the individual on the videotape. After holding an *in camera* hearing, the trial judge denied this motion as well. At this point, Appellant's counsel announced Appellant had decided to plead guilty to the charge. After thoroughly questioning Appellant, the trial judge accepted Appellant's plea and sentenced him to eighteen years imprisonment.

Assistant Appellate Defender, Aileen Clare, was assigned to represent Appellant on appeal. Finding the record failed to demonstrate any preserved or legally substantial issues for appeal, Ms. Clare filed a petition to be relieved as counsel and a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). In the *Anders* brief, Ms. Clare argued the trial court abused its discretion in denying Appellant's pre-trial motion for a continuance. Appellant filed a *pro se* response to Ms. Clare's *Anders* brief, identifying several other issues he believed were significant.

The Court of Appeals dismissed Appellant's appeal pursuant to *Anders* and granted Ms. Clare's petition to be dismissed as counsel. Despite being relieved of her obligation to represent Appellant, Ms. Clare filed a Petition for Rehearing based on a factual discrepancy in the Court of Appeals' order: the order stated Appellant was sentenced to seven and one-half years imprisonment, as opposed to eighteen years. The Court of Appeals denied the Petition for Rehearing and substituted a factually correct opinion dismissing Appellant's appeal and granting Ms. Clare's petition for removal.

In an effort to enable Appellant to pursue federal habeas relief, Ms. Clare filed a petition for writ of certiorari in this Court on Appellant's behalf. The issues before this Court are:

I. Is Appellant required to seek discretionary review by this Court in order to exhaust all state remedies, thereby preserving

his ability to seek federal habeas relief?

II. Did the trial court err in denying Appellant's motion for a continuance?

LAW/ANALYSIS

I. Exhaustion of State Remedies

Both Appellant and the State argue that exhaustion of state remedies for the purpose of federal habeas review requires Appellant to petition for writ of certiorari to this Court. We disagree. The State argues further that the Court of Appeals' dismissal of Appellant's appeal pursuant to Ms. Clare's *Anders* brief and his *pro se* response does not constitute presentation of the issues as required for federal habeas relief. We disagree.

A. Exhaustion of State Remedies

Both parties argue Appellant must at least *seek* discretionary review in this Court in order to exhaust Appellant's state remedies for purposes of federal habeas. It is undisputed that federal law requires state prisoners to exhaust all available state remedies before seeking federal relief. 28 U.S.C.A. § 2254(b) (1992 & Supp. 2001).

The Supreme Court addressed the exhaustion of state remedies in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). In *O'Sullivan,* the Supreme Court restated the general federal rule requiring exhaustion of state remedies, explaining the purpose of exhaustion was to allow state courts an opportunity to act on defendant's claims before he presents those claims in federal court. *O'Sullivan.* In *O'Sullivan*, the Supreme Court recognized the recurring question raised by the federal exhaustion rule: "What remedies must a habeas petitioner invoke to satisfy the federal exhaustion requirement?" *Id.* at 842, 119 S. Ct. at 1731, 144 L. Ed. 2d at 8. In answering this question, the Supreme Court held state prisoners were required "to file petitions for discretionary review when that review is part of the ordinary

appellate procedure in the State." *Id.* at 847, 119 S. Ct. at 1733, 144 L. Ed. 2d at 11.

The Supreme Court's holding, however, raises another question: "What qualifies as 'the ordinary appellate procedure' in a given state?" In our State, this Court issued an order defining exhaustion of state remedies:

> We therefore declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error.

In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief, 321 S.C. 563, 563, 471 S.E.2d 454, 454 (1990). The United States Supreme Court made note of this Court's order in its *O'Sullivan* opinion, commenting that the increased burden on state courts likely to result from its holding may be unwelcome in some state courts. *O'Sullivan.* The Court appeared to recognize the State's ability to define the procedure for exhausting remedies within the State, "In this regard, we note nothing in our decision today requires the exhaustion of any state remedy when a State has provided that that remedy is unavailable." *Id.* at 847, 119 S. Ct. at 1735, 144 L. Ed. 2d at 11. The Court clarified that the exhaustion doctrine "turns on an inquiry into what procedures are 'available' under *state* law" and concluded the doctrine did not preclude federal courts from adhering to a state law or rule making a given procedure unavailable. *Id.* at 847-48, 119 S. Ct. at 1734, 144 L. Ed. 2d at 11 (emphasis added).

In his concurring opinion, Justice Souter elaborated on this point, stating more directly that a State can determine what constitutes exhaustion of its own remedies for purposes of federal habeas relief. In Justice Souter's words, "a state prisoner is likewise free to skip a procedure . . . so long as the State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion." *Id.* at 850, 119

S. Ct. at 1735, 144 L. Ed. 2d at 12 (Souter, J., concurring). The majority opinion in *O'Sullivan* made clear that they did not intend to require exhaustion of any State remedy when the State has declared that remedy unavailable. *Id.* We believe our 1990 order amounts to such a declaration, and, therefore, that *O'Sullivan* does not prevent a prisoner from filing for habeas relief immediately after an adverse decision from this state's Court of Appeals, without first seeking discretionary review by this Court.

The *O'Sullivan* opinion arose out of the Illinois state court system. Under the Illinois appellate system, review by the Supreme Court in most criminal cases is within the Court's "sound discretion." *O'Sullivan* (quoting Ill. Sup. Ct. Rule 315). The Illinois Rules indicate, however, that the discretion of Illinois' Supreme Court is very broad, and contain no definition of what constitutes an exhaustion of Illinois' remedies. *Id.* Under these facts, the United States Supreme Court held "the creation of a discretionary review system does not, *without more*, make review in the Illinois Supreme Court unavailable" for purposes of the doctrine of exhaustion. *O'Sullivan,* 526 U.S. at 848, 119 S. Ct. at 1734, 144 L. Ed. 2d at 11[2] (emphasis added).

The Ninth Circuit addressed the issue that this Court is now facing in *Swoopes v. Sublett*, 196 F.3d 1008 (9th Cir. 1999). In *Swoopes*, an Arizona state prisoner appealed his conviction to the Arizona Court of Appeals and his convictions were affirmed. *Swoopes.* In Arizona, the automatic right to appeal

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[2]In *O'Sullivan*, the Petitioner, Boerckel, was convicted in Illinois state court and then appealed to the Appellate Court of Illinois. After his appeal was denied and his convictions affirmed, Boerckel filed for leave to appeal to the Illinois Supreme Court, a court of discretionary review. The Supreme Court denied his petition and Boerckel filed a petition for habeas relief in the federal district court. Boerckel raised six issues to the district court, but he had not raised all six of those issues in his petition for review in the Illinois Supreme Court. As a result, the District Court found that Boerckel had procedurally defaulted on three of his six claims because he had not raised them in his final petition to the Illinois Supreme Court. *O'Sullivan.*

is limited to Arizona's Court of Appeals, except in capital cases or when a life sentence is imposed. *Id.* (citing Ariz. Rev. Stat. §§ 12-120.21(A)(1); 12-120.24; 13-4031). In all other cases, the Arizona Supreme Court has discretion to grant review. *Id.* (citing Ariz. Rev. Stat. 12-120.24). Based on the Arizona statute and several Arizona opinions supporting the statute, the Ninth Circuit held post-conviction review by the Arizona Supreme Court to be a remedy that is "unavailable" within the meaning of *O'Sullivan*. *Swoopes*, 196 F.3d at 1010. Honoring the Arizona statute, the Ninth Circuit held that "claims of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them." *Id.*

We believe the Ninth Circuit applied the correct analysis and arrived at the correct decision under *O'Sullivan.* Our State has identified the petition for discretionary review to this Court in criminal and post-conviction cases as *outside* South Carolina's standard review process. In our 1990 order, this Court stated that petitions for rehearing and certiorari following an adverse Court of Appeals' decision are not required in order to exhaust all available state remedies. *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases.* The 1990 order qualifies as a plain statement that discretionary review "need not be sought for exhaustion." *O'Sullivan*, 526 U.S. at 850, 119 S. Ct. at 1735, 144 L. Ed. 2d at 12 (Souter, J., concurring).

We reiterate the substance of the 1990 order, *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, and hold it effectively places discretionary review by this Court *outside* of South Carolina's "ordinary appellate procedure" pursuant to *O'Sullivan*. *O'Sullivan.* at 847, 119 S. Ct. at 1733, 144 L. Ed. 2d at 11.

B. *Anders* Brief

The State argues that articulating an issue in an *Anders* brief does not constitute "fair presentation" of that issue to the appellate court necessary to support habeas review. We disagree.

In *Anders v. California*, the United States Supreme Court announced the

procedure an appointed attorney should follow if that attorney believes the client's appeal is frivolous and without merit. 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). The Supreme Court held the attorney could petition for permission to withdraw from the case, but that the petition for withdrawal must be accompanied by a brief "referring to anything in the record that might arguably support the appeal." *Id.* at 744, 87 S. Ct. at 1400, 18 L. Ed. 2d at 498. Under *Anders,* the defendant must be given time to respond and to raise any additional points after his attorney submits the *Anders* brief. *Id.* The court then is obligated to conduct a "full examination" of the record to determine whether the appeal is "wholly frivolous." *Id.* According to *Anders,* if the reviewing court finds the appeal is frivolous, "it may grant counsel's request to withdraw and dismiss the appeal *insofar as federal requirements are concerned*, or proceed to a decision on the merits, if state law so requires." *Id.* at 744, 87 S. Ct. at 1400, 18 L. Ed. 2d at 498 (emphasis added).

The State argues that a dismissal by the Court of Appeals does not qualify as a decision on the merits for purposes of federal habeas review, insisting that the dismissal is based on a finding of frivolousness.[3] The State asserts that arguments presented in an *Anders* brief are not raised for consideration on the merits and are raised merely so the reviewing court may determine if the attorney properly reviewed the case before concluding the appeal was frivolous.

In this particular case, it is clear the Court of Appeals reached the merits in its dismissal. As discussed, according to *Anders*, the reviewing court is obligated to make a full examination of the proceedings on its own. *Anders.* After such an examination, if the reviewing court agrees with the attorney, it may dismiss the appeal or proceed to a decision on the merits. *Id.* On the other hand, if the court disagrees with the attorney's analysis of the appeal, it must afford the defendant "the assistance of counsel to argue the appeal." *Id.* at 744,

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[3]While this Court cannot determine what constitutes a decision "on the merits" under federal law, this Court can determine, for the purposes of state law, whether or not a dismissal pursuant to an *Anders* brief is a "decision on the merits."

87 S. Ct. 1400, 18 L. Ed. 2d at 498. The purpose of filing a brief under *Anders* is to ensure the *merits* of the appeal are not overlooked. The court has to conclude independently, regardless of counsel's conclusion, whether or not the appeal has merit before it can dismiss the appeal.

In the case at hand, Appellant's counsel filed an *Anders* brief with the Court of Appeals and the Appellant filed a *pro se* response, raising the issues he considered important. In the *Anders* brief, Appellant's counsel argued the trial court committed reversible error by denying Appellant's motion for a continuance under the standard articulated by this Court in *State v. Williams*, 305 S.C. 116, 406 S.E.2d 357 (1991). After reviewing both documents and the record as a whole, the Court of Appeals dismissed the appeal pursuant to *Anders* and *Williams*. The Court of Appeals' citation to *Williams* indicates, at the very least, that it reviewed the merits of the argument Appellant's counsel put forth in the *Anders* brief: whether the trial court erred in denying Appellant's motion for a continuance.

As Appellant has not yet filed any federal habeas petition, we do not know what arguments he will choose to raise. The federal court ultimately will determine whether any issues raised to the Court of Appeals were properly presented for purposes of granting federal habeas relief. To guide them, however, and for purposes of state law, we find the Court of Appeals' dismissal in this case was on the merits.

II. Denial of Continuance

Appellant argues the trial court committed reversible error in denying his pre-trial motion for a continuance, and that he should be granted a new trial. We disagree.

It is well-settled in South Carolina that a trial court's denial of a motion for continuance "will not be disturbed absent a clear abuse of discretion." *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996) (citing *State v. Tanner*, 299 S.C. 459, 385 S.E.2d 832 (1989)). In fact, reversals of a continuance are as "'rare as the proverbial hens' teeth.'" *Williams*, 321 S.C. at 459, 469 S.E.2d at

51 (quoting *State v. Litchfield,* 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957)). This Court has repeatedly upheld denials of motions for continuances where there is no showing that any other evidence on behalf of the defendant could have been introduced, or that any other points could have been raised, if more time had been granted to prepare for trial. *Williams* (citing *State v. Squires*, 248 S.C. 239, 149 S.E.2d 601 (1996)). Furthermore, this Court has held that guilty pleas act as a waiver of all non-jurisdictional defects and defenses, including claims of constitutional violations. *Whetsell v. State*, 276 S.C. 295, 277 S.E.2d 891 (1981).

In the case at hand, Appellant pled guilty, and, therefore, waived his right to now raise the denial of his continuance on appeal under *Whetsell*. Regardless, Appellant has made no showing that any evidence could have been introduced if he had more time to prepare for trial. Appellant was taped by the police selling crack to an undercover police officer and does not challenge his identification on appeal. His girlfriend was present at trial and could not remember what she or the Appellant had done on the day in question. Appellant and his attorney had almost one month to prepare for trial. Appellant argued he may have been able to find some witnesses to testify on his behalf if he had not been confined in prison before trial, referring to a neighbor he wanted to interview. He did not name the neighbor, however, or indicate how the neighbor may be able to help him.

This is not a sufficient showing to find an abuse of discretion by the trial judge. *See State v. Tanner* (reversing trial court's denial of motion for continuance when police possessed possible exculpatory evidence which the Solicitor told the defendant had been lost and defendant had not had the opportunity to analyze). Appellant was captured on video tape selling crack, and has made no showing that any new or exculpatory evidence would have been likely to surface if more time was granted.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the Court of Appeals and hold this Court's 1990 order, *In re Exhaustion of State Remedies in Criminal and*

Post-Conviction Relief, 321 S.C. 563, 563, 471 S.E.2d 454, 454 (1990), establishes that seeking discretionary review in this Court is outside of South Carolina's ordinary appellate procedure and, therefore, unnecessary for purposes of exhaustion of this state remedies under *O'Sullivan*.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Dorothy Smith,

Appellant.

Appeal From Georgetown
Howard P. King, Circuit Court Judge

Opinion No. 3440
Heard January 10, 2002 - Filed February 4, 2002

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III and Assistant Appellate Defender Eleanor Cleary, of the South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan and Senior Assistant Attorney General Charles H. Richardson, all of Columbia; and Solicitor J.

Gregory Hembree, of Conway, for respondent.

ANDERSON, J.: Dorothy Smith ("Appellant") appeals her conviction for misprision of a felony, arguing the trial court erred in denying her motion for directed verdict. We affirm.

FACTS/PROCEDURAL BACKGROUND

Lena Mae Grier was found dead at approximately 2:30 p.m. on December 30, 1996. She was the victim of a shooting during a robbery of her Georgetown County convenience store.

Several people saw Grier in the hours before her death. Grier's daughter, Patsy Lewis, lived about a half-mile from the store. Lewis took lunch to Grier around 12:00 p.m. and stayed to help her with the lunchtime rush because her mother was working alone. There were no customers in the store when Lewis left at 1:30 p.m.

Mike Simmons, Grier's friend and pastor, arrived at the store shortly after Lewis departed and visited with Grier until 2:15 p.m. While Simmons was there, a man — whom Simmons identified as Marion Smith ("Marion"), Appellant's husband — entered the store and bought cheese and a few other items. Simmons left Grier shortly after the man exited the store. As Simmons was leaving, he held the door for a female customer entering the store. At that time, Simmons noticed the man he had seen in the store was parked outside in a blue station wagon. Simmons additionally observed a woman — whom Simmons identified as Appellant — seated in the station wagon's front passenger seat.

Clementine Verner, a longtime customer of Grier's, was the woman entering the store as Simmons left. Verner had noticed the blue station wagon with the two occupants when she arrived. She stayed approximately 10 to 15 minutes in the store, conversing with Grier and purchasing a few items. When Verner left, there were no customers in the store; however, she saw the station wagon and its occupants were still in the parking lot. According to Verner, the

pair was eating crackers and what appeared to be cheese. Verner recognized Appellant and Marion as persons she had seen at the store occasionally, although she did not know them personally.

Grier's body was found around 2:30 p.m. by her son-in-law, Thomas Lewis. The cash register and Grier's pocketbook were missing from the store. Following the robbery and murder, Simmons reported what he had seen while at the store to Georgetown County Sheriff's Department investigators. He also shared his observations with Lewis.

The following morning, Lewis prepared her home for the reception of family and friends. The first people to arrive were Appellant and Marion. Lewis did not know either of them. Appellant explained their presence at Lewis' home by relating that she and Marion had been at Grier's store at 12:30 the day before and, upon hearing of Grier's death, had come to express their condolences.

Lewis had been in the store from 12:00 to 1:30 p.m. the previous day and did not remember seeing either Appellant or Marion. When Lewis asked Appellant if she was sure about the time, Appellant averred she was certain. Lewis recalled Simmons' description of the people he had seen while at Grier's store. Lewis excused herself and had Simmons paged with an urgent message for him to come to her home immediately.

Simmons rushed to the residence after getting the message. Upon entering the home, Simmons instantly recognized the couple as the people he had seen at Grier's store. He left the room after a moment of polite conversation and telephoned the sheriff's department. Investigator Robert Medlin instructed Simmons to ask Appellant and Marion to drive over to Grier's store, where they would be met by Medlin and Carter Weaver, a South Carolina Law Enforcement Division agent assisting in the investigation.

Appellant and Marion complied with Simmons' request and proceeded to the store. Once there, the couple was joined by Medlin and Weaver. After a brief conversation, Medlin and Weaver asked the two to come with them to a nearby sheriff's department substation. Appellant and Marion agreed.

Appellant and Marion were interviewed separately at the substation. They were not suspects; instead, the police treated the two as witnesses. Investigators queried both about their trip to Grier's store. At Appellant's trial, Agent Weaver reported what Appellant said in response:

> [Appellant] related to us that she was not aware of the time when they were actually at the store and she stated that they had earlier in that day gone to Marion, South Carolina, to pay some car taxes and had come back through to [Grier's] store to get – – for the purpose of getting some cheese and some other miscellaneous food and that they all – – [Marion] went in and got the cheese. [Appellant] stayed in the car. [Marion] came back to the car, went back in and got some cigarettes and then they left.

Appellant made no further statements nor gave investigators any other indication she had witnessed the robbery or murder. The police let the couple go home.

After comparing Appellant's account of the events relating to the trip to Grier's store with that of her husband's, investigators obtained and executed a search warrant of the couple's home. Appellant and Marion were considered suspects at this point. Appellant accompanied Investigator Medlin and Agent Weaver back to the sheriff's department substation. Once there, the investigators mirandized Appellant and asked her to make a statement. Appellant waived her rights and gave a statement. Appellant admitted that when her husband made his second trip into Grier's store, she heard a "pow" and saw Marion running out of the store carrying a cash register and a pocketbook.

The interview at the substation was not recorded by either audio or video device. Appellant was later transported to the sheriff's department headquarters, where she gave the same statement during a taped interview.

Marion was indicted for the robbery and Grier's murder. He was later

acquitted on all charges.

Appellant was initially indicted for accessory after the fact. The Georgetown County Grand Jury later returned an indictment against her for misprision of a felony. At trial, the circuit judge directed a verdict for Appellant concerning the accessory charge.[1] The judge, however, denied Appellant's directed verdict motion for the misprision of a felony count. Appellant was convicted and sentenced to eight years imprisonment. Appellant appeals.

STANDARD OF REVIEW

Our Supreme Court's recent decision in State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001), edifies regarding the proper scope of review of a trial judge's denial of a motion for directed verdict in the criminal trial setting:

> A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. State v. Burdette, 335 S.C. 34, 515 S.E.2d

[1] In State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998), our Supreme Court held absence is not an essential element of the offense of accessory after the fact, but ruled retroactive application of the new rule altering the elements of the offense would result in a Due Process Clause violation. The Court noted that while ex post facto violations do not apply to actions of the judicial branch, judicial decisions applied retroactively can violate the Due Process Clause and operate precisely like an ex post facto law. Id. at 27-28 & 28 n.4, 495 S.E.2d at 205 & 205 n.4. Because Appellant's offense occurred in 1996 — before the change in the law — the trial court directed a verdict on accessory after the fact because absence from the scene was a necessary element under the pre-Collins law.

> 525 (1999); State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000).

Id. at 97, 544 S.E.2d at 36.

LAW/ANALYSIS

On appeal, Appellant contends the Circuit Court erred in denying her motion for directed verdict on the charge of misprision of a felony. Specifically, she contends there was no direct or substantial circumstantial evidence to support the charge as a matter of law because she was protected by the privilege against self-incrimination. We disagree.

In State v. Carson, 274 S.C. 316, 262 S.E.2d 918 (1980), the Supreme Court expressly stated the crime of misprision of a felony is a cognizable offense in South Carolina jurisprudence. The Carson Court defined "misprision of a felony" as:

> [A] criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with, or subsequent assistance of, him as will make the concealer an accessory before or after the fact.

Id. at 318, 262 S.E.2d at 920 (citations omitted).

The Court further stated:

> Under the federal and state statutes embodying the offense, mere silence or failure to come forward is not enough to constitute misprision; there must be some positive act of concealment of the felony.

Id. (citation omitted).

"While it is true the privilege [against self-incrimination] sometimes works to bar prosecution for misprision, this is only when the statements concealed would incriminate the defendant as an accessory or principal in the protected felony." Id. at 319, 262 S.E.2d at 920 (citations omitted).

Inferentially, there are two elements of the offense:

(1) knowledge; and

(2) concealment.

Regarding the element of knowledge:

> The accused must know that a felony has been committed by someone else. This knowledge is provable as in other criminal cases, i.e., by asking whether a reasonable man with the same facts and information before him would have known that a crime had been committed. If the answer is in the affirmative and the serious crime a felony, the proof of knowledge is sufficient.

Pope v. State, 382 A.2d 880, 885 (Md. Ct. Spec. App. 1978), aff'd in part, rev'd in part, 396 A.2d 1054 (Md. 1979) (reversing appellant's conviction for misprision of a felony on the basis Maryland no longer recognizes this common-law offense while noting the state legislature could enact it as a statutory offense).

Concerning the element of concealment:

> The accused must have concealed or kept secret his knowledge. Evidence must show that he failed or refused to perform his duty when there was a reasonable opportunity available to him to disclose to proper authorities all material facts known to

> him relative to the offense except when the Fifth Amendment eliminates the duty to disclose such information.

Id. (citations omitted); see also In re Morris, 793 P.2d 544, 546 n.1 (Ariz. 1990) ("The elements of the crime of misprision of felony have been stated to be: (1) a felony was committed, (2) defendant had knowledge of the felony, (3) defendant failed to notify authorities and (4) defendant took an affirmative step to conceal the crime.… Mere passive failure to report a felony has been held insufficient to sustain a conviction.") (citations omitted).

Although the issue was not raised at the trial level or in this venue, we note there is no requirement that there be a conviction of the underlying felony as a prerequisite to convict for misprision of a felony. Pope, 382 A.2d at 892 n.6. It is sufficient if the trier of fact determines that a felony was committed, of which the accused had knowledge, and that an opportunity to disclose the crime's commission to the police was presented to the accused. Id.

In the instant case, the felonies Appellant was charged with concealing and failing to disclose were the robbery and murder of Grier. At trial, the circuit judge denied her motion for a directed verdict on the misprision charge, stating:

> [I]t appears that this case falls right within the definition of a misprision of a felony as being criminal neglect of bringing an offender to justice after its commission, but without such previous concert with or subsequent assistance to him as will make the concealer an accessory after or before the fact. I think that there is evidence in the record, actions on the part of this Defendant constituting criminal neglect in bringing the offender to justice after its commission. Those acts could be not only the misstatements to the officers when she was being questioned, but it could be the misstatements to Mrs. Lewis earlier that morning. So there are several things in there that could be criminal neglect in bringing the offender to justice. This case falls very squarely within the definition of misprision of a felony, does not fall within the definition of accessory after the fact when applying the pre State

> versus Collins law. So … the motion for directed verdict as to accessory after the fact is granted. The motion for directed verdict as to misprision of a felony is denied.

Appellant contends her visit to the victim's daughter and her initial statement to the police formed the basis for her prosecution for misprision of a felony. Appellant asserts she "was clearly a suspect in the underlying offense at the time she was interrogated by the police. Accordingly, a prosecution for misprision cannot be based on her refusal to incriminate herself during interrogation. Furthermore, her comments to the victim's daughter did not divert the investigation of the crimes, but ultimately led directly to the arrest of appellant and her husband."

We agree with the trial court's reasoning in this regard. Although a private citizen has no duty to come forward and report knowledge of a crime, we find the holding in Carson clearly states that a person may not conceal his or her knowledge upon direct questioning by authorities so as to mislead them during their investigation of the crime. Concealment under these circumstances amounts to misprision of a felony. See Jack Wenik, Note, Forcing Bystander to Get Involved: Case for Statute Requiring Witnesses to Report Crime, 94 Yale L.J. 1787, 1793 (1985) ("The majority view … was that common law misprision of felony at the state level consisted of a failure to report a crime to the authorities plus an additional element – – an evil intent or some positive act."). (citing Carson).

Here, Appellant intentionally misled the police during their investigation of Grier's murder and concealed her knowledge of the crime. According to Agent Weaver, when Appellant spoke with investigators during her first interview with them at the substation, she said nothing to indicate any untoward activity happened at the store, although she was given reasonable opportunities to tell them what she knew.

Under the law at that time, Appellant could not have been convicted as an accessory after the fact due to her presence at the scene. Additionally, she was not accountable as a principal. Further, during her first interview with police, she was questioned only as a witness. Appellant was not entitled to a directed

verdict on this basis. See Carson, 274 S.C. at 319, 262 S.E.2d at 920 (stating "[w]hile it is true the privilege [against self-incrimination] sometimes works to bar prosecution for misprision, this is only when the statements concealed would incriminate the defendant as an accessory or principal in the protected felony," and the defendant's prosecution for misprision of a felony was proper where the defendant had concealed important information when police first questioned him which, when later disclosed, fully exculpated him from the crimes he witnessed); see also Pope, 382 A.2d at 893 ("That appellant ultimately admitted to the authorities the following day what may have actually occurred does not relieve her from the abrogation of her responsibility to have reported the crime when there were 'reasonable opportunities available.'"). We find the trial court committed no error in denying Appellant's directed verdict motion and submitting the misprision of a felony offense to the jury.

CONCLUSION

For the foregoing reasons, Appellant's conviction and sentence for misprision of a felony are

AFFIRMED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Howard Johnson,

Appellant.

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 3441
Submitted November 14, 2001 - Filed February 4, 2002

AFFIRMED

Assistant Appellate Defender Robert M. Pachak, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh and Assistant Deputy Attorney General Charles H. Richardson, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for respondent.

GOOLSBY, J.: Howard Johnson appeals his conviction for second-degree burglary. We affirm.[1]

On March 2, 2000, Officer H. B. Godfrey, with the Inman Police Department, responded to a burglar alarm at Fast Phil's, a video poker establishment. When Godfrey arrived at the scene, he noticed glass from the front door broken out on the sidewalk in front of the store, indicating someone had tried to exit rather than enter the building. Upon entering the store, Godfrey noticed a ceiling tile in the restroom that had been pushed up where someone could have hidden.

The store manager arrived at the scene about twenty minutes later. After taking a quick look, she noticed that rolled coins, cigarettes, and cigars totaling between $40 and $50 were missing.

Godfrey later watched a security video tape of the premises taken during the time in question and recognized Johnson in the tape. The videotape segment that Godfrey viewed first showed Johnson crawling out from the back of the store after it had closed, scooting across the floor with his jacket over his head, taking items from behind the counter, and finally kicking the front door to leave with coins and cigarettes dropping from his hands. Godfrey then had the store manager rewind the tape so he could view a segment taken a few hours before the store had closed. That segment showed Johnson coming to the register, either to purchase something or to get change, and going back to the poker machines. In both segments of the tape, Johnson was wearing the same clothing. Johnson did not work at Fast Phil's and did not have permission to be there after normal business hours. Employees were aware Johnson had been in the store shortly before it closed, but were unable to find him when they were locking up.

Later that morning, Godfrey procured warrants for Johnson's arrest, which were executed on Johnson by Officer Charles Peace of the Inman Police

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

Department and Officer Detrinka, the county warrant officer, at the residence of Johnson's mother. While executing the warrants, Peace noticed a stack of about 40 or 50 phone cards.[2]

Johnson was indicted for second-degree burglary and petit larceny during the November 2000 term of the Spartanburg County Grand Jury. The case proceeded to trial later that month, and the jury found Johnson guilty as charged. In addition to his sentence on the larceny charge, Johnson received a sentence of life imprisonment on the burglary conviction. Johnson appeals only the conviction and sentence for second-degree burglary.

The sole issue in this appeal is whether the State presented sufficient evidence at trial to prove Johnson had entered Fast Phil's without consent. Johnson argues the trial court should have directed a verdict of acquittal on the second-degree burglary charge because the only possible inference from the evidence presented at trial was that he entered the store while it was open to the general public. We disagree.

South Carolina Code section 16-11-312, under which Johnson was charged, provides in pertinent part as follows:

> (B) 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:
>
> . . .
>
> (2) The burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or

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[2] The store manager testified that she noticed the cards were not in their usual place when she arrived at the scene; however, because the cards were useless until validated, she did not tell Godfrey they were missing.

(3) The entering or remaining occurs in the nighttime.[3]

There appear to be no published decisions from this State addressing the question of whether one who has remained after working hours in a business establishment and then commits a crime within the establishment can be charged with burglary if the initial entry was lawful. Nevertheless, there is ample authority to hold that, for the purpose of proving a burglary of a business establishment, an entry without consent should not be limited to those situations in which the prosecution shows the accused physically crossed the threshold of the building after the establishment had closed and the accused could no longer be considered an invitee.[4]

We hold the State presented sufficient evidence to have the jury determine whether or not an unlawful entry had taken place. Although Johnson may have initially "entered" the store when it was open to the public, he then concealed himself in the ceiling area of the building, where he remained after the store had closed. Without question, Johnson was no longer an invitee of Fast Phil's when he remained in the store after it had closed and committed other unlawful acts in the building.

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[3] S.C. Code Ann. §16-11-312 (1985 and Supp. 2000) (emphasis added). The indictment alleged Johnson "had two prior convictions for Burglary and Housebreaking, and the defendant did enter in the nighttime."

[4] See North Carolina v. Speller, 259 S.E.2d 784, 785 (N.C. Ct. App. 1979) (upholding a conviction for burglary notwithstanding that the defendant had entered the building during regular business, noting his "[g]oing into an area not open to the public and remaining hidden there past closing hours made the entry through the front door open for business unlawful"); 12A C.J.S. Burglary § 25, at 207 (1980) ("Exceeding an invitation given as a business invitee, and staying in a business building after the business is closed, in an area unopen to the public, renders the entry ab initio without consent within the meaning of a burglary statute, and constitutes a trespass for the purpose of a burglary charge.").

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.