The Supreme Court of South Carolina

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N O T I C E

In the Matter of David Ross Clarke

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on June 10, 2015, beginning at 9:30 a.m, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

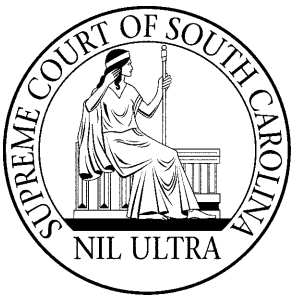
Any individual may appear before the Committee in support of, or in opposition to, the petition.

Susan Taylor Wall, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 7, 2015

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19
May 13, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Max Singleton, Respondent.

Appellate Case No. 2015-000536

Opinion No. 27521
Submitted April 23, 2015 – Filed May 13, 2015

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Ericka M. Williams, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Max B. Singleton, of Greer, 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 (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or definite suspension not to exceed nine (9) months. Respondent requests that any suspension be imposed retroactively to November 7, 2014, the date of his interim suspension. In the Matter of Singleton, 410 S.C. 504, 765 S.E.2d 147 (2014). Respondent further agrees to enter into a restitution plan to pay the costs incurred in the investigation and prosecution of this matter within thirty (30) days of the imposition of discipline and to complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School within nine (9) months of the imposition of discipline. Finally, respondent agrees that, within thirty (30) days of his reinstatement to the practice of law, he will enter into a restitution agreement with the Commission on Lawyer Conduct (the Commission) to pay persons and entities harmed as a result of his

misconduct as discussed in this opinion. We accept the Agreement and suspend respondent from the practice of law in this state for nine (9) months, not retroactive to the date of his interim suspension. In addition, respondent shall enter into a restitution plan to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this opinion and he shall complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School no later than nine (9) months from the date of this opinion. Further, in the event he is reinstated to the practice of law, respondent shall enter into a restitution agreement within thirty (30) days of the date of his reinstatement to pay persons and entities harmed as a result of his misconduct as discussed in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent was retained to represent Complainant A on a matter in traffic court as well as two other criminal matters. After receiving a summons to appear in Magistrate's Court on the traffic matter, Complainant A attempted to reach respondent about the hearing but was unsuccessful. Complainant A appeared in court without representation and, after communicating with respondent by text message, Complainant A resolved the ticket by agreeing to pay a reduced fine.

Respondent represents he was not notified of the Magistrate's Court hearing. Respondent further represents that he was in General Sessions Court for a guilty plea with another client at the time of the Magistrate's Court hearing in Complainant A's case. Respondent did not continue his representation of Complainant A on the remaining matters.

Respondent failed to refund the unearned fees to Complainant A. After a finding by the Resolution of Fee Disputes Board, respondent was ordered to pay $700.00 to Complainant A. Respondent represents he did not pay the award because he did not have the funds to do so.

On August 15, 2012, a Notice of Investigation was mailed to respondent requesting a response to the complaint within fifteen days. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, 277 S.C.

514, 290 S.E.2d 240 (1982), on September 19, 2012, again requesting respondent's response. Respondent's written response was received by ODC on October 26, 2012.

Matter II

In 2008, respondent engaged the services of a court reporting agency. In December of 2011, the court reporting agency filed a complaint with the Commission due to respondent's failure to pay an outstanding invoice in the amount of $588.72. Following the complaint, respondent mailed a check for $200.00 to the court reporting agency on or about February 20, 2012, along with an agreement to mail another payment of $200.00 on or about March 8, 2012, and a final payment of $188.72 on or about March 29, 2012. The disciplinary matter was resolved based on respondent's agreement to make the payments as outlined. The agency accepted the initial $200 payment from respondent and agreed to deduct the accrued interest of $188.72 from the amount due, leaving an unpaid balance of $200.00.

On August 1, 2012, the agency filed a second complaint against respondent for failure to pay the remaining $200.00 balance due on the invoice. Respondent represents he did not pay the final balance to the court reporting agency because he did not have the funds to do so.

Matter III

In July 2012, Complainant B retained respondent in a criminal matter. At times during the representation, respondent failed to adequately communicate with Complainant B regarding the status of Complainant B's case. Complainant B hired new counsel and respondent was relieved from representation.

Matter IV

A circuit court judge received a letter from respondent requesting protection from March 4, 2013, to June 3, 2013, for health reasons. The judge was concerned about the requested leave as respondent had cases that were scheduled to be heard during the time of the requested leave.

The judge asked his law clerk to arrange a meeting with respondent prior to the requested leave date. The law clerk sent an email to respondent on February 28, 2013, inquiring when respondent would be available for a meeting with the circuit court judge. On March 1, 2013, respondent sent an email to the law clerk stating: "I don't know because my wife is still in the hospital and is going to be put on bed rest for the remainder of her pregnancy. She is 31 weeks."

There was no further communication between respondent and the judge prior to the requested protection date. Respondent did not appear in court during the requested protection period. After receiving an email from the judge about a specific case that was scheduled during the protection period, respondent informed the judge that he mistakenly thought that he had been protected by the court.

On April 3, 2013, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen days. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, id., on May 24, 2013, again requesting respondent's response. Respondent's written response was received by ODC on June 10, 2013.

Matter V

Respondent was retained to represent Complainant C in a criminal matter. Complainant C was scheduled to appear in court for the trial docket on November 26, 2012. Respondent had previously informed Complainant C that he would not have to appear in court unless it was for a trial or a plea.

On the eve of court, respondent discovered he would not be able to attend court on November 26, 2012, due to a medical emergency. Respondent represents that he attempted to call Complainant C to inform him that Complainant C needed to appear in court the following day, but respondent was unable to reach Complainant C prior to court. Respondent further represents that he left a voice mail at the Solicitor's Office informing the prosecutor that he would not be in court and that Complainant C did not want to accept the plea offer.

Neither respondent nor Complainant C appeared in court on November 26 and a bench warrant was issued for Complainant C's arrest. Complainant C was arrested on or about April 4, 2013. Respondent represents he was unaware that a bench warrant had been issued for Complainant C. Respondent filed a motion to lift the

bench warrant and, following a hearing on May 10, 2013, the bench warrant was lifted.

Matter VI

After a finding of fact by the Resolution of Fee Disputes Board (Board), respondent was ordered to pay $400.00 to Complainant D. Respondent failed to pay the judgment and a certificate of non-compliance was issued by the Board on September 4, 2013. Respondent represents he did not pay the award because he did not have the funds.

Respondent was mailed a Notice of Investigation on September 18, 2013, requesting a response to the complaint within fifteen days. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, id. on November 8, 2013, again requesting respondent's response. The Treacy letter was returned to ODC unclaimed. Respondent failed to submit a written response to the Notice of Investigation, but he did appear before Disciplinary Counsel and gave testimony under oath regarding the complaint.

Matter VII

ODC investigated a complaint in which the investigation did not reveal clear and convincing evidence of misconduct. Respondent was mailed a Notice of Investigation on February 4, 2014, requesting a response to the complaint within fifteen days. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, id., on February 26, 2014, again requesting respondent's response. The Treacy letter was returned to ODC unclaimed. Respondent failed to submit a written response to the Notice of Investigation, but he did appear before Disciplinary Counsel and gave testimony under oath regarding the complaint.

Matter VIII

Respondent was retained to represent Complainant E in a criminal matter. At times during the representation, respondent failed to keep Complainant E reasonably informed regarding the status of his case. Respondent also failed to respond to reasonable requests for information from Complainant E. At Complainant E's request, respondent was relieved from representation by the court.

Respondent was mailed a Notice of Investigation on May 29, 2014, requesting a response to the complaint within fifteen days. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, id. on July 7, 2014, again requesting respondent's response. Respondent failed to submit a written response to the Notice of Investigation despite the Treacy letter. Respondent did appear before Disciplinary Counsel and gave testimony under oath regarding the complaint.

Matter IX

On December 19, 2011, this Court issued an order of discipline against respondent with conditions. In the Matter of Singleton, 395 S.C. 521, 719 S.E.2d 667 (2011). The Office of Commission Counsel monitored respondent's compliance with the conditions imposed by the Court. Respondent was to provide proof of completion of the South Carolina Bar's Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School by December 19, 2012. Respondent failed to complete any of the required sessions.

Respondent was also required to hire a law office management advisor. For a period of two years, respondent was required to meet with the advisor on a quarterly basis and the advisor was to file a complete report with the Commission within thirty (30) days of each meeting. Respondent met with the advisor on three occasions, but failed to schedule all of the required quarterly sessions. The advisor reported to the Commission that respondent failed to implement the advisor's suggestions for better management of respondent's law office practice. Respondent represents that he did not implement some of the suggestions because he was in the process of winding down his criminal law practice and was not accepting any new clients.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.4 (lawyer shall provide prompt communication to client and promptly comply with reasonable requests for information); Rule 1.5 (lawyer shall not charge or collect unreasonable fee or unreasonable amount for expenses); Rule 1.15 (lawyer shall safekeep client funds); Rule 1.16(d) (upon termination of representation, lawyer shall refund any

advance payment of fee or expense that has not been earned or incurred); Rule 3.4(c) (lawyer shall not knowingly disobey obligation of tribunal); Rule 4.4 (in representing client, lawyer shall not use means that have no substantial purpose other than to burden third person); 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 lawyer to violate Rules of Professional Conduct); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers); Rule 7(a)(3) (it shall be ground for discipline for lawyer to willfully violate valid order of the Supreme Court and/or knowingly fail to respond to lawful demand from disciplinary authority to include request for response under Rule 19, RLDE); and Rule 7(a)(10) (it shall be ground for discipline for lawyer to willfully fail to comply with final decision of Resolution of Fee Disputes Board).

Conclusion

We accept the Agreement and suspend respondent from the practice of law in this state for nine (9) months, not retroactive to the date of his interim suspension.[1] In addition, respondent shall enter into a restitution plan to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this opinion, complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School no later than nine (9) months from the date of this opinion, and provide proof of completion of the programs to the Commission no later than ten (10) days after the

[1] Respondent's disciplinary history includes a 2011 public reprimand, In the Matter of Singleton, supra, and a 2012 letter of caution. The conduct addressed in the letter of caution is relevant to the misconduct in the current proceeding. See Rule 2(r), RLDE (fact that letter of caution has been issued shall not be considered in subsequent disciplinary proceeding against lawyer unless caution or warning contained in letter of caution is relevant to the misconduct alleged in the new proceedings).

conclusion of each program. Further, in the event he is reinstated to the practice of law, respondent shall enter into a restitution agreement within thirty (30) days of the date of his reinstatement to pay $700.00 to Complainant A, $200.00 to the court reporting agency in Matter II, and $400.00 to Complainant D. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Centennial Casualty Co., Inc., Petitioner,

v.

Western Surety Company, d/b/a CNA Surety,
Respondent.

Western Surety Company, d/b/a CNA Surety,
Defendant/Third-Party Plaintiff,

v.

Charleston Auto Auction, A3 Auto Center, LLC, and
Wylie Mickle, Third-Party Defendants.

Appellate Case No. 2014-001521

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27522
Submitted April 7, 2015 – Filed May 13, 2015

REVERSED AND REMANDED

Ian S. Ford, of Ford Wallace Thomson LLC, of Charleston, for Petitioner.

Sidney Markey Stubbs, of Baker Ravenel & Bender, LLP, of Columbia, for Respondent.

PER CURIAM: This matter is before the Court by way of a petition for a writ of certiorari to review the court of appeals' decision in *Centennial Casualty Co. v. Western Surety Co.*, 408 S.C. 554, 758 S.E.2d 916 (Ct. App. 2014). We grant the petition, dispense with further briefing, reverse, and remand to the court of appeals.

I.

Charleston Auto Auction (Charleston Auto) is a wholesale auctioneer of automobiles. Charleston Auto facilitates the sale of automobiles between dealerships by acting as an agent and legal representative, collecting and dispersing funds for purchases, and conveying title between the buyers and sellers. In 2008, an automobile dealer, A3 Auto Center (A3), sought to purchase three automobiles from other car dealerships (Sellers) and use Charleston Auto to facilitate the sale.

Under section 56-15-320(B) of the South Carolina Code (Supp. 2014) (Dealer Bond Statute), all dealers and wholesalers are required to obtain a surety bond "as indemnification for loss or damage suffered by an owner of a motor vehicle, or his legal representative." Pursuant to this statutory requirement, A3 obtained a surety bond from CNA Surety.

Charleston Auto located the three vehicles that A3 sought to purchase from the Sellers. Charleston Auto arranged the sales and the bills of sale contained language appointing Charleston Auto as the agent and legal representative of both A3 and the Sellers for the purpose of processing the transactions. A3 paid Charleston Auto for the vehicles with three checks, which were eventually returned for insufficient funds. Therefore, Charleston Auto sought reimbursement from its insurance carrier, Centennial Casualty Co., who is the Petitioner in this matter. Petitioner paid Charleston Auto's claim and demanded reimbursement from CNA Surety pursuant to A3's surety bond. CNA Surety refused to pay, contending that the Dealer Bond Statute did not apply to the transaction as neither Petitioner nor Charleston Auto was a "legal representative" who suffered a loss or damage.

Petitioner filed suit against CNA Surety, claiming that Charleston Auto was the "legal representative" of A3 and the Sellers and that Petitioner was subrogated to Charleston Auto's rights to seek damages under the Dealer Bond Statute. The trial court found that Petitioner was entitled to reimbursement under A3's surety bond, and CNA Surety appealed. The court of appeals reversed,[1] finding that "[Charleston Auto] and [Petitioner] were not legal representatives of the Sellers" because Charleston Auto "did not stand in the shoes of the Sellers." *Centennial Cas. Co.*, 408 S.C. at 559, 759 S.E.2d at 918. Petitioner filed a petition for writ of certiorari contending that the court of appeals ignored the "legal representative" designation in the bills of sale and misapplied the plain language of the Dealer Bond Statute. We agree.

II.

The Dealer Bond Statute "specifically states the purpose of a dealer's bond is to indemnify 'for loss or damage suffered by *an owner of a motor vehicle, or his legal representative*.'" *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (quoting S.C. Code Ann. § 56-15-320(B)). In fact, the Dealer Bond Statute provides that "[a]n owner or his legal representative who suffers the loss or damage has a right of action against the dealer or wholesaler and against the dealer's or wholesaler's surety upon the bond and may recover damages." S.C. Code Ann. § 56-15-320(B).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Rainey v. Haley*, 404 S.C. 320, 323, 745 S.E.2d 81, 82 (2013) (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "'Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" *Id.* (quoting *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581).

Here, the bills of sale unequivocally appointed Charleston Auto as the "agent and legal representative" of both A3 and the Sellers in connection with the sales

[1] CNA Surety raised other challenges to the trial court's order in its appeal, but the court of appeals did not rule upon those challenges, finding the "legal representative" issue to be dispositive.

transactions. Thus, under the plain language of the Dealer Bond Statute, we find that Petitioner, the legal subrogee of Charleston Auto, is entitled to bring an action on A3's surety bond.

III.

We reverse and remand to the court of appeals for consideration of CNA Surety's remaining challenges to the trial court's order.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kay Paschal, Respondent.

Appellate Case No. 2015-000534

Opinion No. 27523
Submitted April 23, 2015 – Filed May 13, 2015

DEFINITE SUSPENSION

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

S. Jahue Moore, Sr., Esquire, of Moore Taylor Law Firm, P.A., of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension of nine (9) months to three (3) years or disbarment. Respondent requests that the suspension or disbarment be imposed retroactively to January 3, 2012, the date of her interim suspension. In the Matter of Paschal, 396 S.C. 286, 721 S.E.2d 428 (2012). In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter within thirty (30) days of the imposition of discipline. We accept the Agreement and suspend respondent from the practice of law in this state for three (3) years, retroactive to the date of her interim suspension. Further, we order respondent to

pay the costs incurred in the investigation and prosecution of this matter within thirty (30) days of the date of this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Background

Mr. Doe owned a real estate investment company. Respondent met Mr. Doe in March 1984 when he came to her office to meet a client. At the time respondent met Mr. Doe, he was married to Mrs. Doe who also served as the corporate secretary for the real estate investment company. Mr. and Mrs. Doe had two children.

Shortly after they met in 1984, respondent and Mr. Doe began a private, personal relationship. In early 1985, respondent and Mr. Doe began a secret, sexual relationship that continued until after Mrs. Doe's death in 2001.

In 2005, respondent and Mr. Doe lived together and continued their sexual relationship. They remained close companions. Mr. Doe died in February 2011 at the age of 88.

Matter I

From 1986 until 1997, respondent represented Mrs. Doe in a variety of legal matters. Those legal matters included:

1. representation of Mrs. Doe in connection with the purchase of several parcels of real estate including contract negotiation and drafting, title searches, deed preparation, and closing services;

2. representation of Mrs. Doe and others in connection with joint venture sales of several parcels of real estate including contract negotiation and drafting, title searches, deed preparation, and closing services;

3. representation of Mrs. Doe as the plaintiff in two foreclosure lawsuits;

4. preparation of various incorporation and joint venture documents on behalf of Mrs. Doe;

5. correspondence and other collections activities directed toward Mrs. Doe's debtors;

6. drafting notes, mortgages, title opinions, and assignments related to loans made by Mrs. Doe to others;

7. drafting various documents related to the power of attorney Mrs. Doe held for her aunt;

8. representation of Mrs. Doe as personal representative of the estate of her aunt, including preparation of the estate tax return;

9. advising Mrs. Doe regarding various leases and other contracts, including drafting of contracts and amendments;

10. assisting Mrs. Doe in the negotiation of medical bills and health insurance claims;

11. advising Mr. and Mrs. Doe regarding an Internal Revenue Service audit; and

12. drafting a contract for Mr. and Mrs. Doe for renovations to their home.

For these various legal matters, respondent collected in excess of $8,150.00 in legal fees from or on behalf of Mrs. Doe. For several closings on behalf of Mrs. Doe's joint ventures, respondent also collected in total approximately $1,400.00 in commissions on behalf of respondent's own real estate company, Kaspar Properties. Throughout this time, respondent was engaged in a sexual relationship with Mr. Doe, her client's husband. Also during this time, Mr. Doe was providing respondent with personal financial support, including loans, gifts of cash, and payment of some living expenses. Respondent did not disclose the affair, the extent of financial support, or the resulting conflict of interest to Mrs. Doe.

There is no evidence that respondent took any action adverse to, or otherwise compromised, Mrs. Doe's legal interests.

Matter II

During the time that he was married to Mrs. Doe, respondent represented Mr. Doe in a variety of legal matters, including:

1. representation of Mr. Doe and his companies in connection with the purchase of several parcels of real estate including contract negotiation and drafting, title searches, deed preparation, and closing services;

2. preparation of various incorporation and joint venture documents on behalf of Mr. Doe and others;

3. representation of Mr. Doe and others in connection with joint venture sales of several parcels of real estate including contract negotiation and drafting, title searches, deed preparation, and closing services;

4. drafting notes, mortgages, title opinions, and assignments related to loans made by Mr. Doe to others;

5. advising Mr. Doe regarding various leases, easements, building repair agreements, property maintenance agreements, and other contracts, including negotiating and drafting of contracts and amendments;

6. representation of Mr. Doe and his companies in negotiating and resolving disputes with various entities, including a former business partner, the children of a deceased business partner, various contractors, a property manager, a utility company, and city officials;

7. representation of Mr. Doe and his companies in court in connection with the prosecution and defense of several legal actions, including several foreclosures, a breach of contract case, a property damage claim, a condemnation action, a bankruptcy filed by one of his debtors, a personal injury claim, a right-of-way dispute, a mechanics lien claim, a tax assessment appeal, and a landlord-tenant dispute;

8. correspondence and other collections activities directed toward Mr. Doe's debtors and tenants;

9. assisting Mr. Doe in the negotiation of medical bills and health insurance claims;

10. advising Mr. and Mrs. Doe regarding an Internal Revenue Service audit; and

11. negotiating and drafting a contract for Mr. and Mrs. Doe for renovations to their home.

For these various legal matters, respondent collected in excess of $20,000.00 in legal fees from Mr. Doe and his companies. For several closings on behalf of Mr. Doe's joint ventures, respondent collected approximately $23,000.00 in commissions on behalf of respondent's own real estate company, Kaspar Properties. In addition, during this time, respondent assisted Mr. Doe with his companies' accounting and other recordkeeping as well as property management. From 1998 through 2001, respondent received approximately $34,600.00 in consulting fees for these services.

Throughout this time, respondent was engaged in a sexual relationship with Mr. Doe, her client. Also during this time, Mr. Doe was providing respondent with personal financial support, including loans, gifts of cash, and payment of some living expenses. Further, respondent participated as a principal in various joint ventures and property investments to which Mr. Doe was an investor, officer, or partner. Respondent did not disclose to Mr. Doe the conflicts of interest arising from these various relationships and transactions.

Law

Respondent's conduct occurred over many years, during which time the rules of conduct were revised. As to her conduct prior to 1990, respondent admits that she violated the following provisions of the Code of Professional Responsibility, Supreme Court Rule 32: DR1-102(A)(5) (lawyer shall not engage in conduct prejudicial to administration of justice); DR 5-101(except with consent of client after full disclosure, lawyer shall not accept employment if the exercise of professional judgment on behalf of client will be or reasonably may be affected by lawyer's own financial, business, property, or personal interests); DR 5-104 (lawyer shall not enter into business transaction with client if they have differing

interests therein and if client expects lawyer to exercise professional judgment therein for protection of the client, unless client has consented after full disclosure); and DR 5-105 (lawyer shall decline proffered employment if the exercise of independent professional judgment on behalf of client will be or is likely to be adversely affected by the acceptance of the proffered employment; lawyer shall not continue multiple employment if the exercise of lawyer's independent professional judgement on behalf of client will be or is likely to be adversely affected by representation of another client; lawyer may represent multiple clients if it is obvious lawyer can adequately represent the interest of each

and if each consents to representation after full disclosure of possible effect of such representation on exercise of lawyer's professional judgment on behalf of each).

As to her conduct between 1990 and 2001, respondent admits her conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.7(b) (notwithstanding existence of concurrent conflict of interest, lawyer may represent client if: lawyer reasonably believes lawyer will be able to provide competent and diligent representation to each client and each affected client gives informed consent, confirmed in writing); Rule 1.8(a) (lawyer shall not enter into business transaction with client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to client unless: (1) transaction and terms on which lawyer acquires interest are fair and reasonable to client and fully disclosed and transmitted in writing in manner that can be reasonably understood by client; (2) client is advised in writing of desirability of seeking and given reasonable opportunity to seek advice of independent legal counsel on transaction; and (3) client gives informed consent, in writing signed by client, to essential terms of transaction and lawyer's role in transaction, including whether lawyer is representing client in transaction); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice) .

Respondent also admits she has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

Conclusion

We accept the Agreement and suspend respondent from the practice of law in this state for three (3) years, retroactive to the date of her interim suspension.[1] Further, we order respondent to pay the costs incurred in the investigation and prosecution of this matter by the Office of Disciplinary Counsel and Commission on Lawyer Conduct within thirty (30) days of the date of this opinion. 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.

DEFINITE SUSPENSION.

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

[1] Respondent was publicly reprimanded by the Court in 2003. In the Matter of Paschal, 356 S.C. 15, 587 S.E.2d 113 (2003).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Douglas Francis Gay, Respondent.

Appellate Case No. 2015-000531

Opinion No. 27524
Submitted April 24, 2015 – Filed May 13, 2015

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Julie K. Martino, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Peter Demos Protopapas, of Rikard & Protopapas, LLC, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension ranging from one (1) to three (3) years. He requests the suspension be imposed retroactively to January 13, 2012, the date of his interim suspension. In the Matter of Gay, 396 S.C. 287, 721 S.E.2d 429 (2012). In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter within thirty (30) days of the imposition of discipline, to pay restitution to the mediator as discussed hereafter, and to complete the Legal Ethics and Practice Program Ethics School within nine (9) months of the imposition of a sanction. Respondent further agrees he shall not be eligible to seek reinstatement until all conditions of his criminal sentences have been satisfied. We accept the Agreement and suspend respondent from the practice of law in this state for three (3) years, retroactive to the date of his interim

suspension. Further, respondent shall pay the costs incurred in the investigation and prosecution of this matter within thirty (30) days of the date of this opinion, shall pay restitution to the mediator as discussed below, and shall complete the Legal Ethics and Practice Program Ethics School within nine (9) months of the date of this opinion. Respondent shall not be eligible to seek reinstatement until he has satisfied all conditions of his criminal sentences. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent was appointed to defend Complainant A on a number of criminal charges. Complainant A had already been convicted on separate charges at trial with different counsel. Complainant A decided he did not want to go to trial again but, rather, he wanted to plead guilty on the remaining charges. Complainant A pled guilty to two charges before one judge and seven charges before another judge. He was sentenced on March 30, 2009, and April 27, 2009, respectively.

Complainant A requested respondent appeal his convictions and sentences; respondent promised to do as requested. The appeal from the March 30, 2009, sentence was dismissed because respondent failed to timely file and serve the Notice of Appeal. In addition, respondent did not cite any issue on which the appeal could properly proceed as required by Rule 203(B), SCACR. Respondent represents he does not believe any preserved issues existed, but that he filed the Notices of Appeal because his client directed he do so. Respondent admits he did not reply to any correspondence from the South Carolina Court of Appeals or follow the court's directives to pursue the appeals. Respondent failed to respond or take any action on Complainant A's behalf.

As a result of respondent's complacency, Complainant A's appeals were dismissed and, when respondent did not request reinstatement of the appeals, the matters were remitted to the trial court. Respondent admits that he mistakenly believed that his representation of Complainant A ended with the filing of the Notices of Appeal. He explains he thought the Division of Appellate Defense, a division of the South Carolina Commission on Indigent Defense, would assume the representation, but he did not contact that agency in spite of written warning from

the Court of Appeals that unless he provided the Commission on Indigent Defense with all information needed to proceed, he would remain counsel of record. Multiple letters from the court clearly explained that respondent was still responsible for Complainant A's appeals and that respondent needed to take action. Respondent admitted he did not contact the Commission on Indigent Defense to see whether it would handle Complainant A's appeals. Respondent did not advise Complainant A that his appeals had been dismissed.

In addition, respondent did not reply to correspondence from Complainant A. On several occasions, Complainant A wrote respondent or had his family call respondent to request copies of the transcripts, his case file, discovery, and all other relevant documents. Respondent did not respond.

Matter II

Complainant B is a mediator who billed respondent for two separate mediations. Respondent failed to pay the bills in spite of repeated requests by the mediator for more than a year and a half. Respondent admits he did not pay the mediator for his services. Respondent states his clients had not paid him despite repeated requests and that he has not been in a financial position to resolve the debt himself. Respondent maintains that he intends to pay the mediator when he is able to do so.

Matter III

Respondent self-reported his arrest for twelve counts of Failure to Pay Over or Account for Withholding Taxes in violation of S.C. Code Ann. § 12-54-44(B)(2). Because of the arrest, respondent was placed on interim suspension. Id. Respondent subsequently pled guilty to three counts of the lesser included offense of Failure to Pay Withholding Taxes, File a Return, or Maintain Records, in violation of S.C. Code Ann. § 12-54-44(B)(3). Respondent was sentenced to one year imprisonment, suspended upon the service of two years of probation, with probation to terminate upon the completion of eighty (80) hours of community service. Respondent's sentence was the same for each of the three counts to which he pled guilty with all sentences to run concurrently.

As part of the plea agreement, the original charges were dismissed without prejudice. Respondent was ordered to pay $1,500.00 for the cost of prosecuting

the case and $11,469.00 in restitution to the State of South Carolina for the State employee withholding taxes.

Matter IV

After he was placed on interim suspension, respondent spoke with a farmer about a potential foreclosure. Respondent admits his communication with the farmer violated the order placing him on interim suspension.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.2 (lawyer shall lawyer shall abide by client's decisions concerning objectives of representation and shall consult with client as to means by which they are to be pursued); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall provide prompt communication to client and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall promptly deliver to client property that client entitled to receive); Rule 1.16 (lawyer must comply with applicable law requiring notice to or permission of tribunal when terminating representation); Rule 4.4 (in representing client, lawyer shall not use means that have no substantial purpose other than to burden third person); Rule 5.5 (lawyer shall not practice law in violation of regulation of legal profession in that jurisdiction); Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as lawyer in other respects); Rule 8.4(c) (it is professional misconduct for lawyer to commit criminal act involving moral turpitude); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We accept the Agreement and suspend respondent from the practice of law in this state for three (3) years, retroactive to the date of his interim suspension.[1] Further, respondent shall pay restitution of $1,237.50 to the mediator referenced in Matter II within sixty (60) days of the date of this opinion. Respondent shall pay the costs incurred in the investigation and prosecution of this matter by the Office of Disciplinary Counsel and Commission on Lawyer Conduct (the Commission) within thirty (30) days of the date of this opinion and shall complete the Legal Ethics and Practice Program Ethics School within nine (9) months of the date of this opinion and provide proof of completion of the program to the Commission no later than ten (10) days after the conclusion of the program. Respondent shall not seek reinstatement until he has satisfied all conditions of his criminal sentences. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

[1] Respondent's disciplinary history includes an admonition issued in 2007 and a public reprimand issued in 2010. In the Matter of Gay, 388 S.C. 280, 696 S.E.2d 586 (2010).

The Supreme Court of South Carolina

In the Matter of Chester County Magistrate Angel Catina Underwood, Respondent.

Appellate Case No. 2015-000966

ORDER

The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Judicial Disciplinary Enforcement (RJDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that the petition is granted and respondent is placed on interim suspension. Chester County is under no obligation to pay respondent her salary during the suspension. See In the Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991). Respondent is directed to immediately deliver all books, records, bank account records, funds, property, and documents relating to her judicial office to the Chief Magistrate of Chester County. Respondent is enjoined from access to any monies, bank accounts, and records related to her judicial office.

IT IS FURTHER ORDERED that respondent is prohibited from entering the premises of the magistrate court unless escorted by a law enforcement officer after authorization from the Chief Magistrate of Chester County. Finally, respondent is prohibited from having access to, destroying, or canceling any public records and is prohibited from access to any judicial databases or case management systems. This order authorizes the appropriate government or law enforcement official to implement any of the prohibitions as stated in this order.

This Order, when served on any bank or other financial institution maintaining any judicial accounts of respondent, shall serve as notice to the institution that respondent is enjoined from having access to or making withdrawals from the accounts.

s/ Jean H. Toal C.J.

Columbia, South Carolina

May 8, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Orlando Smith, Petitioner,

v.

The State of South Carolina, Respondent.

Appellate Case No. 2012-213673

Appeal From Greenville County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 5316
Submitted March 4, 2015 – Filed May 13, 2015

REVERSED AND REMANDED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

KONDUROS, J.: In this case involving section 17-28-30 of the South Carolina Code (2014), which provides for post-conviction DNA testing, Orlando Smith appeals the circuit court's application of the seven-year time limit for defendants

who pled guilty or no contest. He argues he pled not guilty and the statute contains no time limit for those defendants. We reverse and remand.

In July 2000, Smith was tried and convicted of murder after pleading not guilty. The trial court sentenced him to thirty years' imprisonment.[1]

In 2008, the South Carolina General Assembly passed the Access to Justice Post-Conviction DNA Testing Act (the Act), and on January 1, 2009, it became effective. *See* S.C. Code Ann. § 17-28-10 to -120 (2014), 2008 S.C. Acts 413, § 1. Section 17-28-30(B) states:

> A person who *pled guilty or nolo contendere* to at least one of the offenses enumerated in subsection (A), was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication *no later than seven years from the date of sentencing*.

(emphases added). Section 17-28-30(A) states:

> A person *who pled not guilty* to at least one of the following offenses, was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication:
> (1) murder . . . .

(emphasis added).

[1] Smith filed an appeal, an application for post-conviction relief (PCR), and a petition for writ of habeas corpus, all of which were dismissed.

Smith wrote to the Greenville County Clerk of Court (the Greenville Clerk) requesting an application for Post-Conviction DNA Testing (Application) on February 17, 2009. On March 19, 2009, South Carolina Court Administration sent Smith a letter stating it was developing an Application, which it would distribute and post on the South Carolina Judicial Department website upon the South Carolina Supreme Court's approval.

Smith submitted an Application to the Greenville Clerk dated December 16, 2009. The Greenville Clerk responded with a supreme court order dated April 10, 2009, stating that although the court had created the Application, it would not be accepted until the Act was implemented by the appropriation of funds.

Following the dismissal of a second PCR application by Smith, he appealed to the supreme court. The South Carolina Supreme Court Clerk asked for an explanation of any arguable basis for the assertion the decision was improper regarding the PCR court's findings of untimeliness and successiveness, pursuant to Rule 243(c), SCACR.[2] Smith responded, detailing his previous attempts to obtain DNA testing. The supreme court dismissed the notice of appeal, finding Smith had not shown an arguable basis for asserting the PCR court's determination was improper. However, the order also stated Smith "may submit another Application for DNA Testing to the [Greenville Clerk] pursuant to the Access to Justice Post Conviction DNA Testing Act, and that application should be processed as set forth in the Act." (citation omitted).

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[2] Rule 243(c), SCACR, provides:

> If the lower court has determined that the [PCR] action is barred as successive or being untimely under the statute of limitations, the petitioner must, at the time the notice of appeal is filed, provide an explanation as to why this determination was improper. This explanation must contain sufficient facts, argument and citation to legal authority to show that there is an arguable basis for asserting that the determination by the lower court was improper. If the petitioner fails to make a sufficient showing, the notice of appeal may be dismissed.

Smith filed another Application dated February 23, 2012. [3, 4] In response, the solicitor argued the Application was untimely.[5] The solicitor asserted section 17-28-30(B) required Smith to file his Application within seven years of sentencing. Specifically, it provided Smith was convicted and sentenced on July 19, 2000, and his Application was received February 23, 2012, and therefore, his Application was not filed within seven years of sentencing. The solicitor also set forth additional ways in which Smith's Application did not meet the requirements of the Act.

The circuit court denied Smith's Application, concluding the Application was timed barred by section 17-28-30(B). Smith filed a Rule 59(e), SCRCP, motion to alter or amend, arguing the circuit court applied "the wrong code of law" to his Application. He asserted subsection B, which the circuit court applied, did not apply to his Application because he had not pled guilty. He contended subsection A applied to him and it did not include a limitations period. The circuit court denied Smith's motion stating:

> This [c]ourt reiterates its finding that [section] 17-28-30(B) applies to those applicants who entered a plea of

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[3] The Greenville Clerk's office indicated on March 20, 2012, it had received the Application.

[4] On March 21, 2012, the circuit court ordered Smith be appointed counsel. All of the filings in the circuit court contained in the record as well as the notice of appeal were done by Smith pro se. Smith asserted he was appearing pro se in his motion for default judgment. Nothing in the record indicates any counsel appeared on behalf of Smith in support of his Application until the petition for writ of certiorari was filed with this court.

[5] The solicitor's response was filed June 19, 2012, which Smith asserts was after the ninety days required by the statute for it to respond because the solicitor indicated it received the Application on February 23, 2012. *See* § 17-28-50(B) ("Within ninety days after the forwarding of the application, or upon any further time the court may fix, the solicitor of the circuit in which the applicant was convicted or adjudicated, or the Attorney General if the Attorney General prosecuted the case, shall respond to the application."). Smith moved for default judgment on July 5, 2012, asserting the State had not responded. The record contains no ruling by the circuit court, and Smith contends it did not rule on the motion.

> not guilty and were convicted at trial ("A person who . . . was . . . convicted . . . for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for DNA testing . . . no later than seven years from the date of sentencing.").[6]

(omissions by circuit court). Smith filed a notice of appeal. Smith's counsel later filed a petition for writ of certiorari. The State filed a return in support of the writ for certiorari. This court granted the petition for writ of certiorari.

Smith contends the circuit court erred in applying the seven-year time limit found in section 17-28-30(B), which applies to individuals who pled guilty or no contest by its clear and unambiguous language, to his Application when he pled not guilty, requiring application of section 17-28-30(A), which contains no time limit. The State agrees with Smith's argument. We agree as well.

"Statutory interpretation is a question of law subject to de novo review." *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010).

> Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below. It is well-established that [t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature. Thus, we must follow the plain and unambiguous language in a statute and have no right to impose another meaning.

Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535-36, 725 S.E.2d 693, 695 (2012) (alteration by court) (citations and internal quotation marks omitted).

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[6] Both of the circuit court's orders only address the seven-year time limit as the basis for denying Smith's Application. The orders do not mention any of the solicitor's other grounds for denial.

"In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. A statute should not be construed by concentrating on an isolated phrase." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citation omitted). "Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011).

The circuit court omitted the phrase "who pled guilty or no contest" in its recitation of subsection B, finding it applied to defendants who pled not guilty. When the statute is read in full, particularly without omissions, the only interpretation is the seven-year limit only applies to those who pled guilty or no contest. Because the subsection that applied to those who pled *not* guilty does not include such a limitation, nothing indicates the legislature intended a time limit for defendants who pled not guilty. Therefore, the circuit court erred in applying subsection B to Smith and finding the seven-year time limit barred his Application. Accordingly, we reverse the circuit court's decision and remand for the circuit court to consider Smith's Application.[7]

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[7] The solicitor asserted several additional reasons why Smith's Application did not meet the requirements provided by the Act, but the circuit court did not rule on those arguments. Consequently, those arguments may be considered by the circuit court on remand. *See* § 17-28-90(B) ("The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a preponderance of the evidence . . . (3) the physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense . . . ; (4) the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense . . . ; (5) if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching . . . .").

REVERSED AND REMANDED. [8]

THOMAS and GEATHERS, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michael Gonzales, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-190809

ON WRIT OF CERTIORARI

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 5317
Heard December 8, 2014 – Filed May 13, 2015

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Deputy Attorney General Suzanne Hollifield White, both of Columbia, for Respondent.

KONDUROS, J.: In this post-conviction relief (PCR) action, Michael Gonzales argues the PCR court erred in finding trial counsel was not ineffective for continuing to represent him despite a conflict of interest. We affirm.

FACTS/PROCEDURAL HISTORY

In June 2002, a grand jury indicted Gonzales for trafficking in methamphetamine. In July 2002, a jury convicted Gonzales of trafficking in methamphetamine, and the trial court sentenced him to thirty years' imprisonment and ordered him to pay a two-hundred-thousand-dollar fine.[1] Gonzales filed a direct appeal, and this court affirmed the sentence and conviction. *See State v. Gonzales*, 360 S.C. 263, 600 S.E.2d 122 (Ct. App. 2004), *overruled by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). The supreme court denied Gonzales's petition for a writ of certiorari.

Gonzales filed an application for PCR, alleging trial counsel had a conflict of interest because he also represented Dino Perez.[2] At the PCR hearing, trial counsel testified that in 2001 he represented Perez on several misdemeanor drug charges resulting in the forfeiture of cash. Trial counsel testified Lucy Santana, Gonzales's mother and "Perez's close personal friend," did all the consulting with him regarding Perez's charges because "Perez could not himself [go] into the office because he worked every day and he did not speak very much English." Santana also paid trial counsel's fee for representing Perez.

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[1]Earlier in June 2002, a grand jury also indicted Gonzales for trafficking in marijuana. In October 2004, with different representation, Gonzales pled guilty to the trafficking in marijuana charge, and the plea court sentenced him to five years' imprisonment to run concurrently with the thirty year sentence.

[2] Tara Shurling represented Gonzales in the PCR action. Gonzales's mother originally retained her to represent Gonzales in his direct appeal of the trafficking in methamphetamine charge. However, the United States Attorney's Office (USAO) approached Shurling and told her to "proffer [Gonzales] up because [it] needed him as a witness in a pending prosecution of [Perez]." The district court then appointed Shurling as Gonzales's counsel on a material witness warrant. Subsequently, the trial court appointed her at her request to represent Gonzales on the outstanding marijuana charge, after which she agreed to represent Gonzales in this PCR action.

Trial counsel testified that in January 2002, Santana paid him $25,000 to represent Gonzales in the marijuana trafficking action. Trial counsel stated that in April 2002, Perez was arrested for the same crime, trafficking more than one thousand pounds of marijuana.[3] Trial counsel stated he visited Perez in jail and thereafter agreed to represent him on his trafficking in marijuana charges while simultaneously representing Gonzales. Trial counsel testified his notes indicated Santana again made arrangements to pay his $25,000 fee for representing Perez on the matter.

Trial counsel testified that in June 2002 he was asked to represent Gonzales in the methamphetamine action. He testified Perez paid $3,220 of the $25,000 fee. Trial counsel explained he and Perez reached an agreement whereby trial counsel would take a portion of the money he had recovered for Perez in the 2001 action as part of his fee for representing Gonzales in his pending methamphetamine action. Trial counsel stated the remaining balance was paid by a check from J & M Contractors (J &M). Trial counsel was unsure if J & M was the employer of Gonzales, Santana, or Perez but stated he thought J & M was one of their employers.

Trial counsel contended he did not know Santana, Perez, and Gonzales were family at the time Perez paid a portion of Gonzales's fees. However, he acknowledged he did not know what relationship Perez had with Gonzales that would make Perez inclined to pay part of the fee for Gonzales's defense. Trial counsel testified, "I was aware, at the time that I began representing . . . Gonzales on the methamphetamine charges, that . . . Santana was his mother[and] that . . . Perez was either . . . Santana's boyfriend or friend or ex-boyfriend or friend. I -- that was the extent of my knowledge about their personal relationships." He further explained,

> I somehow want to think that at some point in time . . . Santana told me that . . . Perez was either her boyfriend or her friend, and I want to think -- my, my impression was they had some kind of romantic relationship, but I mean I didn't, maybe I should [have], I didn't see any

[3] The appendix does not include the indictment for Gonzales's trafficking in marijuana charges or the exact amount of marijuana Gonzales was charged with trafficking. Gonzales refers to the charges as "trafficking large quantities of marijuana."

> need to go into vast detail with . . . Santana about the, her personal relationship with . . . Perez.

Trial counsel stated he did not initially consult with Gonzales or Perez regarding waiving the potential conflict of interest. He stated, "[A]s plain as I can put it, I--if a conflict existed, either actual or potential, I did not recognize it at that time." When asked if he recalled ever speaking with Gonzales about his relationship with Perez, trial counsel responded,

> I don't specifically recall asking . . . Gonzales ["]are you in a drug conspiracy with . . . Perez[?"] I, I didn't have any reason to ask that. And you know, I have to just say again, if a potential or actual conflict existed, I, I did not appreciate it. I failed to, to, to apprehend that fact. I - - that's all I can say. I . . . didn't see any reason to go to my client and, and, and interview him on the subject of who are you in a drug conspiracy with.

When asked if he ever thought to investigate the connection between Perez and Gonzales given that (1) Gonzales was only seventeen at the time of his charges; (2) Gonzales and Perez were both charged with the same crime—trafficking in a large quantity of marijuana within the same small geographical region—within a relatively short period of time; and (3) trial counsel's attorney's fees for representing Perez and Gonzales were being paid by either Perez or Santana or both, trial counsel explained,

> No, I, I -- maybe I should [have]. Although I can say, at the time, given everything that I knew, the only thing I knew that . . . Gonzales and . . . Perez had in common was . . . Santana. It, it is not uncommon, at least in my experience not uncommon, that individuals that are related to one another or friends with one another, whatever degree of personal relationship they, they have, often wind up in trouble and, and often in the same kind of trouble, but that doesn't mean it's the same trouble.

Trial counsel also testified his dual representation did not have any effect on his representation of Gonzales at trial. He stated he "tried the cases just as hard and the same way [he] would have no matter who [he] represented otherwise."

Trial counsel testified Perez's trafficking in marijuana charges were originally pending in state court but because of the nature of the charges were subsequently taken over by the federal government and became the subject of a federal prosecution. Trial counsel testified

> I was not aware of [and] did not appreciate, if any existed, any connection to and was never told directly in anyway prior to the trial of . . . Gonzales on methamphetamine trafficking charges that there was any connection at all between . . . Gonzales's marijuana trafficking case and . . . Perez's marijuana trafficking case. . . . I was led to believe it was two totally separate unrelated occurrences[by] the discovery in the case . . . .

Trial counsel further asserted, "I had no information whatsoever, no inkling whatsoever, and was never given any information by the government or anybody else that led me to believe that there was any connection whatsoever [between the two marijuana trafficking cases]."

Trial counsel testified he did not recall law enforcement ever consulting him about the possibility of having Gonzales testify against Perez in exchange for a lesser sentence or negotiating a plea. Further, he stated Gonzales did not discuss with him information concerning Perez that may have been valuable in plea negotiations. Trial counsel stated that after trial, Gonzales actually denied having information about Perez. Trial counsel stated,

> [A]fter consultation with several experts in the field, I went with [an associate to visit Gonzales] and asked him the question directly and told him he need not do anything other than tell me the truth, and he denied that there was any connection, and denied it in the context of saying I've always, I've never had any, anything to do with . . . Perez.

Trial counsel further testified if he had believed Gonzales had information that "could [have been] useful to [Gonzales's] case if presented to the State for a cooperation deal . . . [he] would [have] acted on [that information]" even if it required him to withdraw from the case due to a conflict of interest. He confirmed it is common practice for defense attorneys to pursue plea bargains in cases in which one defendant may be able to provide information to the prosecution concerning "people higher up in the food chain." However, he stated if the possibility of a plea bargain in exchange for information existed in this case, he "did not appreciate the fact that it did." He explained,

> [I]t would not be my general practice to, in every drug case I have, go to law enforcement and say hey, if my client can provide information, will you give him a deal. I, I - - if I have a client who is maintaining his innocence and if I have a client [who has] given me no inkling whatsoever that he has any information to give or any willingness to provide whatever information he may have, I, I do not stand on a client to, to say look, you've got to give it up, you've got to give up the information. . . . [I]f a client though gives me reason to believe that he's willing to do that and some do, or if there's anything about a case that, that alerts me to the, the fact that there may be some substantial benefit to be gained, I wouldn't hesitate to broach that subject with law enforcement or a prosecutor.

Additionally, trial counsel testified Gonzales maintained his innocence and never wanted to plead guilty to any of his pending charges. Trial counsel stated,

> I think what it was, and it's understandable to me, . . . a young man facing 30 years in prison would do anything that, that he thought he could, right or wrong, to help himself. But he was not willing to [cooperate with authorities and give information] and never had given any indication to me or anybody else that he was willing to do that prior to his trial. As a matter of fact, the only thing he told me about that situation was that he was not guilty.

Trial counsel testified that in 2003, the USAO informed him it intended to disqualify him as Perez's attorney due to the conflict of interest. According to trial counsel, the USAO also planned to call trial counsel as a witness or potential witness in the government's case against Perez because the government theorized Perez and Gonzales were co-conspirators in a marijuana trafficking conspiracy. Trial counsel testified, "[T]he conflict that was directly alleged by the federal government was a conflict that they themselves alleged developed as a result of [Gonzales's] debriefing after his imprisonment for methamphetamine charges."

Trial counsel stated he withdrew from Perez's case after consulting with ethics experts, knowledgeable attorneys, experienced attorneys with the National Association of Criminal Defense Lawyers, experienced attorneys with the state association of criminal defense lawyers, and his clients. After withdrawing, trial counsel was informed Gonzales had given statements against Perez to federal authorities. A DEA form[4], summarizing a prison interview with Gonzales given May 29, 2003, was entered into evidence at the PCR hearing over the State's objection.

Trial counsel testified that after he learned the federal government thought there was a connection between Gonzales and Perez, he visited Gonzales in jail and asked him to sign a waiver after full disclosure of the conflict of interest. Trial counsel testified that during the visit, Gonzales denied any connection or dealings with Perez but did not sign the form because he wanted to think about it. Trial counsel testified Perez also denied any connection to Gonzales and "[a]cted like he didn't know what [trial counsel] was talking about." An attorney who accompanied trial counsel during the jail visit with Gonzales testified Gonzales "was adamant that there was no connection of any shape or form between [Perez and him], that he knew nothing about Perez's involvement in any criminal activity, and they just . . . traveled in different circles." In 2004, trial counsel moved to withdraw from Gonzales's marijuana trafficking case, citing "an irreconcilable conflict of interest so as to preclude his further representation."

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[4] The parties never articulate what they are referring to when they discuss the "DEA 6" form. Presumably, in this context, DEA refers to the Federal Drug Enforcement Administration. Shurling indicated the DEA 6 form is a transcript or written report of an interview. She stated it is "a shorthand form [and] DEA statement[]s are referred to as DEA 6's."

A former federal prosecutor who handled Perez's prosecution testified Shurling was eventually able to solicit Gonzales's cooperation in Perez's prosecution. The former prosecutor testified that after meeting with Shurling, Gonzales gave extensive debriefings to various federal agencies concerning Perez's drug organizations. He indicated a potential benefit of providing information that is substantially beneficial in a federal prosecution includes a "motion for downward departure at the time of sentencing [or a] motion for a reduction in their sentence" if the informant has already been sentenced. The former prosecutor further testified federal prosecutors could have appealed to the local authorities and recommended Gonzales receive favorable treatment in the plea bargaining process as a result of his extensive cooperation. He testified that in his experience, defense attorneys encouraged their clients to provide any information with which they had to barter during the plea negotiation process. Regarding whether a conflict of interest existed in Gonzales's case, the former prosecutor testified, "[B]ased on [the USAO's] view of the case, it was apparent . . . there was, at the very least, a potential conflict and possibly a real conflict in [trial counsel] representing both . . . Perez and . . . Gonzales" and as a result the USAO asked trial counsel to remove himself from the case.

Gonzales testified Perez was dating and living with his mother in 2002. Gonzales stated he met Perez when he was about thirteen years old, Perez was a father figure for him, and Perez got him involved in the drug business. He testified he was delivering the narcotics to Perez on the night he was arrested for trafficking marijuana. He stated his mother and Perez then used Perez's money to hire trial counsel to represent him on the charges. He testified that at that time, trial counsel did not discuss any potential conflicts of interest or ask him to sign any waivers. He testified Perez also hired and paid trial counsel to represent him on the methamphetamine charges. Gonzales asserted that after Perez was arrested for trafficking marijuana, Gonzales asked trial counsel if anything could be done to negotiate a better deal because he had information to use against Perez. Gonzales stated trial counsel responded, "he couldn't hear this."

Gonzales testified that if trial counsel would have "from the beginning, told [him] that [he] might be able to get a good deal for [himself] if [he] agreed to cooperate with the state and federal authorities and tell them everything [he] knew about the drug business," he would have cooperated. He asserted he would have wanted a

different lawyer had trial counsel indicated there could be a problem representing both him and Perez.

Gonzales testified Shurling encouraged him to fully cooperate with state and local authorities by telling them everything he knew about the drug business. Gonzales testified Shurling also advised him to convince his mother to leave Perez and cooperate with federal and state authorities. Further, Gonzales testified he was "[v]ery afraid of . . . Perez" and believed he was "extremely violent and a dangerous man."

Finally, a lieutenant from the narcotics unit of the Spartanburg County Sheriff's Department (the Department) testified regarding the value of cooperating witnesses in narcotics investigations. The lieutenant explained cooperating witnesses are "one of the most important tools that [the narcotics unit] use[s]. [Informants] . . . are very valuable when it comes to investigating cases." He testified one lawyer would not normally represent two individuals involved in a drug case. He testified the dual representation would "hamper [the State's] ability to secure the cooperation from a player in a given scenario if the lawyer was also representing one of the higher-ups in the drug organization." The lieutenant testified both the narcotics and homicide divisions of the Department were interested in "turning" Gonzales as a State's witness against Perez and trial counsel's representation of Gonzales and Perez hampered the State's ability to secure Gonzales as a witness. He testified young people are particularly difficult in criminal prosecutions when charged with serious crimes. He explained that in his experience, young people are generally fearful and "their mothers [and] fathers kind of . . . interfere[] with law enforcement. Not, not wanting them to come forward . . . . [M]inors are definitely a problem when it comes to sitting down [and] actually interviewing them . . . ." He stated in this case it was critical for Gonzales to have his own attorney given Gonzales's age and Perez's status as *in loco parentis* at the time of Gonzales's charges.

Additionally, the lieutenant testified the information Gonzales provided to the Department after trial counsel was relieved and Gonzales was represented by Shurling was "very good reliable information that was corroborated through different outsourcing." He stated based on that information, his office would have been willing to go to the State's office on Gonzales's behalf to attempt to get Gonzales a deal.

The PCR court found Gonzales failed to prove trial counsel had a conflict of interest during Gonzales's trial for trafficking in methamphetamine. Specifically, the PCR court found Gonzales, Perez, and Santana did not tell trial counsel the marijuana cases were related or that Gonzales and Perez were involved with each other's charges. Additionally, the PCR court found trial counsel's testimony was credible and Gonzales's testimony was not credible with regard to the alleged conflict of interest. The PCR court found, "Although [trial] [c]ounsel acknowledged that he was first hired to represent [Gonzales] against charges of trafficking in marijuana, the trial for trafficking in methamphetamine was called first and is ultimately the only charge [Gonzales] proceeded on with [trial] [c]ounsel." Therefore, the PCR court found no conflict of interest existed because Gonzales's charges at the time were unrelated to any charges Perez faced, Gonzales denied knowledge of Perez's drug involvement, and there were no adverse interests. The PCR court also noted Gonzales and Perez were not named as coconspirators or codefendants in any discovery obtained by trial counsel. Accordingly, the PCR court denied the PCR application and dismissed the action with prejudice. Gonzales filed a Rule 59(e), SCRCP, motion to alter or amend, which the PCR court denied. Gonzales petitioned for a writ of certiorari, which this court granted.

STANDARD OF REVIEW

"This [c]ourt gives great deference to the PCR court's findings of fact and conclusions of law." *Miller v. State*, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008). The existence in the appendix of any evidence of probative value is sufficient to uphold the PCR court's ruling. *Caprood v. State*, 338 S.C. 103, 109-10, 525 S.E.2d 514, 517 (2000). "This [c]ourt . . . will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (internal quotation marks omitted). If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999).

LAW/ANALYSIS

Gonzales argues the PCR court erred because it found trial counsel was not ineffective for continuing to represent Gonzales despite a conflict of interest. We disagree.

Counsel must provide "reasonably effective assistance" under "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Reviewing courts presume counsel was effective. *Id*. at 690. Therefore, to receive relief, the petitioner must show (1) counsel departed from professional norms resulting in (2) prejudice. *Id*. at 690, 693. "The defendant must first demonstrate that counsel was deficient and then must also show this deficiency resulted in prejudice. To satisfy the first prong, a defendant must show counsel's performance fell below an objective standard of reasonableness." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (citation and internal quotation marks omitted). Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id*. at 700.

"The first essential element of effective assistance of counsel is counsel's ability and willingness to advocate fearlessly and effectively on behalf of his client." *Derrington v. United States*, 681 A.2d 1125, 1133 (D.C. 1996) (internal quotation marks omitted). "[A] defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. This possibility is sufficient to constitute an actual conflict as a matter of law." *State v. Gregory*, 364 S.C. 150, 153, 612 S.E.2d 449, 450-51 (2005) (alteration, emphasis, and internal quotation marks omitted). "The danger of an attorney's conflict of interest is that the attorney may forego efforts he would ordinarily undertake on behalf of one client, in order that the other client may not thereby be harmed." *Derrington*, 681 A.2d at 1133 (internal quotation marks omitted). "An attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial. . . . [D]efense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem." *Holloway v. Arkansas*, 435 U.S. 475, 485-86 (1978) (citation and internal quotation marks omitted).

> [A]n actual conflict of interest occurs[] when a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney

> owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (alterations and internal quotation marks omitted); *see also Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007) ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.").

In a PCR proceeding, the applicant who claims his or her attorney had a conflict of interest bears the burden of demonstrating he or she is entitled to relief. *Jordan v. State*, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013). "Until [an applicant] shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation." *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993). The mere possibility of "a conflict of interest is insufficient to impugn a criminal conviction." *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). "While unconstitutional multiple representation is never harmless error, multiple representation standing alone is not violative of the Sixth Amendment." *Vance v. State*, 275 S.C. 162, 163, 268 S.E.2d 275, 275 (1980) (citation omitted). Additionally, "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).

"To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest *adversely affected his attorney's performance*." *Thomas v. State*, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (emphasis added).

When an actual conflict of interest exists,

> [C]ounsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of

> representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. . . . Prejudice is presumed *only* if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest *adversely affected his lawyer's performance.*

Strickland, 466 U.S. at 692 (emphases added) (citation and internal quotation marks omitted); *see also State v. Sterling*, 377 S.C. 475, 480, 661 S.E.2d 99, 101 (2008) (holding prejudice is presumed when an actual conflict *adversely affects* pretrial strategies as well as the defense at trial). "[A] defendant must establish that an actual conflict of interest *adversely affected his lawyer's performance.*" *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) (emphasis added). "The *Sullivan* standard requires a showing that (1) petitioner's lawyer operated under a conflict of interest and (2) *such conflict adversely affected his lawyer's performance.* If the petitioner makes this showing, prejudice is presumed and nothing more is required for relief." *United States v. Nicholson*, 611 F.3d 191, 205 (4th Cir. 2010) (emphasis added) (citation and internal quotation marks omitted).

> In order to prevail on a conflict claim, a habeas petitioner must establish, under the second prong of *Cuyler*, that the actual conflict of interest *compromised his attorney's representation.* This occurs when an attorney takes action for one client that is necessarily adverse to another, or when an attorney fails to take action for one client for fear of injuring another. In analyzing this issue, we use the three-factor test described in *Mickens v. Taylor*[, 240 F.3d 348, 361 (4th Cir. 2001), *aff'd*, 535 U.S. 162 (2002)]:
>
> First, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable

> under the facts of the case known to the attorney at the time of the attorney's tactical decision. [To demonstrate objective reasonableness,] the petitioner must show that the alternative strategy or tactic was clearly suggested by the circumstances. Finally, the petitioner must establish that *the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict*.

Stephens v. Branker, 570 F.3d 198, 209 (4th Cir. 2009) (second alteration by court) (emphases added) (citation and internal quotation marks omitted).

> A defendant has established an adverse effect if he proves that his attorney took action on behalf of one client that was necessarily adverse to the defense of another or failed to take action on behalf of one because it would adversely affect another. Thus, both taking action and failing to take actions that are clearly suggested by the circumstances can indicate an adverse effect. An adverse effect can arise at any stage of the litigation including pretrial investigation or entry of a plea.

Mickens, 240 F.3d at 360 (citations and internal quotation marks omitted).

Gonzales cites *Derrington*, 681 A.2d at 1127-38, in support of his petition and contends the two cases have very similar facts. The *Derrington* court held the petitioner was denied effective assistance due to a conflict because his attorney had another client charged with a crime about which the petitioner might have had information. *Id.* at 1130, 1138. Trial counsel contended although he initially sought to withdraw from representing the petitioner, he investigated once the petitioner was named and determined he was not an informant on the case. *Id.* at 1127-28, 1130.

However, trial counsel learned of a possible conflict before the petitioner's trial when the petitioner was mentioned as an informant during the trial of another of trial counsel's clients. *Id.* at 1127, 1130. Although the petitioner initially denied he had information, he acknowledged otherwise to trial counsel before his trial

began. *Id.* at 1138. Additionally, the prosecutor confirmed the petitioner was a source. *Id.*

In a recent conflict of interest case from our supreme court, the court found:

> At the PCR hearing, [trial counsel] testified that he was introduced to, and came to represent, Petitioner by way of Summers. [Trial counsel] was actively representing Summers. While Summers was not charged in relation to this methamphetamine seizure, she was the initial focus of law enforcement's investigation. In fact, the investigation was initiated only upon officers' receipt of a tip naming Summers as the individual manufacturing methamphetamine. Moreover, at trial, the evidence of Summers' guilt was such that the trial judge permitted [trial counsel] to proceed on a theory of Summers' third-party guilt, but [trial counsel] never pursued this theory. [Trial counsel] testified at the PCR hearing that he "was trying to throw mud any place [he] could that it would stick." That testimony is fundamentally at odds with [trial counsel's] failure to pursue a third-party guilt defense as to Summers.
>
> We find as a matter of law that [trial counsel's] concurrent representation of Petitioner and Summers constituted an actual conflict of interest. The effect of this actual conflict of interest is best illustrated by [trial counsel's] refusal to pursue a third-party guilt defense as to Summers, especially after being invited by the trial judge to do so. Because of the actual conflict of interest, Petitioner was not required to demonstrate resulting prejudice.

Jordan, 406 S.C. at 450, 752 S.E.2d at 541 (fourth from last alteration by court).

In the present case, several incidents occurred between January 2002, when trial counsel began representing Gonzales, and July 2002, when the trial court sentenced Gonzales in the methamphetamine action, that should have led a

reasonable attorney to question the existence of a conflict of interest in representing both Perez and Gonzales and take action to resolve the conflict. Specifically, those facts include (1) trial counsel knew or should have known of the familial relationship between Perez and Gonzales[5]; (2) Gonzales was seventeen at the time of the charges, indicating his drug involvement could have been associated with an older role model such as Perez; (3) within a few months both Perez and Gonzales were charged with trafficking a very large quantity of marijuana in the same small geographical location; (4) either Perez or Gonzales's mother, Santana, was paying trial counsel's substantial attorney's fees for representing Perez and Gonzales, indicating a connection between the individuals; and (5) trial counsel and Perez agreed trial counsel would apply towards trial counsel's fees for representing Gonzales the funds he recovered for Perez in the forfeiture action involving drug charges. Despite receiving this information, trial counsel did not consult with Gonzales or Perez as to their connection or whether either party wished to waive any potential conflict of interest before Gonzales's trafficking in methamphetamine trial. Trial counsel simply remarked, "[I]f a conflict existed, either actual or potential, I did not recognize it at that time.

However, Gonzales has not shown the conflict of interest adversely affected trial counsel's performance due to the PCR court's credibility findings. The PCR court found trial counsel credible and Gonzales was not credible. Throughout the PCR hearing, trial counsel remained adamant he was not aware of the familial connection between Perez and Gonzales, did not know their trafficking in

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[5] Trial counsel stated:

> I somehow want to think that at some point in time . . . Santana told me that . . . Perez was either her boyfriend or her friend, and I want to think -- my, my impression was they had some kind of romantic relationship, but I mean I didn't, maybe I should [have], I didn't see any need to go into vast detail with . . . Santana about the, her personal relationship with . . . Perez.

Additionally, codefendant's counsel referred to Perez as Gonzales's "stepfather" during trial and an investigating officer acknowledged Gonzales's family's drug business.

marijuana charges were related, and did not know Gonzales wanted to provide information against Perez in order to gain bargaining power in plea negotiations. Additionally, trial counsel indicated Gonzales unwaveringly denied any involvement in or having any information about Perez's charges when he met with Gonzales after trial. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Although an actual conflict existed, because trial counsel did not recognize the conflict, Gonzales cannot demonstrate the conflict affected trial counsel's performance.

We are troubled by trial counsel's failure to recognize the interests of Gonzales and Perez were sufficiently adverse because trial counsel had a duty to Gonzales to use information Gonzales could have provided against Perez in Perez's marijuana action, which would have been detrimental to Perez. *See Duncan*, 281 S.C. at 438, 315 S.E.2d at 811 ("The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client."). Although Gonzales's trafficking in methamphetamine charges proceeded to trial before Gonzales's trafficking in marijuana charge, trial counsel represented Perez and Gonzales on their respective trafficking in marijuana charges for several months prior to Gonzales's trial. *See Sterling*, 377 S.C. at 480, 661 S.E.2d at 101 (noting a defendant suffered a Sixth Amendment violation when counsel acted under a conflict of interest from the pre-indictment stage until the conclusion of the defendant's trial).

Additionally, at the PCR hearing, Gonzales contended that before trial, he told trial counsel he had information to use as an informant against Perez in Perez's trafficking case. Gonzales asserted he asked trial counsel if that information could be used as a bargaining tool to lessen his sentence or potentially lead to a plea deal in his trafficking in methamphetamine action. Gonzales testified trial counsel replied, "I can't hear [that]," indicating that at that time trial counsel also owed a duty to Perez, whose interests were adverse to Gonzales's. *See Thomas*, 346 S.C. at 144, 551 S.E.2d at 256 ("Although petitioner initially waived a conflict of interest, once it became clear an actual conflict existed due to [a] plea bargain, counsel should have either withdrawn from representing one or both of them or acquired another waiver covering this specific conflict."). However, Gonzales

admitted he later denied to trial counsel he could have provided information against Perez. The PCR court found Gonzales uncredible, and we must defer to the PCR court's findings on credibility matters. *See Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) (stating if matters of credibility are involved, this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses); *see also Hyman v. State*, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (stating the appellate court's deference to the PCR court's credibility findings is so great that it required the court to uphold the PCR court's determination even when the trial record unequivocally contradicted the testimony at the PCR hearing).

We also note that throughout trial, trial counsel portrayed Gonzales as a "very young person" unable to make responsible decisions.[6] Likewise, the Department

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[6] At trial, trial counsel repeatedly remarked to the jury Gonzales was a "very young person." After the State's case and during an *in camera* proceeding, Gonzales's codefendant examined an investigating officer as follows:

> [Codefendant]: [D]o you have prior knowledge of . . . Gonzales prior to this case?
>
> [Officer]: Yes, sir, I do.
>
> . . . .
>
> [Codefendant]: And do you know him to be a marijuana drug dealer by prior arrests?
>
> [Officer:] Yes, sir.
>
> . . . .
>
> [Codefendant]: Would you classify [Gonzales's] business -- or excuse me, his family as a *drug dealing family*?
>
> [Officer]: I don't really know his mother.

Lieutenant testified regarding the difficulty in working with young offenders such as Gonzales and their fearfulness when involved in serious crimes. *See Graham v. Florida*, 560 U.S. 48, 78 (2010) (noting the features distinguishing juveniles from adults that put young defendants at a significant disadvantage in criminal proceedings: "[Young defendants] mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by [the young person]." (citations omitted)). Given Gonzales's age and relationship to Perez, there are several reasons why he would have later denied having information to trial counsel after initially telling trial counsel he had the information. *See Wood v. Georgia*, 450 U.S. 261, 268-69 (1981) (noting "the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise"); *Derrington*, 681 A.2d at 1138 (rejecting the contention counsel's representation of the other party did not adversely affect counsel's performance in petitioner's case because the petitioner denied being an informant in the other party's case and reasoning that "one predictable consequence of [counsel's] representation of the [other party], and [petitioner's] knowledge of that representation, would be to inhibit [petitioner] from being candid with [counsel], especially regarding [petitioner's] activities as an informant, for fear of reprisal from the [other party]"). Additionally, at trial, an investigating officer connected

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> [Codefendant]: Do you know his *stepfather* . . . Perez?
>
> [Officer]: Yes, sir.
>
> [Codefendant]: Has [Perez] been arrested --
>
> [Officer]: Yes, sir, he has.
>
> [Codefendant]: --to your knowledge[?] And what for?
>
> [Officer]: Marijuana. Trafficking in marijuana.

(emphases added).

Gonzales's and Perez's marijuana charges, acknowledged Perez as Gonzales's stepfather, and indicated the family was a "drug dealing family."

Once he had new representation, Gonzales eventually provided information against Perez to state and federal authorities as part of plea negotiations and pled guilty to the trafficking in marijuana charges pursuant to the plea deal. A DEA representative testified Gonzales was "extremely cooperative" with federal authorities. A Department representative testified Gonzales ultimately provided to the narcotics unit "very good reliable information that was corroborated through different outsourcing." The representative testified based on that information, his office would have been willing to go to the State on Gonzales's behalf to attempt to get Gonzales a better deal in his methamphetamine charge. Moreover, trial counsel eventually acknowledged the conflict and withdrew from Perez's marijuana trafficking at the recommendation of the USAO. Trial counsel also eventually withdrew from Gonzales's marijuana trafficking action in 2004, conceding "an irreconcilable conflict of interest . . . preclude[d] his further representation."

Based on all of this, counsel should have recognized the conflict and even if he did not, the conflict could have made Gonzales less inclined to tell trial counsel he had information about Perez. However, all of the case law indicates the conflict must have adversely affected trial counsel's performance. Gonzales cannot show this without showing trial counsel recognized the conflict. Because we are bound by the PCR court's finding trial counsel's testimony credible that he did not recognize the conflict, we must find trial counsel's conflict did not adversely affect his performance. Although Shurling later procured a deal for Gonzales on another charge in turn for his testimony against Perez, because trial counsel did not know of the conflict, we cannot find the conflict was the reason he did not pursue a deal in the methamphetamine trafficking case in return for information about Perez.

The present case differs from most of the South Carolina cases on conflict of interest because those cases involved codefendants. *See Lomax*, 379 S.C. at 97, 103, 665 S.E.2d at 166, 169 (holding the PCR court erred in failing to find a conflict of interest existed when plea counsel simultaneously represented both the petitioner and her husband during guilty pleas that arose out of related offenses) (citing *Thomas*, 346 S.C. at 143-45, 551 S.E.2d at 256 (holding the petitioner in PCR proceeding demonstrated actual conflict of interest that affected her counsel's performance given counsel jointly represented the petitioner and her husband in a

case in which solicitor offered a plea bargain that would allow the charge against one spouse to be dismissed if the other spouse would plead guilty to the entire amount of cocaine); *Staggs*, 372 S.C. at 551-52, 643 S.E.2d at 691-92 (holding the petitioner in PCR proceeding demonstrated an actual conflict of interest that adversely affected counsel's trial performance when his counsel, who represented him on the charge of murder, also simultaneously represented the petitioner's father, mother, and brother on related accessory after the fact of murder charges); Allan L. Schwartz, *Circumstances Giving Rise to Conflict of Interest Between or Among Criminal Codefendants Precluding Representation by Same Counsel*, 34 A.L.R.3d 470 (1970 & Supp. 2008) (outlining cases that consider what particular circumstances give rise to conflict of interest when a single counsel represents multiple codefendants)).

This case also differs from *Jordan*, 406 S.C. at 450, 752 S.E.2d at 541. Although the petitioner's girlfriend in *Jordan* was not a codefendant, "she was the initial focus of law enforcement's investigation" and at trial, the evidence of her guilt was such that the trial court permitted trial counsel to proceed on a theory of her third-party guilt, but trial counsel never pursued this theory. *Id.* This case also is distinguishable from *Derrington* because in that case, trial counsel did not dispute he knew the petitioner was named as an informant in the case against his other client. *See* 681 A.2d at 1134 ("The first prong of the *Cuyler* test requires [the petitioner] to establish that [trial counsel] had an actual conflict of interest during the time that he served as [the petitioner's] trial attorney. [The petitioner's] task is made substantially easier by the fact that [trial counsel] himself identified the conflict at the initial status hearing . . . .").

Because Gonzales has not shown trial counsel's conflict adversely affected counsel's performance, he has not shown prejudice. Accordingly, the PCR court's denial of PCR is

AFFIRMED.

HUFF, J., concurs.

SHORT, J: I respectfully dissent. I find Gonzales has shown the conflict of interest adversely affected trial counsel's representation. Although I find credible trial counsel's testimony that he zealously represented Gonzales, I find his failure to timely recognize the conflict of interest adversely affected his performance.

Trial counsel portrayed Gonzales as a "very young person" unable to make responsible decisions, which should have more timely heightened counsel's awareness to the possibility of a conflict of interest. In light of the government officials' testimony of the far more favorable treatment Gonzales could have obtained, I find the conflict of interest adversely affected trial counsel's performance.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services,
Respondent,

v.

Sheronda D. Williams and Antwan Boyd, Defendants,

Of Whom Sheronda D. Williams is the Appellant.

In the interest of a minor under the age of eighteen.

Appellate Case No. 2014-000785

Appeal From Lee County
Gordon B. Jenkinson, Family Court Judge

Opinion No. 5318
Heard April 15, 2015 – Filed May 12, 2015

REVERSED AND REMANDED

John D. Elliott, of Law Offices of John D. Elliott P.A., of Columbia; and Cody Tarlton Mitchell, of Lucas Warr & White, of Hartsville, for Appellant.

Scarlet Bell Moore, of Greenville, for Respondent.

Edgar R. Donnald, Jr., of Sumter, for the Guardian ad Litem.

KONDUROS, J.: Sheronda D. Williams (Mother) appeals the family court's order terminating her parental rights to her eight-year-old daughter (Child). On appeal, Mother argues (1) termination of parental rights (TPR) was not in Child's best interest and (2) the permanency plan adopted by the family court does not address Child's needs or interests and should be modified. Because we find TPR is not in Child's best interest, we reverse and remand for a new permanency planning hearing.

FACTS/PROCEDURAL HISTORY

In September 2010, Child was placed in emergency protective custody after the Department of Social Services (DSS) received a report alleging Child "had fresh and old bruises on her hip, legs[,] and face." Police officers and DSS determined Mother caused the injuries. After Child was removed, she spoke to a forensic interviewer and disclosed she had been sexually abused. DSS and police officers never determined who perpetrated the sexual abuse.

The family court timely held a merits hearing and determined Mother and her husband, Kelvin, physically neglected Child and her brother and Child was sexually abused by an unknown perpetrator. The family court ordered Mother to undergo a psychological evaluation and follow all recommendations.

Dr. Jessie Michael West, a clinical psychologist, evaluated Mother in February 2011. Dr. West determined Mother had symptoms suggestive of schizophrenia, psycho-affective disorder, or bipolar disorder, and he believed Child "may have a similar psychiatric disorder [that] would predispose [Mother] to increased anger [and] excessive discipline." Dr. West believed Mother would not be able to parent effectively until her mental conditions were treated. He recommended a psychiatric evaluation and individual counseling for Mother and marital counseling for Mother and Kelvin.

In December 2012, the family court dismissed Kelvin from the action after a paternity test excluded him as the biological father. The family court determined Antwan Boyd (Father) was Child's biological father.

In December 2013, the family court held a TPR hearing. At the hearing, Dr. West testified Child had frequent temper tantrums and needed an adult in the home who could stabilize her. Dr. West opined the combination of Mother's and Child's personalities could create a hostile environment. He believed Child would be a constant stressor on Mother and Mother would need extra support to handle Child's behavior. Dr. West also believed Mother needed medication and counseling to ensure Child's safety.

Demetrius Adams, a DSS caseworker, testified Mother completed parenting classes and a psychological evaluation, obtained stable housing, and completed some counseling. Mother was referred to individual counseling but only attended two sessions and did not complete it. Additionally, Mother did not complete marital counseling. Adams testified Mother visited Child when she could arrange transportation, explaining Mother lived in Bennettsville and Child was placed in West Columbia. She stated Mother was "pretty faithful about visiting [Child] minus a couple of breaks."

Adams admitted Father contacted DSS in 2010, shortly after Child was placed in foster care, indicating he believed he was Child's father. After Father took a paternity test that confirmed he was Child's father, he requested Child be placed with him. Because Father lived in North Carolina, DSS sought a home study through the Interstate Compact on the Placement of Children (ICPC).[1] Father later asked DSS to stop the home study and never asked DSS to resume it.

At the time of the TPR hearing, Child was placed at Three Rivers Residential Facility because she threatened suicide, behaved defiantly, and could not be managed in a therapeutic foster home. She attended an on-site special education school and a "high intensity after class." Child had lived in nine different placements, including relative placement, foster homes, and another residential facility, and she was in her second residential stay at Three Rivers. Child had directed abuse and other abnormal behaviors toward other children, and Adams believed it would be difficult for Child to be in a home with other children. Adams stated DSS had identified a single female without any children who lived in North Carolina as someone who might be interested in adopting Child. According to Adams, the potential adoptive parent was a nurse who was trained to deal with children with Child's behavioral issues. Adams believed TPR was in Child's best

[1] S.C. Code Ann. § 63-9-2200 (2010).

interest because Child needed the stability and permanency TPR and adoption would provide.

Dr. Ken Master, a child psychiatrist, began treating Child in 2011, when she was about six years old. Dr. Master stated Child had to be restrained about once every other week, and he believed she needed inpatient care because "[s]he was engaging and attacking the staff and peers, spitting on them, [and] doing sexually inappropriate things, . . . [and] she wouldn't respond to standard ways of managing her behavior." Dr. Master believed if Child was placed in a home with other children, the other children would be at risk of sexual or physical assault from Child.

According to Dr. Master, Child's primary diagnosis was post-traumatic stress disorder, which was related to her abuse and "multiple moods." Child also had attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder. Dr. Master saw Child weekly and prescribed her medication for ADHD and anger. Dr. Master opined Child was not capable of attending school as a regular student, although it could be possible in the future. When asked whether Child's diagnosis could ever improve, Dr. Master indicated it could with appropriate structure and support. However, he opined Child did not "have any long term or even remote future."

Dr. Master believed Child was in a "no-win situation" because she could not successfully live with Mother and had not been successful in residential treatment centers. Dr. Master described Child as demanding and stated her abuse issues would need to be fully resolved before Child could be safely returned to Mother. Dr. Master also believed it would be "very important" for Mother to complete individual counseling. He did not believe Mother could provide for Child based on the prior abuse, Child's behavioral problems, and Child's demanding needs.

Dr. Master did not know whether visits with Mother caused Child stress. He testified Child was always happy to see Mother; however, he had not observed enough visits to form an opinion. Dr. Master noted that when Child was placed with relatives, they complained Mother's visits were disruptive. However, he stated Child wanted to continue contact with Mother. He also stated Child "ha[d] considerable jealously about" the fact her siblings resided with Mother.

Dr. Master was unfamiliar with the potential adoptive parent or whether she had any special training. He testified no one could predict how Child would do in that placement until that person visited Child and saw "how impaired [Child] really is." Dr. Master stated Child would test whoever she lived with, explaining "she's going to blow up and spit and kick." However, he believed her chances of making it in a new home were "greater than the chance that she [would] make it in the current situation." Dr. Master initially opined there was a 51% chance placement with the potential adoptive parent would work, then later said it was closer to 55%. He stated, "I'm not coming here and saying, yes this is a much better situation. I'm just telling the [c]ourt in my opinion that it's unbalanced. It's a better situation." Dr. Master opined Child would need "a behavioral interventionist in the home for four or five days a week" if she went to the new placement. Although he could not opine about whether the placement would work, he still believed it was a slightly better option because "the current situation [was not] workable."

Dr. Master recommended six months of continued placement at Three Rivers with visitation between Child and the potential adoptive parent. He also recommended exploring placement with Father during the six-month period, suggesting Father could come once a week for family sessions, they could gradually introduce Father's wife and children in the family sessions, and they could eventually move to off-site visitation. If things went well, Dr. Master opined Child could eventually live in Father's home, "but with intensive wrap around services[,] which means supporters in the home, at least five or six days a week, several hours a day; services in the school; ongoing family therapy; and pharmacological management for [Child]." Dr. Master also believed Father and his wife would need to attend parenting classes for severely disturbed children, explaining sexualized and aggressive children like Child could "create situations where all the other kids get taken out of the home." Dr. Master believed it was very likely Child would have repeated experiences causing her to return to Three Rivers.

When asked whether TPR and adoption were in Child's best interest, Dr. Master explained:

> [I]f you had a person who [was capable of parenting Child, then] it would be in [Child's] best interest to go ahead with the TPR if this person was going to work with [Child]. But unless you can provide the information to show that the person is competent [and] that they're

> interested, then there isn't enough information for me to answer the question. And also that the current situation that she's living in is intolerable.

Following Dr. Master's testimony, the parties agreed DSS would stay the TPR action against Father for six months and Father would complete a treatment plan like the one Dr. Masters recommended. The family court excused Father from the remainder of the proceeding, but the hearing continued against Mother.

Mother admitted Child was removed after she spanked Child and bruised her leg. She stated she was depressed and stressed at that time because her marriage to Kelvin was failing and she was unemployed with two children. Mother testified Child always had behavioral issues, which became worse when she and Kelvin started having problems. She denied sexually abusing Child or knowing who did.

Mother testified she began the first treatment plan but stopped it when she became depressed, completed a psychological evaluation, and intermittently attended counseling. Mother testified her counselor told her they went over everything and left it to her to contact him if she needed to talk. She did not seek further counseling; however, she had counseling sessions with Sharon Woodum, an ordained minister. On cross-examination, Mother conceded she had not completed her treatment plan as of April 2011. Although Mother admitted she did not complete her first treatment plan, she stated she completed "just about everything" since 2012.

At the time of the TPR hearing, Mother had stable housing and employment. She lived with her three-month old child and her one-year old child. Mother believed she was able to care for the children who lived with her and her mood disorder had not caused any further problems. Mother testified she and Kelvin separated in July 2012 but were still married and Kelvin refused to attend marital counseling.

Mother testified she visited Child twice a month when Child was in foster care. Her visitation decreased when Child moved to Three Rivers because Mother did not have transportation, but she visited Child "whenever she could get transportation." Mother believed her visits with Child went well and Child was happy during visits. She stated Child interacted well with her siblings and often said she wanted to live with Mother.

Woodum testified she provided encouragement and spiritual counseling for Mother. However, she admitted she was not a licensed counselor and her advice was based on her ministry rather than a degree in therapy. Woodum often transported Mother to Columbia to visit Child, and she believed the visits went well. She stated Child was "all hugs and kisses" with her siblings. She added, "I've seen like a sadness, emotional time . . . whenever we were visiting we were . . . just talking and laughing and [Child] . . . just automatically said[, ']I don't want to be adopted.'"

The guardian ad litem (the GAL) testified she visited Child "hundreds" of times over a three year period. According to the GAL, Child "very much" wanted to return to Mother. However, the GAL did not believe returning Child to Mother would be in her best interest. The GAL believed Mother needed individual counseling and marital counseling, but she acknowledged Mother had improved. She was also the GAL for Mother's one-year-old child and was not aware of any issues since that child returned home.

The GAL testified, "The majority of the time [Child] would [say] she does not want to be adopted. However, in the past couple of months she has wavered and said she would be willing to try it." The GAL believed placing Child in an adoptive placement would be "disastrous," explaining, "[Child] is not ready to accept . . . another family. She's still holding on hope to see [Mother,] especially after [Mother] started visiting in November. She's obsessed. She's obsessed with going home to her mom."

In her report, which was entered into evidence, the GAL recommended terminating Mother's parental rights "in order for [Child] to heal, move forward, and possibly be placed with a family permanently." She noted no professional believed Mother was capable of parenting Child. The GAL did not believe Father's rights should be terminated, explaining, "Frankly I do not believe [Father] will be able to parent [Child]; however[,] I feel he should be given the opportunity." She continued,

> [Child] has so many issues that must be addressed in order to prepare her for adoption. This child is clinging to the hope of being returned to her family. It is going to take time for her to grieve the loss of not being in this family anymore and once this grieving is done she can begin a healing process.

The family court determined clear and convincing evidence supported the following statutory grounds for TPR: (1) Child was removed from the home, and Mother failed to remedy the conditions causing removal; (2) Mother had a diagnosable condition of mood disorder not otherwise specified that was unlikely to change within a reasonable period of time and that made it unlikely Mother could provide minimally acceptable care for Child; and (3) Child was in foster care for fifteen of the previous twenty-two months. Additionally, the family court found TPR was in Child's best interest and ordered TPR as to Mother. Finally, it determined Child's permanent plan would be TPR and adoption concurrent with reunification with Father. Mother's appeal followed.

In December 2014, the family court approved an agreement between DSS, Father, and the GAL that provided DSS would dismiss its TPR action against Father and be barred from filing a TPR action against Father based upon grounds that accrued prior to November 20, 2014, and Child's permanent plan would be an extension of services for the purpose of reunification with Father.

LAW/ANALYSIS

On appeal, Mother argues TPR is not in Child's best interest. We agree.

The family court may order TPR upon finding a statutory ground for TPR is satisfied and TPR is in the child's best interest. S.C. Code Ann. § 63-7-2570 (Supp. 2014). "Because terminating the legal relationship between natural parents and a child is one of the most difficult issues an appellate court has to decide, great caution must be exercised in reviewing termination proceedings and termination is proper only when the evidence clearly and convincingly mandates such a result." *S.C. Dep't of Soc. Servs. v. Roe*, 371 S.C. 450, 455, 639 S.E.2d 165, 168 (Ct. App. 2006). On appeal from the family court, this court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011); *see also Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Lewis*, 392 S.C. at 385, 709 S.E.2d at 651-52. The burden is upon the appellant to convince this court the family court erred in its findings. *Id*. at 385, 709 S.E.2d at 652.

We find DSS presented clear and convincing evidence to prove a statutory ground for TPR.[2] A statutory ground for TPR exists when a child has been removed from the parent's home "and has been out of the home for a period of six months following the adoption of a placement plan . . . and the parent has not remedied the conditions [that] caused the removal." § 63-7-2570(2). Child was removed from Mother's home in September 2010 after Mother disciplined Child and left bruises on her hip, legs, and face. The family court ordered Mother to complete a placement plan on November 17, 2010. As part of the placement plan, Dr. West evaluated Mother and determined she had mood disorders that needed further treatment and would not be able to parent effectively until her mental conditions were treated. Dr. West recommended a psychiatric evaluation and individual counseling for Mother; however, the record contains no evidence Mother received a psychiatric evaluation, and Mother failed to timely complete individual counseling. Adams testified Mother attended only two sessions of individual counseling and did not complete it. Mother admitted she started and stopped counseling three times and had not completed it as of April 2011. Based on the undisputed evidence of Child's behavioral problems, coupled with Mother's mood disorders, it was imperative for Mother to receive adequate mental health treatment before Child could return home. Mother's failure to do so constitutes clear and convincing evidence to support this statutory ground.[3]

However, we find TPR is not in Child's best interest. In a TPR case, the best interest of the child is the paramount consideration. *S.C. Dep't of Soc. Servs. v.*

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[2] Although the parties do not raise this issue, we address it ex mero motu. *See Ex parte Roper*, 254 S.C. 558, 563, 176 S.E.2d 175, 177 (1970) ("[W]here the rights and best interests of a minor child are concerned, the court may appropriately raise, ex mero motu, issues not raised by the parties."); *Galloway v. Galloway*, 249 S.C. 157, 160, 153 S.E.2d 326, 327 (1967) ("The duty to protect the rights of minors has precedence over procedural rules otherwise limiting the scope of review and matters affecting the rights of minors can be considered by this court [e]x mero motu.").

[3] Because DSS only needs to prove one statutory ground for TPR, we decline to address the remaining statutory grounds. *See S.C. Dep't of Soc. Servs. v. Headden*, 354 S.C. 602, 613, 582 S.E.2d 419, 425 (2003) (stating an appellate court does not need to address a TPR ground if it finds clear and convincing evidence supports another TPR ground).

Smith, 343 S.C. 129, 133, 538 S.E.2d 285, 287 (Ct. App. 2000). "The [interest] of the child shall prevail if the child's interest and the parental rights conflict." S.C. Code Ann. § 63-7-2620 (2010). "Appellate courts must consider the child's perspective, and not the parent's, as the primary concern when determining whether TPR is appropriate." *S.C. Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. 324, 343, 741 S.E.2d 739, 749-50 (2013). "The purpose of [the TPR statute] is to establish procedures for the reasonable and compassionate [TPR] where children are abused, neglected, or abandoned in order to protect the health and welfare of these children and make them eligible for adoption . . . ." S.C. Code Ann. § 63-7-2510 (2010).

At present, it does not appear Child will ever be able to return to Mother's home because Mother has not adequately treated her mental conditions. However, we find TPR has no benefit at this time. During oral argument, DSS conceded the current permanent plan was reunification with Father. Terminating Mother's parental rights while continuing to explore placement with Father does not improve Child's future. As long as Father retains parental rights, Child is not free for adoption. *See* § 63-7-2510 (noting the purpose of TPR statutes is to "protect the health and welfare of [abused, neglected, or abandoned] children and make them eligible for adoption"). If reunification with Father is not ultimately an option and DSS decides to pursue adoption, it will first need to terminate Father's parental rights. If so, it can revisit whether terminating Mother's rights is in Child's best interest at that time. For now, TPR is premature because no viable plan gives Child the family she desperately craves. To deprive her of her own family and give her nothing in return is not in her best interest.

Adams testified DSS sought TPR so Child could achieve permanency and stability. At the time of the TPR hearing, Child had lived in nine foster homes in less than two-and-a-half years, she had disrupted all of her prior placements, and she had to be restrained "about once every other week" due to behavioral problems. The GAL testified placing Child in an adoptive placement would be "disastrous," explaining, "[Child was] not ready to accept . . . another family. . . . She's obsessed with going home to her mom." During oral argument, DSS conceded Child did not have a potential adoptive family and DSS was not actively pursuing adoption for Child. Thus, Child will not achieve permanency and stability through TPR at this time.

Further, Child has a meaningful bond with Mother and her biological maternal family. Both Dr. Master and the GAL testified Child enjoyed visits with Mother.

The GAL stated Child wanted to return to Mother. Woodum and Mother both testified Child enjoyed visiting her maternal siblings. During oral argument, when asked what brought Child joy, the GAL replied "her biological family." Thus, it may be beneficial for Child to maintain a relationship with Mother and her maternal biological family.

During oral argument, DSS stated Child currently lives in a therapeutic foster home, attends a self-contained class in a public school, and has not had any significant behavioral problems recently. The GAL stated Child is "the best emotionally" she has seen her in years. DSS stated it recently reengaged Mother in Child's treatment and began allowing Child visitation with Mother. We are encouraged by Child's recent progress and cognizant DSS has allowed Mother to continue to play a role in Child's life. Based on the foregoing, we do not believe clear and convincing evidence shows TPR is in Child's best interest.

Accordingly, we reverse and remand for a permanency planning hearing. We recognize this is a difficult case with no clear answer, and we encourage the family court to carefully consider a permanent plan that involves Child's maternal and paternal families. The family court should also explore the likelihood of Father reapplying and qualifying for placement under the ICPC and whether North Carolina would agree to any potential placement. Finally, we urge the family court to explore, through Child's therapist, whether Child can begin visitation in Mother's and Father's homes. In rare circumstances, the family court can approve an alternative permanent plan, and this may be one of those rare circumstances. *See* S.C. Code Ann. § 63-7-1700(C) (Supp. 2014).

Because we reverse and remand for a permanency planning hearing, we need not address Mother's remaining argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address appellant's remaining issues when its determination of a prior issue is dispositive).

REVERSED AND REMANDED.

THOMAS and GEATHERS, JJ., concur.