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M E D I A R E L E A S E

February 8, 2008

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 his/her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

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The Commission will not accept applications after **12:00 Noon on Monday, March 10, 2008.**

A vacancy will exist in the office currently held by The Honorable John W. Kittredge, Judge of the Court of Appeals, Seat 3. The successor will fill the unexpired term of that office, which will expire on June 30, 2013.

A vacancy will exist in the office currently held by The Honorable Ralph King Anderson, Jr., Judge of the Court of Appeals, Seat 9, upon Judge Anderson's retirement on or before December 31, 2008. The successor will fill the unexpired term of that office, which will expire on June 30, 2010, and the subsequent full term which will expire on June 30, 2016.

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

* * *

The Supreme Court of South Carolina

In the Matter of Elizabeth T. Galante, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on January 4, 2005, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a petition dated January 2, 2008, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Elizabeth T. Galante shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

February 8, 2008

The Supreme Court of South Carolina

In the Matter of Jacqueline Rose Medina, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 10, 1999, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 22, 2008, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Jacqueline R. Medina shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

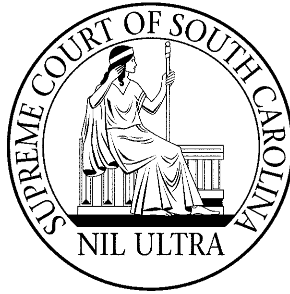
s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

c/ Donald W. Beatty J.

Columbia, South Carolina

February 8, 2008



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 6

February 11, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Donna Moore, Respondent

v.

Lance Moore, Jr., Appellant.

Appeal From Charleston County
Jocelyn B. Cate, Family Court Judge

Opinion No. 26429
Heard November 15, 2007 – Filed February 11, 2008

AFFIRMED AS MODIFIED

Gregory Samuel Forman, of Charleston, and Norbert E. Cummings, Jr., of Cummings Law Firm, of Summerville, for Appellant.

Anthony P. LaMantia, III, Allison J. LaMantia, of LaMantia Law Firm, and Mary Kathryn Schmutz, all of Charleston, for Respondent.

Assistant Attorney General Warren V. Ganjehsani, of Columbia, for Amicus Curiae.

JUSTICE BEATTY: In this direct appeal, Lance Moore, Jr. (Husband) appeals the family court's decision entering an Order of Protection from domestic abuse in favor of Donna Moore (Wife). Husband challenges the court's decision and underlying statutory authority based on due process and equal protection grounds. We affirm as modified.

FACTUAL/PROCEDURAL HISTORY

On October 1, 2006, officers with the Mount Pleasant Police Department were summoned to the Moores' home after 911 personnel received a call from the Moores' fifteen-year-old son. The parties' son reported that Husband had become physically abusive with him and his mother and threatened them with a weapon. Police arrested Husband and charged him with criminal domestic violence (CDV). The next day, Husband was released on bond and ordered not to go near the Moores' residence. According to Wife, Husband drove by the residence and at one point entered the yard to remove several items. On October 3, 2006, Wife filed an action pursuant to section 20-4-50[1] of the "Protection from Domestic Abuse Act" (the Act) requesting an emergency hearing and an Order of Protection against Husband. At 7:50 p.m. on October 4, 2006, Husband was served in Sumter

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[1] Section 20-4-50 provides:

> a) Within twenty-four hours after service of a petition under this chapter upon the respondent, the court may, for good cause shown, hold an emergency hearing and issue an order of protection if the petitioner proves the allegation of abuse by a preponderance of the evidence. A prima facie showing of immediate and present danger of bodily injury, which may be verified by supporting affidavits, constitutes good cause for purposes of this section.

S.C. Code Ann. § 20-4-50(a) (Supp. 2006).

with a summons to appear for an emergency hearing scheduled for 9:00 a.m. on October 5, 2006, in Charleston.

At the hearing, Husband and Wife both appeared without counsel. Initially, the family court judge inquired whether Wife wanted a continuance in order to obtain counsel. Wife declined, stating that she wanted to obtain an immediate restraining order against Husband. When Husband requested a continuance so that he could obtain counsel, the judge denied the request, and stated "[t]his is an Emergency Hearing, [Wife] doesn't want to continue this case, we got to go forward today." Throughout the proceeding, Husband reluctantly responded to the judge's questions and indicated that he did not want to proceed without the assistance of counsel.

After hearing Wife's testimony and questioning the parties, the judge found Husband had abused Wife and their son. As a result, the judge issued an Order of Protection which, *inter alia*: restrained Husband from committing any further abuse or from having any contact with Wife and the parties' two minor children; awarded Wife temporary custody of the parties' children; ordered Husband to pay temporary child and spousal support; and awarded Wife temporary possession of the marital home. In addition to ordering CDV counseling and invoking the assistance of the Department of Social Services for the minor children, the judge also ordered Husband to relinquish any weapons in his possession to the Charleston County Sheriff's Department until further order of the family court.

On October 13, 2006, Husband, who was then represented by counsel, filed a motion for reconsideration. The family court judge held a hearing on the motion. At the hearing, Husband's counsel alleged the issuance of the order violated due process and denied him equal protection based on the following grounds: (1) Husband did not receive "ample notice and an opportunity to answer [Wife's] charges" with the assistance of counsel; and (2) Husband's request for a continuance was denied whereas Wife was offered a continuance to retain counsel. In making these arguments, Husband's counsel claimed the order, specifically the finding of physical abuse, was a final order which could have future ramifications on Husband's employment and his right to possess weapons. Husband also characterized

the proceeding under section 20-4-50(a) as "quasi-criminal" because "it takes away any citizen's rights without due process without a full trial." Based on these arguments, Husband's counsel requested a full hearing on the merits. Counsel, however, recognized that a Temporary Restraining Order could be granted to protect Wife until a final resolution was reached on all of the issues.

By order dated December 15, 2006, the family court denied Husband's motion for reconsideration. The court found Husband's due process rights were not violated by the short-time frame preceding the emergency hearing given the statute specifically permitted the court to conduct the hearing within twenty-four hours after Wife's petition was served. Additionally, the court held the denial of Husband's motion for a continuance did not violate due process because the statute was intended to protect the alleged victim of domestic abuse. Because Wife chose to proceed with the hearing, the court believed that allowing Husband to delay the hearing "would defeat the clear legislative intent of the statute which is to provide alleged victims of abuse immediate access to the Court for orders of protection." Finally, the court found Husband's equal protection claim to be without merit. Relying on the terms of the statute, the court found the "Act affords protection for males, females and minor children alike." The court believed that the emergency hearing would not have been conducted differently "if the sexes of the parties were switched." Subsequently, Husband filed this appeal.

I. DUE PROCESS

Husband challenges the issuance of the family court's order on two due process grounds. Given the permanency and collateral consequences inherent in a finding of physical abuse, Husband first contends the provision of section 20-4-50 which permits a hearing within twenty-four hours of the service of the petition violates due process. As a second ground, Husband asserts the family court's denial of his motion for a continuance constituted an abuse of discretion and violated his right to due process. Specifically, he claims the short notice and denial of a continuance prohibited him from procuring counsel.

Although Husband does not differentiate in his argument between substantive and procedural due process, we believe both are implicated in the issues he raises on appeal. Accordingly, both are addressed in our analysis.

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. "In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 483, 636 S.E.2d 598, 614 (2006); see Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (recognizing that before due process guarantees are implicated, there must be a deprivation by the government of constitutionally protected interest).

Procedural "[d]ue process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007).

In Sloan v. South Carolina Board of Physical Therapy Examiners, this Court explained:

> Procedural due process requirements are not technical; no particular form of procedure is necessary. In re Vora, 354 S.C. at 595, 582 S.E.2d at 416. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Wilson, 352 S.C. at 452, 574 S.E.2d at 733 (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972)). The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur. S.C. Dept. of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997).

Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 484, 636 S.E.2d 598, 615 (2006). "'Where important decisions turn on questions of

fact, due process often requires an opportunity to confront and cross-examine adverse witnesses.'" S.C. Dep't of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 734 (2002) (quoting Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990)).

Applying the above-outlined analysis to the facts of the instant case, we find Husband's substantive due process rights were implicated by the proceedings established in section 20-4-50. See State ex rel. Williams v. Marsh, 626 S.W.2d 223, 230 (Mo. 1982)(en banc) (finding property and liberty interests of respondent to a petition for order of protection are implicated and protection of procedural due process is appropriate). Specifically, Husband's constitutionally protected liberty and property interests are subject to temporary deprivation as a result of the issuance of an Order of Protection. Once the order is issued Husband, i.e., a respondent to a petition, is subject to: the immediate loss of his children; reduction in his financial resources if child/spousal support is ordered; and immediate loss of possession of the marital residence.[2] Husband also immediately becomes

[2] Section 20-4-60 provides in pertinent part:

(c) When the court has, after a hearing for any order of protection, issued an order of protection, it may, in addition:

> (1) Award temporary custody and temporary visitation rights with regard to minor children living in the home over whom the parties have custody.
> (2) Direct the respondent to pay temporary financial support for the petitioner and minor child unless the respondent has no duty to support the petitioner or minor child.
> (3) When the respondent has a legal duty to support the petitioner or minor children living in the household and the household's residence is jointly leased or owned by the parties or the respondent is the sole owner or lessee, grant temporary possession to the petitioner of the residence to the exclusion of the respondent.
> (4) Prohibit the transferring, destruction, encumbering, or otherwise disposing of real or personal property mutually owned

subject to criminal prosecution or contempt proceedings if he violates the Order of Protection. Additionally, Husband is required to immediately relinquish any weapons in his possession or be subject to federal prosecution pursuant to 18 U.S.C.A. § 922.[3] If Husband is employed in law enforcement, the inability to possess a weapon may impact his ability to perform his job.[4]

> or leased by the parties or in which one party claims an equitable interest, except when in the ordinary course of business.
> (5) Provide for temporary possession of the personal property of the parties and order assistance from law enforcement officers in removing personal property of the petitioner if the respondent's eviction has not been ordered.
> (6) Award costs and attorneys' fees to either party.
> (7) Award any other relief authorized by § 20-7-420; provided, however, the court must have due regard for any prior Family Court orders issued in an action between the parties.

S.C. Code Ann. § 20-4-60(c) (1985 & Supp. 2006).

[3] The pertinent provision of this section provides:

> (g) It shall be unlawful for any person--
>
> (8) who is subject to a court order that--
>
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

Significantly, not only is Husband subject to immediate deprivation of constitutionally protected interests, he may also suffer future ramifications as a consequence of the issuance of the Order of Protection. The factual finding of physical abuse may have a long-term impact on both marital and civil litigation. In terms of marital litigation, a definitive finding of physical abuse could be used by Wife in the following respects: a ground for divorce (physical cruelty); the award of custody; a fault factor for the award of alimony; and a factor to be taken into consideration for the equitable apportionment of the marital assets. Furthermore, a factual finding of

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> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;
> . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C.A. § 922(g)(8) (2000 & Supp. 2007).

[4] See Tom Lininger, A Better Way to Disarm Batterers, 54 Hastings L.J. 525, 535-48 (2003) (discussing legislative history and constitutional challenges to ban of guns while restraining order is in effect pursuant to 18 U.S.C. § 922(g)(8)); United States v. Miles, 238 F. Supp. 2d 297, 300-05 (D. ME 2002) (holding 18 U.S.C.A. § 922(g)(8) passes constitutional muster because it is a reasonable restriction on the right to bear arms and is narrowly tailored to support a compelling government interest); United States v. Calor, 172 F. Supp. 2d 900, 905-07 (E.D. KY 2001) (finding temporary deprivation of Husband's property right to enjoy firearms during three-day, pre-hearing seizure period was outweighed by government's interest in protecting victim of domestic violence from further violence and potential death); see also Kellogg v. City of Gary, 562 N.E.2d 685, 693 (Ind. 1990) (discussing due process implications of Second Amendment right to bear arms in conjunction with issuance of civil temporary injunction).

physical abuse could potentially be used in a civil claim by Wife for recovery of actual or punitive damages caused by the physical abuse. See S.C. Code Ann. § 20-4-130 (1985)("Any proceeding under [the chapter regarding the protection from domestic abuse] is in addition to other civil and criminal remedies."). Because Husband's constitutionally protected interests in liberty and property are implicated by the issuance of the Order of Protection, procedural due process protection should be afforded to Husband, i.e., a respondent to a petition.

Although due process protection is applicable in this situation, it is not without limitation. Nor are a respondent's interests paramount to the State's interest in protecting a petitioner or other household members from domestic abuse. In view of these competing interests, it is necessary for this Court to balance these interests to determine the extent and nature of applicable due process procedures. See Arnett v. Kennedy, 416 U.S. 134, 167-68 (1974) (noting extent and nature of due process procedures depends upon weighing of the private interests affected and the related government functions). In doing so, we are guided by the intent of the Legislature in promulgating the Act, particularly section 20-4-50.

Commentators have observed:

> The Protection from Domestic Abuse Act was enacted to deal with the problem of abuse between family members. The effect of the Act was to bring the parties before a judge as quickly as possible to prevent further violence. Speedy access to the courts also [minimizes] the disruption to any children of the parties since the family court may order payment of temporary financial support. By expediting the provision of child support, the Act helps prevent the abused spouse from returning to her abuser based on financial reasons.

17 S.C. Jur. Criminal Domestic Violence, § 14 (Supp. 2007).

We agree with this commentary, and believe the Legislature properly effectuated the above goal by creating a statutory scheme that permits

expedited proceedings within twenty-four hours from service of the petition before either the family court or, if necessary, before a magistrate who may grant a limited temporary restraining order. See S.C. Code § 20-4-30(A) (Supp. 2006) ("The family court has jurisdiction over all proceedings under this chapter except that, during nonbusiness hours or at other times when the court is not in session, the petition may be filed with a magistrate. The magistrate may issue an order of protection granting only the relief provided by Section 20-4-60(a)(1).").

Furthermore, by providing a respondent with notice of a petition prior to the hearing and an opportunity to be heard, section 20-4-20 complies with the requisite procedural due process guarantees. See S.C. Code Ann. § 20-4-20(f) (Supp. 2006) ("'Order of protection' means an order of protection issued to protect the petitioner or minor household members from the abuse of another household member where the respondent has received notice of the proceedings and has an opportunity to be heard.")(emphasis added). Here, Husband was provided notice of the hearing and given an opportunity to actively participate in terms of questioning Wife and answering the court's questions. Husband, however, chose not to participate in the hearing and, thus, failed to take advantage of the procedural safeguards established by the Act.

Additionally, given that relief awarded in an Order of Protection is temporary and potentially modifiable, the procedure established by the Legislature is sufficient to comply with procedural due process. Finally, as evident in this case, a respondent may obtain counsel after the hearing in order to move for reconsideration or seek modification of certain relief awarded to petitioner. See State ex rel. Williams v. Marsh, 626 S.W.2d 223, 230 (MO 1982)(en banc) ("Notice and an opportunity to be heard must be provided by the state in a meaningful manner prior to deprivation of a protected interest. This rule is not necessarily applied when there is a temporary taking, as is the case here. Due process is a flexible concept.") (citations omitted); see also State v. Doe, 765 A.2d 518, 523-29 (Conn. Super. Ct. 2000) (concluding defendant had not been prejudiced by issuance of initial protective order without an attorney where he had the order modified with the aid of counsel).

Notably, appellate courts from other jurisdictions have held that statutes similar to this state's Protection from Domestic Abuse Act are not violative of due process. See, e.g., Paschal v. Hazlinsky, 803 So. 2d 413, 417-19 (La. Ct. App. 2001) (holding no due process violation with respect to hearings for protective orders against domestic abuse); Kampf v. Kampf, 603 N.W.2d 295, 299 (Mich. Ct. App. 1999) (concluding Wife's obtaining personal protection order without notice to Husband did not violate his procedural due process rights); Baker v. Baker, 494 N.W.2d 282, 288-89 n.9 (Minn. 1992), superseded in part by statute in Burkstrand v. Burkstrand, 632 N.W.2d 206 (Minn. 2001) (relying on guidance of cases from other jurisdictions and finding ex parte procedures of Domestic Abuse Act comply with applicable rules as well as due process); Schramek v. Bohren, 429 N.W.2d 501, 503-05 (Wisc. Ct. App. 1988) (finding spousal abuse statute was not unconstitutional).

Even though Husband's procedural due process rights were not violated by the short-time period between service of the petition and the hearing or Husband's inability to procure counsel for the emergency hearing, we are concerned that a factual finding of physical abuse was finally adjudicated at this emergency hearing.

Without question, the immediate protection of potential victims from domestic abuse is a legitimate government interest which requires a prompt hearing and issuance of a temporary order if the evidence necessitates. However, we believe a definitive factual finding of physical abuse for a temporary Order of Protection is not only improper under the terms of the statute, but is also unnecessary to satisfy the government's interest. In our view, the Legislature provided for an emergency hearing, for the benefit of victims of domestic violence and did not intend for these protections to establish collateral consequences for the alleged abuser. Cf. State v. Dispoto, 913 A.2d 791, 798 (N.J. 2007) (stating "the remedial protections afforded under the [New Jersey Protection of Domestic Violence Act] are intended for the benefit of victims of domestic violence and are not meant to serve as a pretext for obtaining information to advance a criminal investigation against an alleged abuser"). Instead, we believe the Legislature intended for the

findings, which result from an emergency hearing pursuant to section 20-4-50(a), to be temporary and confined to the Order of Protection. Implicit in this conclusion is that these findings cannot be used in future litigation unless they are confirmed in a subsequent hearing on the merits.

In reaching this conclusion, we need look no further than the terms of the Act. See Beattie v. Aiken County Dep't of Soc. Servs., 319 S.C. 449, 452, 462 S.E.2d 276, 278 (1995) (recognizing that in interpreting a statute, our primary purpose is to ascertain the intent of the Legislature); Id. ("'A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.'" (quoting Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992))). Specifically, we focus our analysis on the procedural prerequisites for petitioning for an emergency hearing as well as the proof required for the issuance of an Order of Protection.

In terms of procedure, it is significant to note that the Petition for an Order of Protection "must inform the respondent of the right to retain counsel." S.C. Code Ann. § 20-4-40(c) (Supp. 2006). We interpret this requirement to mean that the Legislature intended for a respondent to have a meaningful opportunity to retain counsel in order to participate in a hearing conducted pursuant to the Act. Because section 20-4-50(a) authorizes a family court to conduct an emergency hearing "[w]ithin twenty-four hours after service of a petition," it would be nonsensical to believe that a respondent would be able to retain counsel and prepare for an adjudicative hearing within such a limited time frame. S.C. Code Ann. § 20-4-50(a) (Supp. 2006). A strict reading of this statutory provision would mean that an emergency hearing could be conducted within mere hours of when a respondent was served with the petition. Clearly, we do not believe the Legislature intended for this result.

Furthermore, we glean additional support for our interpretation by comparing a related provision of section 20-4-50 with the above-quoted provision. Subsection (b) of this statute provides:

> If the court denies the motion for a twenty-four-hour hearing or such a hearing is not requested, the petitioner may request and the court must grant a hearing within fifteen days of the filing of a petition. The court must cause a copy of the petition to be served upon the respondent at least five days prior to the hearing, except as provided in subsection (a), in the same manner required for service in the circuit courts. Where service is not accomplished five days prior to the hearing, the respondent, upon his motion, is entitled to a continuance until such time is necessary to provide for compliance with this section.

S.C. Code Ann. § 20-4-50(b) (Supp. 2006). The significant difference between the procedures employed in each of the subsections is that the respondent is given a minimum of five days to obtain counsel and prepare for the hearing and may be granted a continuance if the five days are not provided under subsection (b), whereas there is no mention of a continuance if an emergency hearing is conducted under subsection (a). Given that a respondent is not given a meaningful opportunity to retain counsel and prepare if a twenty-four-hour emergency hearing is requested and conducted, we conclude the Legislature intended for the emergency hearing to be temporary in nature. Inferentially, a hearing conducted pursuant to section 20-4-50(b), which provides a respondent an extended period of time in which to retain counsel and prepare his or her case, should be viewed as an adjudicative hearing on the merits of the action.

A review of the proof required for the issuance of an Order of Protection solidifies our conclusion that an order issued pursuant to a twenty-four-hour emergency hearing is intended to be temporary and not a final determination. For a court to issue an Order of Protection after an emergency hearing, a petitioner must prove "the allegation of abuse by a preponderance of the evidence." S.C. Code Ann. § 20-4-50(a)(Supp. 2006). The statute further provides that "[a] prima facie showing of immediate and present danger of bodily injury, which may be verified by supporting affidavits, constitutes good cause for purposes of this section." Id. A review of these statutory prerequisites reveals that a definitive finding of physical abuse is not essential.

Although the Act defines "abuse" to include "physical abuse," "bodily injury," and "assault," it also recognizes that "the threat of physical harm" is sufficient to constitute a basis for the issuance of an Order of Protection as the result of an emergency hearing. S.C. Code Ann. § 20-4-20(a)(1) (1985 & Supp. 2006). Furthermore, in our opinion, a showing of "immediate and present danger of bodily injury" denotes that the threat of a future occurrence provides the basis for an Order of Protection and, thus, a definitive finding of physical abuse is not mandated. Finally, we note that this type of finding would be sufficient to satisfy the provision of 18 U.S.C.A. § 922(g)(8)(C)(i), which only requires "a finding that such person represents a credible threat to the physical safety of such intimate partner or child."

Based on the foregoing, we hold that an Order of Protection issued pursuant to an emergency hearing is temporary and that a hearing on the merits of the action should, if necessary, be conducted by the family court at a later date.[5] This procedure would then enable a petitioner and a respondent to procure counsel in order to actively and thoroughly participate in an adjudicative hearing on the merits of the action.[6]

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[5] We note that if the findings are temporary, a respondent should no longer suffer the consequences under the federal statute given a respondent would no longer be "subject" to the court order. 18 U.S.C.A. § 922(g)(8) (2000 & Supp. 2007); cf. Weissenburger v. Iowa Dist. Court for Warren County, 740 N.W.2d 431, 436 (Iowa 2007) (holding that Husband was prohibited from possessing firearms pursuant to 18 U.S.C.A. § 922(g)(8) where he was subject to a continuing no-contact order with Wife).

[6] In light of the problems highlighted by this case, we invite the Legislature to revise the Protection from Domestic Abuse Act in order to: clarify the non-adjudicative nature of the emergency hearing; and define the temporary status of an Order of Protection as well as the findings associated with the issuance of such an order.

II. EQUAL PROTECTION

Finally, Husband claims the family court engaged in "invidious gender discrimination" by denying his motion for a continuance but offering Wife a continuance in order to provide her with more time to prepare or seek counsel.

As we understand this argument, Husband is primarily challenging the family court's decision not to grant a continuance as opposed to positing an argument that the Act violates the Equal Protection Clause. Thus, this argument is not in actuality an equal protection challenge. However, to the extent Husband's argument can be construed as such a challenge, we find this issue is without merit.

The Equal Protection Clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Equal protection requires "all persons to be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of South Carolina, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986). "Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny." Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). "Gender-based classifications are not inherently suspect so as to be subject to strict scrutiny and will be upheld if they bear a fair and substantial relationship to legitimate state ends." In the Interest of Joseph T., 312 S.C. 15, 16, 430 S.E.2d 523, 524 (1993). "For a gender-based classification to pass constitutional muster, it must serve an important governmental objective and be substantially related to the achievement of that objective." State v. Wright, 349 S.C. 310, 313, 563 S.E.2d 311, 312 (2002)(citing Craig v. Boren, 429 U.S. 190 (1976)). "A law will be upheld where the gender classification realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Id.

In the instant case, the family court judge did not base her decision on gender, but rather on the respective posture of the parties, i.e., that Wife was the "petitioner" and had the burden of establishing the need for an Order of Protection. As defined by section 20-4-20, a "'[p]etitioner' means the person alleging abuse in a petition for an order of protection." S.C. Code Ann. § 20-4-20(d) (1985) (emphasis added). A review of the quoted text as well the rest of the definitional section of the Act, reveals that the statute clearly utilizes the word "person," a non-gender specific term, to define the parties to an action for an Order of Protection. S.C. Code Ann. § 20-4-20(b), (d), & (e) (1985). Thus, there is no gender-based classification that would implicate a violation of the Equal Protection Clause. See State v. Doe, 765 A.2d 518, 523-27 (Conn. Super. Ct. 2000) (holding statutory classification of victim and a defendant involved in issuance of a protective order did not violate defendant's equal protection rights).

Furthermore, to the extent Husband attacks the family court's decision to deny his motion for a continuance, we find the family court did not abuse its discretion. See Bridwell v. Bridwell, 279 S.C. 111, 112, 302 S.E.2d 856, 858 (1983) (stating the grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record). Because, as previously discussed, Husband was provided with procedural due process at the hearing, we disagree with Husband's contention that he was entitled to a continuance. Moreover, Husband subsequently retained counsel and was permitted to move for reconsideration of the order. Accordingly, Husband was not prejudiced by going forward with the emergency hearing. Townsend v. Townsend, 323 S.C. 309, 313, 474 S.E.2d 424, 427 (1996) (finding appellate court will not set aside a court's ruling on a motion for a continuance unless it clearly appears there was an abuse of discretion to the prejudice of the movant).

CONCLUSION

Because Husband was provided procedural due process prior to the issuance of the Order of Protection, we affirm the decision of the family court. However, we find that an Order of Protection issued pursuant to an

emergency hearing is temporary and does not represent a final adjudication of the merits of the action. Applying our decision to the instant case, we hold the finding of physical abuse was not a final adjudication and, therefore, should not be used against Husband in future litigation. Finally, we find neither the Act nor the family court's decision denying Husband a continuance constituted a violation of the Equal Protection Clause.

AFFIRMED AS MODIFIED.

MOORE, A.C.J., WALLER, PLEICONES, JJ., and Acting Justice J. Ernest Kinard, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kelly Christen Evans, Respondent.

Opinion No. 26430
Submitted January 11, 2008 – Filed February 11, 2008

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Stephanie N. Weissenstein, of Law Offices of Desa A. Ballard, PA, of West Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction in Rule 7(b), RLDE, Rule 413, SCACR. She requests that any suspension or disbarment be made retroactive to the date of her interim suspension, February 26, 2007. In the Matter of Evans, 372 S.C. 254, 642 S.E.2d 578 (2007). In addition, respondent agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct in investigating this matter. We accept the agreement and disbar respondent from the practice of law in this state, retroactive to the date of her interim suspension. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent's misconduct stems from her failure to understand the business operations of her legal practice and her failure to manager her staff. Respondent admits not performing monthly reconciliations as required by Rule 417, SCACR, and, as a consequence of that failure, having individual client accounts with a shortage of funds that went undetected for months.

In particular, respondent admits she had several accounts that were short of funds after loans closings. In one instance, she permitted a refinance equity line closing to take place where the borrower received $150,000.00 in funds although respondent had not received the funds from the lender. This error was carried on respondent's account until brought to her attention by her title insurance company's audit more than one year after the closing. Respondent required seven months to recover the funds from the borrower. Respondent admits she failed in her responsibilities in this closing.[1]

In another loan closing, respondent admits she disbursed approximately $21,000.00 without confirming the funds had been wired to her account. In this matter, respondent has not recovered the funds from the borrower and respondent has replaced the disbursed funds with her own personal funds. Respondent admits she carried the resulting $21,000.00 deficit in her trust account for approximately two years after the closing. Respondent admits she failed in her responsibilities as attorney in this closing.

Respondent admits she did not understand the financial aspects of her business and, therefore, hired an accountant to manage the financial aspects of her practice. While the accountant did perform

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[1] Respondent admits that, while she understood the HUD-1 Settlement Statement, she did not understand that the funds shown on the balance sheet had not been received.

recordkeeping and reconciliations, respondent now recognizes that the reconciliations were inaccurate, incomplete, and did not come close to meeting the requirements imposed by Rule 417, SCACR. Respondent admits she did not review the accountant's trust account reconciliations.[2]

Respondent admits that, at the time of the initial complaint, she had an outstanding balance due to her title insurance company of $60,000.00. Respondent had failed to hold in trust the title insurance premiums that were collected by her at closings. Respondent's practice with the title insurance premiums had been to deposit the premiums when collected at closings into a bank account titled "K.C.E. Title." Respondent admits that the balance in the K.C.E. Title account was between $3,000.00 and $5,000.00 when it should have been sufficient to pay the outstanding amount due the title insurance company.

Respondent admits she transferred funds from the K.C.E. Title account to bank accounts out of state for personal reasons, including payment of her personal mortgage. She states the title insurance company has been paid from monies from the out of state accounts.

Further, respondent admits she wired personal mortgage payments from her trust account on four occasions. She claims this was done in error and that she discovered the error a month and one half later when she received the bank statement. Respondent admits that she did not have any of her own money in the trust account. She states the monies have since been paid back to the trust account.

Additionally, respondent admits she relied on her staff to handle day to day affairs, including office accounting and document preparation, and that she did not adequately supervise her staff.

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[2] Since her interim suspension, respondent has made efforts to have the accounts reconciled and to bring the client accounts into balance. It is believed there is a surplus of funds in the accounts at this time.

Respondent permitted staff members to sign her name as attorney to closing documents and, at the same time, sign as witness to respondent's "signature."

Finally, respondent admits she failed to make timely payments to her employees' 401K accounts after withholding the funds from the employees' paychecks. Further, respondent admits that she added the funds to the employees' 401K accounts in October 2007, eight months after her interim suspension. Respondent agrees that she failed to safeguard her employees' funds, some of which were collected from her employees in early 2006.

LAW

Respondent admits that, by her misconduct, she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.15 (lawyer shall hold property of clients and third persons in the lawyer's possession in connection with a representation separate from the lawyer's own property); Rule 5.3 (partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that a non-lawyer employee's conduct is compatible with the professional obligations of the lawyer); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct).

Respondent further admits her misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct). In addition, respondent admits her misconduct violated Rule 417, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent. The disbarment shall be retroactive to the date of respondent's interim suspension. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC and the Commission on Lawyer Conduct as a result of the investigation 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 she has complied with Rule 30 of Rule 413, SCACR, and shall also surrender her Certificate of Admission to the Practice of Law to the Clerk of Court.

In addition, should it be determined that any restitution remains outstanding, ODC and respondent shall file a restitution plan with the Court within thirty (30) days of the date of this opinion. In the plan, respondent shall agree to pay restitution to all clients, banks, and other persons and entities who have incurred losses as a result of her misconduct in connection with this matter. Moreover, in the restitution plan, respondent shall agree to reimburse the Lawyers' Fund for Client Protection for any claims paid as a result of her misconduct in connection with this matter.

DISBARRED.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Joshua Hunter Norris, Respondent.

Opinion No. 26431
Submitted January 11, 2008 – Filed February 11, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard, of Law Offices of Desa Ballard, PA, of West Columbia, for respondent.

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

FACTS

Respondent represented the estate of a decedent in a malpractice/wrongful death suit on a contingency basis. Respondent contracted for paralegal services and charged the estate $6,300 for these

services. Respondent believed these services were covered by his contract which provided for the client to pay expenses related to litigation. When the complainant, an attorney appointed as the personal representative of the estate, objected to these fees believing they should have been covered by the contingency fee, respondent refunded the total amount to the estate.

The complainant also objected to expert bills submitted as part of the settlement statement as he believed these fees had been falsified. Respondent's wife had assisted respondent in preparing the settlement statement and had been responsible for collecting these bills. Respondent submits that, in investigating the matter, he confronted his wife and she admitted falsifying a number of the doctors' bills.[1] Respondent acknowledges that he is responsible for the actions of his staff and that he should have checked the bills closely before submitting them as part of the settlement statement.
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LAW

Respondent admits that he has committed misconduct in violation of the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 1.1 (lawyer shall provide competent representation to client), Rule 1.5 (lawyer shall not charge unreasonable amount for expenses; contingency fee agreement must set forth expenses to be deducted from recovery), and Rule 5.3 (lawyer who possesses supervisory authority over non-lawyer shall make reasonable efforts to ensure non-lawyer's conduct is compatible with professional obligations of lawyer and shall be responsible for non-lawyer's conduct if the conduct would be violation of Rules of Professional Conduct if engaged in by lawyer). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

[1] Respondent and his wife have since divorced.

CONCLUSION

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

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Joseph Francis Runey, Respondent.

Opinion No. 26432
Submitted January 11, 2008 – Filed February 11, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Joseph Francis Runey, of Charleston, pro se.

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

FACTS

Respondent's financial institution reported ten (10) IOLTA account checks were presented for payment against insufficient funds. Respondent admits he had not been consistently performing reconciliations on his IOLTA account in a timely manner and, further,

that he failed to verify that deposits had been credited to his account prior to disbursement.

LAW

Respondent admits that he has committed misconduct in violation of the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 1.15 (lawyer shall not disburse funds from an account containing the funds of more than one client or third person unless the funds to be disbursed have been deposited in the account and are collected). Further, respondent admits that he violated Rule 417, SCACR. Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Horry County
Magistrate Monte L. Harrelson, Respondent.

Opinion No. 26433
Submitted January 22, 2008 – Filed February 11, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Deborah S. McKeown, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Gregory Scott Bellamy, of Hearn, Brittain & Martin, PA, of Conway, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RJDE, Rule 502, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of either an admonition or a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR. We accept the agreement and impose a public reprimand. The facts as set forth in the agreement are as follows.

FACTS

Respondent has been employed as a magistrate in Horry County since June 1993. From approximately August 2006 until January 2007, respondent engaged in a consensual sexual relationship with an Administrative Assistant employed with the Horry County Central Traffic Court. Respondent is currently unmarried and was unmarried during his intimate relationship with the Administrative Assistant. The Administrative Assistant was married and residing with her husband during her intimate relationship with respondent.

All sexual encounters between respondent and the Administrative Assistant took place outside of work hours and away from work locations. On occasion while respondent was personally involved with the Administrative Assistant, he provided her with gifts and financial assistance.

In Horry County, the Chief Magistrate hires all administrative staff for the Central Traffic Court. The magistrates rotate in and out of Central Traffic Court along with the administrative staff assigned to work in the courtroom for Central Traffic Court. The magistrates do not know what staff will be assigned to traffic court during the weeks they preside over traffic court. Additionally, the magistrates have no hiring, firing, or disciplinary authority over the Central Traffic Court employees. Although the Administrative Assistant involved was not assigned to work with respondent on a regular basis, administrative assistants are randomly assigned to work in the courtroom with magistrates during traffic court sessions and, during those sessions, there is a supervisory relationship between the magistrate and administrative assistant.

When confronted by her husband in January 2007, the Administrative Assistant admitted she had an extra-marital affair with respondent. The husband reported the matter to the Horry County Chief Magistrate. When the Chief Magistrate was notified of the affair, he immediately took steps to re-assign respondent so that the

Administrative Assistant would not work directly for him. The Horry County Government Human Resources Department conducted an investigation into the matter and, no finding of sexual harassment was made as a result of that investigation.

Respondent admits that, on two occasions approximately five years ago, he engaged in sexual encounters with another Central Traffic Court employee while that employee was separated from her husband. That employee no longer works in Central Traffic Court.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge shall personally observe high standards of conduct); Canon 2 (judge shall avoid impropriety and the appearance of impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity of the judiciary); and Canon 4A2 (judge shall conduct extra-judicial activities so that they do not demean the judicial office). Respondent further admits that his misconduct constitutes grounds for discipline under the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR. See Rule 7(a)(1) (it shall be ground for discipline for judge to violate Code of Judicial Conduct) and Rule 7(a)(9) (it shall be ground for discipline for judge to violate Oath of Office), RJDE, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Accordingly, respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Jasper County Magistrate
Rodney A. Kinlaw, Respondent.

Opinion No. 26434
Submitted January 22, 2008 – Filed February 11, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and James G. Bogle, Jr., Senior Assistant Attorney General, both of Columbia, for Office of Disciplinary Counsel.

Rodney A. Kinlaw, of Hardeeville, pro se.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR.[1] The facts as set forth in the Agreement are as follows.

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[1] Respondent no longer holds judicial office. A public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. See In re O'Kelley, 361 S.C. 30,

FACTS

In 1999 and 2006, the Chief Justice of the Supreme Court of South Carolina issued orders which set forth specific requirements for financial accounting in all magistrate courts in this State. Respondent attended training concerning the requirements of the orders but knowingly did not comply with them in at least one or more of the following: 1) respondent failed to insure that deposits were made as required by the orders and 2) respondent failed to insure that the accounts were reconciled monthly as required by the orders.

On or about February 5, 2007, the Chief Magistrate of Jasper County, Sydney McDonald, requested by e-mail that all magistrates bring their bank reconciliation paperwork for the months of October, November, and December 2006 to the quarterly meeting to be held on or about February 8, 2007. Respondent appeared at the meeting but brought only daily deposit paperwork. Chief Magistrate McDonald informed respondent that he did not bring the correct papers and he could supply the original bank statements if the reconciliations would not print.

That evening, respondent returned to his office to obtain the original bank statements. On or about the morning of Friday, February 9, 2007, respondent asked his secretary to print out monthly balance reports for the last quarter of 2006 and January 2007. For unrelated reasons, respondent's secretary quit the same day.

On or about Sunday, February 11, 2007, respondent requested a meeting with Chief Magistrate McDonald to discuss his secretary and money. Chief Magistrate McDonald met with respondent at the Ridgeland's Magistrate's Office at approximately 5:00 p.m. Respondent was in possession of a bank bag containing checks and a bag of mail that had not been filed.

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603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

During the meeting, Chief Magistrate McDonald discovered no deposits had been made by respondent for the month of January 2007. Respondent informed the Chief Magistrate that his secretary had quit and that he believed she had taken cash because there was none in the bank bag with the checks and because no money had been deposited in the bank during the month of January 2007. Chief Magistrate McDonald asked respondent if he had been conducting the reconciliations required by the Chief Justice's orders. Respondent stated he had been doing so for each and every month and that he had initialed the bank statements to so indicate.

Later, however, when examining the bag of mail respondent had brought to the meeting, an unopened bank statement from August 2006 was discovered. When Chief Magistrate McDonald inquired how respondent could have been conducting monthly reconciliations if the August 2006 bank statement had not been opened, respondent opined that he must have received a copy from the bank and reiterated that he had reconciled and initialed every bank statement through December 2006.

ODC's investigators traveled to respondent's office on or about February 12, 2007, and met with respondent. When they arrived, respondent was attempting to reconstruct his monthly reports. He told the investigators that his secretary quit after he asked her to provide the monthly report for January 2007. Respondent insinuated that the secretary was involved in the theft of cash from the January 2007 receipts.

The investigators contacted the secretary and she came to the office. The secretary reported that respondent did not ask her for the January 2007 monthly statement and stated she quit because respondent criticized her for providing bond hearing procedures to Chief Justice McDonald. The secretary acknowledged that deposits in January had not been made because she had not had time and said the alleged missing cash was in the filing cabinet in respondent's office. The investigators retrieved $1,995.00 in an envelope from the filing

cabinet in respondent's office which was more than the $1,706.61 in cash that daily deposit listings showed had been received to date in 2007. In his written statement, respondent claimed he had not put the money in the filing cabinet and did not know it was there. The secretary, who was present when the money was retrieved, stated it was not in the same envelope she had left it in and that the cash and checks received in January had been left in the same envelope when she resigned. Respondent later acknowledged to investigators that he had not made the required monthly reconciliations at any time during the four years he had been a magistrate.

On or about February 14, 2007, the Court placed respondent on interim suspension. In the order of suspension, respondent was directed to deliver all books, records, funds, property, and documents relating to his office to the Chief Magistrate for Jasper County.

Contrary to the Court's February 14, 2007 order, respondent removed magistrate court case files from his office. On or about February 21, 2007, Chief Magistrate McDonald required respondent return the court files to her. Respondent did not promptly return the files. Soon thereafter, Chief Justice McDonald went to respondent's magistrate office and discovered that the court-issued computer was also missing. Chief Magistrate McDonald and an ODC investigator contacted respondent and requested that he return the computer and all other court-related items to her at respondent's office. Thereafter, respondent met Chief Magistrate McDonald at the magistrate's office and returned the computer. On or about Monday, February 26, 2007, respondent returned the court files to Chief Magistrate McDonald.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold the integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining, and enforcing

high standards of conduct and shall personally observe those standards so that the integrity of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity of the judiciary); Canon 3 (judge shall perform the duties of judicial office diligently); Canon 3(B)(2) (judge shall be faithful to the law); Canon 3(B)(8) (judge shall dispose of all judicial matters promptly and efficiently); Canon 3(C)(1) (judge shall maintain professional competence in judicial administration and should cooperate with other judges and court officials in the administration of court business); Canon 3(C)(2) (judge shall require staff to observe standards of diligence that apply to the judge). Further, respondent admits that he has violated Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct), Rule 7(a)(1)(4) (it shall be ground for discipline for judge to persistently fail to perform judicial duties), Rule 7(a)(7) (it shall be ground for discipline for judge to willfully violate a valid court order issued by a court of this state), and Rule 7(a)(9) (it shall be ground for discipline for judge to violate the Oath of Office) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Respondent shall not apply for, seek, or accept any judicial position whatsoever in this State without the prior written authorization of this Court after due service on ODC of any petition seeking the Court's authorization. Respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Former
Tega Cay Municipal Court Judge
Deborah Ann Koulpasis, Respondent.

Opinion No. 26435
Submitted January 22, 2008 – Filed February 11, 2008

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

Desa Ballard and Stephanie N. Weissenstein, of Law Offices of Desa Ballard, PA, of West Columbia, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RJDE, Rule 502, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand pursuant to Rule 7(b), RJDE, Rule 502, SCACR.[1] The facts as set forth in the Agreement are as follows.

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[1] Respondent no longer holds judicial office. A public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. See In re O'Kelley, 361 S.C. 30,

FACTS

On or about July 5, 2006, respondent was charged by the Rock Hill Police Department with one (1) count of Breach of Trust over $10,000 in violation of S.C. Code Ann. § 16-13-230(B)(3) (2003). The arrest warrant alleged respondent converted to her own use $17,594.60 from the law firm from which she had previously been employed as a lawyer. Thereafter, respondent resigned her position as a part-time Municipal Court Judge for Tega Cay. Subsequently, respondent entered a guilty plea in the Court of General Sessions for York County to one (1) count of Breach of Trust under $5,000 in violation of S.C. Code Ann. § 16-13-230(B)(2) (2003) and received a sentence of two (2) years imprisonment suspended upon payment of court costs. Respondent warrants that restitution has been made to her former law firm and/or former senior partner in a mutually agreeable amount.

LAW

By her misconduct, respondent admits she has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold the integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity of the judiciary); Canon 4 (judge shall conduct extra-judicial activities so as to minimize risk of conflict with judicial obligations); and Canon 4A(2) (judge shall conduct all extra-judicial activities so that they do not demean the judicial office). Respondent acknowledges that she did not uphold the integrity of the judiciary contrary to the Judge's Oath as set out in Rule

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603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

502.1, SCACR. Further, respondent admits that she has violated Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct), Rule 7(a)(1)(3) (it shall be ground for discipline for judge to be convicted of crime of moral turpitude or a serious crime), and Rule 7(a)(9) (it shall be ground for discipline for judge to violate the Oath of Office) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Respondent shall not apply for, seek, or accept any judicial position whatsoever in this State without the prior written authorization of this Court after due service on ODC of any petition seeking the Court's authorization. Respondent is hereby reprimanded for her misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph Lowry, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from York County
Lee S. Alford, Circuit Court Judge

Opinion No. 26436
Submitted December 6, 2007 – Filed February 11, 2008

REVERSED

Tara Shurling, of Columbia, for Petitioner.

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

CHIEF JUSTICE TOAL: In this case, the PCR court found that a supplemental jury charge on felony murder did not violate Petitioner's due process rights, and therefore, that Petitioner's counsel was not ineffective in

failing to object to the charge. This Court granted certiorari to review the PCR court's decision. Because we find that the charge unconstitutionally shifted the burden of proof for malice in Petitioner's murder conviction, we reverse.

FACTUAL/PROCEDURAL BACKGROUND

A grand jury indicted Petitioner Joseph Lowry ("Petitioner") for murder, possession of a firearm during the commission of a violent offense, armed robbery, and criminal conspiracy for his role in the September 1994 robbery and murder of a motel desk clerk in York County. At trial, the court instructed the jury on the elements of each of the charged offenses as well as the laws of accomplice liability and criminal intent. The murder charge specifically explained the finding of malice beyond a reasonable doubt and addressed inferences of malice which may be drawn from certain facts, such as the performance of an unlawful act, the use of a deadly weapon, and the commission of a felony (known as the felony murder doctrine). With respect to the felony murder doctrine, the trial court charged:

> Additionally, the law says if one intentionally kills another during the commission of a felony, the inference of malice may arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, again I tell you this inference would be simply an evidentiary fact to be taken into consideration by you along with the other evidence in this case. I charge you that armed robbery with[,] which [Petitioner] is also charged[,] is under our state law a felony.

When the trial court directed the jury to begin deliberations, the solicitor told the court that he had not heard the court charge the felony murder doctrine. Although Petitioner's counsel and the trial court both claimed to have heard such an instruction, the trial court ultimately agreed to bring the jurors back in for a supplemental instruction on felony murder. In order to alleviate Petitioner's counsel's concern that such a supplemental instruction would highlight the theory of felony murder, the trial court stated that it would also incorporate aspects of accomplice liability into the charge.

Upon calling the jury back into the courtroom, the trial court gave the following charge:

> Let me follow up with a very brief instruction regarding what is sometimes referred to as the felony murder doctrine.
>
> The fact that I brought you back in is simply because I neglected to charge this. This particular charge is not to be given any other weight or highlighted in any way by you simply because I brought you in here and gave it to you separate from the other. It is my mistake; I left this out, it was called to my attention, and I must charge it to you. The fact that it is isolated, you are to give it no more consideration. You are to blend it in with the charge as I have given it to you.
>
> . . . you will recall I went over and talked with you about accomplice liability, I meant to conclude that by telling you this in regard to what is called the felony murder doctrine. That is, if a person kills another in the doing or attempting to do an act which is considered a felony, the fact that this occurs while one is doing or attempting to commit a felony makes the killing murder. And, therefore, the killing by one of another in the commission or attempted commission of a felony makes that killing, by virtue of it occurring in that context[,] a murder.

Petitioner's counsel did not object to the supplemental charge.

The jury convicted Petitioner for murder, possession of a firearm during the commission of a violent offense, armed robbery, and criminal conspiracy. The trial court imposed a life sentence for the murder, concurrent five-year sentences for the firearm possession and conspiracy, and a concurrent thirty-year sentence for the armed robbery. Following review pursuant to *Anders v. California*, 386 U.S. 738 (1967), this Court affirmed Petitioner's convictions and sentences. *State v. Lowry*, Op. No. 1998-MO-060 (S.C. Sup. Ct. filed July 20, 1998).

Following his direct appeal, Petitioner filed an application for PCR alleging, among other things, that trial counsel was ineffective for failing to object to the supplemental charge on felony murder. Specifically, Petitioner argued that the supplemental instruction was burden-shifting in nature and violated his due process rights under the federal and state constitutions by presuming the malice element of murder.[1] The PCR court found that the supplemental charge, when considered in context with the initial jury charge, was fair, and therefore, that counsel was not ineffective in failing to object. The PCR court further concluded that the charge was not prejudicial given the "overwhelming evidence" of Petitioner's guilt produced at trial. The PCR court subsequently denied Petitioner's application.

This Court granted certiorari to review Petitioner's belated appeal from the PCR court's decision pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) (holding that an applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR), and Petitioner raises the following issue for review:

> Was counsel ineffective in failing to object to the trial court's supplemental jury instruction on felony murder because it shifted the burden of proof for malice from the State to the Petitioner and deprived Petitioner of due process of law?

STANDARD OF REVIEW

In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. *State v. Smith*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). If no probative evidence exists to support the PCR court's findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

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[1] Appellate counsel briefly outlined the issue in the instant case in the *Anders* brief, but did not raise the issue on direct appeal because it had not been preserved for review.

LAW/ANALYSIS

Petitioner argues that trial counsel was ineffective for failing to object to the court's supplemental instruction on felony murder. Specifically, Petitioner argues that the supplemental charge created a mandatory presumption of malice that shifted the burden of proof from the prosecution to the defendant, thereby depriving Petitioner of due process of law. We agree.

In order to establish a claim of ineffective assistance of counsel, Petitioner must prove that (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced Petitioner's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). A deficient performance by counsel is prejudicial when there is a reasonable probability that, but for the counsel's errors, the outcome of the trial would have been different. *State v. Hill*, 350 S.C. 465, 567 S.E.2d 847 (2002) (quoting *Strickland*, 466 U.S. at 687).

Petitioner's claim arises out of the Due Process Clauses of the Fifth and Fourteenth Amendments, which protect an accused against conviction unless the State supplies proof beyond a reasonable doubt of each element necessary to constitute the crime with which the accused is charged.[2] *In re Winship*, 397 U.S. 358, 364 (1970). This principle prohibits the use of evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of proof beyond a reasonable doubt as to every essential element of the crime. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The relevant inquiry for the Court in this matter is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Todd v. State*, 355 S.C. 396, 403, 585 S.E.2d 305, 309 (2003). In order to

[2] Similar protections are provided in our state constitution. *See* S.C. Const. art. I, § 3.

make this determination, the challenged instruction must be examined in the context of the trial court's entire charge to the jury and not in isolation. *Francis v. Franklin*, 471 U.S. 307, 315 (1985); *Todd*, 355 S.C. at 402, 585 S.E.2d at 308. A jury instruction violates due process if it is reasonably likely that the jury understood the charge to create a mandatory presumption requiring it to infer an element of the offense if the State proved certain predicate facts, thereby relieving the State's burden of proof on an element of the offense. *Francis*, 471 U.S. at 314; *Sandstrom*, 442 U.S. at 521. The ultimate question for the Court to determine is "whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (quoting *Estelle*, 502 U.S. at 72).

We find that the trial court's supplemental instruction on felony murder unquestionably shifted the burden of proof for the malice element of murder from the State to Petitioner.[3] Viewed in its entirety, the supplemental jury charge contained no permissive language indicating that the jury *may* infer malice from Petitioner's participation in the armed robbery. Instead, the charge simply provided that if the jury first determined that a killing occurred in the course of the armed robbery, it *must* find Petitioner guilty of murder. In this way, the charge created a mandatory presumption of the malice element in the crime of murder instead of permitting the jury to find malice upon the State's proof of the element beyond a reasonable doubt. Both this Court and the United States Supreme Court have consistently held that such mandatory presumptions of malice violate a defendant's due process. *See Yates v. Aiken*, 484 U.S. 211 (1988); *Francis*, 471 U.S. 307; *Sandstrom*, 442 U.S. 510; *Arnold v. State/Plath v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992) [hereinafter *Arnold & Plath*].

Even viewing the supplemental charge in conjunction with the proper instruction on felony murder in the trial court's initial charge does not rectify

[3] *See* S.C. Code Ann. § 16-3-10 (2003) ("'*Murder*' is the killing of any person with malice aforethought, either express or implied.") (italics in original).

this patent constitutional error.[4] "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis*, 471 U.S. at 322. In fact, these contradictory instructions likely only exacerbated the error by confusing the jury as to its fact-finding duties with respect to Petitioner's murder charge. *See also State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990) ("It is error to give instructions which may confuse or mislead the jury.").

The fact that the burden-shifting charge occurred in a supplemental instruction is also relevant. *See Bollenbach v. United States*, 326 U.S. 607, 612 (1946) (noting the prominence of presumption language when it arises in a supplemental instruction). That the trial court prefaced the supplemental charge with the admonition that it was "not to be given any other weight or highlighted in any way" does not alter the fact that the improper charge on felony murder was the last thing the jurors heard before beginning deliberations and that its brevity was likely received by the jurors with "heightened alertness rather than the normal attentiveness which may well flag from time to time during the lengthy initial charge." *Arroyo v. Jones*, 685 F.2d 35 (2d. Cir. 1982) (finding constitutional error in presumption language in a supplemental charge on the element of intent because of its special prominence and the series of questions from the jury preceding the supplemental charge).

For these reasons, there is a reasonable likelihood that the jury understood the supplemental charge to create a mandatory presumption that required it to find malice if the State proved Petitioner's involvement in the armed robbery. Accordingly, we hold that the jury's application of the instruction violated Petitioner's due process rights and therefore, that counsel was deficient in failing to object to the charge.

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[4] The trial court's instruction on felony murder in its initial charge to the jury is similar to that characterized as a "proper charge on implied malice" by this Court. *See State v. Norris*, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985) (*overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)).

The analysis in this case, however, does not end here. Certain constitutional errors may be harmless in terms of their effect on the fact-finding process at trial. *Sullivan vs. Louisiana*, 508 U.S. 275, 279 (1993) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). For this reason, an unconstitutional jury instruction will not require reversal of the conviction if the Court determines "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Arnold & Plath*, 309 S.C. at 165, 420 S.E.2d at 838 (quoting *Chapman v. California*, 386 U.S. 18 (1967)).

Harmless error review looks to the basis on which the jury actually rested its verdict. *Sullivan*, 508 U.S. at 279. From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must "find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991). With respect to an unconstitutional presumption in a jury instruction, this means the Court must make a judgment about the significance of the presumption to the jury, measured against the other evidence considered by the jury independently of the presumption. *Id.* at 403-04. A judgment in this regard entails two steps: (1) the Court must ask what evidence the jury actually considered in reaching its verdict, and (2) the Court must weigh the probative force of the evidence as against the probative force of the presumption standing alone. *Id.* at 404.

One of the earliest cases in which this Court applied the *Yates* two-step harmless error analysis arose under circumstances similar to the present case. *Arnold & Plath* involved the murder of a hitchhiker by four individuals acting in concert. 309 S.C. 157, 420 S.E.2d 834. In a joint trial, co-defendants Arnold and Plath were each convicted of murder and sentenced to death for their involvement in the crime. The defendants filed PCR petitions challenging the trial court's judgment on the grounds that the charge to the jury unconstitutionally shifted the burden of proof for malice. *Id*. In a consolidated appeal from the PCR court's denial of relief to Arnold and Plath, this Court found that although the trial court's charge unconstitutionally shifted the burden of proof for malice, the error was harmless beyond a reasonable doubt. In its analysis, the Court considered

testimony by the forensic pathologist describing the extent of the victim's physical injuries, as well as credible testimony by defendant Plath and the two other accomplices to the crime detailing the brutality of the victim's murder. *Id.* at 167-170, 420 S.E.2d at 840-41. Based on this extensive testimony, the Court held that the probative force of the direct evidence was such that beyond a reasonable doubt, the jury could not have rested its verdict solely on the presumption of malice. *Id.* at 171-72, 420 S.E.2d at 841-42. Accordingly, this Court affirmed the PCR court's denial of relief. *See also Yates*, 500 U.S. at 406 n.10 (explaining that in some cases, the predicate facts to be relied on under the presumption may be "so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding the ultimate fact" (quoting *Carella v. California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring))).

In applying this two-step analysis to the instant case, we find the evidentiary circumstances to be markedly different from those in *Arnold & Plath*. Viewing the primary direct evidence against Petitioner at trial and weighing the probative force of this evidence against the probative force of the presumption standing alone, we find that the direct evidence suggests the jury assigned considerable significance to the unconstitutional presumption of malice in the trial court's supplemental instruction.

At Petitioner's trial, the State's primary direct evidence consisted of three statements to police in which Petitioner gave certain information about the crime, along with testimony by two of Petitioner's co-defendants in the conspiracy describing Petitioner's involvement. Additionally, the State produced two friends of Petitioner (not involved in the crime) who testified as to details allegedly corroborating Petitioner's involvement in the murder. Petitioner himself did not testify at trial and did not produce any witnesses or other evidence on his behalf.

We find little direct probative evidence of malice in Petitioner's first two statements given to police, which merely provided information about the crime and Petitioner's acknowledgement that he was present at the crime scene. Only the final statement – which was unsigned by Petitioner and merely consisted of notes by the SLED agent assigned to the case – explained

Petitioner's role as a lookout who was to "come out shooting" if police arrived on the scene while the crime was taking place. We also find that the credibility of Petitioner's co-defendants who testified that Petitioner was instrumental in planning the robbery and murder is questionable at best. Petitioner voluntarily implicated both co-defendants prior to Petitioner himself being investigated for the crime, and co-defendant Melick Russell even admitted wanting retaliation for Petitioner's turning him in to police. Co-defendant Mimi Allison Hodges's testimony that she had received a lighter sentence for her role in the crime in exchange for her testimony against Petitioner and the other conspirators has similar implications on her credibility, in our view.

The probative value of Petitioner's friends' testimony with respect to malice is also minimal. One friend testified that Petitioner bragged about a murder, but also stated that he did not believe Petitioner's story because "where I'm from, you kill somebody, you don't walk around and talk about it." Another friend who testified Petitioner sold him a gun allegedly taken from the victim during the robbery could not produce the gun for comparison purposes. Ultimately, the only undisputed relevant facts to be gleaned from the evidence on the record are that Petitioner was near the scene of the crime at the time it occurred, but was neither the gunman, nor in the getaway car.

Even though the State points out that the trial court thoroughly instructed the jury on its role in evaluating the credibility of witnesses and determining the voluntariness of Petitioner's statements, we find that the evidence considered by the jury does not show beyond a reasonable doubt that the jury's guilty murder verdict is not attributable to the unconstitutional presumption of malice. In our opinion, there is no overwhelming evidence tending to establish Petitioner's guilt of murder. More specifically, we find that the probative force of the undisputed facts along with all other evidence purporting to establish Petitioner's central role in the conspiracy do not rise to the level of "malice" such that we may conclude that the mandatory presumption did not play a significant role in the jury's guilty verdict. Therefore, we hold that the unconstitutional presumption of malice articulated in the supplemental jury instruction on felony murder did not constitute harmless error beyond a reasonable doubt.

Because the unconstitutional jury instruction did not constitute harmless error in Petitioner's murder conviction, we find that there is a reasonable probability that, but for counsel's failure to object to the unconstitutional jury instruction, the outcome of the trial would have been different. *See Arnold & Plath*, 309 S.C. at 165, 420 S.E.2d at 838 (noting that the requirement that a constitutional error be harmless beyond a reasonable doubt "embodies a standard requiring reversal 'if there is a reasonable possibility that the evidence complained of might have contributed to the conviction'" (quoting *Yates*, 500 U.S. at 403)). Accordingly, we hold that trial counsel was ineffective in failing to object to the supplemental charge, and therefore, that the PCR court erred in denying Petitioner's application for relief.

CONCLUSION

For the foregoing reasons, we reverse the PCR court's decision dismissing Petitioner's application and grant relief as to Petitioner's murder conviction.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of David Harold Hanna, Sr., Respondent.

Opinion No. 26437
January 15, 2008 – Filed February 11, 2008

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

David Harold Hanna, Sr., of Spartanburg, 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 any sanction in Rule 7(b), RLDE, Rule 413, SCACR. Respondent requests that, if the Court imposes a period of suspension or disbarment, that the suspension or disbarment be made retroactive to the date of his interim suspension, January 18, 2007. In the Matter of Hanna, 371 S.C. 510, 640 S.E.2d 871 (2007). In addition, respondent agrees to pay the costs incurred by ODC and the Commission on Lawyer Conduct in investigating this matter. We accept the agreement and disbar respondent from the practice of law in this state, retroactive to the date of his interim suspension. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent admits the material portions of the factual allegations set out in the Formal Charges. The Formal Charges charge respondent with nine instances of misconduct.

Matter I

Complainant A was the heir of the late Mr. and Mrs. Doe. Respondent had prepared a will for Mr. Doe. Mr. Doe passed away. Respondent prepared a will for Mrs. Doe. Mrs. Doe passed away shortly after Mr. Doe and before his estate was closed. The will prepared for Mrs. Doe included a devise of real property to respondent.

Prior her death, respondent purchased a truck from Mrs. Doe that had belonged to Mr. Doe. Respondent entered into this business transaction with his client without complying with the consultation and consent requirements of the Rules of Professional Conduct. Respondent did not timely respond to the initial inquiry and several requests for additional information from ODC regarding this matter.

Matter II

Complainant B paid respondent $2,500.00 to assist him in a custody dispute. Respondent did not hold the retainer in trust until it was earned. There were delays and continuances in the matter. Respondent did not adequately communicate with Complainant B regarding the scheduling of the hearing. Respondent did not respond to the initial inquiry or the Treacy[1] letter from ODC.

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[1] See In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982).

Matter III

In 1999, certain real property was deeded to Complainants Mr. and Mrs. Jones in a closing conducted by a contract attorney for a closing services company called Magnolia Title. In 2003, Mr. and Mrs. Jones attempted to sell the property. At that time, they learned that the property description in the 1999 deed was incorrect. By that time, the grantor had died.

Respondent was a contract attorney for Magnolia Title.[2] He also served as legal counsel for Magnolia Title. Respondent prepared a corrective deed and contacted the heir to the grantor. The heir indicated she was not willing to sign a corrective deed until she spoke with Mr. and Mrs. Jones. She requested respondent arrange a meeting. She did not hear anything further from respondent.

A corrective deed was filed. The signature of the grantor's heir was forged and falsely witnessed and notarized. Respondent recorded the deed.

When the forgery was discovered by Mr. and Mrs. Jones, respondent sent a proposed agreement in which they would agree to "use all efforts possible to correct a title problem" for the property, that "there was a clerical error in the past deed," and that they would "use their best efforts in assisting Magnolia Title Agency Incorporated in any and all methods necessary to complete this action…including… assisting in any court action." Mr. and Mrs. Jones did not sign this agreement. Respondent did not disclose the conflict of interest created by his representation of his clients' interests and the interests of Magnolia Title either prior to or subsequent to sending the proposed agreement.

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[2] Respondent was not the contract attorney who conducted the 1999 closing for Mr. and Mrs. Jones.

Mr. and Mrs. Jones specifically instructed respondent not to sue the grantor's heir on their behalf. Respondent filed a quiet title action against the grantor's heir naming Magnolia Title and Mr. and Mrs. Jones as plaintiffs.

Respondent did not timely respond to ODC's written inquires in this matter.

Matter IV

In July 2004, Complainant C paid respondent $1,750.00 to represent her in a custody matter involving her grandchildren. ODC investigated the allegations of neglect, incompetence, and lack of adequate communication and concluded there was not clear and convincing evidence to support Complainant C's allegations. Respondent failed to submit a timely response to the initial inquiry from ODC.

Matter V

Complainant D was represented by respondent's partner in a civil case. Complainant D obtained a favorable judgment, but the defendant was in bankruptcy. Respondent agreed to assist with collection of the judgment since he handled bankruptcy cases for the firm.

Subsequently, respondent left the partnership and took the file with him. He collected a number of payments from the bankruptcy trustee and passed them onto Complainant D. Respondent did not withhold any fees or costs from those payments.

In May 2005, respondent received a check for $5,000.00 from the proceeds of the sale of the defendant's real property. Respondent placed this money in his trust account. He told Complainant D that he needed to review the bankruptcy payments and check with his former firm about the fee arrangements and costs

incurred in the civil case. By August 2005, Complainant D had not heard anything from respondent so she contacted his former firm.

After receiving notice of this grievance, respondent contacted his former firm to attempt to get the matter resolved. When their communications broke down, respondent's attorney advised him to hold the funds in his trust account. On August 27, 2006, respondent sent Complainant D a trust account check for the full $5,000.00.

ODC requested copies of respondent's bank statements to verify that the funds had remained in trust until disbursed. Respondent did not comply with this request.

Matter VI

Respondent established a business relationship with Magnolia Title, a closing services company owned by a non-lawyer. The relationship included respondent's representation of Magnolia Title's clients in real estate closings and the representation of Magnolia Title in claims and litigation arising from closings. Respondent was one of the several contract attorneys who conducted closings for Magnolia Title.

The common practice for non-lawyer staff of Magnolia Title included the preparation of title abstracts and closing documents for respondent's review. The closing attorney (respondent or another lawyer) would then conduct the closing and return the documents and money to Magnolia Title. Disbursements of settlement proceeds were made at the closings prior to the deposit of funds. The non-lawyer staff would then conduct post-closing activities such as recording the documents and obtaining title insurance.

Respondent allowed Magnolia Title to open an IOLTA account on which he shared signatory authority with a non-lawyer paralegal employed by Magnolia Title. Magnolia Title used that trust account for all of its closings, regardless of whether respondent handled

the closing. Respondent ultimately severed his ties with Magnolia Title, but he did not close the trust account.

Magnolia Title used an out-of-state bookkeeping service for reconciliation and management of the trust account. Respondent did not have access to the Magnolia Title trust account records when ODC requested them. Respondent did not instruct the non-lawyer staff of Magnolia Title or the out-of-state bookkeeping company regarding the requirements of Rule 417, SCACR.

Complainant E rented real property to Mr. Smith. Mr. Smith wanted to purchase the property. Complainant E agreed to finance the purchase with a $3,000.00 down payment. Complainant E asked respondent to handle the closing for Mr. Smith. Mr. Smith gave Complainant E a personal check for the down payment plus closing costs. Complainant E negotiated the personal check for a cashier's check, delivered it to Magnolia Title, and scheduled the closing.

Respondent conducted the closing and delivered the documents to Magnolia Title to record. The deed and mortgage were not recorded. When Complainant E contacted respondent after the closing, respondent assured him that the documents had been recorded.

Complainant E discovered that the deed and mortgage had not been recorded when he received a tax notice on the property six months later. By that time, Mr. Smith had defaulted on some of his mortgage payments. Respondent advised Complainant E not to file the deed and mortgage at that time in order to avoid a foreclosure.

ODC made repeated inquiries to respondent regarding an accounting of funds paid from Mr. Smith's check to Magnolia Title for recording fees, deed stamps, title insurance premiums, etc., that should have been refunded. Respondent did not respond.

Matter VII

Complainant F retained respondent to represent her in connection with injuries sustained in an automobile accident on March 2, 2001. When respondent left his law firm to start a solo practice, he took Complainant F's file with him.

Complainant F incurred $55,000.00 in medical bills. Respondent submitted a demand in January 2004. The claim was not settled.

On March 3, 2004, the day after the statute of limitations expired, respondent filed suit. The pleadings had been back-dated to March 1, 2004. Respondent was unable to locate the defendant for service. He did not attempt service by publication. The lawsuit was dismissed.

Respondent did not have malpractice insurance. He attempted to settle with Complainant F for $8,000.00. In his communications with Complainant F regarding this proposal, respondent did not comply with the disclosure and consultation requirements of the Rules of Professional Conduct.

Matter VIII

Complainant G hired respondent for three legal matters. Respondent failed to adequately communicate with Complainant G regarding those matters.

Respondent failed to timely respond to the Notice of Full Investigation in this matter. Respondent failed to respond to ODC's request for additional information.

Matter IX

Complainant H hired respondent to represent him in a bankruptcy matter. A creditors' meeting was held on May 30, 2006. At that meeting, the trustee raised concerns about Complainant H's transfer of real estate to his daughter prior to filing bankruptcy.

Respondent asked Complainant H to gather documents related to the conveyance. Complainant H complied with this request and met with respondent's assistant in his absence on June 9, 2006. The assistant drafted a letter of explanation to the trustee and enclosed the documents. She left the draft and documents for respondent's review.

Complainant H tried repeatedly to contact respondent, but he did not respond. As of July 21, 2006, the date Complainant H submitted his grievance, he had not heard from respondent.

In his response to ODC, respondent stated he did review the draft letter prepared by his assistant but did not send it because he wanted to include a copy of the appraisal which he claimed Complainant H had not yet provided. Respondent submitted copies of a number of letters that he claimed he sent to Complainant H asking for a copy of the appraisal. Complainant H never received these letters.

Ultimately, respondent submitted the letter to the trustee on August 21, 2006, after receiving notice of the grievance. The only change respondent made to the draft initially prepared by his assistant was to add a paragraph that said the delay was due to Complainant H's failure to provide documentation to respondent and that Complainant H had become forgetful.

While Complaint H's matter was pending before the bankruptcy court, the Honorable John E. Waites, United States Bankruptcy Judge, submitted a copy of the order of the bankruptcy court in In the Matter of Farnsworth indefinitely suspending respondent from practicing before the bankruptcy court in this state to ODC. This

indefinite suspension followed various sanctions against respondent in fourteen prior matters from 2003 to 2006. These prior sanctions were imposed for a variety of problems, including failing to obtain debtors' signatures on schedules and amended plans, failing to disclose previous filings, deficient representation, violating local rules, filing improper motions, and failing to timely remit filing fees.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2 (lawyer shall abide by client's decisions concerning objectives of representations); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); Rule 1.7(a) (lawyer shall not represent client if representation will be directly adverse to another client unless lawyer reasonably believes representation will not adversely affect relationship with the other client and each client consents after consultation); Rule 1.7(b) (lawyer shall not represent client if the representation of that client may be materially limited by the lawyer's responsibilities to a third person unless lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation); Rule 1.8(a) (lawyer shall not enter into business transaction with a client unless terms are fair and client consents in writing); Rule 1.8(c) (lawyer shall not prepare an instrument giving lawyer substantial gift from a client); Rule 1.8(h) (lawyer shall not settle a claim for liability with unrepresented client or former client unless that person is advised in writing of desirability of seeking and reasonable opportunity to seek independent legal counsel); Rule 1.9 (lawyer who has formerly represented client in matter shall not thereafter represent another person in same or substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client gives informed consent in writing); Rule 1.15 (lawyer shall promptly deliver funds to which client is entitled; lawyer shall

deposit unearned legal fees into trust account and withdraw funds only when earned); Rule 3.3 (lawyer shall not knowingly make false statement of fact to tribunal); Rule 5.3 (lawyer having direct supervisory authority over non-lawyer shall make reasonable efforts to ensure that person's conduct is compatible with professional obligations of lawyer and shall be responsible for non-lawyer's conduct if conduct would be a violation of Rules of Professional Conduct if engaged in by lawyer); Rule 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); Rule 8.4(a) (it is professional misconduct for a lawyer to violate Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).[3]

Respondent further admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a)(2) (it shall be ground for discipline for lawyer to engage in conduct violating applicable rules of professional conduct in another jurisdiction), Rule 7(a)(3) (it shall be ground for discipline for lawyer to knowingly fail to respond to a lawful demand from disciplinary authority), Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute administration of justice, bring courts or legal profession into disrepute, or conduct demonstrating an unfitness to practice law), and Rule 7(a)(7) (it shall be ground for discipline for lawyer to willfully violate a court order). In addition, respondent admits his misconduct violated Rule 417, SCACR.

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[3] The Rules of Professional Conduct cited in this opinion are those which were in effect at the time of respondent's misconduct.

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent. The disbarment shall be retroactive to the date of respondent's interim suspension. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred by ODC and the Commission on Lawyer Conduct in the investigation of these matters. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

In addition, should it be determined that any restitution remains outstanding, ODC and respondent shall file a restitution plan with the Court within thirty (30) days of the date of this opinion. In the plan, respondent shall agree to pay restitution to all clients, banks, and other persons and entities who have incurred losses as a result of his misconduct in connection with this matter. Moreover, in the restitution plan, respondent shall agree to reimburse the Lawyers' Fund for Client Protection for any claims paid as a result of his misconduct in connection with this matter.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Larry Lorenzen, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

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

Opinion No. 26438
Submitted December 6, 2007 – Filed February 11, 2008

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Lance S. Boozer, of Columbia, for Petitioner.

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

JUSTICE BEATTY: In this post-conviction relief (PCR) case, the Court granted the State's petition for certiorari to review the PCR judge's decision granting relief with respect to Larry Lorenzen's convictions for first-degree criminal sexual conduct (CSC) with a minor and second-degree criminal sexual conduct (CSC) with a minor. We reverse.

FACTS

At trial, the following facts were established regarding the charges. The victim, who was fourteen years old at the time of trial, testified Lorenzen was a family friend who regularly spent time with her mother and often visited her father at his separate residence. The victim claimed that when she was left alone with Lorenzen: (1) he began touching her "privates" when she was nine years old; (2) he digitally penetrated her when she was ten years old; and (3) he attempted to have sexual intercourse with her when she was eleven years old. A few weeks after the sexual intercourse incident, the victim told her mother, a school teacher, and the school psychologist about the abuse.

Subsequently, school officials reported the victim's allegations of sexual abuse to the Aiken County Sheriff's Department. After the initial interview, the victim was immediately examined by an emergency room doctor. Two weeks later, a physician with the Lexington County Children's Center examined the victim to determine whether she had been subjected to chronic sexual abuse. Neither examination revealed physical evidence of sexual assault. However, both physicians testified that the absence of such evidence did not necessarily negate the victim's allegations of sexual abuse.

After the abuse had been revealed, the victim was involved in several violent incidents with family members and others which resulted in her being committed to the Department of Juvenile Justice (DJJ).

Dr. Kay Jordan, a counselor specializing in child sexual abuse, was qualified as an expert witness for the State. Dr. Jordan testified that she had eighteen counseling sessions with the victim between July 2000 and December 2000. According to Dr. Jordan, the victim exhibited symptoms of sexual abuse in that she had nightmares, flashbacks, and became violent. Based on her sessions, Dr. Jordan diagnosed the victim with post-traumatic stress disorder. Dr. Jordan explained that her diagnosis was also based on the victim's history of psychiatric treatment for these symptoms which began when the victim was nine or ten years old.

Lorenzen declined to testify in his defense and did not offer any witnesses. The jury convicted Lorenzen of first-degree CSC with a minor, second-degree CSC with a minor, and lewd act upon a child. The trial judge, however, granted defense counsel's motion for a new trial on the lewd act upon a child charge because the State failed to offer evidence that Lorenzen was over the age of fourteen years when the act occurred. On the two remaining charges, the judge sentenced Lorenzen to life in prison without the possibility of parole pursuant to section 17-25-45 of the South Carolina Code.[1]

After the Court of Appeals affirmed his convictions and sentence, Lorenzen filed an application for post-conviction relief. State v. Larry Lorenzen, Op. No. 2003-UP-436 (S.C. Ct. App. filed June 25, 2003).

At the PCR hearing, Lorenzen testified that he believed his trial counsel should have retained an expert witness to: (1) examine him in order to prove that he was not a pedophile; (2) discuss the lack of physical evidence of sexual abuse; (3) delve into the psychological

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[1] The solicitor sought a sentence of life in prison without the possibility of parole pursuant to section 17-25-25 of the South Carolina Code based on Lorenzen's prior conviction for armed robbery. See S.C. Code Ann. § 17-25-45(A)(1), (C)(1) (2003 & Supp. 2007) (statute permitting the State to seek a sentence of life without the possibility of parole if the person has one or more prior convictions for a "most serious offense," which includes the offense of armed robbery).

issues of the victim; and (4) challenge Dr. Jordan's testimony. Lorenzen also stated that it would have been helpful for the jury to have heard that the victim's father was on the sexual offender registry. Lorenzen further asserted that it might have made a difference if he had testified at trial. However, he admitted the "case was stacked against" him at the point he would have testified. He ultimately asserted that counsel's "performance prejudiced [him] such that it rendered the proceeding fundamentally unfair."

During her testimony, trial counsel admitted that Lorenzen's case was only her third jury trial and her first trial involving a sex crime. She testified she had become more experienced with this type of case since Lorenzen's trial. Specifically, she had learned that it is helpful to have the defendant examined by a forensic psychologist in order to assess the person's propensity for engaging in the alleged sexually-deviant behavior. Additionally, she believed it would have been beneficial for an independent doctor to review the victim's medical records. In terms of the victim's records, counsel stated she had the records from the victim's sessions with the sexual abuse counselor as well as the records from the psychological facilities that treated the victim. Counsel, however, stated the victim's police interview was not videotaped, which she now knew was part of the suggested protocol in child victim cases. She also acknowledged that expert witnesses could have been called to counter Dr. Jordan's testimony. Counsel further testified she was not aware at the time of trial that the victim's father was on the sexual offender registry. Had she known this fact, counsel stated she would have cross-examined the State's expert witness regarding the possibility that the victim was abused by her father. Finally, counsel informed the court that the public defender's office was short staffed at the time of trial. As a result, she did not have a more experienced public defender assisting her during the trial.

The PCR judge granted Lorenzen's application for relief. The judge found that "trial counsel did not adequately prepare for the trial and the defense of [the] charges." In reaching this decision, the judge noted that counsel was not only "lacking in experience," but "she was also lacking in assistance at the office." In terms of the specifics of

trial counsel's performance, the judge addressed several areas where he felt counsel was deficient.

Specifically, the judge found counsel failed to: (1) retain or even consult with an expert witness; (2) conduct an investigation to determine whether another individual, particularly the victim's father who was listed on the sexual offender registry, could have been responsible for sexually abusing the victim; (3) have Lorenzen submit to a polygraph examination in order to assist in the defense; (4) obtain the minor victim's records from the sexual abuse counselor, the Department of Juvenile Justice, and the Department of Social Services; and (5) meet with the minor child prior to trial.

Ultimately, the judge concluded that "[a]ll of these shortcomings are problematic. While no individual failure alone would be a ground for granting this PCR, the cumulative neglect is severe." In reaching his decision to grant Lorenzen's petition for relief, the judge relied on this Court's opinion in Nance v. Frederick, 358 S.C. 480, 596 S.E.2d 62 (2004).[2] The judge recognized that Lorenzen's counsel was not as

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[2] In Nance, the defendant was convicted and received a sentence of death for murder, first-degree CSC, assault and battery with intent to kill, first-degree burglary, and armed robbery. After the circuit court denied Nance's application for post-conviction relief, he petitioned for certiorari. This Court granted certiorari and reversed the PCR judge's order on the ground Nance's trial counsel was ineffective in that he failed to challenge the prosecution's case against Nance. The United States Supreme Court vacated this Court's opinion and remanded the case for consideration in light of Florida v. Nixon, 543 U.S. 175 (2004). Ozmint v. Nance, 543 U.S. 1043 (2005).

Pursuant to the Supreme Court's mandate, this Court found the case represented "one of the rare cases where counsel 'entirely fails to subject the prosecution's case to meaningful adversarial testing.' Moreover, counsel did not act as an adversary to the prosecution's case, but instead helped to bolster the case *against* his client." Nance v. Frederick, 367 S.C. 547, 553, 626 S.E.2d 878, 881 (2006), cert. denied,

deficient as counsel in Nance. However, he found Lorenzen's counsel's "failure to properly and adequately prepare for the trial and prepare [Lorenzen's] defense in general amounted to a complete denial of counsel and failed to subject the prosecution's case to a meaningful adversarial testing." Based on this assessment, the judge granted Lorenzen's application "because, essentially, trial counsel was ineffective for failing to prepare and present [Lorenzen's] case as required under the Sixth Amendment."

This Court granted the State's petition for certiorari to review the PCR judge's decision.

DISCUSSION

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. United States v. Cronic, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 668 (1984). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in

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127 S.Ct. 131 (2006). Specifically, this Court found Nance's trial counsel was deficient in the following respects: (1) counsel was taking several prescription medications during the trial which resulted in impaired memory, lack of sleep, and sedation; (2) counsel provided Nance's expert witness with Nance's medical records just a few hours before the trial; (3) during his opening statement counsel informed the jury that he was appointed as a public defender and did not ask for the case; (4) counsel called a correctional officer as a witness who testified regarding Nance's only incident of misbehavior in jail; (5) counsel called Nance's sister to testify without preparing her to testify and eliciting testimony that Nance was an abnormal child who, among other things, killed the family's pets; and (6) counsel referred to Nance during closing arguments as a "sick" man who did "sick things." Based on the these deficiencies, this Court granted Nance a new trial. The Court found "there was a total breakdown in the adversarial process" and, thus, presumed that Nance was prejudiced. Id. at 555, 626 S.E.2d at 882.

making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), cert. denied, 128 S. Ct. 370 (2007).

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "[P]etitioner must meet the standard established in Strickland v. Washington, 466 U.S. 668 (1984)." Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000). In order to establish a claim of ineffective assistance of counsel, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Caprood, 338 S.C. at 109, 525 S.E.2d at 517 (citing Strickland v. Washington, 466 U.S. 668 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Ard, 372 S.C. at 331, 642 S.E.2d at 596. "Furthermore, when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.'" Id. (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)).

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). A PCR court's findings will be upheld on appeal if there is "any evidence of probative value sufficient to support them." Id. This Court will reverse the PCR court's decision when it is controlled by an error of law. Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004).

Generally, an applicant must show actual prejudice under Strickland. The United States Supreme Court and this Court have recognized that in certain limited circumstances "'prejudice is presumed' because prejudice 'is so likely that case-by-case inquiry . . . is not worth the cost.'" Nance, 367 S.C. at 551, 626 S.E.2d at 880 (quoting Strickland, 466 U.S. at 692)); Cronic, 466 U.S. at 658. In analyzing these narrow circumstances, this Court explained:

> In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." Brown v. French, 147 F.3d 307, 313 (4th Cir. 1998).

Nance, 367 S.C. at 552, 626 S.E.2d at 880. Although an applicant "must ordinarily show actual prejudice, he may be relieved of that burden if counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary." Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002).

I.

The State argues the PCR judge erred in finding that trial counsel was ineffective for failing to call expert witnesses during Lorenzen's trial. For several reasons, we agree with the State's assertion.

First, Lorenzen failed to present evidence that would show a reasonable probability that, but for counsel's failure to call expert witnesses, the result of his trial would have been different. Aside from

his testimony and his trial counsel's testimony, Lorenzen did not offer any other witnesses to testify on his behalf at the PCR hearing. Therefore, it is merely speculative that these allegedly favorable expert witnesses would have aided in his defense. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); see also Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR.").

Secondly, counsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence. See Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (finding trial counsel was not deficient in failing to procure an expert witness to challenge DNA evidence presented at trial where the record established that counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence). At trial, Lorenzen's counsel attacked the State's evidence through cross-examination as well as by positing objections when appropriate. Counsel also vigorously cross-examined Dr. Jordan, the State's expert witness. Significantly, Lorenzen admitted at the PCR hearing that counsel had brought out "some good points" during her cross-examination. Finally, it is noteworthy that counsel in preparing her case had the assistance of two public defenders. Neither public defender recommended or suggested that counsel retain expert witnesses for Lorenzen's defense.

Because Lorenzen failed to meet his burden that trial counsel was deficient and that the result of his trial would have been different but for this alleged deficiency, we hold the PCR judge erred in finding Lorenzen's counsel's failure to call expert witnesses was a critical error in the alleged cumulative errors that constituted ineffective assistance of counsel.

II.

The State contends the PCR judge erred in finding Lorenzen's trial counsel was ineffective for failing to raise the fact that the victim's father was on the sexual offender registry. We agree with the State's contention.

Because the PCR judge admitted the registry without explanation over the State's objection, it is difficult to discern the basis for its admission. In any event, we conclude the sexual offender registry would not have been admissible at trial.

"Our Supreme Court has imposed strict limitations on the admissibility of third-party guilt." State v. Mansfield, 343 S.C. 66, 81, 538 S.E.2d 257, 265 (Ct. App. 2000). "Evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are inconsistent with the defendant's guilt." Id. Recently, after Lorenzen's trial and PCR hearing, our United States Supreme Court clarified the above-outlined rule regarding the admission of third-party guilt in Holmes v. South Carolina, 547 U.S. 319 (2006). In Holmes, the Supreme Court considered the question of "whether a criminal defendant's federal constitutional rights are violated by [a South Carolina] evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." Id. at 321. The Supreme Court answered this question in the affirmative. The Court's holding essentially permits a defendant to introduce evidence of third-party guilt regardless of the strength of the State's case if the evidence meets the following criteria:

> [E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by

> another, is not admissible . . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. 198 S.C., at 104-105, 16 S.E.2d, at 534-535 (quoting 16 C.J., Criminal Law § 1085, p. 560 (1918) and 20 Am.Jur., Evidence § 20 265, p. 254 (1939); footnotes omitted).

Holmes, 547 U.S. at 328 (quoting State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941)).

Applying the foregoing to the facts of the instant case, we find the sexual offender registry listing the victim's father's name would not have been admissible under either a pre- or post-Holmes third-party guilt standard. Significantly, the victim's father was listed on the registry for committing the crime of assault with intent to commit criminal sexual conduct in the first degree which would have involved an adult victim whereas Lorenzen was charged with criminal sexual conduct with a minor. Lorenzen's counsel at the PCR hearing acknowledged there was nothing on the registry to indicate the victim's father committed a crime against a child. Furthermore, Lorenzen's allegation that the victim's father may have been the perpetrator was so nebulous that it would have had no other effect than to "cast a bare suspicion." Therefore, we do not believe these facts would be inconsistent with Lorenzen's guilt or raise a reasonable inference of his innocence. Accordingly, we find the PCR judge erred in using this alleged error as a ground for finding Lorenzen's counsel ineffective.

III.

The State avers the PCR judge erred in finding that Lorenzen's counsel was ineffective for failing to have Lorenzen submit to a polygraph examination. We agree with the State.

"This Court has consistently held the results of polygraph examinations are generally not admissible because the reliability of the

tests is questionable." State v. Council, 335 S.C. 1, 23, 515 S.E.2d 508, 519 (1999), cert. denied, 528 U.S. 1050 (1999). Although this Court in Council declined to recognize a per se rule against the admission of polygraph evidence, it indicated that the "admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the Jones factors." Id. at 24, 515 S.E.2d at 520.

Initially, we note the polygraph issue was not presented to the judge by either Lorenzen or his counsel. Instead, the judge essentially sua sponte raised the issue. Given this procedural posture, it was mere speculation on the part of the PCR judge to find the admission of a favorable polygraph examination would have aided in Lorenzen's defense. Significantly, the PCR judge conceded that "[w]hile the result of any polygraph examination would obviously only be speculative, the fact that one was not performed is problematic." Without the results of a polygraph examination or any other evidence concerning its admission, it is difficult to definitively assess whether it would have been admissible at trial. Because this type of evidence is rarely admitted, we do not believe the facts would support its admission. Therefore, we find Lorenzen did not meet his burden to establish a claim of ineffective assistance of counsel based on this ground.

IV.

The State argues the PCR judge erred in finding Lorenzen's counsel was ineffective for failing to obtain the victim's records from Dr. Jordan, the Department of Juvenile Justice, and the Department of Social Services. We agree with the State.

At the PCR hearing, Lorenzen's trial counsel specifically testified:

> I had extensive records in this case provided to me by the State, not only from [Dr.] Jordan's visit with [the victim] but also from prior—I had the records of all of the physical exams that had been done as well as extensive records from

> [the victim's] prior commitments to certain psychological facilities and I believe that I had her D.J.J. records as well.

Additionally, counsel informed the PCR judge that she had the assistance of two other public defenders helping her prepare the case by extensively reviewing all of these records. Because there is no evidence in the record to support this finding, we hold the PCR judge clearly erred in relying in part on this ground to grant Lorenzen's application for relief. See Scott v. State, 334 S.C. 248, 252, 513 S.E.2d 100, 102 (1999) (stating "an appellate court will not affirm the decision when it is not supported by any probative evidence"); see also Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (A PCR court's findings will be upheld on appeal if there is "any evidence of probative value sufficient to support them."). Furthermore, Lorenzen failed to show that counsel's review of additional records would have been beneficial to his defense. Lorenzen's claim that the records would have changed the result of his trial was speculative at best given he did not present evidence that other records existed or that the records reviewed by counsel included exculpatory evidence.

V.

The State asserts the PCR judge erred in finding Lorenzen's counsel was ineffective for failing to interview the victim prior to trial. We agree with the State's assertion.

Initially, we note that Lorenzen failed to specifically raise this issue or present any evidence at the hearing that interviewing the victim would have led to a different result at trial. Thus, we believe that Lorenzen's mere speculation was insufficient to meet his burden to establish that counsel was ineffective. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) ("Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Finally, we note that counsel cross-examined the victim regarding her allegations. Counsel also thoroughly cross-examined Dr.

Jordan concerning her counseling sessions with the victim and her ultimate diagnosis. Moreover, the victim's disclosure of the sexual abuse was corroborated by several other witnesses. Therefore, we conclude the PCR judge erred in finding that counsel's failure to interview the victim prior to trial constituted a basis for his decision that counsel was ineffective.

CONCLUSION

Based on the foregoing, we conclude the PCR judge erred in granting Lorenzen's application for post-conviction relief. Because none of the alleged errors are meritorious, we hold the PCR judge incorrectly relied on Nance in finding that the cumulative effect of these alleged errors established a claim of ineffective assistance of counsel.[3] Accordingly, we reverse the order of the PCR judge.

REVERSED.

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

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[3] Although we recognize that whether the cumulation of several errors, "which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina" we do not believe the facts of this case present an opportunity to definitively decide this question. See Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (citing Green and stating "[w]hether several errors, which are independently found not be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina").

The Supreme Court of South Carolina

In the Matter of Dennis J. Rhoad, Respondent.

ORDER

Respondent was suspended on November 5, 2007, for a period of ninety (90) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

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

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Pleicones, J., not participating

Columbia, South Carolina

February 11, 2008

The Supreme Court of South Carolina

Luther Alexander, Petitioner,

v.

Forklifts Unlimited, Employer and Zurich American Insurance Company, Carrier, Respondents.

ORDER

We granted the petition for a writ of certiorari to review the Court of Appeals' decision in Alexander v. Forklifts Unlimited, 365 S.C. 509, 618 S.E.2d 307 (Ct. App. 2005). Pursuant to Rule 232, SCACR, the parties have submitted a settlement agreement to this Court. After careful consideration, we accept the proposed agreement. In addition, we hereby vacate the Court of Appeals' published opinion in this matter.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ R. Ferrell Cothran, Jr. A.J.

Columbia, South Carolina

February 6, 2008