OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

December 3, 2001

ADVANCE SHEET NO. 42

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lawrence Merle Bruno, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Greenville County
C. Victor Pyle, Jr., Trial Judge
Larry R. Patterson, Post-Conviction Judge

Opinion No. 25381
Submitted September 27, 2001 - Filed December 3, 2001

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., all of Columbia, and Assistant Attorney General Kathleen Hodges, of

Greenville, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the denial of post-conviction relief (PCR) to petitioner Lawrence Bruno. We affirm.

FACTS

Bruno was convicted of murder and sentenced to life imprisonment. On appeal, this Court affirmed. State v. Bruno, 322 S.C. 534, 473 S.E.2d 450 (1996). As related in the Court's opinion on direct appeal, the basic facts of the crime are as follows:

> [Bruno] and Mark Ross were drinking at a bar one evening in September 1993. The two left the bar in Ross's car. Ross testified that as he was driving away from the bar, he tried to pass the car of James Murphy ("Victim"), who was travelling in the same direction. Victim drove aside Ross's vehicle, began taunting Ross, and pulled in front of him. Ross almost hit the curb in attempting to avoid Victim's car. Ross and Bruno followed Victim's car; they eventually saw it parked at a [Starvin' Marvin] convenience store. At Bruno's request, Ross pulled over into the convenience store's parking lot. From the passenger's side, Bruno looked over at Victim, who was rummaging through the trunk of his car. Bruno yelled to Victim: "Are you – are you James Murphy?" Victim responded, "Who, the hell, wants to know?" From the car, Bruno shot Victim. After the shots were fired, Ross began to drive off, and Bruno pulled his gun back into the car.
>
> Bruno's testimony was that after entering Ross's vehicle at the bar, he fell asleep and did not awake until the car hit a bump or curb on the side of the road. When he awoke, he asked Ross what had happened. Ross replied that Victim had tried to run them off the road. Just at that moment Bruno saw

> Victim "getting in his [car] trunk," and he felt that Victim was coming toward him. Bruno testified "something snapped," and he shot Victim.
>
> Police found Victim shot to death. His body was near his car in the convenience store's parking lot. The trunk of the car was open.

Bruno, 322 S.C. at 535, 473 S.E.2d at 451.

At trial, Bruno attempted to present that he feared Victim and therefore had acted in self-defense or in response to Victim's provocation. Evidence was admitted about two prior incidents between Victim and Bruno.

Regarding the police investigation of the crime, Dale McCard, the lead investigator, explained that he went to Ross's house to question him about his involvement. McCard stated that "[u]pon talking to Mr. Ross, he agreed to come down to the Law Enforcement Center at that time and take a polygraph concerning the event." Bruno's trial counsel did not object to this testimony.

During Ross's testimony, the State asked him what happened when he went to the police station. Ross replied: "A bunch of questioning. Took a polygraph test." Trial counsel raised no objection. On cross-examination, Ross testified that he had been charged with accessory after the fact of murder and that when he first spoke with police, he had denied his involvement in the crime.

Additionally, Ross testified that on the day after the killing, he drove Bruno to the Old Easley Bridge where Bruno threw the gun over one side of the bridge, and the clip and bullets over the other side. In Bruno's statement to police, he stated that he alone went to the Saluda Dam Bridge and threw the gun away on the dam side of the bridge. Based on Ross's information, the gun and the bullets were recovered by police divers at the Old Easley Bridge.

During its closing, the State argued that Ross's version of the events had been corroborated. Specifically, the State argued that Ross "told the

officers what happened at Starvin' Marvin and at the bridge. He didn't lie about it because everything's been corroborated."

The trial court charged the jury on murder, voluntary manslaughter, and self-defense. The jury convicted Bruno of murder. On appeal, Bruno raised two issues related to self-defense. The Court found, however, that Bruno was "not entitled to a self-defense charge, because he presented no evidence that he believed he was in imminent danger of losing his life or sustaining serious bodily injury." Bruno, 322 S.C. at 536, 473 S.E.2d at 452.

At the PCR hearing, trial counsel acknowledged that at the time of Bruno's trial, evidence of polygraph tests was inadmissible. Nevertheless, he testified that he did not have "any explanation" for why he did not object when evidence regarding Ross taking a polygraph was admitted at trial.

The PCR court found that counsel was not ineffective for failing to object to the testimony that Ross had taken a polygraph. Specifically, the PCR court ruled that (1) the two references were isolated comments; (2) counsel would have further focused the jury's attention to the comments if he had objected, and therefore, it was valid strategy to not object; and (3) even if counsel was deficient in failing to object, there was no prejudice to Bruno since the testimony was so ambiguous.

ISSUE

Did the PCR court err in finding counsel was not ineffective for failing to object to the testimony that Ross had taken a polygraph test?

DISCUSSION

Bruno argues that Ross's testimony at trial was key to establishing murder, as opposed to voluntary manslaughter, since it directly contradicted Bruno's own version of events. He further contends that the evidence about Ross taking a polygraph test was prejudicial because it provided improper

corroboration for Ross's version of events.

The burden is on the applicant in a PCR proceeding to prove the allegations in his application. E.g., Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), cert. denied, 474 U.S. 1094 (1986). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Id.

This Court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. E.g., Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, the Court will not uphold the findings of a PCR court if no probative evidence supports those findings. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

Because trial counsel was deficient for failing to object to the polygraph evidence, we hold the PCR court erred in finding that Bruno had not met the first prong of the Strickland test. Nonetheless, the PCR court correctly found Bruno did not carry his burden on establishing prejudice from this deficiency.

Before the Court's decision in State v. Council, 335 S.C. 1, 515 S.E.2d 508, cert. denied, 528 U.S. 1050 (1999),[1] the law of South Carolina was that evidence of polygraph examinations is generally inadmissible. See State v.

[1]In Council, the Court held that because of the adoption of the SCRE, admissibility of polygraph results, as scientific evidence, should be analyzed under Rules 702 and 403, SCRE. However, because Bruno was tried in November 1994, prior to the adoption of the SCRE, pre-Council law applies to the analysis of the instant case.

Johnson, 334 S.C. 78, 90, 512 S.E.2d 795, 801 (1999) ("Evidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible."); State v. Wright, 322 S.C. 253, 255, 471 S.E.2d 700, 701 (1996) ("Generally, the results of polygraph examinations are inadmissible because the reliability of the polygraph is questionable."). Because of the inadmissibility of this type of evidence, a trial judge should be meticulous in ensuring that the jury makes no improper inference from any reference to a polygraph. State v. Pressley, 290 S.C. 251, 252, 349 S.E.2d 403, 404 (1986).

Given the law at the time of Bruno's trial, counsel was deficient when he failed to object to the mention of Ross taking a polygraph. Even a passing reference to a polygraph can create an impermissible inference; therefore, counsel should have objected to this testimony and requested a curative instruction. See id. Although the PCR court found there was a valid strategy for the failure to object, we note that counsel in the instant case gave absolutely no explanation for his failure to object. Cf. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (**where counsel articulates** a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel). Because there is no evidence to support the PCR court's finding that the failure to object was counsel's strategic decision, the PCR court's finding on this issue cannot be upheld. Holland, supra.

However, the PCR court's finding of no prejudice is supported by ample probative evidence. First, the evidence admitted was simply that Ross took a polygraph test; the results of this test were not indicated at trial and, indeed, are not indicated anywhere in the record. While the jury could have inferred that Ross passed the polygraph test, an equally plausible inference is that Ross did not pass the polygraph because Ross testified that he initially denied his involvement in the case. Therefore, this is not a case where there is only one reasonable inference from the polygraph evidence. Cf. Pressley, supra (where, on direct appeal, the Court found reversible error based on repeated references to the appellant's submission to a polygraph examination **and** the evidence that the appellant confessed immediately after taking the polygraph). Because there was no evidence regarding **the results** of the polygraph test, Bruno failed to meet his burden of establishing the prejudicial impact of this

evidence.

Second, we agree with the PCR court that the two references to the polygraph test were isolated comments. We note that the polygraph information was not specifically elicited by the State's questions. Moreover, the State did not exploit counsel's error and heighten whatever prejudicial effect it could have had. Although Bruno complains that the State argued in closing that Ross's version of events had been "corroborated," the State did not repeat in its closing that Ross had taken a polygraph test. Instead, the State simply stated that Ross "told the officers what happened at Starvin' Marvin **and at the bridge**. He didn't lie about it because everything's been corroborated." (Emphasis added). Clearly, at least a part of Ross's version of events, as opposed to Bruno's version, had been corroborated given that police found the gun and bullets at the bridge where Ross told police they could be found, not at another bridge where Bruno said he had thrown them. We therefore reject any argument that the only support for the State's "corroboration" argument was the polygraph test.

Finally, while the State's case certainly relied on Ross's credibility, Bruno's own credibility was also very much at issue. Bruno testified in his own defense, admitted shooting the victim, and primarily argued self-defense. By its verdict, the jury rejected Bruno's account. Thus, we hold that even if counsel had objected, there is no reasonable probability the result at trial would have been any different.

CONCLUSION

Because our confidence in the outcome of trial has not been undermined by counsel's error, we affirm the denial of PCR.

AFFIRMED.

MOORE and BURNETT, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which PLEICONES, J., concurs.

CHIEF JUSTICE TOAL: I respectfully dissent. In my opinion, counsel's failure to object to Ross' references to taking a polygraph test was deficient *and* prejudicial to Bruno. I would find trial counsel's failure to object to Ross' statement that he had taken a polygraph, coupled with the State's closing argument that all of Ross' statements were "corroborated," impermissibly bolstered Ross' testimony, resulting in prejudice to Bruno. Such prejudice requires reversal of the denial of Bruno's application for PCR.

As noted by the majority, *Strickland v. Washington* requires a PCR applicant to show (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. The majority finds defense counsel deficient for failing to object to the polygraph evidence, thereby violating the first prong of *Strickland*. I agree with the majority's analysis up to this point, but disagree with the majority's conclusion that Bruno was not prejudiced by counsel's error.

The majority finds trial counsel deficient based on our precedent that even a passing reference to a polygraph can create an impermissible inference. *See State v. Pressley*, 290 S.C. 251, 252 S.E.2d 403 (1986)(citing *State v. McGuire*, 272 S.C. 547, 253 S.E.2d 669 (1979)). Our case law indicates defense counsel should object to the even the slightest reference to a polygraph and should also request a curative instruction from the judge. *See Id.* In this case, trial counsel did not object or request a curative instruction when the State's chief witness, Ross, referred to taking a polygraph in his testimony. Furthermore, counsel likewise failed to object to State's closing statement that their chief witness' story had been corroborated: Ross "told the officers what happened at Starvin' Marvin and at the bridge. He didn't lie about it because everything's been corroborated." Ross' story about the recovery of the weapon at the bridge was corroborated when the police found the weapon there, but Ross' version of the events at the Starvin' Marvin was not likewise corroborated. Bruno certainly told a different version and no other witness testified to corroborate Ross' story. Therefore, the only possible inference the jury could draw from this closing statement was that Ross' polygraph results corroborated his testimony.

Therefore, I would find Ross' testimony was improperly bolstered by his reference to his polygraph test and by the reference to corroboration of Ross' testimony in the closing statement. Although Ross did not testify about the results of his polygraph, the State's closing statement implies the results of the test corroborated Ross' story. This Court has held repeatedly that polygraphs are inadmissible because they are unreliable. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). Whether the jury believed Bruno's or Ross' version of events, whether they believed Bruno or Ross to be more credible, determined the outcome of this case. Thus the testimony of Ross, as an eye-witness, was critical, and Ross' reference to his polygraph test, coupled with the State's closing that Ross' testimony had been corroborated, gave Ross an unfair edge over Bruno. Therefore, I would hold Bruno was prejudiced by counsel's failure to object to the impermissible polygraph evidence.

For the foregoing reasons, I would hold the trial counsel's failure to object to the testimony that Ross had taken a polygraph test and the State's closing argument that Ross' testimony was corroborated, violated both prongs of *Strickland v. Washington*. Accordingly, I would **REVERSE** the PCR's court's ruling and **REMAND** for a new trial.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ray T. Mayo, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Richland County
Larry R. Patterson, Judge

Opinion No. 25382
Submitted October 24, 2001 - Filed December 3, 2001

REVERSED

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General David A. Spencer, all of Columbia, for petitioner.

Assistant Appellate Defender Aileen P. Clare, of S.C. Office of Appellate Defense, of Columbia , for respondent.

JUSTICE MOORE: Respondent Mayo was convicted of assault with intent to commit third degree criminal sexual conduct and sentenced to ten years. After his direct appeal was dismissed, Mayo filed this action for post-conviction relief (PCR) claiming ineffective assistance of trial counsel. Relief was granted. We reverse.

FACTS

At trial, the twenty-three-year-old victim (Victim) testified she was living in a transitional home for women[1] and was unemployed when she answered a newspaper ad placed by Mayo: "If you're homeless and need a job, maybe I can help, 776-7717." Mayo arranged for his employee, Bill, to pick Victim up and bring her to Mayo's trailer park for an interview. Bill dropped Victim off at Mayo's trailer and went next door.

Mayo's teen-aged son was present when Victim arrived but he left shortly thereafter. Victim testified that when they were alone, Mayo began kissing her. He forcefully pulled her shirt up around her neck, pulled her brassiere down, and groped her breasts. He also put his hand down into her pantyhose and grabbed her genital area, tearing her hose. Victim was frightened and thought Mayo was going to rape her. She finally pushed him off her and ran next door to ask Bill to drive her home.

Witnesses from the home where Victim lived testified she was disheveled when she returned from the interview and subsequently became very upset. After calling the rape crisis center, they took Victim to the hospital.

Mayo testified he was never alone with Victim and that he did nothing more than put his arm around her shoulder when she was getting ready to leave. Both Mayo's son and Bill testified they were at Mayo's trailer during Victim's interview. Mayo's son stated Victim and Mayo were never out of sight and no assault occurred. He saw Mayo put his arm around Victim and

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[1]Victim had recently been released from a mental health institution.

explained that Mayo "puts his arm around everybody."

ISSUES

1. Was counsel ineffective for failing to object to improper bad act evidence?

2. Was Mayo prejudiced by counsel's failure to impeach Victim?

DISCUSSION

1. Cross-examination

Before Mayo took the stand, counsel made a motion *in limine* to exclude evidence of prior bad acts. No specific acts were discussed. The trial judge ruled generally that pursuant to State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990), Mayo could be asked about prior bad acts not subject to conviction that affected his credibility but any denial could not be contradicted.[2]

On direct, Mayo testified he put his arm around Victim but denied he assaulted her. On cross-examination, he again stated he put his arm around Victim's shoulder and that he did this with a lot of women. The solicitor then questioned Mayo as follows:

Q: And it's your testimony today that you put your arm around lots of women?

A: A lot of women I do. As a matter of fact, there's a lady out at the hair salon I go to and stuff like that, they awful nice to me.

Q: And you're awful nice back to them, too, aren't you?

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[2]Mayo was tried in 1994 before enactment of the South Carolina Rules of Evidence.

A: Well–

Q: **And back in 1989 you were awful nice to Ms. Annette Causey, too, weren't you?**

A: What you mean? I was dating her mother.

Q: You were dating her mother?

A: Right.

Q: And you were awful nice to her daughter as well, were you not, according to your testimony, awful nice meaning touching them in a friendly way?

A: **I was not convicted of that.**

At the end of cross-examination, Mayo reiterated that he did not assault Victim. The solicitor then asked:

Q: **Just like you weren't convicted for that one back in 1989 with Annette Causey?**

A: I was not convicted.

The PCR judge found counsel was ineffective for failing to object to the solicitor's last question because it was "improper as either suggesting a conviction despite Mayo's denial . . . or commenting on prior bad acts denied by Mayo."

In our view, the PCR judge's ruling does not take into account the fact that Mayo volunteered the information that he had no conviction involving Annette Causey. Contrary to the PCR judge's ruling, the solicitor did nothing to suggest a conviction. Nor did Mayo ever deny any bad act that the solicitor then improperly commented on – Mayo simply denied he had been

convicted. Since Mayo himself injected the issue of a conviction, there was no sustainable objection counsel could have made. *See* State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991) (one who opens the door to evidence cannot complain of its admission).

There is no evidence to support the PCR judge's ruling that counsel was ineffective.[3] Accordingly, we reverse the grant of PCR on this ground. *See* Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (PCR judge's ruling will be reversed if not supported by any evidence).

2. Impeachment of Victim

The arrest warrant affidavit included an allegation that Mayo pushed Victim into a wall during the assault. Victim did not mention this fact during direct examination. On cross-examination, counsel impeached Victim with several details in her pre-trial statement to police that were inconsistent with her testimony at trial but did not question her about the allegation that Mayo had pushed her into a wall. At the PCR hearing, counsel was not asked whether he intentionally omitted this question as a matter of strategy. The PCR judge found counsel was ineffective for failing to impeach Victim with this detail from her affidavit and concluded Mayo was prejudiced.

Even if we were to agree counsel was ineffective, we find the failure to ask Victim whether Mayo had pushed her into a wall could not have been prejudicial. *See* Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000) (PCR applicant must show both error and prejudice). This fact would only have injected an element of violence that was not otherwise introduced. Based on the record, we conclude there is no reasonable probability that the result at trial would have been different had counsel brought out this fact. Johnson v.

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[3]Counsel testified at the PCR hearing: "[T]he thing that hurt the most was [Mayo] just volunteered that information about, 'I was never convicted.' I almost fell through the table when he said it. Because he didn't need to say it and it would have never gone as far as it did. But of course [the solicitor] just jumped on it the minute he said it and the cat was out of the bag and we were off and running."

State, 325 S.C. 182, 480 S.E.2d 733 (1997) (to prove prejudice, applicant must show there is a reasonable probability the result at trial would have been different).

Since Mayo cannot show prejudice from counsel's failure to impeach Victim with this single detail, the PCR judge's ruling is without evidentiary support. Accordingly, the grant of PCR on this ground is reversed. *See* Bannister v. State, *supra.*

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

County of Greenville, Respondent,

v.

Fletcher C. Mann, Jr., Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 25383
Heard November 13, 2001 - Filed December 3, 2001

REVERSED

O. W. Bannister, Jr., of Bannister & Wyatt, LLC, of Greenville, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for respondent.

CHIEF JUSTICE TOAL: The Greenville County Clerk of Court, Fletcher C. Mann, Jr. ("Mann"), appeals the circuit court's order holding him in criminal contempt for failing to destroy certain firearms as required by an earlier court order.

FACTUAL/ PROCEDURAL BACKGROUND

In 1996, Greenville County began construction of a new courthouse and renovation of its old courthouse. During the construction, numerous civil and criminal court exhibits were discovered which had been stored for long periods of time.[1] Mann, as Clerk of Court, hired Shawn Knox ("Knox") to inventory the exhibits. Knox researched the old exhibits to determine if it was legally appropriate to destroy them. Knox compiled a list of all the exhibits and presented it to a judge for a decision on whether the exhibits needed to be retained or could be discarded. The judge went through the list, indicating which items could be discarded and which needed to be retained. The judge issued a total of nine court orders dealing with the disposal of the exhibits which were no longer needed. This appeal concerns the order issued by the judge which dealt with the destruction of certain firearms. That order, dated February 28, 1997, provided:

> It is hereby ordered, adjudged, and decreed that the Clerk of Court shall destroy any and all weapons and/or ammunitions in its possession and designated by me in the attached pages one (1) through seventeen (17) to be destroyed. These weapons were submitted as criminal exhibits in general sessions cases tried before 1991 in which the defendants have completed their probation or are barred by the statute of limitations from further proceedings. The Clerk of Court shall witness the destruction of the aforementioned exhibits

[1]The testimony indicates the exhibits were from trials which took place between the late 1950s and 1991.

> according to law. This order is done in accordance with §§ 16-23-405, 16-23-50, 23-31-180, 16-23-500, South Carolina Code of Laws, 1976.

Mann admits that while he never actually *saw* or *read* this Order, he was aware that the Order existed. Apparently it was this knowledge which caused Mann to delegate the oversight of the weapons' destruction to Deputy Clerks Nancy Coggins ("Coggins"), Carol Hollis ("Hollis"), and Leanda Handley ("Handley"). However, after Mann delegated his responsibility, no apparent action was taken on the Order until February of 2000.[2]

In February 2000, a site for destroying the firearms was located in Spartanburg County. On February 2, 2000, at the direction of Coggins, Hollis, and Handley, Arthur Jordan ("Jordan") and Andrea Plumley ("Plumley"), employees of the Greenville County Clerk of Court, and Greenville County Deputy Michael Jolly ("Jolly") took the weapons listed in the February 28, 1997, Order and transported them to the recycling facility in Spartanburg. While removing the weapons from the car at the recycling facility, the group noticed a rifle with a glass scope which, because of the glass, could not be destroyed. The testimony indicates that Jolly and Plumley also noticed and expressed an interest in several other weapons which they believed to be of historical or financial value.[3] Jordan called Mann from the recycling center to

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[2]Knox testified he did have discussions concerning the destruction of the firearms with Mann on several occasions between 1997 and 2000. One discussion concerned the repeal of a statute listed in the judge's Order which originally provided for the auctioning of guns. Other than Knox's testimony that these "discussions" took place, there is no other evidence in the record that Mann took any discernable action in response to the Order until February 2000. However, the Order did not direct Mann to destroy the firearms by a specific date or within a specific time frame.

[3]The testimony indicates Jordan and Jolly hoped to bid on the weapons at an auction. However, the statute which allowed for such an auction, section 16-23-500, was repealed, effective May 27, 1998.

inquire about what should be done with the gun with the scope and the guns with historical or financial value. Although there is conflicting testimony about what exact weapons were discussed during the phone conversation, it appears Mann told Jordan: (1) Jolly could keep the weapons Jolly believed to be of value; and (2) Mann would get in touch with Jolly at a later time.[4] Jolly secured a total of seven weapons, five for himself and two for Plumley. The weapons were taken from the recycling center and remained in Jolly and Plumley's personal possession. The other weapons were destroyed as required.

Later that day, Jordan contacted Mann through inter-office email. He summarized what transpired and stated, "there were in total, I think, three weapons that were secured by Officer Jolly per your request. I did as requested and let Mike [Jolly] pick weapons that were in good condition . . . . Andrea Plumley is preparing the papers necessary to comply with . . . [the] order for destruction of these items." Jordan testified he received a response from Mann that same day. Mann's response stated, "it appears to me that everything was handled properly up to this point. You and I need to follow-up with Mike Jolly, with Friday being the best time to do so. I would also like to review with you and Andrea [Plumley] the paperwork that she is preparing, so that we can finalize that part as well." Mann never met with Jolly, Jordan, or Plumley regarding the guns that were not destroyed. Jolly and Jordan testified that, after the trip to the recycling center in Spartanburg, Jolly made several attempts to contact Mann, but to no avail.

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[4]Mann testified that his conversation with Jordan concerned only one gun - - the one with the glass scope. Mann also testified he did not recall giving Jordan any authority to take any guns into his possession. The testimony from Jordan, Plumley, and Jolly, as well as the subsequent emails between Mann and the group, indicate the conversation dealt with more than the single gun. Furthermore, the Statement of Facts in Mann's brief states, "Mann approved Deputy Jolly taking possession of the valuable or historical weapons until it could be determined if they should be destroyed or auctioned." At the very least, Mann was aware later that same day that Jordan had several guns in his possession after receiving an email from Jordan stating as much.

In March 2000 (one month after Jolly, Jordan, and Plumley went to the recycling center to destroy the weapons), SLED began an investigation of the activity surrounding the destruction of the weapons. Jolly retrieved all the weapons and turned them over to SLED. A Greenville County Grand Jury investigated the matter and, on April 4, 2000, recommended that the court require Mann to explain why the weapons were not destroyed. On April 5, 2000, a Rule to Show Cause was issued directing Mann to show cause why he should not be held in contempt of court for failing to comply with the Order of February 28, 1997. On April 25, 2000, pursuant to the Rule to Show Cause, Mann appeared before the same judge who issued the original Order. At the conclusion of the hearing, the judge found Mann in criminal contempt of court. The judge ordered Mann to immediately comply with the prior Order and to pay a fine of $1,500.00. This appeal followed, and the issues now before this Court are:

I. Did the court err in holding Mann in criminal contempt for failing to obey the February 28, 1997, Order since the judge lacked jurisdiction to issue the Order and since the Order was ambiguous, contradictory in its direction, and in conflict with the cited statutes?

II. Did the court err in holding Mann in criminal contempt because the sanction ordered was both a criminal fine and a civil order to comply?

III. Was there sufficient evidence to show Mann intentionally disobeyed the court's February 28, 1997, Order?

LAW/ ANALYSIS

I. Jurisdiction and Ambiguity

Mann argues the judge lacked jurisdiction to issue the February 28, 1997, Order and that the Order was ambiguous, contradictory in its direction, and in contravention of the cited statutes. We agree.

The February 28, 1997, Order provided:

> It is hereby ordered, adjudged, and decreed that the Clerk of Court shall destroy any and all weapons and/or ammunitions in its possession and designated by me in the attached pages one (1) through seventeen (17) to be destroyed. These weapons were submitted as criminal exhibits in general sessions cases tried before 1991 in which the defendants have completed their probation or are barred by the statute of limitations from further proceedings. The Clerk of Court shall witness the destruction of the aforementioned exhibits according to law. *This order is done in accordance with §§ 16-23-405, 16-23-50, 23-31-180, 16-23-500, South Carolina Code of Laws, 1976.* (emphasis added)

The cited sections of the South Carolina Code, as they existed in 1997, at the time the judge issued his Order,[5] provided as follows:

Section 16-23-405(2):

> A person convicted of a crime, in addition to any penalty, shall have any weapon used in the commission or in furtherance of the crime confiscated. Each weapon must be delivered to the chief of police of the municipality or to the sheriff of the county, if the violation occurred outside the corporate limits of a municipality. The law enforcement agencies that received the confiscated weapons shall use them

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[5]Sections 16-23-50, 16-23-405, and 23-31-180 were amended after the Order was issued. The amendments became effective in May 1998. Section 16-23-500 has been repealed since the Order was issued, effective in May 1998. However, when determining whether the Order was ambiguous, this Court applies the statutes cited in the Order as they existed at the time the Order was issued. Neither party cited the correct statutes to this Court.

within their departments, transfer them to another law enforcement agency for their lawful use, or transfer them to the clerk of court or mayor who shall dispose of them as provided by § 16-23-500. Firearms seized by the State Law Enforcement Division may be kept by the division for use by its forensic laboratory.

Section 16-23-50(B):

In addition to the penalty provided in this section, the pistol involved in the violation of this article must be confiscated. The pistol must be delivered to the chief of police of the municipality or to the sheriff of the county, if the violation occurred outside the corporate limits of a municipality. The law enforcement agencies that receive the confiscated pistols may use them within their department, transfer them to another law enforcement agency for their lawful use, transfer them to the clerk of court or mayor who shall dispose of them as provided by Section 16-23-500, or trade them with a retail dealer licensed to sell pistols in this State for a pistol or any other equipment approved by the agency. If the State Law Enforcement Division seized the pistol, it may keep it for use by its forensic laboratory. Records must be kept of all confiscated pistols received by the law enforcement agencies under the provisions of this article.

Section 16-23-500:

The clerk of court in each county and the mayor of each town and city or his designee shall keep a written record of all weapons, as defined by § 16-23- 405, confiscated or forfeited to the custody of the clerk of court, mayor, or other municipal official. The record shall include the make, caliber, and serial number of the weapon and a notation of the legal proceeding which resulted in the confiscation or forfeiture.

At the end of each quarter the clerk of court and the mayor or his designee shall sell at public sale or by sealed bids to a dealer licensed under the provisions of Article 3 of Chapter 31 of Title 23 who is the highest bidder, after one public notice published in a newspaper of general circulation in the appropriate municipality or county, all confiscated or forfeited weapons then held by the clerk of court or the mayor. Weapons may not be sold until the results of the legal proceeding in which they are involved have been finally determined.

When the highest price offered for any weapon is less than twenty-five dollars or if it is a weapon described in § 23-31-180 or any other weapon possession of which is unlawful, a weapon may not be sold but must be destroyed by the official conducting the sale. Any other bid may also be rejected by the person conducting the sale if he determines the bid to be inadequate.

All public sales provided for in this section are subject to the provisions of § 16-23-30. Proceeds of sales by clerks of court must be deposited in the general fund of the county and proceeds of sales by city or town officials must be deposited in the city or town treasury.

Section 23-31-180:

No licensed retail dealer may hold, store, handle, sell, offer for sale, or otherwise possess in his place of business a pistol or other handgun which has a die-cast, metal alloy frame or receiver which melts at a temperature of less than eight hundred degrees Fahrenheit.

A pistol or other handgun possessed or sold by a dealer in violation of this article is declared to be contraband and must be forfeited to the municipality where seized or to the county where seized if outside a municipality. The weapon must be disposed of as provided by Section 16-23-500.

However, any law enforcement agent may register and use these weapons in the line of duty.

We find the Order is ambiguous and contradictory because on the one hand it orders Mann to destroy certain weapons, but on the other hand it orders Mann to comply with statutes that require him to conduct a public auction. *See* S.C. Code Ann. § 16-23-500 (1976).[6] According to the statute, before a weapon could be destroyed, the clerk of court had to first conduct a public auction or sealed bidding. *Id.* If the highest price offered for a weapon at the public sale or by sealed bid was less than twenty-five dollars or deemed inadequate, then, and only then, could the weapon to be destroyed. *Id.* The 1997 statutes do not include the option of destroying the weapons outright, as was required by the judge's Order.[7] Therefore, on its face, the language of the Order is ambiguous and contradictory.

"One may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do." *Welchel v. Boyter*, 260 S.C. 418, 421, 196 S.E.2d 496, 498 (1973); *American Fed. Bank v. Kateman*, 335 S.C. 273, 516 S.E.2d 1 (Ct. App. 1991). Therefore, because the Order is ambiguous and contradictory, Mann cannot be held in contempt for failing to comply with the Order.

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[6]Sections 16-23-405, 16-23-50, and 23-31-180 do not apply to the weapons in this case. All the weapons covered by the judge's Order were exhibits in criminal trials, and therefore in the custody of the Clerk of Court. They were not weapons which, after being confiscated by deputies or police officers, were in the custody of the police department. All the weapons at issue were in the custody and control of the Clerk of Court, and, therefore, Mann was required to comply with section 16-23-500.

[7]The newest version of the statutory scheme does contain an option of destroying the weapons. *See* Effect of Amendment, § 16-23-50 (Supp. 2000) ("The 1998 amendment, in subsection (B), deleted the option of transferring the pistol to the clerk of court or mayor for disposal, *added the option of destroying the pistol*. . .") (emphasis added).

Furthermore, the judge did not have the authority to order the destruction of the weapons. There were very specific statutes on the books which dealt with the disposal of confiscated weapons. As discussed above, the legislature did not give the clerk, sheriff, or anyone else the authority to destroy weapons without first attempting to auction them. Therefore, the judge could not issue an Order requiring the Clerk of Court to destroy weapons which the legislature had specifically indicated were to be auctioned.

This Court notes the considerable uncertainty surrounding the statutory requirements governing the disposal of exhibits, weapons, and so forth which existed at the time the judge issued his Order. We sympathize with the judge's attempt to develop an appropriate method for disposing of the numerous exhibits. Our own task in sorting through the statutes was not made any easier by the fact that neither party has cited the correct law to this Court.

Regardless of the ambiguity in the Order, Mann's conduct in delaying any attempt to comply with or seek clarification of the Order for three years was irresponsible. Mann's failure to assure that his staff did not violate the statutes by taking the weapons for their own purposes clearly demonstrates that Mann was not faithful to his statutory responsibilities. Although Mann technically prevails in this matter it is a Pyrrhic victory in light of the events which precipitated his departure from office.

Since this Order was issued, this Court and the legislature recognized the confusion in this area. In response, the legislature has amended the statutes and this Court has adopted Rule 606, SCACR. Rule 606, which deals with the retention and disposition of exhibits in the circuit and family courts, became effective September 1, 1997. With respect to illegal items, the rule provides: "when the exhibit is a weapon, controlled substance, poison, explosive or any other kind of property which the offering party may not lawfully posses. . .the exhibit shall be disposed of in the manner provided by law or in a manner provided by the court." Rule 606(e), SCACR. This rule indicates that when there is a specific statute or law providing for the disposal of the item, the statute or law should be followed. However, when there is no law or statute dealing directly with the illegal item, the court may direct the manner of disposal.

II. Civil/ Criminal Contempt and III. Evidence of Intent

In light of our holding above, it is not necessary for this Court to address Mann's remaining two issues.

CONCLUSION

Based on the foregoing, we **REVERSE** the circuit court's order holding Mann in criminal contempt.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Mark R. Calhoun, Respondent.

Opinion No. 25384
Submitted October 30, 2001 - Filed December 3, 2001

DEFINITE SUSPENSION

Henry B. Richardson, Jr., and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

Richard A. Harpootlian, of Columbia, for respondent.

PER CURIAM: Respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a suspension from the practice of law for not less than six months, but not more than eighteen months. We accept the agreement and impose an eighteen month suspension retroactive to December 7, 2000, the date respondent was placed on interim suspension. In re Calhoun, 343 S.C. 280, 540 S.E.2d 444 (2000). The facts as admitted in the agreement are as follows.

Facts

On March 15, 2000, respondent received traffic citations for speeding and failing to have a South Carolina vehicle license and registration. Respondent's trial date for the citations was listed as March 30, 2000. Respondent did not appear in magistrate's court, was tried in his absence, and was found guilty of both charges. On March 31, 2000, respondent altered the court date on his copies of the citations in an effort to convince the magistrate to reopen his case.

In respondent's initial response to the Office of Disciplinary Counsel, respondent denied any wrongdoing. Respondent suggested that the prosecuting officer had animosity towards respondent and may have altered the citations. Respondent now acknowledges he altered the court date on the citations.

Law

As a result of his conduct, respondent has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 3.3 (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal or offer evidence that the lawyer knows to be false); Rule 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(c) (engaging in conduct involving moral turpitude); Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).

In addition, respondent has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(3) (willfully violating a valid order of the Commission on Lawyer Conduct); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or bring the legal profession into disrepute); and Rule 7(a)(6) (violating the oath of office taken

upon admission to practice law in this state).

Conclusion

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

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of William Levern Pyatt, Respondent.

Opinion No. 25385
Submitted October 30, 2001 - Filed December 3, 2001

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for the Office of Disciplinary Counsel.

William L. Pyatt, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of a sanction ranging from a public reprimand to a three month suspension. We accept the agreement and issue a public reprimand. The facts as admitted in the agreement are as follows.

Facts

Client retained respondent to represent him in a workers' compensation matter. Client and respondent entered into a contingency fee agreement which provided that respondent would retain one-third of any settlement proceeds as his fee. In addition, client paid respondent $300 to cover "estimated costs."

Respondent settled client's matter for $6,369.87. Client signed an undated settlement statement which indicated that client would receive $4,246.58 and respondent would retain the remaining funds as his fee. The "estimated costs" were not accounted for in the settlement statement.

Respondent deposited the settlement check into his escrow account on December 19, 2000. Prior to depositing the settlement check, respondent had a negative balance in his escrow account. After depositing the settlement check, respondent's escrow account balance was $2,346.58. Respondent did not possess sufficient funds to pay client at that time and continued to have insufficient funds in the account until February 22, 2001, when he made a deposit of $132,546.64.[1]

On February 26, 2001, client received a check drawn upon respondent's escrow account in the amount of $4,246.58.[2] Client cashed a portion of the check, and deposited the remaining funds into his savings account. Client was later informed that the bank was dishonoring the check. On March 9, 2001, respondent issued another check to client in the amount of $4,246.58, plus $100 for client's "troubles."

Upon investigation of this matter, it was discovered that respondent was unaware of the requirements of Rule 417, SCACR.

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[1]These funds were received after resolving another client's matter.

[2]Respondent dated the check, January 4, 2001. In addition, respondent failed to sign the check.

Specifically, respondent failed to maintain receipt and disbursement journals identifying the records of deposits for individual client deposits. Respondent also failed to maintain ledger records and portions of client files to completely understand records of deposit pertaining to them. Finally, respondent also failed to conduct a monthly reconciliation of his escrow account.

Law

As a result of his conduct, respondent has violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.15 (a lawyer shall promptly deliver to the client any funds that the client is entitled to receive); and Rule 8.4(a) (violating the Rules of Professional Conduct);

Respondent has also violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); and Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or bring the legal profession into disrepute).

Respondent also admits that he violated the financial record keeping requirements found in Rule 417, SCACR.

Conclusion

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

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Donald Loren Smith, Respondent.

Opinion No. 25386
Submitted October 29, 2001 - Filed December 3, 2001

DEFINITE SUSPENSION

Henry B. Richardson, Jr. and Paulette Edwards, both of Columbia, for the Office of Disciplinary Counsel.

Desa A. Ballard, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an agreement pursuant to Rule 21, Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension of six months, retroactive to March 1, 2001.[1] We accept the agreement.

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[1]Respondent was placed on interim suspension by order of this Court dated March 1, 2001. In the Matter of Smith, 344 S.C. 39, 543 S.E.2d 536 (2001).

Facts

Respondent was arrested on January 10, 2001, and charged with trafficking in cocaine, trafficking in methamphetamine, and possession of marijuana. Respondent was placed on interim suspension as a result of the charges. The charges have subsequently been dismissed. However, respondent admits that while licensed to practice law in South Carolina, he was a recreational user of cocaine.

Respondent represents and warrants that he has not used or possessed cocaine since January 11, 2001. He further represents and warrants that he will not willfully use or possess cocaine or any other illegal drug in the future.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer) and Rule 8.4(e) (conduct prejudicial to the administration of justice).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); and Rule 7(a)(5) (engaging 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)(6) (violating the oath of office taken upon admission to practice law in this state).

Conclusion

Respondent has fully acknowledged that his actions were in

violation of the Rules for Lawyer Disciplinary Enforcement and the Rules of Professional Conduct. We therefore suspend respondent from the practice of law for six months retroactive to the date of his interim suspension on March 1, 2001. 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, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Commerce Center of Greenville, Inc.,

Respondent,

v.

W. Powers McElveen & Associates, Inc., a South Carolina Corporation, and McDevitt Street Bovis, Inc.,

Defendants,

of whom McDevitt Street Bovis, Inc. is,

Appellant.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 3412
Heard November 6, 2001 - Filed November 19, 2001

AFFIRMED

Robert L. Widener, of McNair Law Firm, of Columbia, for appellant.

Henry W. Brown, of Nexsen, Pruet, Jacobs & Pollard, of Columbia, for respondent.

ANDERSON, J.: In this construction litigation case, W. Powers McElveen & Associates ("Architect") and McDevitt Street Bovis, Inc. ("Contractor") were found 20% and 80% liable, respectively, for the diminution in value of a building owned and subsequently sold by Commerce Center of Greenville, Inc. ("Commerce Center"). Contractor filed post-trial motions challenging various evidentiary rulings. These motions were denied. Contractor appeals. We affirm.

FACTS/PROCEDURAL BACKGROUND

In April 1997, Commerce Center acquired by assignment all of the partnership interests of Park Place Associates ("Associates"). Associates' interests included a five-story building known as the Park Place located in West Columbia. At the time of this transaction, Associates had two separate actions pending against Architect[1] and Contractor[2] for recovery of damages for certain defects in the design and construction of Park Place. Specifically, Associates complained that the windows on all but the first floor of the building leaked.

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[1] The complaint for Associates vs. Architect was filed July 25, 1994.

[2] The complaint for Associates vs. Contractor was filed December 10, 1996. Contractor subsequently initiated a third party complaint against its window installation subcontractor. This third party defendant was not a party to the litigation brought by Associates nor is it a party to this appeal.

Commerce Center, as the assignee of Associates' interests, later moved to consolidate Associates' two actions. On February 5, 1998, Commerce Center's motion was granted.

It was undisputed that an improperly constructed joint will fail prematurely and start leaking. The parties also agreed the windows leaked because of defective design and the poor workmanship of Contractor's window installation subcontractor. Contractor, however, maintained that the design defects, not Contractor's construction defects, were the **greater** cause of Commerce Center's damages.

The windows were sealed with a "conventional caulk joint." A conventional caulk joint is an industry term which describes a standard method of construction and type of seal used around windows. When a window is placed in its respective opening, it is positioned and held in place with plastic, horseshoe-shaped shims so that a space or gap of not less than one-quarter of an inch and not more than three-quarters of an inch is left between the cladding material, which is the material on the building's exterior, and the top edge or the bottom edge of the window system. Next, a foam material called backer rod is inserted into the gap. A sealant-like caulk is then pressed into the gap on top of the backer rod. The backer rod limits the depth of the sealant joint (which is the in-and-out dimension of the joint) and allows the caulk to be pressed into its proper one-to-one ratio of depth to width. A proper ratio ensures a water-tight and lasting joint.

Approximately two weeks after acquiring the building, Commerce Center sold Park Place to Liberty Property Limited Partnership ("LPLP"). Commerce Center continued the actions initiated by Associates. In its pleadings, Commerce Center alleged that it was required to discount the sale price by $175,000 because of the building's defects.[3]

At trial, Commerce Center elicited testimony that Contractor did not install the windows properly in that almost no backer rod was used, the joint

[3] Commerce Center entered into its contract to sell Park Place to LPLP on March 5, 1997. On its schedules, the property was valued at $3,992,000. Upon notice of the construction defects, because LPLP did not want to buy a leaking building, subsequent negotiations reduced the selling price by $175,000.

spacing was inconsistent and frequently of improper width and depth, the fiberglass mesh under the cladding system was exposed in parts, and the shims were the improper size, misplaced, and often protruding into the caulking compound. Contractor acknowledged that essentially no backer rod was used on the building. L.G. Lewis, Jr., an expert called by Commerce Center, testified that the design of the windows did not deviate from accepted architectural practice and it would have performed "satisfactory" if properly executed.

On cross examination, Robert T. Coleman, III, Commerce Center's president, acknowledged that in 1996, Commerce Center believed a cause of the leaks, but not the exclusive cause, was a design defect. He also admitted that Commerce Center would have performed repairs to the building to change the design configuration of the window head even if backer rod had been installed by Contractor.

Commerce Center additionally proffered testimony of necessary remedial remedies to correct the window leaks. Simply adding new caulk would not act as a permanent fix to the leaking problem. Instead, the better, long-term solution was to install flashing across the top of the windows. Mark F. Williams, an expert retained by Commerce Center to design a solution for the leaks, testified about a remedial flashing design he devised. Williams testified his solution did not modify the window design; rather, it involved cutting an approximate eight-inch portion of the cladding away from above the windows and installing a metal flashing or drip edge around the entire building. This solution was considered the most cost-effective because it did not involve removing, repositioning, and reinstalling every window in the building. Lewis opined Williams' remedial solution was "reasonable." Although Commerce Center did not implement these design changes, LPLP did. There is no indication in the record that the building has leaked since renovation.

As part of its pre-trial discovery, in December 1997, Contractor submitted five questions to Associates in a Rule 36, SCRCP request to admit. Commerce Center, answering as assignee of Associates' interests, admitted the construction defects complained of consisted of only the omission of backer rod and

improper joint size at the window head.[4] However, Commerce Center specifically reserved its right "to supplement this response to the extent further deficiencies are discovered." Commerce Center further admitted it had turned down Contractor's offer to pay for recaulking the building and that it would

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[4] Request to admit numbers one and two read, in part:

> 1. Admit that Park Place Associates contends that the Problem is a design defect which Park Place Associates contends is the responsibility of [Architect].
>
> ANSWER:
>
> This Request is admitted in part. Commerce Center [as assignee of all of the partnership interest of Park Place Associates] contends that the problem is in part caused by a design defect. Commerce Center contends that construction defects, consisting of omission of a backer rod and improper joint size at the window head to accommodate sealant and backer rod contributed to the leaking problems.
>
> 2. Admit that the only contention of a breach of contract by the Park Place Associates' agent, [Contractor], is the alleged failure by [Contractor] to install a backer rod and caulk joints between the windows and the building skin.
>
> ANSWER:
>
> Commerce Center admits request number 2 to the extent that it [sic] a breach of contract occurred by omission of backer rod, and failure to create joint width for the installation of a backer rod and sealant. This was the responsibility of [Contractor] pursuant to its contract. [Commerce Center] reserves the right to supplement this response to the extent further deficiencies are discovered.

have performed repairs to the building and changed the design configuration of the window head even if backer rod had been present.[5]

Contractor argued the substance of Commerce Center's admissions to the jury. It used a blow-up of admission number four as demonstrative evidence during its opening arguments and it published in part and argued the substance of the remaining admissions, particularly admission number two, during cross examination of Lewis. Additionally, Contractor referenced the admissions during its closing argument.

Contractor sought on at least three occasions to introduce the admissions into evidence. At the close of Commerce Center's case, Contractor also moved for a directed verdict based upon admission number two because the admission did not acknowledge any construction deficiencies other than the lack of backer rod and improper joint spacing. The court denied Contractor's motion. Concurrently, however, the trial judge granted Commerce Center's oral motion to amend its admissions to comport with the additional testimony of construction defects involving the shims. Over Contractor's objections, the trial judge found no prejudice in allowing this amendment.

Contractor also attempted to introduce two letters sent from Commerce Center's attorney to Contractor and Architect dated June 25 and July 25, 1996,

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[5] Request to admit number four reads, in part:

> 4. Admit that even if [Contractor] had recaulked the building using the appropriate backer rod, the redesign and repairs being performed by Park Place Associates to correct the problem would have still been necessary.
>
> ANSWER:
>
> [Commerce Center] admits that it would have performed repairs to the building to change the design configuration of the window head even if backer rod had been present.

respectively, into evidence. The trial judge did not admit either letter, finding both documents related to settlement negotiations. The first letter explained Commerce Center had discovered the cause of the water leaks:

> The principal problem relates to the configuration of the window heads, particularly at the curved wall and the placement of the sealing joint flush with the exterior surface …. It is apparent, therefore, that in order to produce a water tight building that will allow sealant joints to last the industry period of time, that the window heads need to be reconfigured.

The second letter reiterated Commerce Center's initial findings:

> The revision of the window head detail is necessary to ensure the long term water tightness of the building. Periodic caulking is not going to be sufficient to maintain the integrity of the exterior skin of the building.

The jury returned a verdict in favor of Commerce Center for the entire $175,000 requested for its breach of warranty and breach of contract claims. The jury found Architect liable in the amount of $35,000 (20% at fault) and Contractor liable in the amount of $140,000 (80% at fault). Contractor filed post-trial motions for directed verdict, JNOV, reconsideration, and new trial. The trial court denied these motions. Contractor appeals.

LAW/ANALYSIS

Contractor states in its brief that "[t]he overriding question in this appeal is whether the trial court's exclusion of evidence, allowance of an amendment to a request to admit, and refusal to charge the jury on requests to admit deprived Contractor of a fair trial on the question of causation and apportionment of damages as between Contractor and Architect." Essentially, Contractor argues the trial court's alleged improper evidentiary restrictions in this document-intensive case caused the jury to reach an improper allocation of fault between Contractor and Architect. We disagree.

I. Requests to Admit

A. Judicial Treatment of Admissions Made Pursuant to Rule 36, SCRCP

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the general rules of discovery that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Rule 36(a), SCRCP. The efficacy of these admissions is akin to the doctrine of judicial estoppel:[6] an admission precludes the admitting party from arguing facts at trial contrary to its responses to a request to admit, absent an amendment to or revocation of the admission as allowed under the rules. See Rule 36(b), SCRCP ("Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."); cf. Adams v. Orr, 260 S.C. 92, 194 S.E.2d 232, (1973) (affirming trial judge's refusal to hold that plaintiff's lack of responses to several of defendant's requests to admit were admitted as binding fact because the requests to admit, as worded, were ambiguous and subject to more

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[6] Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same litigation. The doctrine's function is to protect the integrity of the judicial process or the integrity of the courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. The doctrine generally applies only to inconsistent statements of fact. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997) (adopting the doctrine of judicial estoppel as it relates to matters of fact in South Carolina); Quinn v. The Sharon Corporation, 343 S.C. 411, 416, 540 S.E.2d 474, 476 (Ct. App. 2000) (Anderson, J., concurring) ("A court must be able to rely on the statements made by the parties because truth is the bedrock of justice. Therefore, a litigant cannot 'blow both hot and cold.' Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements, or contentions made under oath, is prohibited from adopting an inconsistent posture in subsequent proceedings.") (citations omitted).

than one reasonable interpretation).

Admissions under Rule 36 are treated as admissions in pleadings. Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), overruled on other grounds by Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000); see also James F. Flanagan, South Carolina Civil Procedure 304 (1996) ("Admissions are similar to pleadings."); Pulte Home Corp. v. Woodland Nursery & Landscapes, Inc., 496 S.E.2d 546, 548 (Ga. App. 1998) ("In form and substance [a response to a request to admit] is comparable to an admission in pleadings or stipulation of facts and as such is generally regarded as a judicial admission rather than evidentiary admission of a party.").

South Carolina's Rule 36 is substantively similar to the federal rule. However, Rule 43, unlike its federal counterpart, specifically states that "pleadings shall not be submitted to the jury for its deliberations." Rule 43(g), SCRCP. Thus, in our state, requests to admit are not submitted to the jury; rather, the proper course of action is to publish the admissions to the jury. Id. ("Counsel for a party may read his pleadings to the jury or make a statement to the jury of the facts alleged in the pleadings and the theory of his case.") cf. Tuomey Reg'l Med. Ctr. v. McIntosh, 315 S.C. 189, 191, 432 S.E.2d 485, 487 (1985) ("Rule 36 SCRCP allows amendment of an admission in the discretion of the court when 'the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him....' Once an answer to a Request for Admissions is amended under Rule 36, both the initial answer and the amended answer may be published to the jury. The jury may consider the initial answers as evidence, while the party who made such answers 'is free to explain why it was made and [amended].'").

Here, Contractor did not request to publish Commerce Center's

admissions to the jury. Instead, it sought to enter the admissions into evidence.[7] Despite the absence of a request to publish, the trial judge allowed Contractor to argue the admissions to the jury. Contractor capitalized on this ruling by arguing the substance of the admissions to the jury and presenting the answer to admission number four during both its opening and closing arguments. We find no error.

B. Jury Charge

Contractor argues the trial judge denied its alternative request that the jury be instructed that the responses to the requests to admit were conclusive facts in the case. We find no merit in this contention.

Generally, a party is entitled to a jury charge regarding requests to admit which were published to the jury. See McIntosh, 315 S.C. at 192, 432 S.E.2d at 487 (holding trial court's general charge concerning requests for admissions was a correct statement of law). Here, Contractor argued at trial that "either I can introduce [the requests to admit] as an exhibit or you can tell the jury that it's like a fact." Contractor, however, did not expand on this statement. The record does not contain the full charge to the jury nor does it show that the trial judge refused to present any requested charges to the jury. In fact, there is no indication in the record that the jury was charged with an incorrect expression of the law. See State v. Buckner, 341 S.C. 241, 534 S.E.2d 15 (Ct. App. 2000), cert. denied (holding jury charge is proper if, as a whole, it is free from error and reflects the current and correct law of South Carolina). Since the record does not contain any proposed jury charges and since the record does not reflect that Contractor proffered any proposed charges for the jury, this issue is not preserved. See Wells v. Halyard, 341 S.C. 234, 533 S.E.2d 341 (Ct. App. 2000) (upholding jury charge given by trial judge where record was devoid of appellant's request for a particular charge or the language of the proposed charge that appellant contended judge refused to give); see also McIntosh, 315

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[7] Contractor reiterates this desire in its brief wherein its states: "When Contractor sought to introduce the Requests to Admit into evidence …." and "Contractor renewed its request to introduce these matters into evidence …."

S.C. at 192, 432 S.E.2d at 487 ("The court gave a general charge concerning requests for admissions, which was a correct statement of law. If [defendant] wanted a further charge as to the effect of the amended answers, it was incumbent upon it to specifically proffer such a charge. However, [defendant] failed to proffer an additional charge, either at trial or on appeal.") (citation omitted).

C. Amendment of Requests to Admit

Finally, Contractor argues the trial judge erred in allowing Commerce Center to amend its answers to the requests to admit. That is, Contractor argues Commerce Center should be estopped from asserting any breaches other than the two defects asserted in admission number two which acknowledges "only" the backer rod and caulking were defective. We disagree.

The trial court may allow a party to amend or withdraw its answers to a request to admit when: (1) the presentation of the merits is furthered by the amendment; and (2) the party who obtained the admission cannot demonstrate prejudice because of the amendment. Rule 36(b), SCRCP, cited in Barber v. Hobbs, 313 S.C. 319, 437 S.E.2d 409 (Ct. App. 1993). Prior to the oral amendment of Commerce Center's admissions, Commerce Center proffered testimony, without objection, that the shims were both the wrong size and were improperly positioned. Williams testified that he observed shims that protruded into the sealant. Bob Broom, assistant vice-president and project manager for Architect, and Lewis both averred that the shims used by Contractor were too long. Moreover, the testimony at the trial was detailed, specific, and voluminous as to the proper method for installing the windows. Clearly the positioning of the windows with the shims affects the spacing of the joints. The window installation required more than just caulk and backer rod. In fact, the windows, backer rod, shims, and sealant are used in conjunction to install the windows. The amendment of Commerce Center's admissions did nothing more than conform the admissions to the consistent testimony offered at trial.

Nor was Contractor prejudiced by this amendment. The use of shims is clearly part and parcel with the installation of the windows. Michael S.

McMillon, project superintendent for Contractor, agreed that the backer rod's absence and protruding shims would be clear errors in construction which would likely contribute to the sealant joints' failure. Moreover, Contractor admits it received an inspection report in 1994 prepared by its own expert, George W. McGee, who was hired by Contractor to investigate the window leaks. Jack W. Long, a senior vice-president of Contractor, stated Contractor had understood since at least 1994 that its workmanship was at issue as a cause of leaks. Given Commerce Center's reservation to amend its answer and because Contractor was on notice before the action against it was initiated that the quality of its work was called into question, we find no prejudice in the trial judge's ruling.

Contractor cites Sunvillas Homeowners Association v. Square D Company, 301 S.C. 330, 391 S.E.2d 868 (Ct. App. 1990), for the proposition that any amendment to the requests to admit was invalid without Contractor's consent. This case is clearly distinguishable because it involves an attempt to add a new theory of recovery to the complaint after plaintiff rested his case. In the case sub judice, Commerce Center has maintained throughout the proceedings that the various construction defects by Contractor contributed to the leaks. Commerce Center did not allege a new cause of action nor did it present an unforseen argument late in the proceedings.

II. Admissibility of Commerce Center's June 25 and July 26, 1996, Letters

The courts favor compromise; accordingly, evidence relating to settlements is generally not admissible to prove liability. Rule 408, SCRE; Hunter v. Hyder, 236 S.C. 378, 114 S.E.2d 493 (1960); Hall v. Palmetto Enterprises II, Inc., of Clinton, 282 S.C. 87, 317 S.E.2d 140 (Ct. App. 1984) (holding that an offer to compromise is generally not admissible as an admission).

The June 25, 1996, letter from Commerce Center's counsel to Contractor and Architect concluded:

> I would like to schedule a meeting with everyone involved as

> soon as possible … so that we can discuss this proposed repair and determine how it should be implemented between [Architect] and [Contractor].

Likewise, the July 25, 1996, letter reiterated the request to negotiate:

> I suggested a meeting in my prior letter to discuss this problem and see if a resolution can be reached …. I would be most appreciative if you would check your calendars and find a mutually agreeable day that is suitable to meet in Columbia to discuss this repair and resolution without the necessity of continued litigation.

These letters reference an attempt to schedule a meeting to resolve the case. Thus, on their face, these letters present an attempt to curb further litigation. Clearly, the verbiage of the letters relates to actual settlement negotiations or, at the least, to a settlement relationship between the parties. Simply because the letters were sent by Commerce Center's predecessor in interest does not remove the essential tone for settlement from the letters.

Even assuming, arguendo, that redacted versions of the letters should have been admitted by the trial judge, we find no prejudice. It is well settled that the admission and rejection of testimony are matters largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion. Pike v. South Carolina Dep't of Transp., 343 S.C. 224, 540 S.E.2d 87 (2000); see also R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000), cert. granted (holding the court's ruling to admit or exclude evidence will only be reversed if it constituted an abuse of discretion amounting to an error of law). In order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown. Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997).

The purported admissions in the letters are merely cumulative of the testimony at trial. Generally, there is no abuse of discretion where the excluded testimony is merely cumulative of other evidence proffered to the jury. See Ott

v. Pitman, 320 S.C. 72, 79, 463 S.E.2d 101, 105 (Ct. App. 1995) (upholding trial judge's decision to exclude particular witness testimony, which the Court of Appeals characterized "cumulative to that of other witnesses"). Accordingly, we find no error. Here, Williams, Lewis and McGee all testified that merely recaulking the joints would not be enough. Instead, they declared that the window head design required some revisions or reworking. Williams and McGee further opined that the poor design and workmanship mandated some form of revision of the window heads. Lewis opined that the construction defects alone required a revision. Thus, the jury heard ample evidence that the window heads had to be reconfigured to solve the leaking problem. Moreover, although the trial judge did not allow the letters into evidence, he allowed Contractor to use them to refresh the memories of Commerce Center's witnesses. We find no abuse of discretion and no prejudice arising from denying the admission of these letters into evidence.

CONCLUSION

For the foregoing reasons, the decision of the trial judge is

AFFIRMED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Glasscock, Inc.,

Respondent,

v.

United States Fidelity and Guaranty Company,

Appellant.

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

Opinion No. 3413
Heard November 13, 2001 - Filed December 3, 2001

AFFIRMED

Andrew F. Lindemann, of Davidson, Morrison & Lindemann, of Columbia, for appellant.

John E. Miles, of Miles Law Firm; and Kristi F. Curtis, of Bryan, Bahnmuller, Goldman & McElveen, both of Sumter, for respondent.

ANDERSON, J.: Glasscock, Inc. ("Glasscock") brought a declaratory judgment action against its insurer, United States Fidelity and Guaranty Company ("USF&G"), seeking coverage for loss of use damages under the underinsured motorist ("UIM") portion of its insurance policy. Both parties filed motions seeking summary judgment. The trial court originally ruled for USF&G, but reversed its ruling upon Glasscock's motion to alter or amend the judgment. In response, USF&G filed two motions, one to vacate the ruling, and the other to alter or amend the judgment. Both motions were denied. USF&G appeals these denials. We affirm.

FACTS/PROCEDURAL BACKGROUND

On November 19, 1997, a truck owned and operated by Glasscock was involved in an accident with John Vereen. Vereen maintained an insurance policy with property damage limits of up to $25,000. Glasscock had an insurance policy in effect with USF&G, with $1,000,000 in liability coverage and $1,000,000 in UIM coverage. Glasscock contended that the amount of property damage to the truck and loss of use damages exceeded the $25,000 property damage limit under Vereen's policy and brought a claim for recovery under the UIM portion of its policy with USF&G. USF&G denied Glasscock's claim for UIM benefits, stating that loss of use damages were not covered under the "property damage" definition of the UIM endorsement contained in the policy. The language of the endorsements defining "property damage" under the liability and UIM sections of the policy is different. The liability endorsement reads: "'Property damage' means damage to or loss of use of tangible property." The UIM endorsement reads: "'Property damage' as used in this endorsement means injury to or destruction of your covered 'auto.'"

Glasscock commenced a declaratory judgment action to determine whether loss of use damages were covered under the UIM portion of the policy. Both parties conceded that there were no material issues of fact in dispute and filed motions seeking summary judgment. On March 12, 1999, the trial court granted USF&G's motion for summary judgment stating that loss of use damages were not covered under the UIM provision of the policy. Subsequent to this decision, Glasscock filed a motion for reconsideration pursuant to Rule

59(e), SCRCP. On April 23, 1999, the trial court granted Glasscock's motion and ordered that the UIM policy be reformed to cover loss of use damages under the property damage endorsement. In response to the April 23, 1999, order, USF&G filed two motions, one to vacate pursuant to Rule 60, SCRCP and one for reconsideration pursuant to Rule 59(e) & (f), SCRCP. The trial court denied both motions on November 30, 1999, and this appeal ensued.

ISSUES

I. Did the trial court err in reforming the contract language when reformation was not specifically requested in Glasscock's complaint? ("Procedural Reformation Issue")

II. Did the trial court err in reforming the contract to include loss of use damages within the definition of "property damage" under the UIM endorsement of the policy? ("Substantive Reformation Issue")

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001), cert. granted; Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); see also Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998) (stating that a trial court should grant motion for summary judgment when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law).

In determining whether any triable issue of fact exists, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most

favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999), aff'd, 341 S.C. 320, 534 S.E.2d 672 (2000). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Id.

On appeal, this Court reviews the grant of summary judgment using the same standard applied by the trial court. Bray v. Marathon Corp., Op. No. 3386 (S.C.Ct.App. filed September 10, 2001) (Shearouse Adv. Sh. No. 33 at 81); see also Estate of Cantrell, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990) ("On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party. The judgment may be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.") (citations omitted).

LAW/ANALYSIS

I. Procedural Reformation

In its brief, USF&G frames the procedural reformation issue as follows: "Did the lower court err in reforming the underinsured motorist endorsement to include coverage for loss of use damages where no cause of action for reformation was pled by the Respondent?" While the substantive reformation issue was fully discussed and argued in USF&G's brief, the procedural reformation issue was addressed solely in a footnote contained within the text of the argument relating to substantive reformation. The text of the footnote reads: "In its order filed April 23, 1999, the [Circuit Court] reformed the USF&G policy to extend UIM coverage to include loss of use damages.

Reformation of a contract is a specific cause of action in equity. Glasscock never pled a cause of action for reformation. Instead, Glasscock sought only declaratory relief. Therefore, the [Circuit Court] awarded relief on a cause of action never pled by either party."

South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review. See Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."). In Brown v. Theos, 338 S.C. 305, 309 n.2, 526 S.E.2d 232, 235 n.2 (Ct. App. 1999), aff'd, 345 S.C. 626, 550 S.E.2d 304 (2001), we held that a one sentence paragraph raised in an appellant's brief was insufficient to preserve the issue for appeal: "Brown states in a one sentence paragraph that he had raised an action for 'intentionally negligent and malicious conduct' …. We note Brown's argument is so conclusory that it may be deemed abandoned." (citation omitted). In this case, USF&G's footnote was conclusory and cited no supporting authority. It is insufficient to preserve the argument for review. Additionally, even though USF&G more fully addressed the issue in its reply brief, an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief. See Jackson v. Bi-Lo Stores, Inc., 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) ("The partners make several new arguments relating to estoppel and ratification in their reply brief. However, these arguments are not properly before this Court because an appellant cannot make new arguments for reversal in a reply brief.") (citation omitted). Accordingly, we find that USF&G's argument was not properly presented to this Court and is deemed abandoned.

Even if the issue were properly presented to this Court, we find the reformation action was sufficiently stated in the complaint. Glasscock's complaint alleges, in pertinent part:

> 5. The Plaintiff has made demand upon the Defendant for loss of use under the underinsured motorist coverage, which the Defendant has refused to extend to the Plaintiff under the terms of this policy, based upon the Defendant's position that

rental reimbursement is not covered as it was not defined in the endorsement.

. . . .

7. The Plaintiff is informed and believes that there is a justiciable controversy between it and the Defendant as the Defendant owes and owed the Plaintiff a positive legal duty to provide underinsurance motorist coverage, and/or to make a reasonable and effective offer of such coverage, under the laws and statutes of South Carolina, which the Defendant failed to do.

WHEREFORE, this Plaintiff requests that this court issue a judgment declaring that she be entitled to loss of use under the underinsured motorist coverage.

Sandy Island Corporation v. Ragsdale, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965) states: "The law requires a plaintiff to state the facts constituting his cause of action and demand the relief to which he supposes himself entitled, he is not required to characterize the facts stated, or **to give his cause of action a name**…." (emphasis added). We hold the information presented in Glasscock's complaint is sufficient to state a cause of action.

II. Substantive Reformation

The main thrust of USF&G's argument is that the absence of statutory language mandating that property damages include loss of use deprived the trial court of authority to reform the UIM endorsement to include loss of use damages as property damages. We recognize there is no statutory authority for including loss of use damages in the definition of property damages in UIM endorsements. However, as USF&G states in its brief, insurance companies are free to offer coverage in excess of statutorily required coverage. Pennell v. Foster, 338 S.C. 9, 20, 524 S.E.2d 630, 636 (Ct. App. 1999) ("[A]n automobile insurance policy can, by its language, provide greater coverage than the

minimum required by statute."). In its liability endorsement, USF&G defined "property damage" as including loss of use. By doing so, it chose to provide greater coverage than the minimum required by statute.

S.C. Code Ann. § 38-77-160 requires insurers to offer underinsured motorist coverage **up to the limits** of the insured's liability coverage:

> Automobile insurance carriers shall offer … at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist ….

USF&G argues the language, "up to the limits of the insured liability coverage," only applies to the dollar limit amounts and not to the types of coverage offered in the liability and UIM coverages. We addressed a similar issue in State Farm Mutual Automobile Insurance Company v. Bookert, 330 S.C. 221, 499 S.E.2d 480 (Ct. App. 1997), rev'd on other grounds, 337 S.C. 291, 523 S.E.2d 181 (1999).

In Bookert, the question arose whether the UIM coverage of a policy should be reformed to include damages arising out of the use of an automobile when the UIM endorsement only covered damages for ownership and operation of a vehicle. The liability coverage contained in the policy covered losses arising out of the ownership, operation, and use of a vehicle. In holding that the UIM coverage did include damages arising out of the use of an automobile, we stated:

> Because underinsured motorist coverage is intended to provide coverage where the at-fault driver's liability coverage is insufficient, we conclude the legislature intended for underinsured motorist coverage to provide the **same type of coverage as liability coverage** .... [I]t is logical to conclude underinsured motorist coverage should provide the **same spectrum of coverage as**

liability coverage.

Id. at 229, 499 S.E.2d at 484 (emphasis added).

USF&G suggests that Bookert should not apply to this situation because in Bookert, there was statutory language mandating that automobile policies cover losses arising out of the ownership, operation, and use of a vehicle. We disagree. The clear unambiguous language of Bookert interprets "up to the limits of the insured liability coverage" as contained in § 38-77-160 as requiring the insurer to provide the same type of coverage, not just the same dollar limit. USF&G chose to include loss of use damages within property damages in its liability endorsement. Therefore, its UIM endorsement also includes loss of use damages within its definition of property damage and the trial court's reformation of the contract was proper.

CONCLUSION

For the foregoing reasons, the trial court's decision is

AFFIRMED.

HOWARD and SHULER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Duncan R. Proctor,

Appellant.

Appeal From Charleston County
Charles W. Whetstone, Jr., Circuit Court Judge

Opinion No. 3414
Heard September 27, 2001 - Filed December 3, 2001
Revised December 6, 2001

AFFIRMED IN PART and REMANDED

Chief Attorney Daniel T. Stacey, of South Carolina Office of Appellate Defense, of Columbia; and Christopher Wayne Adams, Southern Center for Human Rights, of Atlanta, GA, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan and

Assistant Attorney General Toyya Brawley Gray, all of Columbia; and Solicitor David P. Schwacke, of N. Charleston, for Respondent.

ANDERSON, J.: Duncan Proctor was convicted of four counts of first degree criminal sexual conduct (CSC) and one count of first degree burglary. The trial court sentenced Proctor to life imprisonment for first degree burglary; one consecutive thirty year term as to one count of first degree CSC; and three concurrent terms of thirty years on the remaining CSC convictions. On appeal, Proctor argues the court erred in (1) denying Proctor's motion to have the proficiency testing records of the DNA expert disclosed and (2) finding Proctor was competent to stand trial. We affirm in part and remand.

FACTS/PROCEDURAL BACKGROUND

On April 1, 1991, Victim woke to find a mask-wearing intruder standing in the doorway of her bedroom. The intruder grabbed her arm, held a knife to her neck, and told her to remove her nightgown. The intruder led Victim into one of the guest bedrooms where he repeatedly raped her at knife point. Sometime during the attacks, the intruder removed his mask, placed it across Victim's face, and warned her not to look at his face. He threatened to kill her if she later called the police. The intruder entered Victim's home through a window.

While committing the criminal sexual conduct, the intruder used a tube of K-Y Jelly. He cleansed himself with a lace doily and a wash cloth during the attacks. Although Victim observed that her attacker had a slight build, olive skin, and wavy dark hair, she did not see his face and could not identify him.

On June 19, 1992, an informant told the City of Charleston Police Department that Proctor was involved in the criminal sexual conduct. Proctor had olive skin, a slight build, and wavy dark brown hair. When the police approached Proctor that day, Proctor sped away in his car and was involved in

a serious automobile accident. Proctor suffered massive brain damage and lost the use of both his legs and his right arm. Proctor's brain injuries impaired his ability to think, remember, and concentrate.

Deoxyribonucleic acid (DNA) analysis identified Proctor as the source of semen collected from Victim during the rape kit examination. The fingerprint analysis performed on prints left on Victim's window screen and on the tube of K-Y Jelly indicated that Proctor was the source of the fingerprints. The blood-type of the attacker, Group B secretor, and hair found at the scene were consistent with that of Proctor.

In December 1992, Proctor was indicted on four counts of first degree CSC and one count of burglary in connection with the rape of Victim. On May 26, 1993, the trial court found Proctor incompetent to stand trial. When his competency was later reviewed, Proctor was declared competent to stand trial pursuant to an order dated June 17, 1997. Venue was transferred to Oconee County.

In his DNA discovery request filed prior to trial, Proctor requested the State turn over all internal and external proficiency tests and all proficiency test results. Proctor submitted a memorandum in which he contended the proficiency test results were discoverable under Rule 5, SCRCrimP, and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Proctor maintained the proficiency test results would be used as evidence at trial, the results were material to the defense, and the raw data to support them was not confidential. Additionally, Proctor alleged that every laboratory makes errors in performing DNA analysis. He presented copies of reports concerning the proficiency test errors made at the Federal Bureau of Investigation's (FBI's) lab and the lab's efforts to hide the errors.

In a memorandum in opposition to Proctor's discovery request, the South Carolina Law Enforcement Division (SLED) averred the test results were not discoverable under either Rule 5 or Brady because Proctor could not show how the proficiency test results were favorable or material. SLED argued the test results were confidential, compiling the reports would be burdensome, and the

proficiency test results were not relevant to the evidence tested in Proctor's case. SLED provided the affidavit of Ira Jeffcoat, the SLED agent who performed the DNA analysis in Proctor's case. In his affidavit, Agent Jeffcoat stated all SLED examiners had passed every proficiency test. He further declared that revealing the results of all proficiency tests would be extremely burdensome on SLED and would destroy the confidentiality of the testing process. The State asserted it had no plans to introduce the proficiency test results in its case in chief at trial.

After a hearing, the trial court denied discovery of the DNA proficiency test results. The trial court ruled the proficiency test results were not discoverable under Rule 5 because the State indicated it would not use the proficiency test results in its case in chief and the results did not relate to any evidence in Proctor's case. The court concluded the results were not material to the preparation of Proctor's defense. The trial court found Proctor would be provided enough information regarding the DNA evidence for his expert witnesses to assess whether Agent Jeffcoat reached the correct conclusion. The court noted Agent Jeffcoat's affidavit provided Proctor with information regarding the proficiency tests.

In addition, the trial court determined Proctor was not entitled to the proficiency test results under Brady because Proctor failed to show an initial basis for his claim that the results were material and favorable to his defense and Proctor only offered unsupported speculations that problems existed with SLED's proficiency testing. The court held the proficiency test results were not relevant to the question of whether Agent Jeffcoat reached the correct conclusions in Proctor's case. Finally, the court found that compiling a proficiency testing report would be burdensome to SLED.

At trial, Agent Jeffcoat explained accreditation and proficiency testing. In 1994, the SLED forensic laboratory became accredited. The agency which determines SLED's accreditation status is the American Society of Crime Laboratory Directors (ASCLD). Agent Jeffcoat declared that accredited means "our procedures in our lab have been inspected by an outside agency, that agency being the [ASCLD]." An important aspect of SLED's quality control program involves proficiency testing.

According to Agent Jeffcoat, for the SLED forensic laboratory to maintain its accreditation status, the ASCLD requires an outside agency to periodically inspect the SLED laboratory and conduct proficiency testing on every forensic examiner. In a proficiency test, an examiner is given known and unknown DNA samples in order to determine if they match. Each examiner is given two open tests a year, in which the examiner knows the samples are part of a proficiency test. In addition, SLED examiners are given one blind proficiency test per year, where the examiners are not informed the samples are part of a proficiency test and the samples are provided as if part of a normal case. The examiners receive a grade of either "pass" or "fail."

ISSUES

I. Did the trial court err in denying Proctor's motion to have the proficiency testing records of the DNA expert disclosed?

II. Did the trial court err in finding Proctor was competent to stand trial?

STANDARD OF REVIEW

Discovery Orders

Adverse orders regarding discovery may be reviewed on appeal but they must be affirmed unless the trial court abused its discretion. See State v. Newell, 303 S.C. 471, 401 S.E.2d 420 (Ct. App. 1991).

Trial Court's Finding of Competency to Stand Trial

On appeal, this Court will affirm a trial court's determination of competency if it has evidentiary support and is not against the preponderance of the evidence. State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996).

LAW/ANALYSIS

I. DNA Proficiency Test Records

Proctor argues the trial court erred in denying his motion "to have the proficiency testing records of the DNA expert disclosed." He asserts the proficiency test results were discoverable under Rule 5, SCRCrimP, and pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The admissibility of DNA evidence in a criminal trial is a major event in regard to evidence against a defendant. The efficacy of DNA evidence is recognized by all afficionados in the criminal trial venue. The DNA expert conducting the analysis is a pivotal player in the laboratory activity. In order to be an accredited laboratory for DNA purposes, the proficiency rate of the DNA examiners is critical in analyzing the reliability of the testing procedure. Accreditation of the laboratory is only allowed if outside monitoring of the DNA examiners is done on the basis of blind and open proficiency tests. The gravamen of the discovery request in the case sub judice is the production of the DNA proficiency rating by the outside laboratory.

In the novel and intriguing evidentiary issue presented in this case, we explore the cornucopia of developing scientific knowledge as meshed with the precepts of due process. The State distills from prior precedent that the defendant is only entitled to limited information in the DNA theater of operations.

Agent Ira Jeffcoat filed an affidavit averring that all SLED examiners had passed every proficiency test. Two documents which address the issues concerning forensic DNA analysis and proficiency testing are the National Research Council Report published in 1992 (NRC I) and a second report published in 1996 (NRC II). Both documents agree that no laboratory has a zero error rate. The NRC I provides: "Laboratory error rates should be measured with appropriate proficiency tests and should play a role in the interpretation of results of forensic DNA typing. As discussed above, proficiency tests provide

a measure of the false-positive and false-negative rates of a laboratory. Even in the best of laboratories, such rates are not zero." NRC I, p.94 (emphasis added). The NRC II reads: "It addresses determination of DNA profiles and considers how laboratory errors (particularly false matches) can arise, how errors might be reduced, and how to take into account the fact that the error rate can never be reduced to zero." NRC II, back cover (emphasis added).

SLED takes the position that Agent Jeffcoat's affidavit is sufficient. The French phrase "pas du tout"[1] is applicable. Are the court and defense counsel required to accept the self-serving assertion by the SLED examiner that he and the other DNA examiners passed all proficiency testing? Does the law allow any meaningful review of the background and qualification of a DNA examiner? Are all litigants in a DNA evidence scenario bound by the statement emanating from the DNA expert witness that he or she passed all proficiency rating testing?

A commonsensical analysis compels this Court to conclude that a DNA expert, like all expert witnesses, is subject to scrutiny and query in regard to qualification and competency. Historically, this State has ruled that the expertise, ability and acumen of an expert witness is relevant and essential. No citation of authority is needed for the well settled rule of practice and procedure that every expert witness is subject to voir dire examination by the opposing party as to his or her qualifications before a final ruling by the trial judge is made as to competency or incompetency of the proffered expert witness.

A. Rule 5, SCRCrimP

Proctor argues the proficiency test results were discoverable pursuant to Rule 5, SCRCrimP. We agree.

The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal

[1]Not at all, not so.

proceedings. See State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999). Rule 5 imposes different duties than Brady. Id. Rule 5(a)(1)(D), SCRCrimP, provides:

> Reports of Examinations and Tests. Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any results or reports . . . of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial. (Emphasis added).

"The definition of 'material' for purposes of Rule 5 is the same as the definition used in the Brady context." Kennerly, 331 S.C. at 453, 503 S.E.2d at 220. Evidence is "material" under Brady only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996). Once a Rule 5 violation is shown, reversal is required only where the defendant suffered prejudice from the violation. State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996); Kennerly, 331 S.C. at 453-54, 503 S.E.2d at 220.

The proficiency test results could very well be material to the preparation of Proctor's defense. All proficiency test results of the DNA analyst involved in the case must be produced. Defense counsel has the right to cross examine the DNA analyst regarding his or her performance on proficiency tests. A failing grade by the DNA analyst on his or her proficiency tests is clearly relevant in the judge's evaluation of the expert's competency and most probably reflects negatively on the reliability of the DNA evidence introduced at trial. The trial court abused its discretion in denying discovery of the proficiency test results pursuant to Rule 5.

As to the second prong of Rule 5, the State asserted prior to trial that it had no plans to introduce the proficiency test results in its case in chief at trial. During direct examination of Agent Jeffcoat at trial, the State questioned him about the SLED laboratory's qualifications to perform DNA analysis. In describing SLED's quality control program, Agent Jeffcoat testified regarding proficiency testing. When instructed by the State to "let the jury know how you are doing on your proficiency test," Agent Jeffcoat responded: "In every occasion where we have been provided proficiency tests, we've always called the correct match." Defense counsel objected stating, "Your Honor, at this point I renew my objection and ask to be allowed to see the underlying data of those proficiency tests." The judge ruled: "That's noted for the record and denied on the same basis as before." Thereafter, Agent Jeffcoat declared: "In all cases in which we have received proficiency tests, we have always made the correct match. We've always matched the donor evidence with the donor in all cases that we've been tested."

A veracious review of the trial testimony leads to the ineluctable conclusion that the State did in fact use the examinations and tests in the State's evidence in chief at the trial. Agent Jeffcoat testified with exactitude in reference to the proficiency test results and the acumen possessed by the DNA SLED examiners.

B. Brady v. Maryland

Proctor asserts he was entitled to the proficiency test results pursuant to Brady because he needed the test results for impeachment purposes. We agree.

Compliance with Brady is a constitutional requirement. See State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999). The Brady disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments. Id.

Brady requires the prosecution to disclose evidence which is favorable to a defendant and material to guilt or punishment. This applies to impeachment

evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996). Evidence is "material" under Brady only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Bagley, 473 U.S. at 682, 105 S.Ct. at 3383, 87 L.Ed.2d at 494; State v. Cain, 297 S.C. 497, 377 S.E.2d 556 (1988). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Bagley, 473 U.S. at 682, 105 S.Ct. at 3383, 87 L.Ed.2d at 494; State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998). Reversal of a conviction is required only if the undisclosed evidence is material and the omission deprived the defendant of a fair trial. State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995).

In State v. Bryant, 307 S.C. 458, 415 S.E.2d 806 (1992), our Supreme Court discussed the materiality prong of Brady:

> [T]he State must produce undisclosed evidence for the trial judge's inspection once a defendant has established a basis for his claim that it contains material exculpatory or impeachment evidence. The trial judge should then rule upon the materiality of the evidence to determine whether the State must produce it for the defendant's use.

Bryant, 307 S.C. at 461-62, 415 S.E.2d at 808-09 (emphasis added)(citing Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987)).

In the present case, the undisclosed proficiency test results could very well be material to Proctor's case for impeachment and important for cross-examination purposes. SLED's contention that compiling the reports would be burdensome has no merit. After the tests were completed, the outside laboratory compiled the data and turned it over to SLED. We find the trial court abused its discretion in refusing to order disclosure of the proficiency test results pursuant to Brady.

C. Other Jurisdictions

In some jurisdictions, a defendant is provided the underlying proficiency test results in discovery. See Hodges v. Commonwealth, 492 S.E.2d 846 (Va. Ct. App. 1997)(where the trial court ordered discovery of the proficiency test data and the parties agreed the lab would provide a memorandum recounting the proficiency testing of a particular examiner, the trial court correctly exercised its discretion in denying the defendant's motion for further discovery regarding the underlying details of the test results); Keen v. Commonwealth, 485 S.E.2d 659 (Va. Ct. App. 1997)(although the appellate court presumed that the trial court erred in refusing to allow discovery of the underlying proficiency test results, the error was deemed harmless in light of the other evidence presented at trial).

Academically and fundamentally, the issue has been dissected into relevant and consequential query to be used at trial before the fact finder. A review of cases in other jurisdictions reveals a plethora of issues raised relating to DNA proficiency tests:

- Is the laboratory error rate relevant in the calculation of the overall odds claimed by the DNA analyst?
- Is the proficiency test data relevant to the credibility of the DNA evidence?
- Should the jury be allowed to consider proficiency test results/records along with the DNA matching data?
- Does the DNA examiner's performance on the proficiency tests go to the weight of the DNA evidence?

See, e.g., State v. Tankersley, 956 P.2d 486 (Ariz. 1998)(determining that if procedures implementing a scientifically accepted testing principle are so seriously flawed that results are rendered unreliable, trial court should not admit the evidence, but once adequate foundation is established, complaints of laboratory error or incompetence are considered by trier of fact in assessing weight of evidence); Commonwealth v. Teixeira, 662 N.E.2d 726 (Mass. App. Ct. 1996)(explaining weaknesses in laboratory's proficiency testing go to weight

to be ascribed to evidence of DNA match, not to its admissibility); State v. Moore, 885 P.2d 457 (Mont. 1994), overruled on other grounds by State v. Gollehon, 906 P.2d 697 (Mont. 1995)(finding challenge to proficiency testing of DNA expert goes to weight of evidence, not its admissibility; even if error rate of expert's proficiency tests presented challenge to reliability of polymerase chain reaction analysis, that argument would not result in exclusion of PCR evidence, as error rate would only be one factor considered in determining admissibility); Keen v. Commonwealth, 485 S.E.2d 659 (Va. Ct. App. 1997)(concluding that even if the proficiency test results of expert had been admitted and could have been used by Keen to establish state laboratory had previously made erroneous findings, this information would not have affected admissibility of the DNA evidence, but rather, would have only affected the weight the fact finder accorded the DNA evidence); State v. Copeland, 922 P.2d 1304 (Wash. 1996)(holding that laboratory error is a matter of weight and not admissibility under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); under Rule of Evidence 702, if lab error or error rates are so serious that results are not helpful to the jury, the trial court may in its discretion rule the evidence inadmissible); State v. Cauthron, 846 P.2d 502, 512 (Wash. 1993)(noting that thorough cross-examination of State's experts on possibility of error in laboratory and errors in proficiency tests allowed jury to get "a balanced picture" of the DNA evidence); National Research Council, The Evaluation of Forensic DNA Evidence (1996)(stating proficiency testing bears on weight that should be accorded forensic test results).

D. Harmless Error

The State maintains that, even if the trial judge erred in denying disclosure of the proficiency test results under Rule 5 or Brady, such error is harmless. We disagree.

The trial judge in the instant case erred in denying disclosure of the proficiency test results under Rule 5 and Brady. Clearly, the error was not harmless. Ignoring the DNA evidence presented at trial, there was substantial disputation of evidence regarding guilt. The record does not disclose overwhelming evidence to support Proctor's conviction in the absence of the

DNA evidence. We hold there is a reasonable probability that the disclosure of SLED's proficiency test results would reasonably have affected the outcome of the trial. See State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985)(error is harmless when it could not reasonably have affected the result of the trial).

II. Competency

Proctor contends the trial court erred in finding him competent to stand trial. We disagree.

A trial court's determination of competency will be upheld on review if it has evidentiary support and is not against the preponderance of the evidence. State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996). "The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him." State v. Bell, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987)(citing Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)). The defendant bears the burden of proving his incompetence by a preponderance of the evidence. Nance, 320 S.C. at 504, 466 S.E.2d at 351; State v. Lee, 274 S.C. 372, 264 S.E.2d 418 (1980).

Proctor was found incompetent to stand trial in 1993. The State moved to have Proctor re-evaluated in 1996. A competency hearing was held in May 1997.

Dr. Jeffrey R. McKee, a forensic psychologist, and Dr. Donald Morgan, a forensic psychiatrist, evaluated Proctor to determine competency. During those evaluations, Proctor stated that he faced charges of "rape," breaking and entering, and assault. Proctor indicated he understood (1) the nature of the competency hearing; (2) that he could be found guilty and sentenced to prison at trial; and (3) that his attorney's role was to prove him not guilty and to consult with Proctor before Proctor answered certain questions.

Dr. McKee declared that, although Proctor suffered a deficit in his short term memory and could not name his attorneys, he could recall new information and gain an understanding of judicial proceedings if prompted by his attorney or given a summary of the proceedings. Dr. Donald Morgan testified Proctor was competent to stand trial, understood the charges against him and the nature of the proceedings, and was able to consult with his attorneys, in spite of Proctor's severe brain damage. Dr. Morgan opined that, despite Proctor's amnesia of events surrounding the time period of the rapes, he could assist in his defense to the extent that he could discuss witness testimony at trial and evaluate legal options. Despite Proctor's severe brain damage and memory deficits, both physicians found Proctor competent to stand trial.

Dr. Harold Morgan, a forensic psychiatrist, stated Proctor was not competent to stand trial. He believed Proctor had a factual understanding of the charges against him, but could not adequately consult with his attorneys because he could not recall the discussions. Dr. Morgan noted that, although Proctor could learn some things by repetition, Proctor could not recall names and could not recall information after any amount of time passed. He found Proctor would need a lot of assistance from his attorneys during a trial because Proctor lost things from his memory very quickly and did not have the "very kind of memory he needs for assisting his attorneys and competently participating in his trial." According to Dr. Morgan, Proctor's attorneys would have to constantly go over the events of each day during trial, including the events of the previous days, in order for Proctor to try to understand the proceedings.

On June 17, 1997, the trial court issued an order finding Proctor competent to stand trial. The court stated Proctor conceded he had a factual understanding of the proceedings against him. In evaluating Proctor's ability to assist his attorneys, the trial court determined Proctor could communicate with his attorneys and Proctor's memory deficits could be corrected through reviews with his attorneys. The trial judge further noted his personal observations that Proctor was attentive, reacted appropriately, and consulted with his attorneys throughout the competency proceedings.

Another competency hearing was held immediately preceding Proctor's March 1998 trial. Dr. Harold Morgan testified Proctor suffered from severe memory deficits and could not retain new information. According to Dr. Morgan, Proctor would not be able to follow highly complicated testimony, such as DNA testimony, nor would he be able to comprehend or retain information about the process of plea negotiations for a long period of time. Although Proctor indicated he understood he had a right to trial, Dr. Morgan opined that Proctor could not assist his attorneys in the preparation of his defense. Dr. Morgan confirmed his opinion from the prior competency proceeding that Proctor was not competent to stand trial.

Dr. Thomas William Behrmann, a psychiatrist, testified for the State regarding Proctor's competency. After reviewing the records from Proctor's prior competency evaluations and meeting with Proctor three times, Dr. Behrmann concluded Proctor was competent to stand trial. Dr. Behrmann based his finding on Proctor's ability to understand the charges against him, appreciate the seriousness of those charges, comprehend the adversarial process, and interact with defense counsel in a helpful manner. Dr. Behrmann believed Proctor's ability to communicate with his attorneys had improved over time. At the end of Dr. Behrmann's testimony, Proctor's counsel informed the trial court that Proctor told her he did not meet with Dr. Behrmann three times nor did he understand what he was testifying about.

Proctor testified at the competency hearing. Proctor could not recall the names of the two physicians who had testified prior to him. He could not remember jury selection or anything said about the legal process.

The trial court affirmed its prior finding that Proctor was competent to stand trial. The trial court noted Proctor's ability to recall appeared to improve. The trial court observed Proctor "does have recollection of this process and has been here all day," responded to questions asked of him, and appeared able to assist his attorneys.

During breaks in testimony throughout the trial, Proctor's counsel informed the court when Proctor would indicate to counsel that he did not understand something or when Proctor could not recall the events of the day.

Proctor concedes he had a factual understanding of the proceedings against him. He contends the trial court erred in finding him competent to stand trial because his memory deficits rendered him unable to rationally assist his attorneys with the defense. Although there was evidence that Proctor was unable to recall some information unless it was constantly repeated, Proctor did not meet his burden of proving he was unable to assist his attorneys. Proctor understood the nature of the charges against him, the seriousness of the charges, and the adversarial nature of the proceedings. He consulted his attorneys when he had questions. Despite Proctor's amnesia regarding the events surrounding the crime, he was able to rationally discuss the trial proceedings with counsel and comprehend them.

We conclude there was ample evidence to support the trial court's finding that Proctor was competent to stand trial. Further, the trial judge's determination of competency is not against the preponderance of the evidence.

CONCLUSION

We find the trial judge did not err in finding Proctor competent to stand trial. The State's evidence reveals that Proctor has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and Proctor possesses a rational, as well as a factual, understanding of the proceedings against him.

We conclude the trial court erred in denying Proctor's motion to have the proficiency test records of the DNA expert disclosed. We hold that, pursuant to Rule 5, SCRCrimP and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a defendant is entitled to the pre-trial production of DNA proficiency test records of the SLED DNA expert. We bifurcate the mandate of production:

1) outside laboratory proficiency tests and records and
2) SLED laboratory proficiency tests and records.

As to the outside laboratory proficiency tests and records done in the accreditation process, we order the pre-trial production of all records of proficiency testing of personnel in the laboratories where Restriction Fragment Length Polymorphism (RFLP) and Polymerase Chain Reaction (PCR) analyses, the two types of DNA testing procedures, are performed in the case and records of laboratory error rates resulting from external blind forensic DNA analyses or any other studies pertaining to error rates.

As to the SLED laboratory proficiency tests and records, we limit the production to the results of proficiency testing of personnel and the results of laboratory error rates resulting from internal blind forensic DNA analyses or any other studies pertaining to error rates.

Accordingly, we remand the case to the Charleston County Court of General Sessions and direct that an in camera Bryant hearing be held to determine whether the records and information produced are material to the defendant's case. If the Circuit Court Judge[2] concludes the records and information are material, the judge shall order a new trial. If the records and information are not material, the Circuit Judge shall affirm the convictions of Duncan R. Proctor.

AFFIRMED IN PART and REMANDED.

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

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[2]We note the trial judge has retired. The remand of this case is to the Circuit Court. Any Circuit Judge assigned to the Charleston County venue has jurisdiction to conduct the in camera Bryant hearing.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Duncan Proctor,

Appellant.

Appeal From Dorchester County
Charles W. Whetstone, Jr., Circuit Court Judge

Opinion No. 3415
Heard September 27, 2001 - Filed December 3, 2001
Revised December 6, 2001

AFFIRMED IN PART and REMANDED

Chief Attorney Daniel T. Stacey, of South Carolina Office of Appellate Defense, of Columbia; and Christopher Wayne Adams, of Southern Center for Human Rights, of Atlanta, GA, for Appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan and

Assistant Attorney General Toyya Brawley Gray, all of Columbia; and Solicitor Walter M. Bailey, of Summerville, for Respondent.

ANDERSON, J.: Duncan Proctor was convicted of first degree burglary, first degree criminal sexual conduct (CSC), assault with intent to kill (AWIK), and possession of a firearm during the commission of a violent crime. The trial court sentenced Proctor to life imprisonment for first degree burglary; one consecutive thirty year term for first degree CSC; one concurrent term of five years for AWIK; and one concurrent term of one year for possession of a firearm. On appeal, Proctor argues the court erred in (1) denying Proctor's motion to have the proficiency testing records of the DNA expert disclosed and (2) finding Proctor was competent to stand trial. We affirm in part and remand.

FACTS/PROCEDURAL BACKGROUND

On August 3, 1991, Victim was awakened early in the morning when an intruder sat on her and forced her arms over her head. The intruder placed a silver or light-colored gun to Victim's head, hit her head on the bed, and threatened to kill her if she did not remain quiet. The intruder pulled the trigger of the gun several times.

Holding her neck, the intruder forced Victim downstairs to the living room where he repeatedly raped her. Several outside lights shined into Victim's windows, and she could see her attacker's face and complexion. During the attacks, the intruder mentioned Victim's daughter by name and threatened to kill her daughter if Victim told anyone about the rape. Victim was unable to call for help after the intruder left because the cords on all three of her telephones had been cut.

Victim was taken to a hospital for evaluation and a rape kit was performed. Evidence collected at the hospital included Victim's gown,

unknown pubic hairs, and semen. Material identified at the crime scene included semen on the carpet and the couch, fingerprints, and a shoe imprint outside the apartment. Victim met with a police sketch artist, who drew a composite of Victim's attacker based on her description.

On June 19, 1992, the City of North Charleston Police Department received information which led to the surveillance of Proctor. When police approached him that day, Proctor sped away in his car and led police on a high-speed chase. Proctor was involved in a serious automobile accident, suffering severe injuries to his head, both legs, and his right arm. A silver gun was retrieved from Proctor's car at the scene of the accident.

Deoxyribonucleic acid (DNA) analysis identified Proctor as the source of semen collected during the rape kit examination. The pubic hair found on Victim was consistent with Proctor's pubic hair. Proctor's blood type was consistent with that of Victim's attacker. None of the fingerprints collected from the scene matched Proctor's fingerprints. The shoe imprint taken from outside Victim's apartment did not match shoes owned by Proctor.

Proctor was indicted in Dorchester County for first degree burglary, first degree CSC, AWIK, and possession of a firearm during the commission of a violent crime. Venue was transferred to Cherokee County.

In his DNA discovery request filed prior to trial, Proctor requested the State turn over all internal and external proficiency tests and all proficiency test results. Proctor submitted a memorandum in which he contended the proficiency test results were discoverable under Rule 5, SCRCrimP, and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Proctor maintained the proficiency test results would be used as evidence at trial, the results were material to the defense, and the raw data to support them was not confidential. Additionally, Proctor alleged that every laboratory makes errors in performing DNA analysis. He presented copies of reports concerning the proficiency test errors made at the Federal Bureau of Investigation's (FBI's) lab and the lab's efforts to hide the errors.

In a memorandum in opposition to Proctor's discovery request, the South Carolina Law Enforcement Division (SLED) averred the test results were not discoverable under either Rule 5 or Brady because Proctor could not show how the proficiency test results were favorable or material. SLED argued the test results were confidential, compiling the reports would be burdensome, and the proficiency test results were not relevant to the evidence tested in Proctor's case. SLED provided the affidavit of Ira Jeffcoat, the SLED agent who performed the DNA analysis in Proctor's case. In his affidavit, Agent Jeffcoat stated all SLED examiners had passed every proficiency test. He further declared that revealing the results of all proficiency tests would be extremely burdensome on SLED and would destroy the confidentiality of the testing process. The State asserted it had no plans to introduce the proficiency test results in its case in chief at trial.

After a hearing, the trial court denied discovery of the DNA proficiency test results. The trial court ruled the proficiency test results were not discoverable under Rule 5 because the State indicated it would not use the proficiency test results in its case in chief and the results did not relate to any evidence in Proctor's case. The court concluded the results were not material to the preparation of Proctor's defense. The trial court found Proctor would be provided enough information regarding the DNA evidence for his expert witnesses to assess whether Agent Jeffcoat reached the correct conclusion. The court noted Agent Jeffcoat's affidavit provided Proctor with information regarding the proficiency tests.

In addition, the trial court determined Proctor was not entitled to the proficiency test results under Brady because Proctor failed to show an initial basis for his claim that the results were material and favorable to his defense and Proctor only offered unsupported speculations that problems existed with SLED's proficiency testing. The court held the proficiency test results were not relevant to the question of whether Agent Jeffcoat reached the correct conclusions in Proctor's case. Finally, the court found that compiling a proficiency testing report would be burdensome to SLED.

At trial, Victim positively identified Proctor as her attacker. She testified the gun found in Proctor's car was similar in size and color to the one used in her attack.

Agent Jeffcoat explained accreditation and proficiency testing. In 1994, the SLED forensic laboratory became accredited. The agency which determines SLED's accreditation status is the American Society of Crime Laboratory Directors (ASCLD). Agent Jeffcoat declared that accreditation means "you have accepted . . . a set of standards that you want your lab to adhere to. Those standards include things such as protocol and a protocol validation, quality control measures, guidelines on the qualifications for your employees, validation procedures for each new test that you bring on line. Different aspects of setting up a lab."

According to Agent Jeffcoat, for the SLED forensic laboratory to maintain its accreditation status, the ASCLD requires an outside agency to periodically inspect the SLED laboratory and conduct proficiency testing on every forensic examiner. In a proficiency test, an examiner is given known and unknown DNA samples in order to determine if they match. Each examiner is given two open tests a year, in which the examiner knows the samples are part of a proficiency test. In addition, SLED examiners are given one blind proficiency test per year, where the examiners are not informed the samples are part of a proficiency test and the samples are provided as if part of a normal case. The examiners receive a grade of either "pass" or "fail."

ISSUES

I. Did the trial court err in denying Proctor's motion to have the proficiency testing records of the DNA expert disclosed?

II. Did the trial court err in finding Proctor was competent to stand trial?

STANDARD OF REVIEW

Discovery Orders

Adverse orders regarding discovery may be reviewed on appeal but they must be affirmed unless the trial court abused its discretion. See State v. Newell, 303 S.C. 471, 401 S.E.2d 420 (Ct. App. 1991).

Trial Court's Finding of Competency to Stand Trial

On appeal, this Court will affirm a trial court's determination of competency if it has evidentiary support and is not against the preponderance of the evidence. State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996).

LAW/ANALYSIS

I. DNA Proficiency Test Records

Proctor argues the trial court erred in denying his motion "to have the proficiency testing records of the DNA expert disclosed." He asserts the proficiency test results were discoverable under Rule 5, SCRCrimP, and pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The admissibility of DNA evidence in a criminal trial is a major event in regard to evidence against a defendant. The efficacy of DNA evidence is recognized by all afficionados in the criminal trial venue. The DNA expert conducting the analysis is a pivotal player in the laboratory activity. In order to be an accredited laboratory for DNA purposes, the proficiency rate of the DNA examiners is critical in analyzing the reliability of the testing procedure. Accreditation of the laboratory is only allowed if outside monitoring of the DNA examiners is done on the basis of blind and open proficiency tests. The gravamen of the discovery request in the case sub judice is the production of the DNA proficiency rating by the outside laboratory.

In the novel and intriguing evidentiary issue presented in this case, we explore the cornucopia of developing scientific knowledge as meshed with the precepts of due process. The State distills from prior precedent that the defendant is only entitled to limited information in the DNA theater of operations.

Agent Ira Jeffcoat filed an affidavit averring that all SLED examiners had passed every proficiency test. Two documents which address the issues concerning forensic DNA analysis and proficiency testing are the National Research Council Report published in 1992 (NRC I) and a second report published in 1996 (NRC II). Both documents agree that no laboratory has a zero error rate. The NRC I provides: "Laboratory error rates should be measured with appropriate proficiency tests and should play a role in the interpretation of results of forensic DNA typing. As discussed above, proficiency tests provide a measure of the false-positive and false-negative rates of a laboratory. Even in the best of laboratories, such rates are not zero." NRC I, p.94 (emphasis added). The NRC II reads: "It addresses determination of DNA profiles and considers how laboratory errors (particularly false matches) can arise, how errors might be reduced, and how to take into account the fact that the error rate can never be reduced to zero." NRC II, back cover (emphasis added).

SLED takes the position that Agent Jeffcoat's affidavit is sufficient. The French phrase "pas du tout"[1] is applicable. Are the court and defense counsel required to accept the self-serving assertion by the SLED examiner that he and the other DNA examiners passed all proficiency testing? Does the law allow any meaningful review of the background and qualification of a DNA examiner? Are all litigants in a DNA evidence scenario bound by the statement emanating from the DNA expert witness that he or she passed all proficiency rating testing?

A commonsensical analysis compels this Court to conclude that a DNA expert, like all expert witnesses, is subject to scrutiny and query in regard to qualification and competency. Historically, this State has ruled that the

[1]Not at all, not so.

expertise, ability and acumen of an expert witness is relevant and essential. No citation of authority is needed for the well settled rule of practice and procedure that every expert witness is subject to voir dire examination by the opposing party as to his or her qualifications before a final ruling by the trial judge is made as to competency or incompetency of the proffered expert witness.

A. Rule 5, SCRCrimP

Proctor argues the proficiency test results were discoverable pursuant to Rule 5, SCRCrimP. We agree.

The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings. See State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999). Rule 5 imposes different duties than Brady. Id. Rule 5(a)(1)(D), SCRCrimP, provides:

> Reports of Examinations and Tests. Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any results or reports . . . of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial. (Emphasis added).

"The definition of 'material' for purposes of Rule 5 is the same as the definition used in the Brady context." Kennerly, 331 S.C. at 453, 503 S.E.2d at 220. Evidence is "material" under Brady only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996). Once a Rule 5 violation is shown, reversal is required only where the defendant suffered prejudice from the violation. State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996); Kennerly, 331 S.C. at 453-54, 503 S.E.2d at 220.

The proficiency test results could very well be material to the preparation of Proctor's defense. All proficiency test results of the DNA analyst involved in the case must be produced. Defense counsel has the right to cross examine the DNA analyst regarding his or her performance on proficiency tests. A failing grade by the DNA analyst on his or her proficiency tests is clearly relevant in the judge's evaluation of the expert's competency and most probably reflects negatively on the reliability of the DNA evidence introduced at trial. The trial court abused its discretion in denying discovery of the proficiency test results pursuant to Rule 5.

As to the second prong of Rule 5, the State asserted prior to trial that it had no plans to introduce the proficiency test results in its case in chief at trial. During direct examination of Agent Jeffcoat, the State questioned him about the SLED laboratory's qualifications to perform DNA analysis. In describing SLED's quality control program, Agent Jeffcoat testified regarding proficiency testing. Thereafter, when asked by the State whether there was a "stated error rate" at "the SLED lab DNA station," Agent Jeffcoat answered: "[E]rror rate is, I guess, would be something, a form that you would apply some numbers to and come up with an overall error rate. We have never done that, developed an error rate. To answer your question, I mean, we have–we have been given proficiencies since 1991." Defense counsel objected stating, "Your Honor, we made a pretrial motion about being able to confront this piece of evidence, and we would move to exclude this part of the testimony." The judge sustained the objection. Although the State elicited testimony regarding proficiency testing, the State did not present the actual test results as part of its evidence in chief at trial. Further, Agent Jeffcoat did not discuss the results of the proficiency tests.

B. Brady v. Maryland

Proctor asserts he was entitled to the proficiency test results pursuant to Brady because he needed the test results for impeachment purposes. We agree.

Compliance with Brady is a constitutional requirement. See State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999). The Brady disclosure rule is grounded in the

defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments. Id.

Brady requires the prosecution to disclose evidence which is favorable to a defendant and material to guilt or punishment. This applies to impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996). Evidence is "material" under Brady only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Bagley, 473 U.S. at 682, 105 S.Ct. at 3383, 87 L.Ed.2d at 494; State v. Cain, 297 S.C. 497, 377 S.E.2d 556 (1988). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Bagley, 473 U.S. at 682, 105 S.Ct. at 3383, 87 L.Ed.2d at 494; State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998). Reversal of a conviction is required only if the undisclosed evidence is material and the omission deprived the defendant of a fair trial. State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995).

In State v. Bryant, 307 S.C. 458, 415 S.E.2d 806 (1992), our Supreme Court discussed the materiality prong of Brady:

> [T]he State must produce undisclosed evidence for the trial judge's inspection once a defendant has established a basis for his claim that it contains material exculpatory or impeachment evidence. The trial judge should then rule upon the materiality of the evidence to determine whether the State must produce it for the defendant's use.

Bryant, 307 S.C. at 461-62, 415 S.E.2d at 808-09 (emphasis added)(citing Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987)).

In the present case, the undisclosed proficiency test results could very well be material to Proctor's case for impeachment and important for cross-examination purposes. SLED's contention that compiling the reports would be burdensome has no merit. After the tests were completed, the outside laboratory

compiled the data and turned it over to SLED. We find the trial court abused its discretion in refusing to order disclosure of the proficiency test results pursuant to Brady.

C. Other Jurisdictions

In some jurisdictions, a defendant is provided the underlying proficiency test results in discovery. See Hodges v. Commonwealth, 492 S.E.2d 846 (Va. Ct. App. 1997)(where the trial court ordered discovery of the proficiency test data and the parties agreed the lab would provide a memorandum recounting the proficiency testing of a particular examiner, the trial court correctly exercised its discretion in denying the defendant's motion for further discovery regarding the underlying details of the test results); Keen v. Commonwealth, 485 S.E.2d 659 (Va. Ct. App. 1997)(although the appellate court presumed that the trial court erred in refusing to allow discovery of the underlying proficiency test results, the error was deemed harmless in light of the other evidence presented at trial).

Academically and fundamentally, the issue has been dissected into relevant and consequential query to be used at trial before the fact finder. A review of cases in other jurisdictions reveals a plethora of issues raised relating to DNA proficiency tests:

- Is the laboratory error rate relevant in the calculation of the overall odds claimed by the DNA analyst?
- Is the proficiency test data relevant to the credibility of the DNA evidence?
- Should the jury be allowed to consider proficiency test results/records along with the DNA matching data?
- Does the DNA examiner's performance on the proficiency tests go to the weight of the DNA evidence?

See, e.g., State v. Tankersley, 956 P.2d 486 (Ariz. 1998)(determining that if procedures implementing a scientifically accepted testing principle are so seriously flawed that results are rendered unreliable, trial court should not admit

the evidence, but once adequate foundation is established, complaints of laboratory error or incompetence are considered by trier of fact in assessing weight of evidence); Commonwealth v. Teixeira, 662 N.E.2d 726 (Mass. App. Ct. 1996)(explaining weaknesses in laboratory's proficiency testing go to weight to be ascribed to evidence of DNA match, not to its admissibility); State v. Moore, 885 P.2d 457 (Mont. 1994), overruled on other grounds by State v. Gollehon, 906 P.2d 697 (Mont. 1995)(finding challenge to proficiency testing of DNA expert goes to weight of evidence, not its admissibility; even if error rate of expert's proficiency tests presented challenge to reliability of polymerase chain reaction analysis, that argument would not result in exclusion of PCR evidence, as error rate would only be one factor considered in determining admissibility); Keen v. Commonwealth, 485 S.E.2d 659 (Va. Ct. App. 1997)(concluding that even if the proficiency test results of expert had been admitted and could have been used by Keen to establish state laboratory had previously made erroneous findings, this information would not have affected admissibility of the DNA evidence, but rather, would have only affected the weight the fact finder accorded the DNA evidence); State v. Copeland, 922 P.2d 1304 (Wash. 1996)(holding that laboratory error is a matter of weight and not admissibility under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); under Rule of Evidence 702, if lab error or error rates are so serious that results are not helpful to the jury, the trial court may in its discretion rule the evidence inadmissible); State v. Cauthron, 846 P.2d 502, 512 (Wash. 1993)(noting that thorough cross-examination of State's experts on possibility of error in laboratory and errors in proficiency tests allowed jury to get "a balanced picture" of the DNA evidence); National Research Council, The Evaluation of Forensic DNA Evidence (1996)(stating proficiency testing bears on weight that should be accorded forensic test results).

D. Harmless Error

The State maintains that, even if the trial judge erred in denying disclosure of the proficiency test results under Rule 5 or Brady, such error is harmless. We disagree.

The trial judge in the instant case erred in denying disclosure of the proficiency test results under Rule 5 and Brady. Clearly, the error was not harmless. Ignoring the DNA evidence presented at trial, there was substantial disputation of evidence regarding guilt. The record does not disclose overwhelming evidence to support Proctor's conviction in the absence of the DNA evidence. We hold there is a reasonable probability that the disclosure of SLED's proficiency test results would reasonably have affected the outcome of the trial. See State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985)(error is harmless when it could not reasonably have affected the result of the trial).

II. Competency

Proctor contends the trial court erred in finding him competent to stand trial. We disagree.

A trial court's determination of competency will be upheld on review if it has evidentiary support and is not against the preponderance of the evidence. State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996). "The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him." State v. Bell, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987)(citing Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)). The defendant bears the burden of proving his incompetence by a preponderance of the evidence. Nance, 320 S.C. at 504, 466 S.E.2d at 351; State v. Lee, 274 S.C. 372, 264 S.E.2d 418 (1980).

Proctor suffered severe brain damage and paralysis to both legs and one arm as a result of his car accident. He was found incompetent to stand trial in 1993. The State moved to have Proctor re-evaluated in 1996. After a competency hearing, the trial court determined in June of 1997 that Proctor was competent to stand trial.

Another competency hearing was held immediately preceding Proctor's March 1998 trial. Proctor testified at the hearing he had been in court several

times for competency hearings and for a Charleston County trial.[2] He was aware he had previously been convicted of "rape" and breaking and entering, he knew the name of the Charleston County solicitor, and he knew that the judge in the Dorchester County case also presided over the Charleston County case. Proctor could name his three attorneys, but he believed one attorney could not adequately represent him because she was upset that she shared the same last name with Proctor. Proctor could not recall where he was on the date of the criminal sexual conduct involving Victim. He did not recall reviewing the evidence in the Charleston County case or in the Dorchester County case with his attorneys. Proctor listed and defined the crimes he was charged with, understood the seriousness of the crimes, and noted they carried long sentences. Proctor stated he learned the roles of the judge and jury by watching "Matlock" on television, but he believed a jury consisted of eleven jurors who did not have to reach a unanimous verdict. Proctor declared he understood what his attorneys discussed with him and he believed he could communicate with them.

Dr. Catherine Lewis, a forensic psychiatrist, evaluated Proctor on four occasions and testified regarding his competency. Proctor did not recall the evidence the State had against him but he described the type of evidence which could be used in a CSC trial. Dr. Lewis believed that despite Proctor's memory problem, Proctor would benefit from having a notebook or cards summarizing the evidence and would be able to work with his attorneys in discussing the weight of the evidence. Dr. Lewis opined Proctor was competent to stand trial because he understood the trial proceedings and he was able to interact with his attorneys and would ask questions if he did not understand.

Dr. Harold Morgan, a forensic psychiatrist, evaluated Proctor eight times and testified concerning his competency. Proctor told Dr. Morgan during one evaluation that he received a harsher sentence in the Charleston County trial because the trial judge became angry when Proctor spoke with his attorneys.

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[2]A few weeks prior to this trial, Proctor was convicted of one count of first degree burglary and four counts of first degree CSC as to a woman in Charleston County.

Dr. Morgan noted Proctor had a factual understanding of the judicial process and the charges against him but opined Proctor did not have a rational understanding of the process. Dr. Morgan doubted that providing Proctor with notebooks or cards summarizing the evidence in the case would aid Proctor because his memory deficit rendered him unable to retain information and unable to process what happens in court. He believed Proctor was not competent to stand trial due to Proctor's memory problems and because his rational understanding was impaired.

After Dr. Lewis and Dr. Morgan testified, Proctor again took the stand. He stated he did not recall the questions previously asked of him or the testimony of the psychiatrists.

The trial court found Proctor did not meet his burden of showing he was incompetent and affirmed its prior finding that Proctor was competent to stand trial. After the jury began to deliberate in this case, Proctor's counsel informed the court of several instances throughout the trial where Proctor could not recall recent information or was confused regarding the proceedings.

Proctor concedes he had a factual understanding of the proceedings against him. He contends the trial court erred in finding him competent to stand trial because his memory deficits rendered him unable to rationally assist his attorneys with the defense. Although there was evidence that Proctor was unable to recall some information unless it was constantly repeated, Proctor did not meet his burden of proving he was unable to assist his attorneys. Proctor understood the nature of the charges against him, the seriousness of the charges, and the adversarial nature of the proceedings. He consulted his attorneys when he had questions. Despite Proctor's amnesia regarding the events surrounding the crime, he was able to rationally discuss the trial proceedings with counsel and comprehend them.

We conclude there was ample evidence to support the trial court's finding that Proctor was competent to stand trial despite his amnesia. Further, the trial judge's determination of competency is not against the preponderance of the evidence.

CONCLUSION

We find the trial judge did not err in finding Proctor competent to stand trial. The State's evidence reveals that Proctor has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and Proctor possesses a rational, as well as a factual, understanding of the proceedings against him.

We conclude the trial court erred in denying Proctor's motion to have the proficiency test records of the DNA expert disclosed. We hold that, pursuant to Rule 5, SCRCrimP and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a defendant is entitled to the pre-trial production of DNA proficiency test records of the SLED DNA expert. We bifurcate the mandate of production:

1) outside laboratory proficiency tests and records and
2) SLED laboratory proficiency tests and records.

As to the outside laboratory proficiency tests and records done in the accreditation process, we order the pre-trial production of all records of proficiency testing of personnel in the laboratories where Restriction Fragment Length Polymorphism (RFLP) and Polymerase Chain Reaction (PCR) analyses, the two types of DNA testing procedures, are performed in the case and records of laboratory error rates resulting from external blind forensic DNA analyses or any other studies pertaining to error rates.

As to the SLED laboratory proficiency tests and records, we limit the production to the results of proficiency testing of personnel and the results of laboratory error rates resulting from internal blind forensic DNA analyses or any other studies pertaining to error rates.

Accordingly, we remand the case to the Dorchester County Court of General Sessions and direct that an in camera Bryant hearing be held to determine whether the records and information produced are material to the

defendant's case. If the Circuit Court Judge[3] concludes the records and information are material, the judge shall order a new trial. If the records and information are not material, the Circuit Judge shall affirm the convictions of Duncan R. Proctor.

AFFIRMED IN PART and REMANDED.

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

[3]We note the trial judge has retired. The remand of this case is to the Circuit Court. Any Circuit Judge assigned to the Dorchester County venue has jurisdiction to conduct the in camera Bryant hearing.