The Supreme Court of South Carolina

In the Matter of
Joseph F. Kent, Deceased.

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition advising the Court that Joseph F. Kent, Esquire, passed away on May 5, 2007. At the request of Mr. Kent's personal representative, ODC has filed a petition asking the Court to appoint an attorney to disburse Mr. Kent's law firm escrow account funds pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that J. Kevin Holmes, Esquire, is hereby appointed to assume responsibility for Mr. Kent's escrow account. Mr. Holmes may make disbursements from the escrow account to Mr. Kent's appropriate clients.

This Order, when served on any bank or other financial institution maintaining Mr. Kent's escrow account, shall serve as notice

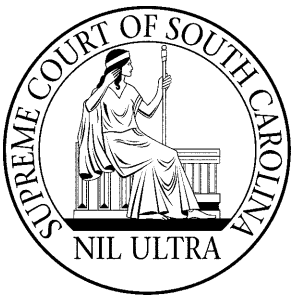
to the bank or other financial institution that J. Kevin Holmes, Esquire, has been duly appointed by this Court.

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

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

Columbia, South Carolina

November 1, 2007



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39

November 5, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Melisa W. Gay, Respondent.

Opinion No. 26386
Submitted September 26, 2007 – Filed November 5, 2007

PUBLIC REPRIMAND

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

Lawrence E. Richter, Jr., of the Richter Law Firm, LLC, of Mount Pleasant, for respondent.

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

FACTS

Matter I

In 1998, respondent was hired to represent Complainant A in a criminal matter. In 2000, just days before the hearing on the

motion to suppress, Complainant A consulted with another lawyer (Lawyer) about assisting with the case. Lawyer agreed to assist Complainant A. Lawyer's understanding was that respondent would remain involved in the case. Respondent's understanding was that Lawyer would be taking over the case and she would no longer be involved.

Although aware of the upcoming motion hearing, respondent did not appear. Lawyer appeared and informed the court that he believed respondent was to be helping him with the case. Lawyer requested a continuance because respondent did not appear and he was unable to proceed without her assistance. The judge telephoned respondent from his chambers and outside the presence of Complainant A and Lawyer. When the judge returned to the courtroom, he announced he was relieving respondent from the case. He then denied the motion to suppress and informed Lawyer he had ten days to prepare for trial.

When the case was called for trial, Complainant A pled guilty and was sentenced to fifteen years imprisonment. His decision to do so was based on Lawyer's inability to proceed without respondent's assistance. Complainant A's subsequent post-conviction relief petition was granted on a finding of ineffective assistance of counsel.

Matter II

Respondent was retained to represent Complainant B in a criminal matter. During that representation, respondent learned that someone had misappropriated funds from Complainant B's bank account. In addition to the criminal case, respondent agreed to represent Complainant B in a civil case against the bank. At some point, respondent also became involved in defending a civil action filed by Complainant B's landlord and the sale of Complainant B's mobile home.

Respondent failed to accurately account for funds she received on Complainant B's behalf. She did not comply with Complainant B's repeated requests for an accounting of funds and itemization of fees incurred. Respondent refused to provide Complainant with copies of canceled checks related to transactions on his behalf, asserting they were confidential and he was not entitled to them. On advice of counsel, respondent subsequently produced copies of the checks. Respondent had no written fee agreement in any of the cases handled for Complainant B. At least one of the matters was handled on a contingency basis.

Matter III

Respondent failed to adequately train and supervise staff members who were responsible for bookkeeping and maintaining trust account records. Errors in respondent's records included unidentified deposit entries, check entries which did not identify the client to whom they were associated, checks which did not contain a meaningful description or client reference, checks inadvertently issued twice, deposits into the wrong account, payments from the trust account on behalf of clients in excess of funds those clients had on deposit, and resulting bank charges to the trust account due to the errors. Respondent's recordkeeping errors violated Rule 417, SCACR.

In addition, respondent's failure to properly reconcile her trust account, maintain accurate client ledgers, and supervise her staff resulted in errors causing negative balances in some of her clients' trust accounts. On several occasions, respondent issued checks from her trust account payable to cash and delivered the cash to clients or their designees. Respondent did not maintain any documentation of these transactions.

Respondent commingled her personal funds with client funds when she deposited proceeds of her own insurance claim and her own tax refund into her trust account.

There is no evidence respondent profited personally from her mismanagement of her trust account. Prior to the commencement of this investigation, respondent had recognized problems with her management of her trust account and had already begun taking steps to remedy those problems. Since notice of this investigation, respondent has retained the services of an experienced accounting professional who has reconciled her account, corrected her errors, accounted for client funds, assisted her in restoring client balances, and established an accounting system for her office.

LAW

Respondent admits that by her misconduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall hold client property separate from her own property); Rule 1.16 (lawyer may withdraw from representation if withdrawal can be accomplished without material adverse effect on the interest of the client); and Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct). Further, respondent agrees her misconduct violated the recordkeeping provisions of Rule 417, SCACR. Respondent acknowledges that her misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

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

PUBLIC REPRIMAND.

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

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Dane A. Bonecutter, Respondent.

Opinion No. 26387
Submitted September 28, 2007 – Filed November 5, 2007

DEFINITE SUSPENSION

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

J. Steedley Bogan, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of any sanction ranging from a letter of caution to a definite suspension not to exceed two (2) years. See Rule 7(b), RLDE, Rule 413, SCACR. He requests the suspension be made retroactive to the date of his interim

suspension.[1] We accept the Agreement and impose a definite suspension of two years, retroactive to the date of respondent's interim suspension. The facts, as set forth in the Agreement, are as follows.

FACTS

On February 3, 2005, respondent's membership in the South Carolina Bar was suspended due to his non-compliance with continuing legal education (CLE) requirements for 2002. Respondent represents he failed to comply with the CLE requirements due to financial difficulties. On March 6, 2003, respondent's membership in the South Carolina Bar was suspended due to non-payment of his 2003 license fee. Respondent represents he failed to pay the license fee due to financial difficulties. On April 11, 2003, the Court issued an order suspending respondent from the practice of law due to his failure to correct the foregoing requirements for membership in the Bar.

Notwithstanding his suspensions, respondent continued to work for an attorney through November 2003. Respondent represents his job consisted of clerical duties as he did not appear in court or sign letters or pleadings. From mid-December 2003 to January 2, 2004, respondent was employed as a contract attorney for Nextra Litigation Solutions, LLC, on a document review project.

Thereafter, respondent worked as a paralegal for a law firm from April 26, 2004, to June 11, 2004. Respondent represented to the firm that his law license was on inactive status when, in fact, he was suspended. Respondent represents that he misunderstood the rules at the time and honestly believed that his license was inactive due to the fact that he had been administratively suspended as opposed to suspended for an ethical violation. Further, respondent represents he was unaware at the time that Rule 34, RLDE, Rule 413, SCACR,

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[1] Respondent was placed on interim suspension on March 11, 2005. In the Matter of Bonecutter, 363 S.C. 110, 610 S.E.2d 503 (2005).

prohibits a suspended lawyer from working in any capacity connected with the law.

Respondent was reinstated to the practice of law on June 28, 2004. On August 4, 2004, respondent was served with a Notice of Full Investigation requiring him to respond to the allegations within thirty (30) days pursuant to Rule 19(c)(3), RLDE, Rule 413, SCACR. Respondent failed to respond to the notice within thirty (30) days. Although he contacted ODC before he received the Notice of Full Investigation, respondent now realizes that this did not excuse him from responding to the notice. Respondent represents he was depressed over his financial situation and, as a result, failed to properly respond to the Notice of Full Investigation.

Respondent remained unemployed until March 7, 2005, when he accepted a position as an associate attorney with a law firm. Respondent immediately advised his supervisor of his March 11, 2005 interim suspension.[2] He is no longer employed by the firm.

Respondent was admitted to the Ohio Bar in 1986[3] and the South Carolina Bar in 1999. He has no prior disciplinary history in this state. Since being placed on interim suspension, respondent has fully cooperated with ODC. Respondent represents that he is no longer suffering from any meaningful depression.

LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (it shall be a ground for discipline for lawyer to violate the Rules of

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[2] The interim suspension stemmed from respondent's failure to respond to the Notice of Full Investigation. Rule 17(c), RLDE, Rule 413, SCACR.

[3] The Supreme Court of Ohio suspended respondent on April 8, 2005 for non-compliance with Ohio CLE requirements and failure to pay a fine for non-compliance.

Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers); Rule 7(a)(3) (it shall be a ground for discipline for lawyer to willfully violate an order of the Supreme Court or knowingly fail to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5) (it shall be a ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law); and Rule 7(a)(7) (it shall be a ground for discipline for lawyer to willfully violate a court order). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 5.5(a) (lawyer shall not practice law in violation of regulations of the legal profession); Rule 8.1(b) (lawyer shall not knowingly fail to respond to a lawful demand from a disciplinary authority); Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct); and Rule 8.4(d) (it is professional misconduct for lawyer to engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a definite suspension of two years, retroactive to the date of respondent's interim suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Widdicombe, Respondent,

v.

Rachel P. Tucker-Cales, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Judy C. Bridges, Family Court Judge
Frances P. Segars-Andrews, Family Court Judge
Jocelyn B. Cate, Family Court Judge

Opinion No. 26388
Submitted November 1, 2007 – Filed November 5, 2007

AFFIRMED IN PART; VACATED IN PART.

Rachel P. Tucker-Cales, of Mt. Pleasant, Pro Se.

Paul B. Ferrara, III, of the Ferrara Law Firm, PLLC, of N. Charleston, for Respondent.

PER CURIAM: Petitioner has filed a petition asking this Court to review the Court of Appeals' opinion in Widdicombe v. Tucker-Cales, 366 S.C. 75, 620 S.E.2d 333 (Ct. App. 2005). We grant the petition, dispense

with further briefing, and vacate the portion of the Court of Appeals' opinion supporting the family court's exercise of jurisdiction in this case pursuant to the doctrine of unclean hands, but affirm the opinion on all other grounds.

FACTUAL/PROCEDURAL BACKGROUND

The family court issued an emergency ex parte order granting respondent (Father) custody of the parties' minor child. Subsequently, petitioner (Mother) and Father entered into a temporary consent order granting Father sole care, custody, and control of the child.

Mother then moved for relief from the prior custody orders, alleging the family court was without jurisdiction to modify the original custody order. The family court denied Mother's motion to dismiss, finding the family court had continuing, exclusive jurisdiction. The Court of Appeals affirmed.

ISSUE

Did the Court of Appeals err in further justifying the family court's continued exercise of jurisdiction over the parties' dispute pursuant to the doctrine of unclean hands?

DISCUSSION

Mother contends the Court of Appeals erred in justifying the family court's continued exercise of jurisdiction over the parties' dispute pursuant to the doctrine of unclean hands based on her failure to give Father 60 days' notice before moving out of state. Mother argues this finding is not supported by the record. We agree.

The Court of Appeals held Mother was a resident of South Carolina pursuant to the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738(A) (1988) and the Uniform Child Custody Jurisdiction Act (UCCJA), S.C. Code Ann. §§ 20-7-782, et seq. (1985), and, therefore, the family court had subject matter jurisdiction over the case.

As additional support for the family court's exercise of jurisdiction in this case, the Court of Appeals noted other states have applied the doctrine of unclean hands to jurisdictional issues raised pursuant to the PKPA and UCCJA. Noting the original custody order in this case required Mother to provide 60 days' notice before taking the child out of the jurisdiction, and finding the record indicated no such notice was provided, the Court of Appeals held they would not consider Mother's sudden move to North Carolina on the eve of Father's filing of his complaint for custody, without notice to Father, as a change of residence under the PKPA.

We hold the record does not support the Court of Appeals' finding that Mother failed to give proper notice to Father of her move to North Carolina. Rather, Father's affidavit, submitted in support of an emergency change of custody, stated Mother provided notice to him in August 1998 of her plan to move to North Carolina. Sometime between September and October 1998, Mother moved to North Carolina. However, the ex parte order was not entered until August 2000. See Wooten v. Wooten, 364 S.C. 532, 615 S.E.2d 98 (2005) (in appeals from family court, an appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence). Accordingly, we vacate that portion of the Court of Appeals' opinion further supporting the exercise of jurisdiction in this case pursuant to the doctrine of unclean hands. However, we affirm the remainder of the opinion holding the family court properly found it had subject matter jurisdiction to entertain the dispute.

AFFIRMED IN PART; VACATED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Carroll Ansell Gantt, Respondent.

Opinion No. 26389
Submitted September 28, 2007 – Filed November 5, 2007

DEFINITE SUSPENSION

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

J. Leeds Barroll, IV, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction ranging from a public reprimand to a definite suspension not to exceed six (6) months. We accept the agreement and definitely suspend respondent from the practice of law in this state for six (6) months. The facts, as set forth in the agreement, are as follows.

FACTS[1]

Matter I

Respondent prepared a contract of sale for the purchase of an unimproved lot. The deed was prepared for a total consideration of $90,000.00. At some point after the sale and prior to recording, respondent changed the consideration stated on the deed to reflect a sales price of $10,000. The deed was then recorded with the incorrect amount to assist respondent's clients with a reduced recording fee.

Matter II

A Construction Company which was solely owned by one individual entered into a contract of sale to purchase three (3) lots in the I-77 Business Park. An informal agreement between the owner of the Construction Company and four other individuals provided that the Construction Company would acquire a specified lot, Party 2 would acquire a specified lot, and the remaining three individuals (Party 3) would acquire the third specified lot. Since the contract of sale reflected that the Construction Company alone was purchasing all three lots, the bank required written acknowledgment of Party 3's right to the specified lot before it would finance that portion of the purchase.

Respondent prepared a document entitled "Assignment" in which the Construction Company purported to transfer and assign the specified lot to Party 3. Respondent signed the Construction Company owner's name to the document as a true signature, witnessed the signature, and then forwarded the document to the bank. Respondent represents that he was furthering his client's objectives and that his client gave him the authority to prepare and submit the document to the bank. Respondent represents that Party 3 obtained financing based on Party 3's individual credit and the document forwarded to the bank was

[1] The agreement provides that respondent has been forthright and cooperative with the investigation of these matters.

only used to confirm the Construction Company owner's intent to sell the specified lot to Party 3.

Respondent also prepared a document entitled "Assignment" in which the Construction Company purported to transfer and assign the specified lot to Party 2. Respondent signed the Construction Company owner's name to the document and then witnessed the signature. Respondent also signed his secretary's name as a witness to the signature although she did not witness the signing of the document. Respondent states that this second document was never presented to the Bank or any other agency or institution.

Matter III

On October 18, 2004, respondent signed a document entitled "Name Affidavit" on behalf of his clients, Husband and Wife. Lawyer signed both Husband's and Wife's names on the affidavit and submitted it to a mortgage company. Respondent also notarized the false signatures. The purpose of the document was for Husband and Wife to acknowledge a typographical error in the spelling of their last name prior to the disbursement of any funds by the mortgage company.

LAW

Respondent admits that by his misconduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 4.1 (in course of representing a client, lawyer shall not knowingly make false statement of material fact to a third person); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); and Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). In addition, respondent admits his misconduct constitutes grounds for discipline under Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for six (6) months. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Pamela L. Buchanan-Lyon, Respondent.

Opinion No. 26390
Submitted September 26, 2007 – Filed November 5, 2007

INDEFINITE SUSPENSION

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

Pamela L. Buchanan-Lyon, pro se, of Anderson.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to any sanction provided by Rule 7(b), RLDE, Rule 413, SCACR. She requests that any suspension or disbarment be made retroactive to April 6, 2006, the date she was transferred to incapacity inactive status. See In the Matter of Buchanan-Lyon, 368 S.C. 186, 628 S.E.2d 891 (2006). We accept the agreement and indefinitely suspend respondent from the practice of law in this state. Respondent's

request to make the suspension retroactive is denied. The facts, as set forth in the agreement, are as follows.

FACTS

In March 2006, respondent filed a self-report in which she stated she had failed to comply with the requirements set forth in Rule 417, SCACR. Specifically, respondent did not maintain client trust ledgers or sufficient copies of receipts and disbursements to and from her trust account, she did not maintain or have her trust account bank statements in a readily accessible location, and she was not reconciling her trust account statements on a monthly basis. Due in part to respondent's failure to comply with Rule 417, SCACR, as of March 2006, at least $18,000 in client funds were unaccounted for and respondent did not have sufficient funds in her trust account to cover the client funds.

Respondent requests the Court consider her diagnosis of bipolar affective disorder in mitigation of her misconduct. According to the agreement, respondent has been fully cooperative and forthright with ODC throughout the investigation.

LAW

Respondent admits that by her misconduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer shall safekeep client property); and Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct). Further, respondent admits her misconduct violated Rule 417, SCACR. In addition, respondent admits her misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

CONCLUSION

We accept the Agreement for Discipline by Consent and indefinitely suspend respondent from the practice of law. The suspension shall not be retroactive to the date respondent was transferred to incapacity inactive status. Before she may file a Petition for Reinstatement respondent shall make full restitution to all persons and entities which have been harmed by her misconduct. Similarly, prior to filing a Petition for Reinstatement, respondent shall fully reimburse the Lawyers' Fund for Client Protection should it pay any claims on her behalf. Within fifteen days of the date of this opinion, respondent shall surrender her certificate of admission to practice law in this state to the Clerk of Court and shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR.

INDEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony Marlar, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26391
Submitted November 1, 2007 – Filed November 5, 2007

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Daniel E. Grigg, all of Columbia, for Petitioner.

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

PER CURIAM: The State seeks a writ of certiorari to review the decision of the Court of Appeals vacating the order of the circuit court denying respondent's application for post-conviction relief (PCR). *Marlar v. State*, 373 S.C. 275, 644 S.E.2d 769 (Ct. App. 2007). We grant the petition for a writ of certiorari on the State's Questions I and II, dispense with further briefing, and reverse the opinion of the Court of Appeals. The petition is denied on the State's Questions III and IV.

Pursuant to S.C. Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The failure to specifically rule on the issues precludes appellate review of the issues. *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). The order of the PCR judge in this matter fails to specifically address any of the allegations raised by respondent.

Although the Court of Appeals initially indicated the order failed to comply with § 17-27-80 and should be remanded for specific findings of fact and conclusions of law, the court later held respondent's allegations were preserved for appellate review. In making this determination, the Court of Appeals apparently relied on the following language in the PCR judge's order:

> As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them. Therefore, any and all allegations not specifically addressed in this Order are hereby denied and dismissed.

This paragraph does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law. This language should not be included in a PCR order unless there are

allegations contained in the application and/or mentioned at the PCR hearing about which absolutely no evidence is presented.

The Court of Appeals rejected the State's argument that none of respondent's allegations were preserved for appellate review because respondent failed to make a Rule 59(e), SCRCP, motion to alter or amend the judgment to include specific findings of fact and conclusions of law. *See Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001); *Pruitt v. State, supra*. In discussing this argument, the Court of Appeals noted this Court has remanded PCR actions to the PCR judge for specific rulings, despite the fact there were no Rule 59(e) motions. The court then pointed to the more recent case of *Humbert v. State*, *supra*, in which this Court held an issue was not preserved for appellate review because it was not addressed in the PCR order and no Rule 59(e) motion was filed. The Court of Appeals' opinion then states, "It does not appear that *Humbert* overruled the prior cases, and it is not clear whether, in light of *Humbert*, an appellate court may still take the extraordinary action of overlooking the failure to file a Rule 59(e) motion and remanding matters so that specific orders may be issued by the PCR court."

The cases this Court remanded for specific findings were unique cases in which the Court attempted to remind circuit court judges and parties that: (1) specific findings of fact and conclusions of law were required; and (2) a Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review. Although the cases apparently have not accomplished the Court's goal, they do not change the general rule that issues which are not properly preserved will not be addressed on appeal. In fact, in *Pruitt*, this Court stated in a footnote, "In vacating and remanding in this case, we are not abandoning the general rule that issues must be raised to, and ruled on by, the post-conviction judge to be preserved for appellate review. The extraordinary action we take today is necessary only because our opinion in *McCray* [*v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991)] is not being followed." *Pruitt v. State*, 310 S.C. at 255, 423 S.E.2d at 128.

Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his

allegations, the issues were not preserved for appellate review, and the Court of Appeals erred in addressing the merits of the issues and remanding the matter to the PCR judge. *Humbert v. State, supra; Pruitt v. State, supra.*

We take this opportunity to reiterate our admonition that "[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCP." *Pruitt v. State*, 310 S.C. at 256, 423 S.E.2d at 128.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Dennis J. Rhoad,

Respondent.

Opinion No. 26392
Submitted September 20, 2007 – Filed November 5, 2007

DEFINITE SUSPENSION

Attorney General Henry Dargan McMaster and Assistant Deputy Attorney General Robert E. Bogan, both of Columbia, for the Office of Disciplinary Counsel.

A. Camden Lewis, of Lewis & Babcock, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Dennis Rhoad (respondent) was charged with possession of cocaine and later encouraged others to make misleading statements to two of his clients. The Commission on Lawyer Conduct (Commission) recommended that this Court impose the sanction of an admonition plus costs. We sanction respondent with a ninety-day definite suspension plus costs.

FACTS

In the early morning hours of June 21, 2003, respondent became intoxicated at a bar. He and his friends walked to a fraternity party, where some attendees were snorting lines of cocaine from the surface of a framed poster on a pool table. Respondent inhaled one or possibly two lines of cocaine.[1] A police officer observed the activity through the window from the porch of the house across the street. Six people, including respondent, were arrested for possession of cocaine.

After Disciplinary Counsel petitioned for an interim suspension on July 2, 2003, respondent informed them that he had been diagnosed with an "addictive illness" in the form of an alcohol disorder. Respondent opposed the interim suspension, arguing he was voluntarily placing himself in a rigorous rehabilitation program and that his wife, also an attorney, could handle his cases while he was absent. On July 3, 2003, respondent wrote a detailed memorandum regarding the status of every client's case. In the memorandum, respondent instructed his wife and his staff to inform two of his clients that other attorneys would be handling their cases because respondent would be away "working on a big case." Respondent admitted this statement was untruthful, but he indicated he was merely trying to keep private the fact that he would be attending in-patient treatment for his addictive illness. There is no evidence that respondent's wife or his staff ever made those representations to the clients.

Respondent was placed on interim suspension on July 8, 2003. While on interim suspension, respondent completed the six week in-patient treatment program and participated in a pre-trial intervention (P.T.I.) program. He attended psychological counseling and Alcoholics Anonymous meetings for his addictive illness. Following the dismissal of the possession of cocaine charge pursuant to P.T.I., respondent was

[1] Respondent does not recall whether he inhaled two lines because he was intoxicated at the time.

reinstated by this Court in December 2003. He cooperated fully in the investigation by Disciplinary Counsel.

The Commission[2] found respondent's "one time admitted use of cocaine" violated various Rules of Professional Conduct (Rule 407, SCACR): Rule 8.4(a), RPC (providing that it is misconduct for a lawyer to attempt to violate the Rules of Professional Conduct); Rule 8.4(b), RPC (stating it is misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); and Rule 8.4(c), RPC (providing it is misconduct to commit a criminal act involving moral turpitude). The Commission also found respondent's instructions to his wife and staff to provide false information to two clients regarding his whereabouts violated Rule 8.4(d), RPC (stating it is misconduct to engage in conduct involving dishonesty, fraud, deceit or misrepresentation). The Commission noted, however, that no clients were harmed or intended to be harmed by the violation. The Commission further found respondent's actions constituted grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1), RLDE (violating a Rule of Professional Conduct); and Rule 7(a)(5), RLDE (conduct tending to pollute the administration of justice or bringing the legal profession into disrepute). The Commission recommended a sanction of an admonition and payment of costs of the proceedings.

DISCUSSION

Respondent does not complain about the finding of misconduct or the recommended sanction. Disciplinary Counsel, however, maintains the recommended sanction is not sufficient. Thus, the only matter for this Court to determine is whether the recommendation of an admonition is the appropriate sanction. See In re Strickland, 354 S.C. 169, 580 S.E.2d 126 (2003) (holding that after a thorough review of the record, the Court must impose the sanction it deems appropriate); In re Long, 346 S.C. 110, 551 S.E.2d 586 (2001) (holding the authority to discipline attorneys and the manner in which discipline is given rests entirely with this Court); In re

[2] The sub-panel's report was fully adopted by the panel.

Larkin, 336 S.C. 366, 520 S.E.2d 804 (1999) (noting the Court is not bound by the panel's recommendation and may make its own findings of fact and conclusions of law).

We agree with the Commission that respondent's actions violated the above-listed rules. Despite the Commission's recommendation that the Court impose a sanction of an admonition plus costs of the proceedings, we find a definite suspension of ninety days is more appropriate. The Court has imposed definite suspensions in analogous cases. See In re Newton, 361 S.C. 404, 605 S.E.2d 538 (2004) (sanctioning attorney who cultivated marijuana plants behind his house to a definite suspension of up to one year after a charge for possession with intent to distribute marijuana was dismissed for lack of evidence and a charge of manufacturing marijuana was dismissed after completion of a pre-trial intervention program); In re Floyd, 328 S.C. 167, 492 S.E.2d 791 (1997) (imposing a twelve-month suspension on an attorney who pled guilty to possession of heroin and to knowingly and intentionally acquiring or obtaining possession of a controlled substance, pursuant to a prescription authorized by one medical doctor, and withholding from that doctor the fact that he was also obtaining a similar controlled substance at the same time from another doctor).

Respondent's use of a controlled substance and attempt to mislead clients warrants the more severe sanction of a ninety-day suspension, plus payment of the costs of the proceedings. This suspension is not retroactive to the date of the interim suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Larry Lee, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Aiken County
James R. Barber, Circuit Court Judge

Opinion No. 26393
Heard September 20, 2007 – Filed November 5, 2007

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General David A. Spencer, all of Columbia, and Barbara R. Morgan, of Aiken, for Petitioner.

Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Respondent.

JUSTICE PLEICONES: Respondent Larry Lee (Lee) was indicted in 2001 for first-degree criminal sexual conduct (CSC) and lewd act upon a child based upon charges that he sexually abused his two stepdaughters on separate occasions between 1982 and 1985. The jury found Lee guilty, and he received an aggregate sentence of forty-five years imprisonment. The Court of Appeals vacated Lee's convictions, finding the excessive pre-indictment delay violated the Due Process Clause of the Fifth Amendment. State v. Lee, 360 S.C. 530, 602 S.E.2d 113 (Ct. App. 2004). We granted the State's petition for certiorari and now affirm.

FACTS

Lee married the mother of the two alleged victims in 1982. Lee, his wife, and the two stepdaughters moved into a home together. In 1988, the Department of Social Services (DSS) investigated allegations that Lee sexually abused his stepdaughters. These allegations arose during a juvenile criminal investigation involving the stepdaughters. DSS removed the stepdaughters from the home and placed them in the custody of their aunt, but DSS returned the stepdaughters to the home with Lee within several months.

The solicitor's office represented DSS during the family court hearings in 1988 which involved the allegations against Lee. According to the State, the procedure used at that time was for an assistant solicitor to prosecute family court cases on behalf of DSS. After the family court proceedings, the State took no further action until Lee was indicted in 2001.

ISSUE

Did the Court of Appeals err in vacating Lee's convictions due to excessive pre-indictment delay in violation of the Due Process Clause of the Fifth Amendment?

ANALYSIS

The State argues the Court of Appeals erred in vacating Lee's convictions based on the excessive pre-indictment delay. We disagree.

We have adopted a two-prong inquiry when pre-indictment delay is alleged to have violated a defendant's due process rights. State v. Brazell, 325 S.C. 65, 72-73, 480 S.E.2d 64, 68-69 (1997) (citing U.S. v. Lovasco, 431 U.S. 783 (1977)). First, the defendant must prove that the delay caused substantial actual prejudice to his right to a fair trial. Id. The second prong requires the court to consider the reason for the State's delay and to balance the justification for the delay against the prejudice to the defendant. Id. The State contends that the Court of Appeals erred by finding Lee satisfied both parts of the inquiry.

Substantial Actual Prejudice

The State argues the Court of Appeals erred in holding that Lee met his burden of proving substantial actual prejudice because Lee presented only non-specific, conjectural possibilities of prejudice. We disagree.

To prove substantial prejudice, Lee must show that he was "'meaningfully impaired in his ability to defend against the [S]tate's charges to such an extent that the disposition of the criminal proceeding was likely effected [sic].'" Brazell, 325 S.C. at 73, 480 S.E.2d at 69 (quoting Jones v. Angelone, 94 F.3d 900, 907 (4th Cir. 1996)). Prejudice to the defense of a criminal case may result from the shortest and most necessary delay, but every delay-caused detriment to a defendant's case should not abort a criminal prosecution. U.S. v. Marion, 404 U.S. 307, 324-325 (1971). To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. Id. at 325.

To meet his burden of showing substantial prejudice, the defendant must identify the evidence and expected content of the evidence with

specificity, as well as show that he made serious efforts to obtain the evidence and that it was not available from other source. Brazell, *supra*. The State argues that Lee cannot prove the alleged exculpatory evidence with specificity, and it contends that the missing evidence is just as likely to be inculpatory instead of exculpatory. The State's argument is without merit.

The Court of Appeals determined:

> Lee did more than merely rely on the length of the delay to establish substantial actual prejudice. As Lee's counsel pointed out, the delay of twelve years presented a significant obstacle in preparing an adequate defense and receiving a fair trial. All the records from the family court case have been destroyed. No records contemporaneous with the alleged offenses are available, particularly those explaining why the stepdaughters were placed back into Lee's home after being removed. Lee's efforts to acquire the same information from other sources were likewise unavailing. Lee's original attorney could not be located, and the DSS investigator could recall no specifics about the investigation. Without this information, Lee's counsel could not adequately cross-examine the victims and other family members regarding the alleged incidents and the juvenile investigation that prompted DSS to become involved. Moreover, Lee's counsel was also prevented from refuting the delayed disclosure evidence presented by the State through its expert witness.

Lee, 360 S.C. at 538, 602 S.E.2d at 117-118.

Ample evidence supports the Court of Appeals' conclusion that Lee suffered actual substantial prejudice from the pre-indictment delay. Lee had no record of the previous DSS investigation into the alleged abuse. He could not gain access to evidence concerning the Department of Juvenile Justice

investigating officer or records from the family court proceedings. Because Lee *never* had access to these records, it was admittedly difficult for him to accurately identify specific pieces of evidence that would have exonerated him. Nonetheless, the absence of any contemporaneous evidence prejudiced Lee's ability to defend himself, as he had no ability to cross-examine the State's witnesses nor obtain items of exculpatory evidence. The missing evidence, although possibly damaging, on balance would have likely benefited Lee because it would have revealed the State's justification for placing the stepchildren back in the home with Lee and revealed why the State did not prosecute him in 1988 or 1989.

For these reasons, the Court of Appeals did not err in determining Lee proved he suffered substantial actual prejudice due to the pre-indictment delay.

Justification for Delay

The State argues that Lee cannot satisfy the second prong of the due process analysis for pre-indictment delay because there is no evidence that the State acted intentionally to gain a tactical advantage over Lee. The State also argues that the twelve year delay was justified when compared to the purported prejudice to Lee. We disagree, as the absence of any prosecutorial bad faith motive is not fatal to Lee's Fifth Amendment claim.

Brazell sets forth the test for excessive pre-indictment delay under the Fifth Amendment. In Brazell, we adopted the Fourth Circuit standard[1] for the second prong of the due process analysis. The State argues that Brazell did not adopt the Fourth Circuit test because the Brazell court declined to consider the second part of the test after Brazell failed to establish substantial actual prejudice. We disagree. Although Brazell did not specifically

[1] The Fourth Circuit is one of two federal circuits that does not currently require a showing that the government intentionally delayed the indictment so as to gain a tactical advantage. *See* U.S. v. Automated Med. Laboratories, Inc., 770 F.2d 399 (4th Cir. 1985); Howell v. Barker, 904 F.2d 889 (4th Cir. 1990).

acknowledge the adoption of the Fourth Circuit rule, the Court clearly adopted the Fourth Circuit's test for pre-indictment delay by citing Howell and Automated Med. Laboratories when it discussed the two-part inquiry.

Regardless, we find the Fourth Circuit standard to be the better rule. Requiring a higher burden of proof in proving improper motives on the part of the prosecution would put an almost impossible burden on defendants to maintain a Fifth Amendment due process claim in pre-indictment delay cases. *See* Howell, *supra* at 895 (holding that to require proof of prosecutorial bad faith would mean that no matter how egregious the prejudice to a defendant, and no matter how long the pre-indictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred and that this conclusion, on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play).

Accordingly, the second part of the due process inquiry requires the court to consider the prosecution's reasons for the delay and balance the justification for delay with any prejudice to the defendant. Brazell, *supra*. When balancing the prejudice and the justification, the basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates "fundamental conceptions of justice" or "the community's sense of fair play and decency." Id. (quoting U.S. v. Automated Med. Laboratories, Inc., *supra* at 404).

With the balancing test in mind, the Court of Appeals correctly held that the State offered no valid explanation for the delay in indicting Lee, and thus, in light of the prejudice to the defendant, the prosecution of Lee twelve years later violated fundamental concepts of justice and the community's sense of fair play. The only explanation ever given by the State involved its reason for indicting Lee in 2001, namely that other allegations and charges of similar conduct with other alleged victims had surfaced. However, this rationalization does not explain the delay from 1988 to 2001, nor does it justify the substantial prejudice to Lee's ability to defend against these charges.

CONCLUSION

For the reasons previously stated, the Court of Appeals did not err in vacating Lee's convictions due the excessive pre-indictment delay of twelve years.

AFFIRMED.

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

CHIEF JUSTICE TOAL: I respectfully dissent. In accordance with the majority of the federal circuits that have addressed the issue, I would hold that pre-indictment delay does not violate the Fifth Amendment's due process clause unless a defendant can show both actual prejudice and that the State has intentionally delayed the issuance of an indictment in order to gain an unfair tactical advantage. *See Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996) (recognizing that this test applies in every federal circuit save the Fourth and the Ninth).

But leaving this aside, I disagree with the majority's analysis of how the facts presented here interact with the majority's interpretation of this Court's decision in *State v. Brazell*, 325 S.C. 65, 480 S.E.2d 64 (1997). In contrast to the specific showing of prejudice *Brazell* purports to require, there is no specific showing of prejudice in the instant case. *See id*. at 73, 480 S.E.2d at 69 (providing that when the claimed prejudice is caused by the unavailability of a witness, courts require that the defendant identify the witness he would have called; demonstrate, with specificity, the expected testimony; establish that the defendant made serious attempts to locate the witness; and show that the information the witness would have provided was not available from another source). Although the court below broadly asserted that "[n]o records contemporaneous with the alleged offenses are available . . . [and Appellant's] efforts to acquire the same information from other sources were likewise unavailing," *State v. Lee*, 360 S.C. 530, 538, 602 S.E.2d 113, 117-18 (2004), the record in this case reveals only that Appellant's attorney tried (unsuccessfully) to subpoena documents from the Department of Social Services, and that the persons the attorney sought to interview did not recall these specific incidents. In my view, this is a showing totally devoid of specificity.

The record does not contain any evidence of an attempt to view the family court's file regarding the prior incidents. Furthermore, there is no evidence demonstrating that other purportedly sought evidence, such as the alleged victims' school records, could not be obtained from alternate sources; nor is there evidence that the information purportedly contained in school records or in the minds of potential witnesses could not be obtained through interviewing other family members or acquaintances. Finally, there is no

specific assertion as to how any of this information would be beneficial to Appellant. No Court may justifiably ask a litigant to prove a negative – that is to say, no Court may ask a party to specifically establish the contents of a document that the party has never seen or the substance of testimony a party has never heard – but Appellant's arguments are, at bottom, utter speculation regarding the possible content of documents that may never have even existed. In my view, *Brazell* requires substantially more in the way of specificity.

As a final aside, I would dismiss the lower court's assertion that the State offered no substantial reason for the pre-indictment delay as completely out of place given this case's posture. *Id*. at 539, 602 S.E.2d at 118. At trial, the court adopted the State's position that the court could not find a due process violation absent a showing that the State intentionally delayed the issuance of an indictment in order to gain an unfair tactical advantage. Thus, at trial, there was no need for the State to offer any justification for the delay whatsoever. We ought not ask the parties to make any kind of an evidentiary showing in this Court that they did not make below. If *Brazell* requires reversal of the trial court's decision because the court applied the wrong legal standard, we ought to remand to the trial court for application of the correct one.

For the foregoing reasons, I respectfully dissent.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Stearns Bank National Association, Plaintiff,

v.

Glenwood Falls, LP, a South Carolina limited partnership, DC Development, Inc., McBride Building Supplies & Hardware, Inc., First Federal Savings and Loan Association of Charleston, Charleston Affordable Housing, Inc., and The Building Center, Inc., Defendants.

In re: DC Development, Inc., Appellant,

v.

Glenwood Falls, LP, a South Carolina limited partnership, Respondent.

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 26394
Submitted October 18, 2007 – Filed November 5, 2007

REVERSED

William E. Booth, III, of W. Columbia, for Appellant.

Michael W. Tighe, and Mary Dameron Milliken, both of Callison Tighe & Robinson, of Columbia, for Respondents.

JUSTICE PLEICONES: Appellant, the judgment creditor, appeals a circuit court order requiring it to post a bond pursuant to S.C. Code Ann. § 18-9-130 (Supp. 2006) if it wishes to enforce its judgment during the pendency of respondent's (the judgment debtor's) appeal of an order denying respondent's Rule 60, SCRCP, motion to set aside the judgment. We reverse.

FACTS

Appellant obtained a default judgment for approximately $1.3 million against respondent in January 2005. Respondent filed a timely motion to set aside the default under Rule 60(b)(2) and(4), SCRCP, in March 2005. Respondent did not, however, ask the circuit court for relief pursuant to Rule 62(b), SCRCP, which provides, in relevant part:

> In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition…of a motion for relief…made pursuant to Rule 60….

Since no stay was sought pursuant to this rule, appellant was entitled to enforce its judgment despite the pendency of respondent's Rule 60 motion.

In August 2005, the circuit court denied respondent's Rule 60 motion, and in January 2006, denied respondent's Rule 59 motion to reconsider the Rule 60 denial. Respondent then filed an appeal on the merits of the 60(b) motion. That appeal has been decided by the Court of Appeals, which affirmed. Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 373 S.C. 331,

644 S.E.2d 793 (Ct. App. 2007). Respondent is seeking a writ of certiorari to review that decision.

Months after respondent appealed the denial of its Rule 60(b) motion, it filed a motion in circuit court seeking to stay the underlying default judgment pending disposition of the appeal. Following a hearing, the circuit judge issued an order refusing respondent's request that he stay appellant's right to execute on the judgment during the Rule 60 appeal, but holding that if appellant wished to do so, it must post a bond or undertaking pursuant to § 18-9-130. The order goes on to provide that should appellant comply with the statute by posting a bond, then respondent in turn could stay the execution by posting its own bond under § 18-9-130. This appeal follows.

ISSUE

> Whether the circuit court erred in holding that § 18-9-130 applied to an appeal from an order denying a Rule 60(b) motion?

ANALYSIS

Section 18-9-130 provides:

> (A)(1) A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution.

The predicate for 18-9-130 is that a money judgment has been appealed. Here, respondent, having defaulted, was barred from such a direct appeal, e.g. Winesett v. Winesett, 287 S.C. 332, 338 S.E.2d 340 (1985), and instead sought and was denied an opportunity to set that money judgment aside. An order denying the Rule 60(b), SCRCP, motion is simply not "a judgment directing the payment of money." See also Raby Constr., LLP v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004) (Rule 60 order separate and distinct from

underlying judgment). An appeal from a 60(b) denial does not stay the original judgment. Id.

The filing of a Rule 60(b) motion "does not affect the finality of a judgment or suspend its operation." Rule 60(b). If the debtor wishes to stay enforcement of the judgment pending the trial court's disposition of the debtor's Rule 60(b) motion, the burden is on it to make the motion under Rule 62(b), SCRCP. Whether to grant such a stay rests in the court's discretion "on such conditions for the security of the [creditor] as are proper…" Rule 62(b). The policy expressed in Rule 60 and in Rule 62(b) favors the creditor over the debtor.

Moreover, when a debtor appeals the denial of its 60(b) motion, Rule 225, SCACR, which governs stays on appeal, comes into play. The general rule is that an appeal acts as an automatic stay of the relief granted below, subject to certain exceptions. Id. Rule 60(b) denials are not subject to an exception, nor is there any logical reason why they would be. The denial of such a motion grants no relief: that "no relief" is automatically stayed leaves the parties in the exact position they were in before the 60(b) motion and appeal, that is, the original judgment is unaffected. Accordingly, absent the grant of some extraordinary relief to the debtor by the appellate court during the pendency of such an appeal, the creditor is entitled to enforce its judgment.

CONCLUSION

The circuit court order applying § 18-9-130 to the appellant's judgment is

REVERSED.

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

The Supreme Court of South Carolina

In the Matter of
Thomas D. Broadwater, Petitioner.

ORDER

On November 17, 1999, petitioner was placed on interim suspension. In the Matter of Broadwater, 337 S.C. 59, 522 S.E.2d 816 (1999). On June 12, 2000, the Court suspended petitioner from the practice of law for two years. In the Matter of Broadwater, 341 S.C. 101, 533 S.E.2d 589 (2000).

In January 2007, petitioner filed a Petition for Reinstatement and the matter was referred to the Committee on Character and Fitness (CCF). The CCF has filed a Report and Recommendation in which it recommends the Court grant the petition subject to the condition that petitioner's financial recordkeeping methods are approved by the Office of Disciplinary Counsel (ODC). Neither petitioner nor ODC filed any exceptions to the CCF's Report and Recommendation.

The Court grants the Petition for Reinstatement subject to the condition that ODC approves petitioner's financial recordkeeping methods. Before he practices law petitioner shall submit a written description of his financial recordkeeping plans to ODC. The description shall include an explanation of petitioner's receipt and disbursement methods to and from his law office accounts and all other recordkeeping requirements set forth in Rule 417, SCACR, and Rule 407, SCACR. ODC shall review the submitted plan and determine if the proposal meets the requirements of Rule 417, SCACR, and Rule 407, SCACR. Once ODC approves petitioner's financial recordkeeping methods, petitioner shall thereafter submit a compliance report with supporting documentation to ODC on a quarterly basis for a two year period.

Further, prior to practicing law, petitioner shall insure that he is in full compliance with the 2006-2007 Mandatory Continuing Legal Education & Specialization reporting requirements.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina

October 31, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Linda Mc Company, Inc., Respondent,

v.

James G. Shore and Jan Shore, Appellants.

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

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

AFFIRMED

John Martin Foster, of Rock Hill, for Appellants.

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

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

I.

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

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

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

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

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

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

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

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

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

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

II.

A. Validity of the Judgment

The Shores argue that because the Company failed to follow the terms of paragraph 2 in the Judgment to fix the amount of Judgment by affidavit, its

filing was void and the court was without jurisdiction. We disagree.

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

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

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

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

644, 478 S.E.2d 868, 871 (Ct. App. 1996). The absence of an affidavit has no bearing on the subject matter jurisdiction of the court. The referee properly concluded that the Judgment was not void.

B. Filing of Judgment Within Ten Years

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

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

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

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

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

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

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

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prior to the filing of the [appellant's] appeal," and the appellants raised the issue for the first time on appeal, the matter was not preserved. Id.

LaRosa and A Fast Photo Express certainly did not treat the ten-year time limit on judgments in section 15-39-30 as jurisdictional.

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

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

matter of avoidance under Rule 8(c), SCRCP, and must be raised in the trial court when the defense becomes available.

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

C. Accord and Satisfaction

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

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

The Shores contend the Agreement and subsequent cashing of the late check created an accord and satisfaction of the debt. They further maintain the phone messages left by Jan modified the Agreement to allow for the remaining payment to be late. The referee found there was no meeting of the

minds. The referee further found the Shores did not comply with the terms of the Agreement because the Shores made the outstanding $55,000.00 payment after the date called for in the Agreement. As a result, the referee found there was no accord and satisfaction. We find no error by the referee in this regard.

D. Estoppel

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

III.

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

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tommy Hutto, Petitioner

v.

State of South Carolina, Respondent

Appeal From Aiken County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 4308
Heard September 12, 2007 – Filed October 26, 2007

AFFIRMED

Assistant Appellate Defender Wanda H. Carter, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Lance S. Boozer,

Assistant Attorney General Paula Magargle, and John Benjamin Aplin, all of Columbia, for Respondent.

CURETON, A.J.: Tommy Hutto was convicted of first-degree burglary, first-degree criminal sexual conduct, and armed robbery. The trial court sentenced Hutto to 30 years each for the first-degree criminal sexual conduct and armed robbery charges and life imprisonment for the burglary charge. The post-conviction relief (PCR) court denied Hutto's request for relief and we granted certiorari. We affirm.

FACTS

In the early morning hours of July 16, 1998, Victim, a 90-year-old woman, awoke to the sound of someone breaking the glass in her door. Victim saw a man enter her home. The intruder accidentally cut himself while attempting to gain entry into Victim's home. Victim grabbed a loaded rifle in order to confront the intruder, but the intruder wrestled it away from her. Victim's assailant robbed, sexually assaulted her, and burglarized her home before leaving.

On August 1, 1998, Hutto's probation agent, accompanied by probation agent James Harris, visited Hutto on a routine visit to verify Hutto's address. During the home visit, Harris noticed lacerations on Hutto's arms and hands.

Hubert Nimau, the police investigator handling Victim's case, issued a "be on the lookout" notice requesting information regarding suspects fitting the following profile: Caucasian male, approximately 24 to 25 years old, 5'8" tall, weighing 130 pounds, short dark hair, and has fresh cuts or lacerations to his arms and hands. Believing Hutto could fit the description, Harris disclosed his observations of Hutto's lacerations to Nimau. Nimau, utilizing information from Harris as well as other information independently received in response to a crime watchers news article, prepared a lineup which included Hutto's picture. Victim identified Hutto as her assailant by selecting his picture out of the lineup.

Based on this identification, Nimau obtained a search warrant for Hutto's blood. Nimau executed the search warrant and a nurse obtained Hutto's blood for testing pursuant to the warrant. A forensic DNA analyst at the South Carolina Law Enforcement Division, compared Hutto's DNA with DNA samples taken from the crime scene at Victim's house. The DNA samples taken from the crime scene, including cuttings taken from Victim's pajama bottoms, matched Hutto's DNA.[1]

Hutto was indicted for armed robbery, criminal sexual conduct in the first degree, and burglary in the first degree. On November 3, 1999, a jury found Hutto guilty of all three charges. The trial judge sentenced Hutto to thirty years imprisonment for the armed robbery charge, thirty years imprisonment for criminal sexual conduct, and life imprisonment for the burglary charge, with the sentences set to run concurrently. Hutto appealed his convictions to our court and we affirmed in an unpublished opinion. See State v. Hutto, Op. No. 2002-UP-395 (S.C. Ct. App. filed June 4, 2002).

Hutto applied for PCR and, after a hearing, the PCR judge denied Hutto's request for relief. Hutto appeals.

STANDARD OF REVIEW

"To establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." Custodio v. State, 373 S.C. 4, 9, 644 S.E.2d 36, 38 (2007). "Judicial scrutiny of counsel's performance is highly deferential and the court must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional

[1] Dr. Taylor testified "that the probability of selecting an unrelated person from the general population at random having a DNA profile matching the items that I analyzed, the swabs from the house and the cutting from the pajama bottom, is approximately 1 in 12 trillion blacks and 1 in 500 billion Caucasians."

assistance . . . .' " Simpson v. Moore, 367 S.C. 587, 598, 627 S.E.2d 701, 707 (2006) (quoting Butler v. State, 286 S.C. 441, 445, 334 S.E.2d 813, 816 (1985)).

"This Court will sustain the PCR judge's factual findings and conclusions regarding ineffective assistance of counsel if there is any probative evidence to support those findings." Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998). "However, if there is no probative evidence to support the PCR judge's findings, the findings will not be upheld." Id. In addition, our court will reverse the PCR judge's decision if it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

DISCUSSION

We granted certiorari to address whether Hutto's trial counsel was ineffective for not moving to suppress the evidence presented against Hutto on the basis of an improper disclosure by a probation agent.

Section 24-21-290 of the South Carolina Code provides as follows:

> **Information received by probation agents privileged.**
>
> All information and data obtained in the discharge of his official duty by a probation agent is privileged information, is not receivable as evidence in a court, and may not be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive reports unless ordered by the court or the director.

S.C. Code Ann. § 24-21-290 (2007).

On appeal, Hutto argues Harris disclosed privileged observations made in the discharge of his official duties as a probation agent without having

obtained proper authorization pursuant to section 24-21-290 to disclose that information. In addition, Hutto complains that Harris improperly testified about his observations in violation of the statute. Furthermore, Hutto reasons that the evidence gained as a result of the unauthorized disclosure, specifically Victim's identification of Hutto from the line-up and the DNA evidence obtained as a result of the identification, should be excluded as fruits of the poisonous tree. Based on all of the above, Hutto contends his trial counsel was ineffective for failing to object to the admission of this evidence pursuant to section 24-21-290.

The main purpose of the exclusionary rule is the deterrence of police misconduct. State v. Harvin, 345 S.C. 190, 194, 547 S.E.2d 497, 500 (2001). "In the context of the application of the exclusionary rule, our supreme court held the 'exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedures.' " State v. Sheldon, 344 S.C. 340, 343, 543 S.E.2d 585, 586 (Ct. App. 2001) (quoting State v. Chandler, 267 S.C. 138, 226 S.E.2d 553 (1976)).

"The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality." State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996). The challenged evidence is admissible, however, if it was obtained from a lawful source independent of the illegal conduct. Id.

Addressing Hutto's argument concerning the probation officer's disclosure, the PCR judge found Hutto's counsel was not ineffective for failing to raise the issue to the trial court. The court held that, even if counsel was deficient, Hutto could not demonstrate that his counsel's failure prejudiced the outcome of the case. The court reasoned that "24-21-290 [does not] require the exclusion of any subsequent evidence obtained as a result of an improper disclosure." The PCR judge explained in his order that "even if trial counsel did move to exclude evidence pursuant to statute 24-21-290, the

trial court would only have been obliged to exclude any testimony about the cuts on the Applicant's hands."

The interpretation of a statute is a question of law for the court. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). We hold that Harris's observations of Hutto's scratches do not constitute the kind of information or data considered privileged under section 24-21-290. The statute's title indicates that for information or data to be privileged under section 24-21-290, it must be "received" by a probation agent. Black's Law Dictionary defines the word "receive" as to "take into possession and control; accept custody of." 1433 (4th ed. 1968). This definition infers a transfer or transmission. We find that Hutto has failed to show how Harris "received" information or data by merely observing the wounds on Hutto's hands and arms. We believe this interpretation is in keeping with the legislative intent and would not undermine the statute's purpose. See 98 C.J.S. Witnesses § 366, at 339-40 (2002) ("[I]n some jurisdictions, a statutory privilege [attaches] to information and data obtained in the discharge of official duties by probation and parole agents, the purpose of which is to permit interviewees to express themselves fully without fear of disclosure or reprisal.").

Moreover, Nimau explained during his in camera testimony that he included Hutto's picture in the lineup after receiving information from two sources: Harris and a tip made in response to a crime watchers' newspaper article. Regardless of whether or not Harris's observations constitute "information and data" under section 24-21-290, the record indicates Nimau had sufficient justification to include Hutto's picture in the lineup independently of Harris's information. As such, Harris's disclosure to Nimau was not the only reason Hutto appeared in the lineup, and therefore we find no reason to exclude Victim's identification of Hutto or the DNA evidence obtained through a search warrant based on that identification.[2] To exclude

[2] We are authorized to consider any sustaining ground found within the record. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal."). See also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420,

the evidence would place the police in a worse position than they otherwise would have been. See Nix v. Williams, 467 U.S. 431, 443 (1984) ("The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.").[3]

AFFIRMED.

WILLIAMS, J., and CURETON and GOOLSBY, AJJ, concur

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526 S.E.2d 716, 723 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.").

[3] We note the alleged violations of section 24-21-290 stemmed from the actions of a probation agent rather than a police officer. "A probation agent has, in the execution of his duties, the . . . powers of arrest, and, to the extent necessary, the same right to execute process given by law to sheriffs. A probation agent has the power and authority to enforce the criminal laws of the State." S.C. Code Ann. § 24-21-280(b) (2007). However, "[t]he United States Supreme Court has yet to consider whether the exclusionary rule applies if a constitutional violation stems from erroneous information provided to police by the officers or employees of a probation department." People v. Ferguson, 109 Cal. App. 4th 367, 373 (Cal. Ct. App. 2003). This appears to be a novel issue for South Carolina as well. Having determined that section 24-21-290 does not apply in this case, we need not address this issue.