The Supreme Court of South Carolina

O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of magistrates and municipal judges who have not complied with the continuing legal education requirements of Rule 510, SCACR. These judges are hereby suspended from their judicial offices, without pay, until further Order of this Court.

s/ Jean H. Toal C.J.
For the Court

Columbia, South Carolina

September 7, 2007

The Honorable Clinton J. Hall II
Calhoun Falls Municipal Court

The Honorable Joe Henry Harden
Easley Municipal Court

The Honorable Heather D. Lewis
Aynor Municipal Court

The Honorable Bobby M. Pruitt
Spartanburg Municipal Court

The Honorable Charles L. Smith
Yemassee Municipal Court

The Honorable Patrick Dorn Sullivan
Aiken County Magistrate

The Honorable Harvey G. Turner
Chester Municipal Court

The Supreme Court of South Carolina

In the Matter of
David A. Culberson, Deceased.

ORDER

The Office of Disciplinary Counsel has filed a petition advising the Court that Mr. Culberson passed away on August 27, 2007, and requesting appointment of an attorney to protect Mr. Culberson's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that Jonathan R. Hendrix, Esquire, is hereby appointed to assume responsibility for Mr. Culberson's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Culberson maintained. Mr. Hendrix shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Culberson's clients. Mr. Hendrix may make disbursements from Mr. Culberson's trust account(s), escrow account(s), operating account(s), and any other law office account(s)

Mr. Culberson maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Culberson, shall serve as notice to the bank or other financial institution that Jonathan R. Hendrix, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Jonathan R. Hendrix, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Culberson's mail and the authority to direct that Mr. Culberson's mail be delivered to Mr. Hendrix's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

August 31, 2007

The Supreme Court of South Carolina

In the Matter of
Gene W. Dukes, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Dukes and the interests of Mr. Dukes' clients.

IT IS ORDERED that Bruce A. Berlinsky, Esquire, is hereby appointed to assume responsibility for Mr. Dukes' client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Dukes may have maintained. Mr. Berlinsky shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Dukes' clients and may make disbursements from Mr. Dukes' trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of Gene W. Dukes, Esquire, shall serve as notice to the bank or other financial institution

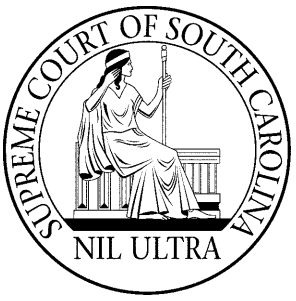
that Bruce A. Berlinsky, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Bruce A. Berlinsky, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Dukes' mail and the authority to direct that Mr. Dukes' mail be delivered to Mr. Berlinsky's office.

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

August 31, 2007



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34

September 10, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

Page

None

UNPUBLISHED OPINIONS

None

PETITIONS FOR REHEARING

4264-Law Firm of Paul L. Erickson v. Boykin	Pending
4272-Hilton Head Plantation v. T. Donald	Pending
4276-McCrosson v. Tanenbaum	Pending
4279-Linda Mc Co. Inc. v. Shore et al.	Pending
4280-Smith v. Barr	Pending
4284-Nash v. Tindall Corp.	Pending
4286-R. Brown v. D. Brown	Pending
2007-UP-272-Mortgage Electronic v. Suite	Pending
2007-UP-337-SCDSS v. Sharon W.	Pending
2007-UP-345-Fernandes v. Fernandes	Pending
2007-UP-354-Brunson v. Brunson	Pending
2007-UP-358-Ayers v. Freeman	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4014 – State v. D. Wharton	Pending
4022 – Widdicombe v. Tucker-Cales	Pending

4060 – State v. Compton	Pending
4071 – State v. K. Covert	Pending
4089 – S. Taylor v. SCDMV	Pending
4107 – The State v. Russell W. Rice, Jr.	Pending
4111 – LandBank Fund VII v. Dickerson	Pending
4121 – State v. D. Lockamy	Pending
4128 – Shealy v. Doe	Pending
4136 – Ardis v. Sessions	Pending
4139 – Temple v. Tec-Fab	Pending
4140 – Est. of J. Haley v. Brown	Pending
4143 – State v. K. Navy	Pending
4145 – Windham v. Riddle	Pending
4148 – Metts v. Mims	Pending
4156--State v. D. Rikard	Pending
4157– Sanders v. Meadwestvaco	Pending
4159-State v. T. Curry	Pending
4162 – Reed-Richards v. Clemson	Pending
4163 – F. Walsh v. J. Woods	Pending
4165 – Ex Parte: Johnson (Bank of America)	Pending
4168 – Huggins v. Sherriff J.R. Metts	Pending
4169—State v. W. Snowdon	Pending
4170--Ligon v. Norris	Pending

4172 – State v. Clinton Roberson	Pending
4173 – O'Leary-Payne v. R. R. Hilton Heard	Pending
4175 – Brannon v. Palmetto Bank	Pending
4176 – SC Farm Bureau v. Dawsey	Pending
4178 – Query v. Burgess	Pending
4179 – Wilkinson v. Palmetto State Transp.	Pending
4180 – Holcombe v. Bank of America	Pending
4182 – James v. State Employee Insurance	Pending
4183 – State v. Craig Duval Davis	Pending
4184 – Annie Jones v. John or Jane Doe	Pending
4185—Dismuke v. SCDMV	Pending
4186 – Commissioners of Public Works v. SCDHEC	Pending
4187 – Kimmer v. Murata of America	Pending
4189—State v. T. Claypoole	Pending
4195—D. Rhoad v. State	Pending
4196—State v. G. White	Pending
4197—Barton v. Higgs	Pending
4198--Vestry v. Orkin Exterminating	Pending
4200—S. Brownlee v. SCDHEC	Pending
4202--State v. Arthur Smith	Pending
4205—Altman v. Griffith	Pending

4206—Hardee v. W.D. McDowell et al.	Pending
4209-Moore v. Weinberg	Pending
4211-State v. C. Govan	Pending
4212-Porter v. Labor Depot	Pending
4216-SC Dist Council v. River of Life	Pending
4217-Fickling v. City of Charleston	Pending
4220-Jamison v. Ford Motor	Pending
4224-Gissel v. Hart	Pending
4225-Marlar v. State	Pending
4227-Forrest v. A.S. Price et al.	Pending
4231-Stearns Bank v. Glenwood Falls	Pending
4238-Hopper v. Terry Hunt Const.	Pending
4239-State v. Dicapua	Pending
4240-BAGE v. Southeastern Roofing	Pending
4244-State v. O. Gentile	Pending
4245-Sheppard v. Justin Enterprises	Pending
2005-UP-345 – State v. B. Cantrell	Pending
2005-UP-490 – Widdicombe v. Dupree	Pending
2006-UP-037-State v. Henderson	Pending
2006-UP-194-State v. E. Johnson	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-237-SCDOT v. McDonald’s Corp.	Pending

2006-UP-241-Marin v. Black & Decker	Pending
2006-UP-279-Williamson v. Bermuda Run	Pending
2006-UP-303-State v. T. Dinkins	Pending
2006-UP-304-Bethards v. Parex	Pending
2006-UP-313-Uzenda v. Pittman	Pending
2006-UP-314-Williams et. al v. Weaver et. al	Pending
2006-UP-315-Thomas Construction v. Rocketship Prop.	Pending
2006-UP-316-State v. Tyrelle Davis	Pending
2006-UP-317-Wells Fargo Home Mortgage v. Thomasena J. Holloway and Albert Holloway	Pending
2006-UP-320-McConnell v. John Burry	Pending
2006-UP-329-Washington Mutual v. Hiott	Pending
2006-UP-332-McCullar v. Est. of Campbell	Pending
2006-UP-333-Robinson v. Bon Secours	Pending
2006-UP-350-State v. M. Harrison	Pending
2006-UP-359-Pfeil et. al v. Walker et. al	Pending
2006-UP-360-SCDOT v. Buckles	Pending
2006-UP-367-Coon v. Renaissance	Pending
2006-UP-372-State v. Bobby Gibson, Jr.	Pending
2006-UP-374-Tennant v. Georgetown et al.	Pending
2006-UP-377-Curry v. Manigault	Pending

2006-UP-378-Ziegenfus v. Fairfield Electric	Pending
2006-UP-385-York Printing v. Springs Ind.	Pending
2006-UP-390-State v. Scottie Robinson	Pending
2006-UP-393-M. Graves v. W. Graves	Pending
2006-UP-395-S. James v. E. James	Pending
2006-UP-403-State v. C. Mitchell	Pending
2006-UP-412-K&K v. E&C Williams Mechanical	Pending
2006-UP-413-Rhodes v. Eadon	Pending
2006-UP-416-State v. Mayzes and Manley	Pending
2006-UP-417-Mitchell v. Florence Cty School	Pending
2006-UP-420-Ables v. Gladden	Pending
2006-UP-426-J. Byrd v. D. Byrd	Pending
2006-UP-427-Collins v. Griffin	Pending
2006-UP-431-Lancaster v. Sanders	Pending
2007-UP-004-Anvar v. Greenville Hospital Sys.	Pending
2007-UP-010-Jordan v. Kelly Co. et al.	Pending
2007-UP-015-Village West v. Arata	Pending
2007-UP-023-Pinckney v. Salamon	Pending
2007-UP-052-State v. S. Frazier	Pending
2007-UP-054-Galbreath-Jenkins v. Jenkins	Pending
2007-UP-056-Tennant v. Beaufort County	Pending

2007-UP-061-J. H. Seale & Son v. Munn	Pending
2007-UP-062-Citifinancial v. Kennedy	Pending
2007-UP-063-Bewersdorf v. SCDPS	Pending
2007-UP-064-Amerson v. Ervin (Newsome)	Pending
2007-UP-066-Computer Products Inc. v. JEM Rest.	Pending
2007-UP-087-Featherston v. Staarman	Pending
2007-UP-090-Pappas v. Ollie's Seafood	Pending
2007-UP-091-Sundown Operating v. Intedge	Pending
2007-UP-098-Dickey v. Clarke Nursing	Pending
2007-UP-109-Michael B. and Andrea M. v. Melissa M.	Pending
2007-UP-110-Cynthia Holmes v. James Holmes	Pending
2007-UP-111-Village West v. International Sales	Pending
2007-UP-130-Altman v. Garner	Pending
2007-UP-133-Thompson v. Russell	Pending
2007-UP-135-Newman v. AFC Enterprises	Pending
2007-UP-147-Simpson v. Simpson	Pending
2007-UP-162-In the matter of W. Deans	Pending
2007-UP-172-Austin v. Town of Hilton Head	Pending
2007-UP-183-State v. Hernandez, Guerrero, Arjona	Pending
2007-UP-189-McMasters v. Charpia	Pending
2007-UP-190-Hartzler v. Hartzler	Pending

2007-UP-193-City of Columbia v. M. Assaad Faltas	Pending
2007-UP-199-CompTrust AGC v. Whitaker's	Pending
2007-UP-202-L. Young v. E. Lock	Pending
2007-UP-226-R. Butler v. SC Dept. of Education	Pending
2007-UP-243-E. Jones v. SCDSS	Pending
2007-UP-249-J. Tedder v. Dixie Lawn Service	Pending
2007-UP-252-Buffington v. T.O.E. Enterprises	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of McBee, Bethune, and Lynchburg Municipal Court Judge Fred D. Stephens, Respondent.

Opinion No. 26378
Submitted August 22, 2007 – Filed September 10, 2007

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, Henry B. Richardson, Jr., Senior Disciplinary Counsel, and Robert E. Bogan, Assistant Deputy Attorney General, all of Columbia, for Office of Disciplinary Counsel.

William S. Tetterton, of Camden, for respondent.

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

[1] While this matter was pending, respondent resigned as municipal court judge for the towns of McBee, Bethune, and

FACTS

On June 14, 2006, while serving as a judge for the Town of McBee, respondent was indicted by the State Grand Jury of South Carolina on the charge of common law misconduct in office. The McBee Chief of Police was also indicted on the same offense. According to the indictment, respondent and the Chief of Police assisted certain persons charged with crimes in avoiding prosecution by coercing them to surrender money and property to the Town of McBee in exchange for having criminal charges against them dismissed. On June 16, 2006, the Court placed respondent on interim suspension.

On March 30, 2007, respondent pled guilty to the indicted offense and was sentenced to five (5) years imprisonment, suspended to ninety (90) days incarceration and three (3) years of probation. On June 27, 2007, respondent tendered his resignation as municipal court judge for the towns of McBee, Bethune, and Lynchburg.

LAW

By his misconduct, respondent admits he has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold the integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety and appearance of impropriety in all activities); Canon 2(A) (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3 (judge shall perform duties of judicial office impartially); and Canon 3B(2) (judge shall be faithful to the law). Respondent also

---

Lynchburg. Accordingly, a public reprimand is the most severe sanction the Court can impose when a judge no longer holds judicial office. See In re O'Kelley, 361 S.C. 30, 603 S.E.2d 410 (2004); In re Gravely, 321 S.C. 235, 467 S.E.2d 924 (1996).

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

CONCLUSION

We accept the Agreement for Discipline by Consent and issue a public reprimand. Respondent shall neither seek nor accept any judicial position in this State without the prior written authorization of this Court after due service on ODC of any petition seeking the Court's authorization. Respondent is hereby reprimanded for his misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Grover Rye, Appellant.

Appeal from Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 26379
Heard May 3, 2007 – Filed September 10, 2007

REVERSED AND REMANDED

Katherine Carruth Link, of West Columbia, and Kenneth M. Mathews, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Solicitor Warren Blair Giese, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This is a direct appeal in a criminal case. A jury convicted Appellant Grover Rye ("Appellant") of murder, and we certified the case for review from the court of appeals. Because we find that

the jury was not properly charged regarding a defense Appellant asserted at trial, we reverse.

FACTUAL/PROCEDURAL BACKGROUND

The events which culminated in the incident that is the subject of this appeal are both disturbing and bizarre. According to the record, Appellant owned a parcel of property on which he stored tools and equipment he used in his business. Although this property was not Appellant's primary residence, he occasionally slept in a house located on the property. Appellant visited the property every day, and sometimes more than once a day, to maintain the property and to feed several pet cats Appellant kept there.

Between March and August 2004, Appellant experienced continuous problems with trespassers on his property. According to the record, these trespassers not only entered Appellant's property, damaged the premises, and stole Appellant's equipment, the trespassers also made a sport of shooting (and killing) Appellant's pet cats. According to Appellant, he phoned the police on several separate occasions after discovering that trespassers had been on his property, but he was told that the police "did not need to respond to cat-killing reports."

According to the record, one of the primary trespassers was Appellant's neighbor. On the day of the incident which is the subject of the instant case, the neighbor, a friend, and the deceased (an off-duty county police deputy), took firearms onto Appellant's property and engaged in more of the violent activity we have described. After shooting for some time, the three trespassers returned to the neighbor's residence to reload. After accomplishing this, the neighbor and the deceased ventured back onto Appellant's property.

According to Appellant, he went onto his property at some point during this time period, saw a dead cat by the front steps of his house, and observed footprints around the house. Appellant alleges that he went to his cousin's house, phoned the police, and went back to his driveway to await the police's arrival. Appellant alleges that he then heard a gunshot on his property. At

that point, Appellant grabbed his rifle from his vehicle and ran towards his house.

Appellant and the neighbor gave conflicting testimony at trial regarding the circumstances surrounding the shooting of the deceased. According to Appellant, he approached the house, heard additional gunshots around him, and then saw the deceased charging at him in a slouching position with his rifle. Appellant asserted that no words passed between the men, but that the men immediately exchanged gunfire. Appellant testified that after firing four shots at the deceased, Appellant ran from his property.

According to the neighbor, when he and the deceased returned from reloading their weapons, Appellant came around a corner on the property with his weapon raised. The neighbor testified that Appellant confronted the deceased, and that upon being confronted, the deceased held his gun by the handle to put the gun on the ground, requested that Appellant not shoot, and raised one of his arms. The neighbor testified that as the deceased kneeled to put down the gun, Appellant shot the deceased multiple times.

A jury convicted Appellant of murder, and this appeal followed. We certified the case for review from the court of appeals pursuant to Rule 204(b), SCACR, and Appellant purports to present a total of eight issues for our review. Exercising our prerogative to decide only those questions that are necessary to the resolution of a case, we find that only one issue requires discussion:

> Did the trial court err in refusing to charge Appellant's proposed charge on the defense of habitation?

STANDARD OF REVIEW

A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. *State v. Burkhart*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002). Conversely, where a defendant requests a charge on a defense that is supported by the evidence presented at trial, the trial court is required to charge the jury on that

defense, and the failure to do so is reversible error. *State v. Day*, 341 S.C. 410, 416-17, 535 S.E.2d 431, 434 (2000).

LAW/ANALYSIS

Appellant argues that the trial court erred by incorrectly charging the jury as to the defense of habitation. We agree.

At trial, Appellant sought to make use of two defenses: self-defense and the defense of habitation. While charging the jury on the law of habitation, the trial court properly stated that the law recognizes the right of every person to defend his or her premises, but differentiated habitation from self-defense with the sole caveat that "[a] person defending his or her home or premises . . . has no duty to retreat." Though this was most of the picture, it was not the complete picture.

In this case, it was important for the jury to fully understand exactly what "defending one's home or premises" meant. As the defense of habitation provides, defending one's home or premises means ending an unwarranted intrusion through the use of reasonably necessary means of ejection. *State v. Bradley*, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923). By instructing that "[t]he same elements required by law to establish self-defense apply to the defense of habitation, with the exception of the duty to retreat," the charges in the instant case incorrectly implied that habitation requires a defendant to establish that his person or property was in some danger of injury or harm.[1]

[1] This implication arises from one of the elements of the defense of self-defense. As our precedent recognizes, self-defense requires that a defendant show that (1) he was without fault in bringing on the difficulty; (2) he was in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. *State v. Bryant*, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999).

For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances. *Bradley*, 126 S.C. at 533, 120 S.E. at 242. Stated differently, unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he (or his property) was in imminent danger sustaining serious injury or damage. Instead, the defense of habitation provides that where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser. Although our precedents properly recognize that self-defense and habitation are analogous, *see, e.g., State v. Sullivan*, 345 S.C. 169, 173, 547 S.E.2d 183, 185 (2001), the defenses are not identical.

In *Bradley*, this Court outlined four scenarios involving the law of habitation: (1) When the occupant is the slayer and stands upon habitation apart from self-defense; (2) When the occupant is the slayer, stands upon the right of self-defense, but claims immunity from his duty to retreat; (3) When the occupant is the slain and the homicide occurred while he sought to protect his habitation; and (4) When the occupant is the slain and the homicide occurred while he was attempting to eject a trespasser but was outside of his habitation. *Id*. at 233-37, 120 S.E. at 242-243. Although scenarios (3) and (4) clearly have no application here, a review of the record reveals that Appellant sought to avail himself not only of self-defense as described in scenario (2), but also of the defense of habitation described in scenario (1). By differentiating habitation from self-defense solely on the element of a duty to retreat, the trial court's charge addressed the second scenario, but it did not address the first.

In the instant case, the trial court's charge on the defense of habitation was incomplete. For that reason, we must reverse.

CONCLUSION

For the foregoing reasons, we reverse Appellant's conviction and remand the case for a new trial.

PLEICONES, J., and Acting Justice Alexander S. Macaulay, concur. MOORE, J. dissenting in a separate opinion in which Acting Justice E. C. Burnett, III, concurs.

JUSTICE MOORE: I respectfully dissent and would affirm the decision of the trial court.

FACTS

The shooting death of Rob Odom (Odom) occurred on August 14, 2004. For several months prior to Odom's death, appellant had contended with vandalism, break-ins, thefts, destruction of property, and the killing of his pet cats at his property on 1300 VanBoklen Road. Appellant did not reside at the property but occasionally slept at the house located there. He also used the property to store tools and equipment needed in his heating and air conditioning business. He visited the property every day, sometimes more than once a day, to maintain the property and feed the cats.

Between March and August 14, 2004, appellant encountered many problems with trespassers on his property. The trespassers shot and killed appellant's cats on several occasions. On one occasion, the front door of the house had been kicked in and $975 worth of tools had been taken. The path the trespassers took led to 1324 VanBoklen. Sometimes appellant called the police and sometimes he did not. On one occasion, an officer responded and appellant testified she would not get out of her car. Appellant told her it was a continuous problem and that it was only going to escalate. He stated the officer told him not to call 911 again and that deputies did not need to respond to cat-killing reports.

One of the perpetrators, Mason Mitchell, testified he thought the house was abandoned and that it was okay to shoot the cats. However, he admitted on cross-examination that he knew someone was feeding the cats. Mitchell was apparently an eyewitness to Odom's death and he and appellant gave conflicting stories as to what occurred that day.

According to Mitchell, on August 14, 2004, he, Odom, and James O'Connell went to appellant's property and shot cats, a box, an old car, and shot the lock off the barn. Odom had an AR-15, O'Connell had a .22 and Mitchell had a .40 caliber pistol. Mitchell alleged that this day was the first time Odom had ever joined him and O'Connell to shoot cats. After shooting

for some time, they went back to their residence and reloaded. Then, Mitchell and Odom returned to the property to shoot more cats.

When they returned, they shot at one cat and then appellant came around the corner through the gate carrying a rifle. Appellant had his gun raised and told Odom to put his gun down. Odom allegedly said, "okay, don't shoot," and began to put his gun down. Odom also stated, "it's alright to be over here, it's alright to shoot the cats." Odom kneeled down to put the gun, which he was now holding by the handle, on the ground and his left arm was raised. As Odom was doing that, Mitchell testified appellant shot him. Odom hit the ground, screamed, and tried to crawl away. At this point, Mitchell was hiding behind another shed. He heard four shots total. He stated Odom never shot at appellant, nor did he.

Mitchell stated he ran back to his house and yelled for his friends to call 911. He and O'Connell went back to appellant's property to help Odom. Upon arriving, they encountered appellant who pointed his gun at them and told them they "better get off the property or the same thing would happen to" them. They left and then Mitchell and Odom's mother-in-law drove to appellant's property. Upon arriving, appellant told them Odom was dead and that they better get out of there or it would happen to them.

According to appellant, on August 14, 2004, he went to his property and saw a dead cat by the front steps of the house. He also saw three sets of tracks and the lock shot off his barn. He went to his cousin's house and called 911. He then went back to wait in his driveway for the deputies. After hearing a pistol shot, he grabbed his rifle out of his truck and ran up to the house. He stated that his intention when he took the rifle out of his truck was to hold the guys there until the police came and that he had no intention of killing anyone. He went past one of the three gates and two shots rang out. He then saw Odom and a third shot went past him. Appellant went into his yard and Odom was charging at him in a slouching position with his rifle.

Appellant testified there was no doubt in his mind that Odom was going to shoot him. He stated no words were spoken between them. He stated he did not have a chance to aim his gun and that he just shot. He felt

that if had waited a second, Odom would have killed him. He stated Odom fell in a position just like he was standing and that his hands were in the same position just like he was holding the gun.[2] Appellant testified Odom shot at him three times and he shot at Odom four times. Because he was afraid the other perpetrators were present, he ran to the gate expecting to be shot at.

Appellant then ran to his cousin James' home and again called 911. Appellant stated the following in this 911 call:

> I just called you about somebody breaking into my damn barn, shooting my cats. Well, while I was on the phone with you, the son of a bitch come back in the yard and just pulled a gun on me and he's deader than goddamn hell now. I just shot the hell out of him. He pulled a gun on me.

He then went back to his property and encountered two men who he said were threatening to kill him. He stated he charged at them with his gun and they ran away.

Investigator Barnes testified that appellant's initial statements about where Odom and he were when the shots occurred were inconsistent with the evidence found at the scene. For instance, shell casings from Odom's gun were not found in the area that appellant indicated Odom was shooting him from. There was testimony, however, that Odom's gun had only 37 rounds in the magazine and one in the chamber, meaning three shots could have been fired out of it.[3] After appellant was released from jail, he found some of Odom's shell casings located near a scrap metal pile, the location where appellant alleged Odom was initially. Barnes stated, however, that there is no

---

[2]Appellant did not explain how Odom's rifle ended up six feet from Odom's body or why the rifle was on safety when it was found.

[3]A ballistics expert testified, however, that given it is difficult to fully load an AR-15, it would not be uncommon for only 38 rounds to be loaded into a 40-round magazine.

way to determine when those casings were fired. Barnes testified that appellant has consistently stated that he shot at Odom in self-defense.

Deputy Janell McMillian testified she responded to a call at appellant's property. She testified appellant was upset because someone was trying to injure his cats and that he stated words to the effect that he was going to get whoever was injuring the cats or he was going to try and kill them.

Deputy Enzer testified that when he spoke with appellant, while on the burglary call, he became concerned because appellant informed him he had sat in the woods with his rifle the previous day. Deputy Enzer testified he told appellant that if he caught someone on his property, he should call the police and should not take action on his own. Deputy Enzer specifically told appellant not to shoot anyone over the cats.

Investigator Ray Livingston testified that when he spoke with appellant while on the burglary call, appellant stated that he did not want to hurt anyone and that he was going to try and sue whoever was killing the cats and damaging his property.

The autopsy revealed that the shot to Odom's neck was not fatal, but the other three shots were potentially fatal. The neck wound was from the side, one wound was slightly to the back, and the other two were from the back. Odom's left arm was elevated when he was shot. The wound angles were such that Odom could not have been facing appellant when he was shot.

During deliberations, the jury asked questions about whether malice could be determined by events in earlier days such as appellant's demeanor and his statements to officers. The court refused to comment on that question. The jury subsequently found appellant guilty of murder. After appellant's motion for a new trial was denied, the court sentenced him to thirty years' imprisonment.

ISSUES

I. Did the trial court err by failing to direct a verdict of acquittal?

II. Did the trial court err by refusing to charge appellant's proposed charge on appearances and defense of habitation?

DISCUSSION

I. Directed Verdict

Appellant moved for a directed verdict, arguing it was impossible the killing occurred as declared by Mitchell and that there was no evidence to support the State's theory. The court denied the motion stating there was sufficient evidence to support the charge if the jury chooses to believe that evidence.

Appellant argues the directed verdict motion should have been granted because he acted in self-defense as a matter of law and because he acted in defense of his habitation as a matter of law.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury. State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001). On appeal from the denial of a directed verdict, the Court must view the evidence in the light most favorable to the State. State v. McHoney, *supra*.

Directed Verdict Regarding Self-Defense

To establish self-defense, the defendant must establish: (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997).

However, a person attacked on his own premises, without fault, has the right to claim immunity from the law of retreat. *Id.*

I would find there was sufficient evidence to send the case to the jury on the charge of murder. The State presented sufficient evidence showing that appellant may have not been acting in self-defense at the time he killed Odom. Specifically, the State presented evidence from an eye-witness that Odom never shot at appellant and that he was actually attempting to surrender his weapon at the time he was shot. Odom's weapon was found six feet from his body and Odom was actually shot in the back three times. The State also presented evidence that appellant had possibly laid in wait with his rifle to catch intruders on his property. Also, he had been cautioned by Deputy Enzer that he could not shoot someone because they had been shooting his cats. Accordingly, there was sufficient evidence showing that appellant may have been acting with malice aforethought and not in self-defense. Whether appellant was acting in self-defense was a question for the jury. Because there is evidence reasonably tending to prove appellant's guilt, the case was properly submitted to the jury by the trial court. State v. Buckmon, *supra*.

Appellant relies on the case of State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), for the proposition that he is entitled to an acquittal because self-defense was established as a matter of law. In Hendrix, the victim and Hendrix had a poor relationship. Early on the day of the shooting, the victim told Hendrix "they were going to have to fight to settle this thing." Later, the victim, while intoxicated, drove to Hendrix's property. While pointing a shotgun, Hendrix warned the victim to "back off." The victim returned to his truck, obtained a shotgun, and walked towards Hendrix. Hendrix told the victim to put his gun down and then shot four times in rapid succession and killed the victim. Witnesses for the State testified the victim never pointed his gun at Hendrix. Witnesses for the defense testified the victim pointed his gun at Hendrix and stated, "Say your prayers, I'm going to kill you."

In a 3-2 decision, the majority of the Hendrix court discussed the four elements of self-defense and found that self-defense was established as a

matter of law. Regarding the fourth element, the majority stated that Hendrix was on his own land when the confrontation occurred and had no duty to retreat. Regarding the first element, the majority found nothing to indicate Hendrix had provoked the fatal altercation. Regarding the second and third elements, the Hendrix majority found these elements were clearly established by the evidence. The majority found that Hendrix was actually in immediate danger of losing his own life and the circumstances were such to warrant a man of ordinary prudence to strike the fatal blow to save his own life. The majority concluded that a verdict of acquittal was appropriate.

The Hendrix dissent found that, based on the testimony, there were at least two inferences that could be drawn to explain why Hendrix shot the victim: (1) that Hendrix acted under a reasonable apprehension of danger, either actual or apparent, in which case the killing was justified; or (2) that Hendrix acted out of malice, in which case the killing was unlawful. I would find that the dissent appropriately concluded that it was a factual question whether Hendrix shot and killed the victim in self-defense or out of malice and that this factual question was solely within the province of the jury, not the court. Accordingly, I would overrule the Hendrix decision to the extent the majority of that court determined that self-defense could be established as a matter of law although there is more than one inference to be drawn from the evidence presented.

In the instant case, given there are two inferences to be drawn from the evidence presented at appellant's trial, the trial court properly denied the motion for a directed verdict.

Directed Verdict Regarding Defense of Habitation

The defense of habitation is analogous to self-defense and should be charged when the defendant presents evidence that he was defending himself from imminent attack on his own premises. State v. Sullivan, 345 S.C. 169, 547 S.E.2d 183 (2001). To establish the defense of habitation, the defendant must establish that a trespasser has endeavored to enter his habitation in a violent manner or with intent to commit a felony on him or the habitation itself or in an attempt to commit the misdemeanor of forcible entry. State v.

Bradley, 126 S.C. 528, 120 S.E. 240 (1923); State v. Brooks, 79 S.C. 144, 60 S.E. 518 (1908). The defendant is permitted to use deadly force against the trespasser and there is no duty for the defendant to retreat before taking the life of the trespasser. Brooks, *supra*.

The trial court did not err by denying the directed verdict motion because whether appellant was acting in the defense of his habitation is a factual question to be resolved by the jury. As previously noted, there was sufficient evidence showing that appellant may have been acting with malice aforethought when he shot Odom. Whether appellant was actually acting in defense of habitation was a jury question.

II. Proposed Charges

The trial court charged the jury:

> The defendant has raised in this case what is called the defense of self-defense. Self-defense is a complete defense. And if it is established, you must find the defendant not guilty. The State had the burden of disproving self-defense by proof beyond a reasonable doubt as I have already defined that term for you. If you have a reasonable doubt of the defendant's guilt after considering all of the evidence, including the evidence of self-defense, then you must find the defendant not guilty. On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all the evidence, including the evidence of self-defense, then you must find the defendant guilty.
>
> The following elements are required to establish self-defense. . . .
>
> First, the defendant must be without fault in bringing on the difficulty. If the defendant's conduct

was the type which was reasonably calculated to and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense.

The second element of self-defense is that the defendant was actually in imminent danger of death or serious bodily injury or that the defendant actually believed that he was in imminent danger of death or serious bodily injury. If the defendant was actually in imminent danger, it must be shown that the circumstances would have warranted a person of ordinary firmness and courage to strike the fatal blow to prevent death or serious bodily injury. If the defendant believed that he was in imminent danger of death or serious bodily injury, it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief.

In deciding whether the defendant actually was or believed that he was in imminent danger of death or serious bodily injury, you should consider all the facts and circumstances surrounding the crime, including the physical condition and characteristics of the defendant and the victim.

The defendant does not have to show that he was actually in danger. It is enough that the defendant believed he was in imminent danger and a reasonable and prudent person of ordinary reason and ordinary firmness and courage would have had the same belief.

The defendant has the right to act on appearances, even though the defendant's beliefs may have been mistaken. It is for you to decide whether

the defendant's fear of immediate danger of death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same circumstances or situation.

I will further charge you that evidence of prior difficulty between the defendant and the victim may be considered in deciding whether the threat existed, whether the defendant had a reason to believe that a threat existed and how serious the threat was.

I will further charge you that relative sizes, ages and weights of the defendant and the victim may be considered in deciding the apparent or the actual need for force in self-defense and the amount of force that was needed.

The final element of self-defense is that the defendant had no probable way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular circumstance. I will charge you that if the defendant was on his own premises, on his own property, the defendant had no duty to retreat before acting in self-defense. A defendant has no duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase. And I would further charge you that a person cannot be required to make an exact calculation as to the degree or the amount of force which may be needed to avoid death or serious bodily harm; therefore, in self-defense the defendant has the right to use the force needed to avoid death or serious bodily harm.

The force used in self-defense does not have to be limited to the degree or the amount of force used

> by the victim. The defendant has the right to use so much force as appeared to be necessary for complete self-protection and which a person of ordinary reason and firmness would have believed they needed to prevent death or serious bodily harm. If the defendant is justified in defending himself or others and in firing the first shot, then the defendant is also justified in continuing to shoot until it is apparent that the danger of death or serious bodily injury has completely ended.
>
> A. Proposed Charge on Defense of Habitation
>
> The trial court charged the defense of habitation by stating:
>
> . . . the law recognizes the right of every person to defend his or her premises. The same elements required by law to establish self-defense apply to the defense of habitation, with the exception of the duty to retreat. A person defending his or her home or premises or property on their own premises has no duty to retreat, and the same burden of proof as applies to self-defense applies to this defense of habitation, that is, the burden of proof is on the State to prove that the defense of habitation did not exist, and the State must prove that beyond a reasonable doubt.

Appellant argues, however, that his proposed charge should have been given because the requested charge was not otherwise covered by the court's charge. Appellant's proposed charge on the defense of habitation stated:

> A person may use deadly force to protect his home. Thus, he may use deadly force to eject a trespasser who is in his house or in the area immediately surrounding his house.

> Unless the trespasser is peaceable and well-behaved, defendant is not required to ask the trespasser to leave before using force.

The trial court refused to charge the proposed charge because the court believed it had adequately covered the law.

It was unnecessary for the trial court to use the proposed charge when his charge to the jury adequately covered the contents of the proposed charge. The habitation charge the court gave stated that a person has a right to defend their premises and does not have a duty to retreat. Further, the court charged that the same elements required to establish self-defense apply to the defense of habitation. Included within the self-defense charge were the following statements: (1) "a person cannot be required to make an exact calculation as to the degree or the amount of force which may be needed to avoid death or serious bodily harm; therefore, . . . the defendant has the right to use the force needed to avoid death or serious bodily harm;" (2) "The force used . . . does not have to be limited to the degree or the amount of force used by the victim. The defendant has the right to use so much force as appeared to be necessary for complete self-protection and which a person of ordinary reason and firmness would have believed they needed to prevent death or serious bodily harm;" and (3) "the defendant is also justified in continuing to shoot until it is apparent that the danger of death or serious bodily injury has completely ended." Accordingly, the statements regarding deadly force were sufficiently covered in the court's charge. *See* State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989) (if trial court refuses to give specific charge, there is no error if charge actually given sufficiently covers substance of request).

While nothing in the court's charge mentioned the word "trespasser" or that the defendant "is not required to ask the trespasser to leave before using force," all that is required is that the substance of the law must be charged to the jury, not any particular verbiage. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721, *cert. denied*, 531 U.S. 946 (2000). While the requested charge would not have been inappropriate, the trial court's charge, when considered as a whole, adequately covered the applicable law under the facts of this case.

Therefore, I would find the trial court did not err by failing to charge appellant's proposed instruction on the defense of habitation.

B. Proposed Charge on Acting on Appearances

Appellant's proposed charge on appearances is as follows:

> In the consideration of whether self-defense is applicable herein, you should try as near as you can to put yourself in defendant's situation at the time he [fired the fatal shot]. You should consider the circumstances by which he was surrounded, and take into consideration the person with whom he was dealing, and all of the facts which surrounded him, as you obtained the same from the testimony, and as near as you can, view the situation from defendant's standpoint. Unless the state shows that a person of ordinary reason, coolness and prudence would not have acted as defendant did under the circumstances that surrounded him at the time the fatal [shot was fired] then you should find the defendant not guilty.

The trial court refused to charge the proposed charge because the court believed it had adequately covered the law.

A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused. State v. Austin, 299 S.C. 456, 385 S.E.2d 830 (1989). However, if the trial court refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request. *Id.*

Although appellant's proposed charge on appearances was a correct statement of the law,[4] it was unnecessary for the trial court to use the proposed charge when his charge to the jury adequately covered the contents of the proposed charge. Besides the specific appearances charge the court issued, the court also charged the jury the following:

> If the defendant was actually in imminent danger, it must be shown that the circumstances would have warranted a person of ordinary firmness and courage to strike the fatal blow to prevent death or serious bodily injury. If the defendant believed that he was in imminent danger of death or serious bodily injury, it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief.
>
> In deciding whether the defendant actually was or believed that he was in imminent danger of death or serious bodily injury, you should consider all the facts and circumstances surrounding the crime, including the physical condition and characteristics of the defendant and the victim.
>
> The defendant does not have to show that he was actually in danger. It is enough that the defendant believed he was in imminent danger and a reasonable and prudent person of ordinary reason and ordinary firmness and courage would have had the same belief.

Accordingly, I would find the trial court did not err by refusing to give appellant's proposed charge on appearances. *See* State v. Burkhart, 350 S.C. 252, 565 S.E.2d 298 (2002) (failure to give requested jury instruction is not

---

[4]*See* State v. Rash, 182 S.C. 42, 188 S.E. 435 (1936) (finding this charge embodied a sound proposition of law and should have been charged in connection with the element of self-defense).

prejudicial error where the instructions given afford the proper test for determining the issues); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721, *cert. denied*, 531 U.S. 946 (2000) (trial court's refusal to provide specific jury instructions is not reversible error if the general instructions are sufficiently broad to enable the jury to understand the law and the issues involved).

CONCLUSION

Whether appellant was actually acting in self-defense or in defense of his habitation were questions for the jury. Therefore, I would find the trial court properly denied the motions for directed verdict and that the trial court did not err by refusing to charge appellant's proposed instructions to the jury. Further, I would affirm appellant's remaining issues pursuant to Rule 220(b)(1), SCACR, and the following authorities: Issue 4: State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002) (the admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice); Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000) (trial judge has broad discretion in determining whether to admit demonstrative evidence including charts and diagrams which are not direct evidence and have only secondary relevance); State v. McAlister, 149 S.C. 367, 147 S.E. 310 (1929) (admission of an inaccurate crime scene diagram not in error where judge informed jury it was not drawn to scale and informed jury it was admissible for the purpose of explaining a witness' testimony regarding landmarks); Issue 5: State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995), *cert. denied*, 516 U.S. 1080 (1996) (admission of evidence is within trial court's discretion and absent abuse of discretion, it will not be reversed on appeal); Issue 6: State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, *cert. denied*, 534 U.S. 977 (2001) (improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony); Issue 7: State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007) (defendants making a claim under Brady must demonstrate that (1) the evidence was favorable to the defense; (2) it was in the possession of or known to the prosecution; (3) it

was suppressed by the prosecution; and (4) it was material to guilt or punishment); Issue 8: State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999) (to qualify for reversal on ground of cumulative effect of trial errors, defendant must demonstrate errors adversely affected his right to fair trial).

I further find no merit to the State's Issue requesting the dismissal of the appeal for failure to timely serve the Notice of Appeal. Pursuant to Rule 233(b), SCACR, the service was properly made by mailing to the solicitor at his last known address.

Acting Justice E. C. Burnett, III, concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of H. Dewain Herring, Respondent.

Opinion No. 26380
Submitted August 14, 2007 – Filed September 10, 2007

DISBARRED

Henry B. Richardson, Jr., Senior Disciplinary Counsel, and Robert E. Bogan, Assistant Deputy Attorney General, both of Columbia, for Office of Disciplinary Counsel.

Richard A. Harpootlian, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of any sanction within Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and disbar respondent from the practice of law in this State. The facts, as set forth in the Agreement, are as follows.

FACTS

On February 16, 2006, respondent was indicted on the charges of murder and pointing and presenting a firearm.[1] A jury convicted respondent on both charges. Respondent was sentenced to thirty (30) years imprisonment for murder and five (5) years imprisonment for pointing and presenting a firearm.[2]

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) and Rule 8.4(c) (it is professional misconduct for a lawyer to commit a criminal act involving moral turpitude). In addition, respondent admits his misconduct is grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it is a ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(4) (it is a ground for discipline for lawyer to be convicted of a crime of moral turpitude or a serious crime).

CONCLUSION

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this State. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of

---

[1] Respondent was placed on interim suspension. In the Matter of Herring, 367 S.C. 325, 626 S.E.2d 326 (2006).

[2] The Agreement specifies that, by entering into the Agreement, respondent admits that he was indicted for and convicted of the two crimes and, further, that the Agreement is not intended to be an admission by respondent of any other fact relating to the crimes.

Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ronte Houey, Appellant.

Appeal From Cherokee County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 26381
Heard June 5, 2007 – Filed September 10, 2007

AFFIRMED

Thomas E. Shealy, of Gaffney, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

JUSTICE PLEICONES: Ronte Houey (Appellant) was charged with second-degree criminal sexual conduct with a minor (CSCM). The solicitor moved pursuant to S.C. Code Ann. § 16-3-740(B) (2003) for an order requiring Appellant to submit to testing for HIV and other diseases. The circuit court ordered the testing, and we affirm.

FACTS

After Appellant was arrested and charged with second-degree CSCM, the solicitor, at the request of the victim's legal guardian, moved for an order requiring Appellant to submit to HIV and other STD testing pursuant to S.C. Code Ann. § 16-3-740(B).[1] Appellant opposed the motion, arguing the State must first demonstrate probable cause that Appellant actually carries the disease before testing may be ordered. He claimed the failure of § 16-3-740(B) to require such a probable cause determination resulted in an unconstitutional invasion of his privacy. Appellant also argued the statute was unconstitutionally vague.

The circuit court issued an order requiring Appellant to be tested, finding any alleged constitutional violations were irrelevant in light of the State's stipulation that it would not use the test results during trial. The circuit court also found that testing ordered pursuant to § 16-3-740(B) did not violate Appellant's constitutional rights.

ISSUES

1. Does S.C. Code Ann. § 16-3-740(B) require the State to establish probable cause that a suspect is actually infected with a disease before testing may be ordered?

2. Is S.C. Code Ann. § 16-3-740(B) unconstitutionally vague?

1. PROBABLE CAUSE

Appellant asserts § 16-3-740(B) permits a search of an individual's bodily fluids without a probable cause determination the defendant is actually infected. As such, he argues it violates Fourth Amendment guarantees

[1] Despite the caption which implies sexually transmitted diseases are included, § 16-3-740(B) only allows for petitions for court orders to have an offender tested for Hepatitis B and HIV.

against unreasonable searches and seizures, as well as Article I, section 10 of the South Carolina Constitution. We disagree.[2]

> Section 16-3-740(B) provides:
>
> (B) Upon the request of a victim who has been exposed to body fluids during the commission of a criminal offense, or upon the request of the legal guardian of a victim who has been exposed to body fluids during the commission of a criminal offense, the solicitor must, at any time after the offender is charged, or at any time after a petition has been filed against an offender in family court, petition the court to have the offender tested for Hepatitis B and HIV. An offender must not be tested under this section for Hepatitis B and HIV without a court order. To obtain a court order, the solicitor must demonstrate the following:
>
> (1) the victim or the victim's legal guardian requested the tests;
>
> (2) there is probable cause that the offender committed the offense;
>
> (3) there is probable cause that during the commission of the offense there was a risk that body fluids were transmitted from one person to another; and

[2] Initially, we find the circuit erred by holding any potential constitutional violation would be harmless given the State's agreement not to use the test results against Appellant. The agreement is irrelevant because § 16-3-740(I) precludes admission of test results gathered pursuant to subsection (B) in the offender's criminal trial. Nonetheless, we do not believe the testing violated Appellant's constitutional rights.

> (4) the offender has received notice of the petition and notice of his right to have counsel represent him at a hearing.
>
> The results of the tests must be kept confidential and disclosed only to the solicitor who obtained the court order. The solicitor shall then notify only those persons designated in subsection (C).

S.C. Code Ann. § 16-3-740(B).

The State concedes the testing of blood is a search within the ambit of the Fourth Amendment. *See* Skinner v. Ry. Lab. Exec., 489 U.S. 602, 617 (1989); State v. Baccus, 367 S.C. 41, 53, 625 S.E.2d 216, 222 (2006). However, the United States Supreme Court has used a special needs analysis, rather than a traditional probable cause inquiry, in cases where testing of bodily fluids was sought not as part of a criminal investigation, but rather to promote other important state interests.[3]

The special needs exception allows a search unsupported by probable cause when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements of the Fourth Amendment impracticable. Skinner, *supra* at 619. In "special needs" cases, where the object of the search is not to discover evidence to be used at a criminal trial, the State's need to search must be balanced against the invasion occasioned by the search, and the search will be reasonable if the State's interest outweighs the interest of the individual. Adams v. State, 498 S.E.2d 268, 271 (Ga. 1998) (citing Skinner, *supra* at 619).

[3] *See* Chandler v. Miller, 520 U.S. 305 (1997) (analyzing Georgia statute requiring drug tests of candidates for state office); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (analyzing school district's requirement that student athletes be tested for drug use); Natl. Treas. Employees Union v. Von Raab, 489 U.S. 656 (1989) (analyzing United States Customs Service employee drug testing program); and Skinner, *supra* (analyzing Federal Railroad Administration employee drug testing program).

We must first determine whether a special need exists which allows the State to test an offender pursuant to § 16-3-740(B). We find that the State has a valid interest in protecting the health and safety of victims. Moreover, since § 16-3-740(C) requires counseling for the offender and counseling for the victim at the victim's request, the statute furthers the State's interest in stemming the spread of HIV and Hepatitis B through education and counseling. As stated by the Illinois Supreme Court:

> There are few, if any, interests more essential to a stable society than the health and safety of its members. Toward that end, the State has a compelling interest in protecting and promoting public health and, here, in adopting measures reasonably designed to prevent the spread of AIDS….Once persons who are carriers of the virus have been identified, the victims of their conduct and the offenders themselves can receive necessary treatment, and, moreover, can adjust their conduct so that other members of the public do not also become exposed to HIV. In this way, the spread of AIDS through the community can be slowed, if not halted. We believe that the HIV testing requirement advances a special governmental need.

People v. Adams, 597 N.E.2d 574, 580-581 (Ill. 1992) (cited in Adams v. State, *supra*).

In relation to Appellant's privacy interest, the Fourth Amendment permits minor intrusions by the State into an individual's body under stringently limited conditions. State v. Allen, 277 S.C. 595, 597, 291 S.E.2d 459, 460 (1982). Although § 16-3-740(B) does not specify how the offender should be tested, the statute has a provision for additional testing by blood, saliva, and head or pubic hair. S.C. Code Ann. § 16-3-740(F). Regardless of the manner tested pursuant to this section, Appellant has a nominal privacy interest in being free from HIV and Hepatitis B testing, even where such minimally invasive testing is done only for health reasons outside the context of a criminal investigation.

Where the privacy interests implicated by the search are minimal, and where an important non-criminal governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. Skinner, *supra* at 624. Such is the case here. The State's interest in these cases would be jeopardized by requiring individualized suspicion because it would be nearly impossible to show probable cause that an offender suffers from HIV or Hepatitis B, since neither disease usually manifests clear outward symptoms. Thus, the statute does not violate the Fourth Amendment by failing to require probable cause that the offender has HIV or Hepatitis B before a court may order testing pursuant to § 16-3-740(B).

While the Fourth Amendment does not require probable cause and a warrant where special needs exist, our legislature has acted to provide extra protection. Under § 16-3-740(B), both probable cause AND a court order are required before an offender may be tested. Our holding today that the special needs exception applies to the issue of particularized suspicion does not render these statutory prerequisites impracticable or unnecessary.

Appellant's argument that §16-3-740(B) is unconstitutional under the South Carolina Constitution also fails. Although our constitution favors a higher level of privacy protection than the Fourth Amendment, State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), the testing at issue here is not overly intrusive or so unreasonable as to render the statute violative of the South Carolina Constitution.

Accordingly, we hold that probable cause based on individualized suspicion that an offender carries HIV or Hepatitis B is not required by the Fourth Amendment of the United States Constitution or by Article I, section 10, of the South Carolina Constitution.

2. VAGUENESS

Appellant also contends § 16-3-740(B) is unconstitutionally vague, inasmuch as it allows testing without regard to the timing of an alleged crime.

Appellant's argues that since there is no requirement of immediate testing of a suspect, any test result may not necessarily be indicative of the suspect's condition at the time of the alleged assault. We disagree.

The void-for-vagueness doctrine rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. Peterson Outdoor Advert. v. City of Myrtle Beach, 327 S.C. 230, 236, 489 S.E.2d 630, 633 (1997). As to civil standards, there appears a less stringent test than that applied in criminal contexts. *See* Village of Hoffman Est., 455 U.S. 489, 498-499 (1982) (stating criminal statutes, in general, face a higher vagueness standard than do civil statutes because the consequences of imprecision in the latter are qualitatively less severe).

Appellant's arguments regarding the timing of testing address evidentiary concerns in the context of the criminal proceeding. Appellant's concerns are not relevant in light of the State's interest in preventing the spread of HIV and Hepatitis B and the State's interest in protecting the health of alleged victims. These interests are advanced regardless of the time of testing. Accordingly, we find no constitutional violation due to vagueness.

CONCLUSION

We hold that the State need not show probable cause that an offender has a disease before testing may be ordered pursuant to § 16-3-740(B), provided the statutory requirements have been met. In addition, § 16-3-740(B) is not unconstitutionally vague. The circuit court's order is

AFFIRMED.

TOAL, C.J., and Acting Justice E. C. Burnett, III, concur. WALLER, J., concurring in result only in a separate opinion in which MOORE, J., concurs.

JUSTICE WALLER: I concur in result with the majority opinion, but write separately in adherence to my opinion, as originally written, which is as follows:

Appellant, Ronte Houey, was indicted in November 2005 for criminal sexual conduct (CSC) in the second degree with a minor. The solicitor moved pursuant to S.C. Code Ann. § 16-3-740(B) (2003) for an order requiring Houey to submit to testing for HIV[4] and other sexually transmitted diseases (STD). Houey appeals the order, contending both that § 16-3-740 is unconstitutionally vague, and that the state has no legitimate public health interest in requiring him to be tested for HIV or other diseases. We disagree and affirm.

FACTS

Houey was arrested and charged with second-degree CSC for having had sexual intercourse in August 2005, with a girl who was thirteen years old; Houey was twenty years old at the time. Thereafter, at the request of the Victim's legal guardian, the solicitor moved for an order requiring Houey to submit to HIV and other sexually transmitted disease testing pursuant to S.C. Code Ann. § 16-3-740(B). Houey opposed the motion, contending the state must first demonstrate probable cause Houey actually carried a sexually transmitted disease or was HIV positive before testing could be ordered. He contended the failure of § 16-3-740(B) to require such a probable cause determination resulted in an unconstitutional invasion of his privacy. He also contended the statute was impermissibly vague.

The circuit court issued an order requiring Houey to be tested, finding any alleged constitutional violations were irrelevant in light of the state's stipulation that it would not use the test results during trial. Houey appealed; while the appeal was pending, however, Houey was tried and acquitted of the offense with which he was charged. Accordingly, he has not been tested.

[4] Human immunodeficiency virus.

ISSUES

1. Does S.C. Code Ann. § 16-3-740(B) require the state to establish probable cause that a suspect is actually infected with a sexually transmitted disease before testing may be ordered?

2. Is S.C. Code Ann. § 16-3-740(B) unconstitutionally vague?

1. PROBABLE CAUSE

Houey asserts S.C. Code Ann. § 16-3-740 unconstitutionally permits a search of an individual's body fluids without a probable cause determination the defendant is infected with HIV or STD's. As such, he contends it violates Fourth Amendment guarantees against unreasonable searches and seizures. U.S. Const. amend. IV; S.C. Const. art. I, § 10. We disagree.

S.C. Code Ann. § 16-3-740 (B) provides, in pertinent part:

> (B) Upon the request of a victim who has been exposed to body fluids during the commission of a criminal offense, or upon the request of the legal guardian of a victim who has been exposed to body fluids during the commission of a criminal offense, the solicitor must, at any time after the offender is charged, or at any time after a petition has been filed against an offender in family court, petition the court to have the offender tested for Hepatitis B and HIV. An offender must not be tested under this section for Hepatitis B and HIV without a court order. To obtain a court order, the solicitor must demonstrate the following:
>
> (1) the victim or the victim's legal guardian requested the tests;
> (2) there is probable cause that the offender committed the offense;
> (3) there is probable cause that during the commission of the offense there was a risk that body fluids were transmitted from one person to another; and

> (4) the offender has received notice of the petition and notice of his right to have counsel represent him at a hearing.
>
> The results of the tests must be kept confidential and disclosed only to the solicitor who obtained the court order. The solicitor shall then notify only those persons designated in subsection (C).

Initially, we agree with the circuit court that given the state's agreement it would not use the test results against Houey, any Fourth Amendment violation is harmless. See State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court). In any event, we find no Fourth Amendment violation.

The state concedes the testing of blood for HIV or STD's is a search within the meaning of the Fourth Amendment. See State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006). See also Chandler v. Miller, 520 U.S. 1295 (1997); Skinner v. Ry. Labor Executives, 489 U.S. 602 (1989); Schmerber v. California, 384 U.S. 757 (1966). When such a search is conducted in furtherance of criminal investigation, the balance is tipped in favor of the defendant and the search "is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." Skinner, 489 U.S. at 624. However, an exception to the warrant clause may apply when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Id. In Skinner, the U.S. Supreme Court held that where the privacy interests implicated by a search are minimal, and where an important governmental interest furthered by an intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. Id.

As noted by the New Jersey Supreme Court in State in Interest of J.G., 701 A.2d 1260, 1266 (N.J. 1997),

> Recently, the Supreme Court has used a special needs analysis in cases where body searches were not conducted to further a

> criminal investigation, but rather, were alleged to promote other important state interests. See Chandler, 520 U.S. at 1295 (applying special needs analysis to Georgia statute requiring drug tests of candidates for state office); Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995) (applying special needs analysis to requirement that student athletes be tested for drug use); Von Raab, 489 U.S. at 656 (applying special needs analysis to United States Customs Service employee drug testing program); Skinner, 489 U.S. at 602 (applying special needs analysis to Federal Railroad Administration employee drug testing program); see also Stigile v. Clinton, 110 F.3d 801 (D.C.Cir. 1997) (applying special needs analysis to Office of Management and Budget's random drug testing program); Tanks v. Greater Cleveland Reg'l Transit Auth., 930 F.2d 475 (6th Cir. 1991) (applying special needs analysis to suspicionless drug testing of bus driver); Transport Workers' Union of Philadelphia, Local 234 v. SEPTA, 884 F.2d 709 (3d Cir. 1989) (applying special needs analysis to SEPTA's drug testing program).

The Interest of J.G court found HIV testing of accused sex offenders ranks among the limited circumstances in which suspicionless searches are warranted, noting that "the warrant and individualized suspicion requirements are impractical in this context. . . HIV infected sexual offenders often have no outward manifestations of infection, which means that probable cause or individualized suspicion that an assailant is infected with the AIDS virus could not be found without testing. . . . Requiring probable cause or individualized suspicion before testing could be conducted would create the proverbial Catch-22 and would frustrate the governmental purpose behind the search." 701 A.2d at 1267 (Internal citations omitted). See also State v. Wallace, 2005 WL 940029 (Ohio App. 2 Dist. 2005) (statute authorizing warrantless testing for STD's upon indictment for enumerated sex offenses did not violate right of privacy, due process or right to be free from unreasonable search and seizure).

We find S.C. Code Ann. § 16-3-740 does not effect an unconstitutional invasion of Houey's privacy. The test may be ordered only if 1) the victim or

a guardian requests it, 2) there is probable cause to believe the defendant committed the offense, and 3) there is probable cause to believe there is a risk bodily fluids may have been transferred from the defendant to the victim. Further, dissemination of the results of any such testing is extremely limited. Given the interests of the victim in ascertaining whether the alleged assailant is HIV positive, we find the statute sufficiently complies with the special needs analysis set forth by the United States Supreme Court in Skinner and Chandler.

2. VAGUENESS

Houey also contends S.C. Code Ann. § 16-3-740 is impermissibly vague, inasmuch as it allows testing without regard to the timing of an assault. Houey's contention is essentially that, since there is no requirement of immediate testing of a suspect, any test result may not necessarily be indicative of the suspect's condition at the time of the alleged assault. We find no constitutional violation.

Generally, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982). As to civil standards, there appears a less stringent test than that applied in criminal contexts. See Village of Hoffman Estates v. Flipside, 455 U.S. 489, 498 (1982) (criminal statutes, in general, face a higher vagueness standard than do civil statutes because the consequences of imprecision are qualitatively less severe); In re Guardianship of Carlsmith, 151 P.3d 717 (Hawaii 2007) (when a statute is not concerned with criminal conduct or first amendment considerations, the court must be fairly lenient in evaluating a claim of vagueness. A civil statute must be so vague and indefinite as really to be no rule or standard at all. Uncertainty is not enough for statute to be unconstitutionally vague; rather, it must be substantially incomprehensible).

A statute can be impermissibly vague for either of two independent reasons. First, it may fail to provide people of ordinary intelligence a

reasonable opportunity to understand what conduct it prohibits. Or, second, it may authorize or encourage arbitrary and discriminatory enforcement. Hill v. Colorado, 530 U.S. 703, 732 (2000); State v. Thompkins, 263 S.C. 472, 211 S.E.2d 549 (1975). See also In re Amir X.S., 371 S.C. 380, 391, 639 S.E.2d 144, 150 (2006) (concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication); Curtis v. State, 345 S.C.. 557, 549 S.E.2d 591 (2001).

Under the facts of this case, due to the relatively brief period of time between the alleged assault (August 2, 2005), and the date on which the state sought testing (October 27, 2005), we find no constitutional violation.

AFFIRMED.

MOORE, J., concurs.

The Supreme Court of South Carolina

In re: Amendments to Rule 403, SCACR

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 403(c)(4), SCACR, is hereby amended to state as follows:

> **(4)** one (1) trial experience which must be either a trial in equity before a circuit court judge, master-in-equity, or special referee, or an administrative proceeding before an Administrative Law Judge or administrative officer of this State or of the United States. The administrative hearing must be governed by either the South Carolina Administrative Procedures Act or the Federal Administrative Procedure Act, and the hearing must take place within South Carolina.

Further, the first paragraph of the Certificate to be used with Rule 403, SCACR, shall state as follows:

> **This certificate is to be used to show completion of the trial experiences required by Rule 403 of the South Carolina Appellate Court Rules (SCACR). The text of this Rule is printed on the back of this form. This Certificate must be submitted in DUPLICATE (the original and one copy) to the Clerk of the South Carolina Supreme Court, P.O. Box 11330, Columbia, SC 29211, along with a filing fee of $25. <u>Except for signatures, all entries must be legibly printed or typed.</u> COMPLETED CERTIFICATES SHALL NOT BE ACCEPTED UNTIL AFTER THE APPLICANT HAS BEEN SWORN IN AS A MEMBER OF THE SOUTH CAROLINA BAR.**

These amendments shall be effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

September 6, 2007

The Supreme Court of South Carolina

C E R T I F I C A T E

This certificate is to be used to show completion of the trial experiences required by Rule 403 of the South Carolina Appellate Court Rules (SCACR). The text of this Rule is printed on the back of this form. This Certificate must be submitted in DUPLICATE (the original and one copy) to the Clerk of the South Carolina Supreme Court, P.O. Box 11330, Columbia, SC 29211, along with a filing fee of $25. Except for the signatures, all entries must be legibly printed or typed. COMPLETED CERTIFICATES SHALL NOT BE ACCEPTED UNTIL AFTER THE APPLICANT HAS BEEN SWORN IN AS A MEMBER OF THE SOUTH CAROLINA BAR.

COURT OF COMMON PLEAS or U.S. DISTRICT COURT FOR THE DISTRICT OF S.C.

Case Name:_____Date:_____ATTEST:_____
*Signature of Judge

Court:_____Name of Judge:_____

COURT OF GENERAL SESSIONS or U.S. DISTRICT COURT FOR THE DISTRICT OF S.C.

Case Name:_____Date:_____ATTEST:_____
*Signature of Judge

Court:_____Name of Judge:_____

FAMILY COURT

Case Name:_____Date:_____ATTEST:_____
*Signature of Judge

Name of Judge:_____

***The signature of the Judge is an attestation that the trial experience complied with the requirements of Rule 403(c), SCACR, including the requirement that the trial experience include an opening statement, a closing argument and direct and cross examination of at least three witnesses.**

EQUITY TRIAL/ADMINISTRATIVE PROCEEDING

Case Name:_____Date:_____ATTEST:_____
Signature of Judge/Presiding Officer

Name of Presiding Officer and Title:_____

CERTIFICATION BY ATTORNEY

I, _____, hereby certify that I completed one-half of the credit hours needed for law school graduation prior to participating in and/or observing the trials or hearings listed on this form. I further certify that I have observed or participated in the above trials in accordance with the provisions of Rule 403, SCACR.

Signed this _____ day _____, 20_____. _____
SIGNATURE

Revised 9/6/2007

RULE 403
TRIAL EXPERIENCES

(a) General Rule. Although admitted to practice law in this State, an attorney shall not appear as counsel in any hearing, trial, or deposition in a case pending before a court of this State until the attorney's trial experiences required by this rule have been approved by the Supreme Court. An attorney whose trial experiences have not been approved may appear as counsel if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing, trial, or deposition. Attorneys admitted to practice law in this State on or before March 1, 1979, are exempt from the requirements of this rule. Attorneys holding a limited certificate to practice law in this State need not comply with the requirements of this rule.

(b) Trial Experiences Defined. A trial experience is defined as the:

(1) actual participation in an entire contested testimonial-type trial or hearing if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing or trial; or

(2) observation of an entire contested testimonial-type trial or hearing.

(c) Trial Experiences Required. An attorney must complete four (4) trial experiences. The required trial experiences are:

(1) one (1) civil jury trial in a Court of Common Pleas or in the United States District Court for the District of South Carolina;

(2) one (1) criminal jury trial in General Sessions Court or in the United States District Court for the District of South Carolina;

(3) one (1) trial in the Family Court; and

(4) one (1) trial experience which must be either a trial in equity before a circuit judge, master-in-equity, or special referee, or an administrative proceeding before an Administrative Law Judge or administrative officer of this State or of the United States. The administrative proceeding must be governed by either the South Carolina Administrative Procedures Act or the Federal Administrative Procedure Act, and the hearing must take place within South Carolina.

Each of the trial experiences set forth in (1), (2), and (3) above must include an opening statement, a closing argument and direct and cross examination of at least three witnesses.

(d) When Trial Experiences May be Completed. Trial experiences may be completed any time after the completion of one-half (½) of the credit hours needed for law school graduation.

(e) Certificate to be Filed. The attorney shall file with the Supreme Court a Certificate showing that the trial experiences have been completed. This Certificate, which shall be on a form approved by the Supreme Court, shall state the names of the cases, the dates and the tribunals involved and shall be attested to by the respective judge, master, referee or administrative officer. A filing fee of $25 shall accompany the Certificate.

(f) Attorneys Admitted in Another State. An attorney who has been admitted to practice law in another state, territory or the District of Columbia for three (3) years may satisfy the requirements of this rule by providing proof of equivalent experience in the other jurisdiction for each category of cases specified in (c) above. This proof of equivalent experience shall be made in the form of an affidavit and shall include at least the name of the case, the case number, a brief description of the facts of the case and the type of trial experience used to satisfy the requirements of (c) above. To provide the definitive evidence required of attorneys under this section, a letter from a judge of a court of record in the other jurisdiction with personal knowledge of the attorney, attesting to that attorney's trial competence, may be substituted for detailed evidence of

such experience. The affidavit shall be filed with the Supreme Court. A filing fee of $25 shall accompany the affidavit.

(g) Judge Advocate General Lawyers. The Judge Advocate General's Corps of any service of the Armed Forces of the United States (including the United States Coast Guard) shall be considered a jurisdiction for the purposes of (f) above. Further, for the purposes of (f) above, an attorney who has been a judge advocate for three years or more, either active or reserve, may use a court-martial with members as equivalent experience for the trial experience required in (c)(1), and may use a separation action or other adverse personnel action before a formal board of officers as equivalent experience for the trial experience required by (c)(4). Additionally, an attorney who has served on active duty as a judge advocate for three (3) years or more may submit a letter from a military judge or staff judge advocate in the grade of Colonel or above with personal knowledge of the attorney, attesting to the attorney's trial competence, and this letter shall have the same effect as the letter from a judge under (f) above. All other requirements of (f) must be complied with.

(h) Circuit Court Law Clerks and Federal District Court Law Clerks. A person employed full time for nine (9) months as a law clerk for a South Carolina circuit court judge or as a law clerk for a United States District Court Judge in the District of South Carolina may be certified as having completed the requirements of this rule by participating in or observing one (1) experience described in (c)(3) or (4) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (e) above) must be submitted for the trial.

(i) Appellate Court Law Clerks and Staff Attorneys. A person employed full time for eighteen (18) months as a law clerk or staff attorney for the Supreme Court of South Carolina or the South Carolina Court of Appeals, or the United States Court of Appeals for the Fourth Circuit may be certified as having completed the requirements of this rule by participating in or observing one (1) experience described in (c)(3) or (4) above. A part-time law clerk or staff attorney may be certified in a similar manner if the law clerk or staff attorney has been employed as a law clerk or staff attorney for at least 2700 hours. The law clerk or staff attorney must submit a statement from a judge, justice or other court official certifying that the law clerk has been employed as a law clerk or staff attorney for the period required by this rule. A Certificate (see (e) above) must be submitted for the trial.

(j) Bankruptcy Law Clerks. A person employed full time for nine (9) months as a law clerk for a United States Bankruptcy Judge in South Carolina may be certified as having completed the requirements of this rule by participating in or observing the three (3) trial experiences described in (c)(1), (2) and (3) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (e) above) must be submitted for the trials.

(k) Approval or Disapproval. The Court will notify the attorney if the trial experiences submitted in the Certificate or affidavit have been approved or disapproved.

(l) Confidentiality. The confidentiality provisions of Rule 402(i), SCACR, shall apply to all files and records of the Clerk of the Supreme Court relating to the administration of this rule. The Clerk may, however, disclose whether an attorney's trial experiences have been approved and the date of that approval.

Notice of approval or disapproval of the trial experiences should be sent to:

NAME: _____

STREET OR P. O. BOX: _____

STATE and ZIP: _____

TELEPHONE NO. (Home)(____)_____ (Work)(_____)_____

The Supreme Court of South Carolina

In re: Amendments to the South Carolina Appellate Court Rules

---

O R D E R

The South Carolina Bar has proposed several amendments to Rule 416, South Carolina Appellate Court Rules, concerning the Resolution of Fee Disputes Board of the South Carolina Bar. The changes were approved at a meeting of the House of Delegates on January 25, 2007.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 416, South Carolina Appellate Court Rules, as set forth in the attachment to this Order. This order is effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina
September 7, 2007

RULE 416. RESOLUTION OF FEE DISPUTES BOARD

. . .

RULE 2. JURISDICTION

The purpose of the Board is to establish procedures whereby a dispute concerning fees, costs or disbursements between a client and an attorney who is a member of the South Carolina Bar (the Bar) may be resolved expeditiously, fairly and professionally, thereby furthering the administration of justice, encouraging the highest standards of ethical and professional conduct, assisting in upholding the integrity and honor of the legal profession, and applying the knowledge, experience and ability of the legal profession to the promotion of the public good. As used in these Rules, "fee" is deemed to include a legal fee, costs of litigation and disbursements associated with a legal cause, claim or matter and "client" is defined as a person on whose behalf professional legal services have been rendered by an attorney who is a member of the South Carolina Bar.

Under no circumstances will the Board participate in: (1) a fee dispute involving an amount in dispute of $50,000 or more; or (2) disputes over which, in the first instance, a court, commission, judge, or other tribunal has jurisdiction to fix the fee. When an allegation of attorney misconduct arises out of a fee dispute other than as to the reasonableness of the fee, the Board, in its discretion, may refer the matter to the Commission on Lawyer Conduct. If the alleged misconduct does not arise out of a fee dispute, it shall be referred to the Commission on Lawyer Conduct.

No fee dispute may be filed with the Board more than three (3) years after the dispute arose.

Jurisdictional issues shall be determined by the circuit chair.

Last Amended by Order dated September 7, 2007.

. . .

RULE 4. DUTIES

The Board is authorized to receive, inquire into, take proofs, and make findings and final determination of disputes between attorneys and clients. It

shall be the duty of the Board to encourage the amicable resolution of fee disputes falling within its jurisdiction. Each member shall continue to serve until completion of ongoing work on the Board.

Amended by Order dated September 7, 2007.

. . .

RULE 8. ASSIGNED MEMBER

The member of the circuit panel who is assigned to conduct the initial investigation of an application shall be known as the "assigned member." The assigned member shall not be a member of the hearing panel which hears a dispute investigated by that assigned member or represent a party before that hearing panel. With the consent of the Executive Director of the Bar and as provided in Rule 11, a Bar staff person who is a Bar member or who is supervised by a Bar member may be appointed as the assigned member.

Amended by Order dated September 7, 2007.

RULE 9. RULE EXCLUSIVE UPON CONSENT

(a) Any client-applicant for the services of the Board must consent in writing to be bound by a final decision of the Board. Thereafter, the attorney is also bound.

(b) No application will be accepted from an attorney unless accompanied by the client's written consent to jurisdiction and consent to be bound by the final decision of the Board. Thereafter, both parties are bound.

(c) Upon consent of the client-applicant to be bound by the final decision of the Board, exclusive jurisdiction over the fee dispute vests in the Board.

Amended by Order dated September 7, 2007.

RULE 10. COMMENCEMENT OF PROCEEDINGS

All proceedings hereunder shall be commenced by filing in the office of the Bar, on forms provided by the Bar, a written statement of the facts and circumstances surrounding the dispute, furnishing complete names and addresses. If the client-applicant is not the person who paid for the lawyer's services, the third party payer, with the written consent of the client-

applicant, may jointly file with the client-applicant, with both signatures affixed to the form. If the materials submitted exceed twenty-five (25) pages, the client-applicant shall submit three sets of the materials.

A copy of the completed form, as filed, shall be sent by certified mail to all parties to the disagreement or dispute. A copy shall be sent by regular mail or email to the circuit chair in the circuit where the principal place of practice of the attorney is located. If the application involves attorneys in more than one circuit, a copy of the completed form shall be sent to the chair of the Executive Council, who shall designate which of these circuit chairs shall have jurisdiction and shall proceed with the matter.

If the amount in dispute exceeds $5,000, the circuit chair may appoint a hearing panel without assignment of the matter to an assigned member.

After the initial correspondence, all other correspondence will be sent by regular mail or, with the written consent of the client and lawyer, by email. Such written consent may be withdrawn by written notice served on all other parties or attorneys. If served by regular mail, correspondence will be deemed served upon deposit in the U.S. Mail with proper postage affixed. If served by email, service is complete upon transmission, unless the party making service learns that the attempted service did not reach the person to be served. All parties have the duty to inform the circuit chair of any change of address.

Amended by Order dated September 7, 2007.

RULE 11. INVESTIGATION BY ASSIGNED MEMBER

Upon receipt of the completed form, the circuit chair shall promptly appoint the assigned member. The assigned member shall conduct an investigation sufficient to enable the rendering of an informed recommendation. The assigned member's recommendation shall be written and contain the reasons for it. This report shall be submitted to the circuit chair, with a copy to the Bar office, as soon as possible and not later than ninety (90) days after appointment of the assigned member, unless the time is extended by the circuit chair pursuant to Rule 12. The circuit chair shall send a copy of the report to each of the parties and notification of the circuit chair's concurrence or nonconcurrence with the recommendations of the assigned member.

The attorney shall respond to the issues raised in the application within thirty (30) days of being contacted by the assigned member. The assigned member may extend the period for response once and by no more than thirty (30) days.

The parties to the dispute and any witnesses on their behalves shall make themselves available for interview at a time and place designated by the assigned member within the time required for the assigned member to make a report. If a party or a witness cannot, for any reason, be present at the designated time and place, that witness or party shall submit a written response to the assigned member within fourteen (14) days of the date the assigned member designated as the interview date, unless the assigned member grants the party or witness an extension. The party or witness may also submit a statement in writing, provided such statement is delivered to the assigned member on or before the date designated for the interview of that party or witness. The response to questions along with the written statement, if any, together shall constitute the complete statement of the party or witness concerning the dispute. In the event a party fails to respond, then the assigned member must render a decision based upon the available materials.

The assigned member may encourage resolution of the dispute by compromise where the circumstances warrant such effort. Efforts at compromise may include mediation of the dispute by the assigned member. Compromise or consent agreements, whether written or oral, become the final decision of the Board fifteen (15) days after the date of a letter from the circuit chair to the parties confirming the agreement.

Amended by Order dated September 7, 2007.

RULE 12. SCHEDULE OF PROCEEDINGS

(a) All fee disputes should be resolved within six (6) months. The assigned member's report should be completed within thirty (30) to ninety (90) days after being forwarded by the circuit chair. A fee dispute may not exceed six (6) months without the written consent of the circuit chair for good cause shown. Any extension of time granted by the circuit chair must be for a specified period of time which shall be the least amount of time deemed necessary to resolve the dispute.

(b) If an assigned member does not respond to reminders from the Bar office, the Bar office will notify the circuit chair.

(c) If a fee dispute has been assigned and is pending, without an extension approved by the circuit chair,

> **(1)** more than ninety (90) days, then the circuit chair may, at his or her discretion:
>
> > **(A)** reassign the fee dispute; or
> >
> > **(B)** if the amount exceeds $5,000, appoint a hearing panel, which shall schedule a hearing within thirty (30) days.
>
> **(2)** more than six (6) months, then the circuit chair shall, with the concurrence of the Executive Council Chair:
>
> > **(A)** reassign the fee dispute;
> >
> > **(B)** if the amount exceeds $5,000, appoint a hearing panel, which shall schedule a hearing within thirty (30) days; or
> >
> > **(C)** return all investigative notes and application to a designated Bar staff member for investigation as the assigned member.

In these events, the original assigned member shall immediately turn over notes and files to the circuit chair.

(d) If the circuit chair is delinquent, then the case may be reassigned to the Executive Council Chair or the Executive Council Chair's designee.

Last Amended by Order dated September 7, 2007.

RULE 13. PROCEEDINGS OF THE BOARD

If the amount in dispute is $5,000 or less, the decision of the assigned member with the concurrence of the circuit chair shall be the final decision of the Board.

If the amount in dispute is more than $5,000, the decision of the assigned member with the concurrence of the circuit chair shall be served on the parties by first class mail, with proper postage affixed, or by email, provided the parties have consented to service by email in accordance with Rule 10.

The decision is final unless a written request for a hearing panel is made by filing such request with the circuit chair within thirty (30) days after the date of mailing written notification of the decision. (For Hearing Panel Decision, see Rule 17.)

If the chair does not concur with the decision of the assigned member, a hearing panel will be appointed.

Amended by Order dated September 7, 2007.

. . .

RULE 15. PANEL HEARINGS

The chair of the hearing panel shall convene a hearing at a place within the circuit within forty-five (45) days of assignment by the circuit chair and at least thirty (30) days after giving notice to the parties by first class mail, with proper postage affixed, unless otherwise agreed by all parties and the panel members. The notice shall inform the parties that the hearing is *de novo* and that no reports or other information from the assigned member will be considered. The notice also shall inform the parties that they may have witnesses present and may present documentary evidence and should present all evidence they expect to present at the hearing.

If the circuit chair determines that a hearing panel or panel member is delinquent in scheduling or attending a hearing, the circuit chair has the authority to reassign the whole panel or reassign one or more panel members.

If a party or a witness cannot, for any reason, be present at the hearing, a written statement shall be submitted which shall be the complete statement of the party or witness. If a party fails to appear, then the hearing panel shall render its decision based on the available testimony and documentation.

Conduct of the hearings shall be pursuant to such rules and procedures as the Executive Council may prescribe. While it is not necessary to follow strictly the rules of evidence as generally applied in circuit court, hearings should be conducted in conformance generally with them. If the hearing cannot be completed within the allotted time, it may be adjourned by the panel chair and reconvened with no less than ten (10) days notice, unless the parties and panel members otherwise agree to a date and time certain.

A party to a fee dispute may, at the party's own expense, cause any hearing by the panel to be recorded and transcribed. The tape recording of the hearing shall be the property of the Board. If a party has a hearing transcribed, the party shall, at the party's own expense, provide a copy of the transcript to the Board.

Last Amended by Order dated September 7, 2007.

RULE 16. VOLUNTARY TERMINATION

Prior to the final decision of the Board, the party who initiated the process may terminate the process. Termination of the process takes effect upon receipt in the Bar office of written acknowledgement from the initiating party.

This written acknowledgement of withdrawal will have the effect of ending the availability of the procedure with prejudice to the initiating party as to that dispute so that a party who initially filed an application with the Board may not make a second filing on the same dispute after withdrawing the first filing. Should that party fail to make a written acknowledgement of the withdrawal, the Board shall proceed to resolve the matter without delay.

Nothing herein is to be construed as limiting a party from filing an amended or supplemental form pertaining to the dispute, if requested or if needed, under such conditions as the hearing panel may provide or as may be established by the Executive Council.

Last Amended by Order dated September 7, 2007.

RULE 17. HEARING PANEL DECISION

Upon conclusion of the panel hearing, the hearing panel members shall forthwith proceed to reach a decision and shall, within fifteen (15) days of the hearing, issue a written decision, including a factual statement of the controversy and the reasons for the decision reached. A decision of the majority of the hearing panel shall constitute a final decision of the Board. The written decision shall be filed with the Bar, and a copy sent to the circuit chair and each party to the dispute by first class mail, with proper postage affixed, or by email, provided the parties have consented to service by email in accordance with Rule 10. Service by mail is complete upon mailing.

Last Amended by Order dated September 7, 2007.

RULE 18. CONFLICTS OF INTEREST

In case of a conflict of interest or disqualification of a circuit chair and vice-chair after disqualification of a circuit chair in a given case, the chair of the Executive Council shall then act as the circuit chair in that specific instance.

In case the chair of the Executive Council has a conflict of interest or is disqualified, the member of the Executive Council next senior in years of active practice in this state shall act as Executive Council chair in that specific instance.

In extraordinary cases where members of the circuit panel are disqualified for any reason, either voluntarily or involuntarily, in a specific dispute, and there do not remain enough members of the circuit panel to comprise the hearing panel, the chair of the Executive Council, or, in the event of the disqualification of the chair of the Executive Council, the President shall appoint the requisite number of members from the Board to the hearing panel.

Likewise, should any member of the circuit panel in a judicial circuit fail or refuse to discharge the duties of a member of the Board, the chair of the Executive Council shall appoint a substitute member from members of the Board.

Amended by Order dated September 7, 2007.

. . .

RULE 20. APPEALS

(a) A party may appeal the final decision of the Board to the circuit court in the county where the principal place of practice of the attorney is located, with written notice to the South Carolina Bar Resolution of Fee Disputes Board, Post Office Box 608, Columbia, SC 29202. The court shall only vacate a final decision of the Board where:

> **(1)** the decision was procured by corruption, fraud or other undue means;
>
> **(2)** there was evident partiality or corruption in an assigned member or hearing panel member, or misconduct prejudicing the rights of any party;

(3) the assigned member or hearing panel members exceeded their powers;

(4) the hearing panel members refused to postpone the hearing, if any, upon sufficient cause being shown therefore, or the assigned member or hearing panel members refused to hear evidence material to the controversy, or otherwise conducted the proceeding so as to substantially prejudice the rights of a party;

(5) the hearing panel chair did not provide notice of the hearing as required under Rule 15.

Filing an appeal does not stay the issuance of a Certificate of Non-Compliance. However, if, upon filing a notice of appeal, a lawyer pays the disputed sum to the Bar to be held in trust pending resolution of the appeal, no Certificate of Non-Compliance shall be issued. The Bar shall remit the disputed sum to the prevailing party within ten (10) days of the entry of an order by the circuit court.

(b) An appeal must be made within thirty (30) days after the mailing of a copy of the final decision by the appealing party, except that if based upon corruption, fraud or other undue means, it shall be made within thirty (30) days after such grounds are known or should have been known.

(c) The Board shall supply to the circuit court the following material which shall constitute the record on appeal: the application, the decision of the assigned member, the concurrence or non-concurrence of the circuit chair, and in disputes involving amounts greater than $5,000, the decision of the hearing panel. The parties and the circuit court shall provide the Board, at the above address, notice of all proceedings and the final disposition.

(d) In vacating the final decision, the court may order a reconsideration by a new assigned member appointed by the circuit chair, or if vacating the decision of a hearing panel, a rehearing before a new hearing panel appointed by the circuit chair. When a final decision of the Board is vacated, any judgment which may have been entered pursuant to that decision also is vacated.

Amended by Order dated November 5, 2003. The amendment to 20(a) provides that an appeal from a decision of the Board does not stay the

issuance of a Certificate of Non-Compliance and restricts the circuit court from vacating a decision of the Board only when one of the five grounds set forth in 20(a) have been met. The amendment to 20(c) provides that the parties and the circuit court shall provide the Board with notice of all proceedings and the final disposition.

Last Amended by Order dated September 7, 2007.

. . .

RULE 22. AMENDMENTS TO RULES

Upon approval by the Bar's House of Delegates, amendments to these Rules shall be submitted to the Supreme Court of South Carolina for approval.

Amended by Order dated September 7, 2007.