The Supreme Court of South Carolina

In the Matter of Andrea S. Canupp, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 15, 1993, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated April 3, 2006, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

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

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

May 4, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17

May 8, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Johnell Porter, Respondent

v.

State of South Carolina, Petitioner.

ORDER

Respondent (Porter) filed a petition for rehearing in which he asked the Court to reconsider its opinion reversing the post-conviction relief court's finding of ineffective assistance of counsel.

We deny the petition for rehearing, withdraw the former opinion, and substitute the attached opinion.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

IT IS SO ORDERED.

Columbia, South Carolina

May 1, 2006

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Johnell Porter, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal from Chester County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 26121
Submitted October 19, 2005 – Refiled May 1, 2006

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Molly R. Crum, all of Columbia, for Petitioner.

Assistant Appellate Defender Aileen P. Claire, South Carolina Office of Appellate Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: The post-conviction relief (PCR) court granted Johnell Porter (Porter) a new trial after finding that counsel was ineffective for failing to file a *Brady* motion, failing to investigate the validity of a photographic identification, and failing to interview a witness. This Court granted the State's petition to review the PCR court's decision. We reverse.

FACTUAL / PROCEDURAL BACKGROUND

Porter was indicted in 1980 for the armed robbery of Morris Jewelers. Porter pled guilty and was sentenced to twelve years confinement, consecutive to any sentence imposed by other jurisdictions.[1] Porter did not appeal his guilty plea or sentence.

Porter applied for PCR in 1984. The PCR petition was dismissed without prejudice, with leave to re-file when Porter returned to South Carolina to serve his sentence. Porter refiled his petition for PCR in 1997, after being returned to South Carolina. This petition was also dismissed. Porter subsequently moved for a new PCR hearing, which was granted. At the hearing, Porter argued that his trial counsel was ineffective for failing to file a *Brady* motion, failing to investigate the validity of a photographic identification, and failing to interview a witness. The PCR judge agreed with Porter and granted Porter a new trial.

The State appealed, raising the following issues for review:

I. Did the PCR court err in finding Porter's trial counsel ineffective for failing to file a *Brady* motion?

II. Did the PCR court err in finding Porter's trial counsel ineffective for failing to investigate the validity of the photographic identification?

[1] At the time of the plea, Porter was incarcerated in North Carolina.

III. Did the PCR court err in finding Porter's trial counsel ineffective for failing to interview a witness?

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and conclusions of law. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (citing *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995)). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). If no probative evidence exists to support the findings, this Court will reverse. *Pierce v. State*, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000) (citing *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996)).

LAW / ANALYSIS

I. *Brady* Motion

The State contends that the PCR court erred in finding that Porter's trial counsel was ineffective for failing to file a *Brady* motion. We agree.

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An applicant may attack the voluntary and intelligent character of a guilty plea entered on the advice of counsel only by demonstrating that counsel's representation was below an objective standard of reasonableness. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). Further, the applicant must show that there is a reasonable probability that he would have insisted on proceeding to trial on the matter instead of pleading guilty. *Id.* Additionally, the applicant has the burden of proving the allegations of the PCR petition. *Bannister v. State*, 333 S.C. 298, 302, 509 S.E.2d 807, 809 (1998).

The *Brady* disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. *State v. Kennerly*, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, (1985). Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. *Kennerly*, 331 S.C. at 453, 503 S.E.2d at 220. "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381. Furthermore, the prosecution has the duty to disclose such evidence even in the absence of a request by the accused. *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, (1976).

In the instant case, the prosecution did not possess any material evidence which was not disclosed to Porter's trial counsel. The evidence Porter claims his trial counsel failed to obtain through a *Brady* motion consists of the fact that the witness did not identify Porter at the crime scene. This information was immaterial in light of the subsequent identification of Porter in a photographic line-up. Further, Porter has failed to provide any evidence of probative value that would indicate the outcome of the proceeding would have been different. Stated otherwise, the confidence of the proceeding has not been undermined. Regardless of the witness' inability to identify Porter at the scene of the crime, the fact remains that Porter was positively identified by the witness in a photographic line-up. Moreover, Porter's co-defendant also indicated a willingness to identify Porter as one of the perpetrators. In addition, Porter's trial counsel testified that he informed Porter that the solicitor would request a life sentence if Porter went to trial and was found guilty. Accordingly, we find that the alleged nondisclosure was not material exculpatory evidence.

While the materiality of the evidence is important, the dispositive issue in this case is whether trial counsel rendered reasonably effective

assistance under prevailing professional norms. The United States Supreme Court has held that, although not required to do so by law, if a prosecutor adopts an "open file policy" where the defense is allowed to review the prosecution file in satisfaction of the prosecution's discovery obligations and the duty to disclose material exculpatory evidence as a matter of the due process clause, defense counsel may reasonably rely on that file to contain all materials the state is obligated to disclose.[2] *Strickler v. Greene*, 527 U.S. 263, 283 n.23, 119 S.Ct. 1936, 1949 n.23 (1999).

Porter's trial counsel testified at the PCR hearing that he did not file a formal *Brady* motion because the solicitor had an open file policy. Porter's trial counsel was allowed to review all the evidence in the solicitor's file. Under *Strickler*, Porter's trial counsel's failure to file the *Brady* motion was reasonable in light of the open file policy.

For these reasons, we find that Porter's trial counsel's failure to file a *Brady* motion did not constitute ineffective assistance of counsel.

II. Photographic Line-up

The State contends that the PCR court erred in finding that Porter's trial counsel was ineffective for failing to investigate the validity of the photographic identification. We agree.

Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

[2] It is important to note that we do not find that the prosecution is presumed to comply with *Brady* simply by instituting an open file policy. The duty to disclose under *Brady* applies to the prosecution regardless of the manner in which the prosecution chooses to do so.

Porter's trial counsel testified that he had the opportunity to examine the photographic line-up from which Porter was identified. Counsel further testified that the line-up was reasonable. The photographic line-up formed the basis upon which the arrest warrant for Porter was issued. No probative evidence was presented at the PCR hearing to show that the statement in the arrest warrant was false, [3] or that the witness's identification of Porter from the photographic line-up was false or unreasonable. Additionally, no evidence was presented at the PCR hearing showing that further investigation would have lead to a different result. Accordingly, we hold that Porter's trial counsel's failure to further investigate the identification was not deficient, and thus did not rise to the level of ineffective assistance of counsel.

III. Witness Interview

The State argues that the PCR court erred in finding that Porter's trial counsel was ineffective for failing to interview a witness. We agree.

Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR. *Bannister,* 333 S.C. at 303, 509 S.E.2d at 809.

Porter's trial counsel testified that he did not interview the witness because he believed the information that was given to him by the solicitor and the chief of police was true. Despite the improvidence of counsel's reliance on these statements alone, Porter has not presented any evidence showing that an interview of the witness would have yielded a result different from that which Porter's trial counsel believed at the time of the plea. Porter pled guilty in light of the complete information that was available at that time. Therefore, we hold that Porter's trial counsel's failure to interview a witness did not amount to ineffective assistance of counsel.

[3] The Chief of Police made the sworn statement in the arrest warrant that the "[d]efendant was identified as one of the suspects involved in the armed robbery of Morris Jewelers in Great Falls, SC. [A witness] identified the defendant in a photo-line up [sic]."

Because we find that trial counsel's performance was not deficient, Porter has not satisfied the first prong of *Strickland*. Accordingly, a finding of prejudice is not required.

CONCLUSION

For the foregoing reasons, we reverse the PCR court's ruling and reinstate Porter's conviction and sentence.

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent and would affirm the post-conviction relief (PCR) judge's order because I find there is some evidence of probative value in the record to support his findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The PCR judge found trial counsel was ineffective in failing to file a Brady motion. Had such a motion been made, the State presumably would have revealed the fact that the witness who identified Porter in a photo line-up had been unable to identify him at the scene, a fact which would have had impeachment value had the witness testified at trial.

The first question is not whether the PCR court erred in finding counsel's performance deficient in failing to make a Brady request, but rather there is any evidentiary support in the record for the finding.[1] Cherry, *supra*. While I may not have reached the same conclusion as the PCR judge regarding counsel's performance, I cannot say it lacks evidentiary support especially in light of trial counsel's testimony that he did no independent investigation but instead relied solely on information supplied by law enforcement and by the solicitor's office.

The second question is whether the record contains any evidence of probative value to support the PCR judge's finding that Porter established prejudice as the result of this deficient performance, that is, evidence that but for counsel's deficient performance Porter would not have pled guilty but would have insisted on going to trial. In my opinion, Porter's testimony that he would not have pled had he had all relevant information is sufficient to uphold the PCR judge's prejudice finding. E.g., Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994) (great appellate deference to PCR judge's

[1] Certainly had the PCR found counsel's performance not deficient because he reasonably relied upon the solicitor's open file policy, that finding would be upheld under Cherry. Nothing in Strickler v. Greene, 527 U.S. 263 (1999), however, precludes a finding that such reliance was not reasonable. This is especially so where, as here, the undisclosed evidence is not a document or other physical item, but rather something intangible, a witness's non-identification.

credibility findings required Court to uphold judge's determination even where testimony at PCR hearing flatly contradicted by trial record).

While I may not have made the same findings as did the PCR judge on the failure to file a Brady motion claim, under our limited scope of review these findings should be upheld. Cherry, *supra*. I therefore respectfully dissent, and would affirm the grant of PCR to Porter.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Willie Baxter, Appellant,

v.

Martin Brothers, Inc,
Employer, and Capital
City Insurance, Carrier, Respondents.

Appeal From Sumter County
Howard P. King, Circuit Court Judge

Opinion No. 26142
Heard March 9, 2006 – Filed May 1, 2006

AFFIRMED AS MODIFIED

Stephen B. Samuels, of McWhirter, Bellinger & Associates, of Sumter, for Appellant.

Donald L. Van Riper, of Collins & Lacy, of Columbia, for Respondents.

JUSTICE PLEICONES: This is a workers' compensation case. A single commissioner of the Workers' Compensation Commission awarded attorney fees to Appellant Willie Baxter (Appellant) in connection with Appellant's motion to compel Respondents Martin Brothers, Inc. and Capital

City Insurance (Respondents) to comply with a consent order. The commission's appellate panel reversed the award of attorney fees, holding that under the Workers' Compensation Act,[1] the commissioner lacked authority to grant such an award. On further review, the circuit court affirmed the appellate panel's decision. We certified the case pursuant to Rule 204(b), SCACR, and we now affirm as modified.

FACTS

After Respondents failed to satisfy most of the obligations imposed on them by the consent order, Appellant moved the commission to order Respondents to comply with the order and to hold Respondents in contempt. Agreeing with Appellant that Respondents had failed to comply with the consent order, the single commissioner ordered Respondents to "immediately comply" with the order and to "provide proof of compliance to [Appellant's] counsel within twenty days of the hearing." The commissioner further ordered Respondents to "pay $250.00 to [Appellant's] counsel for attorney's fees due as a result of bringing this Motion." The commissioner then held that if Respondents were to fail to provide the proof of compliance within twenty days, then Respondents would "be held in contempt" and "a further hearing [would] be held to determine appropriate penalties and sanctions for contempt."

Respondents appealed to the appellate panel, challenging only the award of attorney fees. Respondents argued that the commissioner lacked authority to award attorney fees in connection with the motion, because neither the consent order nor the Workers' Compensation Act provided such authority. See Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) (citing "[t]he general rule ... that attorney's fees are not recoverable unless authorized by contract or statute"). In response, Appellant argued that the rule that attorney fees can be awarded as a litigation expense only if permitted by statute or contract was inapplicable. Appellant asserted that the commissioner had awarded attorney fees not as an expense of

[1] S.C. Code Ann. §§ 42-1-10 *et seq.* (1976 and Supp. 2005).

bringing the motion to compel, but rather as a sanction for contempt pursuant to South Carolina Code sections 42-1-540[2] and 42-3-150.[3]

The appellate panel reversed the award. The panel found that the single commissioner had awarded attorney fees as a litigation expense, not as a sanction for contempt. The panel then held that the commissioner lacked authority to award attorney fees as a litigation expense.

Appellant appealed to the circuit court, again arguing that the commissioner had properly awarded attorney fees as a sanction for contempt. The court agreed with Appellant as to the nature of the award, but nevertheless held that the decision of the appellate panel was correct. The court found that under the Workers' Compensation Act, the commissioner lacked a general power of contempt and therefore lacked authority to award attorney fees as a sanction for contempt. Thus, the court affirmed the decision of the appellate panel to reverse the award of attorney fees.

ISSUES

I. Whether the single commissioner awarded attorney fees as a litigation expense or as a sanction for contempt.

II. Whether the single commissioner had authority to award attorney fees.

ANALYSIS

South Carolina Code section 1-23-380(A)(6)[4] governs our review of workers' compensation decisions. Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000). We must determine whether the circuit court properly determined whether the appellate panel's findings of fact are

[2] S.C. Code Ann. § 42-1-540 (1976).
[3] S.C. Code Ann. § 42-3-150 (1976).

[4] S.C. Code Ann. § 1-23-380(A)(6) (2005).

supported by substantial evidence in the record and whether the panel's decision is affected by an error of law. See id. at 455, 535 S.E.2d at 442 (holding that the full commission is "the ultimate fact finder").

I. NATURE OF THE AWARD

It is clear from the single commissioner's order that he awarded attorney fees as an expense of bringing the motion to compel, not as a sanction for contempt. The commissioner did not even hold Respondents in contempt. Rather, the commissioner warned that Respondents *would* be held in contempt if they failed to provide proof of compliance with the consent order within twenty days of the hearing. Not only did this warning not constitute a holding of contempt, but also it related to the requirement that Respondents provide proof of compliance, not to their obligation to pay attorney fees.[5]

The circuit court therefore erred in reversing the appellate panel's finding that the single commissioner awarded attorney fees as a litigation expense.

II. AUTHORITY TO AWARD ATTORNEY FEES

As the appellate panel held, the single commissioner lacked authority to award attorney fees as a litigation expense. "The general rule is that

[5] The record indicates that Respondent failed to comply with the single commissioner's order to comply with the consent order. Appellant moved the full commission to compel and to hold Respondents in contempt. The full commission referred the matter to the appellate panel for resolution contemporaneous with the resolution of this attorney-fee appeal. The appellate panel decided the attorney-fee issue as discussed above, but remanded the case "to the jurisdictional commissioner for a hearing on the [second] Motion to Compel." Consequently, whether Respondents are in contempt for violating the single commissioner's order to comply with the consent order is not before us.

attorney's fees are not recoverable unless authorized by contract or statute." Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). Neither the consent order nor any statute provides for an award of attorney fees. Although the circuit court failed to address the proper issue, the court reached the correct result in affirming the appellate panel's decision. We therefore affirm as modified.

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, WALLER, JJ., and Acting Justice Roger L. Couch, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Spartanburg County Magistrate Johnny Lee Cash, Respondent.

Opinion No. 26143
Submitted April 18, 2006 – Filed May 8, 2006

REMOVED FROM OFFICE

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

Robert M. Holland, of Spartanburg, for respondent.

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

FACTS

On November 2, 1991, respondent was married. He worked as a magistrate's constable for several years, became a part-

time magistrate in the late 1990s and, eventually, a full-time magistrate in 2001.

Respondent met Female 1 when he was working as a magistrate's constable. They were co-workers on friendly terms until sometime in the summer of 2003 when she began to confide in respondent about certain employment-related concerns and her fear that her job was in jeopardy due to circumstances involving another magistrate.

Female 1 became aware that respondent frequently worked on a boat at a friend's house during the evening. Respondent told Female 1 they could talk at the friend's house.

Female 1 met respondent at the friend's' house on a few occasions and, on at least one of those occasions, engaged in sexual activity. The sexual activity constituted adultery.

Respondent and Female 1 acknowledge engaging in sexual activity on a second occasion.

Female 1 reported to ODC that, although she did have a close relationship with respondent, she viewed respondent's flirting as horseplay and never took it seriously. Female 1 later informed ODC that she engaged in sexual activity with respondent only because his first initiation of sex surprised her and, due to her fragile emotional state caused by other employment-related concerns, including fear of losing her job, she believed she could not refuse his advances.

Respondent represents he believed the sexual activity with Female 1 was mutually desired. Respondent also represents that Female 1 neither appeared emotionally fragile nor did she say or do anything to suggest to him that her involvement was other than completely free and voluntary.

Female 2 has worked for the Magistrate Court for more than twenty years. Respondent met her while he was a constable.

When he became Chief Magistrate in early 2004, respondent's supervisory responsibilities caused him to interact more frequently with Female 2.

According to respondent, he and Female 2 realized they were both in failed relationships with their spouses and eventually fell in love. Respondent acknowledges engaging in extra-marital sexual activity with Female 2 on several occasions while she was employed by the Spartanburg Magistrate Court, including on two occasions while attending court-related seminars out of town.

On March 18, 2005, respondent's wife filed a complaint seeking a divorce from respondent on the ground of adultery. The divorce was granted by order filed August 5, 2005. Female 2 was also divorced from her husband and, subsequently, married respondent. Both continue to be employed in the Spartanburg Central Magistrate Court.

Before respondent's romantic relationship with Female 2, but while he was the Chief Magistrate, respondent made administrative changes in the Spartanburg Central Magistrate Court that included a promotion for Female 2. Respondent contends the promotion was based exclusively on merit, experience, and longevity, but acknowledged that, in hindsight, it may have had the appearance of being based on favoritism.

LAW

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

public confidence in the integrity and impartiality of the judiciary); Canon 4 (judge shall conduct his extra-judicial activities as to minimize the risk of conflict with his judicial obligations); and Canon 4A(2) (judge shall conduct all extra-judicial activities so they do not demean the judicial office). By violating the Code of Judicial Conduct, respondent admits he has also violated Rule 7(a)(1) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and remove respondent from office. It is therefore ordered that respondent be removed from office as of the date of the filing of this opinion.

REMOVED FROM OFFICE.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Dillon County
Magistrate John R. Davis, Respondent.

Opinion No. 26144
Submitted April 18, 2006 – Filed May 8, 2006

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Deborah S. McKeown, Assistant Disciplinary Counsel, of Columbia, for The Office of Disciplinary Counsel.

John R. Davis, of Latta, pro se.

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

FACTS

At approximately 11:30 p.m. on October 1, 2005, Officer Jones of the Latta Police Department arrested an individual,

respondent's uncle, for driving under the influence and, thereafter, transported him to the Dillon County Detention Center. At approximately 12:35 a.m. on the morning of October 2, 2005, respondent's uncle registered a 0.14% on the Datamaster test administered at the detention center by Trooper Byrd.

Thereafter, respondent's uncle contacted respondent from the detention center and advised he had been arrested for driving under the influence. At approximately 1:20 a.m., respondent entered the booking area at the Dillon County Detention Center, conducted a special bond proceeding for his uncle, and allowed his uncle to sign a personal recognizance bond. Respondent then left the detention center; he did not ascertain whether there were other inmates awaiting bond hearings. At approximately 1:41 a.m., respondent was released by the detention center.

Respondent acknowledges he should not have presided over his uncle's bond hearing. He further acknowledges he was not the magistrate on call that evening, that he did not seek permission to conduct the special bond proceeding, that he failed to ascertain if there were other inmates awaiting bond hearings, and that he did not conduct bond hearings for any other hearings awaiting bond hearings. Respondent also failed to inform the chief magistrate that a special bond proceeding had been conducted.

On one prior occasion in 2004, respondent conducted a special bond hearing for a defendant charged with two counts of burglary and grand larceny and released that defendant on a personal recognizance bond. In that matter, respondent failed to notify the victim of the bond hearing, failed to ascertain if there were other inmates awaiting bond hearings, and did not conduct bond hearings for any other inmates awaiting bond hearings. Respondent also failed to inform the chief magistrate that a special bond proceeding had been conducted.

Respondent acknowledges that the preferential treatment given by him to these two defendants violated the Chief Justice's

Administrative Order of November 29, 2000, as well as the Code of Judicial Conduct. ODC states that, to its best knowledge and belief, respondent has been forthright and fully cooperative with its inquires into this matter.

LAW

By his misconduct, respondent has violated the following Canons of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity of the judiciary); Canon 1A (judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity of the judiciary will be preserved); Canon 2 (judge shall avoid impropriety in all activities); Canon 2A (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity of the judiciary); Canon 2B (judge shall not allow familial or other relationships to influence his judicial conduct or judgment); Canon 3 (judge shall perform duties of judicial office impartially and diligently); Canon 3(B)(1) (judge shall hear and decide matters assigned to the judge except in those in which disqualification is required); Canon 3B(2) (judge shall be faithful to the law and maintain professional competence in it); Canon 3B(5) (judge shall perform judicial duties without bias or prejudice); Canon 3(B)(7) (judge shall not consider ex parte communications); Canon 3B(8) (judge shall dispose of all judicial matters promptly, efficiently, and fairly); Canon 3(E)(1)(a) (judge shall disqualify himself where he has a personal bias or prejudice concerning a party); and Canon 3(E)(1)(d)(i) (judge shall disqualify himself where a person within the third degree of relationship is a party to the proceeding). Respondent further admits he has also violated the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for judge to violate the Code of Judicial Conduct), Rule 7(a)(7) (it shall be ground for discipline for judge to willfully violate a valid court order issued by a court of this state), and Rule 7(a)(9) (it shall be a ground for discipline for judge to violated the Judge's Oath of Office).

CONCLUSION

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State of South Carolina, Petitioner,

v.

Gary Thomas Hill, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26145
Heard March 22, 2006 – Filed May 8, 2006

REVERSED

Deputy Director for Legal Services Teresa A. Knox, Assistant Chief Legal Counsel J. Benjamin Aplin, and Legal Counsel Tommy Evans, Jr., all of South Carolina Department of Probation, Parole & Pardon Services, of Columbia, for Petitioner.

J. Stephen Welch and Adam M. Cain, both of The Welch Law Firm, of Greenwood, for Respondent.

CHIEF JUSTICE TOAL: The trial court revoked Respondent's probation after he committed several probation violations. The court of appeals reversed in part, holding that Rule 5, SCRCrimP (titled "Disclosure in Criminal Cases") and the disclosure rule announced in *Brady v. Maryland*[1] applied to probation revocation proceedings. The State appealed and we now reverse.

FACTUAL/PROCEDURAL BACKGROUND

Respondent received a twenty year prison sentence for convictions of second degree arson, second degree burglary, malicious injury to personal property, driving under the influence – fourth offense, and criminal domestic violence – third offense. The trial court suspended the sentence to ten years imprisonment and five years probation. Respondent began his probation in 1997.

Approximately five months before Respondent's probation was scheduled to end, Respondent's probation agent received a call from the Department of Social Services alleging that Respondent was in possession of a firearm and had been pointing the weapon at his son. The probation agent contacted Respondent and ordered him to report to the probation office.

While meeting with his probation agent at the probation office, Respondent admitted a .22 caliber rifle was in his home. Respondent alleged the rifle was his son's and that the son sometimes kept the gun in the house. At the time, Respondent's son was 11 or 12 years old. The probation agent informed Respondent that he and Respondent would be accompanying some additional probation agents to Respondent's house, that the agents were going to search the house, and that Respondent would be arrested for violating his probation if the agents discovered any weapons. At that point, Respondent asked to go into the hallway and get a drink of water. The probation agent granted Respondent's request, and after reaching the water fountain, Respondent ran down the hallway and out of the building. Seeing

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

Respondent's attempt to escape, the probation agent ordered Respondent to stop.

As the probation agent pursued Respondent, three other agents joined in the pursuit. After exiting the building, Respondent locked himself in his vehicle and attempted to leave the probation office parking lot. The four agents surrounded Respondent's vehicle, drew their firearms, and ordered Respondent to get out of his vehicle. Respondent, however, started his vehicle and attempted to drive away from the premises. Although at least one agent attempted to prevent Respondent from leaving by standing in front of his vehicle, Respondent continued to drive forward. The agent obstructing Respondent's exit was able to avoid being struck by Respondent's vehicle, and at this point, one of the agents began firing his weapon into Respondent's car. Although Respondent received three gunshot wounds, he managed to drive out of the parking lot and escape. Respondent was arrested later at the emergency room.

The State charged Respondent with violating his probation by possessing a firearm, failing to obey his probation agent's commands, and failing to avoid injurious habits by attempting to run over a probation agent with his car. Prior to Respondent's revocation proceeding, Respondent served his probation agent with a request for disclosure of information pursuant to Rule 5 and *Brady*.[2] At some point, Respondent filed a motion to continue the revocation proceeding because his probation agent refused to comply with the disclosure requests.

At the hearing on Respondent's motion for a continuance, the court addressed Respondent's *Brady* and Rule 5 requests. In a reference to S.C. Code Ann. § 24-21-290 (Supp. 2005)[3] (titled "Information received by

[2] After the court revoked his probation, Respondent served the Tenth Circuit Solicitor's Office with *Brady* and Rule 5 requests. These requests, however, are not the subject of this appeal.

[3] The version of the statute appearing in the 2005 code supplement is identical to the version in effect at all times relevant to this case.

probation agents privileged"), the court advised that a statute provided for the confidentiality of the department of probation's records unless they are ordered disclosed by the court. The court instructed Respondent to bring a motion under § 24-21-290 if he was indeed seeking the probation agent's file. Respondent, however, filed no additional motions or requests. The trial court held Respondent's probation revocation proceeding approximately one month later, and at the conclusion of the proceeding, the court revoked Respondent's probation and sentenced him to seven years imprisonment.

Respondent moved for reconsideration, arguing that the police report covering his escape from the probation office was unfinished at the time of his probation revocation proceeding and that the final police report contained mitigating evidence.[4] During the hearing on Respondent's motion for reconsideration, Respondent alleged he did not intend to harm any of the probation agents and that the probation agents were not in any danger of sustaining serious injury during his escape attempt.[5] After hearing Respondent's offered evidence, including testimony from Respondent himself, the court denied Respondent's motion. Respondent appealed.

The court of appeals affirmed the trial court's decision on two issues not related to this appeal,[6] but the court reversed the revocation of

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[4] Respondent obtained the police report in response to subpoenas he served on the South Carolina Law Enforcement Division (SLED) and the Tenth Circuit Solicitor's Office.

[5] At the beginning of the hearing, the trial court asked Respondent whether he was introducing mitigating evidence or offering evidence disputing facts that were already determined. Because Respondent indicated he sought to dispute the fact that he intended to harm any of the probation agents during his escape, Respondent specified that his motion was a motion for a new trial.

[6] These issues involved 42 U.S.C. § 1983 and Rules 28 and 29, SCRCrimP. The court of appeals found these issues were not preserved for review. *State v. Hill*, 359 S.C. 301, 315-16, 597 S.E.2d 822, 830 (Ct. App. 2004).

Respondent's probation. The court of appeals held that *Brady* and Rule 5 applied to probation revocation proceedings because South Carolina courts had extended these rules "beyond criminal trial proceedings" and because a probation revocation proceeding involves a determination of guilt. *Hill*, 359 S.C. at 312-3, 597 S.E.2d at 828-29.

The State argued that even if *Brady* and Rule 5 applied, Respondent's due process rights were not violated because Respondent eventually received the requested information, presented the information at his motion for a new trial, and the trial court affirmed its decision. Disagreeing, the court of appeals stated "[h]aving already found [Respondent] violated his probation . . . we believe it would have been difficult for the court to be completely objective during the subsequent proceeding. Thus we find the information was material and the failure to disclose it deprived [Respondent] of a fair hearing." *Id*. at 314-15, 597 S.E.2d at 829-30. The State appealed.

This Court granted certiorari to review the court of appeals' decision and the State raises the following issues for review:

I. Did the court of appeals err in extending *Brady* and Rule 5 to probation revocation proceedings?

II. If *Brady* and Rule 5 apply to probation revocation proceedings, did the State violate either rule?

LAW/ANALYSIS

I. *Brady* and Rule 5's Applicability to Probation Revocation

The issues of whether the specific requirements of *Brady* and Rule 5 apply to probation revocation proceedings are novel questions in South Carolina. The State argues that the court of appeals erred in applying both rules to these proceedings, and we agree.

A. *Brady*

Brady provides that a criminal defendant is denied due process when the prosecution suppresses evidence that is favorable to him. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In *Brady*, an appeal from a state court murder conviction, the prosecution failed to disclose that a co-defendant previously admitted to the killing. *Id*. at 84. The Maryland court of appeals held that the failure to disclose this evidence constituted a denial of due process, and the United States Supreme Court agreed. *Id*. at 86. Though the court addressed the due process violation in dicta, *see id.* at 92 (White, J., concurring), the rule requiring the disclosure of evidence favorable to the accused is commonly known as the *Brady* rule.

Although *Brady* provides a bright-line rule for the disclosure requirements necessary to guarantee that a criminal defendant receives due process, it is equally fundamental that due process requirements are not rigid and inflexible. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Instead, due process only calls for such protections as the particular situation demands. *Id*. In the specific areas of probation and parole revocation, both this Court and the United States Supreme Court have provided guidance as to what due process requires.

In *Morrissey v. Brewer*, 408 U.S. 471, 474 (1972), a parolee alleged that minimal due process required that he be given a pre-revocation hearing. The court recognized that although both criminal trials and parole revocations involve potential deprivations of liberty, revocation "deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Id*. at 480. Similarly, the court recognized the state's "overwhelming interest" in being able to return the parolee to prison without the burden of a new criminal trial. *Id*. at 483. The court qualified this statement, however, by noting that the state had "no interest in revoking parole without some informal procedural guarantees." *Id*. at 483-84. Ultimately, the court held that fundamental justice required a parolee be given a reasonable opportunity to explain an alleged violation. *Id*.

Importantly, the court in *Morrissey* left the states with the responsibility of determining the exact procedures to be followed. *Id*. at 488-

89. Instead of detailing specific procedures, the court limited its declaration to describing the minimum requirements of due process. *Id*. The court listed these requirements as (a) written notice of the alleged violations, (b) disclosure to the parolee of the evidence against him, (c) an opportunity to be heard in person and to present witnesses and evidence, (d) the right to confront and cross-examine, (e) a neutral and detached hearing body, and (f) a written decision from the hearing body. *Id*.

In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the United States Supreme Court dealt with whether due process required that a probation violator be given a hearing before his probation was revoked. In *Gagnon*, the court drew almost exclusively from its opinion in *Morrissey*; relying heavily on the "limited liberty" interest subject to deprivation in the probation and parole setting. *Gagnon*, 411 U.S. at 781. Adhering closely to *Morrissey*'s reasoning, the court quickly determined that due process required that a probationer be given a hearing before his probation was revoked. *Gagnon*, 411 U.S. at 782.

Additionally, the court further elaborated on the differences between criminal trials and probation revocation proceedings. For example, the court advised that a probation agent's function is not to compel conformance to a strict code of behavior, but rather, to supervise a course of rehabilitation. *Id*. at 784. For this reason, the court noted that probation agents are often armed with the power to unilaterally recommend or declare revocation. *Id*. While the court recognized the importance of the liberty interests at stake in probation revocation proceedings, the court ultimately reversed the lower court's decision requiring the states to provide counsel for probationers in revocation proceedings. *Id*. at 787. The court stated, "there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer have stakes in preserving these differences." *Id*. at 788-89. The court resolved the issue of a probationer's right to counsel in a revocation proceeding by recommending a case by case approach; an approach dependent on the complexity of the alleged violations

and whether the probationer's ability to meaningfully contest the alleged violations required the services of a trained advocate.[7] *Id*. at 788.

This broad framework, supplied by the United States Supreme Court's interpretation of federal due process guarantees, is somewhat amorphous. *Morrissey* and *Gagnon* establish that a probationer charged with a violation must be afforded minimal due process. This allows us to re-phrase the question presented to read: "does minimal due process require that *Brady* be extended to probation revocation proceedings?" We conclude that the court of appeals erred in answering "yes." Both reasons provided by the court of appeals for applying *Brady* are fundamentally incorrect.

First, the court of appeals reasoned that the differences between a criminal trial and a revocation proceeding were irrelevant to the issue because South Carolina courts had extended *Brady* to sentencing proceedings and guilty pleas. *Hill*, 359 S.C. at 312, 597 S.E.2d at 828. Although the court of appeals correctly noted that guilty pleas and sentencing proceedings are not criminal trials in the literal sense, the court of appeals overlooked the fact that, like a trial, both of these actions occur before the court imposes a criminal sentence. Probation revocation, by comparison, occurs after a criminal sentence is imposed. In this analysis, the intervening criminal sentence is the crucial point at which the due process guarantees dramatically change. Because he is already covered with a criminal sentence, a

[7] In South Carolina, Rule 602(A), SCACR, provides indigent probationers with counsel at a revocation hearing.

Additionally, at first glance, *Gagnon*'s resolution of the right to counsel issue appears to be at odds with *Mempa v. Wash. Bd. of Prison Terms and Paroles*, 389 U.S. 128 (1967). However, *Mempa* dealt with probation revocation in a rather unique context. In *Mempa*, two defendants received probation as a result of guilty pleas. *Id*. at 130, 132. When the defendants were later charged with probation violations, the revocation court conducted full sentencing hearings on the original criminal charges. *Id*. at 135. The Supreme Court held that due process required that the probationers have counsel at these proceedings because they amounted to "deferred sentencing hearings." *Id*. at 137. In our view, *Mempa* and *Gagnon* are not in conflict.

probationer is subject only to a deprivation of "limited liberty" in a revocation proceeding.

Second, the court of appeals erred in reasoning that "[s]imilar to a sentencing or guilty plea proceeding, a probation revocation proceeding involves a determination of guilt." *Id*. at 312-13, 597 S.E.2d at 828. In elaborating on the framework established by the United States Supreme Court, we have stated that while the underlying probation violations "may themselves be criminal offenses, the probation revocation proceeding is not a criminal trial of those charges, but a more informal proceeding with respect to notice and proof of the alleged violations." *State v. Franks*, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981) (holding that the Fourth Amendment's requirement that a neutral magistrate issue an arrest warrant is not applicable to a probationer charged with a violation). Thus, our Court has recognized "that the rights of an offender in a probation revocation hearing are not the same as those extended him . . . upon the trial of the original offense." *Id*. at 639, 281 S.E.2d at 228; *see also Duckson v. State*, 355 S.C. 596, 586 S.E.2d 576 (2003) (recognizing the differences between parole and probation revocation proceedings and criminal trials).

We hold that *Brady*'s rule should not, and indeed, cannot be applied to probation revocation proceedings. *Brady*'s requirement that evidence favorable to the accused be disclosed is necessary in criminal trials because a criminal conviction is a determination of guilt beyond a reasonable doubt. *Brady* is based on the premise that the suppression of evidence that is material to guilt or punishment casts the reliability of the verdict into doubt; therefore, the guilt standard cannot have been met. In contrast, probation revocation proceedings have a much lower evidentiary threshold. Instead of requiring proof beyond a reasonable doubt, probation is properly revoked upon an evidentiary showing of facts *tending to establish* a violation. *State v. White*, 318 S.C.130, 136, 61 S.E.2d 754, 756 (1950). In our view, a disclosure standard that governs when nearly concrete proof is required is unworkable and impractical in a proceeding where a party need only *tend* to look guilty.

Our opinion in *Franks* provides the guiding principle for this case: while the underlying probation violations may be criminal offenses, the probation revocation proceeding is not a criminal trial of those charges. 276 S.C. at 638, 281 S.E.2d at 228. In South Carolina, a probationer must avoid injurious or vicious habits, avoid persons or places of disreputable character, permit the probation agent to visit at his home or elsewhere, work faithfully at suitable employment, obey a curfew, support his dependents, and follow his probation agent's instructions and advice. S.C. Code Ann. § 24-21-430 (Supp. 2005). The subjective natures of these factors further support the distinctions between probation revocation proceedings and criminal trials, as well as the conclusion that *Brady*'s disclosure rule is ill-suited for applicability to probation revocation.

Because they are fundamentally different from a criminal trial and other pre-sentencing proceedings, we decline to extend the *Brady* rule to probation revocation proceedings.[8] The relevant precedent, particularly *Gagnon*, *Morrissey*, and *Franks*, already require that a probationer be afforded reasonable discovery. Accordingly, we reverse the court of appeals' decision.

B. Rule 5, SCRCrimP

[8] In other circumstances, § 24-21-290 (providing that a probation agent's file is privileged) could prove critical to a due process analysis. For example, during oral argument, Respondent constructed a hypothetical case in which, while charging a probationer with violating his probation by using illegal drugs, the probation office possessed a negative drug test for the probationer. Respondent alleged that failing to extend *Brady* to revocation proceedings would operate to suppress the exculpatory drug test. This hypothetical is not instructive. The hypothetical improperly presumes (1) that the probation office would seek revocation in the face of a negative drug test, and (2) that the trial court would deny a § 24-21-290 disclosure request. Additionally, since §§ 24-21-290 and 24-21-450 operate to govern discovery in probation revocation cases, any due process challenge to discovery in these cases would necessarily be a challenge to these statutes. Such is not this case.

Rule 5, SCRCrimP, provides for the disclosure of evidence in criminal cases. We hold that Rule 5 does not apply to probation revocation proceedings because these proceedings are not criminal trials.

Morrissey and *Gagnon* outline the boundaries beyond which the scope of discovery in these "limited liberty" cases may not be restricted. Specifically, these cases indicate that minimal due process requires that a probationer be given notice of the alleged violations and disclosure of the evidence against him. *Gagnon*, 411 U.S. at 782; *Morrissey*, 408 U.S. at 488-89.

In South Carolina, §§ 24-21-290 and 24-21-450 set forth rules concerning discovery in probation revocation proceedings. In line with *Morrissey* and *Gagnon*'s notice and disclosure requirements, § 24-21-450 requires a probation agent to prepare and submit a pre-hearing report showing how the probationer has allegedly violated his probation.[9] Blindly adding Rule 5 to this framework is unnecessary.

Additionally, § 24-21-290 further supports the position that Rule 5 should not apply to probation revocation proceedings. If the probation agent was, as a matter of rule, required to disclose his file, the confidentiality statute would be meaningless.

For these reasons, we hold that Rule 5 is irrelevant in this context and does not apply to probation revocation proceedings.[10]

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[9] Notably, § 24-21-450 only requires the probation agent to submit the violation report to the court. However, the State alleges that this report is given to the probationer before his hearing and Respondent has not contested the State's assertion in this regard.

[10] Although we hold that *Brady* and Rule 5 do not apply to probation revocation proceedings, we question whether holding to the contrary would have any effect on Respondent's case. Though it is likely that the probation agent's file eventually contained the SLED and Anderson City Police reports, it is questionable whether these reports were in the agent's file prior to the probation revocation proceeding. Additionally, we are unsure as to why

II. Reversible Error

The State argues the court of appeals erred in finding *Brady* and Rule 5 violations because the court based its harmless error analysis entirely on speculation. We agree. Though we need not address this issue because we have held that *Brady* and Rule 5 do not apply to probation revocation proceedings, we take this opportunity to both clarify what constitutes reversible error under *Brady* and correct an egregious error in the lower court's opinion.

Determining whether evidence withheld by the state is "material" under *Brady* turns on whether the cumulative effect of the withheld evidence results in a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). Stated differently, the question is whether the defendant received a trial resulting in a verdict worthy of confidence. *Id*. at 434.

In reversing the revocation of Respondent's probation, the court of appeals, under the guise of a harmless error analysis, stated "[h]aving already found [Respondent] violated his probation . . . we believe it would have been difficult for the court to be completely objective during the subsequent proceeding. Thus we find the information was material and the failure to disclose it deprived [Respondent] of a fair hearing." *Id*. at 314-15, 597 S.E.2d at 829-30. We are utterly perplexed by this analysis. If this statement provided the correct standard for harmless error (notwithstanding the fact that *Kyles* provides the standard for determining a *Brady* violation), there would be no purpose in ever filing for reconsideration, rehearing, or a new trial based on after discovered evidence.

Respondent chose to seek these reports from his probation agent and not directly from these law enforcement agencies. In most cases, we believe the confidential status of the probation agent's file works to the probationer's advantage. *See State v. Hook*, 356 S.C.421, 425, 590 S.E.2d 25, 27 (2003) (stating that the statute effectively operates to keep the probationer's confession to his probation agent out of court).

Additionally, this analysis ignores the fact that the trial court heard Respondent's after acquired evidence and affirmed its original decision. Because the trial court affirmed its decision after hearing this evidence, by the very definition, any error in failing to disclose the evidence was harmless error. *See State v. Kelley*, 319 S.C. 173, 460 S.E.2d 368 (1993) (stating that error is harmless if it could not reasonably have affected the result of trial).

CONCLUSION

For the foregoing reasons, we reverse the court of appeals' decision holding that Rule 5 and *Brady* apply to probation revocation proceedings and finding violations of both.

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., concurring separately.

JUSTICE PLEICONES: I concur in the majority's decision to reverse the Court of Appeals' decision. I write separately, however, because in my opinion neither the Rule 5 issue nor the Brady issue was preserved for appeal. The circuit court did not rule on either claim, instead directing Respondent to file a motion under S.C. Code Ann. § 24-21-290 (Supp. 2005).[1] Respondent neither objected to this ruling nor filed a motion pursuant to the statute. Accordingly, no issue involving Respondent's discovery request was preserved for appellate review, and the Court of Appeals erred in addressing the merits of Respondent's appeal. E.g., State v. Burton, 356 S.C. 259, 589 S.E.2d 6 (2003). I would therefore reverse the Court of Appeals, but would not reach the substantive issues.

[1] Like the trial judge, I believe that discovery in probation revocation proceedings is governed, at least in the first instance, by the statute.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nancy S. Layman, David M. Fitzgerald, Vicki K. Zelenko, Wyman M. Looney and Nancy Ahrens, on behalf of themselves and all others similarly situated, Petitioners,

v.

The State of South Carolina and The South Carolina Retirement System, Respondents.

ORIGINAL JURISDICTION

Appeal from Richland County
John L. Breeden, Circuit Court Judge

Opinion No. 26146
Heard December 1, 2005 - Filed May 4, 2006

DECLARATORY JUDGMENT ISSUED

A. Camden Lewis, Keith M. Babcock, and Ariail E. King, all of Lewis Babcock & Hawkins, of Columbia; and Richard A. Harpootlian, of Columbia, for Petitioners.

Stephen Van Camp and Sarah G. Major, of Columbia; and Thornwell F. Sowell, Robert E. Stepp, Roland M. Franklin, Jr., and Tina Cundari, all of Sowell Gray Stepp Todd & Laffitte, of Columbia, for Respondents.

Andrew F. Lindemann and William H. Davidson, III, of Davidson Morrison & Lindemann, of Columbia, for Amicus Curiae State Retirees Association; Eric C. Schweitzer, of Ogletree Deakins Nash Smoak & Stewart, of Columbia, for Amicus Curiae South Carolina Chamber of Commerce; and Philip J. Mace, of Columbia, for Amicus Curiae State Employees Association.

CHIEF JUSTICE TOAL: Petitioners[1] brought this action in response to the enactment on July 1, 2005 of the State Retirement System Preservation and Investment Reform Act[2] (Act 153). Act 153 amends several statutes relating to the operation of the South Carolina Retirement System. Specifically, Act 153 brought about significant changes for employees who participate in TERI.[3] In addition, Act 153 affected employees who are not

[1] Petitioners consist of a class defined as:

> All persons currently employed by an employer participating in the South Carolina Retirement System who elected prior to July 1, 2005, the effective date of Act 153, to participate in the Teacher and Employee Retention Incentive Program (TERI) pursuant to S.C. Code Ann. § 9-1-2210, *et seq*, as well as all retired members of the System who have returned to employment covered by the System prior to July 1, 2005, and are not currently TERI participants.

[2] Act No. 153, 2005 S.C. Acts 1697.

[3] The TERI program is codified at S.C. Code Ann. § 9-1-2210 (Supp. 2004).

TERI participants but have retired and returned to work for the State in positions covered by the retirement system (working retiree program).[4]

In January of 2001, the South Carolina General Assembly enacted the Teacher and Employee Retention Incentive Program (TERI). Hereinafter, we will refer to this statute as "old TERI." In addition, we will refer to those who elected to participate in the old TERI program before July 1, 2005 as "old TERI participants." Further, those eligible to retire but not participating in TERI could participate in the working retiree program. We will refer to this program as the "old working retiree program" and its participants as "old working retirees."

Pursuant to the old TERI program, old TERI participants could retire, but continue to work for the State for up to five years following their retirement. During these five years, the State withheld the normal pension benefits due to old TERI participants. Under the old TERI program the State paid these accrued benefits either as a lump sum at the end of five years or the old TERI participant could roll the accrued benefits over into a qualifying retirement fund. Under the old TERI statute, an old TERI participant made no further employee contributions to the retirement system. In return, the State was able to utilize experienced, well-trained employees for up to five years after they retired. In addition, the old TERI participants did not accrue further service credit during their participation in the old TERI program and were not eligible for group life insurance or disability retirement benefits.

In contrast, under the old working retiree statute, the statute considered a working retiree to be retired and did not require the old working retiree to make further employee contributions to the system. However, the old working retiree statute limited the old working retiree to making no more than $50,000 per year in salary.

Petitioners (old TERI program participants and old working retiree participants) who retired before July 1, 2005 under the old TERI program or pursuant to the old working retiree statute brought this action against the

[4] Terms of employment for Retiree participants are codified at S.C. Code Ann. § 9-1-1790 (Supp. 2004).

State of South Carolina and South Carolina Retirement System (Respondents or the State), alleging breach of contract. In addition, the old TERI program participants and old working retiree participants argue the State should be estopped from retroactively applying new legislation to Petitioners. Finally, the old TERI program participants and old working retiree participants claim violations of the Takings and Due Process Clauses of the State and Federal Constitutions. This Court granted Petitioners' request for the case to be heard in the Court's original jurisdiction. We hold that the State unlawfully breached its contract with those Petitioners participating in the old TERI program. In addition, we remand the old working retiree participants' breach of contract claim to the trial court for action consistent with this opinion.

FACTUAL / PROCEDURAL BACKGROUND

The portion of Act 153 at the center of this controversy pertains to a financial contribution that old TERI and old working retiree participants are now required to submit to the retirement system. The changes wrought by Act 153 dramatically alter the former versions of the TERI and working retiree statutes. Under the prior enactment of the TERI and working retiree programs, neither the old TERI participants nor the old working retiree participants were required to contribute to the retirement system. Under the terms of the prior programs, for all intents and purposes, both the old TERI participants and the old working retiree participants were considered to be retired.

Petitioners claim that the requirement that they now contribute 6.25% of their annual salary to the retirement program constitutes a breach of contract.[5] In the alternative, if no contract is found, Petitioners assert that the State should be estopped from requiring further contributions due to Petitioners' reliance on the terms of the former TERI and working retiree programs. Further, Petitioners claim that the enactment of Act 153 constitutes an unconstitutional taking and a deprivation of their property without due process of law.

[5] The contribution will increase to 6.5% in 2006.

Previously, Petitioners sought a temporary restraining order seeking to enjoin the State from collecting Petitioners' contributions to the retirement system. The circuit court granted the motion, preventing the State from collecting contributions from the four named Petitioners in this case. Respondents appealed and petitioned for a writ of supersedeas. However, while the motions were pending in the circuit court, the case was certified to the Supreme Court pursuant to Rule 204(b), SCACR. As a result, Petitioners filed a petition for original jurisdiction.

This Court denied the State's petition for supersedeas, but granted the petition for original jurisdiction. In addition, Petitioners filed a motion for class certification, which the Court granted. The class was deemed to consist of all participants who had retired under the old TERI program under the former version of § 9-1-2210, and all those participants considered old working retirees under the previous version of § 9-1-1790; all of whom elected to participate in the programs before July 1, 2005. Further, the Court ordered all contributions withdrawn from the class members be transferred into an interest bearing account and escrowed pending the outcome of this litigation. As a result, the following issues are before the Court:

I. Do the statutory provisions of the former versions of the TERI and the working retiree programs create contracts?

II. Is the State estopped from requiring Petitioners to make contributions to the retirement system?

III. Does the enactment of Act 153 constitute an unconstitutional taking under either the State or Federal Constitution?

IV. Does Act 153 violate the Due Process Clause of the State or Federal Constitution?

LAW / ANALYSIS

I. Breach of Contract

A. TERI Program

Old TERI program participants argue that the statutory provisions governing old TERI participants created contracts which the State breached by requiring previously enrolled TERI participants to contribute to the retirement system. We agree.

Generally, statutes do not create contractual rights. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985). However, if the statute indicates that the legislature intended to bind itself contractually, a contract may be found to exist. *Id*. In South Carolina, contractual rights are created by statute only when they are expressly found in the language of the legislation. *See S.C. Public Serv. Auth. v. Summers*, 282 S.C. 148, 318 S.E.2d 113 (1984).

With the above guidelines in mind, we turn to the prior version of the TERI statute, enacted in 2001, to determine if a contract existed. In the present case, the relevant portions of the prior statute provide that a member of the State Retirement Systerm eligible to retire may:

> [e]lect to participate in the Teacher and Employee Retention Incentive Program (program). A member electing to participate in the program retires for purposes of the system, and the member's normal retirement benefit is calculated on the basis of the member's average final compensation and service credit at the time the program period begins. *The program participant shall agree to continue employment with an employer participating in the system for a program period, not to exceed five years.*
>
> . . . .
>
> (B) During the specified program period, receipt of the member's

> normal retirement benefit is deferred. The member's deferred monthly benefit must be placed in the system's trust fund on behalf of the member. No interest is paid on the member's deferred monthly benefit placed in the system's trust fund during the specified program period.
>
> . . . .
>
> (D) *A program participant is retired from the retirement system as of the beginning of the program period. A program participant makes no further employee contributions to the system, accrues no service credit during the program period, and is not eligible to receive group life insurance benefits or disability retirement benefits.* Accrued annual leave and sick leave used in any manner in the calculation of the program participant's retirement benefit is deducted from the amount of such leave accrued by the participant.

S.C. Code Ann. § 9-1-2210 (Supp. 2004) (emphasis added).

In sum, the above former statutory authority (old TERI) provided a means for eligible employees to retire, but continue to work subject to several limitations. Under the old TERI program, an employee could retire, but continue to work for an additional five years after retirement. Instead of receiving their retirement check, the old TERI program participants' retirement money was placed in a non-interest bearing account to be paid out at the end of the five-year program period. During the five year period, under the prior statute, the employees were deemed retired and made no further contributions to the retirement system out of their paycheck. In addition, old TERI program participants gave up the opportunity to accrue further service credit, thus, any increase in salary would not result in an increase in retirement benefits. In return, the State was able to retain a large number of experienced and well-trained employees for a period not to exceed five years.

As a result of the enactment of Act 153, old TERI participants are now required "to pay to the system the employee contribution as if a program participant were an active contributing member," while gaining no additional service credit. Act No. 153, 2005 S.C. Acts 1697.

We hold that the language in the old TERI statute demonstrates, in unambiguous terms, the intent of the legislature to bind itself to the terms in the statute. We find it telling that the legislature used terms that are indicative of a contract: "A . . . member who is *eligible* [to retire under TERI]. . . and *complies* with the *requirements* of this article . . . . *shall agree* . . . ." S.C. Code Ann. § 9-1-2210 (A) (emphasis added). Far from simply describing the terms of old TERI participants' employment, the former TERI statute outlined an employment program in which those employees eligible for retirement could enroll for a fixed period of time up to five years.[6] The old TERI statute fixed obligations, required affirmative actions by both the State and old TERI program participants, and contained contractually significant language.

We next consider whether there was a breach of the agreement. When the State, through Act 153, sought to collect retirement contributions from the old TERI participants, it was in clear breach of the contract it created by the relevant statutes. Once the bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration. We find that, as applied to old TERI participants, the enactment of Act 153 constitutes a breach of contract. Therefore, we hold the State may not unilaterally alter its agreement with old TERI program participants by forcing the old TERI participants to contribute to the retirement system.[7]

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[6] Most of the TERI participants are continuing contract teachers and each year the employment contracts of the participants in TERI are subject to renewal, unless the teacher is fired for cause. But the TERI program was available for those employees eligible to participate for up to five years. *See* S.C. Code Ann. § 59-26-40 (Supp. 2004) (explaining the various contract levels for teachers).

[7] The State should have treated the retirement contributions by old TERI participants in the same manner in which the State treated the old TERI participants with regard to the grievance system. In Act 153, Section 3, the State exempted old TERI participants from the change in Act 153 related to the grievance procedure for employees. The State should have exempted old

The State argues that the statutes did not create a binding contract and that this case is "on all fours" with *Alston v. City of Camden*. 322 S.C. 38, 46, 471 S.E.2d 174, 178 (1996). In *Alston*, this Court held that employees generally have no contractual rights in their employment merely by virtue of a city ordinance describing the terms of their employment. *Id.* at 45, 471 S.E.2d at 177. We find that *Alston* is distinguishable in several respects. First, the Court held that the benefits affected in *Alston* were "fringe benefits," and that the employee had a reasonable expectation that those benefits might be subject to change. *Id*. at 48, 471 S.E.2d 179. In addition, the agreement in *Alston* was the type of unilateral contract that is subject to modification at any time. *Id*. at 48-49, 471 S.E.2d at 179.

Our holding in the present case rests not on general principles of contract law, but rather, on the plain meaning of the language used by the legislature in the old TERI statute. Unlike the city ordinance in *Alston*, Act 153 sought to materially alter terms which formed a substantial part of the basis for the bargain struck between the State and old TERI participants. In these limited circumstances, we read the old TERI statute to go beyond terms of employment to create a defined employment program. While our rule has been, and continues to be, that statutes do not create contracts that bind the State, the State may not utilize such significant contractual language and disregard its plain meaning and practical effect.

Further, our holding today does not hamper the legislature's ability to govern. The new TERI program will continue in its current form and all participants in the new TERI program, enacted via Act 153, will be subject to the terms of that statute. Further, and contrary to the State's suggestion, our holding will not place the actuarial soundness of the retirement system in ruins. The State's contention that the unfunded accounting liability amortization period will be close to reaching its thirty year limits is based on an assumption that 100 percent of eligible retirees will participate in the old TERI program. This is inaccurate in two respects. First, old TERI participants do not contend that the program cannot be changed with respect

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TERI participants from all portions of Act 153 related to the new TERI program, instead of applying *new* legislation to *old* TERI participants.

to future participants enrolled after July 1, 2005. As a result, the study fails to recognize that under the new TERI program, new TERI participants enrolled after July 1, 2005 will contribute to the retirement system as set forth in Act No. 153. In fact, the study relied upon by the State is based upon an incorrect assumption. This inaccuracy is outlined in the record before this Court in an affidavit relied upon heavily by the State in the claim that the retirement system will reach near crisis. The affidavit of a consulting actuary from Milliman, Inc. stated: "if current and ***future*** TERI retirees and reemployed retirees do not pay the member contribution . . . ." (emphasis added). The opinion of this Court does not affect the decision of the State to require new or future TERI participants, those enrolled after July 1, 2005, to make retirement contributions.

Second, the contention that the number of old TERI participants is growing at a rapid pace is a complete misrepresentation. The numbers of participants in the old TERI program is diminishing with each passing day and by June 30, 2010, the number of old TERI program participants will be zero. Any new TERI participants (those enrolled after July 1, 2005) are covered by Act 153 and will make contributions to the system as directed by the new requirements of Act 153.

Based on the above, we find that the provision of the old TERI statute created a binding contract and hold that the State breached that contract by applying the requirements of Act 153 to old TERI participants enrolled prior to July 1, 2005.[8]

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[8] This holding has almost the same effect on the old TERI participants as envisioned under H. 4544, introduced to the House of Representatives in January of 2006. *See* S.C. H. 4544, 116th Gen. Assembly, 2nd Reg. Sess. (Jan. 31, 2006) (stating that persons who began participation in the Teacher and Employee Retention Incentive Program (TERI) before July 1, 2005, or who were reemployed retirees who returned to employment of employers covered under the South Carolina Retirement System (SCRS) or the South Carolina Police Officers Retirement System (SCPORS) before July 1, 2005, are exempt from the payment of employee contributions otherwise due SCRS or SCPORS with respect to employment after June 30, 2005. The exemption continues for these employees through the termination of TERI participation

B. Working Retirees

Petitioners argue that the statutory provisions governing old working retirees created contracts which the State breached by requiring previously enrolled working retirees to contribute to the retirement system. We disagree.

A person eligible for retirement could have elected to become a working retiree. A working retiree is outlined under the former statute as:

> [A] retired member of the system who has been retired for at least sixty days may return to employment covered by the system and earn up to fifty thousand dollars a fiscal year without affecting the monthly retirement allowance he is receiving from the system.

S.C. Code Ann. § 9-1-1790 (A) (Supp. 2004). As an old working retiree, a person would be paid their retirement check. Instead of having the retirement check placed in an escrow account like the old TERI program, the old working retiree received the monthly check and could invest the money as he or she saw fit. An old working retiree was also considered to be retired, and as a result, did not make further contributions to the retirement system. However, in order to retain both his retirement check and normal pay, an old working retiree was limited to earning $50,000 in salary.

As outlined above in this opinion, absent clear statutory language indicating an intent by the legislature to bind itself contractually, a statute does not create a contract. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985).

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and while a reemployed retiree remains employed in the position held before July 1, 2005. SCRS and SCPORS shall refund without interest the employee contributions made by the TERI program participants and reemployed retirees receiving the exemption allowed pursuant to this joint resolution). However, this Court ordered the withheld contributions be placed in an interest bearing account during this litigation.

In the present case, the old working retiree statute does not use the same contractually significant language as utilized in the old TERI statute. As a result, we hold that the old working retiree statute does not create a binding contract between the State and the old working retirees prohibiting the State from altering the statute exempting old working retirees from further contributions to the retirement system. Stated differently, the old working retiree statute does not evidence an intent by the legislature to be bound to any terms related to the old working retiree program.

However, the record contains evidence indicating that some of the old working retirees may have written contracts detailing the terms of the old working retiree program, including the promise that the old working retirees would not have to make further contributions to the retirement system. These documents, if signed by both parties upon enrollment in the old working retiree program, might reflect what agreement, if any, was made. In addition, some of the old working retirees who do not have signed documents may have relied upon statements made by the State in making a decision to retire and become a working retiree under the prior statute.

As a result, we remand the issue of breach of contract as to the old working retirees to the trial court for a case by case factual determination of whether any actions of the State with regard to individual old working retirees constituted a breach of contract.

Issues II, III, and IV

Because we find that the old TERI statute created a binding contract, we do not address the remaining issues.

CONCLUSION

Based on the above reasoning, we hold that the State breached its contract with Petitioners who were enrolled as old TERI participants by forcing those old TERI participants to make retirement system contributions. Accordingly, all retirement system contributions withheld from old TERI participants enrolled prior to July 1, 2005 shall be returned with interest to

such TERI participants and no further contributions from TERI participants enrolled prior to July 1, 2005 shall be required.

It should be noted that our decision today is a very narrow one which affects only those TERI participants who joined the old TERI program, originally enacted in 2001, prior to July 1, 2005. This Court has previously ordered that all disputed contributions be escrowed in an interest bearing account during this litigation and as a result this money is available to be returned to the TERI participants. Both the State and the old TERI participants were protected by this Court in its order requiring the disputed funds be escrowed in an interest bearing account. Thus, under this Court's previous order, the disputed retirement system contributions have been segregated in a separate account during the course of this litigation, and now the State has the funds readily available to accomplish the refund ordered herein.

The new TERI program as adopted by the legislature in Act 153 continues to be valid and all those participants joining after July 1, 2005 are subject to the entirety of the requirements outlining the new TERI program in Act 153. It is fully within the power of the legislature to make changes to laws that impact future participants, but as outlined in this opinion, the State breached its contract with the old TERI participants by changing the terms of the existing statutory agreement after participants agreed to those terms by electing to retire.

Finally, we remand the issue of breach of contract as related to the old working retirees to the trial court. The record before this Court does not allow us to make the factual or legal inquiry necessary to determine if a binding contract existed between the State and the old working retirees regarding the making of further retirement system contributions.

MOORE, BURNETT, JJ., and Acting Justices Perry M. Buckner and D. L. Jefferson, concur.

The Supreme Court of South Carolina

RE: Court-Annexed ADR Rules and
Amendment to Rule 601, SCACR

O R D E R

By order dated February 1, 2006 (copy attached), this Court adopted Court-Annexed ADR Rules and amended Rule 601, SCACR, and these rule changes were submitted to the General Assembly pursuant to Article V, § 4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, these rule changes are effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
May 3, 2006

The Supreme Court of South Carolina

RE: Court-Annexed ADR Rules and
Amendment to Rule 601, SCACR

ORDER

Pursuant to Article V, §4 of the South Carolina Constitution, the Court-Annexed ADR Rules attached to this order are adopted, and are substituted for the current Circuit Court Alternative Dispute Resolution Rules and the Family Court Mediation Rules. Further, Rule 601(a)(9) of the South Carolina Appellate Court Rules is amended to read: "(9) Alternative Dispute Resolution Conferences conducted pursuant to the SC Court-Annexed ADR Rules." These rules changes shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Waller, J., not participating

Columbia, South Carolina
February 1, 2006

COURT-ANNEXED ADR RULES

PART I: GENERAL ADR PROCESS

Rule 1
Scope of Rules

With the exceptions stated in Rule 3, these rules govern court-annexed Alternative Dispute Resolution (ADR) processes in South Carolina Circuit Courts in civil suits, and in South Carolina Family Courts in domestic relations actions in counties designated by the Supreme Court of South Carolina for mandatory ADR or as required by statute. They shall be construed to secure the just, speedy, inexpensive and collaborative resolution of every action.

These rules shall also govern all mediations in Medical Malpractice actions as required by S.C. Code § 15-79-120 and S.C. Code § 15-79-125(C).

Rule 2
Definitions

(a) Mediation. An informal process in which a third-party mediator facilitates settlement discussions between parties. Any settlement is voluntary. In the absence of settlement, the parties lose none of their rights to trial.

(b) Mediator. A neutral person who acts to encourage and facilitate the resolution of a dispute. The mediator does not decide the issues in controversy or impose settlement.

(c) Arbitration. An informal process in which a third-party arbitrator issues an award deciding the issues in controversy. The award may be binding or non-binding as specified in these rules.

(d) Arbitrator. A neutral person who acts to decide the issues in controversy of a dispute.

(e) Neutral. A mediator or arbitrator.

(f) Certified. A mediator or arbitrator who is approved by the Board of Arbitrator and Mediator Certification to be eligible for court appointment pursuant to these rules.

(g) Alternative Dispute Resolution (ADR) Conference. A mediation or arbitration. Arbitration conferences may also be referred to as hearings.

(h) Roster. The official list of certified neutrals maintained and published by the South Carolina Supreme Court Board of Arbitrator and Mediator Certification.

(i) Board. The South Carolina Supreme Court Board of Arbitrator and Mediator Certification.

Rule 3
Actions Subject to ADR

(a) Mediation. All civil actions filed in the circuit court, all cases in which a Notice of Intent to File Suit is filed pursuant to the provisions of S.C. Code §15-79-125(A), and all contested issues in domestic relations actions filed in family court, except for cases set forth in Rule 3(b) or (c), are subject to court-ordered mediation under these rules unless the parties agree to conduct an arbitration. The parties may select their own neutral and may mediate or arbitrate at any time.

(b) Exceptions. ADR is not required for:

(1) special proceedings, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

(2) requests for temporary relief;

(3) appeals;

(4) post-conviction relief (PCR) matters;

(5) contempt of court proceedings;

(6) forfeiture proceedings brought by governmental entities;

(7) mortgage foreclosures; and

(8) cases that have been previously subjected to an ADR conference, unless otherwise required by this rule or by statute.

(c) Motion to Refer Case to Mediation. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

Rule 4
Selection or Appointment of Neutral

(a) Eligibility. A neutral may be a person who:

(1) is a certified neutral under Rule 15; or

(2) is not a certified neutral but in the opinion of all of the parties is otherwise qualified by training or experience to mediate or arbitrate all or some of the issues in the action.

(b) Roster of Certified Neutrals. The Board shall maintain a current roster ("Roster") of neutrals certified under Rule 15 who are willing to serve in each county. The Board shall make the Roster available to the clerks of court for each county. A certified neutral shall notify the Supreme Court's Board of Arbitrator and Mediator Certification if the neutral desires to be added to or deleted from the Roster. The Board and clerk of court for each county shall make this roster available to the public.

(c) Appointment of Mediator by Circuit Court. In circuit court cases subject to ADR in which no Proof of ADR has been filed on the 210th day after the filing of the action, the Clerk of Court shall appoint a primary

mediator and a secondary mediator from the current Roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed. A Notice of ADR appointing the mediators shall be issued upon a form approved by the Supreme Court or its designee. In the event of a conflict with the primary mediator, the secondary mediator shall serve. In the event of a conflict with the secondary mediator, and if the parties have not agreed to the selection of an alternative mediator, the plaintiff or the plaintiff's attorney shall immediately file with the Clerk of Court a written notice advising the court of this fact and requesting the appointment of two more mediators. In lieu of mediation, the parties may select non-binding arbitration pursuant to these rules.

In medical malpractice cases subject to pre-suit mediation as required by S.C. Code § 15-79-125(C), the Notice of Intent to File Suit shall be filed in accordance with procedures for filing a lis pendens and requires the same filing fee as provided by S.C. Code § 8-21-310(11)(b). The Notice of Intent to File Suit shall contain language directed to the defendant(s) that the dispute is subject to pre-suit mediation within 120 days and must contain a place for the names of the primary and secondary mediators. At the time the Notice of Intent to File Suit is filed, the Clerk of Court shall appoint a primary mediator and a secondary mediator in the manner set forth in the paragraph above. The plaintiff shall serve the defendants with the Notice of Intent to File Suit containing the mediator appointment. Notwithstanding the clerk's appointments, the parties by agreement may choose a different mediator at any time.

(d) Appointment of Mediator by Family Court. In family court cases subject to ADR, early mediation is encouraged.

(1) If there are unresolved issues of custody or visitation, an early mediation of those issues is required. In such event, the court shall appoint a mediator at a temporary hearing. If there is no temporary hearing, then the parties shall agree upon a mediator or notify the court for the appointment of a mediator within fifteen (15) days of the joinder of the issues of custody or visitation. In the event a mediation has not already been held to attempt resolution of the issues of custody and visitation, the temporary order shall designate a mediator in language substantially complying with the form approved by the Supreme Court or its designee. The designation shall

include the name, address and phone number of the primary mediator, whether the mediator was selected or appointed, and if appointed, the name, address and phone number of a secondary mediator. E-mail addresses shall be included, if available.

(2) If issues other than custody or visitation are in dispute and no Proof of ADR has been filed certifying that the issues have been mediated, the parties must mediate those issues prior to the scheduling of a hearing on the merits; provided, however, the parties may submit the issues of property and alimony to binding arbitration in accordance with subparagraph (5). A mediator shall be designated in the following manner:

(A) When the parties file a request for a merits hearing, the request shall include the name of the stipulated mediator or a request for appointment of a mediator. The court shall not schedule a hearing on the merits until a Proof of ADR has been filed.

(B) If a mediator has not been stipulated in the request for merits hearing, the clerk of court shall appoint a primary mediator and a secondary mediator from the current Roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed. A Notice of ADR appointing the mediators shall be issued upon a form approved by the Supreme Court or its designee.

(3) In the event of a conflict with the primary mediator, the secondary mediator shall serve. In the event of a conflict with the secondary mediator, and if the parties have not agreed to the selection of an alternative mediator, the plaintiff or the plaintiff’s attorney shall immediately file with the Clerk of Court a written notice advising the court of this fact and requesting the appointment of two more mediators.

(4) An initial mediation conference must occur within thirty (30) days of appointment or selection. The parties must complete mediation and file a Proof of ADR with the clerk's office before a merits hearing can be scheduled.

(5) In lieu of mediation, the parties may elect to submit issues of property and alimony to binding arbitration in accordance with the Uniform Arbitration Act, S.C. Code § 15-48-10 et seq.

(e) By agreement. By agreement, the parties may choose a neutral at any time. In any event, the ADR conference shall be held on or before the deadlines provided for in these rules.

(f) Notice to Neutral. The parties shall notify the selected or appointed neutral to initiate scheduling of the ADR Conference.

Rule 5
The ADR Conference

(a) Location of the Conference. The ADR Conference is to be held within the county where the case is filed at a site designated by the neutral or any other site agreed upon by the parties and the neutral.

(b) Discovery and Motions. The ADR conference shall not be cause for delay of other proceedings in the case, including the completion of discovery, the filing and hearing of motions, or any other matter that would delay preparation of the case for trial, except by order of the court.

(c) Recesses. The neutral may recess the ADR conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(d) Privacy. ADR conferences are private. Other persons may attend only with the permission of the parties, their attorneys and the mediator.

(e) Motion to Defer ADR. A party may file a motion to defer an ADR conference. For good cause, the Chief Judge for Administrative Purposes of the circuit may grant the motion.

(f) Deadline for the ADR Conference in Circuit Court. The ADR conference shall be held on or before three hundred (300) days from the date

of the filing of the action. The case shall not be on the circuit court trial roster until a Proof of ADR is filed.

Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the Notice of Intent to File Suit or as the Court directs.

(g) Scheduling in Family Court. The parties shall contact and cooperate with the mediator to set the schedule for conferences and the mediator may recess a conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference. The case shall not be docketed in family court for trial until a Proof of ADR is filed.

Rule 6
Duties of the Parties, Representatives and Attorneys – Mediation

(a) Duty to Inform. In cases subject to ADR under these rules, all attorneys should fairly and objectively inform their clients about mediation and arbitration.

(b) Attendance. The following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties or as ordered or approved by the Chief Judge for Administrative Purposes of the circuit:

(1) The mediator;

(2) All individual parties; or an officer, director or employee having full authority to settle the claim for a corporate party; or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and recommend a settlement to the appropriate decision-making body of the agency;

(3) The party's counsel of record, if any; and

(4) For any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim.

(c) Identification of Matters in Dispute. The mediator may require, prior to the scheduled mediation conference, that each party provide a brief memorandum setting forth their position with regard to the issues that need to be resolved. The memorandum should be no more than five (5) pages in length unless permitted by the mediator. With the consent of all parties, such memoranda may be mutually exchanged by the parties.

(d) Cooperation. The parties and their representatives shall cooperate with the mediator.

(e) Confidentiality. Communications during the mediation settlement conference shall be confidential in accordance with Rule 8.

(f) Agreement in Circuit Court. Upon reaching an agreement, the parties shall, before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys. If the parties envision a more formal agreement, the mediator shall assign one of the parties' attorneys to prepare the agreement. A consent judgment or voluntary dismissal shall be filed with the court by such persons as may be designated by the mediator.

(g) Agreement in Family Court. Parties must participate in at least three (3) hours of mediation unless an agreement is reached sooner. Upon the parties reaching an agreement, the mediator shall provide a Memorandum of Agreement to the parties, attorneys of record, and guardians ad litem of record. It is the obligation of the parties to seek approval of the agreement by the family court.

Rule 7
Authority and Duties of Mediators

(a) Authority of Mediators. The mediator shall at all times be authorized to control the conference and the procedures to be followed.

(b) Duties. The mediator shall set up the mediation conference. The mediator shall define and describe the following to the parties:

(1) The mediation process, including the difference between mediation and other forms of conflict resolution;

(2) The facts that the mediation conference is not a trial; the mediator is not a judge, jury or arbitrator; and the parties retain the right to trial if they do not reach a settlement;

(3) The inadmissibility of conduct and statements as evidence in any arbitral, judicial or other proceeding;

(4) The circumstances under which the mediator may meet alone with either of the parties or with any other person;

(5) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(6) The duties and responsibilities of the mediator and the parties;

(7) The fact that any agreement must be reached by mutual consent of the parties; and

(8) The costs of the mediation settlement conference.

(c) Confidentiality. The mediator must comply with Rule 8 regarding confidentiality.

(d) Duty of Impartiality/Disclosure. The mediator has a duty to be impartial and to disclose any circumstance likely to affect impartiality or independence, including any bias, prejudice or financial or personal interest in the result of the mediation or any past or present relationship with the parties or their representatives.

(e) Declaring Impasse. It is the duty of the mediator to timely determine when the mediation is not viable, that an impasse exists, or that the mediation should end. A mediation cannot be unilaterally ended without the permission of the mediator.

(f) Reporting Results of Conference. Within ten (10) days of conclusion of the conference, the mediator shall file with the Clerk of Court a Proof of ADR on a form approved by the Supreme Court or its designee. Any request for a final hearing in a contested case subject to ADR under these rules shall include a copy of a Proof of ADR. South Carolina Court Administration or the South Carolina Commission on Alternative Dispute Resolution may require the mediator to provide additional statistical data for evaluation of the program.

In pre-suit medical malpractice mediations required by S.C. Code §15-79-125, the Clerk of Court shall mail a copy of the Proof of ADR to all attorneys and unrepresented parties by regular mail. The 60-day period in which to file a summons and complaint in accordance with S.C. Code §15-79-125(E)(1) shall commence upon receipt of written notice from the Clerk of Court of the filing of the Proof of ADR.

(g) Immunity. The mediator shall have immunity from liability to the same extent afforded judicial officers of this state.

Rule 8
Confidentiality

(a) Confidentiality. Communications during a mediation settlement conference shall be confidential. Additionally, the parties, their attorneys and any other person present must execute an approved Agreement to Mediate that protects the confidentiality of the process. To that end, the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding, including, but not limited to:

(1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;

(2) Admissions made in the course of the mediation proceeding by another party or any other person present;

(3) Proposals made or views expressed by the mediator;

(4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; or

(5) All records, reports or other documents created solely for use in the mediation.

(b) Limited Exceptions to Confidentiality. This rule does not prohibit:

(1) Disclosures as may be stipulated by all parties;

(2) A report to or an inquiry from the Chief Judge for Administrative Purposes regarding a possible violation of these rules;

(3) The mediator or participants from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the ADR program;

(4) Threats of harm or attempts to inflict physical harm made during the mediation sessions; and

(5) Any disclosures required by law or a professional code of ethics.

(c) Private Consultation/Confidentiality. The mediator may meet and consult individually with any party or parties or their counsel during a mediation conference. The mediator without consent shall not divulge confidential information disclosed to a mediator in the course of a private consultation.

(d) No Waiver of Privilege. No communication by a party or attorney to the mediator in private session shall operate to waive any attorney-client privilege.

(e) Mediator Not to be Called as Witness. The mediator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the mediation in any adversary proceeding or judicial forum. All records, reports and other documents received by the mediator while serving in that capacity shall be confidential.

Rule 9
Compensation of Neutral

(a) By Agreement. When the parties stipulate the neutral, the parties and the neutral shall agree upon compensation.

(b) By Court Order – Mediation. When the mediator is appointed by the court, the mediator shall be compensated by the parties at a rate of $175 per hour, provided that the court-appointed mediator shall charge no greater than one hour of time in preparing for the initial mediation conference. Travel time shall not be compensated. Expense reimbursement shall be limited to actual expenses not exceeding $50, unless otherwise ordered by the Chief Judge for Administrative Purposes of the circuit. An appointed mediator may charge no more than $175 for cancellation of an ADR Conference.

(**c) Payment of Compensation by the Parties**. Unless otherwise agreed to by the parties or ordered by the court, fees and expenses for the ADR conference shall be paid in equal shares per party. Payment shall be due upon conclusion of the conference unless other arrangements are made with the neutral, or unless a party advises the neutral of his or her intention to file a motion to be exempted from payment of neutral fees and expenses pursuant to Rule 9(d).

(d) Indigent Cases. Where a mediator has been appointed, a party may move before the Chief Judge for Administrative Purposes to be exempted from payment of neutral fees and expenses based upon indigency. Applications for indigency shall be filed no later than ten (10) days after the ADR conference has been concluded. Determination of indigency shall be in the sole discretion of the Chief Judge for Administrative Purposes.

Rule 10
Sanctions

(a) Proof of ADR. If by the time required by these rules, no Proof of ADR has been filed with the Office of the Clerk of Court and the case has not been exempted or deferred from ADR by court order, the court may issue a Rule to Show Cause why sanctions should not be imposed, including the dismissal of an action without prejudice or the striking of a pleading. The court may also manage such cases through status conferences and/or scheduling orders.

(b) Sanctions. If any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person or entity, any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCP.

PART II: ARBITRATION

Where arbitration is properly selected by the parties under Part I of these rules, the following rules shall also apply:

Rule 11
Duties of the Parties, Representatives and Attorneys – Arbitration

(a) Attendance. The following persons shall physically attend an arbitration unless otherwise agreed to by the arbitrator and all parties or as ordered or approved by the Chief Judge for Administrative Purposes:

(1) The arbitrator;

(2) All individual parties; or an officer, director, or employee for a corporate party; or in the case of a governmental agency, a representative of that agency; and

(3) The party's counsel of record, if any.

(b) Identification of Matters of Dispute. The arbitrator may require, prior to the scheduled arbitration conference, that each party provide a brief memorandum setting forth their position with regard to the issues that need to be resolved. The memorandum should be no more than five (5) pages in length unless permitted by the arbitrator. Such memoranda shall be exchanged by the parties at the same time and in the same manner as the memoranda are furnished to the arbitrator.

(c) Cooperation. The parties and their representatives shall cooperate with the arbitrator.

Rule 12
Non-Binding Arbitration Hearing and Award

(a) Scope. This rule applies only to non-binding arbitrations. Nothing in this rule shall be construed to apply to binding arbitration pursuant to the Uniform Arbitration Act as adopted in South Carolina. Arbitrations selected by the parties under these rules are deemed non-binding arbitrations unless otherwise expressly agreed by the parties.

(b) Arbitration Hearings. The following shall apply to arbitration hearings, unless otherwise expressly agreed by the parties:

(1) Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were at trial. The arbitrator is empowered and authorized to administer oaths and affirmations.

(2) Rule 45, SCRCP, shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(3) The arbitrator shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the Chief Judge for Administrative Purposes.

(4) The South Carolina Rules of Evidence do not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) No *ex parte* communications between the parties or their counsel and the arbitrator are permitted.

(6) The arbitration hearing shall be limited to two hours unless the arbitrator determines that more time is necessary to insure fairness and justice to the parties. The arbitrator is not required to receive repetitive or cumulative evidence.

(7) No recording or transcript of an arbitration hearing shall be made.

(c) Award. Unless otherwise expressly agreed by the parties:

(1) The award shall be in writing, signed by the arbitrator. Within ten (10) business days after the hearing is concluded, the arbitrator shall serve the original award on the prevailing party, copies of the award on all other parties, and a Proof of ADR with the court, together with a certificate of service. The arbitration hearing is concluded when all the evidence is in and any arguments or post-hearing briefs the arbitrator permits have been completed or received.

(2) The award must resolve all issues raised by the pleadings.

(3) Findings of facts and conclusions of law or opinions supporting an award are not required.

(d) Trial De Novo as a Right. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties on a form approved by the Supreme Court or its designee within thirty (30) days after receipt of the arbitrator's award. No evidence that there has been an arbitration proceeding or any fact concerning the arbitration may be

admitted in a trial, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties and the court's approval.

(e) Judgment Entered on Award. If the case is not terminated by agreement of the parties, and no party files a demand for trial de novo under Rule 12(d), the prevailing party shall submit to the Chief Judge for Administrative Purposes a proposed order directing the entry of judgment on the award, which when entered, shall have the same effect as a consent judgment in the action and may be enforced accordingly.

Rule 13
Authority and Duties of Arbitrators

(a) Authority of Arbitrators. The arbitrator shall at all times be authorized to control the hearing and the procedures to be followed.

(b) Duties. The arbitrator shall set up the arbitration hearing. The arbitrator shall define and describe the following to the parties:

(1) The non-binding arbitration process, including the difference between arbitration and other forms of conflict resolution;

(2) The duties and responsibilities of the arbitrator and the parties; and

(3) The cost of the arbitration hearing.

(c) Arbitrator Not to be Called as Witness. The arbitrator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the arbitration in any adversary proceeding or judicial forum. All records, reports and other documents received by the arbitrator while serving in that capacity shall be confidential.

(d) Duty of Impartiality/Disclosure. The arbitrator has a duty to be impartial and to disclose any circumstance likely to affect impartiality or independence, including any bias, prejudice or financial or personal interest

in the result of the arbitration or any past or present relationship with the parties or their representatives.

(e) Reporting Results of Hearing. Within ten (10) days of conclusion of the hearing as set forth in Rule 12(c), the arbitrator shall file with the Clerk of Court Proof of ADR on a form approved by the Supreme Court or its designee. South Carolina Court Administration or the South Carolina Commission on Alternative Dispute Resolution may require the arbitrator to provide additional statistical data for evaluation of the program.

(f) Immunity. The arbitrator shall have immunity from liability to the same extent afforded judicial officers of this state.

PART III: REGULATION OF NEUTRALS

Rule 14
Board of Arbitrator and Mediator Certification

There is hereby established a Board of Arbitrator and Mediator Certification. The Board will be composed of five (5) persons appointed by the Supreme Court for a term of three (3) years or until a replacement member is appointed. In the event of a vacancy on the Board, the Supreme Court shall appoint someone to fill the unexpired term. Three members of the Board shall constitute a quorum. In the event that members of the Board disqualify themselves in a pending matter leaving less than a quorum, the Supreme Court may appoint *ad hoc* members to restore the Board to full membership in that matter.

Rule 15
Certification of Court-Appointed Neutrals

The Board of Arbitrator and Mediator Certification ("Board") shall receive and approve applications for certifications of persons to be appointed as mediators or arbitrators. The application shall be on a form approved by the Supreme Court or the Board.

(a) Circuit Court Certification. For circuit court certification, a person must:

(1) Either:

(A) Be admitted to practice law in this State for at least three (3) years and be a member in good standing of the South Carolina Bar; or

(B) Be admitted to practice law in the highest court of another state or the District of Columbia for at least three (3) years and:

(i) Be at least 21 years old;

(ii) Have received a juris doctorate degree or its equivalent from a law school approved by the American Bar Association;

(iii) Be a member in good standing in each jurisdiction where he or she is admitted to practice law;

(iv) Be an associate member of the South Carolina Bar in good standing; and

(v) Agree to be subject to the Rules of Professional Conduct, Rule 407, SCACR, and the Rule on Disciplinary Procedure, Rule 413, SCACR, to the same extent as an active member of the South Carolina Bar.

(2) Be of good moral character;

(3) Have not, within the last five (5) years, been:

(A) Disbarred or suspended from the practice of law;

(B) Denied admission to a bar for character or ethical reasons; or

(C) Publicly reprimanded or publicly disciplined for professional conduct;

(4) Pay all administrative fees and comply with all procedures established by the Supreme Court, the Board and the Commission on Alternative Dispute Resolution; and

(5) Agree to provide mediation/arbitration to indigents without pay.

(6) To be certified as a Mediator, a person must also:

(A) Have completed a minimum of forty (40) hours in a civil mediation training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board; and

(B) Demonstrate familiarity with the statutes, rules and practice governing mediation settlement conferences in South Carolina.

(7) To be certified as an Arbitrator, a person must also:

(A) Have served as a Master-in-Equity, Circuit or Appellate Court Judge; or

(B) Have completed a minimum of six (6) hours in a civil arbitration training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board; and

(C) Demonstrate familiarity with the statutes, rules and practice governing arbitration hearings in South Carolina;

(b) Family Court Mediator Certification. For family court mediator certification, a person must:

(1) Either:

(A) Be admitted to practice law in this State for at least three (3) years and be a member in good standing of the South Carolina Bar;

(B) Be admitted to practice law in the highest court of another state or the District of Columbia for at least three (3) years and:

(i) Be at least 21 years old;

(ii) Have received a juris doctorate degree or its equivalent from a law school approved by the American Bar Association;

(iii) Be a member in good standing in each jurisdiction where he or she is admitted to practice law;

(iv) Be an associate member of the South Carolina Bar in good standing; and,

(v) Agree to be subject to the Rules of Professional Conduct, Rule 407, SCACR, and the Rule on Disciplinary Procedure, Rule 413, SCACR, to the same extent as an active member of the South Carolina Bar; or,

(C) Be a psychologist, master social worker, independent social worker, professional counselor, associate counselor, marital and family therapist, or physician specializing in psychiatry, licensed for at least three (3) years under Title 40 of the 1976 Code of Laws, as amended.

(2) Have completed a minimum of forty (40) hours in a family court mediation training program approved by the Board, or any other training program attended prior to the promulgation of these rules or attended in other states and approved by the Board;

(3) Demonstrate familiarity with the statutes, rules and practice governing mediation settlement conferences in South Carolina;

(4) Be of good moral character;

(5) Have not, within the last five (5) years, been:

(A) Disbarred or suspended from the practice of law or a profession set forth in Rule 15(b)(1)(C);

(B) Denied admission to a bar or denied a professional license for character or ethical reasons; or

(C) Publicly reprimanded or publicly disciplined for professional conduct;

(6) Pay all administrative fees and comply with all procedures established by the Supreme Court, the Board and the Commission on Alternative Dispute Resolution; and

(7) Agree to provide mediation to indigents without pay.

Rule 16
Approval of Training Programs

A training program must be approved by the Supreme Court or its designee, the Board of Arbitrator and Mediator Certification, before the program can be used for compliance with Rule 15(a)(6)(A) (certification of circuit court mediators), Rule 15(b)(2) (certification of family court mediators), or Rule 15(a)(7)(B) (certification of circuit court arbitrators). Approval need not be given in advance of training attendance. The Supreme Court may set administrative fees, which must be paid in advance of approval.

(a) Approval of Circuit Court Mediator Training Programs

(1) An approved training program for mediators of the Court of Common Pleas civil actions shall consist of a minimum of forty (40) hours of instruction, unless otherwise provided by these rules. The curriculum of such programs shall at a minimum include:

(A) Conflict resolution and mediation theory;

(B) Mediation processes and techniques, including the process and techniques of trial court mediation;

(C) Standards of conduct and ethics for mediators;

(D) Statutes, rules and practice governing mediation settlement conferences in South Carolina;

(E) Demonstrations of mediation settlement conferences;

(F) Simulations of mediation settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(G) Such other requirements as the Supreme Court from time to time may decide are appropriate.

(2) Training programs completed in South Carolina or other states may be approved by the Board if:

(A) The program consisted of a minimum of 37 hours of instruction;

(B) The program covered all the topics enumerated in paragraph (a)(1) of this Rule except subparagraph (D) related to South Carolina law; and

(C) The applicant takes at least three (3) hours of supplemental training pre-approved by the Supreme Court or the Board, covering the South Carolina law topics enumerated in paragraph (a)(1), subparagraph (D) of this Rule.

(b) Approval of Family Court Mediator Training Programs

(1) An approved training program for mediators in the Family Court shall consist of a minimum of forty (40) hours of instruction, unless

otherwise provided by these rules. The curriculum of such programs shall at a minimum include:

(A) Statutes, rules and practice concerning family and related law in South Carolina, including the law regarding custody, visitation, support, division of property and alimony;

(B) Conflict resolution, family dynamics, and mediation theory in general, as well as specific training regarding domestic violence;

(C) Mediation processes and techniques, including the process and techniques of trial court mediation;

(D) Standards of conduct and ethics for mediators;

(E) Statutes, rules and practice governing mediation settlement conferences in South Carolina;

(F) Demonstrations of mediation conferences;

(G) Simulations of mediation settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(H) Such other requirements as the Supreme Court from time to time may decide are appropriate for good instruction.

(2) Training programs completed in South Carolina or other states may be approved by the Board if:

(A) The program consisted of a minimum of 37 hours of instruction;

(B) The program covered all the topics enumerated in paragraph (b)(1) of this Rule except subparagraphs (A) and/or (E) related to South Carolina law; and

(C) The applicant takes at least three (3) hours of supplemental training pre-approved by the Supreme Court or the Board, covering the South Carolina law topics enumerated in paragraph (b)(1), subparagraphs (A) and (E) of this Rule.

(c) Approval of Circuit Court Arbitrator Training Programs

(1) An approved training program for arbitrators of the Court of Common Pleas civil actions shall consist of a minimum of six (6) hours of instruction, unless otherwise provided by these rules. The curriculum of such programs shall at a minimum include:

(A) Conflict resolution and arbitration theory;

(B) Arbitration processes and techniques, including the process and techniques of both binding and non-binding arbitration;

(C) Standards of conduct and ethics for arbitrators;

(D) Statutes, rules and practice governing arbitration hearings in South Carolina;

(E) Demonstrations of arbitration hearings; and

(F) Such other requirements as the Supreme Court from time to time may decide are appropriate.

(2) Training programs completed in South Carolina or other states may be approved by the Board if:

(A) The program consisted of a minimum of 6 hours of instruction;

(B) The program covered all the topics enumerated in paragraph (c)(1) of this Rule except subparagraph (D) related to South Carolina law; and

(C) The applicant takes at least three (3) hours of supplemental training pre-approved by the Supreme Court or the Board, covering the South Carolina law topics enumerated in paragraph (c)(1), subparagraph (D) of this Rule.

Rule 17
Standards of Conduct, Decertification and Discipline of Neutrals

(a) Standards of Conduct for Mediators. Any person serving as a mediator, whether certified or not, shall comply with the Standards of Conduct for Mediators, which is attached as Appendix A to these rules.

(b) Standards of Conduct for Arbitrators. Any person serving as an arbitrator, whether certified or not, shall comply with the Code of Ethics for Arbitrators, which is attached as Appendix B to these rules.

(c) Decertification of Neutrals. Certification under Rule 15 may be revoked at any time if it is shown that the neutral no longer meets the requirements to be certified under Rule 15 or that the neutral has failed to faithfully observe these rules, the ethical standards of Rules 17(a) or (b), or has engaged in any conduct showing an unfitness to serve as a neutral.

(d) Discipline of Neutrals. A neutral who violates these rules, the ethical standards of Rules 17(a) or (b), or who has engaged in any conduct showing an unfitness to serve as a neutral may, in addition to decertification under Rule 17(c), be subject to discipline by the Supreme Court. This discipline may include any sanction the Supreme Court determines is appropriate, to include an order publicly reprimanding the neutral for the conduct, an order barring the neutral from serving as a neutral in any court of this State for a definite or indefinite period of time, an order requiring the neutral to complete additional training, and/or the assessment of a fine. The fact that discipline is taken against an attorney under this Rule shall not preclude action against the attorney under Rule 413, SCACR, if the conduct is misconduct under that rule. The fact that discipline is taken under this Rule against a licensed professional listed in Rule 15(b)(1)(C) shall not preclude action against the professional under the rules or statutes governing that profession, if the conduct is misconduct under that rule or statute.

(e) Processing Complaints of Misconduct by Neutrals. Persons alleging that a neutral has engaged in misconduct may file a complaint with the Board of Arbitrator and Mediator Certification. Misconduct includes any conduct or other circumstances that would warrant decertification or discipline under Rule 17(c) or (d). The Board shall review each complaint, may require the neutral to file a response to the complaint, may conduct such investigation as it deems appropriate, and may dismiss complaints it finds to be without merit. The Board may petition the Supreme Court to temporarily suspend a neutral pending further action on the complaint. If the Board finds that there is probable cause to believe that misconduct has occurred that would warrant decertification or other disciplinary action under these rules, the Board shall conduct a hearing into the matter after giving the neutral at least ten (10) days notice of the hearing. The Board may issue subpoenas compelling persons to attend the hearing or to produce records. A person violating such a subpoena shall be in contempt of the Supreme Court. The rules of evidence applicable to the circuit court shall generally be observed in the conduct of the hearing, and all testimony shall be under oath or affirmation. The proceedings shall be transcribed. If, after conducting the hearing, the Board determines that decertification or other disciplinary action is not warranted, it shall dismiss the matter. If the Board determines that decertification or other disciplinary action is appropriate, it shall make a written recommendation to the Supreme Court and provide a copy to the neutral. A copy of the transcript of the hearing and any exhibits shall be filed with the Supreme Court. The neutral may, within fifteen (15) days after the Board submits its recommendation to the Supreme Court, file a response to the Board's recommendation. The Supreme Court shall then take such action as it deems appropriate. The Supreme Court shall not be bound by any specific sanction recommended by the Board. No hearing shall be held before the Supreme Court unless it determines that a hearing is appropriate.

PART IV: IMPLEMENTATION

Rule 18
Clerks of Court

All circuit and family court Clerks of Court in each county shall perform whatever duties are required pursuant to these rules relating to record keeping, notification to the court, parties, or attorneys, docket control, maintenance of rosters, and service of orders.

Rule 19
Local Rule-Making

These rules shall be uniform for all counties in which they are applicable. Local rules may be allowed only upon approval of the Supreme Court. Unless otherwise specified by these rules, all motions related to ADR or to these rules should be directed to the Chief Judge for Administrative Purposes.

Rule 20
Application of Rules

These rules shall apply to cases filed in circuit or family court on or after the effective date of any statute mandating ADR or Supreme Court order designating that county or court as subject to these rules.

[Note: Appendices A and B to these rules are identical to Appendices A and B contained in the Circuit Court Alternative Dispute Resolution Rules and the Family Court Mediation Rules.]