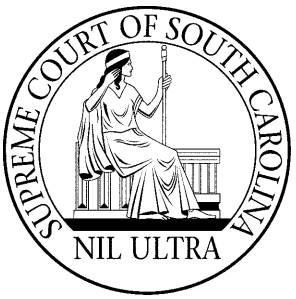

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24
June 24, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Kenneth Gary Cooper, Respondent

Appellate Case No. 2014-002702

Opinion No. 27534
Submitted June 8, 2015 – Filed June 24, 2015

DEFINITE SUSPENSION

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

William L. Runyon, Jr., of Charleston, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of an admonition, public reprimand, or a definite suspension not to exceed twelve (12) months. We accept the Agreement and suspend respondent from the practice of law in this state for twelve (12) months. The facts, as set forth in the Agreement, are as follows.

Facts

On January 31, 2012, respondent went to a restaurant where his son tended bar in order to drive his son home after completing his shift. While at the restaurant, respondent came into contact with a former neighbor and the neighbor's son. A verbal altercation escalated into a physical fight. The Charleston County Sheriff's

Office responded. The former neighbor alleged respondent and respondent's son physically assaulted him and his son. The former neighbor refused medical treatment while his son was transported to the hospital.

On February 3 and February 7, 2012, the neighbor and his son met with detectives from the Charleston County Sheriff's Office and positively identified respondent as the individual who had assaulted them. On February 29, 2012, respondent was arrested and charged with Assault and Battery, 2nd degree, and Assault and Battery, 3rd degree.

Respondent represents that he believed that both charges against him were going to be tried in General Sessions Court. In actuality, the Assault and Battery, 3rd degree, charge was heard by the Magistrate's Court and, on April 17, 2012, respondent was found guilty *in absentia*. On May 17, 2012, respondent paid the fines and costs in the amount of $1,124.76 to satisfy the sentence.

Thereafter, respondent retained counsel. Among other actions, counsel filed a motion seeking to obtain the son's medical records from the night of the altercation. The son's medical records demonstrated the son was substantially intoxicated and that his injuries would not support the Assault and Battery, 2nd degree, charge.

On November 6, 2013, the Assault and Battery, 2nd degree, charge was remanded to Magistrate's Court. Ultimately, this charge was marked nolle prosequi on May 21, 2014.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct) and Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as lawyer in other respects).

Respondent also admits his misconduct constitutes ground for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule

7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law in this state for twelve (12) months.[1] Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

[1] Respondent's disciplinary history includes a six (6) month suspension from the practice of law, with conditions. *In the Matter of Cooper*, 397 S.C. 339, 725 S.E.2d 491 (2012). In addition, the Court found respondent in criminal and civil contempt of this Court for willfully violating the conditions of his six (6) month suspension and failing to pay the costs of the disciplinary proceeding. *In the Matter of Cooper*, 405 S.C. 579, 748 S.E.2d 778 (2013).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Paul Clarendon Ballou, Respondent

Appellate Case No. 2015-000959

Opinion No. 27535
Submitted June 9, 2015 – Filed June 24, 2015

DISBARRED

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

Paul Clarendon Ballou, of Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension ranging from nine (9) months to three (3) years or disbarment. He requests that any suspension or disbarment be imposed retroactively to May 23, 2013, the date of his interim suspension. *In the Matter of Ballou*, 403 S.C. 138, 742 S.E.2d 868 (2013). In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of discipline and to complete the Legal Ethics and Practice Program Ethics School and Trust Account School prior to reinstatement. Further, within sixty (60) days of the imposition of discipline, respondent agrees to enter into a restitution agreement with the Commission to repay clients and third parties

harmed as a result of his misconduct. We accept the Agreement and disbar respondent from the practice of law in this state retroactively to the date of his interim suspension, and, further, impose the conditions as set forth hereafter in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent represented Complainant A and his wife in a personal injury case. Subsequent to mediation, Client A became dissatisfied with respondent's representation, terminated respondent's services, and demanded his file. Respondent prepared a handwritten release for Complainant A's signature discharging respondent from representation. The release also stated respondent had incurred $313.05 in expenses, the defendant had offered to settle the case for $23,000, and that respondent asserted an attorneys' fee lien in the amount of 25% or $5,750 payable out of any settlement of the case along with costs. Complainant A signed the document and added the following notation: "With reservations and after Disciplinary Counsel Review Board."

Complainant A and his wife later settled the case with the defendant insurance company. The insurance company sent a check to respondent in the amount of $5,750 payable to the order of respondent's firm, Complainant A, and Complainant A's wife. Respondent endorsed the check, signing the names of Complainant A and his wife without their consent. Respondent then deposited the check into his operating account.

Matter II

Respondent's firm represented Complainant B on criminal charges arising out of her employment; the employer alleged Complainant B had stolen funds from the employer. On November 17, 2006, the criminal charges were dismissed with leave to re-indict by the solicitor's office.

After the employer's insurance company covered the stolen funds, it attempted to recover the amount it paid to the employer from Complainant B. Some of the efforts to recover the funds were allegedly made by a recovery management company.

Thereafter, respondent represented Complainant B in a civil suit for damages allegedly suffered by Complainant B as a result of the collections efforts taken by or on behalf of the insurance company. Initially, respondent filed suit in state court in March of 2007. On May 27, 2008, respondent filed for a voluntary non-suit pursuant to Rule 41(a)(1), SCRCP, because the complaint had not been served.

In July 2008, respondent filed suit in state court. On August 25, 2008, the case was removed to federal court. On June 8, 2009, defendant Recovery Management Company moved to dismiss the suit for lack of jurisdiction. On July 7, 2009, the court granted the motion to dismiss due to respondent's failure to respond. The court noted respondent had called the court on June 25 or 26, 2009 requesting an extension of time and was advised that an extension would be granted if respondent filed the motion by June 29, 2009. The court did not receive the motion despite a follow-up call from the court shortly after the June 29, 2009, deadline. Respondent did not notify Complainant B of this development.

On December18, 2009, the defendant insurance company filed a motion for summary judgment. On January 19, 2010, respondent filed a response to the motion. On January 29, 2010, the court ordered respondent to show cause why the response should not be stricken for failure to cure a signatory deficiency. The court's order noted that the Clerk of Court had drawn the deficiency to respondent's attention three times and respondent had ignored the requests to cure. Ultimately, respondent acknowledged and corrected his filing deficiency and assured the court that he would avoid future difficulties by obtaining additional training in the e-filing procedures used by the court. As a result, the court did not strike the response.

On February 8, 2010, the trial court issued its order granting summary judgment to the defendant insurance company finding that Complainant B had not filed her suit within the statute of limitations and the record lacked sufficient evidence to support the claims. Respondent was unaware of the order as he did not monitor his e-mail account properly. Respondent failed to timely inform Complainant B of the order granting summary judgement and failed to preserve Complainant B's appellate rights. Respondent made a unilateral decision not to pursue the case as respondent believed that this was in Complainant B's best interest.

Matter III

Respondent represented Complainant C in a personal injury matter. Respondent received a settlement of $101,000 in the case. Respondent deposited the entire settlement amount into his operating account. Pursuant to the written fee agreement, respondent should have received $33,633.00 (1/3%) as attorneys' fees. Out of the $101,000 settlement, respondent disbursed $55,000 to the client and kept the remaining fees in his operating account. There was no written agreement between respondent and Complainant C regarding the withholding of any funds beyond the initial one third stated in the fee agreement. Respondent failed to safeguard the additional fees in his trust account.

On March 6, 2013, a subpoena for respondent's trust account records was issued and mailed to the address of record shown in the Attorney Information System. The subpoena was returned "unclaimed" to ODC. A subpoena dated April 17, 2013, was served by a South Carolina Law Enforcement Division agent on respondent on the same day. The subpoena again requested respondent's trust account records by May 14, 2013. Respondent advised ODC he did not have the trust account records demanded by the subpoena.

Respondent admits he does not maintain a client trust account. He further admits that he deposited and disbursed client settlement funds into and out of his operating account. Respondent also conducted his personal and office business through this same operating account.

Matter IV

Respondent represented Complainants D against an insurance carrier concerning personal injuries sustained by them in an automobile accident. The carrier offered a settlement which was accepted by Complainants D. The carrier issued a check payable to respondent's firm and Complainants D on June 23, 2010, and requested an executed release be returned to the carrier. Respondent and Complainants D endorsed and negotiated the check, but respondent did not return the executed release to the carrier.

ODC initiated its investigation of this matter on November 5, 2010, by sending a Notice of Investigation to respondent and requesting a response within fifteen days. When respondent failed to respond within the fifteen days, ODC sent

respondent a letter by certified mail on January 13, 2011, reminding respondent of his obligation to respond and citing *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982). Respondent submitted his response to ODC by letter dated January 28, 2011. Respondent also returned the executed release to the insurance carrier in January 2011.

Matter V

Respondent requested a copy of a deposition transcript and copies of exhibits from two other depositions from a court reporting agency. These items were delivered as requested on January 21, 2010. Respondent failed to pay the invoice for these services until January of 2011, after ODC initiated its investigation into this matter.

Matter VI

Respondent and his law partner retained the services of a court reporter to attend and transcribe depositions on seven occasions. The transcripts of the depositions were hand-delivered to respondent and his partner, along with an invoice for each transcript. Respondent and his law partner failed to pay the invoices despite telephone calls and other communication from the court reporting agency regarding payment. The court reporting agency obtained a judgment against respondent and his law partner in the amount of $4,120.69 which represented the amount due for the outstanding invoices plus interest and court costs. Out of the total invoiced amount, respondent's invoiced share was $801.58.

Matter VII

Respondent was retained to represent Complainant E in a workers compensation matter. In connection with the representation, respondent also agreed to assist Complainant E in filing for social security benefits; respondent was not paid separately for his representation in the social security matter. The initial application for social security benefits was denied. Respondent did not timely file an appeal of the denial. Eventually, Complainant E refiled her application for social security benefits and was approved for benefits.

On February 25, 2014, ODC mailed respondent a Notice of Additional Allegations and requested a response within fifteen days. At respondent's request, a fifteen day extension was granted. When respondent failed to respond by the extended

deadline, ODC sent respondent a letter by certified mail on April 4, 2014, reminding respondent of his obligation to respond and citing *In the Matter of Treacy*, *Id*. Respondent failed to submit a response.

Matter VIII

Respondent engaged a court reporter for services to be rendered on January 30, 2013. The transcript was delivered to respondent on or about February 12, 2013, along with the original invoice. Despite monthly invoices and contact from the court reporting agency, respondent failed to pay the original invoice of $383.90. With the late fee, respondent owes the court reporting agency $401.18.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.2 (lawyer shall abide by client's decisions concerning objectives of representation and consult with client as to means by which they are to be pursued); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall promptly inform client of any decision in which client's informed consent required; lawyer shall keep client reasonably informed about status of matter); Rule 1.15 (lawyer shall safekeep client funds; lawyer shall promptly deliver to client or third person any funds client or third person entitled to receive); Rule 4.4(a) (in representing client, lawyer shall not use means that have no substantial purpose other than to burden third person); Rule 8.1(b) (in connection with disciplinary matter, lawyer shall not fail to respond to lawful demand from disciplinary authority); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). Further, respondent admits he failed to comply with Rule 417, SCACR.

Respondent also admits his misconduct constitutes grounds for discipline pursuant to the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(3) (it shall be ground for discipline for lawyer to willfully fail to comply with subpoena issued pursuant to the Rules for Lawyer

Disciplinary Enforcement or to knowingly fail to respond to lawful demand from disciplinary authority to include request for response).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state retroactively to the date of his interim suspension. Within thirty (30) days of the date of this opinion, respondent shall reimburse ODC and the Commission for costs incurred in the investigation and prosecution of this matter. Within sixty (60) days of the date of this opinion, respondent shall enter into a restitution agreement with the Commission to repay his former client and third parties harmed as a result of his misconduct as follows: 1) Complainant C - $10,000; 2) the court reporting agency in Matter VI - $841.58; 3) the court reporting agency in Matter VIII - $401.18; and 4) the Lawyers' Fund for Client Protection (Lawyers' Fund) - in full for any payments made on his behalf to any of the clients or third parties referenced in this opinion.[1] Before he shall be eligible to file a petition for reinstatement, respondent shall complete the Legal Ethics and Practice Program Ethics School and Trust Account School. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

[1] The amount due from respondent to Complainant C and the two court reporting agencies shall be reduced by any payments made to Complainant C and the court reporting agencies by the Lawyers' Fund.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter James Marshall Biddle, Respondent.

Appellate Case No. 2015-000947

Opinion No. 27536
Submitted June 3, 2015 – Filed June 24, 2015

DEFINITE SUSPENSION

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

Kevin Mitchell Barth, Esquire, of Barth, Ballenger & Lewis, LLP, of Florence, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension from one (1) to three (3) years or to disbarment. In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of discipline and to complete the Legal Ethics and Practice Program Ethics School prior to reinstatement or readmission. Further, upon reinstatement or readmission, respondent agrees to hire a law office management advisor upon the terms and conditions stated hereafter in this opinion. We accept the Agreement and suspend respondent from the practice of law in this state for three (3) years with conditions as stated hereafter. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

Respondent represented a client in a breach of contract action. On July 21, 2008, respondent filed a Summons and Complaint on his client's behalf. The defendant was served on August 1, 2008. On September 3, 2008, respondent sent a letter to the defendant stating his client would dismiss the lawsuit without prejudice upon receipt and verification of certain videotapes. A signature line was provided for the defendant; the defendant signed the letter and returned it to respondent.

Less than two months later, on November 10, 2008, instead of a dismissal, respondent filed a second Summons with an Amended Complaint on behalf of his client. The Amended Complaint added a claim of bad faith in connection with the alleged breach of contract. Respondent then filed an Affidavit of Default on September 9, 2009, and a damages hearing was held on December 8, 2009. Respondent obtained an Order of Default and Judgment against the defendant in the amount of $618,500. The defendant filed a Motion to Alter or Amend based on his belief that the case was to be dismissed; the motion has not yet been scheduled for a hearing; respondent has not responded to the motion.

Respondent did not respond to ODC's initial inquiry in this matter and did not timely respond to a reminder letter sent pursuant to *In the Matter of Treacy*, 277 S.C. 514, 290 S.E.2d 240 (1982).

Matter II

Respondent represented a client in a post-conviction relief (PCR) action. The PCR application was denied by order dated February 23, 2011. The order shows a copy was sent to respondent on February 28, 2011. However, respondent requested a copy of the order from the Attorney General on April 28, 2011, indicating he had not previously received the order.

Respondent's client sent several letters to the Supreme Court of South Carolina inquiring about the status of his appeal. In response, the Court informed the client that no appeal had been filed. The client filed a *pro se* Notice of Appeal. The Court notified respondent of his client's filing and reminded respondent he was still

counsel of record. The Court required respondent to provide it with a copy of the order on appeal, the date of receipt of the order, the Notice of Appeal, and proof of service on opposing counsel. Respondent failed to respond to the Supreme Court and his client's appeal was dismissed.
Respondent did not respond to ODC's initial inquiry in this matter and did not timely respond to a reminder letter sent pursuant to *In the Matter of Treacy*, *Id.*

Matter III

Respondent represented another client in a PCR action. Respondent timely filed a Notice of Intent to Appeal for the client on November 1, 2011. However, respondent did not respond to several inquiries by the South Carolina Commission on Indigent Defense, the Division of Appellate Defense to determine whether he would continue to represent the client on appeal. Accordingly, the Supreme Court determined respondent was still counsel of record and informed him he would need to order the transcript. Respondent did not do so and, on March 28, 2012, Appellate Defense ordered the PCR transcript and took over the representation of the client.

Respondent did not respond to ODC's initial inquiry in this matter and did not timely respond to a reminder letter sent pursuant to *In the Matter of Treacy*, *Id.*

Matter IV

Respondent was hired by a property management company. Clients and customers of the company were to submit claim information to respondent's office so respondent could assist the company with the decision of whether to file for bankruptcy protection. During the gathering of this information, the company decided it had no choice but to file for bankruptcy protection.

Claimant A was one of the bankruptcy claimants. He was told to send his information to an email address at respondent's office. When that email address did not work, he was given a second email address at respondent's office. Claimant A called respondent's office but could not get any information about the claims process. Claimant A did not receive any information from respondent.

Respondent admits that once the decision to file for bankruptcy protection was made, he had no communication with the claimants. The claimants were notified

of the bankruptcy filing by the company's bankruptcy attorney, not respondent. Respondent did not notify any claimants that he was no longer involved in the matter.

Respondent did not respond to ODC's initial inquiry in this matter and did not timely respond to a reminder letter sent pursuant to *In the Matter of Treacy*, *Id*.

Matter V

Respondent represented Client A, the Personal Representative of Client A's brother's estate. Client A was appointed on February 15, 2010. On February 15, 2011, a Request to Close was sent from the Horry County Probate Court to respondent based on the passage of twelve months since Client A's appointment. Respondent was advised that several documents needed to be filed to close the estate. The Probate Court requested respondent file these documents within twenty days. Respondent did not file the requested documents.

On April 18, 2011, respondent requested a sixty day extension to file the requested documents. The extension request was granted, making the new due date July 1, 2011.

On July 14, 2011, the Horry County Probate Court informed respondent that his extension had expired and included another Request to Close and a request for other information. Respondent sent blank forms to Client A to complete.

On July 22, 2011, Horry County Probate Court Judge A issued a Rule to Show Cause for a hearing on August 19, 2011, for respondent to show cause why he should not be held in contempt for failure to file the required documents to close the estate. On August 18, 2011, respondent filed documents in the Horry County Probate Court. The hearing on the Rule to Show Cause was cancelled.

On September 1, 2011, the Horry County Probate Court informed respondent that several amendments were required to be made to the documents before the estate could be closed. Respondent was given twenty days to make the amendments. On November 2, 2011, the Horry County Probate Court reminded respondent that the amended documents were still outstanding and requested the documents be filed within fourteen days.

On December 29, 2011, the Horry County Probate Court issued a third Request to Close and reminded respondent of the repeated requests for the amended documents. The court gave respondent an additional thirty days to file the documents.

On March 5, 2012, Horry County Probate Court Judge A issued a Citation for Accounting for Closing and set April 6, 2012, for respondent to provide the court with the outstanding documents. Horry County Probate Court Judge A then issued a Rule to Show Cause and set a hearing for May 14, 2012, for respondent to show cause why he should not be held in contempt for failure to file the documents necessary to close the estate.

On May 15, 2012, a Summons to Show Cause was issued by Horry County Probate Court Judge A to respondent to appear on June 12, 2012, and show cause why he should not be held in contempt due to his failure to respond to court demands for documents. Horry County Probate Court Judge B presided over this hearing during which respondent testified and assured the court that all of the amended closing documents would be filed no later than June 30, 2012. The Rule to Show Cause was held in abeyance pending the submission of the amended documents.

On July 3, 2012, Horry County Probate Court Judge B issued an Order on Summons to Show Cause based on the hearing on June 20, 2012. Horry County Probate Court Judge B made several findings with regard to respondent's failure to respond to repeated requests by the court for respondent to file documents in order to close the estate. Horry County Probate Court Judge B found respondent to be in willful contempt of court for failure to timely respond and ordered him to pay a civil contempt fine in the amount of $500. On July 18, 2012, respondent filed the requested documents in the Horry County Probate Court and paid the $500 contempt fine.

Respondent did not respond to ODC's initial inquiry in this matter and did not timely respond to a reminder letter sent pursuant to *In the Matter of Treacy, Id.*

Matter VI

In August 2012, Jane Doe contacted respondent for assistance with a probate matter. The matter was of some urgency as Jane Doe believed the personal representative of the estate in question was in breach of her fiduciary duties and Jane Doe wanted respondent to help her protect the assets of the estate.

During the initial telephone conference, respondent told Jane Doe he would go to the probate court and look into the matter. He later told Jane Doe a petition to remove the personal representative would need to be filed and he led her to believe he had filed a petition in probate court when he did not do so.

Jane Doe emailed and telephoned respondent multiple times over the course of six months inquiring about the status of the petition and to find out whether a hearing had been scheduled. Respondent routinely ignored her inquiries, but did respond on two noteworthy occasions. Once, in November 2012, Jane Doe asked respondent whether she needed to retain a new lawyer because she was frustrated with respondent's failure to return her calls or respond to her emails. She wanted copies of the documents that had been filed and asked why no hearing had been scheduled. Respondent replied via email, "Jane: Not necessary. Will email documents," convincing her that he had in fact filed the petition.

On another occasion, in response to repeated requests for information from Jane Doe, respondent informed her that he was very busy and, while he was trying to help her, clients who had paid his standard retainer fee needed his assistance. Although Jane Doe had not executed a fee agreement with respondent and never paid him any money, she offered to send him money on more than one occasion.

Finally, after many more attempts to contact respondent, Jane Doe emailed respondent on Saturday, February 16, 2013, and again complained about his lack of communication. She gave respondent an ultimatum, stating that if she did not hear from respondent by Monday at 5:00 p.m., she would find other representation. Jane Doe sent this email with a request to notify her when it was read. She received confirmation that the email was read on Saturday.

On Monday evening, respondent sent a text message to Jane Doe and told her that her email from Saturday had gone into his "junk folder" and that he had just read it that day. Based on Jane Doe's confirmation receipt, this was untrue. Respondent sent another text message to Jane Doe telling her that the hearing date was set, but he could not remember the date and he would let her know on Tuesday.

Respondent never filed the petition and, therefore, no hearing date was scheduled. Respondent's representations to Jane Doe that he had filed the petition and that a hearing had been set were untrue.

Jane Doe's emails demonstrate she believed respondent was representing her and his limited responses show that this perception was justified. In contrast to this perception, respondent reported to ODC that he did not represent Jane Doe. He stated he had reviewed the documents on his own time and at his own expense.

Jane Doe eventually hired another lawyer who discovered respondent had not filed anything in probate court. The new attorney filed the petition on March 1, 2013, requesting the removal of the personal representative based on a breach of fiduciary duty. This petition was filed approximately eighteen months after Jane Doe initially contacted respondent.

Matter VII

Complainant A was sued by a company for a debt allegedly owed to the company. Complainant A sent a letter to the company's attorney denying liability and mistakenly thought the letter would suffice as an Answer. He contended he did not owe the money because someone forged his signature as guarantor for the debt. The amount of the debt at the time the company filed the Complaint was $5,588.43, not including the accruing interest. The company's attorney filed a Motion for Default, and judgment was entered against Complainant A on January 11, 2011.

Complainant A met with respondent on February 1, 2011, for the purpose of retaining respondent to file a Motion to Set Aside the Default Judgment based on fraud. Complainant A paid respondent $500 at the initial meeting.

On February 4, 2011, respondent sent a retainer letter to Complainant A. In the letter, respondent explained that the representation would cover the Motion to Set

Aside and the fee would be $1,500. Respondent acknowledged the prior receipt of $500. The letter also stated respondent would accept a payment arrangement but that "[w]e must receive at least half of this retainer fee prior to work being done on the case." The engagement letter contained a signature line for Complainant A consenting to respondent's representation based on terms of the letter. Complainant A did not return the letter to respondent. Respondent did not refund the $500 or any portion of it to Complainant A, did not contact Complainant A about the case, or do any work on the case to earn the $500.

In 2013, Complainant A requested respondent assist him with the refinance of a mortgage. As part of the title check, respondent found the prior judgment and discussed it with Complainant A. Complainant A told respondent he thought respondent had taken care of the judgment pursuant to their agreement. Respondent told Complainant A he had not done any work on the matter because Complainant A had not paid the fee.

In August of 2013, respondent filed a Motion to Set Aside Default Judgment. A hearing on the motion was held on September 10, 2013, at which time the judge denied the motion based on the expiration of the one year statute of limitations.

On September 26, 2013, respondent received a letter from another attorney indicating Complainant A had hired him to take over the matter and requesting Complainant A's file from respondent. A release signed by Complainant A was included in the letter.

On September 30, 2013, Complainant A provided the Magistrate's Order denying the Motion to Set Aside Default Judgment to respondent via email. Respondent replied and informed Complainant A that he had heard from Complainant A's new attorney and had ten days in which to file an appeal of the judge's ruling. Respondent also indicated that Complainant A still owed him money for the refinance matter and the default judgment matter. Respondent indicated "[u]pon payment I will provide your files to [new attorney]."

Respondent admits he should have informed Complainant A at the initial meeting that Complainant A had one year to file the Motion to Set Aside Default Judgment and that he should have contacted Complainant A within the one year period. He further admits he should have returned Complainant A's $500, requested the

outstanding fee within the statute of limitations period, or have communicated with Complainant A before the statute of limitations expired.

Matter VIII

John Doe and other members of a Planned Development (PD) met with respondent in the summer of 2010 and discussed suing the developer for a variety of issues involving the lack of neighborhood amenities and problems with the Home Owners' Association (HOA). Respondent quoted a fee of $5,000 to file suit.

Several months later, on February 1, 2011, John Doe paid respondent $2,500 to get started on the lawsuit. No fee agreement was executed and no other homeowners paid any money to respondent.

In 2011, the developer was foreclosed upon and the issues related to the HOA and the amenities became moot. Respondent did no further work on the matter. He did not send a bill to John Doe or other homeowners and, although he alleged he did a "good bit" of work on the matter, he did not keep time records to verify this claim.

In December 2012, John Doe, based on his belief that respondent still represented him, contacted respondent about suing the City of Conway. John Doe alleged the city illegally issued certificates of occupancy to the residents of the PD and issued building permits for a new builder to build homes in the PD. John Doe's complaint, in part, was that the new builder was intending to build smaller homes in contravention of the PD's original plan. John Doe and respondent communicated for several months about the issues and, on April 22, 2013, respondent sent a text to John Doe stating: "John: I'm ready to take on the city of Conway!"

In May 2013, the City of Conway filed a Complaint and Motion for a Restraining Order against John Doe. The basis for the motion was that John Doe had behaved aggressively and threateningly toward City officials. John Doe notified respondent of the Complaint and respondent appeared at the hearing on John Doe's behalf. There was no fee agreement addressing this representation, but respondent represented John Doe at the hearing. He cross-examined witnesses, presented arguments to the judge, and advocated on John Doe's behalf.

Over the next several months, John Doe sent emails and text messages to respondent about several issues relating to the new homes, the PD, and the conduct of certain city employees. Respondent frequently responded with messages indicating that he was gathering evidence or working on the matters in some fashion. John Doe's messages to respondent became more and more strident and vitriolic toward the city, toward several people involved in the matter, and toward respondent. The communications between John Doe and respondent became hostile and, in November, John Doe filed a complaint against respondent with the ODC.

In response to the Notice of Investigation, respondent indicated that he never intended to sue the City and that he told John Doe to hire an out-of-town attorney. This is contradicted by respondent's text message. Respondent indicated that he did not believe John Doe had an actionable claim against the City until October 2013 when John Doe's request for a fencing permit was denied. Respondent admits he did not inform John Doe of this opinion.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.2 (lawyer shall abide by client's decisions concerning objective of representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness is representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly comply with reasonable requests for information); Rule 1.5 (scope of representation and basis or rate of fee and expenses for which client will be responsible shall be communicated to client, preferably in writing, before or within reasonable time after commencing representation); Rule 1.16 (upon termination of representation, lawyer shall take steps to extent reasonably practicable to protect client's interests, such as giving reasonable notice to client); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client); Rule 3.3 (lawyer shall not make false statement of fact to tribunal); Rule 3.4 (lawyer shall not conceal document or other material having potential evidentiary value; lawyer shall not knowingly disobey obligation under rules of tribunal); Rule 3.5(d) (lawyer shall not engage in conduct tending to disrupt tribunal); Rule 8.1 (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority); Rule 8.4(a) (it is professional misconduct for lawyer to

violate Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); and Rule 7(a)(3) (it shall be ground for discipline for lawyer to willfully fail to respond to lawful demand from disciplinary authority to include request for response).

Conclusion

We accept the Agreement and definitely suspend respondent from the practice of law in this state for three (3) years.[1] Respondent shall pay the costs incurred in the investigation and prosecution of this matter within thirty (30) days of the date of this opinion. He shall complete the Legal Ethics and Practice Program Ethics School prior to filing a Petition for Reinstatement.

In the event respondent is reinstated to the practice of law, he shall hire a law office management advisor approved by the Commission and complete the following: 1) within thirty days of retaining the advisor, respondent shall meet with the advisor to conduct a thorough review of his law office management practices; 2) within thirty days of the date of the review, the advisor shall file a report concerning respondent's law office management practices with the Commission; the report shall include a review, analysis, and recommendations concerning respondent's practice; 3) respondent shall meet with the advisor once every three months for two years and the advisor shall file a complete report with the Commission within thirty days of each meeting; and 4) respondent shall be responsible for payment of the advisor and for timely submission of the advisor's

[1] Respondent's disciplinary history includes a public reprimand issued in 2009, *In the Matter of Biddle*, 382 S.C. 233, 676 S.E.2d 319 (2009), and a letter of caution issued in 2011 warning respondent to adhere to some of the Rules of Professional Conduct cited in the current matter. *See* Rule 2(r), RLDE (fact that a letter of caution has been issued shall not be considered in subsequent disciplinary proceeding against lawyer unless caution relevant to misconduct alleged in proceeding).

reports. Respondent's failure to comply with any of these conditions or with the advisor's recommendations shall constitute grounds for further discipline.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

The Supreme Court of South Carolina

In the Matter of E. John Daugs, Petitioner.

Appellate Case No. 2015-000967

ORDER

Petitioner has submitted a Motion to Resign in Lieu of Discipline pursuant to Rule 35 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules. We grant the Motion to Resign in Lieu of Discipline. In accordance with the provisions of Rule 35, RLDE, petitioner's resignation shall be permanent.

Within fifteen (15) days of the date of this order, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, and shall also surrender his Certificate of Admission to Practice Law to the Clerk of Court.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Beatty, J., not participating

Columbia, South Carolina

June 18, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Ron Santa McCray, Appellant.

Appellate Case No. 2012-213393

Appeal From Berkeley County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5321
Heard January 6, 2015 – Filed June 24, 2015

AFFIRMED

James Kristian Falk, of Bush Law Group, P.C., of Charleston, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Kaycie Smith Timmons, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

WILLIAMS, J: Ron McCray appeals his murder conviction, arguing the circuit court erred in (1) denying his request to charge the jury with the language from section 16-11-440(C) of the South Carolina Code (Supp. 2014); (2) allowing an expert who did not prepare a forensic report to testify and act as a conduit for the admission of the report; (3) refusing to admit testimony relating to Reginald Porcher's criminal record, drug use, and previous violent acts; and (4) restricting his cross-examination of two witnesses when the State failed to produce relevant impeachment evidence prior to his initial cross-examination of the two witnesses. We affirm.

FACTS/PROCEDURAL HISTORY

On September 16, 2009, an officer with the City of Charleston Police Department was called to the scene of a shooting on Jack Primus Road in Berkeley County, South Carolina. Upon arriving at the scene, the officer saw a female on her knees with Reginald Porcher's head cradled next to her body. He noticed blood around Porcher, who did not appear to be conscious. The officer cleared the group of people who had gathered around the woman and secured the scene. Police arrested McCray the following day and charged him with the murder of Porcher. His case was called for trial on October 29, 2012.

At trial, the State called Joyce Wright to testify. Joyce testified she was sitting on her friend's porch when Porcher was shot. She stated she saw a tall person wearing a white t-shirt walking toward a crowd near a tree[1] with something in his hand. Joyce testified she then heard a gunshot and the children who were playing nearby began to run away from the tree. According to Joyce, she also heard the children yelling "Ron shot Reggie" as they fled the area. Joyce stated she observed Porcher walking around in a circle and holding his neck before he fell to the ground.

Felicia Coaxum, who lived with Joyce, also testified at trial. Coaxum testified that, at the time of the shooting, she was asleep in her mother's room and was awakened by a loud noise. She looked outside and saw Porcher's truck rolling backwards toward the woods. Coaxum testified that—as the truck was rolling back—she saw Porcher lying on the ground, and McCray was standing over him holding

[1] Underlie Road, which runs off Jack Primus Road, has a tree that is a gathering place for families who live in the area. The area where the tree is located belongs to the heirs of Mr. Wigfall. McCray is a direct descendent of Mr. Wigfall through his mother, who is still alive.

something that had a "metal, wooden handle." According to Coaxum, McCray stomped on Porcher while saying "die mother-f***er, die." While Porcher was lying on the ground, Coaxum stated McCray asked the other people in the area if they had a problem and said "that he's God." Coaxum testified that, after stomping on Porcher, McCray got into a car and left.

In addition to Joyce and Coaxum, the State offered the testimony of Akeem Ashby. Ashby testified he was at the tree when McCray pulled up in his car and got out with a shotgun in his hand. As Ashby began to run away from the area, he said he heard a gunshot. Ashby also testified he heard McCray say "[s]omething like . . . I assure you all I'm God."

At the conclusion of Ashby's testimony, the State recalled Joyce and questioned her about a 2001 fraudulent check charge. Joyce confirmed she had a fraudulent check charge on her record, and the State did not ask any additional questions. On cross-examination, McCray asked Joyce if she knew Abdullah Fishburne, but the circuit court instructed McCray that this cross-examination was limited to Joyce's prior convictions. McCray withdrew the question, and Joyce was dismissed. Next, the State recalled Coaxum and questioned her about a 2004 breach of trust charge. McCray had no additional questions for Coaxum on cross-examination.

Porcher's father (Father), Robert Porcher Jr., also testified during the trial. During his testimony, the State asked Father if Porcher would have had a professional football career like Porcher's older brother, and Father responded that an automobile accident prevented Porcher from playing football. McCray argued that Father's testimony opened the door for testimony regarding prior bad acts because the jury could construe the testimony about a potential football career as evidence of Porcher's good character. As it pertained to the automobile accident, the circuit court limited McCray's cross-examination to the effect the accident had on Porcher's physical abilities. However, after McCray cross-examined Father, the circuit court allowed McCray to proffer testimony from Father regarding Porcher's prior criminal convictions. McCray then questioned Father about Porcher's previous convictions for burglary, disturbing schools, and fighting.

After McCray's cross-examination of Father—but before proffering his additional testimony—McCray argued he should be allowed a second unlimited opportunity to cross-examine Joyce and Coaxum because he did not receive their criminal records in discovery. According to McCray, knowledge of their previous convictions would have altered the way he prepared for and questioned the

witnesses. The State acknowledged its failure to immediately turn over the reports was a mistake, but noted it did not realize this mistake until the witnesses were on the stand. The circuit court denied McCray's request for a second unlimited cross-examination of Coaxum and Joyce.

Next, the State called James Boykin to testify. Boykin testified that—after McCray shot Porcher—McCray called him and told him, "I shot that mother-f***er" and "I hope he died." McCray also told Boykin he spit in Porcher's face and said "die mother-f***er, die." According to Boykin, McCray arrived at his house the morning after the shooting and told him "he needed to go get his check and stuff because he had to handle some business because he kn[ew] he was in trouble." Boykin testified McCray called his supervisor to have his check put in Boykin's name. Boykin drove to the construction site where McCray had previously worked to pick up McCray's check and work tools. Boykin stated that, while he was at the site, he spoke with a former employer and the owner of the site, after which he decided to call 911 out of fear of being charged as an accomplice to murder. Next, Boykin testified he took McCray's check to the bank, cashed the check, and gave the money to McCray. Boykin said he then took McCray to a pawn shop where he planned to sell his work tools, but because Boykin had called 911, the police were waiting at the pawn shop where they arrested Boykin and McCray in the parking lot.

The State subsequently called Stephanie Stanley, a forensic analyst with the State Law Enforcement Division (SLED), to testify. Stanley, who was qualified as a forensic science expert, testified that she worked as the peer reviewer for Katie Urka, the forensic scientist who performed a DNA analysis on samples taken from the scene of Porcher's death. Stanley testified about the procedures a peer reviewer follows in reviewing a DNA analyst's work. McCray objected to her testimony on the grounds that Stanley could not testify as to the results of an investigation she did not conduct. The circuit court, however, allowed Stanley to continue to testify regarding the conclusions she drew from Urka's report. At the conclusion of her testimony, Stanley testified that Porcher's blood was found on swabs from a Toyota Tacoma Truck, the ground on Jack Primus Road, and a gold Nissan Maxima.

After questioning an expert pathologist about Porcher's autopsy, the State rested and McCray moved for directed verdict. The circuit court denied McCray's motion for directed verdict.

In support of his theory of self-defense, McCray submitted Porcher's South Carolina Department of Corrections (SCDC) medical and disciplinary records into evidence and listed several witnesses who were going to testify about Porcher's past criminal history, drug use, and previous violent incidents. The State filed a motion in limine, arguing the records and testimony were inadmissible because they were irrelevant and highly prejudicial. The circuit court required McCray to proffer the evidence and testimony to rule on its admissibility.

During Lieutenant Frank Jackson's proffer, he testified he investigated Porcher in a burglary and safecracking incident that occurred in 2002. According to Jackson, Porcher was convicted of burglary, second-degree burglary as a violent offense, and safecracking after he and two others took an ATM from a convenience store. After Jackson's testimony was proffered, the circuit court denied the admission of the SCDC records and Jackson's testimony because the incidents described in the documents and the testimony were situation-specific, and neither Porcher nor McCray were near a convenience store or an ATM at the time of the homicide.

Subsequently, McCray proffered Lieutenant David Brabham's testimony. Brabham testified that he arrested Porcher in June 2000 for driving under suspension, failure to stop for a blue light, and the unlawful carrying of a pistol. The circuit court did not admit Brabham's testimony because the incident was "not so closely connected with the homicide as to indicate the deceased's state of mind," finding no indication that the incident would cause a reasonable apprehension of great bodily harm.

Next, McCray proffered Chavis Wright's testimony. Chavis testified he was with Porcher in the Jack Primus Road area purchasing marijuana from Abdulla Fishburne the night before Porcher was killed. According to Chavis, Porcher was "very upset and very angry [and] [h]e was carrying on about the situation with [Fishburne] and [McCray] earlier that day." Chavis testified he saw Porcher pull out a handgun and fire it in the air. When asked what he learned about Porcher and McCray that evening, Chavis stated, "I learn[ed] . . . that he had animosity towards him, and he was going to retaliate on him the next day." The circuit court found Chavis's testimony about Porcher being with him when he purchased marijuana and Porcher firing a gun into the air was not relevant to Porcher's death. The circuit court also found the testimony regarding the drugs and the gun was more prejudicial than probative, noting "there is absolutely no . . . indication that they were so closely connected with the homicide as to justify their inclusion."

However, the circuit court stated it would allow Chavis to testify that Porcher was upset with McCray for beating up his friend.

After Chavis testified, McCray took the stand on his own behalf to present his theory of self-defense. McCray testified about the events that led to Porcher being shot. According to McCray, on the day in question, he was riding in a car with Christopher Cleggett on Jack Primus Road when he saw Porcher's truck parked near the tree and told Cleggett to pull over because he wanted to talk to Porcher. McCray testified that he got out of the car and yelled to Porcher that he was coming to speak with him. McCray stated Porcher then ran toward his own truck, got in the driver's side door, grabbed something from under the seat, and got back out of the truck. McCray testified he believed Porcher was grabbing a weapon. In response, McCray said that he went back to the car and grabbed a shotgun. McCray stated he believed Porcher was pointing a gun at him, so he shot at Porcher.

Next, McCray testified that Porcher's truck began rolling backward and ran over Porcher's leg. McCray stated he ran toward Porcher and kicked him while he was lying on the ground in an attempt to "take the weapon off of him." McCray, however, then testified that he never saw a weapon. McCray further testified that Porcher did not appear to have been shot. However, he then stated Porcher had been shot—and that he kicked Porcher—but "nothing was wrong with him."

After closing arguments, the circuit court first charged the jury with the elements of murder. Then, because McCray argued he shot Porcher in self-defense, the circuit court charged the jury with the law regarding self-defense. In addition, the circuit court instructed the jury that "[i]f the defendant was on his own premises, the defendant has no duty to retreat before acting in self-defense." McCray objected to the circuit court's charges and requested the court charge the jury with the language from section 16-11-440(C).[2] The circuit court denied McCray's requested jury charge.

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[2] Section 16-11-440(C) states,

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force,

McCray was found guilty of murder and sentenced to life imprisonment. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in denying McCray's request to charge the jury with the language from section 16-11-440(C)?

II. Did the circuit court err in allowing a witness to testify as an expert in DNA analysis when the expert had no independent basis for her opinion and her testimony was based upon testimonial hearsay contained in a report prepared by a nontestifying DNA analyst?

III. Did the circuit court err in denying McCray's request to admit evidence and testimony regarding Porcher's criminal record, drug use, and previous violent acts?

IV. Did the circuit court err in denying McCray's request to conduct a second unlimited cross-examination of two witnesses when the State failed to provide McCray with relevant impeachment evidence in advance of his initial cross-examination of the witnesses?

LAW/ANALYSIS

I. Jury Charge

McCray argues the circuit court erred in denying his request to charge the jury with the language from section 16-11-440(C) because the court's self-defense charge failed to properly reflect that, as an heir to the property where the incident occurred, McCray did not have a duty to retreat. We disagree.

"In reviewing jury charges for error, this [c]ourt considers the [circuit] court's jury charge as a whole and in light of the evidence and issues presented at trial." *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (citation omitted). "A jury

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> if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

charge is correct if, when read as a whole, the charge adequately covers the law." *Id.* at 90-91, 747 S.E.2d at 448. "Generally, the [circuit court] is required to charge only the current and correct law of South Carolina." *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004) (citation omitted). "To warrant reversal, a [circuit court]'s refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* at 262, 607 S.E.2d at 95 (citation omitted).

The circuit court charged the jury with the self-defense instruction our supreme court adopted in *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984). In *Davis*, our supreme court suggested the circuit court use the following instruction when the facts indicate a self-defense charge is appropriate:

> Self-defense is a complete defense. If established, you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.

Id. at 46, 317 S.E.2d at 453.

While we recognize the jury instruction in *Davis* is not an exclusive charge, additional elements may be included with a self-defense charge if the facts and

circumstances of the case support their addition. *See State v. Fuller*, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989) (holding it was error for the circuit court to charge the *Davis* instruction as an exclusive self-defense charge when the facts and circumstances necessitated the circuit court charge additional elements that were requested by the defendant); *see also State v. Nichols*, 325 S.C. 111, 116-17, 481 S.E.2d 118, 121 (1997) (finding the evidence supported including additional instructions on (1) "the right to act on appearances," (2) "relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense").

In the instant case, the facts and circumstances do not necessitate self-defense instructions in excess of the *Davis* instruction. A review of the record shows that McCray arrived at the area near the tree, exited his vehicle, yelled something at Porcher, and then fired his shotgun at Porcher. After shooting Porcher, McCray approached Porcher, kicked him, and yelled "die mother-f***er, die." Accordingly, based on the facts and circumstances of this case, we find the circuit court charged the correct law and did not err in denying McCray's request to charge the jury with the language from section 16-11-440(C).

II. DNA Expert Testimony

Next, McCray argues the circuit court erred in allowing an expert witness to testify when she had no independent basis for her opinion and her testimony was based upon testimonial hearsay contained in a report prepared by a nontestifying DNA analyst. We agree; however, we find this error was harmless.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the [circuit] court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006) (citation omitted).

The Sixth Amendment's Confrontation Clause guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, the U.S. Supreme Court held the admission of testimonial hearsay against an accused violates the Confrontation Clause if (1) the declarant is unavailable to testify at trial and (2) the accused has had no prior opportunity to cross-examine the declarant. 541 U.S. 36, 59 (2004). "The touchstone for determining whether an expert is giving an independent judgment or merely acting as a transmitter for

testimonial hearsay is whether an expert is applying his training and expertise to the sources before him, thereby producing an original product that can be tested through cross-examination." *United States v. Palacios*, 677 F.3d 234, 243 (4th Cir. 2012) (quoting *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009)) (internal quotation marks omitted).

This issue hinges on whether Stanley—a DNA analysis expert who peer reviewed another DNA expert's report—merely served as a conduit for introducing the results of DNA tests that were performed by an expert who did not testify. After a thorough review of the record, we find Stanley did not offer any independent opinions regarding the results of the tests or produce an original product that could be tested through cross-examination. Specifically, during cross-examination, Stanley stated, "I did not perform DNA analysis in this case. . . . My job was as a peer reviewer." Additionally, Stanley stated she was not present when the tests were conducted. Stanley's statement that the DNA swabs from the scene matched Porcher's DNA appears to be based solely on Urka's tests; therefore, we find Stanley merely served as a conduit to introduce the results of Urka's DNA tests. Accordingly, the circuit court's admission of Stanley's testimony violated McCray's rights under the Confrontation Clause.

"A violation of [a] defendant's Sixth Amendment right to confront [a] witness is not *per se* reversible error if the error was harmless beyond a reasonable doubt." *State v. Pradubsri*, 403 S.C. 270, 280, 743 S.E.2d 98, 104 (Ct. App. 2013) (citation omitted).

> Whether such an error is harmless in a particular case depends upon a host of factors. . . . These factors include the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

State v. Gracely, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012) (alteration in original) (emphasis omitted) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 673, (1986)).

We find Stanley's testimony to be of minimal importance to the State's case. Stanley's testimony that Porcher's DNA matched the DNA recovered from the scene merely proves Porcher—whom McCray admittedly shot and kicked—was bleeding after being shot and kicked by McCray. Although Stanley's testimony was contradicted by McCray's testimony that Porcher was not bleeding after being shot and kicked, we find this contradiction to be insignificant when considering the overwhelming evidence of McCray's guilt. Accordingly, we find it is clear beyond a reasonable doubt that the admission of Stanley's testimony was harmless.

III. Prior Bad Acts

McCray argues the circuit court erred in denying his request to admit evidence of Porcher's criminal record, drug use, and previous violent acts through the admission of Porcher's SCDC records and the testimonies of Father, Jackson, Brabham, and Chavis. We disagree.

"The admission or exclusion of evidence is left to the sound discretion of the [circuit court], whose decision will not be reversed on appeal absent an abuse of discretion" or the commission of a legal error resulting in prejudice to the defendant. *State v. Martucci*, 380 S.C. 232, 247, 669 S.E.2d 589, 606 (2008) (citations omitted). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *Id.* (citation omitted).

Rule 402 of the South Carolina Rules of Evidence states "[a]ll relevant evidence is admissible . . . ." Rule 404 of the South Carolina Rules of Evidence states the following:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> . . .
>
> (2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the

> prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

"It is firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence." *State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 360 (Ct. App. 2008) (citing *State v. Young*, 364 S.C. 476, 485, 613 S.E.2d 386, 391 (Ct. App. 2005). "Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the [circuit court]." *Id.* at 483, 663 S.E.2d 360 (citation omitted).

A. Robert Porcher Jr.

McCray argues the circuit court erred in denying the admission of Father's testimony regarding Porcher's arrests and prior bad acts because Father's testimony became relevant once he put his son's purported good character at issue through his statements about a potential football career. We disagree.

We find Father's testimony regarding Porcher's ability to play football was not evidence of Porcher's good character. Rather, Father's testimony was an explanation of Porcher's physical limitations that was relevant in light of McCray's testimony regarding Porcher's movement during the altercation. We find the circuit court did not abuse its discretion in determining that Father's testimony did not open the door for additional prior bad act evidence. Accordingly, we affirm the circuit court's denial of the admission of Father's testimony regarding Porcher's prior bad acts.

B. SCDC Records

McCray argues the proffered SCDC records were admissible because the medical examiner's testimony about Porcher's toxicology report—which stated Porcher had

marijuana metabolites in his system at the time of his death—opened the door for the admission of evidence of prior drug use. We disagree.

"As a general rule, if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal." *State v. Santiago*, 370 S.C. 153, 163, 634 S.E.2d 23, 28 (Ct. App. 2006) (citation omitted). At trial, McCray did not argue the State's use of the toxicology report opened the door for the admission of the SCDC records.[3] Therefore, we find this argument is not preserved for appellate review because it was not raised to or ruled upon by the circuit court.

C. Testimonies of Lt. Frank Jackson and Lt. David Brabham

McCray argues the testimonies of Jackson and Brabham were admissible because the specific incidents described were so closely connected to the homicide as to reasonably indicate Porcher's state of mind. We disagree.

> The rule has long been established in this State that evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant, or, if directed against others, were so closely connected in point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide . . . .

State v. Amburgey, 206 S.C. 426, 429, 34 S.E.2d 779, 780 (1945) (citation omitted).

Based on our review of the record, we find the State did not open the door to testimony regarding Porcher's violent past and agree with the circuit court's conclusion that Jackson and Brabham's testimonies were situation-specific and unrelated to Porcher's state of mind at the time of the homicide. Accordingly, we find the circuit court properly denied the admission of the officers' testimonies.

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[3] Instead, McCray argued the medical examiner's testimony opened the door for Chavis to testify about marijuana. The circuit court, however, did not rule on this argument when it was initially raised and, after Chavis's testimony was proffered, the court denied the admission of his testimony regarding drug use on other grounds.

D. Chavis Wright's Testimony

McCray argues the circuit court erred in finding Chavis's testimony regarding the night before Porcher's death, as well as his mention of Porcher's drug use and use of a gun, were irrelevant. McCray contends the evidence was relevant because the close temporal relationship with Porcher's death goes toward McCray's state of mind at the time of the murder. We disagree.

> In the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at the point of time or occasion with the homicide as to reasonably indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm.

State v. Day, 341 S.C. 410, 419-20, 535 S.E.2d 431, 436 (2000) (citations omitted).

We agree with the State that Chavis's testimony about Porcher firing the gun the night before the incident was not so closely connected to the homicide to allow for its admission because, at the time of the homicide, no gun was found and no evidence was produced to show McCray was aware of Porcher's behavior the night before. Furthermore, upon review of the record, we find no evidence that McCray had a reasonable apprehension of great bodily harm based on Chavis's testimony. Accordingly, we find the circuit court properly denied the admission of Chavis's testimony regarding Porcher's brandishing and firing a weapon the night before the homicide.

IV. Due Process

Finally, McCray argues the circuit court erred in denying his request to conduct a second unlimited cross-examination of Coaxum and Joyce because the State's failure to provide their prior criminal records violated his due process rights pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963). We disagree.

"The *Brady* disclosure rule requires the prosecution to provide the defendant with any evidence in the prosecution's possession that may be favorable to the accused

and material to guilt or punishment." *State v. Anderson*, 407 S.C. 278, 286, 754 S.E.2d 905, 909 (Ct. App. 2014) (citing *Hyman v. State*, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012)). The State has the duty to disclose evidence even in the absence of a request by the accused. *Id.* at 287, 754 S.E.2d at 909 (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)).

"[A]n individual asserting a *Brady* violation must demonstrate the evidence was (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) suppressed by the State; and (4) material to the accused's guilt or innocence, or was impeaching." *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 419 (1995)). "Favorable evidence is either favorable exculpatory evidence or favorable impeachment evidence." *Id*. (citing *United States v. Bagley*, 473 U.S. 667, 676 (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." *Hyman*, 397 S.C. at 45, 723 S.E.2d at 380 (quoting *Porter v. State*, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006)). "[I]nformation is not deemed 'material' if the defense discovers the information in time to adequately use it at trial." *State v. Kennerly*, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). "A reasonable probability is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Anderson*, 407 S.C. at 287, 754 S.E.2d at 909 (citing *Hyman*, 397 S.C. at 45-46, 723 S.E.2d at 380).

In the instant case, Coaxum's and Joyce's prior convictions both related to dishonesty and, pursuant to Rule 609 of the South Carolina Rules of Evidence, these prior convictions were admissible as impeachment evidence. *See* Rule 609 (a)(2), SCRE ("[E]vidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment."). We find the impeachment evidence was favorable to McCray. *See Anderson*, 407 S.C. at 287, 754 S.E.2d at 909 (noting impeachment evidence is favorable).

We further find the evidence was in the State's possession and was suppressed by the State. During the trial, the State admitted that the failure to turn over the documents until after the witnesses testified was an oversight. The State apologized for this error and stated it did not purposely suppress the evidence. Regardless of whether the State intended to suppress the evidence, we find the State was in possession of the evidence and its failure to give McCray the evidence satisfies the second and third *Brady* requirements.

Although the evidence was favorable impeachment evidence, in the State's possession, and suppressed by the State, we find no *Brady* violation occurred because the evidence was not material as defined by the fourth *Brady* element. *See Hyman*, 397 S.C. at 45, 723 S.E.2d at 380 ("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." (citation omitted)). The evidence was not material because the State produced testimony from multiple witnesses corroborating Coaxum's and Joyce's testimony. Specifically, Boykin's testimony—that McCray said he "shot that mother-f***er" and, as he was standing over Porcher, spit in Porcher's face and said "die mother-f***er, die"—provides support for the conclusion that any discrediting of the witnesses' testimonies would have been minimal. Additionally, Ashby's testimony corroborated Coaxum's, Joyce's, and Boykin's testimony. Therefore, we find the proceeding would not have been different had the evidence been disclosed to the defense prior to the initial cross-examination.

Accordingly, based on the significant amount of corroborating testimony, we find the suppressed evidence was not material and the State's suppression of the witnesses' criminal records did not violate the *Brady* disclosure rule.

CONCLUSION

Based on the forgoing, the circuit court's decision is

AFFIRMED.

GEATHERS and McDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Daniel Demond Griffin, Appellant.

Appellate Case No. 2012-213602

Appeal From Greenwood County
Thomas L. Hughston Jr., Circuit Court Judge

Opinion No. 5322
Heard February 11, 2015 – Filed June 24, 2015

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General John Benjamin Aplin, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, for Respondent.

GEATHERS, J.: Daniel Demond Griffin (Appellant) appeals his convictions for first-degree assault and battery, armed robbery, and possession of a weapon during the commission of a violent crime. He contends the circuit court erred in denying his motion to dismiss, in which he asserted he was unlawfully stopped, seized,

detained, and arrested by deputies who had not been duly qualified to serve as deputy sheriffs. We affirm.

FACTS/PROCEDURAL HISTORY

On November 30, 2010, several deputies from the Greenwood County Sheriff's Office (GCSO) captured and arrested Appellant.[1] A grand jury indicted Appellant for first-degree assault and battery, armed robbery, and possession of a weapon during the commission of a violent crime. A bench trial was held in May 2012.

During the trial, Appellant moved to dismiss the matter with prejudice, asserting "multiple [GCSO] employees chased, stopped, seized, detained, handcuffed, and/or arrested [him] prior to being duly qualified to serve as deputy sheriffs." In the motion, Appellant contended the matter should be dismissed with prejudice because the GCSO did not comply with sections 23-13-10 and 23-13-20 of the South Carolina Code (2007). Section 23-13-10 states that once the sheriff has appointed someone to be a deputy, a certificate detailing the appointment must be signed by the sheriff and the appointment must be approved by a circuit court judge. Section 23-13-20 requires each deputy to "enter into bond in the sum of one thousand dollars" and take an oath of office. Section 23-13-20 further states, "The form of such bond shall be approved by the county attorney and, with the oaths, shall be filed with and kept by the clerk of court for the county."

In support of the motion to dismiss, Appellant called Ingram Moon to testify. Moon stated she had served as the Greenwood County Clerk of Court since 2004 and had been employed in the clerk's office since 1985. Moon testified the clerk's office had no record of any bonds being filed by anyone from the GCSO. She also stated the first time any oath certificates were filed in the court was on September

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[1] Appellant and two other men robbed Quentin Carter (Victim) and then struck Victim in the head numerous times with a gun. After Appellant and his codefendants left the scene, Victim's sister called the police, and a "be on the lookout" (BOLO) alert was issued. Appellant and his codefendants subsequently encountered a GCSO deputy who had heard the BOLO alert. A high-speed police chase ensued. The chase ended when the car in which Appellant was riding crashed into another deputy's patrol car. Appellant and his codefendants left their vehicle and fled on foot, but they were all subsequently apprehended by GCSO deputies.

30, 2011. Moon produced copies of those certificates. Each certificate contained the oath taken by the deputies of the GCSO and was signed by a deputy and by the sheriff.

Moon also testified that on September 30, 2011, she recorded an order from a circuit court judge. In the order, the judge requested the oath certificates be recorded in the clerk's office (2011 Approval Order). Moon testified that prior to the 2011 Approval Order, no orders from circuit court judges approving the appointments of the sheriff's deputies had been filed in her office.

In the 2011 Approval Order, the circuit court judge listed the names of the deputies whose appointments he was approving. The judge initially noted he believed section 23-13-10 was unconstitutional because of a separation of powers issue.[2] However, the judge proceeded to approve all of the deputies on the list, stating "[A]ny deputy who is, has been, or ever shall be duly hired by the sheriff and who otherwise meets all other qualifications and legal requirements for the office of deputy sheriff shall automatically be covered by this order." He also wrote, "To the extent permitted by law, [the 2011 Approval Order] shall be applied *nunc pro tunc* back to the date the [deputies on the list] were first sworn as deputies."

After Moon testified, the circuit court agreed to take the motion to dismiss under advisement. The State continued with its presentation of evidence. Several deputies took the stand and testified about the circumstances surrounding Appellant's capture and arrest. Upon taking the stand, the deputies testified regarding the amount of time they had been employed with the GCSO. All of the

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[2] The circuit court judge's separation of powers concern stemmed from the portion of section 23-13-10 that requires deputy appointments be approved by a circuit court judge. He stated, "[T]he office of sheriff belongs to the executive branch of government, and the office of circuit judge belongs to the judicial branch of government." He believed the court had "no authority over hiring, discharge or other personnel decisions of the sheriff's office"; therefore, he attempted to interpret the statute in a way that would prevent a separation of powers issue. The judge noted "the traditional, ceremonial role of the judiciary in administering oaths to elected or appointed officials" and determined section 23-13-10 "merely requires [a] judge to note passive acceptance . . . to an executive decision within the exclusive discretion of the sheriff."

deputies stated they were bonded and had taken an oath for every sheriff for whom they had worked.

After the State rested, Appellant moved for a directed verdict on the lawfulness of the arrest issue. Appellant again asked the circuit court to take the matter under advisement. Subsequently, Appellant took the stand and testified in his own defense.

On October 12, 2012, the circuit court issued a written order in which it noted Appellant had moved to dismiss the charges, asserting he had been unlawfully stopped, seized, detained, and arrested. The court declined, however, to decide the issue of the appointment of the deputies, finding "[e]ven if the deputies were not properly appointed under the statutes, the remedy would not be to dismiss these charges, or suppress any evidence entered at trial." The circuit court proceeded to find Appellant guilty on all charges.

The court subsequently sentenced Appellant to ten years' imprisonment for the assault and battery conviction, ten years' imprisonment for armed robbery, and five years' imprisonment for possession of a weapon during the commission of a violent crime, all to be served concurrently. This appeal followed.

ISSUE ON APPEAL

Did the circuit court err in denying Appellant's motion to dismiss, in which he asserted he was unlawfully stopped, seized, detained, and arrested by deputies who had not been duly qualified to serve as deputy sheriffs?

STANDARD OF REVIEW

In criminal cases, an appellate court may review only errors of law. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The appellate court will reverse only when there is clear error." *State v. Rogers*, 368 S.C. 529, 533, 629 S.E.2d 679, 681 (Ct. App. 2006).

LAW/ANALYSIS

Appellant contends the circuit court erred in denying his motion to dismiss. To support this assertion, he argues the process used to appoint the deputies was not in

compliance with the statutory requirements of sections 23-13-10 and 23-13-20 of the South Carolina Code.

Under section 23-13-10, "[t]he sheriff may appoint one or more deputies to be approved by the judge of the circuit court or any circuit judge presiding therein. Such appointment shall be evidenced by a certificate thereof, signed by the sheriff, and shall continue during his pleasure." Further, section 23-13-20 imposes additional requirements: "Each deputy sheriff shall, before entering upon the discharge of his duty, enter into bond in the sum of one thousand dollars, with sufficient surety, to be approved by the sheriff of the county . . . ." Section 23-13-20 also requires that each deputy take an oath of office and file proof of the bond and oath with the county's clerk of court.

The GCSO's deputy appointment process did not comply with all of the requirements of sections 23-13-10 and 23-13-20. Although section 23-13-20 requires that proof of the deputies' bonds and oaths be filed with the clerk of court, Moon testified the clerk's office had no record of any bonds being filed by anyone from the GCSO. She also stated the first time any oath certificates were filed with the clerk's office was on September 30, 2011. Additionally, section 23-13-10 requires that deputy appointments be approved by a circuit court judge; however, Moon testified no orders from circuit court judges approving the appointments of the sheriff's deputies had been filed in her office prior to the 2011 Approval Order.

Nonetheless, the GCSO deputies can be considered de facto deputies despite their failure to comply with all of the requirements of sections 23-13-10 and 23-13-20. "One who is actually acting as deputy sheriff under a color of appointment is such officer de facto, even though the person's appointment was not made with all the formalities required by statute, . . . as where the appointment is not . . . filed[] or confirmed by the judge . . . ." 80 C.J.S. *Sheriffs and Constables* § 38 (2015) (footnotes omitted). "Likewise, one acting as deputy is a de facto officer notwithstanding the person has failed to file the requisite oath[] or has failed to give[] or sign the necessary bond." *Id.* (footnotes omitted). "It is the appointment that confers the office . . . ." *Kottman v. Ayer*, 34 S.C.L. (3 Strob.) 92, 94 (1848). "[S]o long as the officer appointed continues to discharge the duties of his office, his official acts, as to third persons, are legal," despite his failure to give a bond or take an oath. *Id.*

In *State v. McGraw*, our supreme court considered whether a deputy was properly appointed. 35 S.C. 283, 287, 289, 14 S.E. 630, 631 (1892). It found that although the deputy had been appointed and had acted as a deputy, the deputy had never taken the oath of office and his appointment had never been formally approved by a circuit court judge. *Id.* at 287, 14 S.E. at 631. Notwithstanding these deficiencies, the court determined the deputy was "at least a *de facto* officer." *Id.* at 289, 14 S.E. at 631; *see Farmer v. Sellers*, 89 S.C. 492, 496, 72 S.E. 224, 226 (1911) (stating if constables were required to give bond, "one holding the appointment of the Governor without giving the bond must be respected as a de facto officer"); *Elledge v. Wharton*, 89 S.C. 113, 114, 71 S.E. 657, 657 (1911) (holding although the rural police officers' appointment was made without the recommendation of the legislative delegation of Greenwood County, they were de facto officers because they were commissioned by the Governor, took the oath of office, were bonded, and discharged their duties in good faith); *see also State v. Hopkins*, 15 S.C. 153, 156 (1881) ("The written appointment had not been given to [the deputy clerk], or approved by the judge, or recorded, but he acted as deputy in good faith, and the fact that all the requirements had not been complied with did not make void the acts done by him as deputy.").[3]

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[3] We also find instructive cases from several other jurisdictions that have conferred de facto status on deputies whose appointments were not in accordance with state statutes. For example, in *Amerson v. State*, 648 So. 2d 58, 59-60 (Miss. 1994), Amerson contended he could not be convicted of simple assault upon a law enforcement officer because the deputy he assaulted did not attend the training academy, as required by statute, and, therefore, was not a law enforcement officer. The Supreme Court of Mississippi determined that as to Amerson, the deputy's actions were valid. *Id.* at 62. It stated, "Even if any deficiencies existed in [the deputy's] appointment as deputy sheriff, [he] would still have been a de facto deputy sheriff" at the time of the assault because he was acting pursuant to the appointment, control, consent, and approval of the sheriff. *Id.* Furthermore, the deputy was dressed in uniform, wearing a badge signed by the sheriff, and was identifiable to the inmates as a deputy sheriff who had authority. *Id.* The court went on to find Amerson could still be found guilty of assaulting an officer and would "not be allowed to benefit from administrative failures because these failures were not readily apparent and were unknown to Amerson at the time of the assault." *Id.*; *see also Malone v. State*, 406 So. 2d 1060, 1062-63 (Ala. Crim. App. 1981) (finding the trial court properly denied the appellant's motion to quash the arrest warrant and dismiss the complaint; despite not filing written copies of their

In the instant case, all of the deputies who participated in Appellant's capture and arrest had been employed with the GCSO for a significant amount of time, ranging from eight to twenty-eight years. Additionally, all of the deputies stated they were bonded and had taken an oath for every sheriff for whom they had worked.

Furthermore, at the time of Appellant's capture and arrest, the GCSO deputies were performing duties consistent with their appointments as deputies and were identifiable to Appellant as deputy sheriffs who had authority. Deputy Marc Cromer testified he encountered Appellant and Appellant's two codefendants at a gas station after the BOLO alert had been issued. Although Deputy Cromer was in an unmarked police vehicle, he testified he drove next to Appellant's vehicle, activated his blue light, was in uniform, and identified himself as a deputy with the GCSO. Deputy Cromer stated that after this exchange, Appellant and his codefendants "took off," resulting in a high speed chase.

Moreover, when Appellant took the stand, he testified he remembered seeing "a patrol car" when he and his codefendants arrived at the gas station. Appellant also stated he and his codefendants ran from the scene after they "hit the police car." Nothing in the record indicates that, on the date of Appellant's capture and arrest, he believed the deputies were not duly qualified. Thus, we find the GCSO deputies could be considered de facto deputies despite not complying with the requirements of sections 23-13-10 and 23-13-20. *See Kottman*, 34 S.C.L. at 94 (stating if an "appointed [officer] continues to discharge the duties of his office, his official acts, as to third persons, are legal," even if he did not comply with all of the

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oaths before arresting the appellant, both deputies were acting under color of right as de facto deputies because they were orally sworn in the presence of the sheriff, performed duties consistent with the appointment, maintained an office in the county jail, and were entrusted with the only keys to the county jail); *State v. Stago*, 312 P.2d 160, 161-62 (Ariz. 1957) (finding although the deputy's appointment was not recorded in the office of the county recorder and his appointment was never approved by the Board of Supervisors, he was not deprived of de facto deputy status); *Call v. Commonwealth*, 482 S.W.2d 770, 772 (Ky. Ct. App. 1972) (holding the sheriff's wife was a de facto officer even though the county judge had not approved her appointment), *modified on other grounds*, 492 S.W.2d 195 (Ky. Ct. App. 1973).

formalities of appointment); *see also Amerson*, 648 So. 2d at 62 (finding the defendant could still be found guilty even though the deputy's appointment did not comply with statutory requirements because the defendant should "not be allowed to benefit from administrative failures [if the] failures were not readily apparent and were unknown to [the defendant] at the time of the" crime).

CONCLUSION

Based on the foregoing reasons, the circuit court's denial of Appellant's motion to dismiss is

AFFIRMED.

THOMAS and KONDUROS, JJ., concur.