The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
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N O T I C E

IN THE MATTER OF ROBERT J. CANTRELL, PETITIONER

Robert J. Cantrell, who was definitely suspended from the practice of law for two years, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, January 18, 2008, beginning at 1:00 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

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

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
December 10, 2007

The Supreme Court of South Carolina

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N O T I C E

IN THE MATTER OF MARK VICTOR EVANS, PETITIONER

Mark Victor Evans, who was disbarred, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, January 18, 2008, beginning at 2:00 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

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

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

December 10, 2007

The Supreme Court of South Carolina

In the Matter of Samuel
Michael Ogburn, Respondent.

ORDER

By opinion of this same date, respondent was suspended from the practice of law in this state for sixty days. The Office of Disciplinary Counsel has requested the appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that William Brantley Cox, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Cox shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Cox may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that 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 respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that William Brantley Cox, 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 William Brantley Cox, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Cox's office.

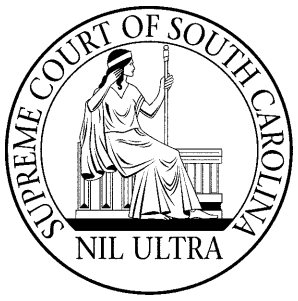
Mr. Cox's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

FOR THE COURT

Columbia, South Carolina
December 10, 2007



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 42

December 10, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of T. Andrew Johnson, Respondent.

Opinion No. 26398
Submitted November 6, 2007 – Filed December 10, 2007

DEFINITE SUSPENSION

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

Daryl G. Hawkins, of Law Offices of Daryl G. Hawkins, LLC, 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 a definite suspension not to exceed one (1) year, retroactive to October 4, 2006, the date of his interim suspension.[1] We accept the agreement and definitely suspend respondent from the practice of law in this state for one (1) year, retroactive to October 4, 2006. The facts, as set forth in the agreement, are as follows.

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[1] See In the Matter of Johnson, 370 S.C. 495, 636 S.E.2d 620 (2006).

FACTS

In November 1998, respondent was admitted to the practice of law. At all times relevant to this agreement, he was a sole practicioner. In January 2004, respondent began to practice real estate law, primarily handling residential refinancings, and he closed roughly four to nine refinancing closings per month.

In August 2004, Johnny Hoy contacted respondent and asked him to conduct real estate closings for individuals purchasing mobile home/real estate packages. As a real estate developer/investor Hoy would sell the mobile home property and arrange for financing for buyers with BB&T. Neither Hoy nor respondent knew each other or had business dealings before this initial contact.

Respondent had not previously closed mobile home transactions and had only limited experience in purchase transactions. Respondent informed Hoy, as well as the BB&T representative, Robert Green, the manager of a local branch, of his lack of experience in the area of mobile home purchase transactions. Respondent requested written closing instructions from BB&T and was told by both Green and Hoy that BB&T did not provide written closing instructions to closing lawyers and that, instead, BB&T relied upon their bank representatives to orally convey any applicable instructions. Respondent received direction regarding the lender's closing procedures from Green.

Respondent learned that a law firm in Columbia had previously represented Hoy in similar transactions. Hoy advised respondent that the law firm could no longer process the closings because of a disagreement with the firm's title insurance company.

Respondent contacted a lawyer at the law firm and asked questions about appropriate procedures in back to back closings, mobile home transactions, and this type of closing in general and why the law firm had ceased representing purchase(s)/mortgagee(s) in real

estate closings arranged by Hoy. Respondent represents the lawyer told him that Hoy was "a straight shooter," or words of similar import and the law firm only ceased representing purchaser(s)/mortgagee(s) in transactions arranged by Hoy because the firm's title insurance company would not insure mobile home/real estate package transactions. The lawyer stated he hoped to assist Hoy in the future. The lawyer gave respondent no warning or information which would have raised concerns about Hoy, Green, or the procedures which had been presented.

In addition, respondent learned that another attorney had also closed loans for Hoy in an identical manner. Respondent represents he attempted to contact this lawyer, but was unable to reach him.

During the first transaction involving Hoy and Green, respondent asked Hoy whether the buyer's closings funds would be paid by money order or cashier's check and Hoy informed respondent that he had already been paid. Respondent advised Hoy that advance payment of a down payment would require respondent to obtain approval from the lender and that he would inquire whether and how the advance payment would be reflected on the HUD-1 Settlement Statement.

Respondent communicated with Green who advised that the fact that Hoy had already been paid a down payment was acceptable procedure approved by the bank and that it was, in fact, a common occurrence. Green also advised respondent that, as a rule, the lender did not "source and season" either down payment funds or title, thereby diminishing the need for the closing attorney to verify funds or formalize disclosure. Further, Green advised that this procedure had been followed for a significant time by its two former closing attorneys, as well as an attorney in Aiken. Once again, respondent requested written closing instructions but was again told by Green that BB&T did not furnish written closing instructions.

At the first of the BB&T/Hoy closings, respondent presented the HUD-1 Settlement Statement to the buyer and seller and invited their attention to, among other things, the purchase price, the loan amount, and the down payment and asked if each was true and correct. Neither buyer nor seller indicated the amount was incorrect or that the down payment had not been paid. Respondent did not, however, devote any additional time or resources to the investigation of the acts surrounding the down payment in this matter and, instead, closed the loan as it was presented.

Thereafter, from August 12, 2004 through April 30, 2005, respondent served as closing attorney for purchaser(s)/mortgagee(s) in approximately 48 transactions arranged by Hoy, most, if not all, financed by BB&T with Green. Twenty-three of the transactions were "flips" where the subject property was purchased by Hoy and then conveyed to the actual/eventual purchaser(s)/mortgagee(s) in a second transaction at a value in excess of the real or initial acquisition costs by Hoy. The HUD-1 Settlement Statements did not reflect the fact that the funds from the second transaction were used to fund Hoy's acquisition of the property in the first transaction.[2]

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[2] Specifically, the HUD-1 Settlement Statement did not show a concurrent transaction in which Hoy purchased the same property. In essence, there was a transaction between Hoy and the seller of foreclosed properties (usually the bank that had foreclosed on the property) and, concurrently, a transaction where Hoy was selling the same property to a third party buyer. While Hoy paid for his purchase with a business check drawn on his corporate account, respondent should have known that the short amount of time between Hoy's purchase and his sale enabled Hoy to use the same incoming funds from the second transaction to fund his purchase of the property in the first transaction. Respondent acknowledges that the HUD-1 Settlement Statement in the sales transaction by Hoy should have reflected that the funds from the sale were being applied to the initial acquisition by Hoy and the "due seller" line should have been reduced by a like amount.

Respondent became concerned about the methods Hoy was using to consummate the transactions and discussed his concerns with Green. Among other perceived irregularities, respondent was concerned with 1) the back to back closings, title issues, de-titling issues, and valuation of the transactions wherein Hoy was acquiring the property then immediately (sometimes in the same day) conveying the property to a buyer; 2) the claimed down payment which both Hoy and the party purchasing the property from Hoy assured respondent had been paid; and 3) the possibility that some purchasers/mortgagees who qualified for loans did not intend to reside on the property and may have purchased properties for relatives who did not qualify for loans but intended to reside on the property.

Green advised respondent that the bank took no position on who resided on the purchaser's property. Further, Green, once again, told respondent that the methodology being used by Hoy was acceptable to the bank in all respects and that no other notification or documentation was necessary. Respondent faxed the Court's opinion in Matter of Lathan, 360 S.C. 326, 600 S.E.2d 902 (2004), to Green and insisted on complying with the requirement of placing the letters "POC" (payable outside of closing) on line 303 of all future HUD-1 Settlement Statements. Green indicated that, while respondent's request to comply with Matter of Lathan was "very conscientious" and "not necessary," it would be acceptable to the bank. Thereafter, respondent closed an additional thirty-seven loans involving BB&T and Hoy. Unlike the loans in Matter of Lathan, the Hoy/BB&T loans were not sold on the secondary market but were retained and serviced by BB&T.

In a significant number of the transactions, the "cash from borrower" line on the HUD-1 Settlement Statements was marked "POC" when, in fact, the amounts were not actually paid outside of the closing to Hoy by the purchaser(s)/mortgagee(s). Respondent acknowledges that, under the circumstances of the closings, he should have known that this information reported to him by the buyers and Hoy was incorrect and he admits he eventually suspected this to be the case notwithstanding representations by the borrowers and/or Hoy.

In one matter, Hoy arranged two transactions where he was receiving title to a property in the first transaction and conveying the property in the second transaction. Hoy advised respondent that he had the subject property under contract with an out of state bank that was selling the property out of foreclosure, that the bank had allowed Hoy to take possession of the residence, that his contract to purchase had been in effect for roughly three months so that he could bring the residence up to a saleable state, and that he had made substantial repairs to the property's subfloor and replaced all of its appliances.

The two closings were both scheduled for December 12, 2004. On that day, respondent learned the selling bank had actually allowed Hoy to permit the eventual buyer to move into the property and the buyer had already taken up residence. The selling bank, however, waited until some time in January to mail the January 18th-dated deed to respondent. Respondent contacted the selling bank and attempted to obtain a properly dated deed which reflected the actual closing date of December 12, but the bank refused to do so.

Respondent brought this situation to the attention of the parties in the second transaction, the lending bank, the eventual buyer, and Hoy. The bank's loan officer indicated he would need to consult with his supervisor and, subsequently, advised respondent that the bank's position was that the loan on the transaction from Hoy to the bank's customer should be reclosed at a date after January 18 to correct any existing deficiencies. Respondent inquired of the officer of the Register of Deeds regarding the process to ensure title was properly conveyed and was advised to record a corrective deed. The loan was then re-closed per the request of the bank and a corrective deed was recorded which reflected a deed transfer date subsequent to the transfer to Hoy on January 18th.

Ultimately, respondent learned that Hoy, Green, and the appraisers used by Hoy were subject to a federal investigation in connection with the real estate closings handled by respondent. Respondent made a self-report to ODC. Subsequently, another attorney

who had also filed a civil lawsuit against respondent, Hoy, and Green, filed a complaint against respondent with the Commission on Lawyer Conduct.

Hoy and Green were indicted by federal authorities. Both pled guilty to bank fraud. An allegation in Hoy's indictment states Hoy was responsible for falsifying the loan applications of borrowers,[3] in addition to falsely reporting that he had received down payments. Federal authorities advised ODC that respondent cooperated fully in their investigation.

ODC does not contend respondent was aware of Hoy's or Green's criminal activities. Instead, ODC contends that respondent's failure to insist on certified funds from Hoy in his initial purchase of the properties was an unknowing and unintentional aid to Hoy and Green. Respondent's error was the result of failing to devote adequate time to the investigation of the facts surrounding the circumstances of the loans and, specifically, to the alleged down payments.

In mitigation, respondent attempted to contact two lawyers who had previously represented Hoy and did speak with one of the lawyers about representing Hoy. Further, respondent had multiple conversations with the bank's loan officer, Green, about the propriety of Hoy's transactions. However, respondent did not realize that Green was engaged in a conspiracy with Hoy.

ODC believes respondent did not deliberately seek to assist Hoy or Green or their co-conspirators in criminal undertakings or have knowledge of their criminal intent. Respondent represents he saw no appraisals and had no contact with appraisers; ODC does not dispute this representation. Respondent's title search was conducted by an outside abstractor and the abstractor's fees were reasonable and customary in the area and properly reported on the HUD-1 Settlement Statements. ODC's investigation reveals respondent did not receive

[3] It is not claimed that respondent had any involvement in or suspicion of Hoy's false applications.

any additional financial compensation or other benefit from the closings involving Hoy and Green. All fees received by respondent are shown on the HUD-1 Settlement Statements and his law firm's trust account ledgers and the fees appear to be reasonable and customary for work of this type in the Columbia and Lexington areas of the state.

Respondent has no previous disciplinary history. He has been fully cooperative and forthright with ODC and the federal authorities in connection with their investigations. ODC submits respondent's forthrightness was demonstrated in his ready and candid admissions about his suspicions and concerns.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2 (lawyer may limit objectives of representation with client consent after consultation); Rule 1.7(a) (lawyer shall not represent client if representation involves a concurrent conflict of interest); Rule 4.1(a) (in representing a client, lawyer shall not make false statement of material fact to a third person); Rule 4.1(b) (in representing a client, lawyer shall not fail to disclose a material fact when disclosure is necessary to avoid assisting criminal or fraudulent act by a client); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice). In addition, respondent admits his misconduct constitutes grounds for discipline pursuant to Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law one (1) year, retroactive to October 4, 2006. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Leroy Jonathan DuBre, Respondent.

Opinion No. 26399
Submitted October 30, 2007 – Filed December 10, 2007

PUBLIC REPRIMAND

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

Leroy Jonathan DuBre, of Greenville, pro se.

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

FACTS

Matter I

Brock & Scott, PLLC, is a law firm with its principal place of business in Winston Salem, North Carolina. At one time, Brock & Scott had several other offices in North Carolina and in Greer, South

Carolina. Respondent was employed with Brock & Scott as managing attorney of the Greer office from May 2005 to February or March 2006.

In March 2006, Brock & Scott was retained to file a complaint on behalf of Client A who was seeking a deficiency judgment on the foreclosed property of Complainants. In March 2006, respondent signed the Summons and Complaint and Plaintiff's Interrogatories and Request for Production of Documents in the collection action. The Summons and Complaint were served on the Complainants on or about March 31, 2006. On or about April 18, 2006, the Complainants served their answer at the Greer office of Brock & Scott.

On or about June 15, 2006, Brock & Scott moved for a default judgment on behalf of Client A. The motion was granted. Upon notification of the default judgment, Complainants notified Brock & Scott of their prior answer to the complaint. Brock & Scott then notified the court of the error in seeking the default judgment and requested that the default judgment be set aside. The judgment was set aside by order dated August 17, 2006.

Respondent maintains he took no actions on Complainants' case other than signing the Summons and Complaint and the Plaintiff's Interrogatories and Request for Production of Documents. Respondent states that the Summons and Complaint and the Plaintiff's Interrogatories and Request for Production of Documents were prepared in the Winston Salem office and forwarded to the Greer office for his signature. Respondent also states he forwarded the signed Summons and Complaint and the Plaintiff's Interrogatories and Request for Production of Documents to the Winston Salem office and all other matters were handled through the Winston Salem office.

Respondent represents there were no attorneys in the Winston Salem office who were licensed to practice law in South Carolina. Respondent admits that his actions assisted in the unauthorized practice of law.

Matter II

Respondent represents he signed an estimated fifty (50) to one hundred and fifty (150) Summons and Complaints for Brock & Scott but performed no other action on the cases. He represents that in collection proceedings it was the practice of Brock & Scott to handle the entire action from the Winston Salem office and respondent's only function was the signing of documents to be filed with the court.

Further, respondent admits that his responsibilities as managing attorney for the Greer office included the marketing and closing of loans. Respondent states that when he solicited clients, he distributed a package of information which contained contact information for Brock & Scott. Respondent admits the telephone number in the material appeared to be a South Carolina number but was actually a "backdoor" number which directly contacted the Winston Salem office. Respondent states the same was true for the facsimile number provided to potential clients.

Respondent maintains he became very concerned about the procedures employed by Brock & Scott in its collection matters and that he made several attempts to become more involved in the collections procedures. He asserts he resigned from the law office of Brock & Scott when his attempts to become more active were unsuccessful.

ODC agrees respondent has been very cooperative and forthright in ODC's investigation of these matters.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.5 (lawyer shall not assist non-lawyer in the unauthorized practice of law) and Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct). Respondent acknowledges that his misconduct constitutes grounds for

discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

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

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of John A. Pincelli, Respondent.

Opinion No. 26400
Submitted October 30, 2007 – Filed December 10, 2007

PUBLIC REPRIMAND

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

J. Steedley Bogan, of Columbia, for respondent.

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

FACTS

In the spring of 2003, respondent created an entity known as "Sandlapper Legal Services, LLC" (Sandlapper) which operated out of respondent's law firm offices under his supervision and direction. While Sandlapper was described as a "closing coordination company," respondent agrees that, due to the services it provided, Sandlapper was, in fact, a law firm.

From 2003 through 2005, Sandlapper coordinated closings of approximately 3,000 home equity refinancing loans.[1] Sandlapper had approximately fifty (50) South Carolina-licensed attorneys at various locations throughout the state to attend closings and serve as closing attorneys as contemplated by the directives set out in State v. Buyers Services Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987), and Doe v. Condon 351 S.C. 158, 568 S.E.2d 356 (2002).[2] Respondent represents that the closing attorneys complied with the first three closing steps set forth in Doe v. Condon, id., however, Sandlapper's and the closing attorneys' involvement in the closings ended after the documents were executed and turned over to the lender. Instead, Sandlapper and its closings attorneys gave lenders written instructions explaining how the lender should record the mortgage and any other closings documents.

In March 2004, respondent contacted Robert Wilcox, Esquire, and sought his advice as to Sandapper's procedures. Mr. Wilcox provided respondent with a written opinion which advised, in part, "lawyer's involvement or active supervision is required also at earlier stages of the title search and the preparation of loan documents and at the later stages of recordation and disbursement." Thereafter, respondent reformed Sandlapper's closing practices to address Mr. Wilcox's recommendations, except that respondent continued to allow lenders to record their own mortgages through reliance on the written instructions provided by Sandlapper. In summary, no attorney supervised the recordation of the mortgages or other legal documents.[3]

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[1] No purchase money mortgages transactions were closed by or under the supervision of Sandlapper.

[2] In 2003, the Court withdrew Doe v. Condon, id., and filed the substitute opinion of Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003).

[3] Further, the lenders made their own disbursements at the closings without any supervision from an attorney in violation of Doe Law Firm v. Richardson, 371 S.C. 14, 585 S.E.2d 773 (2006). In Doe

In mitigation, ODC is unaware of any damages to clients or lenders as a result of respondent's misconduct. Further, ODC recognizes that lenders were most at risk from respondent's misconduct yet, according to respondent, lenders preferred to record their own mortgages without attorney involvement. However, respondent acknowledges that lenders cannot authorize variances to Court directives and that errors made in recordation by non-attorney supervised lenders might injure subsequent assignees of the mortgages.

Respondent warrants that he will make every effort toward complying with each and every requirement for the closing of real estate transactions as promulgated by the Court. Respondent has fully cooperated with ODC in seeking to expeditiously conclude this matter.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 5.5 (lawyer shall not assist non-lawyer in unauthorized practice of law); and Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct), Rule 7(a)(3) (it shall be ground for discipline for lawyer to willfully violate a valid

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Law Firm, the Court held that "the disbursement of funds in the context of residential real estate loan closings cannot and should not be separated from the [closing] process as a whole" and, therefore, concluded a lawyer should oversee this step in the closing process. Id. S.C. at 18, S.E.2d at 868. The Court delayed the effective date of the decision until January 22, 2007, to provide time for businesses to adjust their practices to conform to the new rule.

order of the Supreme Court); and Rule 7(a)(6) (it shall be ground for discipline for lawyer to violate oath of office).

CONCLUSION

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

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of R. Brian Ponder, Respondent.

Opinion No. 26401
Submitted October 29, 2007 – Filed December 10, 2007

PUBLIC REPRIMAND

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

Elizabeth Van Doren Gray, of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for respondent.

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

FACTS

Respondent, a sole practicioner, employed Jean Knowles as a non-lawyer legal assistant from October 2002 through January 2006. Knowles assisted respondent with the preparation and closing of real estate transactions.

In 2003-2004, respondent began suffering from a serious heart ailment and was hospitalized in intensive care and diagnosed with atrial fibrillation. After release from his initial hospitalization, respondent had additional episodes and emergency hospital treatment. He was advised by his treating physician to alter his lifestyle and to reduce stress.

In January 2004, Knowles offered to reconcile respondent's trust account and to generally manage his trust account. Respondent accepted the offer in an effort to reduce his stress as recommended by his physician. During the time Knowles was assisting respondent with his trust account reconciliations, respondent reviewed her reports and the bank accounts but not the cancelled checks. At the time, electronic copies of the checks were provided by the bank in CD format.

In December 2005, respondent's family began experiencing a series of deaths of close family members. Respondent's sister-in-law died in December 2005, his father-in-law died in February 2006, and his wife's uncle died in March 2006. Knowles' employment was terminated in January 20, 2006 for reasons unrelated to her embezzlement, which had not yet been discovered.

In March 2006, respondent received a "NSF" (non-sufficient funds) notice from the bank concerning his trust account. Respondent represents to ODC that, after receiving the notice, he "meant to report and investigate [that matter] but failed to do so due to several family crises in that time frame." When preparing to respond to inquiries from ODC concerning the matters set forth in the agreement, respondent found the NSF notice and recalled receiving it. Respondent agrees this notice was a red flag that should have caused him to make inquiries into the integrity of his trust account.

In the Spring of 2006, respondent hired an independent bookkeeper to examine his trust account. During the audit, the bookkeeper discovered that CDs containing copies of respondent's returned trust account checks were missing and requested them from the bank.

On June 13, 2006, respondent was notified by his title insurance company that a check in the amount of $113,000 drawn on his trust account had been dishonored upon presentment due to insufficient funds being available in respondent's trust account.[1] At the close of business on June 15, 2006, after obtaining access to the CDs provided by the bank, the bookkeeper confirmed to respondent that there were substantial shortages in his trust account. On June 16, 2006, respondent contacted ODC by telephone, advised ODC of the shortages, and prepared a written self-report.[2] An officer with respondent's title insurance carrier made a complaint to ODC concerning this matter.

Thereafter, respondent deposited $30,000 of personal funds into his trust account and made arrangements to close the trust account which contained the shortages. Later, respondent deposited an additional $13,000 into the account to cover the shortages.

Respondent's audit revealed that, beginning in January 2004 and continuing until her arrest in June 2006 (well after her termination in January 2006), Knowles embezzled $238,672.06. During that period, Knowles (who did not have signatory authority on respondent's trust account) forged respondent's name to 88 checks drawn on respondent's trust account, six of which were written after her termination by respondent. Seventeen of the forged checks exceed $5,100. All of the forged checks were made payable to Knowles, her husband, or her children.

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[1] The check had been written to pay off a first lien in connection with a real estate transaction in which respondent had served as the closing attorney.

[2] Respondent advised the Greenville County Sheriff's Office of this matter. On June 26, 2006, Knowles was charged with Breach of Trust with Fraudulent Intent greater than a value of $5,000.

Not until after making the self-report to ODC did respondent request his bank notify ODC of any overdrafts on his trust account as required by Rule 1.15(h), RPC, Rule 407, SCACR. In response to inquires from ODC, respondent represented that he had in fact written the requisite letter to his bank shortly after it became a requirement on October 1, 2005, but did not mail the letter to the bank and only discovered he had not done so when he found the letter in preparation of a response to inquires from ODC.

Respondent did not review cancelled checks from his trust account until he received notice of the overdraft from his title insurance carrier in June 2006. Respondent did not review the cancelled checks from his trust account notwithstanding the requirements of Rule 1.15(a), RPC, and Rule 417, SCACR, which mandate monthly reconciliation of bank statements with trust account records. Respondent recognizes that his failure to fully comply with the published directives of the Court and his failure to more closely supervise Knowles enabled Knowles to commit embezzlement and when compliance with the directives would have revealed the checks she was forging and the resulting shortages in respondent's trust account.

Respondent admits that, as a result of his failure to comply with Rule 1.15, RPC, and Rule 417, SCACR, he did not provide clients with competent or diligent representation. Further, he admits he allowed monies belonging to one client to be used for the benefit of another as a result of the necessity of "lapping" of monies in his trust account due to shortages caused by Knowles' embezzlement.

In mitigation, respondent has been continuously engaged in the practice of law in this state since 1995 and has not previously been the subject of any disciplinary complaint. Respondent self-reported this matter to ODC and has fully cooperated with ODC's inquiries and efforts to conclude this matter expeditiously. During a portion of the period in which the embezzlement occurred, respondent was dealing with a serious personal health problem and the death of three close family members.

Further, with the best interests of his clients in mind, respondent had the foresight to: 1) obtain fidelity insurance coverage in the amount of $100,000 (which has been paid in full towards the amounts embezzled); 2) deposit $43,000 of his personal funds into the trust account to cover the shortages caused by Knowles' embezzlement;[3] and 3) obtain through errors and omissions coverage and insured closing arrangements with his title company ample funds available to compensate all victims of Knowles' embezzlement, except for possibly himself.

Since discovering the embezzlement, respondent has implemented additional office management procedures designed to more effectively safeguard his clients' funds and to more closely supervise his staff. Respondent represents he is how fully complying with the requirements of Rule 1.15(h), RPC, and Rule 417, SCACR, and will make every effort to strictly comply in the future. Further, respondent represents that his trust account is now balanced. ODC believes these representations to be correct.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.3 (lawyer shall act with reasonable diligence in representing client); Rule 1.15(a) (lawyer shall safekeep client funds); Rule 1.15(g) (lawyer shall not use entrusted property for benefit of any person other than the owner of the property); Rule 1.15(h) (lawyer shall file written directive with financial institution to report to Commission on Lawyer Conduct when instrument is returned against trust account for insufficient funds); Rule 5.3(a) (lawyer shall make reasonable efforts to ensure firm has measures giving reasonable assurances that non-lawyer employee's conduct is compatible with professional

[3] Respondent has lost approximately $28,000 in embezzled money which represented his portion of title insurance premiums.

obligations of lawyer); Rule 5.3(b) (lawyer having direct supervisory authority over non-lawyer shall make reasonable efforts to ensure non-lawyer's conduct is compatible with professional obligations of lawyer); Rule 5.3(c)(2) (lawyer shall be responsible for conduct of non-lawyer if he has supervisory authority over non-lawyer and knows of the non-lawyer's conduct at a time when its consequences can be avoided but fails to take remedial action); and Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct). In addition, respondent admits the he violated the recordkeeping provisions of Rule 417, SCACR. Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Alex J. Newton, Respondent.

Opinion No. 26402
Submitted November 6, 2007 - Filed December 10, 2007

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Assistant Deputy Attorney General, and Robert E. Bogan, both of Columbia, for Office of Disciplinary Counsel.

Desa A. Ballard, of West Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to disbarment. Respondent requests that the date of disbarment be retroactive to the date of interim suspension.[1] We accept the Agreement and disbar respondent from the practice of law in this state, retroactive to March 22, 2006. The facts, as set forth in the Agreement, are as follows.

[1] Respondent was placed on interim suspension by order of this Court dated March 22, 2006. In the Matter of Newton, 368 S.C. 171, 628 S.E.2d 883 (2006).

Facts

Between May 1, 2002, and March 1, 2004, respondent, who was engaged in the business of closing residential mortgage loans, closed certain transactions as part of a two-transaction "flip," using loan proceeds intended to fund only the second transaction to fund both. Respondent also lent funds from his trust account to one or more "straw men" purchasers on certain occasions to effect these transactions. In connection with these "flip" transactions, respondent prepared HUD-1 closing statements containing false representations and/or omissions that were material to the transactions. Respondent also permitted borrowers to certify that the properties purchased would be owner-occupied as a primary residence, a condition for loan approval, when he knew that was not true.

Respondent submitted the false certifications and HUD-1 closing statements to lenders through the United States Mail and through private and commercial carriers. Respondent was charged with one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371, a felony under federal law and a serious crime under Rule 2(aa), Rule 413, SCACR. Respondent pled guilty in federal court to the charged offense and was sentenced to forty-one months' imprisonment. The indictment and plea were related to one of the closings mentioned hereinabove.

Law

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 1.4 (lawyer shall consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law); Rule 1.8 (lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation); Rule 1.15 (lawyer shall hold property of clients in the lawyer's possession in connection with a representation separate from the

lawyer's own property); Rule 4.1 (in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person or fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); 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); Rule 8.4(c) (it is professional misconduct for lawyer to engage in conduct involving moral turpitude); Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent further admits his misconduct constitutes grounds for discipline under the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for lawyer to violate the Rules of Professional Conduct); Rule 7(a)(4) (be convicted of a crime of moral turpitude or a serious crime); Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice, bring the courts or legal profession into disrepute, or demonstrating an unfitness to practice law); and Rule 7(a)(6) (it shall be a ground for discipline for a lawyer to violate the oath of office). In addition, respondent admits his misconduct violated Rule 417, SCACR.

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state retroactive to March 22, 2006. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Glenn Rogers, Jr., Respondent.

Opinion No. 26403
Submitted November 6, 2007 - Filed December 10, 2007

DEFINITE SUSPENSION

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

Douglas J. Robinson, of Camden, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a range of sanctions from a confidential admonition to a sixty day suspension pursuant to Rule 7(b), RLDE, Rule 413, SCACR. Respondent requests any suspension be made retroactive to the date of his interim suspension.[1] We accept the agreement and suspend respondent from the practice of law in this state for sixty days, retroactive to the date of his interim suspension.

[1] Respondent was placed on interim suspension by order of this Court dated August 17, 2007. In the Matter of Rogers, 375 S.C. 58, 650 S.E.2d 463 (2007).

FACTS

Respondent, who was a public defender at the time, failed to appear for a case and another public defender picked the jury on his behalf. Respondent appeared for trial the following day, but asked for a continuance on the grounds that he had been ill and was unprepared. While respondent maintains he informed the solicitor he was ill, he failed to notify his client of the trial in the belief the case would be continued. The trial judge found respondent in contempt and ordered respondent to pay the cost of the jury and write a written apology to the jurors. Respondent fully complied with the order. Respondent contends he did not notify the Office of Disciplinary Counsel of the finding of contempt because the sanctioning judge found respondent's conduct did not amount to an ethical violation, a contention the Office of Disciplinary Counsel states it has no reason to doubt since the matter was not reported by the sanctioning judge.

In this matter and three other matters, respondent failed to respond to the Office of Disciplinary Counsel's initial inquiries, Treacy letters,[2] and notices of full investigation. Respondent maintains he failed to respond to the Office of Disciplinary Counsel because he was suffering from depression. Respondent, who has been diagnosed as suffering from depression, has sought help from Lawyers Helping Lawyers, has signed a monitoring agreement with them and has been seeing a psychiatrist recommended by them as well. In addition, respondent has since met with the Office of Disciplinary Counsel and provided information regarding the complaints against him, including the three additional complaints, which the Office of Disciplinary Counsel states it would have recommended dismissing if it had received the requested information from respondent. Finally, respondent has fully cooperated with the Office of Disciplinary Counsel since being placed on interim suspension.

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

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, keep the client reasonably informed about the status of the matter, and promptly comply with reasonable requests for information); and Rule 8.1(b) (a lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority).

Respondent also admits that he has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct); Rule 7(a)(3) (it shall be a ground for discipline for a lawyer to fail to respond to a lawful demand from a disciplinary authority including a request for a response); and Rule 7(a)(6) (it shall be a ground for discipline for a lawyer to violate the oath of office taken upon admission to practice law in this state).

Conclusion

We find a sixty day suspension is the appropriate sanction for respondent's misconduct. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for sixty days, retroactive to the date of his interim suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Samuel Michael Ogburn, Respondent.

Opinion No. 26404
Submitted November 6, 2007 – Filed December 10, 2007

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Samuel Michael Ogburn, of Camden, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a range of sanctions from a confidential admonition to a sixty day suspension pursuant to Rule 7(b), RLDE, Rule 413, SCACR. We accept the agreement and suspend respondent from the practice of law in this state for sixty days. The facts, as set forth in the Agreement, are as follows.

FACTS

In handling a real estate transaction, respondent went to the home of a client to review all of the closing documents prior to the closing. Respondent witnessed the client sign all of the necessary documents. While

respondent signed his name as a witness on the mortgage, no one else was present to function as a second witness to the execution of the mortgage by the client. When respondent returned to his office, he instructed a paralegal to sign her name, under oath, as the second witness to the mortgage and as personally witnessing the client's execution of the mortgage, despite the fact the paralegal was not present when the client signed the mortgage. Respondent notarized the paralegal's signature and statement even though he knew it was false. The mortgage was subsequently recorded in the appropriate county office.

During the course of the investigation by the Office of Disciplinary Counsel, in which respondent was fully cooperative, respondent testified that while it was his typical procedure when conducting closings in a client's home to contact the client before closing to insure an additional person would be present to witness the execution of certain documents, on approximately two to three other occasions, when another person was not present at a closing, respondent instructed a paralegal or another member of his staff to indicate on a document that they had witnessed the client's signature when, in fact, they had not been personally present for the execution. However, by way of affidavit in mitigation, respondent states that for over three years he has strictly required the presence of a second witness at every closing and has, in fact, refused to conduct closings on several occasions due to the lack of a second witness.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct); and Rule 8.4(d)(it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent also admits that he has violated Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, by violating the Rules of Professional Conduct.

Conclusion

We find a sixty day suspension is the appropriate sanction for respondent's misconduct. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for sixty days.[1] Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

[1] The Office of Disciplinary Counsel has requested an attorney to protect clients' interests be appointed, pursuant to Rule 31, RLDE, Rule 413, SCACR, if a definite suspension is imposed. We have granted that request by separate order.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James A. Smith, Petitioner

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Colleton County
John C. Few, Circuit Court Judge

Opinion No. 26405
Submitted September 20, 2007 – Filed December 10, 2007

AFFIRMED

Appellate Defender Aileen P. Clare, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Jeanette Van Ginhoven, of Columbia, for Respondent.

JUSTICE BEATTY: Petitioner was convicted of two counts of murder. After his convictions were affirmed on direct appeal, Petitioner brought this action seeking post-conviction relief (PCR) on the grounds both his trial counsel and appellate counsel were ineffective. We granted certiorari to review the PCR judge's denial of relief to Petitioner. We affirm.

FACTUAL/PROCEDURAL HISTORY

On June 1, 1997, Gwen Utsey reported to the Colleton County Sheriff's Department that her sister-in-law, Hattie Mae Yates, and Yates's two-week-old daughter, Moesha, had been missing for one day. On June 5, 1997, deputies discovered Hattie Mae's abandoned car in a wooded area near the home of Petitioner and his girlfriend, Darlene Winningham. On June 16, 1997, Winningham gave a statement to Detective Steve Bazzle in which she claimed Petitioner had killed Hattie Mae and Moesha Yates. Winningham informed Detective Bazzle where the bodies were located, but denied that she had been involved in the murders or the subsequent "cover up." Based on this information, investigators with the sheriff's department recovered the bodies in a make-shift grave.

Upon discovering that Winningham had identified him as the primary suspect, Petitioner gave a lengthy statement to Detective Bazzle. According to Petitioner, Hattie Mae, his crack cocaine supplier, drove to his home in Cottageville on the afternoon of May 31, 1997, to discuss a crack cocaine transaction. As Hattie Mae waited in her car with Moesha, Petitioner went inside the home to retrieve cash for the transaction. Petitioner claimed that Winningham "flipped out" and began shooting when he attempted to pay Hattie Mae with $100 that he had taken from Winningham. Petitioner then stated he attempted to cover up the crime by hiding Hattie Mae's car, burying the bodies, and disposing of the rifle. Following his statement, Petitioner led detectives to a pond where he had hidden the murder weapon.

Both Petitioner and Winningham were charged with the murders. At Petitioner's trial, Winningham testified for the State. Winningham testified that on May 31, 2007, at around 3:00 p.m., her friend drove her and her three children home after taking them to the grocery store. According to Winningham, Petitioner came out of the house and told her to take the children to their grandfather's home. When Winningham returned home, Hattie Mae came to the Petitioner's home and pulled around to the back porch. Winningham stated she heard a "gun go off" and Petitioner yelled for her to check the road to see if there were any cars coming toward the home. Winningham claimed Petitioner then drove off in Hattie Mae's car through the back yard into a field. Petitioner returned and requested Winningham's help after he struck a tree. Winningham stated that she saw Hattie Mae lying dead on the ground and Moesha lying still in the car seat. Winningham testified that over the course of the next three days Petitioner returned to the woods several times and engaged the assistance of Kenneth Dale Bazzle, Jr., Winningham's oldest son, to empty and burn the contents of Hattie Mae's car, to hide the car in the country, and to bury the victims' bodies. Kenneth Dale Bazzle corroborated Winningham's testimony. Additionally, Kenneth Dale stated that Petitioner told him that he had killed Hattie Mae and Moesha.

Petitioner testified in his defense. Although he recounted a similar sequence of events as that described in the State's case, he adamantly denied that he shot Hattie Mae and Moesha. He maintained that Winningham became enraged and fired into Hattie Mae's car after he handed $100 to Hattie Mae for crack cocaine.

The trial court submitted two counts of murder to the jury. The jury found Petitioner guilty of both counts, and the trial court sentenced Petitioner to life imprisonment without parole and a consecutive thirty-year term.

After his convictions were affirmed on direct appeal, Petitioner filed for PCR. In his application, Petitioner asserted he was being held unlawfully because: (1) his convictions and sentences for two counts of murder were unconstitutional in that they constituted a violation of

the Double Jeopardy Clause; (2) the solicitor made improper comments during his closing argument; (3) after-discovered evidence required reversal of his convictions and sentences; and (4) his trial counsel and appellate counsel were ineffective. Subsequently, Petitioner amended his petition to include an allegation that after-discovered evidence revealed one of the jurors knew him from being incarcerated in the same facility and shared this information with the other members of the jury.

The PCR judge held a hearing on the petition. At the hearing, Petitioner testified and presented the testimony of Juror Floyd Walling as well as John D. Bryan, Petitioner's trial counsel. The PCR judge also permitted Petitioner to supplement the record with the statement and affidavit of Kenneth Dale Bazzle in order to compare the statement with Bazzle's trial testimony.

The PCR judge denied Petitioner relief and dismissed his application with prejudice. The PCR judge held trial counsel was not ineffective for failing to: (1) request specific jury voir dire questions which would have uncovered Juror Walling's prior relationship with Petitioner; (2) object to the solicitor's improper closing argument; and (3) object to a portion of Winningham's testimony. Additionally, the PCR judge found appellate counsel was not ineffective in presenting Petitioner's direct appeal to the Court of Appeals. Petitioner appeals from this order.

STANDARD OF REVIEW

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), cert.denied, 128 S. Ct. 370 (2007).

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

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

DISCUSSION

I.

A.

Petitioner first asserts the PCR judge erred in failing to find the presence of Juror Floyd Walling, with whom he had been incarcerated prior to trial, constituted a per se violation of his due process right to a fair and impartial jury.

During voir dire, the trial judge asked the members of the jury pool whether any member was "related by blood or marriage" to Petitioner or was a "close personal friend." Walling did not respond to

this question. Before Walling was seated on the jury, his trial counsel had three remaining peremptory challenges.

While serving his sentence for the two counts of murder, Petitioner discovered that he and Juror Walling had been incarcerated together at the Colleton County Detention Center in 1997. Petitioner made the connection when his cellmate noticed that Floyd Walling, the cellmate's cousin, was listed as a juror on Petitioner's trial transcript. Petitioner remembered Walling after the cellmate told him that Walling was also known as "Rum Gully." At the PCR hearing, Petitioner testified he did not recognize Walling as the man he knew in prison because Walling had shaved his beard and was not wearing prison attire. Additionally, Petitioner was not aware of Walling's given name, but rather, knew him as "Rum Gully." Although he was unable to produce documentation, Petitioner claimed that he and Walling had altercations while in jail, which included incidents where Petitioner threw urine on Walling and struck him with a mop.

Petitioner presented Walling as a witness at the PCR hearing. Walling testified he was detained several times for failing to pay child support. While serving this time, Walling was assigned to laundry detail. In this capacity, Walling encountered Petitioner when he delivered clean clothing to him. Despite this interaction, Walling testified that he and Petitioner never spoke to one another. He further testified there was an incident where an inmate threw urine and feces on him, but he did not know who did it and did not suspect that Petitioner was responsible. Walling admitted that while in jail he heard that Petitioner was "accused of murder, but that was yet to be proven." Walling stated that he did recognize Petitioner at the time of trial as the person who was being detained in the Colleton County Detention Center in 1997. Although he did not disclose this information to the trial judge, Walling claimed that had the judge inquired whether he knew Petitioner he would have answered affirmatively and "asked them to dismiss [him] off the jury."

In response to questioning by the PCR judge, Walling denied having any bias or prejudice against Petitioner. Walling, however,

admitted he had told the other jurors that he had been incarcerated with Petitioner and that Petitioner "was accused of murder, but he's got to be proven before he's [convicted]."

Petitioner's trial counsel testified that had he known that Walling and Petitioner had been incarcerated together, he "would have probably used a peremptory strike."

In his order, the PCR judge found "Walling's testimony that he had no preexisting bias against the [Petitioner] to be highly credible." In light of the evidence presented at the hearing, the judge believed Walling "acted as a fair and impartial juror" and that Petitioner failed to show that Walling prejudiced the other jury members by informing them that the two had been incarcerated together. The judge reasoned that the jury was "clearly aware that [Petitioner] was incarcerated at the time of trial but had not been convicted of the crimes with which he was charged."

Based on the foregoing facts, Petitioner contends Juror Walling's presence on the jury was a per se violation of due process on the ground "the circumstances of their relationship created a 'presumption of bias.'"[1] Specifically, Petitioner asserts the information revealed by Walling to the other jury members "could have had no other effect than to fix the image of petitioner as an inmate, hence a criminal, in the jurors' minds."

"[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury."

[1] The State avers Petitioner's argument is procedurally barred on the ground that it should have been raised in a direct appeal. Petitioner, however, did not become aware of his prior relationship with Juror Walling until after his direct appeal had been ruled on and he was in the process of preparing his petition for post-conviction relief. Accordingly, Petitioner's claim for relief is appropriately based on "after-discovered evidence." Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993).

Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). "'[I]n order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature.'" State v. Bryant, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003)(quoting State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993)).

"To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). "When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." Id. "Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn." Id. at 586-87, 550 S.E.2d at 284.

"Determining whether a juror's failure to respond to a voir dire question amounts to intentional concealment is a 'fact intensive determination that must be made on a case-by-case basis.'" State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101-02 (Ct. App. 2004)(quoting State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004)). "Intentional concealment occurs 'when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable.'" Id. "Concealment is considered unintentional where the voir dire question posed is ambiguous or incomprehensible to the average juror or where 'the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.'" Id.

Applying the above-outlined principles to the facts of the instant case, we find the PCR judge properly denied Petitioner relief on this

ground. Here, it was reasonable for Juror Walling to remain silent when asked during voir dire whether any member of the jury pool was "related by blood or marriage or a close personal friend of [Petitioner]." At the PCR hearing, Juror Walling testified that he and Petitioner were not close friends. Petitioner corroborated Walling's testimony when he acknowledged that he did not know Walling very well. Juror Walling also testified that he did not have any bias or prejudice against Petitioner, and he and the other members of the jury held the State to its burden of proof before finding Petitioner guilty of the two murder charges.

Based on Juror Walling's testimony at the hearing, we believe that Walling did not intentionally conceal the existence of his prior relationship with Petitioner. See Guillebeaux, 362 S.C. at 274-75, 607 S.E.2d at 101-02 (holding juror did not intentionally conceal existence of social relationship with the State's chief witness and, thus, trial judge did not abuse his discretion in denying defendant's motion for a new trial); State v. Galbreath, 359 S.C. 398, 403-04, 597 S.E.2d 845 847-48 (Ct. App. 2004) (finding juror did not intentionally conceal that juror knew the victim's mother and that juror's brother-in-law rented land from someone in victim's extended family where juror accurately answered voir dire question posed and the alleged relationships did not amount to close personal friends or business associates with any of the witnesses); see also Sparkman, 358 S.C. at 496-97, 596 S.E.2d at 376-77 (concluding no intentional concealment where the judge asked on voir dire whether anyone had been the victim of a "serious crime" and seated juror did not immediately recall that he had been a victim of a crime forty years earlier and was not sure if the crime constituted a "serious" one).

Furthermore, because the disposition of this issue essentially involves a credibility determination as to whether Juror Walling intentionally concealed his prior relationship with Petitioner, we defer to the PCR judge's findings. The PCR judge specifically found Juror Walling's testimony to be "highly credible." Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994) (stating the Court gives great deference to a PCR court's findings when matters of credibility

are involved); State v. Loftis, 232 S.C. 35, 45, 100 S.E.2d 671, 675 (1957) (declining to interfere with trial judge's discretion in matter concerning jury because trial judge has the opportunity to consider credibility of jurors). Accordingly, we affirm the judge's holding that Petitioner did not suffer a per se violation of his due process right to a fair and impartial jury.

B.

In the alternative, Petitioner asserts he should receive a new trial because trial counsel was ineffective for not requesting appropriate voir dire questions. Petitioner contends that had counsel asked the court to "inquire about social contacts beyond 'close, personal' friendships and business associations," Juror Walling would have come forward and counsel could have made a motion to remove him for cause or exercise a peremptory strike.

Without reiterating the above analysis, there is evidence to support the PCR judge's decision that Petitioner "failed to make the requisite showing of prejudice resulting from Counsel's alleged deficiency in regards to additional jury voir dire." Juror Walling testified that he and the other members of the jury held the State to its burden of proof before finding Petitioner guilty. Additionally, Juror Walling stated that "it was a while there before they could convince me that he's the one [that] done it." Given Juror Walling and the other members of the jury adhered to the requisite standard of proof before convicting Petitioner, we find any alleged error by trial counsel did not result in a violation of Petitioner's right to a fair and impartial jury. Thus, the PCR judge properly denied Petitioner relief on this ground.

II.

Next, Petitioner argues the PCR judge erred in finding trial counsel was not ineffective for failing to object to certain portions of the solicitor's closing argument on due process grounds as well as Rule 22 of the South Carolina Rules of Criminal Procedure. Specifically, Petitioner contends trial counsel was ineffective for not objecting to the

solicitor's comments on constitutional due process grounds "rather than mere rule violations."

At trial, there was conflicting testimony as to whether Petitioner or his girlfriend, Darlene Winningham, shot Hattie Mae Yates and her infant daughter. In response to this testimony, the solicitor stated during his closing argument:

> I know that [Petitioner] was surprised when those children got there at 3:00 or 3:30, and that he sent them off. I know that he thought Hattie Mae Yates - - -
>
> * * *
>
> And, God only knows, I don't know what the motive for that is, and his Honor will charge you that the State is not required to prove a motive. I don't know whether they got mad with each other or what, but I know it happened. I know that the person on the porch didn't kill them.
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> * * *
>
> You know, Hattie Mae Yates – there may come a time in life where your life doesn't mean much, and I can't tell you that Hattie's did, but I can tell you one thing. That little girl that was sitting in that car seat she ain't never done anything to anybody. Never in her life has she ever said a bad word. And I know she is dead, and she's dead at the hands of [Petitioner], and, for that, you need to convict him for murder.

To each of these comments, trial counsel interposed an objection and moved for a mistrial based on Rule 22 of the South Carolina Rules

of Criminal Procedure.[2] The trial judge denied the motion for a mistrial. In reaching this decision, the judge did not believe "that there was such egregious abuse as would suggest that the Solicitor ha[d] invaded the jury's province of deciding whether or not the facts and inferences drawn therefrom would support a verdict."

At the PCR hearing, trial counsel explained that he objected on the basis of Rule 22 because he "didn't really see a huge difference between the constitutional rule and the criminal procedural rule. It's both preventative and both exist for the same reason in order to give him a fair trial. That's the reason for both rules." The PCR judge also apparently did not see a distinction between an objection based on Rule 22 and due process grounds. In denying Petitioner relief on this ground, the judge found that "Counsel cannot be said to have failed to make every reasonable effort to protect the [Petitioner's] right to a fair trial." The judge noted that counsel made "timely objections to the solicitor's comments where appropriate" and "moved for a mistrial on the ground that the solicitor's comments constituted a violation of professional ethics." The judge concluded that "given the overwhelming evidence of [Petitioner's] guilt of the crimes with which he was charged, the [Petitioner] has failed to make the requisite showing of prejudice resulting from any alleged deficiency."

Despite the PCR judge's failure to specifically rule on the distinction made by Petitioner in terms of a Rule 22 objection versus an objection based on constitutional due process grounds, we believe his ultimate decision that trial counsel was not ineffective was correct and is supported by the record.

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[2] Rule 22 of the South Carolina Rules of Criminal Procedure provides, "In arguing before a jury, no attorney shall address or refer to by name or otherwise any member of the jury he is addressing, or otherwise make any personal appeal to any or all members of the jury." Rule 22, SCRCrimP.

As a threshold matter, trial counsel was not deficient in failing to specifically object on constitutional grounds. As we view Rule 22, we believe it was promulgated on the concepts of due process and fundamental fairness. Our research has not revealed any cases which analyze Rule 22. Therefore, Rule 22 is not considered distinctly different from an objection based on due process principles. Accordingly, we hold trial counsel's objection based on Rule 22 was sufficient to encompass any due process claims alleged by Petitioner.

Even assuming that trial counsel was deficient in not interposing a specific objection based on constitutional grounds, Petitioner was not prejudiced by his failure to do so. We find that any impropriety in the solicitor's closing argument was not sufficient to warrant the grant of a new trial.

A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. Id. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). However, "[a] solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record." Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the

solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.; see State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997)("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice."). Furthermore, a trial judge is allowed discretion in dealing with the range and propriety of closing argument to the jury, and rulings on such matters will not be disturbed absent an abuse of discretion. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

In the instant case, the solicitor's comments were confined to facts established during trial and, in the context of the entire record, were not so egregious as to have "infected the trial with unfairness as to make the resulting conviction a denial of due process." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004), cert. denied, 544 U.S. 943 (2005). Although the solicitor improperly used the pronoun "I" in his closing argument, these comments were limited and did not recur throughout his argument. Furthermore, there was also overwhelming evidence of Petitioner's guilt. See State v. McFadden, 318 S.C. 404, 416, 458 S.E.2d 61, 68 (Ct. App. 1995) (holding the solicitor's comments did not infect the trial with unfairness to the extent that his conviction was a denial of due process where there was ample evidence of guilt in the record). Finally, the trial judge charged the jury that "[y]ou must not consider as evidence any statement of counsel made during the trial," and instructed the jury members regarding their duty to "pass upon the credibility or believability of the witnesses." These instructions were sufficient to cure any possible prejudice caused by the solicitor's comments. Therefore, we do not believe there was a reasonable probability that the result of the trial would have been different had trial counsel objected on due process grounds.

III.

Finally, Petitioner argues the PCR judge erred in failing to find that appellate counsel was ineffective for briefing the solicitor's closing

argument issue as a due process violation rather than raising the Rule 22 procedural issue that was presented at trial.

In his brief to the Court of Appeals, Petitioner's appellate counsel argued "the [trial] court erred in violation of due process of law when it repeatedly permitted the solicitor to inject his personal opinion that appellant was guilty into a case where the key witness had given grossly inconsistent information about the case." In an opinion pursuant to Rule 220(b)(2), SCACR, the Court of Appeals affirmed Petitioner's convictions on error preservation grounds because the constitutional issue raised on appeal had not been raised at trial. State v. James Smith, Op. No. 2002-UP-320 (S.C. Ct. App. filed May 3, 2002).

In his order, the PCR judge found appellate counsel was not ineffective. In reaching this decision, the judge noted that appellate counsel had filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and thus, Petitioner's case had received full review by the Court of Appeals. Because appellate counsel filed a regular appeal and not an Anders brief on behalf of Petitioner, the PCR judge clearly erred in his findings. This error, however, does not warrant reversal given that Petitioner is unable to show that any alleged deficiency in appellate counsel's performance would have resulted in a different outcome on appeal.

A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). "Although appellate counsel is required to provide effective assistance of counsel, 'appellate counsel is *not* required to raise every nonfrivolous issue that is presented by the record.'" Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), cert. denied, 543 U.S. 845 (2004) (quoting Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990)).

Because trial counsel objected to the solicitor's closing argument pursuant to Rule 22, appellate counsel was remiss in failing to brief the specific issue raised at trial. Petitioner, however, cannot establish that

he was prejudiced by this deficiency. As previously discussed trial counsel's objection based on Rule 22 encompassed any possible due process claims of the Petitioner. Moreover, the impropriety of the solicitor's closing remarks did not rise to the level which would have deprived Petitioner of a fair trial. Therefore, while Petitioner has shown error, there is evidence to support the PCR judge's ruling that Petitioner was not entitled to relief on this ground.

Based on the foregoing reasons, the order of PCR judge denying Petitioner relief is

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Linda Mc Company, Inc., Respondent,

v.

James G. Shore and Jan Shore, Appellants.

Appeal From Lancaster County
William T. Moody, Special Referee
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 4279
Heard June 5, 2007 – Filed July 26, 2007
Withdrawn, Substituted and Refiled November 2, 2007

AFFIRMED

John Martin Foster, of Rock Hill, for Appellants.

James R. Snell, Jr., of Lexington, for Respondent.

KITTREDGE, J.: James and Jan Shore (the Shores) appeal the issuance of an order to execute and levy a judgment against them. The Shores contend the judgment was void, the judgment lacked active energy because it was more than ten years old, there was an accord and satisfaction of the debt, and the Linda Mc Company (the Company) should be estopped from denying the accord and satisfaction. We affirm.

I.

On December 8, 1994, the Shores agreed to give the Company a judgment by confession (the Judgment) as settlement of litigation over unpaid sales commissions. The Judgment was entered on June 2, 1995, and provided in relevant part as follows:

> 1. [The Shores] confess judgment to [the Company] in the amount of $110,000.00 and hereby authorize the Clerk of Court for Lancaster County, South Carolina, to enter judgment in favor of [the Company] against [the Shores], jointly and severally, for such amount, plus such costs and reasonable attorneys' fees incurred by [the Company] in enforcing the unconditional guaranty, a copy of which is attached hereto as Exhibit 1 (the "Guaranty"). . . .
>
> 2. [The Shores] agree that [the Company] may immediately, by affidavit through its attorneys, set forth the correct amount of this Judgment by adjusting the amount stated above for any credits previously applied by [the Company], and that [the Company] may apply to a court of competent jurisdiction for a judgment against [the Shores], jointly and severally, in the amount of the total sum due and owing hereunder, plus costs and reasonable

> attorneys' fees incurred by [the Company] in enforcing the Guaranty, without further notice to [the Shores] and without further authority from [the Shores]; provided, however, that in no event may said sum exceed $110,000.00, plus costs and reasonable attorneys' fees incurred by [the Company] in enforcing the Guaranty. [The Shores] authorize the entry of judgment for the amount due and owing as set out in the affidavit, which judgment will continue to bear interest at the highest legal rate permitted by law. The Judgment by Confession is not contingent upon any other considerations or proceedings and the Court is authorized to enter judgment for the amount set forth in the affidavit.

Sometime after the Judgment was entered, the Shores paid the Company $55,000. On February 20, 2004, the Company wrote a letter (the Agreement) to the Shores wherein it agreed to waive all post-judgment interest if the Company received the remaining $55,000 before May 7, 2004. The Shores paid the Company $26,750 by check dated May 13, 2004.

The sheriff sought to execute on the Judgment, but as is customary, the execution was returned nulla bona.[1] On July 29, 2004, the Company filed a petition for supplemental proceedings. The Company countered that the Shores possessed assets subject to execution on the Judgment. On August 3, 2004, the Shores issued a check to the Company in the amount of $28,500. The trial court granted the Company's petition for supplemental proceedings on August 9, 2004, and referred the matter to a special referee.

On October 1, 2004, the referee conducted a hearing to determine whether the Shores had any assets that could be used to satisfy the remaining balance on the Judgment. Prior to the hearing, the Shores filed a motion to

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[1] Nulla bona is "a form of return by a sheriff or constable upon an execution when the judgment debtor has no seizable property within the jurisdiction." Black's Law Dictionary 1095 (7th ed. 1999).

dismiss under Rule 12(b)(1), SCRCP, asserting in part that the Judgment was void for lack of an affidavit. The motion was denied on December 1, 2004, as the referee concluded the Judgment was valid and enforceable.

On May 24, 2005, the referee conducted an additional hearing at which the Shores asserted the Agreement had been modified by a phone message Jan left at the Company's attorney's office. This phone message, according to the Shores, constituted an accord and satisfaction of the debt. In particular, Jan testified that in May 2004 she left the Company's attorney two messages explaining the Shores were sending half of the amount due and "if there was any problem with that" to call her and she would "get the other half put together." In the message, she also stated she would pay the outstanding amount at the end of the next quarter, meaning July or August. Additionally, the Shores introduced their phone records showing a call lasting two minutes was placed to the Company's attorney on May 13, 2004. The Company's attorney testified that although his secretary checked and logged his messages, she would often not include the content of the messages. He recalled receiving a couple of phone calls from the Shores but did not know what they were about and never called the Shores back.

The Judgment was subject to execution and levy until June 2, 2005. On June 3, 2005, the referee issued his report to the circuit court finding there had been no accord and satisfaction. The referee also found the Shores owed interest outstanding from the entry of the Judgment to date, as well as costs and attorney's fees. On the same day, June 3, the circuit court issued an order to execute and levy. The Shores did not raise the matter of the Judgment's expiration in the trial court. On June 24, 2005, three weeks after the Judgment expired, the Shores filed a notice of appeal.

II.

A. Validity of the Judgment

The Shores argue that because the Company failed to follow the terms of paragraph 2 in the Judgment to fix the amount of Judgment by affidavit, its filing was void and the court was without jurisdiction. We disagree.

The Judgment complies with the statutory requirements of section 15-35-360 of the South Carolina Code (2005). This section provides:

> Before a judgment by confession shall be entered a statement in writing must be made and signed by the defendant and verified by his oath to the following effect: (1) It must state the amount for which judgment may be entered and authorize the entry of judgment therefor; (2) If it be for the money due or to become due, it must state concisely the facts out of which it arose and must show that the sum confessed therefor is justly due or to become due; and (3) If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and must show that the sum confessed therefor does not exceed the liability.

The Judgment sets forth that the Shores owe "$110,000, plus costs and reasonable attorney's fees incurred by Plaintiff in enforcing the Guaranty." The Judgment was made in writing and signed by the Shores and verified by their oath. Post-judgment interest accrued as a matter of law. The Judgment satisfies the statutory requirements.

The Shores' argument centers on the fact that the Company never filed the affidavit setting forth the amount of Judgment specified in paragraph 2 of the Judgment. The language pertaining to the affidavit, however, is permissive and not mandatory; it states an affidavit *may* be filed. Further, the failure to file the affidavit does not render the Judgment void as contemplated by Rule 60(b)(4), SCRCP. Rule 60(b)(4) provides the court may relieve a party or his legal representative from a final judgment, order, or proceeding if the judgment is void. "The definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." McDaniel v. U.S. Fid. & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996). The absence of an affidavit has

no bearing on the subject matter jurisdiction of the court. The referee properly concluded that the Judgment was not void.

B. Filing of Judgment Within Ten Years

The Shores argue because the ten-year period expired on June 2, 2005, section 15-39-30 deprives the Judgment of active energy, thereby rendering the June 3, 2005 order ineffective. This argument was not presented to the trial court, and we find the issue is not preserved for appellate review. See In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."); Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.").

Application of issue preservation principles may appear harsh under these circumstances, for the Shores' ability to challenge the ten-year limitation period did not arise until the statutory period ran on June 2, 2005. Yet the Shores had the opportunity to raise the defense in a motion to amend their pleadings or a motion to alter, amend or vacate and did not do so.

We believe this court's opinion in LaRosa v. Johnston, 328 S.C. 293, 493 S.E.2d 100 (Ct. App. 1997), requires us to dispose of this challenge on issue preservation principles.[2] In LaRosa, the judgment was entered on

[2] A Fast Photo Express, Inc. v. First National Bank of Chicago, 369 S.C. 80, 630 S.E.2d 285 (Ct. App. 2006), further buttresses our decision. In A Fast Photo Express, the judgment against the appellants expired on September 30, 2004. 369 S.C. at 86, 630 S.E.2d at 288. An order, however, was issued by the master on September 23, 2004. Id. Appellants filed their notice of appeal prior to the expiration of the judgment on September 27, 2004. Id. This court did not reach the merits, and held that because "the issue of whether the judgment had expired was never raised to the master prior to the filing of the [appellant's] appeal," and the appellants raised the issue for the first time on appeal, the matter was not preserved. Id.

March 11, 1986. 328 S.C. at 295, 493 S.E.2d at 101. Supplemental proceedings were instituted prior to the expiration of the ten-year period set forth in section 15-39-30; however, the trial court signed an order in connection with collection of the judgment on March 15, 1996. Id. at 296, 493 S.E.2d at 101. The clerk filed the order on March 18, 1996. Id. As we observed, "Starting on March 11, 1986, the judgment was good until March 11, 1996." 328 S.C. at 297, 493 S.E.2d at 102. Following the March 18, 1996 order, Johnston moved to "alter, amend, and vacate [the trial court's order], because LaRosa's judgment against Johnston expired on March 11, 1996—ten years after the judgment was filed." Id. at 296, 493 S.E.2d at 101. The trial court denied the motion and we reversed, holding the judgment expired on March 11, 1996. Id. at 300, 493 S.E.2d at 103.

It appears that LaRosa objected to the court considering a defense not included in the pleadings. We rejected LaRosa's argument: "When the judgment expired, Johnston acquired a statutory defense that had previously been unavailable. We are not going to penalize Johnston for failing to raise a defense which she could not have raised." Id. at 297, 493 S.E.2d at 102. The point is that Johnston *did* assert the statutory defense as soon as it became available by way of a motion to alter. Because the statutory defense was brought to the trial court's attention as soon as the defense became available, the trial court addressed the very issue that was subsequently challenged on appeal.

At oral argument, the Shores took the position that the expiration of ten-year time limit on judgments impacts subject matter jurisdiction. Thus, according to the Shores, this issue may be raised at any time—even for the first time on appeal. The Shores do not, however, cite authority for this argument. We can find no South Carolina case law to support the Shores' argument that this is an issue of subject matter jurisdiction, and this court in LaRosa and A Fast Photo Express certainly did not treat the ten-year time limit on judgments in section 15-39-30 as jurisdictional.

We find further support for our holding today in a recent decision from our supreme court. In Lever v. Lighting Galleries, Inc., 374 S.C. 30, 31, 647 S.E.2d 214, 215 (2007), Lever borrowed money from Lighting Galleries in 1988. The debt was secured by a Note, together with a mortgage on property Lever owned in Aiken County. Id. When Lever failed to pay Lighting Galleries in accordance with the parties' agreement, Lighting Galleries brought suit on the note and obtained a judgment in April 1989. Id. "Lighting Galleries was unable to collect on its judgment, which expired ten years later, in April 1999." Id. at 32, 647 S.E.2d at 215. After the judgment lien's expiration, Lever brought an action arguing that the expired judgment on the note barred a foreclosure action. Id. at 32, 647 S.E.2d at 215-16. The court rejected Lever's argument: "We hold that Lighting Galleries may pursue a foreclosure action notwithstanding its judgment against Lever was extinguished by virtue of the statute of limitations." Id. at 36, 647 S.E.2d at 218. Thus, our supreme court construes the ten-year time limit on judgments in section 15-39-30 as a statute of limitations.

This appears to be the prevailing law across the country, for in our research, we have found that other jurisdictions treat enactments similar to section 15-39-30 as statutes of limitations on judgments. See 47 Am. Jur. 2d. Judgments § 781 (2006) ("A judgment creditor generally has the right to bring an action on the judgment at any time after its rendition, until barred by an applicable statute of limitations."); see also, e.g., Elliott v. Estate of Elliott, 596 S.E.2d 819, 821 (N.C. Ct. App. 2004) ("North Carolina imposes a ten-year statute of limitations upon the enforcement of a judgment or decree of any court of the United States."); Allied Funding v. Huemmer, 626 A.2d 1055, 1060-61 (Md. Ct. Spec. App. 1993) (holding the twelve-year "statute of limitations" began to run when the confessed judgment was entered and barred a subsequent suit); Cottrill v. Cottrill, 631 S.E.2d 609, 612-13 (W. Va. 2006) (noting a statutory requirement to execute a judgment within a ten-year period is a "statute of limitations" and, therefore, an affirmative defense). Because section 15-39-30 operates as a statute of limitations, it constitutes a matter of avoidance under Rule 8(c), SCRCP, and must be raised in the trial court when the defense becomes available.

In the case before us, the Shores never raised this statutory defense to the trial court by way of a motion to alter, amend, vacate or otherwise. Consequently, we conclude the Shores' newly asserted defense under section 15-39-30 is not preserved for appellate review. We understand that our ruling allows the underlying judgment to have active energy beyond the ten-year statutory period, but our rejection of the Shores' subject matter jurisdiction argument and the concomitant application of issue preservation principles compels the result we reach today.

C. Accord and Satisfaction

The Shores maintain because the Company was aware of the Shore's proposal to modify the Agreement, the referee erred in finding there was no accord and satisfaction. We disagree.

An accord and satisfaction occurs when there is: (1) an agreement to accept in discharge of an obligation something different from that which the creditor is claiming or is entitled to receive; and (2) payment of the consideration expressed in the new agreement. Tremont Constr. Co. v. Dunlap, 310 S.C. 180, 182, 425 S.E.2d 792, 793 (Ct. App. 1992). Like any contract, an accord and satisfaction requires a meeting of the minds. Keels v. Pierce, 315 S.C. 339, 343, 433 S.E.2d 902, 905 (Ct. App. 1993). The debtor must intend and make unmistakably clear the payment tendered fully satisfies the creditor's demand and the creditor must accept payment with the intention that it will operate as a satisfaction. Tremont Constr. Co., 310 S.C. at 182, 425 S.E.2d at 793. Without an agreement to discharge the obligation there can be no accord, and without an accord there can be no satisfaction. Id.

The Shores contend the Agreement and subsequent cashing of the late check created an accord and satisfaction of the debt. They further maintain the phone messages left by Jan modified the Agreement to allow for the remaining payment to be late. The referee found there was no meeting of the minds. The referee further found the Shores did not comply with the terms of the Agreement because the Shores made the outstanding $55,000.00 payment

after the date called for in the Agreement. As a result, the referee found there was no accord and satisfaction. We find no error by the referee in this regard.

D. Estoppel

The Shores argue the Company had a duty to respond to the Shores' proposal to modify the Agreement and failing that duty the Company is estopped from denying the modification of the Agreement. This argument was neither presented to nor addressed by the trial court. Consequently, it is not preserved for review on appeal. In re Michael H., 360 S.C. at 546, 602 S.E.2d at 732; Lucas, 359 S.C. at 510-11, 598 S.E.2d at 715.

III.

For the reasons stated above, the order of the trial court is

AFFIRMED.

HEARN, C.J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Donald Wayne Paige, Appellant.

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 4320
Submitted November 1, 2007 – Filed December 4, 2007

AFFIRMED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, of the South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

HUFF, J.: Appellant, Donald Wayne Paige, was indicted for murder and subsequently convicted of involuntary manslaughter.[1] He appeals, asserting the trial judge erred in failing to require spectators at his trial to remove photograph buttons of the deceased from their clothing. We affirm.[2]

FACTUAL/PROCEDURAL BACKGROUND

This case arose from a tragic confrontation involving three men, resulting in the shotgun death of one of them. The evidence presented at trial shows that around 9:00 in the morning on April 23, 2004, Donald Paige and his friend and employer, Ray Davis, arrived at the camper home of the victim, Jason Henderson, and his fiancée, Andrea Pruitt. Paige and Davis knocked on the door, and Henderson answered it. Paige held a sawed-off shotgun. A conversation ensued and heated words were exchanged between Henderson and Paige. Although there is some dispute as to whether Paige pointed the gun at Henderson and whether Henderson grabbed the gun, causing it to discharge, it is undisputed that the gun went off, hitting Henderson in his abdomen, resulting in his death. It is also undisputed that Paige entered Henderson's property accompanied by Davis for the purpose of confronting Henderson about a financial dispute between Henderson and Davis, he did so armed with a sawed-off shotgun, and when he knocked on Henderson's door he had the shotgun loaded and cocked with his finger on the trigger.

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[1] Paige was also indicted for and convicted of possession of a weapon during the commission of a violent crime. However, the trial judge, with the State's consent, vacated the weapons charge based on a determination that involuntary manslaughter did not qualify as a crime of violence.

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

LAW/ANALYSIS

The only issue raised on appeal is whether the trial court erred in denying appellant's motion to have spectators in the courtroom remove from their clothing photograph buttons of the victim. Appellant contends there was evidence the decedent was "going after appellant when the gun accidentally" discharged, and that, by wearing the buttons, the spectators were attempting to create sympathy "for what otherwise did not appear to be a very sympathetic situation," to the prejudice of appellant. Appellant maintains he is thus entitled to a new trial. We disagree.

The record reveals that prior to jury selection in Paige's trial, defense counsel indicated she had a matter to bring to the court's attention. Counsel noted that there were "several persons sitting on this side behind the State with pictures taped to their clothing." She inquired whether they were pictures of the deceased and asked, if they were, that the spectators remove them. The solicitor responded that they were pictures of the deceased, that his family members had the buttons created after his death, and that none of the State's witnesses would be wearing them. The court questioned whether any of these individuals would be testifying, and the solicitor indicated they would not. The following colloquy then occurred:

> [Court]: They will be sitting in the back of the courtroom? None of them will be at the counsel table?
>
> [Solicitor]: None will be at the table, Your Honor. We will be happy to put them in whatever row the court deems appropriate, but certainly they are - - it's a public courtroom and a photograph of the deceased can't be prejudicial.

Defense counsel objected, stating the purpose of the photo was to invoke jury sympathy for the State's case, and because they were sitting behind the State in the courtroom, it was prejudicial to the defendant. The court ruled it would not require the individuals to remove the buttons, but would make sure

that they did not sit on the front row of seats. He further instructed the solicitor that she was to instruct these spectators there were to be no gestures of any kind made by them, or they would be removed from the courtroom. The court stated if they pointed to the picture or did anything to try to influence the jury, it would not be tolerated. The solicitor insured the court these individuals would be instructed accordingly. Thereafter, the jury was drawn and the trial proceeded, with no further mention of the buttons.

Whether a defendant's fair trial rights may be violated when spectators wear photo buttons of the victim at his or her trial is a matter of first impression in this jurisdiction. The United States Supreme Court has recently indicated that the effect of spectators wearing such buttons on a defendant's fair trial rights was an open question. Carey v. Musladin, ___U.S. ___, ___, 127 S. Ct. 649, 653 (2006). In Carey, the state court, citing Holbrook v. Flynn, 475 U.S. 560 (1986), found Musladin had to show actual or inherent prejudice to succeed on his claim, and concluded the buttons "had not branded defendant with an unmistakable mark of guilt in the eyes of the jurors." Id. at 652. At the conclusion of the state appellate process, Musladin filed an application for writ of habeas corpus in federal district court, which the District Court denied. The Court of Appeals for the Ninth Circuit reversed, finding the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law. Id. In particular, the Court of Appeals relied on the Supreme Court's decisions in Estelle v. Williams, 425 U.S. 501 (1976) and Holbrook v. Flynn, 475 U.S. 560 (1986). Id. The Supreme Court vacated, finding there was a lack of holdings from the court regarding the potentially prejudicial effect of spectator courtroom conduct and, thus, the state court did not unreasonably apply clearly established federal law.[3] Id. at 654. In doing so, the Supreme

[3]The Supreme Court pointed out that the lack of guidance from its own court was reflected in the lower courts' widely divergent treatment of defendants' spectator-conduct claims, ranging from applying Williams and Flynn to spectator claims, to distinguishing Flynn on the facts, to ruling on the issue without relying on, discussing, or distinguishing Williams or Flynn. Musladin, 127 S. Ct. at 654.

Court observed that both Williams, wherein the State compelled the defendant to stand trial in prison garb, and Flynn, wherein the State seated four uniformed troopers immediately behind the defendant at trial, involved government-sponsored courtroom practices, as opposed to the spectator conduct complained of by Musladin. Id. at 653. While the court had articulated the test for inherent prejudice that applies to state conduct in Williams and Flynn, the court concluded it had never applied that test to spectators' conduct. The court then pointed out, "Indeed, part of the legal test of Williams and Flynn – asking whether the practices furthered an essential state interest – suggests that those cases apply only to state sponsored practices." Id. at 653-54.

Turning to our own established law, we note the general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the trial court, and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). As to courtroom conduct, our courts have held that a defendant in a criminal prosecution is constitutionally guaranteed a fair trial by an impartial jury, and in order to fully safeguard this protection, it is required that the jury render its verdict free from outside influence. State v. Carrigan, 284 S.C. 610, 613-14, 328 S.E.2d 119, 121 (Ct. App. 1985). In State v. Stewart, 278 S.C. 296, 295 S.E.2d 627 (1982), cert. denied, 459 U.S. 828 (1982), our supreme court stated as follows:

> The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution. While this right does not require a "perfect" trial, the very heart of a "fair trial" embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment.
>
> > Ideal conditions, it is true, are not to be expected, and verdicts should not be set aside by an appellate court for misconduct in a trial, unless the evidence is clear

> and convincing that extraneous influences so interfered with the conduct of the trial, or so pressed upon the jury, as to become factors in the result. State v. Weldon, 91 S.C. 29, 74 S.E. 43 (1912).
>
> It is the duty of the trial judge to see that the integrity of his court is not obstructed by any person or persons whatsoever. Shearer v. DeShon, 240 S.C. 472, 126 S.E.2d 514 (1962); 75 Am.Jur.2d Trial § 40 (1974). His exercise of this duty will not be disturbed absent an abuse of discretion.

Id. at 303-04, 295 S.E.2d at 630-31.

While research reveals our state courts have not addressed the issue of spectator courtroom conduct of wearing buttons displaying photos of the victim, our supreme court has addressed the issue of the government-sponsored courtroom practice of having uniformed officers present in the courtroom. In State v. Hill, 331 S.C. 94, 501 S.E.2d 122 (1998), cert. denied, 525 U.S. 1043 (1998), Hill asserted the presence of the officers "was a show of force which denied him a fair trial." Id. at 100-01, 501 S.E.2d at 125-26. Citing Holbrook v. Flynn, 475 U.S. 560 (1986), the court held that in order to prevail on such a claim, Hill was required to show that measures taken in the courtroom created either an actual or inherent prejudicial effect on the jury. Id. at 101, 501 S.E.2d at 126. "Inherent prejudice occurs when 'an unacceptable risk is presented of impermissible factors coming into play.'" Id. citing Flynn. Noting the court could not determine from the record how many uniformed officers were present, nor whether they were present to provide security or to testify, it found any actual prejudice in the case was wholly speculative, and Hill failed to present any evidence to show the presence of the officers had any effect on the jury. The court further determined that without anything more than Hill's mere assertion that six officers were present in the courtroom, the court could not find Hill had shown any inherent prejudice. Id.

In the case at hand, assuming arguendo that our state courts would apply the "actual or inherent prejudicial effect on the jury" test to this

spectator, as opposed to state-sponsored conduct, we conclude Paige has failed to show any actual or inherent prejudice under the circumstances of this case. The record shows the only mention of the buttons was prior to jury selection, and out of the presence of the jury venire, at which time defense counsel had to inquire whether the buttons did in fact depict a picture of the victim. There is no evidence of the size of the buttons, or the number of spectators who wore the buttons. While the trial court stated he would not require the individuals to remove the buttons, he insured that these spectators would not be called as witnesses, nor would they be seated in the front row. He further instructed that these individuals would not be allowed to make gestures, point to the pictures, or do anything in an attempt to influence the jury. Because no other mention was made of the buttons, this court cannot even determine that these spectators remained in the courtroom for the remainder of the trial or, if they did, whether they continued to wear the buttons. Simply put, there is absolutely no evidence of record that the jurors in this matter were ever exposed to these button photos, and, if they were, whether they could perceive that they depicted the victim. Accordingly, we find no actual or inherent prejudice to Paige based on the record before us. Additionally, the evidence is not clear and convincing of extraneous influences that "so interfered with the conduct of the trial, or so pressed upon the jury," as to become factors in the result of Paige's trial. State v. Stewart, 278 S.C. at 303, 295 S.E.2d at 631 (quoting State v. Weldon, 91 S.C. 29, 74 S.E. 43 (1912)).

Based on the foregoing, Paige's conviction is

AFFIRMED.

PIEPER, JJ., and CURETON, AJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jerry Gerald Serrette, Appellant.

Appeal From Horry County
John L. Breeden, Circuit Court Judge

Opinion No. 4321
Submitted December 1, 2007 – Filed December 4, 2007

APPEAL DISMISSED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., Office of the Attorney General, of

Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

PER CURIAM: Jerry Gerald Serrette appeals from his convictions for trafficking cocaine and possession with intent to distribute marijuana. Serrette contends this court should remand for a reconstruction hearing because the record of his original trial was lost during the nearly eleven-year gap between conviction and sentencing due to his fugitive status. We dismiss.

FACTS

On October 12, 1994, Serrette was convicted in absentia for trafficking cocaine and possession with intent to distribute marijuana. A bench warrant was issued, and over ten years later, Serrette was arrested and sentenced to six years' imprisonment for the cocaine charge and a concurrent four years' imprisonment on the marijuana charge. After filing a notice of appeal, Serrette learned his trial transcript had been destroyed pursuant to Rule 607(i), SCACR, which allows court reporters to reuse or destroy tapes of a proceeding after five years. On appeal, Serrette asks this court to remand for a reconstruction hearing. The State opposes a remand and contends the case should be dismissed.

LAW/ANALYSIS

Serrette argues he is entitled to a direct appeal, which cannot be meaningfully perfected without a trial transcript. He asks that we remand his case to have the record reconstructed and allow the circuit court to determine whether reconstruction is possible. The State counters that dismissing the appeal is an appropriate sanction because Serrette's willful decision to remain a fugitive from justice for nearly eleven years has "present[ed] an obstacle to orderly appellate review" as discussed in Ortega-Rodriguez v. United States, 507 U.S. 234, 251 (1993). We agree with the State's position.

Though South Carolina affords criminal defendants the opportunity to appeal, the right to an appeal may be lost through a variety of actions by an appellant, such as: (1) failure to timely serve a notice of appeal under Rule 203, SCACR; (2) failure to serve and file an initial brief and designation of matter under Rule 208(a)(4), SCACR; or (3) failure to serve and file a record on appeal and final brief under Rules 210 and 211, SCACR. See Rule 231, SCACR. Furthermore, the burden is on the appellant to provide the appellate court with an adequate record for review. State v. Williams, 321 S.C. 455, 464 n.4, 469 S.E.2d 49, 54 n.4 (1996).

In Ortega-Rodriguez v. United States, 507 U.S. 234 (1993), the United States Supreme Court found that a rule which *automatically* dismissed the appeal of a one time fugitive was not proper. The Court found that the fact the appellant was a fugitive had to "have an impact on the appellate process sufficient to warrant an appellate sanction." Id. at 249. In addition, the Court noted: "a long escape, even if ended before sentencing and appeal, may so delay the onset of appellate proceedings that the Government would be prejudiced . . . . We recognize that this problem might, in some instances, make dismissal an appropriate response." Id.

Serrette points out that our court has the authority to remand for a reconstruction of the record pursuant to China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); however, such a remedy would undoubtedly be futile considering the passage of over ten years' time between conviction and sentencing.[1] See State v. Ladson, 373 S.C. 320, 326, 644 S.E.2d 271, 274 (Ct. App. 2007) ("It is simply unrealistic and unreasonable to think that a trial judge and counsel can – under these circumstances [the passage of fourteen months] – reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules."). Furthermore, Serrette's own actions are the reason a transcript of the proceedings below is not available; this is not a situation where the court reporter's equipment malfunctioned at trial leading to a loss of the trial transcript. See Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983). We can divine no

[1] During the ten-year interim between the trial and sentencing, Serrette's trial counsel passed away.

reason why Serrette is entitled to a reconstruction of the record when the destruction of the transcript resulted from his willful decision to remain a fugitive.

Instead, we find Serrette's actions have "the kind of connection to the appellate process that [justifies] an appellate sanction of dismissal." Ortega-Rodriguez, 507 U.S. at 251 (1993); see also State v. Verikokides, 925 P.2d 1255, 1256 (Utah 1996) (holding that a criminal appeal may be dismissed if "the State can show that it has been prejudiced by the defendant's absence and the consequent lapse of time"); State v. Goree, 659 N.W.2d 344, 348-49 (Neb. Ct. App. 2003) (discussing cases in which appeals were dismissed based on the appellant's fugitive status prior to commencement of the appeal); State v. Lundahl, 882 P.2d 644 (Or. Ct. App. 1994) (upholding the dismissal of defendant's appeal where defendant's seven-year fugitive status significantly interfered with appellate process); cf. Lamb v. State, 293 S.C. 174, 359 S.E.2d 282 (1987); Martin v. State, 276 S.C. 514, 280 S.E.2d 210 (1981); and State v. Johnson, 44 S.C. 556, 21 S.E. 806 (1895) (all dismissing the appeals of escapees who fled during pendency of their appeal). Accordingly, Serrette's appeal is hereby

DISMISSED.

HEARN, C.J., KITTREDGE, J., and CURETON, A.J., concur.