# The Supreme Court of South Carolina

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O R D E R

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Pursuant to Rule 36, SCRCrimP, the attached revised General Sessions Sentencing Sheet, Form SCCA/217, is hereby approved effective January 1, 2001, as the sentencing sheet to be used in criminal cases disposed of in South Carolina General Sessions Courts. This sentencing sheet is required to be used in criminal cases to the exclusion of all others. This form may be generated locally by clerks of court and solicitors as needed on word processors and/or computers. The computer generated form must include all language in its entirety exactly as it appears in the approved form. The computer generated form cannot include any additional language not found on the approved form and cannot broaden or limit the scope of the use of the approved form.

IT IS SO ORDERED.

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

Columbia, South Carolina

**STATE OF SOUTH CAROLINA** )
)
COUNTY OF _____ )
STATE VS. )
_____ )
AKA:_____ )
Race:_____ Sex:_____ Age:_____ )
DOB:___/___/_____ SS#:_____ )
Address: _____ )
_____ )
DL#:_____ SID#:_____ )

**IN THE COURT OF GENERAL SESSIONS**
INDICTMENT/CASE#:

_____- GS - _____ - _____
A/W#:_____
Date of Offense:_____
S.C. Code §:_____
CDR Code #:_____/_____/_____/_____
Q **CASE RESTORED**

**SENTENCE**
Q PLEA Q TRIAL

In disposition of the said indictment comes now the Defendant who was Q CONVICTED OF or Q PLEADS TO:_____
in violation of §_____ of the S.C. Code of Laws, bearing CDR Code # ____/____/____/____
Q NON-VIOLENT Q VIOLENT Q SERIOUS Q MOST SERIOUS Q 17-25-45
The charge is: Q As Indicted, Q Lesser Included Offense, Q Defendant Waives Presentment to Grand Jury.
The plea is: Q Without Negotiations or Recommendation, Q Negotiated Sentence, Q Recommendation by the State.
ATTEST:

_____ _____ _____
Solicitor Defendant Attorney for Defendant

WHEREFORE, the Defendant is committed to the Q **State Department of Corrections**, Q **County Detention Center,** for a determinate term of _____ days/months/years or Q under the **Youthful Offender Act** not to exceed _____ years and/or to pay a fine of $_____; provided that upon the service of _____ days/months/years and/or payment of $_____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

Q The Defendant is to be given credit for _____ days/months jail time.
Q CONCURRENT or Q CONSECUTIVE to sentence on:_____

**SPECIAL CONDITIONS:**

G RESTITUTION: GHeard, GWaived, GOrdered
Total: $_____plus 20% fee: $_____
Payment Terms:_____
G set by SCDPPPS_____
_____
Recipient:_____
*Fine: . . . . . .$_____
§14-1-206 (Assessments 100%). . . . .$_____
§14-1-211(A)(1) (Surcharge) . . . . . .$_____
§14-1-211(A)(2) (Surcharge) . . . . . .$_____
§56-5-2995 (DUI Assessment). . . . . .$_____
3% to County (if paid in installments). . . .$_____
TOTAL . . . . . $_____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $_____ beginning _____
$_____ paid to Public Defender Fund
Other:_____
_____
_____

_____
Clerk of Court/ Deputy Clerk

PRESIDING JUDGE_____
Judge Code: ____/____/____/____

Court Reporter:_____
Sentence Date:_____

# OPINIONS

OF

# THE SUPREME COURT

AND

# COURT OF APPEALS

OF

# SOUTH CAROLINA

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**FILED DURING THE WEEK ENDING**

**December 16, 2000**

**ADVANCE SHEET NO. 43**

**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Respondent,

v.

Jerome Addison, Petitioner.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

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Opinion No. 25216
Heard October 17, 2000 - Filed December 11, 2000

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**AFFIRMED AS MODIFIED**

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Deputy Chief Attorney Joseph L. Savitz, III, of S.C. Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, all of Columbia; and Solicitor David P. Schwacke, of N. Charleston, for respondent.

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**JUSTICE MOORE:** We granted a writ of certiorari to review the Court of Appeals' decision affirming petitioner's convictions for kidnapping and assault and battery with intent to kill.[1] We affirm as modified herein.

## FACTS

At trial, Debra Brown (Victim) testified she was acquainted with petitioner and saw him on the night of February 14, 1996, at a bar she frequented. He offered her a ride home after she had had several drinks. On the way, Victim waited in the car while petitioner made a stop at a friend's house. When he returned to the car, he had drugs with him and was angry about being cheated.

Victim became frightened and tried to get out of the car but petitioner restrained her. He drove to a wooded area where he pulled her out of the car. He raped her on the ground then forced her back into the car and drove to a partially boarded-up trailer owned by his mother. There he beat Victim repeatedly about the face, head, and back with a tire iron, forced her to smoke crack after trying to make her swallow it, and raped her again.

Finally, at about 6:00 a.m. the following morning, petitioner agreed to let Victim leave with the threat that he would kill her and her children if she told anyone. He dropped her off near her home. Victim walked to her sister's house and from there was taken by ambulance to the hospital where she was treated for facial fractures and severe bruising.

Petitioner admitted having sex with Victim but claimed it was consensual. He testified they agreed to exchange sex for drugs and left the bar together for that purpose. At the trailer, they smoked crack and had sex. When Victim indicated she did not want to have sex with him again, petitioner cut off the drugs. Victim became angry and attacked petitioner with a piece of board. Petitioner defended himself.

The trial judge charged self-defense. Petitioner requested an additional charge that the State must disprove self-defense. The trial judge refused the

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[1]338 S.C. 277, 525 S.E.2d 901 (Ct. App. 1999).

charge and petitioner appealed.[2] The Court of Appeals affirmed with one judge dissenting.

## ISSUE

Did the trial judge err in refusing to instruct the jury that the State has the burden of disproving self-defense?

## DISCUSSION

Petitioner contends under State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998), he was entitled to a charge that the State had the burden of disproving self-defense beyond a reasonable doubt.

Wiggins addressed whether the defendant was entitled to a directed verdict because the State failed to negate self-defense. We noted that self-defense is no longer an affirmative defense in our State and that "current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt." 330 S.C. at 544, 500 S.E.2d at 492.[3] The Court of Appeals' majority found Wiggins was not controlling in the context of a jury charge. We disagree.

In State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984), we issued a model self-defense charge that removed the burden from the defendant to prove self-defense. Instead, trial courts were to charge:

If you have a reasonable doubt of the defendant's guilt after

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[2]Petitioner also argued on appeal to the Court of Appeals that the trial judge's self-defense charge was confusing. We agree with the Court of Appeals that this argument is procedurally barred. *See* State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997) (argument not raised below not preserved for review).

[3]Wiggins cites State v. Fuller, 297 S.C. 440, 442, 377 S.E.2d 328, 330 (1989), in which we quoted the trial judge's charge including the following language: "[A]bsence of self-defense must be proven by the prosecution beyond a reasonable doubt." In Fuller, however, this aspect of the charge was never addressed.

> considering all the evidence including the evidence of self-defense, then you must find him not guilty. On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense, then you must find him guilty.

282 SC. at 46, 317 S.E.2d at 453. This charge was made mandatory in State v. Glover, 284 S.C. 152, 326 S.E.2d 150 (1985); *see also* State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987).

In Wiggins, we specified for the first time, though not in the context of a jury charge, that the State has the burden of disproving self-defense. Wiggins is dispositive of the issue here. *See* State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987) (error to refuse charge that was correct statement of law). When self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt.[4] Because petitioner was tried before the filing of our opinion in Wiggins, however, we hold the trial judge did not err in refusing the charge in this case. The decision of the Court of Appeals is

**AFFIRMED AS MODIFIED.**

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

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[4]Nearly all courts considering the State's burden of proof have held the defendant is entitled to such a charge. *See* State v. Duarte, 165 Ariz. 230, 798 P.2d 368 (1990); Sanchez v. People, 820 P.2d 1103 (Colo. 1991); State v. Bryant, 233 Conn. 1, 658 A.2d 89 (1995); Fields v. State, 258 Ga. 595, 372 S.E.2d 811 (1988); People v. Williams, 220 Ill. App. 3d 822, 580 N.E.2d 1340, 162 Ill. Dec. 921 (1991); Davis v. State, 714 N.E.2d 717 (Ind. 1999); State v. Ceaser, 585 N.W.2d 192 (Iowa 1998); State v. Carter, 227 La. 820, 80 Sol2d 420 (1955); State v. Plante, 623 A.2d 166 (Me. 1993); Johnson v. State, 749 So.2d 369 (Miss. 1999); State v. Warren, 9 Neb. App. 60, 608 N.W.2d 617 (2000); State v. McMinn, 141 N.H. 636, 690 A.2d 1017 (1997); State v. Abbott, 36 N.J. 63, 174 A.2d 881 (1961); State v. Parish, 118 N.M. 39, 878 P.2d 988 (N.M. 1994); State v. Bartlett, 136 Vt. 142, 385 A.2d 1109 (1978); State v. McKinney, 178 W.Va. 200, 358 S.E.2d 596 (1987); State v. Walden, 131 Wash. 2d 469, 932 P.2d 1237 (1997); Duckett v. State, 966 P.2d 941 (Wyo. 1998).

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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The State, Respondent,

v.

Lawrence Edward Moore, Petitioner.

The State, Respondent,

v.

Terrance Wideman, Petitioner.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Greenwood County
David H. Maring, Sr., Circuit Court Judge

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Opinion No. 25217
Heard October 17, 2000 - Filed December 11, 2000

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**AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

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Assistant Appellate Defenders Katherine Carruth Link and M. Anne Pearce, of South Carolina Office of Appellate Defense, of Columbia, for petitioners.

Attorney General Charles Molony Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert. E. Bogan, and Senior Assistant Attorney General Charles H. Richardson, of Columbia, and Solicitor W. Townes Jones, of Greenwood, for respondent.

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**JUSTICE WALLER:** We granted a writ of certiorari to review the Court of Appeals' opinions in State v. Moore, 334 S.C. 411, 513 S.E.2d 626 (Ct. App. 1999) and State v. Wideman, Op. No. 99-UP-101 (S.C. Ct. App. filed Feb. 22, 1999).[1] We affirm in part, reverse in part, and remand for a new trial.

## FACTS

Moore and Wideman were convicted of second degree burglary and grand larceny. At their joint trial, they challenged the admissibility of the identification given by the robbery victim's neighbor, Stephanie Davis. At an *in camera* hearing, Davis testified she was driven to her Greenwood apartment by her father at approximately 11:15 am on June 11, 1996. From approximately 50 yards away, she observed two men coming out of her neighbor Steven Bell's house; Davis knew Bell was at work. After exiting her father's car, Davis asked the two men what they were doing and both "startled" and ran. She called 9-1-1 and gave police a description of the men. Davis described two African-American males, one was taller and darker, "he had on a white hat . . . a white t-shirt and blue shorts . . . the white hat fell off and [she saw] braided hair." The taller man was thinner, and Davis saw only his profile. The other man had on a white t-shirt, either shorts or pants, and a black hat. Davis could not say whether he was stocky or thin, only that he was the shorter of the two. She saw him only from the back.[2]

Approximately ninety minutes later, Davis was taken in a police patrol

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[1] The opinions are virtually identical, with the exception of footnote 2 in Wideman, dealing with a preservation issue.

[2] The record does not indicate precisely the distance at which Davis encountered the men. She was at her mailbox and the men were in her neighbor's back yard.

vehicle to an area near Greenwood Supply where two men were being detained by police. The suspects were the only non-uniformed persons in the vicinity. When asked if she could identify the men, Davis replied, "Yes, . . . the clothes– it was a hat on the ground and I remembered the black hat, and the clothes were the same." With respect to the taller man with the braided hair, after Davis had "seen him up close," she identified him for police as "Coochie Terry," a man she recognized as having lived in an apartment near her sister. On cross-examination, Davis admitted she had not really seen either man's face at the time of the initial confrontation.

At the close of the *in camera* hearing, the trial court ruled, "[t]he court's finding is that there is evidence - - I won't say it's reliable, but I think that's a matter for the jury - - that she can identify them. I don't find it unduly suggestive. I find the issues - - the weight is a matter for the jury." The Court of Appeals majority reversed and remanded. The court found error in the trial court's failure to make a determination of the reliability of Davis' identification in accordance with the factors set forth in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); see also State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct. App. 1993).[3] Accordingly, the majority remanded to the trial court for a hearing to determine whether Davis' statement was reliable under the totality of the circumstances. Chief Judge Howell dissented, finding Davis' identification unreliable as a matter of law such that a remand was unnecessary.

## ISSUE

Did the Court of Appeals err in remanding to the trial court for a hearing to determine whether the identification in this case was unreliable?

## DISCUSSION

A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). An in-court identification of an accused is

[3] Given the paucity of evidence against the defendants, the Court of Appeals concluded the error could not be deemed harmless. 334 S.C. at 416, 513 S.E.2d at 628. There is no challenge to this finding on certiorari.

inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977) (citing Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)); State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980).

The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Manson v. Brathwaite, supra. First, "[a] court must first determine whether the identification process was unduly suggestive . . . . [It] next must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." Curtis v. Commonwealth, 396 S.E.2d 386, 388 (Va. 1990)(citing Neil v. Biggers, 409 U.S. at 198).

> Only if [the procedure] was suggestive need the court consider the second question--whether there was a substantial likelihood of irreparable misidentification. Although one-on-one show-ups have been sharply criticized, and are inherently suggestive, the identification need not be excluded as long as under all the circumstances the identification was reliable notwithstanding any suggestive procedure. [The] inquiry, therefore, must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification.

Jefferson v. State, 425 S.E.2d 915, 918 (Ga. 1992). See also State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980); State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980)(central question is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive).

Here, in assessing the first-prong, the trial court ruled the show-up procedure was not unduly suggestive. This was error. Single person show-ups are particularly disfavored in the law. Stovall, 388 U.S. at 402 (practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned); see also State v. Johnson, 311 S.C. 132, 134, 427 S.E.2d 718, 719 (Ct. App. 1993)(single person show-ups are particularly disfavored in the law). Here, the witness was brought to a location where two individuals, wearing clothing similar to that described by the witness,

were surrounded by uniformed police officers; it is patent the show-up procedure used was unduly suggestive. Accord In the Interest of Rashee, 308 S.C. 392, 418 S.E.2d 326 (Ct. App. 1992) (taking witness to location where suspects, but no other individuals, are being detained is suggestive).[4]

Given our finding that the show-up used in this case was unduly suggestive, we must determine whether a remand is necessary or whether, under the unique facts of this case, the matter of reliability may be determined by this Court. We find a remand unnecessary. We agree with Chief Judge Howell's dissent that, under the facts of this case, the identification is unreliable as a matter of law and therefore a remand would serve no useful purpose.[5]

As noted in Chief Judge Howell's dissent in this case, whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact. State v. Moore, 334 S.C. at 418, 513 S.E.2d at 629. In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Clyburn v. Sumter County Sch. Dist., 317 S.C. 50, 53, 451 S.E.2d 885, 887-88 (1994). Generally, the decision to admit an eyewitness identification is at the trail judge's discretion and will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error. State v. Johnson, 311 S.C. 132, 427 S.E.2d 718 (Ct. App. 1993). However, an eyewitness identification which is unreliable because of suggestive line-up procedures is constitutionally inadmissible as a matter of law. Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir. 1976), cert. denied, 430 U.S. 910, 97 S.Ct. 1183, 51 L.Ed.2d 587 (1977), *citing* Foster v. California, 394

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[4] Although the Court of Appeals majority did not explicitly hold the show-up unduly suggestive, it is implicit from its recitation of authority and subsequent treatment of the reliability issue that it indeed did so. Accordingly, to the extent the majority found the show-up unduly suggestive, its opinion is affirmed.

[5] Given that a full hearing has been conducted and a full record exists, a remand for a hearing on the reliability of Davis' identification is unnecessary. Accord State v. Cash, 304 S.C. 223, 403 S.E.2d 632 (1991)(remand unnecessary where it is clear remand for hearing would serve no useful purpose). Unlike State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992), in which no hearing was held to determine the admissibility of a police officer's in-court identification, a full hearing has already been held in this matter.

U.S. 440, 442-43, n.2 (1969).

The following factors are to be considered in evaluating the totality of the circumstances as to whether an identification is admissible:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. at 199, 93 S.Ct. at 382; State v. Stewart, 275 S.C. at 450, 272 S.E.2d at 629. Only after a determination as to the reliability of a witness' identification has been made by the trial court may the witness testify before the jury. State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999).

Reviewing the Neil v. Biggers factors, we find the only factor established with any degree of reliability in this case is number 5, the amount of time between the crime and the confrontation, which was between 1 ½ - 2 hours. This factor, however, is clearly outweighed by the other factors. As noted by Chief Judge Howell, at the time of the crime, Davis saw the two defendants for only a very brief period of time, at some distance. This is not a case in which the witness had an opportunity to observe the defendant at close proximity for some considerable period of time. See State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980). As to the second factor, Davis' attention was likely not as acute as it might have been had she been the victim of a crime.[6] Third, the degree of accuracy of Davis' description is tenuous, at best. Her descriptions were based primarily on the suspects' clothing and race, and that one was taller than the other. She really did not get a look at either suspect's face, but saw one from the profile. Of further concern is the fact that Davis failed to recognize Wideman at the scene of the crime, notwithstanding she claimed to have seen the side of his face and knew him from her sister's apartment complex. The fact that Davis failed to recognize him until the show-up highlights both the inherent unreliability of the identification and the completely suggestive nature of the

[6] This Court has noted that the attention of a mere passerby is likely to be less acute than that of a victim. State v. Ford, 278 S.C. 384, 386, 296 S.E.2d 866, 867 (1982).

show-up procedure. Further, as to the defendant Moore, Davis gave no physical description of him other than the fact that he was shorter and wore a black hat. She did not recall if he was stocky or thin; she recognized him at the show-up only by virtue of the black hat on the ground beside him. When asked at the show-up if she recognized the suspects, she specifically stated, "Yes, . . . the clothes– it was a hat on the ground and I remembered the black hat, and the clothes were the same." Under the totality of the circumstances here, we find a substantial likelihood of irreparable misidentification such that the identifications are unreliable as a matter of law.[7] Accordingly, a remand to the trial court is both unnecessary and contrary to the interests of judicial economy.

The Court of Appeals' opinion is

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR A NEW TRIAL.**

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

[7] We note that, although Davis' identification is unreliable as a matter of law, she is in no way prevented from testifying as a fact witness on remand, insofar as the events she witnessed are relevant and necessary to establish the state's case.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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In the Matter of Daniel
L. Blake, Respondent.

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Opinion No. 25218
Submitted November 7, 2000 - Filed December 11, 2000

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DEFINITE SUSPENSION

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Susan M. Johnston, of Columbia, for the Office of Disciplinary Counsel.

Susan Batten Lipscomb, of Columbia, for respondent.

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**PER CURIAM:** In this attorney disciplinary matter, 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 definite suspension from the practice of law for four (4) months. We accept the agreement.

The facts as admitted in the agreement are as follows.

## Facts

Respondent represented a client in a divorce and custody matter. Respondent did not properly calendar the court hearing in the matter. On the day before the temporary hearing was scheduled, respondent realized that there was a scheduling problem. Respondent filed a motion for a continuance in which he misrepresented to the court that he was ill, and stated that he could not attend the hearing.

When the trial judge telephoned respondent's office, respondent's staff, without direction from respondent, informed the judge that respondent was in another county on a different client matter. In actuality, respondent was attending a CLE course on the day of the hearing. Respondent's request for a continuance was denied and the opposing party obtained temporary custody of the child.

If respondent and his client had attended the temporary hearing, custody may have remained with his client. The client was not informed as to the status of her case until a week after the hearing, thereby further prejudicing her case.

## Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (a lawyer shall keep a client reasonably informed about the status of a matter); Rule 3.3 (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal); Rule 4.1 (a lawyer shall not make a false statement of material fact or law to a third person); Rule 5.3 (a lawyer shall be responsible for the conduct of a non-lawyer assistant); and Rule 8.4 (misconduct for a lawyer to violate the Rules of Professional Conduct).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating or attempting to violate 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).

## Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for four (4) months. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett, III J.

s/Costa M. Pleicones J.

# The Supreme Court of South Carolina

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O R D E R

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Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 32, Rules for Lawyer Disciplinary Enforcement, Rule 413, South Carolina Appellate Court Rules, is amended to read as follows.

> A lawyer who has been suspended for a definite period of six months or less may be reinstated to the practice of law at the end of the period of suspension by filing with the Supreme Court, and serving upon disciplinary counsel, an affidavit stating that the lawyer is currently in good standing with the Commission on Continuing Legal Education and Specialization, has fully complied with the requirements of the suspension order, and has paid any required fees and costs, including payment of necessary expenses and compensation approved by the Supreme Court to the attorney appointed pursuant to Rule 31, RLDE, to protect the interests of the lawyer's clients for necessary expenses, or to the Lawyers' Fund for Client Protection if the Fund has paid the appointed attorney under Rule 31(f), RLDE.

Rule 33(f), RLDE, Rule 413, SCACR, is amended by adding the following subsection.

> (11) The lawyer has paid necessary expenses and compensation approved by the Supreme Court to the attorney appointed pursuant to Rule 31, RLDE, to protect the interests of the lawyer's clients for necessary expenses, or to the Lawyers'

Fund for Client Protection if the Fund has paid the appointed attorney under Rule 31(f), RLDE.

These amendments shall be effective immediately.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
December 7, 2000

# The Supreme Court of South Carolina

In the Matter of Mark R. Calhoun, Respondent.

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O R D E R

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Petitioner has been indicted on two counts of obstructing justice. The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, because he has been charged with a serious crime. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being placed on interim suspension.

IT IS ORDERED that the petition is granted and respondent is suspended from the practice of law in this State until further order of this Court.

IT IS FURTHER ORDERED that Lexious A. Rogerson, Jr., Esquire, is appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Rogerson shall take action as

required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Rogerson may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Lexious A. Rogerson, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Lexious A. Rogerson, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Rogerson's office.

s/Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina
December 7, 2000

# The Supreme Court of South Carolina

In the Matter of Charles
G. Vaughan, Respondent.

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O R D E R

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The Office of Disciplinary Counsel petitions this Court for an order transferring respondent to incapacity inactive status pursuant to Rule 17(b), RLDE, Rule 413, SCACR. The Guardian *ad litem* for respondent consents to the petition.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of this Court.

IT IS FURTHER ORDERED that Delton W. Powers, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other accounts into which respondent may have deposited client or trust monies. Mr. Powers shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Powers has authority to make disbursements from respondent's trust, escrow, and/or

operating account(s) as is reasonably necessary and may apply to the Chair of the Commission on Lawyer Conduct for authority to make any disbursements that appear to be unusual or out of the ordinary.

IT IS FURTHER ORDERED that this Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as notice to the bank or other financial institution that Delton W. Powers, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Delton W. Powers, Jr., Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority the direct that respondent's mail be delivered to Mr. Powers' office.

s/Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

December 7, 2000

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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Janice H. Engle,

Appellant,

v.

George S. Engle, III,

Respondent.

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Appeal From Greenville County
Wesley L. Brown, Family Court Judge

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Opinion No. 3265
Heard September 14, 2000 - Filed December 11, 2000

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**AFFIRMED AS MODIFIED**

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J. Falkner Wilkes, of Meglic, Wilkes & Godwin, of Greenville, for appellant.

Jason P. Boan, of Turnipseed, Ridge & Boan, of Spartanburg, for respondent.

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**HOWARD, J.**: Janice H. Engle, the mother, brought this action against George S. Engle, III, the father, seeking increased child support and the dependent income tax deduction for the parties' child. The family court awarded an increase in child support based on the father's increased income and income imputed to the mother. The court declined to award the mother the state and

federal dependent income tax exemption. The mother appeals. We affirm as modified.

## FACTS

The parties were married in 1981 and divorced in 1988. They have one child, born May 27, 1984. The mother was granted custody of the child and was awarded child support. The father was awarded visitation and the dependent tax exemption. In 1989, by agreement between the parties, the father's child support obligation was increased to $800 per month. It was later reduced by court order to $640 per month.

The mother instituted the present action against the father in May of 1997 seeking increased support in accordance with the Child Support Guidelines ("the Guidelines"), maintenance of the child's health insurance by the father, pro rata division of the child's medical expenses, the dependent tax exemption, and attorney's fees.

By order dated December 22, 1998, the family court increased the father's child support obligation to $829.17 per month and allowed him to retain the dependent tax exemption. With the exception of changes not pertinent to this appeal, the mother's post trial motion for reconsideration was denied.

## LAW/ANALYSIS

### I. Child Support Calculation

#### A. Mother's Income

On appeal, the mother asserts the family court erred in imputing income to her for purposes of calculating child support. We disagree.

The mother has a master's degree in education. Prior to April of 1997, she was employed as a departmental coordinator in the chemistry department at Furman University earning approximately $28,000 per year. In April of 1997, the mother quit her job at Furman University and relocated with the child to Idaho to pursue graduate studies in biology. At the time of trial, she was earning $1,022 per month as a graduate student at Boise State University. For

purposes of calculating child support, the family court imputed $28,000 per year in income to the mother, reasoning she would have been earning at least that amount if she had not voluntarily terminated her employment at Furman University.

In an action on appeal from the family court, the appellate court may find facts in accordance with its own view of the preponderance of the evidence. Epperly v. Epperly, 312 S.C. 411, 414, 440 S.E.2d 884, 885 (1994). However, this does not mean that the court should disregard the findings of the family court judge, who saw and heard the witnesses. Hooper v. Rockwell, 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999). Child support awards are addressed to the sound discretion of the trial judge and, absent an abuse of discretion, will not be disturbed on appeal. Mitchell v. Mitchell, 283 S.C. 87, 92, 320 S.E.2d 706, 710 (1984). An abuse of discretion occurs when the court is controlled by some error of law or where the order, based upon the findings of fact, is without evidentiary support. Kelley v. Kelley, 324 S.C. 481, 485, 477 S.E.2d 727, 729 (Ct. App. 1996).

We find no error in the family court's decision to impute income to the mother for purposes of determining child support. Under the Guidelines, "income" is defined as "the actual gross income of the parent, if employed to full capacity, or potential income if unemployed or underemployed." 27 S.C. Code Ann. Regs. 114-4720(A) (Supp. 1999). The Guidelines further provide:

> Potential Income. If the court finds that a parent is voluntarily unemployed or underemployed, it should calculate child support based on a determination of potential income which would otherwise ordinarily be available to the parent.
>
> . . . .
>
> (b) In order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earning level of the parent based on that parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community.

27 S.C. Code Ann. Regs. 114-4720(A)(5) (Supp. 1999).

Where a parent voluntarily lessens his or her earning capacity, this Court will closely scrutinize the facts to determine the parent's earning potential, rather than the parent's actual income. See Camp v. Camp, 269 S.C. 173, 174, 236 S.E.2d 814, 815 (1977); Robinson v. Tyson, 319 S.C. 360, 363, 461 S.E.2d 397, 399 (Ct. App. 1995); see also Chastain v. Chastain, 289 S.C. 281, 283, 346 S.E.2d 33, 35 (Ct. App. 1986) (finding that father with master's degree voluntarily removed himself from the job market to attend law school and his earning potential was properly considered in calculating child support).

While the mother's decision to further her education is admirable in the present case, the record contains ample evidence to support the family court's determination that she voluntarily decreased her earning capacity in pursuit of this goal. Prior to her move to Idaho, the mother was employed at Furman University for seven years, attained advancement within the University, and was highly thought of by her superiors. Based on this evidence, we affirm the family court's finding that the mother is voluntarily underemployed.

### B. Father's Income

The mother also asserts that the family court erred in its calculation of the father's income for purposes of determining child support. We agree.

According to the Guidelines, a party's gross income is usually determined based upon the required financial declarations provided by the party; however, "where the amounts reflected on the financial declaration may be in issue, the Court may rely on suitable documentation of current earnings, preferably for at least one month." 27 S.C. Code Ann. Regs. 114-4720(A)(6) (Supp. 1999). Such documentation includes pay stubs and may be verified by tax returns filed by the payer. Id.

The father is employed as a stock broker. At trial, the mother presented tax returns and W-2 forms indicating that the father's adjusted gross income was $114,154 in 1996 and $132,218.50 in 1997. Pay stubs, also submitted into evidence, show that as of September 25, 1998, the father's year-to-date income from commissions alone totaled $110,324.94. The father's financial declaration, however, showed approximate earnings of $6,239 per month. The father testified that the financial declaration figure was based on four recent pay stubs.

The family court did not find that the father's financial declaration failed to fairly reflect his current income, stating that nothing was presented to indicate that the amount was inaccurate and that the court "accept[ed] the $6239.71 as . . . his actual earnings." However, using evidence submitted by the mother, the court determined "the [father] has enjoyed an average income, including an annual fluctuating company bonus, of approximately $9,500 per month for the last three years" and then stated, "I think if we probably looked at the records today, he probably has been making the ninety-five hundred, maybe even more."

In arriving at an income amount for the father, the family court used neither the father's claimed figure from his financial declaration, nor the figure obtained from averaging the father's tax returns and pay stubs. Instead, the family court used the figure of $8,000 in calculating the father's child support obligation. In explaining the $8,000 figure, the court stated: "[I]t just so happen[ed] that I felt like $8,000 was a reasonable compromise as an obtainable figure. I had no idea what he would actually make . . . ."

Although the family court stated that the mother had presented no evidence to contradict the father's claimed income on his financial declaration, we conclude the record establishes that the declarations were in fact inaccurate. The father claimed that his financial declaration reflected his earnings in the previous four months of June, July, August, and September 1998. The amount shown on the father's financial declaration as his gross income is $6,239.71. However, the father's pay stubs for those same four months record a total gross pay of $32,727.86, which averages $8,181.97 per month. The father's financial declaration clearly is not reflective of his actual earnings.

When the amount reflected on the party's financial declaration is in issue, the court may rely on other documentation. Id. While the Guidelines provide that the documentation should be for "at least one month," the phrase "at least" implies that one month is a minimum period. See id.

Due to his employment as a stock broker, the father's income varies from month to month and year to year. According to the father's testimony, the last time his child support obligation was calculated, his income figure was based on a five-year average because of his "fluctuating income." We believe that an

average figure should have been used to calculate the father's income figure under the circumstances of this case.

The record includes the father's last two tax returns and a pay stub giving the year-to-date income for the ten months prior to the hearing. The father has earned approximately $10,491 per month for the thirty-four months prior to the hearing. Using the Child Support Guidelines and Worksheets in effect at the time of the hearing, we calculate the father's child support obligation to be $984.15 per month and award this amount retroactive to December 22, 1998, the date of the original order.

### C. Deviation from the Guidelines

The family court also stated in its order that, even if support were to be calculated based upon a higher income figure for the father, the father's child support obligation should be set below the Guideline amount because of the mother's failure to maintain employment at her earning potential and the extra expense the father would incur in arranging visitation with the child.

Deviation from the Guidelines should be the exception rather than the rule. Sexton v. Sexton, 321 S.C. 487, 491, 469 S.E.2d 608, 611 (Ct. App. 1996). "When the court orders a child support award that varies significantly from the amount resulting from the application of the [G]uidelines, the court shall make specific, written findings of those facts upon which it bases its conclusion supporting that award." 27 S.C. Code Ann. Regs. 114-4710(A)(1) (Supp. 1999). A list of possible reasons for deviation from the Guidelines is provided by statute. See S.C. Code Ann. § 20-7-852 (Supp. 1999). Neither of the court's explanations for a deviation from the Guidelines is included among the factors supporting deviation listed in the regulations. See id.

As to the mother's failure to maintain employment at her earning potential, the court has already imputed income to the mother due to her voluntary underemployment. Because income was imputed to her, the father's proportionate share of the total support amount has already been reduced from what it would be if the mother's lower, actual income figure had been used in the calculation. We fail to see why the mother's voluntary underemployment supports further lowering the father's support obligation in this instance.

As to the expense the father will incur in arranging visitation with the child now living in Idaho, the evidence does not support a deviation. Deviation is warranted when application of the Guidelines in a particular case would be unjust or inappropriate. Id. Here the evidence clearly reflects that the father has ample income and assets with which to pay for visitation expenses.[1] Therefore, we conclude that deviation is not warranted.

## II. Retroactive Increase

The mother next asserts the family court erred in failing to award the increase in child support retroactive to the date of filing. We find no error.

The mother asserts that retroactive child support need not be specifically prayed for as long as a factual basis is established. Although Sutton v. Sutton, 291 S.C. 401, 408, 353 S.E.2d 884, 888 (Ct. App. 1987), upheld an award of retroactive child support when the mother had failed to specifically mention retroactive child support in her petition, we find no abuse of discretion in the family court's failure to award retroactive child support in the present case.

The decision to award retroactive child support rests in the sound discretion of the family court. Kelly v. Kelly, 310 S.C. 299, 302, 423 S.E.2d 153, 155 (Ct. App. 1992). The entitlement to retroactive child support depends upon the facts and circumstances of each case. Sutton, 291 S.C. at 408, 353 S.E.2d at 888.

The mother argues that failure to award the support retroactive to the date of filing encourages the payer to delay. She asserts that the continuances in the present case significantly delayed the trial, unjustly enriching the father at the expense of the child. However, in the present case, the family court found

[1]The mother points out that the court failed to impute any income to the non income producing assets of the father. The Guidelines provide that the court "should impute income to any non income producing assets of either parent . . . other than a primary residence or personal property. Examples of such assets are vacation homes . . . and idle land." 27 S.C. Code Ann. Regs. 114-4720(A)(2)(b) (Supp. 1999). The father testified to ownership of a thirty-six acre farm, which recently appraised at $137,000, and to which no income was imputed.

that the father did not intentionally delay the litigation and that the mother was responsible for some of the delays. Therefore, we find no abuse of discretion.

## III. Dependent Tax Exemption

The mother next asserts the family court erred in failing to award her the dependent tax exemption for the child. We disagree.

The allocation of a dependent tax exemption is within the family court's discretion. Hudson v. Hudson, 340 S.C. 198, 205, 530 S.E.2d 400, 404 (Ct. App. 2000).

In awarding the tax exemption to the father, the family court reasoned that the father earned the greater income and would therefore benefit most from the exemption. As to the mother's argument that the tax exemption would assist her in her efforts to finance the child's college education, the court noted the issue of whether, or how much, each party should contribute toward the child's college education was not an issue before the court.[2] We find no abuse of discretion in the family court's consideration of this issue.

For the foregoing reasons, the decision of the family court is

**AFFIRMED AS MODIFIED.**

**STILWELL and SHULER, JJ., concur.**

[2]Moreover, the father has conceded during oral argument that he is willing to assist in paying for the child's college education.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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The State, . . . . . Respondent,

v.

Harold Bradley, . . . . . Appellant.

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Appeal From Clarendon County
M. Duane Shuler, Circuit Court Judge

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Opinion No. 3266
Submitted November 6, 2000 - Filed December 11, 2000

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**AFFIRMED**

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Assistant Appellate Defender Robert M. Pachak, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh and Senior Assistant Attorney General Charles H. Richardson, all of Columbia; and Solicitor C. Kelly Jackson, of Sumter, for respondent.

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**CURETON, J.**: Harold Bradley appeals his first degree burglary, armed robbery, and weapon possession convictions on the ground the trial court erred in denying Bradley's motion for a mental evaluation. We affirm.[1]

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[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

## FACTS

In 1993, Bradley was hospitalized and released with a diagnosis of "Major Depression with Psychotic Features and a Conduct Disorder as well as Antisocial Personality Traits." Bradley contacted the Clarendon Mental Health Center in January, 1995, but did not comply with the recommended treatment.

In October, 1997, a Clarendon County Grand Jury indicted Bradley for charges involved in this appeal.[2] The circuit court ordered the Department of Mental Health (DMH) to evaluate Bradley and determine whether he had the requisite mental capacity to stand trial and whether he was criminally responsible for the charged crimes.

Pursuant to the circuit court order, DMH attempted a competency evaluation of Bradley on May 8, 1998. DMH abandoned the evaluation "due to the lack of patient cooperation" finding Bradley responded to questions in a deliberately vague and evasive manner. DMH declined to issue opinions regarding Bradley's diagnosis and competency to stand trial.

DMH evaluated Bradley again on August 14, 1998, with his attorney present, in an attempt to complete the evaluation. Bradley was still generally uncooperative, but answered some questions. In the evaluation report, issued by Dr. Richard Frierson of DMH, Frierson concluded Bradley "is not mentally retarded and is functioning in a range of average intelligence." Dr. Frierson also noted that most of Bradley's answers were purposely vague, and that "some skill is involved in being able to do this consistently." In the DMH letter accompanying the evaluation, written by an Associate Director at DMH, the Director concluded "the hospital staff finds that [Bradley] shows Mild Mental Retardation" and stated: "In regard to the determination of competency to stand trial, indications of mental retardation should be evaluated by the South Carolina Department of Disabilities and Special Needs [DDSN]." There were no evaluation reports written by DMH physicians indicating mental retardation.

Bradley's case was tried before a jury in October of 1998. Before the trial, Bradley's attorney moved that Bradley be examined by DDSN. The circuit court denied the motion.

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[2] Bradley was also indicted for attempted murder.

## LAW/ ANALYSIS

Bradley, relying on the DMH letter, maintains the trial court violated South Carolina Code Annotated Section 44-23-410 (Supp. 1999) by denying his motion for a psychiatric evaluation by DDSN. We disagree.

The relevant portions of Section 44-23-410 state:

> Whenever a judge . . . has reason to believe that a person on trial before him . . . is not fit to stand trial because the person lacks [mental] capacity . . .the judge shall:
>
> > (1) order examination of the person by . . . the Department of Mental Health if the person is suspected of having a mental illness or . . . by the Department of Disabilities and Special Needs if the person is suspected of being mentally retarded . . . or by both [DMH and DDSN] . . . if the person is suspected of having both mental illness and mental retardation . . . or
> >
> > (2) order the person committed for examination and observation to . . . [DMH or DSSN] . . .. If the examiners designated by the Department of Mental Health find indications of mental retardation or a related disability but not mental illness, the department shall not render an evaluation on the person's mental capacity, but shall inform the court that the person is "not mentally ill" and recommend that the person should be evaluated for competency to stand trial by the Department of Disabilities and Special Needs.

S.C. Code Ann. § 44-23-410 (Supp. 1999).

Bradley argues the trial judge erred by not sending him to DDSN for evaluation, despite the DMH letter. However, in reviewing section 44-23-410 and predecessor statutes, our supreme court held that it is within the trial judge's discretion to

determine whether a defendant should be given a mental examination. State v. Bradshaw, 269 S.C. 642, 239 S.E.2d 652 (1977); State v. Anderson, 181 S.C. 527, 188 S.E. 186 (1936); State v. Chandler, 126 S.C. 149, 119 S.E. 774 (1923)). In Bradshaw the court stated: "We think it clear . . . that the trial judge still has such discretion. He is faced with the question of whether there is 'reason to believe' a defendant lacks a certain mental capacity. This determination necessarily requires the exercise of discretion." Bradshaw at 644, 239 S.E.2d at 653.

In State v. Drayton, 270 S.C. 582, 243 S.E.2d 458 (1978), again addressing section 44-23-410, the supreme court stated:

> The statutory injunction, that an examination be ordered when the circuit judge 'has reason to believe' that a defendant is not mentally competent to stand trial, involves the exercise of the discretion of the trial judge in evaluating the facts presented on the question of competency. Therefore, whether a competency examination is ordered is within the discretion of the trial judge and a refusal to grant such an order will not be set aside unless there is a clear showing of abuse of such discretion.

Drayton at 584, 243 S.E.2d at 459. See also State v. Singleton, 322 S.C. 480, 472 S.E.2d 480 (Ct. App. 1996) (finding the question whether to order a competency examination pursuant to the statute is within the discretion of the trial court).

In light of Dr. Frierson's evaluation report, we conclude the failure of the trial court to direct a further examination to determine Bradley's competency did not constitute an abuse of discretion. Accordingly, the conviction is

**AFFIRMED.**

**GOOLSBY and ANDERSON, JJ., concur.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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M. Andrew Jeffords,

Appellant,

v.

Bonneau Lesesne, individually and d/b/a
"The Watering Hole,"

Respondent.

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Appeal From Florence County
James Carlyle Williams, Jr., Circuit Court Judge

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Opinion No. 3267
Heard September 12, 2000 - Filed December 11, 2000

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**REVERSED AND REMANDED**

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Eugene A. Fallon and H. Thad White, Jr., both of Fallon Law Firm, of Florence, for appellant.

Arthur E. Justice, Jr., of Turner, Padget, Graham & Laney, of Florence, for respondent.

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**HOWARD, J.**: Andrew Jeffords brought this negligence action against Bonneau Lesesne, individually and doing business as The Watering Hole (collectively referred to as "Lesesne"), for injuries Jeffords received in an assault which occurred at The Watering Hole, a bar owned by Lesesne. At trial, the court directed a verdict for Lesesne as to all allegations of negligence except those pertaining to the sale of alcohol to an intoxicated person under the Dram Shop Act. See S.C. Code Ann. §61-6-2220 (Supp. 1999). As to the remaining issue, the jury returned a verdict for Lesesne, concluding his employees did not knowingly sell alcohol to the assailant.

On appeal, Jeffords argues the trial court erred in (1) granting Lesesne's motion for directed verdict as to the allegations of negligence; (2) refusing to admit opinion testimony from the former manager of The Watering Hole regarding deviations by Lesesne and bar employees from the policies and procedures of the bar on the night of the altercation; and (3) charging the jury an incorrect burden of proof. We reverse and remand for a new trial.

## FACTS

Lesesne is the owner of several businesses which sell alcoholic beverages for consumption on the premises, including The Watering Hole. On October 4, 1994, The Watering Hole hosted an "End of Summer Bash." The event was heavily promoted and open to the public. The bar was crowded, and Lesesne did not provide any security.

Jeffords and several of his friends attended the event, intending to play pool on a coin operated pool table. While waiting to play, Jeffords placed quarters on the edge of the table. As Jeffords began to deposit the quarters to play pool, another patron, later identified as Chris Driggers, claimed ownership of the quarters. Jeffords disputed Driggers' claim. Suddenly, and without warning, Driggers hit Jeffords in the mouth with his pool cue, causing Jeffords severe injuries. Driggers ultimately pled guilty to Assault and Battery of a High and Aggravated Nature for the assault.

Jeffords brought this action, asserting three allegations of negligence creating a reasonably foreseeable risk of third party conduct such as the assault by Driggers. At the conclusion of Jeffords' case, Lesesne moved for a directed verdict as to those allegations of negligence, arguing that neither Lesesne nor

the employees of The Watering Hole could foresee the criminal acts of a third person. The trial court granted the motion as to all allegations of negligence except as to the service of alcohol by the bar to an intoxicated person.

Ultimately, the jury found for Lesesne on the Dram Shop allegations, concluding that the employees of The Watering Hole did sell beer to Driggers, but did not know or have reason to know that Driggers was intoxicated. This appeal follows.

## LAW/ ANALYSIS

### I. Directed Verdict

Jeffords argues the trial court erred in directing a verdict as to the negligence of Lesesne in creating a reasonably foreseeable risk of such third party conduct as Driggers' assault. The court found no evidence to support a conclusion that the following allegations of negligence were a proximate cause of Jeffords' injuries: (1) the defendant failed to secure and maintain the premises in a reasonably safe condition; (2) the defendant failed to employ adequate security guards; and (3) the defendant failed to adequately warn Jeffords.

In ruling on a directed verdict motion, the trial court must view the evidence and all inferences which may be reasonably drawn therefrom in the light most favorable to the non-moving party. Fleming v. Borden, Inc., 316 S.C. 452, 450 S.E.2d 589 (1994). If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. Id.

An action for negligence requires the plaintiff to allege facts sufficient to demonstrate: (1) a duty of care owed by the defendant; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by the breach. Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (2000).

Generally, there is no duty to protect against the criminal acts of a third party unless the owner of the premises knew or had reason to know of the criminal attack. Bullard v. Ehrhardt, 283 S.C. 557, 324 S.E.2d 61 (1984). In Bullard, the court found that the tavern owner could not have foreseen the criminal actions of a patron who spontaneously threw a beer bottle at another patron. Id. Similarly, based upon the spontaneity of the attack in this case, the trial court concluded that any negligence in failing to have security or to warn was not a proximate cause of Jeffords' injury. Applying the general rule found

applicable in Bullard, the trial court concluded that liability could attach to Lesesne only if The Watering Hole employees negligently sold alcohol to Driggers when he was in an intoxicated condition.

Jeffords argues the trial court construed his cause of action too narrowly. He maintains a question of fact was raised as to the liability of Lesesne because Lesesne and his employees created a foreseeable risk of such third party conduct.

To factually support this argument, Jeffords presented evidence to establish the following: (1) The Watering Hole is in a high crime area; (2) it is a bar which serves beer by the pitcher and the glass; (3) on the night in question it hosted a special event in conjunction with a local radio station, advertising a large cash prize and attracting a larger than normal crowd; (4) Lesesne has a written policy in effect for The Watering Hole and his other establishments calling for security measures which were not in place on that night; (5) the only employees on duty that night were two female bartenders; and (6) the pool tables are located in the back room, out of the sight of the bartenders.

As legal authority for this argument, Jeffords cites Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990). In that case, the City employed only fourteen security guards to police a crowd of 6,000 people attending a rock concert which featured a rock group whose songs contained lyrics encouraging lawless behavior. The City provided no reserve seating on the main floor, and those on the main floor stood before the band. The crowd became unruly, pushing and shoving each other, and some smoked marijuana and consumed alcohol. There were pieces of broken glass on the floor. A patron standing on the main floor was injured when he was struck by a beer bottle thrown by another patron standing above him in the balcony.

Under the Tort Claims Act, a governmental entity cannot be held liable for a loss resulting from the act or omission of a person other than an employee, including, but not limited to, the criminal acts of third persons. See S.C. Code Ann §15-78-60 (20) (Supp. 1999). Notwithstanding this provision, our supreme court upheld a jury verdict against the City of Greenville based upon its negligence in failing to adequately secure its auditorium during the concert. Although the City argued it was statutorily immune from liability under §15-78-60 (20), our supreme court rejected this contention "where the very basis upon which appellant is claimed to be negligent is that appellant created a reasonably

foreseeable risk of such third party conduct." Greenville Mem'l Auditorium, 301 S.C. at 247, 391 S.E.2d at 549.

Prior to Greenville Memorial Auditorium, our supreme court alluded to the negligence of those who create a reasonably foreseeable risk of such third party criminal conduct as a basis for liability in Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977). In Shipes, the court quoted with approval from the Restatement of Torts:

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. * * * If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

269 S.C. at 485, 238 S.E.2d at 169 (quoting Restatement of Torts 2d §344 comment (f)); see Daniel v. Days Inn of America, Inc., 292 S.C. 291, 356 S.E.2d 129 (Ct. App. 1987); Munn v. Hardee's Food Sys., Inc., 274 S.C. 529, 266 S.E.2d 414 (1980); Miletic v. Wal-Mart Stores, Inc., 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000); Dalon v. Golden Lanes, Inc., 320 S.C. 534, 466 S.E.2d 368 (Ct. App. 1996); Callen v. Cale Yarborough Enter., 314 S.C. 204, 442 S.E.2d 216 (Ct. App. 1994). Essentially, Jeffords maintains that the place and character of The Watering Hole is such that Lesesne and his employees should have reasonably anticipated the criminal acts of Driggers.

Taking the evidence in a light most favorable to Jeffords, we agree. The Watering Hole is located in a "high crime area," situated next to a motel owned by Lesesne. Because of the number of previous crimes committed in the area, Lesesne provided police with a free room at the motel, hoping their presence would lower the crime rate.

The promotion that evening was provided through a local radio station, which had placed a remote broadcasting site in the parking lot on the property, next to the motel. Small prizes were advertised, as well as a national broadcasting promotion for a chance to win $100,000. Disc jockeys played music through large speakers in the parking lot, luring those within earshot and those

listening over the radio to come to the bar to win a prize. People were waiting in line for their chance to win, and those who won smaller prizes were waiting in line to collect their prizes. At least one witness described the bar as "packed." No doorman was present to screen the entry of patrons.

Lesesne owns several restaurants at which alcohol is also served. A policy manual for The Watering Hole stated a "policy to provide a safe and controlled area for patrons' entertainment and alcohol beverage consumption." Furthermore, the stated policy was to "prevent any customer from becoming intoxicated." According to the policy and Lesesne, the bar provided "FREE protein enriched food in the bar area for our patrons" to prevent them from becoming intoxicated by drinking alcoholic beverages on an empty stomach. Notwithstanding this policy, only two bartenders were on duty that night. No further security, such as doormen, "bouncers," or a wait staff, was provided.

Prior to the assault, Driggers was loud, obnoxious, aggressive, disheveled in appearance, glassy eyed, and "even a little intimidating." According to Jeffords' witnesses, it was obvious Driggers and his companion "had been drinking probably quite a while."

Based upon the above evidence, we conclude a factual issue was presented as to the negligence of Lesesne and his employees in creating a reasonably foreseeable risk of behavior such as the assault by Driggers. Even though the actual assault by Driggers may have been so swift that it could not have been stopped once it began, a factual issue is presented as to whether that type of criminal conduct was a foreseeable risk created by the place and character of Lesesne's business activities on that evening. If so, then a factual issue was presented as to whether Lesesne's failure to take precautions or to provide a reasonably sufficient number of servants to afford a reasonable protection against such criminal conduct on the part of third persons constituted negligence proximately causing Jeffords' injuries. Therefore, we conclude the trial court erred in directing a verdict.

The touchstone of proximate cause in South Carolina is foreseeability of some injury from a defendant's acts or omissions. Daniel, 292 S.C. at 301, 356 S.E.2d at 134-35 (citing Kennedy v. Carter, 249 S.C. 168, 153 S.E.2d 312 (1967)). The standard by which foreseeability is determined is that of looking to the natural and probable consequences of the act complained of. Id. (citing Young v. Tide Craft, 270 S.C. 453, 242 S.E.2d 671 (1978)). It is not necessary that the actor must have contemplated or could have anticipated the particular

event which occurred. Id. He may be liable for anything which appears to have been a natural and probable consequence of his negligence. "If the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability." Id. (quoting Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966)). Ordinarily, the question of proximate cause is a jury issue. Id. (citing Carter v. Anderson Mem'l Hosp., 284 S.C. 229, 325 S.E.2d 78 (Ct. App. 1985)).

We conclude the place and the character of the activity was such as to raise a factual issue concerning the reasonable foreseeability of such conduct and the necessity of taking reasonable precautions, such as providing security or a reasonably sufficient number of servants, to afford protection.

In a light most favorable to Jeffords, The Watering Hole was in a high crime area, and a substantial part of the promotional activity was aimed at attracting bystanders who were within this area. Lesesne's written policies establish that they knew the consumption of alcohol raised safety concerns. Cf. Callen, 314 S.C. at 206, 442 S.E.2d at 218 ("Hardee's is a fast-food restaurant which serves no alcohol. It certainly does not fit the description of an operation which attracts or provides a climate for crime."). Not only was this spelled out in their manual, but specific dietary tactics were adopted to minimize the effects of alcohol on people drinking on an empty stomach. Furthermore, in a light most favorable to Jeffords, the evidence as to the special promotion and the crowd lends itself to the inference that a more frenzied atmosphere was cultivated by Lesesne.

Perhaps most compelling is the evidence as to the condition of Driggers in the minutes prior to the assault. In a light most favorable to Jeffords, Driggers showed signs of intoxication, was obnoxious, and was aggressive for at least several minutes prior to the assault. Consequently, even though the actual manifestation of physical aggression may not have been foreseeable, the fact of the aggression was arguably a natural result of Lesesne's failure to provide sufficient personnel or security to control the premises and warn patrons.[1] See Greenville Mem'l Auditorium, 301 S.C. at 242, 391 S.E.2d at 546; Daniel, 292

[1]Although the jury found that the defendants did not sell alcohol to Driggers when they knew or should have known him to be intoxicated, this is a separate issue from the negligence of defendants in creating a foreseeable risk of criminal acts such as those of Driggers when and if he became intoxicated.

S.C. at 300, 356 S.E.2d at 134 ("It is not required that notice to a proprietor regarding danger to a patron be long and continued in order to subject him to liability; it is enough that there be a sequence of conduct sufficient to enable him to act on behalf of his guest's safety.")

Based on the above, we conclude the trial judge erred in directing a verdict as to the negligence of Lesesne in creating a reasonably foreseeable risk of third party criminal conduct such as the assault of Driggers.

## CONCLUSION

For the foregoing reasons, the directed verdict of the circuit court is reversed, and the case is remanded for a new trial on those issues.[2]

**REVERSED.**

**STILWELL and SHULER, JJ., concur.**

[2]Jeffords' two remaining issues on appeal allege trial errors which are not likely to come up again upon retrial. For that reason, we decline to address them.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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South Carolina Department of Probation, Parole and Pardon Services,

In Re:

The State,

v.

Kimberly Ann Reynolds,

Defendant.

Of Whom: South Carolina Department of Probation, Parole and Pardon Services is Appellant, and

Kimberly Ann Reynolds is Respondent.

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Appeal From Greenville County
Charles B. Simmons, Special Circuit Court Judge

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Opinion No. 3268
Heard September 14, 2000 - Filed December 11, 2000

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**AFFIRMED IN PART, REVERSED IN PART**

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General Counsel Teresa A. Knox and Legal Counsels Deborah Drucker Deutschmann and Stephanie J. Smart, all

of SC Department of Probation, Parole & Pardon Services, of Columbia, for appellant.
David L. Thomas, of David L. Thomas & Associates, of Greenville, for respondent.

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**PER CURIAM:** The South Carolina Department of Probation, Parole and Pardon Services ("Department") appeals from the denial of its motion to modify the probationary sentence imposed upon Kimberly Ann Reynolds following her guilty plea in General Sessions Court to two counts of Breach of Trust with Fraudulent Intent. The circuit court sentenced Reynolds to five years on each count, suspended upon the service of two years probation, with restitution to be paid directly to her victims. By ordering direct payment of restitution, the court eliminated Department collection fees. On appeal, the Department asserts that the circuit court exceeded its authority by imposing a sentence circumventing the statutorily imposed fee delineated in S.C. Code Ann. §24-21-490(A) (Supp. 1999). We affirm in part and reverse in part.

## FACTS

Reynolds pled guilty in General Sessions Court to two counts of Breach of Trust with Fraudulent Intent, admitting she embezzled $53,686.79 from two previous employers. In mitigation, Reynolds told the court her elderly family members would mortgage their residence to borrow $25,000 for partial restitution if Reynolds was able to make the mortgage payments. Therefore, the loan depended upon Reynolds receiving a probationary sentence so that she could continue to work.

Relying in part upon this representation, the trial court sentenced Reynolds to probation, ordering full restitution. The court ruled that the initial payment of $25,000 was to be paid to the victims in proportional shares within ten days of sentencing as a precondition to probation, with the remainder to be paid directly to the victims during the course of probation.

The Department filed a motion to reconsider the sentence.[1] The trial court denied

[1] As an additional sustaining ground, Reynolds asserts that the Department does not have the right to appeal the order or sentence, pointing out that the Department did not file a motion to intervene. We decline to consider this argument because there is no

the Department's motion. This appeal follows.

## LAW / ANALYSIS

### I.

The Department argues the trial court erred in ordering that restitution be paid directly to the victims because the Department is required by statute to collect and distribute restitution from all offenders under probationary supervision. S.C. Code Ann. § 24-21-490(A) (Supp. 1999). The Department also asserts that the trial court's sentence had the effect of waiving the twenty percent collection fee which it is required to assess on restitution payments. In addition, the Department contends that the court erred in holding that the collection fee was a fine when the court ruled on its motion for reconsideration.

The Department contends that S.C. Code Ann. §24-21-490(A) (Supp. 1999) plainly mandates that the Department collect and distribute all restitution from all offenders on probationary supervision and the trial court lacked authority to order otherwise. The section provides:

> [t]he Department of Probation, Parole, and Pardon Services shall have the responsibility for collecting and distributing restitution on a monthly basis from all offenders under probationary and intensive probationary supervision.

S.C. Code Ann. §24-21-490(A) (Supp. 1999) (emphasis added).

If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation, and the court has no right to look for or impose another meaning. Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 323, 440 S.E.2d 373, 374 (1994).

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citation of authority, and it is so conclusory as to be an abandonment of this issue on appeal. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); Stier, Kent & Canady, Inc. v. Jackson, 317 S.C. 179, 183, 452 S.E.2d 606, 609 (Ct. App. 1994).

We conclude section 24-21-490(A) is unambiguous and conveys a clear and definite meaning. The legislature stated its intention that the Department collect restitution owed by all offenders under probationary and intensive probationary supervision, and then distribute that money to the victims.

We agree with the Department that the circuit court does not have the authority to circumvent the legislature's intent for the Department to manage the payment of restitution from individuals under its supervision. Once an individual is placed on probation, any restitution owed by that individual must be collected and distributed by the Department.

However, the $25,000 Reynolds was ordered to pay was a condition precedent to probation. Reynolds was not under probationary supervision because her placement on probation depended on the payment of the $25,000. Because Reynolds was not yet on probation under the supervision of the Department, section 24-21-490(A) did not apply to the original payment. Therefore, the initial $25,000 Reynolds paid as a condition precedent to probation may be paid directly to her victims. However, the remainder of the restitution ordered by the court must be collected and distributed by the Department in accordance with section 24-21-490(A).

Furthermore, the trial court does not have the authority to waive the collection fee on restitution payments paid to the Department. State v. Shelton, 338 S.C. 350, 352, 526 S.E.2d 515, 516 (Ct. App. 2000). As the Department contends, the statute mandates that the Department assess a collection fee of twenty percent. S.C. Code Ann. §24-21-490(B) (Supp. 1999).

The statute provides:

> Notwithstanding Section 14-17-725, the Department of Probation, Parole, and Pardon Services shall assess a collection fee of twenty percent of each restitution program and deposit this collection fee into a separate account. The monies in this account must not be used until specifically authorized by law. The department shall maintain individual restitution accounts which reflect each transaction and the amount paid, the collection fee, and the unpaid balance of the account. A summary of these accounts must be reported to the Governor's Office, the President of the Senate, the Speaker of the House, the Chairman of the House Judiciary Committee, and the Chairman of the Senate Corrections and

> Penology Committee every six months following the enactment of this section.

S.C. Code Ann. § 24-21-490(B) (Supp. 1999).

In Shelton, the trial court waived the collection fee regarding restitution paid through the Department. On appeal, this Court held that "[t]he General Assembly's use of the term 'shall'" rendered the assessment of the collection fee a compulsory obligation which could not be waived by the trial court in the sentence imposed upon the offender. Shelton, 338 S.C. at 352, 526 S.E.2d at 516.

**II.**

The Department next argues the trial court erred in categorizing the twenty percent collection fee as a fine. The Department contends the collection fee is an authorized fee, not an unauthorized fine.

We agree that the twenty percent collection fee is not a fine. In Shelton, this Court held as much.

> [A]s to the circuit court's holding that the collection fee constitutes an "unauthorized fine" or a "substantial fine," it plainly is not a fine at all. The goal of the collection fee, as evidenced by the statute's language, is not to punish; rather, its goal is the remedial purpose of compensating the department for any loss incurred in administering the restitution center program. The collection fee, therefore, is what the statute says it is, a "collection fee," and its assessment and collection are expressly authorized.

Id. at 352-53, 526 S.E.2d at 516 (footnote omitted).

Therefore, the trial judge erred in ruling that the collection fee "act[ed] as an unauthorized 'fine.'"

## CONCLUSION

Accordingly, Reynolds must pay directly to each victim a proportional share of the initial $25,000 as a condition precedent to probation; however, the remainder of the restitution must be paid through the Department with the appropriate collection fee going to the Department.

For the forgoing reasons, the order of the circuit court is

**AFFIRMED IN PART AND REVERSED IN PART.**

**STILWELL, HOWARD, and SHULER, JJ., concur**.

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

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State of South Carolina,

Appellant,

v.

Michelle A. Rowlands,

Respondent.

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Appeal From Charleston County
Alison Renee Lee, Circuit Court Judge

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Opinion No. 3269
Submitted November 6, 2000 - Filed December 11, 2000

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**AFFIRMED**

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Deputy County Attorney Thomas E. Lynn, of North Charleston, for appellant.

T. Kirk Truslow, of North Myrtle Beach, for respondent.

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**GOOLSBY, J.:** The magistrate's court dismissed a driving under the influence charge against Michelle A. Rowlands on the basis of double jeopardy.

The circuit court affirmed. The State appeals, arguing Rowland's prosecution is not barred by double jeopardy and the circuit court erred in affirming the magistrate's exclusion of evidence that Rowlands refused to take a blood test. We affirm.

## FACTS/PROCEDURAL BACKGROUND

February 9, 1997, Rowlands was arrested and charged with driving under the influence. The State's case against Rowlands came before the magistrate's court October 29, 1998.

Following the court's consideration of pretrial motions, both parties advised the court that they were ready to proceed and the jury reentered the courtroom. The court then instructed both parties to verify that all witnesses were sequestered. At that point, the State discovered the absence of a material witness and informed the court that it had a matter to take up outside the presence of the jury. The court stated it would hear the motion after swearing the jury. Neither party objected.

The court swore the jury and asked them to return to the jury room. The State then moved for a continuance on the ground that a material witness under subpoena was not present. Because the jury had been sworn, the court denied the motion for a continuance but granted the State's alternate motion for a mistrial.

The case was rescheduled for February 11, 1999. Prior to trial, Rowlands moved to dismiss the case arguing the prosecution was barred by double jeopardy. After considering the parties' arguments and reviewing the applicable law, the magistrate granted the motion. The State appealed to the circuit court.

The circuit court affirmed, finding the State should have prevented the jury from being sworn and the absence of a State witness did not constitute a "manifest necessity" for a new trial. The State appeals.

## LAW/ANALYSIS

The Double Jeopardy Clause of the South Carolina Constitution[1] and the Fifth Amendment to the United States Constitution[2] protects all citizens from being twice put in jeopardy of life or liberty. A defendant, may not therefore, be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial.[3] Generally, jeopardy attaches when a jury is sworn and impaneled, unless prior to reaching a verdict, the jury is discharged with the defendant's consent or upon some ground of legal necessity.[4] In the present case, the magistrate's court granted the mistrial based upon the unavailability of a government witness.

Although the decision is vested in the sound discretion of the trial court,[5] a mistrial is proper only where it is dictated by "manifest necessity" or "the public's interest in a fair trial designated to end in just judgment."[6] Whether a mistrial is "manifestly necessary" is a fact specific inquiry.[7] "It is not a

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[1] S.C. Const. art. I, § 12.

[2] U.S. Const. amend. V; see also Benton v. Maryland, 395 U.S. 784, 794 (1969) ("[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and . . . [therefore applies] to the States through the Fourteenth Amendment.").

[3] State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977).

[4] State v. Stephenson, 54 S.C. 234, 32 S.E. 305 (1899); see also State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983) (holding that a mistrial must be dictated by manifest necessity before a plea of double jeopardy will be denied).

[5] State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).

[6] Prince, 279 S.C. at 33, 301 S.E.2d at 472.

[7] Gilliam v. Foster, 75 F.3d 881 (4th Cir. 1996); see also State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (finding that a mistrial was manifestly necessary where the solicitor died during trial); State v. Ravencraft, 222 S.C. 139, 71 S.E.2d 798 (1952) (finding that the trial court did not abuse its discretion in ordering a mistrial where the State introduced improper evidence); Ex parte Prince, 185 S.C. 150, 193 S.E. 429 (1937) (holding that the inability of the

mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge."[8] A trial judge's decision to grant or deny a mistrial will not be reversed on appeal absent an abuse of discretion amounting to an error of law.[9]

The State argues Rowland's February 1999 prosecution does not constitute double jeopardy because the magistrate found that a mistrial was manifestly necessary. We disagree.

In making its ruling, the magistrate's court relied heavily upon Downum v. United States.[10] In Downum, a majority of the United States Supreme Court held that a defendant's second trial was barred by double jeopardy where the first impaneled jury was dismissed prior to reaching a verdict because the prosecutor realized a government witness had failed to appear. Although the Court declined to state that the absence of a witness will never justify a mistrial, the majority opinion made it clear that courts must "resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.'"[11] Adopting language from a ninth circuit decision, the Court ruled that by impaneling the jury without first determining the whereabouts of his or her witnesses, the prosecutor "'took a

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jury to agree upon a verdict is regarded as presenting a case of legal necessity for a mistrial); State v. Rector, 166 S.C. 335, 164 S.E. 865 (1931)(finding that a mistrial was manifestly necessary where a juror admitted prejudice); but see State v. Prince, 279 S.C. 30, 301 S.E.2d 471 (1983) (holding that a mistrial was not dictated by manifest necessity where the jury requested to rehear more than two hours of testimony after deliberating for five and one-half hours).

[8] Gilliam, 75 F.3d at 895.

[9] Council, 335 S.C. at 12, 515 S.E.2d at 514.

[10] 372 U.S. 734 (1963).

[11] Id. at 738 (quoting United States v. Watson, 28 F. Cas. 499, 501 (S.D.N.Y. 1868); see also Arizona v. Washington, 434 U.S. 497, 508 (1978) ("[T]he strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence . . . .").

chance.'"[12] The magistrate in this case ultimately agreed, stating "I think under [Downum] versus United States, 372 U.S. 734, which is a 1963 case, I think its very clear that for me to let this case go forward today would be reversible error."[13]

The State correctly notes that, unlike the instant case, the absent witness in Downum was not under subpoena and the prosecutor knew prior to the trial date that the witness could not be found. Like the Supreme Court in Downum, however, we agree with the ninth circuit's analysis in Cornera v. United States.[14]

> While [the witness'] absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses. It is uniformly held that, in the absence of sufficient evidence to convict, the district attorney cannot by any act of his deprive the defendant of the benefit of the

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[12] Downum, 372 U.S. at 737 (quoting Cornero v. United States, 48 F.2d 69, 71 (9th Cir. 1931)); but see Humphrey v. State, 2000 WL 891344 (Ga. App. 2000) (holding that the trial court did not abuse its discretion in declaring a mistrial where a State witness under subpoena failed to appear).

[13] The State relies primarily upon the following statement made by the magistrate prior to her ruling: "I believe that it was manifest necessity to have that witness there and the mistrial was granted." Although we acknowledge that the statement appears to be inconsistent with a dismissal based upon double jeopardy, we find that the magistrate ultimately based her decision on Downum and concluded that the mistrial was improvidently granted.

[14] 48 F.2d 69.

constitutional provision prohibiting a person from being twice put in jeopardy for the same offense.[15]

The State also argues that unlike the prosecutor in Downum, the prosecutor here moved for a continuance prior to the swearing of the jury. That is not, however, what the prosecutor did in this instance.

Where a motion for a continuance is based upon grounds that exist prior to trial, it must ordinarily be made before the jury is sworn.[16] Although the prosecutor indicated he had a motion to be heard outside the jury's presence, he failed to inform the court of either the nature of or the grounds for the motion. This case is unlike a situation where a party's general objection or blanket request to take up a matter of law is contextually apparent.[17] The State's request to take up a matter outside the jury's presence could not have reasonably alerted the magistrate that the State desired a continuance or needed to present its motion before the jury was sworn. At the very least, the State should have asked the court to delay swearing the jury until after hearing the motion.

Had the State timely requested a continuance, the magistrate would likely have granted the motion. Once, however, the court swore the jury, the State's predicament shifted from the need for a continuance to a failure of proof. Under the circumstances of this case, a mistrial was not dictated by necessity or by the ends of public justice. The mistrial was, therefore, improvidently granted and the magistrate's court correctly dismissed the charges against Rowlands on the ground of double jeopardy.

Because we hold Rowland's prosecution for DUI is barred by double jeopardy, discussion of the State's challenge to the magistrate's evidentiary ruling is unnecessary.

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[15] Id. at 71.

[16] State v. Greuling, 257 S.C. 515, 186 S.E.2d 706 (1972); State v. Leonard, 287 S.C. 462, 339 S.E.2d 159 (Ct. App. 1986), rev'd on other grounds, 292 S.C. 133, 355 S.E.2d 270 (1987).

[17] See Rule 103(a)(1), SCRE.

**AFFIRMED**.

**CURETON and CONNOR, JJ., concur**.