The Supreme Court of South Carolina

RE: Extension Requests in Criminal Direct Appeals
and Post-Conviction Relief Certiorari Proceedings

ORDER

This Court finds that it is appropriate to establish a uniform policy for processing extension requests by counsel in criminal direct appeals and post-conviction relief (PCR) certiorari proceedings. Accordingly, the following procedures shall apply when an extension is requested in these cases at both this Court and the South Carolina Court of Appeals in both capital and non-capital cases.

(1) One extension of up to thirty (30) days each may be granted for any stage of the appellate proceeding without a showing of good cause.

(2) A second extension request may be granted upon a showing of good cause. The facts supporting good cause shall be set forth in the motion. The signature of the attorney on the motion shall be a

certification that the attorney believes that the extension is warranted and that there is good cause to seek the extension.

(3) A third extension may be granted upon a showing of good cause. The facts supporting the good cause shall be set forth in the motion. If filed by the Division of Appellate Defense or the Office of the Attorney General, the motion shall be signed by the attorney involved and his or her immediate supervisor. If filed by a private lawyer, the motion shall be signed by the attorney involved and, if lawyer is not a sole practitioner, by another member of the firm. The signatures on the motion shall be a certification by these attorneys that they believe that the extension is warranted and that there is good cause to seek the extension.

(4) A fourth or subsequent extension may be granted upon a showing of extraordinary circumstances. The motion must contain sufficient facts to show that there are extraordinary circumstances that warrant the extension, and must state what actions are being taken to insure that no further extension will be required. If filed by the Division of Appellate Defense, the motion shall be signed by the attorney involved, and the Executive Director of the Office of Indigent Defense or his or her chief

deputy. If filed by the Office of the Attorney General, the motion shall be signed by the attorney involved, and the Attorney General or his or her chief deputy. If filed by a private lawyer, the motion shall be signed by the attorney involved and, if lawyer is not a sole practitioner, by the senior partner or the next most senior partner in the firm. The signatures on the motion shall be a certification by these attorneys that they believe that the extension is warranted and that extraordinary circumstances are present.

(5) Counsel are expected to minimize extension requests, and multiple extensions should generally be sought only for a stage of the appellate proceeding which involves research or writing by the attorney, such as the preparation of a brief or the preparation of the petition for a writ of certiorari, return or reply in a PCR case.

(6) Nothing in this order shall be construed as preventing the Supreme Court or the Court of Appeals from further restricting extensions in an individual case when warranted, including cases which may be expedited.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
March 18, 2009

The Supreme Court of South Carolina

In the Matter of Joseph Vincent Manders, Jr., Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on March 14, 2001, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated February 19, 2009, Petitioner submitted his 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 his 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 his 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 he has fully complied with the provisions of this order. The resignation of Joseph Vincent Manders, Jr. shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

March 19, 2009

The Supreme Court of South Carolina

In the Matter of Thomas
Everett Wright, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 23, 1993, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to South Carolina Supreme Court, dated January 28, 2009, Petitioner submitted his 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 his 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 his 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 he has fully complied with the provisions of this order. The resignation of Thomas Everett Wright shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

March 19, 2009

The Supreme Court of South Carolina

In re: Amendments to the Lawyers' Fund for Client Protection of the South Carolina Bar Rules of Procedure

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O R D E R

In accordance with Rule 411(c)(2), South Carolina Appellate Court Rules, the South Carolina Bar has proposed a number of amendments to the Lawyers' Fund for Client Protection of the South Carolina Bar Rules of Procedure. The amendments seek to expedite claims by providing specific deadlines for processing claims. The amendments also include a new section governing confidentiality of applications, proceedings, and reports.

We grant the Bar's petition to amend the Lawyers' Fund for Client Protection of the South Carolina Bar Rules of Procedure, as set forth in the attachment to this Order. These amendments shall be effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

March 20, 2009

LAWYERS' FUND FOR CLIENT PROTECTION
OF THE SOUTH CAROLINA BAR
RULES OF PROCEDURE

. . .

SECTION II. APPLICATION FOR REIMBURSEMENT

. . .

6. If the lawyer is a member in good standing of the South Carolina Bar, the applicant's cooperation in grievance proceedings against such lawyer shall be a prerequisite to the granting of relief to such applicant from the Fund. The Committee may require that a claimant prosecute or cooperate in appropriate civil proceedings against the accused lawyer as a prerequisite to the granting of relief to such applicant from the Fund.

SECTION III. PROCESSING APPLICATION

1. The Committee shall cause reasonable investigation of any applications coming to its attention, either by applications for reimbursement or by certification from the Commission on Lawyer Conduct, its agents, or the Board of Governors of the South Carolina Bar.

2. The Chair of the Committee shall cause each such application to be sent to a member of the Committee or other member of the South Carolina Bar for investigation and report. A copy of the application shall be served upon or sent by registered mail to the last known address of the lawyer who it is claimed committed the dishonest act. Whenever possible, the application will be referred to a member of the Committee or member of the South Carolina Bar who practices in the Judicial Circuit wherein the alleged defalcating lawyer practiced.

3. When, in the opinion of the member to whom application has been referred, the application is clearly not for a reimbursable loss, no further investigation need be conducted. A report with respect to such application

shall be made as hereinafter specified by the member to whom the application was referred.

4. A member to whom a report is referred for investigation shall conduct such investigation in such manner as deemed necessary and desirable to determine whether the application is for a reimbursable loss and to guide the Committee in determining the extent, if any, to which the application shall be paid from the Fund.

5. Any information obtained by the member from the files of the Commission on Lawyer Conduct shall be used solely by or for the Lawyers' Fund for Client Protection Committee; but otherwise shall constitute confidential information.

6. Reports with respect to applications shall be submitted by the members to whom they have been referred for investigation to the Committee Liaison within ninety days.

7. The Committee Liaison shall submit reports with respect to applications to the Chair of the Committee and to the members of the Committee within ten working days of their receipt.

8. After considering the reports on applications to be processed, a Committee member may request that testimony be presented. Absent such recommendation or request, applications shall be processed on the basis of information contained in the report of the member who investigated such applications. In all cases, the alleged defalcating lawyer or a personal representative will be given an opportunity to be heard by the Committee if he or she so requests. The "fact" of dishonest conduct is usually determined by the Commission on Lawyer Conduct or a civil or criminal court; not by the Lawyers' Fund for Client Protection Committee.

9. The Committee shall, in its discretion, determine the amount of loss, if any, for which any client shall be reimbursed from the Fund. In making such determination, the Committee shall consider, *inter alia*, the following:

(a) Any conduct of the client which contributed to the loss.

(b) The comparative hardship which the client suffered because of the loss.

(c) The total amount of reimbursable losses of the clients of any one lawyer or association of lawyers.

(d) The total amount of reimbursable losses in previous years for which the total reimbursement has not been made and the total assets of the Fund.

(e) The total amount of insurance or other source of funds available to compensate the client for the loss.

(f) The Committee may, in its discretion, allow further reimbursement in any year of a reimbursable loss allowed by it in prior years with respect to a loss which has not been fully reimbursed; provided such further reimbursement would not be inconsistent or in conflict with any previous determination with respect to such a loss.

(g) No reimbursement shall be made to any client, a report of whose application has not been submitted to the Committee, except as provided below. No reimbursement shall be made to any client unless said reimbursement is approved by a majority vote of the Committee at a duly held meeting at which a quorum is present, except as provided below.

Small claims may be authorized by the Chair of the Committee and paid without a meeting of the Committee upon compliance with the following procedure:

(i) The application is for reimbursement in an amount of $1,000 or less;

(ii) The investigating member has represented that all elements justifying reimbursement under these rules have been satisfied; and

(iii) The members of the Committee are provided a copy of the client's application and the investigating member's report, a majority of members approve such reimbursement, and approvals are filed with the records of the Committee.

10. An applicant may be advised of the status of the Committee's consideration of his application and shall be advised of the final determination of the Committee.

11. All participants in the application, investigation or proceeding (including the applicant) shall conduct themselves so as to maintain the confidentiality of the application, investigation or proceedings. This provision shall not be construed to deny relevant information to the Commission on Lawyer Conduct or authorized agencies investigating qualifications for governmental employment, or to prohibit the release of statistical information which does not disclose the identity of the parties. If requested, any information from the files of the Lawyers' Fund for Client Protection may be provided to law enforcement and the Commission on Lawyer Conduct.

. . .

Section VII. GENERAL PROVISIONS

No publicity shall be given to applications for reimbursement until payment is approved; thereafter, publicity shall be within the discretion of the Committee subject to the provisions of Section III.

These Rules may be changed at any time by the majority vote of the Committee subject to the approval of the Board of Governors of the South Carolina Bar and provided such change is not inconsistent with the Rule of the Supreme Court of South Carolina establishing the Lawyers' Fund for Client Protection. Members of the Committee, investigating members and Bar staff shall be immune from liability and suit while acting within the scope of their duties under this Rule or any rules which may be promulgated by the Committee.

Section VIII. CONFIDENTIALITY

The Committee, pursuant to Rule 411(c)(4), memorializes a Rule regarding the confidentiality of applications, proceedings and reports. Unless otherwise directed by the lawyer that the matter be made public pursuant to the Rule, this

Rule shall apply.

1. Upon filing of an application pursuant to Rule 411, the lawyer whose alleged conduct predicates the application shall be provided a copy of that application. The copy shall be sent to the address of the lawyer on the Bar member register, unless another address is known.

2. The cover letter forwarding the application to the lawyer will also identify the investigator assigned to the matter and invite that lawyer to contact the investigator should he or she deem it necessary. The investigator is under no obligation to contact the lawyer.

3. During the course of investigation, individual investigators gather information and prepare reports for the Committee to consider. The reports submitted by the individual investigator provide background and make a recommendation, although the recommendation is not binding upon the Committee. The reports are intended to provide as much information as possible so that the Committee can have a full and frank deliberation. All file materials, other than the application and the Committee's decision, are deemed confidential work product and shall not be produced.

4. Nothing contained herein shall be construed to deny access to relevant information to appropriate authorized agencies as authorized by the Committee's Rules of Procedure. To that extent, information regarding obligations of lawyers to the Fund may be shared with appropriate authorities determining the feasibility of reinstating the lawyer to the practice of law. The deliberations and reasoning for the award amounts will not be shared with those agencies absent a case-by-case approval by the Committee.

5. Civil subpoenas will be honored as to specific matter, but work product produced in the course of an investigation shall not be produced.

The Supreme Court of South Carolina

RE: Lawyers Suspended by the South Carolina Bar

The South Carolina Bar has furnished the attached list of lawyers who have been administratively suspended from the practice of law pursuant to Rule 419(b)(1), SCACR, since February 1, 2009. This list is being published pursuant to Rule 419(d)(1), SCACR. If these lawyers are not reinstated by the South Carolina Bar by April 1, 2009, they will be suspended by order of the Supreme Court and will be required to surrender their certificates to practice law in South Carolina. Rule 419(e)(1), SCACR.

Columbia South Carolina
March 23, 2009

Attorneys Suspended for Nonpayment of 2009 License Fees
As of March 1, 2009

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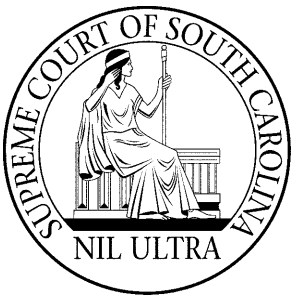

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13
March 23, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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2008-UP-646-Robinson v. Est. of Harris	Pending
2008-UP-647-Robinson v. Est. of Harris	Pending
2008-UP-648-Robinson v. Est. of Harris	Pending
2008-UP-649-Robinson v. Est. of Harris	Pending
2008-UP-651-Lawyers Title Ins. V. Pegasus	Pending
2008-UP-664-State v. Davis	Pending
2008-UP-705-Robinson v. Est of Harris	Pending
2008-UP-712-First South Bank v. Clifton Corp.	Pending

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of James W. Fayssoux, Respondent.

Opinion No. 26617
Submitted February 6, 2009 – Filed March 23, 2009

PUBLIC REPRIMAND

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

James W. Fayssoux, of Greenville, 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 the imposition of an admonition, a public reprimand, or the imposition of a definite suspension not to exceed sixty (60) days. We accept the Agreement and impose a public reprimand. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent self-reported to ODC that he, along with several other lawyers, numerous non-lawyers, and several business

entities had been named as defendants in civil litigation initiated by a lender. Respondent's errors and omissions carrier settled the litigation by paying damages in an agreed amount of $35,000 to the lender.

It is now known that, as a result of a federal investigation, James Byrd, Eric Byrd, and their related business associates and/or entities entered into schemes to acquire and then sell real estate at inflated values to the detriment of the purchasers and to a lender who made loans to those purchasers. Due to those schemes, the lender made loans to persons it would not have otherwise approved. Further, the lender made loans contrary to its policies and procedures and in amounts in excess of its lending policies and procedures which it had in place to promote timely repayment and to prevent default upon its loans secured by real estate mortgages. Subsequently, both the Byrds and others were indicted and sentenced to terms in federal prison for wire, mail, and/or bank fraud.

Respondent represents that he was unaware of any criminal activity in connection with any of the real estate transactions he handled that were arranged by the Byrds. ODC does not dispute this representation. Further, respondent represents that he does not believe that his activities constituted criminal acts and ODC does not dispute this representation.[1]

However, twenty-eight (28) real estate closings which were handled by respondent as arranged by one or both of the Byrds revealed irregularities that ODC contends constitute lawyer misconduct on the part of respondent. With the advantage of information revealed by hindsight and the investigation by the federal authorities and ODC, respondent agrees with ODC's contention.

In one transaction, respondent wrote a check on his trust account payable to Vision Enterprises, an entity known by respondent

[1] Respondent was not charged with any criminal activity in connection with the transactions reported in this opinion and neither respondent nor ODC expect any charges to be filed in the future.

to be owned and/or controlled by one or more of the Byrds. The check was for the exact amount due to the seller Eric Byrd on a related HUD-1 Settlement Statement prepared by respondent. As a result, the information furnished to the borrower and lender on the HUD-1 contained incorrect information.

In another transaction, Vision Enterprises placed an $18,000 mechanics lien against real property acquired by James Byrd who then sold the same property the next day, paying the mechanics lien out of the proceeds of that sale. Respondent prepared the closing papers and made the disbursements. It is now recognized that Byrd, through his colleague's placement of the mechanics lien, actually placed the mechanics lien against himself and then paid it out of the proceeds of the sale to a borrower and a loan made by the lender, even though little or no repairs were made to the property. ODC contends respondent should have recognized this was a sham mechanics lien because it was placed on property by an entity or person known to respondent to be a Byrd confidant the very day before Byrd and/or a Byrd-controlled entity sold the property.

In several other Byrd-arranged closings, the HUD-1s prepared by or at the direction of respondent showed money being withheld for repairs. It is now known that little, if any, such repairs warranting the amount withheld were actually made. Respondent withheld the funds and paid them over to one or more of the Byrds and/or one or more entities controlled by or having a very close working relationship with the Byrds. In retrospect, respondent now recognizes that, as a result, both borrowers and lenders were acquiring interest in real property at inflated values and/or there was greater consideration begin received by the seller than reflected on the corresponding HUD-1s prepared by respondent.

In three other transactions, respondent's firm's pension and profit sharing plan provided loans in Byrd-arranged transactions (and then sold those properties for a profit). By participating in the transactions, respondent had business dealings with a client without complying with the requirements of the Rules of Professional Conduct.

Further, the properties were sold to Byrd under financing to the pension and profit sharing plan (secured by notes and mortgages to that plan from Byrd or Byrd-controlled entities). Respondent prepared the closing documents in these transactions and then handled the closings when Byrd sold these three properties to borrowers. Monies from these transactions were applied toward the notes and mortgages, but no mention of the monies being paid to the pension and profit sharing plan of respondent's firm were made on the borrowers' HUD-1s. By omitting the information from the HUD-1s, the information given to the lender and borrowers was not entirely correct. Further, respondent issued title insurance policies that did not make exception to the mortgages, notwithstanding the fact that the mortgages were publicly recorded. These three transactions were the subject of the civil litigation against respondent and the federal indictments against the Byrds and others.

In another transaction, Eric Byrd was the seller and another Byrd business associate was the buyer in the arrangement. Respondent was aware of the relationship between the seller and buyer and closed the transaction. Line 201 on the HUD-1 Settlement Statement (earnest money paid by borrowers) states that $12,000 was paid as earnest money by the borrower when, in fact, no such amount was received by respondent into his firm's trust account and no notation "POC" (paid outside of closing) was made on that line. As a result, the receipts and disbursements made out of respondent's trust account were not consistent with the information on the HUD-1.

In several other matters closed by respondent, James Byrd purchased transactions as refinancings which allowed Byrd to circumvent the lender's guidelines, procedures, and policies applicable to purchase transactions to avoid the lender making loans on property at inflated amounts. In furtherance of this scheme, a Byrd-controlled land trust served as a straw buyer giving a note and mortgage. Respondent was aware that the land trust was a Byrd-related and controlled entity. In hindsight, respondent acknowledges the peculiarities of these

transactions should have served as "red flags" that improprieties were being committed in connection with these real estate transactions.

Another Byrd scheme was to make fictitious notes and mortgages from Byrd cohorts as "borrowers" to Next Generation (an entity known at the time by respondent to be Byrd-controlled). While respondent did not draft these notes and mortgages, in some cases they were drawn and recorded the day before respondent conducted the closings on the encumbered property sold to genuine borrowers. Respondent should have seen additional "red flags" when Byrd left the closing with a check made to the lender, especially when a known Byrd family member was the borrower.

Respondent represents that all checks exchanged during these transactions were honored upon presentment. ODC does not dispute this representation. However, it is now known that personal checks which were brought to closings handled by respondent in some of the transactions by the Byrds or their associates would only be made good out of the proceeds of the ultimate, inflated sales of the subject property.

Toward the end of their relationship, respondent began having concerns about the propriety of the Byrds' transactions. Around the same time, one of the Byrds asked respondent to assist in "flip" transactions; respondent recognized participating in a "flip" transaction would constitute misconduct. Respondent ceased closing transactions for the Byrds.

Respondent has been engaged in the practice of law since 1972. He has no prior disciplinary history. He has fully cooperated with ODC's inquiries into this matter.

LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of

this jurisdiction regarding professional conduct of lawyers). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.7(a) (lawyer shall not represent client if representation involves concurrent conflict of interest); Rule 1.8(a) (lawyer shall not enter into business transaction with client or knowingly acquire a pecuniary or security interest adverse to a client unless certain conditions are met); Rule 4.1(a) (in course of representing client, lawyer shall not make false statement of material fact to a third person); Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice).

CONCLUSION

The misconduct reported in this opinion would normally warrant the imposition of a suspension from the practice of law. However, because respondent self-reported his misconduct to ODC, fully cooperated with the disciplinary investigation, and has served the Bar of this State for more than thirty years with no prior disciplinary history, we find that a public reprimand is warranted. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Donald D. Berry, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Cherokee County
Doyet A. Early, III, Post-Conviction Relief Judge

Opinion No. 26618
Submitted November 19, 2008 – Filed March 23, 2009

REVERSED AND REMANDED

Deputy Chief Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General S. Prentiss Counts, all of Columbia, for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the denial of Donald D. Berry's application for post-conviction relief (PCR). Berry pled guilty to a drug charge, second offense, and was sentenced to prison. The prior offense for enhancement purposes was a drug paraphernalia conviction. Because a drug paraphernalia conviction does not qualify as a prior offense for enhancement purposes under South Carolina's statutory scheme and plea counsel neither informed Berry of this fact nor made an objection in the plea court, we reverse the denial of PCR, vacate the guilty plea, and remand to the general sessions court.

I.

Berry pled guilty to manufacturing methamphetamine, second offense, and was sentenced to seven years' imprisonment. The plea was enhanced to a second offense by Berry's prior conviction for possession of drug paraphernalia. As part of the plea agreement, an accompanying possession with intent to distribute methamphetamine charge was dismissed. The PCR court found Berry did not establish his entitlement to relief and denied his application. Berry sought a writ of certiorari, which we granted.

Section 44-53-470 of the South Carolina Code (Supp. 2007) states, "[a]n offense is considered a second or subsequent offense if . . . the offender has been convicted within the previous ten years of a violation of a provision of this article or of another state or federal statute relating to narcotic drugs, marijuana, depressants, stimulants, or hallucinogenic drugs . . . ." Additionally, section 44-53-375(B)(2) of the South Carolina Code (Supp. 2007) provides the following requirements for an enhanced offense:

> [F]or a second offense or if, in the case of a first conviction of a violation of this section, the offender has been convicted of any of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant,

> stimulant, or hallucinogenic drugs, the offender must be imprisoned for not less than five years nor more than thirty years, or fined not more than fifty thousand dollars, or both.

II.

Whether a drug paraphernalia conviction qualifies as a prior offense for enhancement purposes has not been decided by this Court. The question is one of statutory construction. *See State v. Dingle*, 376 S.C. 643, 649, 659 S.E.2d 101, 105 (2008) ("In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the Legislature."). Moreover, in construing a criminal statute, we are guided by the rule of lenity—the principle that any ambiguity must be resolved in favor of the accused. *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) ("[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant."). We hold that the Legislature intended a prior offense to qualify for enhancement purposes only if the prior offense "relates to" one of the statutorily enumerated drugs.

To construe a paraphernalia conviction as "relating to" drugs would be contrary to unambiguously expressed legislative intent and additionally violate the rule of lenity long established in our jurisprudence. Moreover, were we to construe the phrase "relate to" so loosely as to include a paraphernalia conviction, there would essentially be no limitation for qualifying enhancement offenses. We therefore hold that a conviction for possession of drug paraphernalia may not be used for enhancement purposes as it does not "relate to" drugs as statutorily mandated.

III.

Ineffective Assistance of Counsel

We now turn to Berry's PCR claim of ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel under the Sixth Amendment, a PCR applicant must prove deficient representation and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Where a defendant pleads guilty upon the advice of counsel, post-conviction relief is available only when the applicant proves the advice he received from counsel "fell below an objective standard of reasonableness" and that "but for" counsel's deficient representation, he would not have pled guilty. *Hill v. Lockhart*, 474 U.S. 52, 56-59 (1985). Plea counsel for Berry acknowledges he neither challenged the State's reliance on the paraphernalia conviction for enhancement purposes, nor informed Berry of the potential challenge.

A. Deficient Representation

We find plea counsel's failure to inform Berry of the potential challenge of the use of the paraphernalia conviction for enhancement purposes amounts to deficient representation. *Strickland v. Washington*, 466 U.S. at 687. In so ruling, we recognize that a defendant, for a host of legitimate reasons, may plead guilty to an offense for which a valid legal challenge may exist. *See Rollison v. State*, 346 S.C. 506, 510, 552 S.E.2d 290, 292 (2001) ("A defendant may, as part of a plea bargain, agree to plead guilty to a crime for which he has been indicted (or to which he has waived grand jury presentment), but of which he is not guilty."); *Anderson v. State*, 342 S.C. 54, 58, 535 S.E.2d 649, 651 (2000) ("We find the decision to accept a plea to voluntary manslaughter notwithstanding the lack of any provocation was simply a tactical maneuver to avoid the very real possibility that the jury might come back with a verdict of murder. Accordingly, we find the plea was knowingly and voluntarily entered."). The difference in such circumstances between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea. Here, counsel never informed Berry of the potential challenge to the use of the drug paraphernalia conviction for enhancement. In fact, Berry's plea counsel never gave any thought to the issue.

We believe the Sixth Amendment guarantee of effective assistance of counsel requires that counsel accurately inform a defendant, to the extent possible, of the qualifying nature of a prior offense for enhancement purposes. It may well be that in situations unlike the one before us, the

answer is unclear. Yet, an accused is entitled to counsel's considered and reasonable judgment.[1] In fact, uncertainty concerning a potential legal challenge may well provide a defendant a catalyst in plea negotiations with the State. In this regard, a defendant may choose to forgo a legal challenge and opt for what he considers a favorable plea arrangement, especially where other charges will be dismissed or sentences are run concurrently.

This "give and take" lies at the heart of virtually every guilty plea, as plea agreements allow our overly burdened criminal courts to function. The point, for purposes of the issue before us, is that such decisions must be made knowingly and voluntarily with the advice of constitutionally competent counsel. Simply saying "I never gave it a thought" falls short of the Sixth Amendment guarantee of effective assistance of counsel. As a result, we find counsel's failure to even consider whether a paraphernalia conviction qualifies for enhancement, and so inform Berry, fell below the standard of objective reasonableness. We therefore find plea counsel provided constitutionally deficient representation.

B. Prejudice

We next turn to the second step in the analysis—whether Berry was prejudiced by the deficient representation. *Strickland v. Washington*, 466 U.S. at 687. As this was a guilty plea, Berry "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. During the PCR hearing, Berry repeatedly said that he would have gone to trial had he known that his paraphernalia conviction did not qualify as a prior offense for enhancement purposes. *Cf. Robinson v. State*, Op. No. 26564 (S.C.Sup.Ct. filed Nov. 24, 2008) (Shearouse Adv.Sh. No. 43 at 25) (granting post-conviction relief and remanding for resentencing where prior uncounseled conviction was improperly used for enhancement and applicant

[1] While the case at hand concerns use of prior convictions for enhancement purposes, this reference to an accused's entitlement to counsel's considered and reasonable judgment clearly has broad application in Sixth Amendment jurisprudence.

insisted that he wanted to plead guilty free of the "unconstitutional prior conviction[]"). We find Berry has established the prejudice prong of *Strickland v. Washington*, and we grant him the relief he requests.

IV.

We grant Berry post-conviction relief and return him to his pre-guilty plea position. Berry's conviction and sentence for manufacturing methamphetamine are vacated. Because the accompanying indictment for possession with intent to distribute methamphetamine was dismissed as part of the plea bargain, it is restored as an active charge. We remand these charges to the general sessions court for disposition.

REVERSED AND REMANDED.

TOAL, C.J., WALLER, and BEATTY, JJ., concur. PLEICONES, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert A. Rydde and Brandon Konija, Appellants,

v.

M. Robin Morris, Respondent.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 26619
Heard February 4, 2009 – Filed March 23, 2009

AFFIRMED

Eric S. Bland, of Bland Richter, LLP, of Columbia, Ronald L. Richter, Jr., Bland Richter, LLP, of Charleston, Thomas A. Pendarvis, of Pendarvis Law Offices, PC, of Beaufort, for Appellants.

Susan Taylor Wall, and J.W. Nelson Chandler, both of Parker, Poe, Adams & Bernstein, LLP, of Charleston, for Respondent.

JUSTICE KITTREDGE: This legal malpractice action presents the following question: whether an attorney's alleged negligent failure to timely draft a will and arrange for its execution permits prospective beneficiaries of the estate to maintain a cause of action for legal malpractice. There is no

such claim in South Carolina, and we hold an attorney owes no duty to a prospective beneficiary of a nonexistent will. In so ruling, we affirm the trial court's dismissal of the action.

I.

Johanna W. Knight was an elderly resident of Myrtle Beach, South Carolina, who died on October 3, 2005, as a result of lung cancer. Approximately one month prior to her death, attorney M. Robin Morris was engaged by Knight to prepare her estate plan. Morris provided Knight with an estate planning questionnaire. Knight returned the estate planning questionnaire to Morris on Thursday, September 22, 2005. Appellants Robert A. Rydde and Brandon Konija, and others, were included as prospective will beneficiaries in the questionnaire completed by Knight.

On Tuesday, September 27, 2005, Morris delivered to Knight a portion of the requested estate plan documents: a durable healthcare power of attorney and a durable financial power of attorney. These documents were not executed. Knight was incapacitated on September 28, for she was on a respirator in the intensive care unit and was in a drug-induced sleep. As noted, Knight died on October 3.

Because a will was not prepared for execution prior to Knight's death, her estate passed through intestacy. Appellants filed this legal malpractice action under various theories, all of which are premised on the imposition of a duty on Morris in favor of the non-client prospective beneficiaries. Morris answered the complaint by moving to dismiss pursuant to Rule 12(b)(6), SCRCP.

II.

The learned trial judge determined that Appellants' complaint failed to "state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCP. On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001).

That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the "facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* at 233, 553 S.E.2d at 499.

III.

Appellants assert that attorney Morris owed them a duty to draft a will for Knight (naming Appellants as beneficiaries) between Thursday September 22, 2005, and the following Tuesday, September 27, which was the day before Knight became completely unresponsive. Without pause, we reject the notion of imposing a duty on an attorney in favor of a prospective beneficiary for the attorney's purported negligent failure to timely draft a will.

A.

We begin with South Carolina law. A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996); *Ellis v. Davidson*, 358 S.C. 509, 523, 595 S.E.2d 817, 824 (Ct. App. 2004); *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 656 (Ct. App. 2002). "Before a claim for malpractice may be asserted, there must exist an attorney-client relationship." *Am. Fed. Bank, FSB v. No. One Main Joint Venture*, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996); *see also Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) ("[A]n attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." (quoting *Gaar v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986))).

B.

Our decision today not to impose a duty on an attorney in favor of a prospective beneficiary for alleged negligent failure to draft a will follows the law in other jurisdictions. We find persuasive the reasoning of decisions from New Hampshire, Connecticut, and Florida. We reference these three jurisdictions, for these states recognize generally that an attorney owes a duty to a non-client intended beneficiary of an executed will where it is shown that the testator's intent has been defeated or diminished by negligence on the part of the attorney, resulting in loss to the beneficiary. Having relaxed the traditional privity requirement in legal malpractice claims, these states nevertheless draw the line and refuse for compelling policy reasons to permit a malpractice claim by a non-client for negligent failure to draft a will. [1]

The Connecticut Supreme Court was presented with this issue in *Krawczyk v. Stingle*, 543 A.2d 733 (Conn. 1988). While acknowledging its precedent permitting a cause of action against an attorney who failed to draft a will in conformity with a testator's wishes, the *Krawczyk* court addressed "whether such liability should be further expanded to encompass negligent delay in completing and furnishing estate planning documents for execution by the client." *Id.* at 735. The Connecticut Supreme Court concluded "that the imposition of liability to third parties for negligent delay in the execution of estate planning documents would not comport with a lawyer's duty of

[1] While Connecticut, New Hampshire, and Florida all recognize that a non-client may maintain a legal malpractice claim under certain circumstances, these states follow different approaches. These states, however, are uniform in their rejection of a claim by a non-client for alleged negligence for the failure to draft a will. For an in depth analysis of the different approaches in the Nation, see Max. N. Pickelsimer, Comment, *Attorney Malpractice in Will Drafting: Will South Carolina Expand Privity to Impose a Duty to Intended Beneficiaries of a Will?*, 58 S.C. L. REV. 581, 585-98 (2007).

undivided loyalty to the client." *Id.* at 736. *Krawczyk* advanced the following policy rationale for its decision, with which we concur:

> A central dimension of the attorney-client relationship is the attorney's duty of "[e]ntire devotion to the interest of the client." This obligation would be undermined were an attorney to be held liable to third parties if, due to the attorney's delay, the testator did not have an opportunity to execute estate planning documents prior to death. Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen. These potential conflicts of interest are especially significant in the context of the final disposition of a client's estate, where the testator's testamentary capacity and the absence of undue influence are often central issues.

Id. (internal citations omitted).

In *Sisson v. Jankowski*, 809 A.2d 1265 (N.H. 2002), the New Hampshire Supreme Court answered a certified question from the United States District Court for the District of New Hampshire: "[w]hether . . . an attorney's negligent failure to arrange for his or her client's timely execution of a will . . . which failure proximately caused the client to die intestate, gives rise to a viable common law claim against that attorney by an intended beneficiary of the unexecuted will." *Id.* at 1265-66. *Sisson*, relying on *Krawczyk* and other authorities, answered the question in the negative. By focusing on "the importance of an attorney's undivided loyalty to a client," the *Sisson* analysis mirrors the self-evident policy considerations discussed in *Krawczyk*.

> [W]e conclude that the risk of interfering with the attorney's duty of undivided loyalty to the client exceeds the risk of harm to the prospective beneficiary. For these reasons, we join the majority of courts that have considered this issue and hold that an attorney does not owe a duty of care to a prospective will beneficiary to have the will executed promptly.

Id. at 1270.

We next turn to a Florida Court of Appeals case, *Babcock v. Malone*, 760 So.2d 1056 (Fla. Dist. Ct. App. 2000). Babcock and others filed a lawsuit alleging that their uncle's lawyer was "negligent in failing to timely prepare a new will for [him]. As a result, their uncle died before executing the new will under which [Babcock and the others] would have inherited, and instead they were left nothing." *Id.* at 1056. The trial court dismissed the lawsuit for failure to state a cause of action. *Babcock* focused on the absence of an executed will and rejected the legal malpractice claim, noting the "risk of misinterpreting the testator's intent" and the "heighten[ed] . . . tendency to manufacture false evidence that cannot be rebutted due to the unavailability of the testator." *Id.* at 1057 (quoting *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So.2d 1378, 1380 (Fla. 1993)).

C.

And finally, this Court's recent recognition of a physician's limited duty to third parties lends Appellants no support. In *Hardee v. Bio-Medical Applications of S.C., Inc.*, 370 S.C. 511, 636 S.E.2d 629 (2006), a physician failed to warn a patient of the ill effects that could result from dialysis treatment. While driving home following the dialysis treatment, the patient lost control of his vehicle and collided with a vehicle in which Allene and Kathleen Hardee were traveling. The Hardees filed a tort action against the physician for failure to provide appropriate warnings to the patient.

We reversed the trial court's grant of summary judgment to the physician and noted that "a medical provider has a duty to warn [the patient] of the dangers associated with medical treatment." *Id.* at 516, 636 S.E.2d at

631. Based on the duty to warn the patient, we held that "a medical provider who provides treatment which it knows may have detrimental effects on a patient's capacities and abilities owes a duty to prevent harm to patients and to reasonably foreseeable third parties by warning the patient of the attendant risks and effects before administering the treatment." *Id.* at 516, 636 S.E.2d at 631-32. Appellants misapprehend the reach of *Hardee*.

The central feature in *Hardee*'s "very narrow holding" is the recognition that "this duty owed to third parties is identical to the duty owed to the patient." *Id.* at 516, 636 S.E.2d at 632. Thus, a medical provider's breach of a potential duty to reasonably foreseeable third parties is inextricably connected to a breach of duty to the patient. We stressed that "our holding does not hamper the doctor-patient relationship." *Id.* at 516, 636 S.E.2d at 632.

Hardee lends Appellants no aid. The imposition of a duty on an attorney to a prospective beneficiary of a nonexistent will would wreak havoc on the attorney's ethical duty of undivided loyalty to the client and force an impermissible wedge in the attorney-client relationship. The rationale and policy underpinnings of *Hardee* support our rejection of the duty Appellants seek to impose.

IV.

In sum, under the circumstances presented, we see no reason to depart from existing law which imposes a privity requirement as a condition to maintaining a legal malpractice claim in South Carolina. We hold an attorney owes no duty to a prospective beneficiary of a nonexistent will. The judgment of the trial court is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John and Jane Loe #1 and
John and Jane Loe #2, Respondents,

v.

Mother, Father, and Berkeley
County Department of Social
Services, Defendants,

of whom Mother is the Appellant.

In the interest of two minor children under the age of 18.

Appeal from Berkeley County
H. E. Bonnoitt, Jr., Family Court Judge

Published Opinion No. 4518
Heard January 21, 2009 – Filed March 20, 2009

REVERSED AND REMANDED

Rita J. Roache, of North Charleston, for Appellant.

R. Glenn Lister, Jr., of Mount Pleasant, for Respondents.

Sally C. Dey, of Charleston, Guardian Ad Litem.

PER CURIAM: In this consolidated action, Mother appeals from the family court's order terminating her parental rights (TPR) to her daughter and son. On appeal, Mother argues the family court erred in: (1) finding any statutory ground for TPR was proven by clear and convincing evidence, (2) finding TPR was in her children's best interests, and (3) granting the foster parents' petitions to adopt Daughter and Son. Furthermore, Mother argues the family court erred in denying her mistrial motion and ordering her to pay one-third of the fees for the guardian ad litem (GAL) and the GAL's attorney. We reverse and remand.

FACTS

Mother and Father married in 2002 and divorced two years later. They have three children together: Sister, now eight years old, and Daughter and Son, twins, who are now six years old. When Daughter was six months old, she was severely injured, purportedly while in Father's care.[1] Although Mother noticed Daughter's eyes were "rolling back and forth in her head," she waited two days before seeking medical care. Daughter's pediatrician testified he sent Daughter directly from his office to the hospital, where she remained for fourteen days. Physicians diagnosed Daughter's condition as non-accidental, subdural hematomas, i.e., "bleeding around the brain," which is often associated with "Shaken Baby Syndrome." Daughter's physicians testified her injuries were the result of physical abuse.

After the hospital reported Daughter's injuries to the Department of Social Services (DSS), law enforcement took the twins into emergency protective custody. Following a probable cause hearing, the family court granted DSS custody of Mother's three children. A month later, the court conducted a removal merits hearing, and thereafter, approved a placement plan (plan) granting Mother supervised visitation and requiring her to maintain employment and pay child support. A few months later, Mother and Father separated, and in December 2004, the family court granted Mother

[1] Mother testified Daughter "was fine" when she left the children with Father; however, when Mother returned from the grocery store, she noticed Daughter was "moving her arms and legs. She was sweating a lot."

a divorce and issued a restraining order against Father. In October 2003, six months after Daughter's abuse, DSS voluntarily, and without a court order, returned Sister to Mother's custody. On August 23, 2004, the family court ratified returning legal and physical custody of Daughter to Mother.

In August 2004, the family court conducted the initial permanency planning hearing and noted Mother had stipulated to a finding that she physically abused Daughter.[2] At the time of the hearing, Daughter resided in foster care with John and Jane Loe #1 (Loes #1), and Son resided in foster care with John and Jane Loe #2 (Loes #2). The children's GAL and DSS recommended a permanent plan of reunification of Daughter and Son with Mother. The family court found Mother had "substantially complied" with the terms of her plan by securing and maintaining employment, completing a parenting assessment, and consistently paying child support. In consideration of Daughter's and Son's extensive medical needs, however, the court granted DSS's request for an extension for reunification, explaining:

> [Son] has a shunt that drains excess fluid from his brain and underdeveloped lungs. The shunt requires monitoring to ensure that it does not get clogged or [is] not draining properly. [Son's] breathing is normally rapid and shallow and requires monitoring for any changes or problems with breathing. If a problem should occur and the treatment is not administered in a timely manner, complications could result which could cause death. [Daughter] is developmentally delayed due to her injuries. [She] cannot sit upright without assistance and it takes approximately one hour to feed [her]. [Daughter] is unable to crawl on her hands and knees . . . . [She] currently attends occupational therapy, speech therapy, and physical therapy several times a week.

[2] Four years later, however, social worker Rheba Dewitt testified DSS never determined who had inflicted Daughter's injuries.

The family court conducted a second permanency planning hearing in April 2005 and found "it was more likely than not" Father had physically abused and neglected the children, and it ordered Father to have no further contact with his children. In contrast, regarding Mother, the court's order stated: "The permanency planning for reunification remains status quo." Furthermore, the court found it was in Daughter's and Son's best interests to modify Mother's plan to allow her to have weekly, unsupervised visits with Daughter and Son. The court authorized a six-month extension of foster care to give Mother more time to become involved in her children's medical care.

A week after the family court reaffirmed the plan for reunification, Loes #1 and Loes #2 (collectively, the Foster Parents) filed private actions against Mother, Father, and Berkeley County DSS. The Foster Parents' complaint asked the court to terminate Mother's and Father's parental rights, require DSS to prepare investigative reports necessary for adoption, issue a decree of adoption, and change the children's legal names. Nevertheless, DSS continued to move forward with its plan to reunite Mother with her children; a few weeks later, Daughter and Son began weekly, unsupervised, overnight visits with Mother and Sister. The overnight visits were suspended three months later, after Mother requested a meeting with DSS and stated she was overwhelmed by the demands of caring for Sister, as well as Daughter and Son, who were then age two. Thereafter, DSS modified Mother's visitation to Thursdays, from 10:30 a.m. to 4:30 p.m. Weekend, overnight visits resumed in July 2006, and thereafter, continued without interruption.

When the family court conducted a third permanency planning hearing in March 2006, Daughter and Son had resided in foster care for three years. Once again, the family court found Mother had completed her modified plan, consistently visited her children, and paid child support; nevertheless, the court expressed concern that overnight visitation had been unsuccessful. Noting DSS had "assessed the viability of adoption" and was now recommending "a concurrent plan" of reunification within six months or TPR and adoption, the court ordered DSS to continue providing services to Mother while it pursued both options. In October 2006, Mother submitted an affidavit to the court stating she had done everything DSS had asked of her.

Mother's affidavit stated she was grateful for the care the Foster Parents had provided for her children, and she asked the court to allow her children "to come home." Daughter and Son remained in foster care.

In January 2007, Mother filed an answer and counterclaim in response to the Foster Parents' complaint. Mother's pleadings stated custody of Daughter and Son should be returned to her because she had completed the terms of her DSS plans; moreover, Mother noted that since October 2003, DSS had found her home to be appropriate for Sister. Mother informed the court she had qualified for legal aid services, and she asked the court to hold the Foster Parents responsible for all fees associated with bringing their action, including the fees for the GAL and the GAL's attorney.

The family court consolidated the Foster Parents' actions and conducted a hearing in January and February 2007, that included six days of testimony on behalf of Mother and the Foster Parents. Ultimately, the family court terminated Mother's and Father's parental rights, granted the petition of Loes #1 to adopt Daughter, granted the petition of Loes #2 to adopt Son, ordered Mother to have no further contact with Daughter and Son, granted the Foster Parents' request to change the children's names, ordered revision of the birth certificates, denied Mother's mistrial motion, and ordered Mother to pay fees of approximately $10,000. Mother's appeal followed.[3]

ISSUES

1. Did the family court err in terminating Mother's parental rights?

2. Did the family court abuse its discretion in ordering Mother to pay one-third of the fees for the GAL and the GAL's attorney?

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[3] The family court also terminated the parental rights of Father, who did not attend the TPR hearing and was found in default. See S.C. Code Ann. § 63-7-2590(B) (Supp. 2008) ("The relationship between a parent and child may be terminated with respect to one parent without affecting the relationship between the child and the other parent.").

3. Did the family court err in denying Mother's motion for a mistrial?

STANDARD OF REVIEW

In appeals from the family court:

> [T]his court has authority to find the facts in accordance with our own view of the preponderance of the evidence. However, this broad scope of review does not require us to disregard the findings of the family court. We are mindful that the family court, which saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony.

Pirri v. Pirri, 369 S.C. 258, 264, 631 S.E.2d 279, 282-83 (Ct. App. 2006) (internal citations omitted).

LAW/ANALYSIS

I. Termination of Parental Rights

Mother contends the family court erred in terminating her parental rights to Daughter and Son. We agree.

A. Fundamental Rights of Parents

The South Carolina Children's Code sets forth this State's policy regarding reunification: "It is the policy of this State to reunite the child with his family in a timely manner, whether or not the child has been placed in the care of the State voluntarily." S.C. Code Ann. § 63-1-20(D) (Supp. 2008). Moreover, the Children's Code "shall be liberally construed to the end that families whose unity or well-being is threatened shall be assisted and protected, and restored if possible as secure units of law-abiding members . . . ." S.C. Code Ann. § 63-1-30 (Supp. 2008).

The United States Supreme Court has declared: "[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66 (2000). In respect for this fundamental right, our own supreme court instructs courts to proceed with thoughtful deliberation when deciding whether to terminate a parent's rights:

> The termination of the legal relationship between natural parents and a child presents one [of] the most difficult issues this Court is called upon to decide. We exercise great caution in reviewing termination proceedings and will conclude termination is proper only when the evidence clearly and convincingly mandates such a result.
>
> . . . Parental rights warrant vigilant protection under the law and due process mandates a fundamentally fair procedure when the state seeks to terminate the parent-child relationship.

S.C. Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 626, 614 S.E.2d 642, 645 (2005). Moreover, the Cochran court provided specific guidance as to when courts can consider TPR: "The fundamental purpose of terminating parental rights is to provide the greatest possible protection to a child whose parents are unwilling or unable to provide adequate care for the physical, emotional, and mental needs of the child." Id. at 632, 614 S.E.2d at 648.

Citing the Fourteenth Amendment of the United States Constitution and the United States Supreme Court's decision in Santosky v. Kramer, this court declared:

> Under the United States Constitution, natural parents are entitled to fundamentally fair procedures when the State seeks to sever the relationship they have with their child. In Santosky, the United States

> Supreme Court announced: "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life . . . . When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."

Charleston County Dep't of Soc. Servs. v. Jackson, 368 S.C. 87, 96, 627 S.E.2d 765, 770 (Ct. App. 2006) (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)) (internal citations omitted).

B. Statutory Grounds for TPR

In South Carolina, TPR is governed by statute, and the family court can order TPR only upon finding one or more of eleven statutory grounds exist and also finding TPR is in the child's best interest. S.C. Code Ann. § 63-7-2570 (Supp. 2008). "Before terminating parental rights, the alleged grounds for termination must be proven by clear and convincing evidence. On appeal, this Court may review the record and make its own determination of whether the termination grounds are supported by clear and convincing evidence." S.C. Dep't of Soc. Servs. v. Mother ex rel. Minor Child, 375 S.C. 276, 282-83, 651 S.E.2d 622, 625 (Ct. App. 2007) (internal citations omitted).

> Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.

Anonymous (M-156-90) v. State Bd. of Med. Examiners, 329 S.C. 371, 375, 496 S.E.2d 17, 18 (1998) (internal citations and quotation marks omitted).

The family court found Mother satisfied the following statutory grounds for TPR: (1) Daughter had been harmed, and it was unlikely Mother could make the home safe within twelve months, pursuant to section 63-7-2570(1); (2) Mother had not remedied the conditions that caused the removal of her children, pursuant to section 63-7-2570(2); (3) Mother has a diagnosable condition that is unlikely to change within a reasonable time, and this condition makes it unlikely she can provide minimally acceptable care for her children, pursuant to section 63-7-2570(6); and (4) Mother's children have been in foster care for fifteen of the most recent twenty-two months, pursuant to section 63-7-2570(8).

Initially, we note that while a judicial decision to terminate parental rights is always difficult, the unique posture of this case gives us reason to exercise extreme caution. Typically, in a TPR case before this court, DSS initiates the TPR action because it has deemed a parent to be "unfit" or unwilling to raise a child that has been placed in the state's custody. This case is procedurally unique—DSS has aligned itself with Mother in opposing termination of her parental rights. Furthermore, DSS argued persuasively to the family court that Daughter's and Son's best interests would be served by reuniting them with Mother and Sister.

We commend the Foster Parents for providing exceptional care to these medically fragile children throughout the four years that preceded the TPR hearing. We recognize Daughter and Son are thriving, in large part, because the Foster Parents consistently provided them with love and attentive care.

At the outset of our analysis, we point out that six days of testimony produced a dense, factually-intensive, and complex record. While the family court's order expressed great concern that Mother had not accompanied the Foster Parents on many of the children's medical appointments, we note Mother was consistently working two jobs to pay child support, yet still

managed to join her children for many of their medical visits. The children's pediatrician testified Mother had met with him recently to discuss her children's medical conditions and acknowledged Mother demonstrated concern for her children.

Six months after Mother's three children were placed in foster care, DSS returned Sister to Mother's physical custody. Mother contends DSS would not have returned her three-year-old child if her home was unsafe. We agree.

At the first permanency planning hearing, conducted in August 2004, the court found Mother had "substantially complied" with the requirements of her placement plan. Thereafter, the court granted DSS's request to extend foster care, not because of Mother's shortcomings, but because Daughter's and Son's extensive medical needs were best met by continuing their temporary placement in therapeutic foster care.

At the TPR hearing, the principal of Sister's school testified: "[Mother] is a very involved parent. She's out in our school. If we need her, we call her and she will come." The principal reported Sister does well in school, is well-groomed, and has good manners. Furthermore, she stated the school coordinates speech therapy, occupational therapy, physical therapy, and transportation services for children who require these services.

Dr. Judith Hurt, a parenting coordinator, testified she had known Mother for six years and had observed Mother's interaction with her three children:

> I saw her work with the children, playing games and also doing some cognitive activities, reading with them and doing . . . puzzles. . . . She knew that children had a very short time period of attention. She handled the misbehavior very well. There was never any screaming, any hollering. She knew how

> to use what we call "quiet time," just take them away from the activity.

Hurt testified she sent several letters to DSS asking them to give Mother "the opportunity to demonstrate to DSS that she is capable of being an effective mother." Hurt added that Mother lives with her mother, who is willing to help care for the children.

Since April 2005, Daughter and Son have had regular, unsupervised visits with Mother and Sister. In July 2006, these visits were extended to include weekends, from 4:00 p.m. on Friday to 2:00 p.m. on Sunday, and Thursday afternoons. We agree with Mother that DSS would not have continued Daughter's and Son's unsupervised visits with her for two years if Mother's home was unsafe or DSS had concerns about a repetition of the abuse Daughter had suffered four years earlier. Moreover, Mother contends Father caused Daughter's injuries, and Mother remedied the situation that led to her children's removal by divorcing Father in December 2004.

Medical University of South Carolina social worker Marcella Hamilton testified she began working with Mother shortly after her children were placed in foster care. Hamilton testified Mother had "some depressive symptoms" caused by environmental factors and stated an anti-depressant medication was prescribed for "a small period of time." When she was asked why Mother was depressed, Hamilton explained:

> Because [Mother] was young, I think she was 21 at the time. She had three small children. Her children had been taken away, the two babies had special needs. [Father] was no longer in the picture. She was doing everything she needed to do in terms of getting her children back. She was doing all the work. I believe that's enough to make anyone depressed when you have all of those circumstances on you at one time.

Licensed clinical psychologist Jack Booth conducted parenting assessments of Mother in 2004 and 2006. Booth testified: "[I] felt much more comfortable that in the second interview [Mother] would certainly protect the children. She didn't want [Father] near them." Furthermore, when Booth was asked if Mother was ready to be reunited with her children, he responded: "I think if she has the capacity to learn, then she has the capacity to be taught; and the answer is yes."

In March 2006, Stephen James was appointed as the children's GAL in the underlying DSS action. James testified he had visited Mother's home and observed "the children were fine with [Mother]." James testified he had "no doubt" Mother is concerned about her children and loves them.

In May 2006, Sally Dey was appointed as the children's GAL in the Foster Parents' private action. Dey testified she visited Mother's home twice and also talked with her on the telephone. Dey visited Mother's home in July 2006, and her report stated: "At the time of my visit, [Mother] was having visitation with the twins. The home was clean and neat and there was adequate space for the children. The children appeared to be happy[,] and I did not see anything that would cause me concern for their safety." Yet, at the TPR hearing, Dey recommended TPR and adoption because "[t]hese foster parents have done an extraordinary job with these children."

The record establishes the Foster Parents have done an exceptional job caring for their foster children. However, the evidence also indicates Mother's home is now safe. Mother remedied the conditions that led to her children's removal by divorcing Father and completing two DSS placement plans. The evidence failed to show Mother has a diagnosable condition that would make it unlikely she could provide "minimally acceptable care" for Daughter and Son. Moreover, we find Mother consistently paid child support, consistently visited her children, and communicated regularly with the children's medical caregivers. Accordingly, in our view, the record before us does not establish by clear and convincing evidence that Mother: (1) could not make her home safe within twelve months, (2) failed to remedy the conditions that caused her children's removal, or (3) has a diagnosable

condition that is unlikely to change and makes it unlikely she can provide minimally acceptable care for her children.

The family court also found Mother met a fourth statutory ground for TPR, i.e., Daughter and Son had resided in foster care for fifteen of the most recent twenty-two months. This fact is indisputable. Mother correctly points out, however, DSS requested the extensions of foster care after Mother had fulfilled the court's requirements for her children's return. As a result, Mother contends the actions of others raised barriers and caused delays that resulted in her children remaining in foster care beyond the statutory time required to trigger this ground for TPR. We agree.

Many states have a statutorily mandated "improvement" period during which a parent must demonstrate consistent efforts and progress in meeting the requirements the court has specified for reunification. In South Carolina, when a child has resided in foster care for fifteen of the most recent twenty-two months, this ground alone is sufficient to satisfy a statutory ground for TPR. See Jackson, 368 S.C. at 101, 627 S.E.2d at 773; S.C. Dep't of Soc. Servs. v. Sims, 359 S.C. 601, 608, 598 S.E.2d 303, 307 (Ct. App. 2004). In Jackson, we also recognized: "[T]he child and his parents share a vital interest in preventing erroneous termination of their natural relationship until the State proves parental unfitness." 368 S.C. at 96, 627 S.E.2d at 770 (quoting Santosky, 455 U.S. at 761) (internal quotation marks omitted).

In this case, DSS testified it caused the delays in reunifying Mother and her children. DSS foster care supervisor Katina Ferguson testified Mother successfully completed two DSS plans. When Ferguson was asked if there was any reason Daughter and Son could not be reunited with Mother, Ferguson responded in the negative. Moreover, Ferguson testified DSS caused significant delays in Mother's case:

> [Mother's] visitation with her children was supposed to be increased to a point where the children would be spending more time with [her] than in foster care. That way we would be able to assess her ability to

> care for the children; however, our efforts at doing that have been dual. There have been barriers that have been put up to not allow that to happen.

DSS supervisor Barbara Parrott testified she first became aware of the possibility of TPR in October 2005. Parrott stated the only ground DSS had for TPR was fifteen of twenty-two months, and "we determined it was really not [Mother's] fault for that ground, and I did not take the case into the [TPR] unit." Parrott testified DSS staff told her Mother had remedied the conditions that led to her children's removal. Furthermore, she testified the DSS Adoptions Unit had declined Mother's case because "there was not sufficient evidence for grounds of [TPR]." Parrott testified it was understandable that Mother could not attend all of the children's appointments because of her work schedule; however, she stated if the children were returned, Mother "would have control over setting those appointments, which she does not [have] at this time." Moreover, several of the children's providers testified they are willing to schedule appointments that do not conflict with Mother's work schedule.

When asked why this case had been allowed to continue so long, Parrott responded:

> From my review of the file, it seemed like there were times when communication wasn't as it should have been. Staffings, one recommendation would be made and then something else would be put on the table. The treatment plan was changed a few times, and we didn't get back into court like we should have.

Parrott was forthright in acknowledging DSS probably "dropped the ball," and she stated: "[I]t is not [Mother's] fault." Parrott agreed the Foster Parents would provide a loving and suitable home for Daughter and Son, then she added: "But I feel like [Mother] will also." When asked why DSS had not filed a TPR action, Parrott responded: "[B]ecause our plan was reunification, and [Mother] had complied with all of the treatment plan."

DSS counsel Paul White asked the family court to deny the Foster Parents' request for TPR, stating:

> DSS dropped the ball. And that really is not something [Mother] had any control over. DSS does have its shortcomings and we are working on trying to overcome those shortcomings, but the fact remains that a good many of the delays in this case have been departmental and not because of anything [Mother] did. So while it is true that the children have been in foster care 15 of the last 22 months . . . that can't all be ascribed to [Mother].

Because we have a duty to protect Mother's fundamental right to raise her children and entitlement to fair procedures, and because DSS admitted it caused the delays that allowed two of Mother's children to remain in foster care for fifteen of the most recent twenty-two months, we find clear and convincing evidence did not establish Mother satisfied this statutory ground for TPR.[4]

The eleven statutory grounds serve as a safety net that protects a fit and willing parent's fundamental right to raise his or her child. Even if the Foster Parents are perhaps better situated than Mother to offer advantages to Daughter and Son, we believe the fundamental right of a fit parent to raise his or her child must be vigorously protected. Because no statutory ground supports termination of Mother's parental rights to Daughter or Son, we need

[4] We also find support for our decision in this case from this language from a concurring opinion by Justice Pleicones: "I am not willing to sever the parent-child relationship solely on the basis that the child has spent fifteen of twenty-two months in foster care **where the appellant presented substantial evidence that much of the delay in the processing of this case is attributable to the acts of others.**" Cochran, 356 S.C. at 420, 589 S.E.2d at 756 (Pleicones, J. concurring) (emphasis added).

not consider whether terminating Mother's rights would be in her children's best interests. Accordingly, we reverse the family court's order terminating Mother's parental rights to Daughter and Son, return their legal and physical custody to Berkeley County DSS, and remand for a determination of whether the children can be safely returned to Mother's home.

II. Guardian ad Litem Fees

Next, Mother argues it "seems unfair" to require her to pay almost $10,000 in fees to defend an action brought by the Foster Parents because she earns a minimal income working two jobs, and she is "unable to pay her own attorney's fees." We agree.

Appointment of a GAL in a private action is controlled by the South Carolina Private Guardian Ad Litem Reform Act, which became effective January 15, 2003, and states:

> (A) In a private action before the family court in which custody or visitation of a minor child is an issue, the court may appoint a guardian ad litem only when it determines that:
>
> > (1) without a guardian ad litem, the court will likely not be fully informed about the facts of the case and there is a substantial dispute which necessitates a guardian ad litem; or
> >
> > (2) both parties consent to the appointment of a guardian ad litem who is approved by the court.

§ 63-3-810 (Supp. 2008). Furthermore, the Reform Act authorizes the family court to appoint an attorney to represent a non-attorney GAL. See § 63-3-820(E) (Supp. 2008). When the family court determines appointment of an attorney to represent the GAL is necessary, it must "set forth the reasons for the appointment and must establish a method for compensating the attorney." Id.

> At the time of appointment of a [GAL], the family court judge must set forth the method and rate of compensation for the [GAL], including an initial authorization of a fee based on the facts of the case. **If the [GAL] determines that it is necessary to exceed the fee initially authorized by the judge, the guardian must provide notice to both parties and obtain the judge's written authorization or the consent of both parties to charge more than the initially authorized fee.**

§ 63-3-850(A) (Supp. 2008) (emphasis added). The statute provides the GAL is entitled to "reasonable compensation subject to the review and approval of the court." § 63-3-850(B). Moreover, in determining the reasonableness of GAL fees and costs, "the court must take into account" the following factors:

> (1) the complexity of the issues before the court;
> (2) the contentiousness of the litigation;
> (3) the time expended by the guardian;
> (4) the expenses reasonably incurred by the guardian;
> (5) the financial ability of each party to pay fees and costs; and
> (6) any other factors the court considers necessary.

§ 63-3-850(B) (Supp. 2008).

As the TPR hearing reached an end, Mother's counsel stated:

> [W]e would also ask that all [GAL] fees and attorney for the [GAL] fees be paid by [the Foster Parents]. There is uncontroverted testimony that [the Foster Parents'] income is sufficient to pay the cost and fees of this matter.

Mother earns $1,440 per month and has documented expenses of $1,118 per month. As a legal aid client, Mother's income is under 125% of the poverty level. Moreover, the Foster Parents brought the action and paid the GAL's retainer fee of $2,000.

"An award of GAL fees lies within the sound discretion of the family court judge and will not be disturbed on appeal absent an abuse of that discretion." Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 196, 612 S.E.2d 707, 714 (Ct. App. 2005). The record indicates the family court awarded the GAL, who was involved in this case from May 2006 to March 2007, fees and costs of $13,712, and it awarded the GAL's attorney, who was involved in the case from January 2007 to March 2007, fees and costs of $15,248.

In reviewing the reasonableness of these fees, the family court erred in applying the factors indicated in Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991), rather than the factors mandated by the statute. Furthermore, the statute states an attorney-GAL is not authorized to have counsel appointed. We do not address whether the GAL fees were properly approved pursuant to section 63-3-850 or whether the fees are reasonable. Instead, we remand for a determination of whether the statutory requirements were met in authorizing fees for the GAL and the GAL's attorney and a determination of reasonableness, pursuant to the factors specified in section 63-3-850(B).

In light of our ruling as to TPR, we additionally instruct Mother is not responsible for paying the fees of either the GAL or the GAL's attorney; instead, the family court must allocate the fees it finds to be reasonable among the Foster Parents and DSS. See Camburn v. Smith, 355 S.C. 574, 581, 586 S.E.2d 565, 568 (2003) ("[W]here guardian ad litem fees are incurred in an action that is found meritless on appeal, the party instigating the action should pay."); S.C. Dep't of Soc. Servs. v. Tharp, 312 S.C. 243, 245, 439 S.E.2d 854, 856 (1994) (finding DSS liable for a reasonable GAL fee and remanding for a hearing de novo and development of a full record).

CONCLUSION[5]

We find the clear and convincing evidence does not support a statutory ground for termination of Mother's parental rights to Daughter and Son. Accordingly, we reverse the judgment of the family court in terminating Mother's parental rights and in granting the Foster Parents' petitions to adopt their foster children; we return legal and physical custody of Daughter and Son to Berkeley County DSS; and we remand the case to the family court for (1) a review of the GAL's and the GAL's attorney's fees and a determination of responsibility for payment of these fees and (2) a hearing on appropriate temporary and permanent custody of Daughter and Son.[6]

The order of the family court is

REVERSED AND REMANDED.

HEARN, C.J., SHORT and KONDUROS, JJ., concur.

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[5] Mother additionally argued the family court erred in denying her mistrial motion. Because our determination of the prior issues is dispositive, we need not review this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

[6] We note Berkeley County DSS and Mother, whose parental rights have been reestablished, are the parties to the family court's hearing regarding a new permanency plan for Daughter and Son.