OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

February 12, 2001

ADVANCE SHEET NO. 6

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Burnella Forrester, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25247
Heard March 21, 2000 - Filed February 12, 2001

REVERSED

Senior Assistant Appellate Defender Wanda H. Haile, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor E. L.

Clements, III, of Florence, all for respondent.

CHIEF JUSTICE TOAL: A jury convicted petitioner Burnella Forrester ("Forrester") of trafficking in crack cocaine. She appealed the trial court's admission into evidence of the crack cocaine seized from her purse. The Court of Appeals affirmed the conviction. We granted certiorari to review the decision of the Court of Appeals. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

At the time of Forrester's arrest, Allen Rhodes was a member of the Florence County Police Department's drug and weapon interdiction team. Part of his job entailed supervising the local train station and intercepting suspicious characters as they entered the city. According to his testimony, on November 13, 1995, Officer Rhodes observed Forrester arriving at the Florence train station with her juvenile son. While she was using a pay phone, Forrester apparently noticed Rhodes observing her and appeared startled. With his suspicions aroused, Rhodes followed Forrester and her son to a local Burger King. While the Forresters ate, Rhodes approached them for questioning.

Officer Rhodes testified that he identified himself as a member of the drug and weapons interdiction team. He claimed that after identifying himself to Forrester, she agreed to let him search her luggage, and they left the Burger King to conduct the search. Rhodes testified that while he searched her luggage, Forrester clutched her pocketbook tightly. Because he was suspicious of her actions, Rhodes asked to search her purse. Forrester, without surrendering possession, held it open for him to see inside. Without requesting permission to search the purse, Officer Rhodes took the purse, felt it inside and out, tore out the bottom lining, and discovered the crack cocaine.[1]

Forrester's version of the events is similar, but portrays Rhodes as even

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[1]Officer Rhodes' testified: "And at that point, I removed the bag from her shoulder and did find the area where she had concealed the crack cocaine beneath the liner. And I was trying to find a way to get the crack out, and I ripped – I ripped this pocket open, and the liner of the pocket itself had been ripped out, and so it was beneath the liner of the rest of the purse."

more aggressive in his confrontation with her. Forrester claimed she told Rhodes nothing was in her purse, and she held it open for him to see inside. At that point, she testified Rhodes "snatched" the bag from her shoulder and reached into it, tearing it open and finding the crack cocaine. Forrester's son verified her version of the events. The trial judge ruled Forrester voluntarily consented to the search of her pocketbook. In neither version of the events did Rhodes inform Forrester of her constitutional right to refuse to give consent to search her pocketbook.

At trial, Forrester argued that she had not given consent to search her bag, and thus, that the crack cocaine was discovered in violation of the express right to privacy provision found in S.C. Const. art. I, § 10. She contended our state constitution provides a higher level of protection from government searches than the Fourth Amendment. Forrester argued Officer Rhodes' failure to inform her of her right to refuse consent to a search the purse invalidated the search, and the crack cocaine should have been excluded from evidence at her trial for trafficking in cocaine. The trial judge ruled the crack admissible. The Court of Appeals affirmed the trial court's ruling. *See State v. Forrester*, 334 S.C. 567, 514 S.E.2d 332 (Ct. App. 1999). Forrester has appealed and the main issue before the Court is:

> Does the South Carolina Constitution's prohibition on "unreasonable invasions of privacy" require suspects to be affirmatively informed that they have the right to refuse consent to a search of their possessions?

LAW/ANALYSIS

I. Preservation

The State argues the issue of Forrester's consent to search was not preserved for review. We disagree.

Prior to opening statements, Forrester argued to suppress the discovered cocaine on the grounds that she had not given consent for Officer Rhodes to take her purse and search it. One aspect of her argument was that the explicit right to privacy provision in S.C. Const. art. I, § 10 grants protection above and beyond the Fourth Amendment. She argued our state constitution required the officer to inform her of the right to refuse consent, and that Officer Rhodes

exceeded his authority in the search of her purse. The trial court disagreed. The trial court refused to rule the right to privacy provision required Officer Rhodes to inform Forrester of her right to refuse consent. The case then proceeded directly to trial.

In most cases, "[m]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." *See State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996). However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection. The issue is preserved:

> Because no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling. Thus, . . . [the] motion was not a motion *in limine*. The trial court's ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal.

State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410 (Ct. App. 1995). Here, the witness introducing the cocaine for the state was the initial witness in the trial. No evidence was taken between the trial court's ruling on the admission of the cocaine and its introduction. Since no opportunity existed for the court to change its ruling, Forrester did not need to object a second time to the introduction of the cocaine for the issue to be properly preserved for review. *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997); *see also* Toal, Vafai, & Muckenfuss, *Appellate Practice in South Carolina* 76 (1999).

II. The Right to Privacy and Consensual Searches

A. Relationship Between the Federal and State Constitutions

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures.

> The right of the people to be secure in their persons, houses, papers,

> and effects, against unreasonable searches and seizures, shall not be violated, . . .

U.S. Const. amend. IV. Beginning in the early twentieth century, the United States Supreme Court declared that evidence seized in violation of the Fourth Amendment must be excluded in federal criminal proceedings. *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). Later, the Court applied the Fourth Amendment and its exclusionary rule to the individual states as well. *See Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed.2d. 1081 (1961); *Wolf v. Colorado*, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949). Therefore, all citizens enjoy this federal constitutional protection in every criminal proceeding.

In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures. *See* S.C. Const. art. I. § 10. The relationship between the two constitutions is significant because "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." *State v. Easler*, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997); *see also State v. Austin*, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991). Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights. *Id.* This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling. *See Segura v. Texas*, 826 S.W.2d 178, 182 (Tex. 1992). Thus, this Court can interpret the state protection against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution.

Especially important in this analysis is South Carolina's explicit constitutional right to privacy.[2] In addition to language which mirrors the Fourth Amendment, S.C. Const. art. 1 § 10 contains an express protection of the right to privacy:

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[2]The U.S. Supreme Court bases the federal right to privacy in the protected "penumbra" of specific guarantees of the Bill of Rights. *See Griswold v. Connecticut*, 381 U.S. 479, 487, 85 S. Ct. 1678, 1683, 14 L. Ed. 2d 510 (1965). This analysis has engendered much controversy over the years among constitutional scholars and the Court itself.

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated, . . .

(emphasis added). Initially, even in the absence of a specific right to privacy provision, this Court could interpret our state constitution as providing more protection than the federal counterpart. However, by articulating a specific prohibition against "unreasonable invasions of privacy," the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence.

Ten states have express right to privacy provisions in their constitutions.[3] South Carolina and five other states have their right to privacy provision included in the section prohibiting unreasonable search and seizures.[4] South Carolina and the other states with a right to privacy provision imbedded in the search and seizure provision of their constitutions have held such a provision creates a distinct privacy right that applies both within and outside the search and seizure context. *See, e.g., Singleton v. State,* 313 S.C. 75, 437 S.E.2d 53 (1993)(finding the state constitutional right to privacy prevented the forced medication of a death row inmate in preparation of execution). Furthermore, many of the states that have adopted explicit state constitutional right to privacy provisions have read their constitutions as applying protection above and beyond the protection provided by the federal Constitution. *See, e.g., State v. Church*, 538 So.2d 993 (La. 1989)(disallowing a police roadblock under the state constitution's right to privacy even though it did not violate the Fourth Amendment).

The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment. The issue in the case before the Court is whether this

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[3]Alaska Const. art. I, § 22; Ariz. Const. art. II, § 8; Cal. Const. art. I, § 1; Fla. Const. art. I, § 23; Hawaii Const. art. I, § 6; Ill. Const. art. I, § 6; La. Const. art. I, § 5; Mont. Const. art. II, § 10; S.C. Const. art. I, § 10; Wash. Const. art. I, § 7

[4]They are Hawaii, Illinois, Louisiana, Washington, and Arizona.

privacy provision goes so far as to require informed consent to government searches.

B. Informed Consent

Forrester argues our state's right to privacy provision should require police officers to inform citizens that they have the right to refuse consensual searches and without such admonition, a search is involuntary. We disagree.

This Court has previously rejected the argument that police officers must inform a suspect of the right to refuse consent prior to a search. *See State v. Wallace*, 269 S.C. 547, 238 S.E.2d 675 (1977). In *Wallace*, we applied a "totality of the circumstances" analysis for determining whether a search was voluntary. Therefore, like the federal standard, our state standard does not require a law enforcement officer conducting a search to inform the defendant of his right to refuse consent. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed.2d 854 (1973). The lack of such warning is only one factor to be considered in determining the voluntary nature of the consent. *Wallace*, at 552, 238 S.E.2d at 677. Petitioner's position would make consent to search dependant on a *Miranda*-like warning given prior to the search. We reject such a requirement.

Eight of the nine other states that have an explicit right to privacy provision contained in their constitution have rejected Forrester's argument that suspects must be informed of their right to refuse consent to search.[5]

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[5]*Gray v. State*, 596 P.2d 1154, 1158 (Alaska 1979)("The person giving the consent need not be advised of the right to refuse to allow a search prior to executing a valid consent to search, although the subject's awareness of the right to refuse is a factor in the determination of the voluntariness of the consent."); *State v. Acinelli*, 952 P.2d 304, 308 (Ariz. 1998)("Whether a defendant knew he had a right to refuse the request to search is but one factor to be taken into account."); *People v. Mills*, 210 Cal. Rptr. 669, 672, 164 Cal. App. 3d 652, 657 (1985)("Advisement by a law enforcement officer that one has the right to refuse a consent to search is unnecessary to a valid consent."); *Sims v. State*, 743 So.2d 97, 98 (Fla. 1999)("Although knowledge of one's right to refuse a search without a warrant is a factor to be considered in determining whether the consent obtained was freely and voluntarily given, there is no per se requirement that a defendant must be informed of such right."); *State v. Kearns*, 867 P.2d 903, 909

Washington's Supreme Court has issued a limited ruling that officers must inform home owners of the right to refuse consent when the government attempts to search their home without a warrant. *See Washington v. Ferrier*, 960 P.2d 927 (Wash. 1998). However, Washington's constitutional privacy provision is unique in that it specifically focuses on protecting the home.[6] Furthermore, Washington courts have not required informed consent in other governmental search situations. *See State v. Hastings*, 830 P.2d 658, 661 (Wash. 1992)("Consent must be voluntary, but this does not mean that it must be made with full knowledge of the right to refuse the entry or search.").

As noted by the Court of Appeals, the drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches. *See* Committee to Make a Study of the Constitution of South Carolina, 1895, Minutes of Committee Meeting 6 (Sept. 15, 1967). According to their minutes, "The committee agreed that [the search and seizure provision] should remain, but that is [sic] should be revised to take care of the invasion of privacy through modern electronic devices." *Id.* However, the committee also recognized that the provision would have an impact beyond just the area of electronic surveillance. As Committee Member Sinkler stated, "I think this is an area that, really, should develop and should not be confined to the intent of those who sit around this table." *Id.* at 6 (Oct. 6, 1967).

Furthermore, the committee was aware they were drafting a provision

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(Haw. 1994)("The police are not required to inform the person to be searched of his or her right to refuse consent, but their failure to so inform is a factor to be considered in determining whether consent to a search was freely and voluntarily given."); *People v. Leon*, 723 N.E.2d 1206, 1214 (Ill. 2000)("Further, ignorance of the right to refuse consent does not vitiate the voluntariness of the consent, but is merely one factor to consider when examining the totality of the circumstances."); *State v. Overton*, 596 So.2d 1344, 1353 (La. 1992)("While the defendant was not verbally informed of his right to refuse to consent to this search, such a warning is not required."); *State v. Steinmetz*, 961 P.2d 95, 100 (Mont. 1998)("However, '[t]he police do not have to warn a person of the right to withhold consent.'").

[6]"No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7.

that operated separately from the Fourth Amendment.[7] During their discussions, the committee characterized the then prevailing United States Supreme Court standard as a liberal approach to the protection against search and seizure. *Id.* at 5 (Oct. 6, 1967). One committee member noted that "It is possible, too, that there will be a swing back from this liberal interpretation." *Id.* at 7 (Oct. 6, 1967).

Forrester's "prior admonition rule" would subsume the "totality of the circumstances" test followed by this Court in *State v. Wallace,* 269 S.C. 547, 238 S.E.2d 675 (1977). Forrester also fails to cite any authority from South Carolina or any other jurisdiction adopting the rule she advocates. Except for the narrow Washington state exception for warrantless searches of the home, no precedential support for Forrester's position can be found.[8] In conclusion, while our state constitution may provide a higher level of protection in the search and seizure context, it does not go so far as to require informed consent prior to government searches.

C. Forrester's Consent[9]

Although our state constitution did not require Officer Rhodes to inform Forrester of her right to refuse giving consent to search her purse, Officer

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[7]It is important to note that committee minutes will not be controlling of the intent behind, or interpretation of, our state constitution. *See Greenville Baseball, Inc. v. Bearden,* 200 S.C. 363, 371, 20 S.E.2d 813, 817 (1942); *Tallevast v. Kaminski*, 146 S.C. 225, 143 S.E. 796 (1928). This fact was even noted in Committee Member Sinkler's observation that their discussions would not control any subsequent interpretation. We include these discussions for their historical context and interest.

[8]The Court of Appeals partially relied on *Illinois v. Brownlee,* 687 N.E.2d 1174 (Ill. App. Ct. 1997) in rejecting Forrester's argument. The Illinois Supreme Court has overruled *Brownlee,* although on other grounds. *See Illinois v. Brownlee,* 713 N.E.2d 556 (Ill. 1999).

[9]The State's exclusive argument has been that the search was properly conducted pursuant to Forrester's consent. As such, the State has not argued Officer Rhodes had justification to search Forrester pursuant to *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968) or any other theory.

Rhodes exceeded the scope of Forrester's consent when he proceeded beyond the visual inspection of the purse granted by Forrester to an intense physical examination of the purse. As a result, the crack cocaine should have been excluded at trial.

Under our state constitution, suspects are free to limit the scope of the searches to which they consent. When relying on the consent of a suspect, a police officer's search must not exceed the scope of the consent granted or the search becomes unreasonable. In a situation where a citizen's response to an officer's request to "look into" a container, such as her purse, is merely offering the officer a restricted view of the inside of the container while retaining possession, a reasonable police officer would not assume that this guarded action also granted permission to take possession of, search throughly, and even partially destroy the container itself. *Cf.*, *State v. Garcia*, 986 P.2d 491, 494 (N.M. 1999)("Although an individual consenting to a vehicle search should expect that search to be thorough, he need not anticipate that the search will involve the destruction of his vehicle, its parts or contents."). The current situation could be very different had Forrester surrendered possession of her purse to Officer Rhodes without placing any restriction on the scope of the search. However, even in a situation where they have received a general and unqualified consent, "the police do not have carte blanche to do whatever they please." 3 Wayne R. LaFave, *Search and Seizure* § 8.1(c), at 612 (3d ed. 1996).

Forrester's response to the request to search her purse was not to surrender possession of the purse for an unrestricted search, but instead she provided a limited view of the purse's interior, obviously with the hope that Officer Rhodes' suspicions would be satisfied and she would escape detection. The difference between her reaction and the handing over possession of the purse or granting verbal permission to search her purse is obvious. If this Court held that Forrester's consent, clearly limited by her actions, opened her purse up to the intrusive inspection executed by Officer Rhodes, we would eviscerate the distinction between limited and unlimited consent in police searches. Such a result would ignore a citizen's right under our constitution to limit the scope of their consent in government searches.

CONCLUSION

Based on the foregoing, we **REVERSE** the decision of the Court of Appeals and find the crack cocaine should have been excluded at trial.

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

JUSTICE BURNETT (concurring and dissenting): I agree with the majority's holding in II.B that the right to privacy contained in the South Carolina Constitution does not require police officers to inform citizens they have a right to refuse consensual searches. I dissent from the reversal of petitioner's conviction on a ground which has never been raised to nor ruled upon by any court.

As noted by the Court of Appeals and petitioner herself, the sole issue on appeal is whether the South Carolina Constitution's express protection against unreasonable invasions of privacy mandates that citizens be affirmatively informed of their right to refuse consent to a search. See S.C. Const. art. I, § 10. The majority characterizes this as the "main" issue, when in fact it is the only issue ever argued by petitioner. We all agree the South Carolina Constitution requires no such prophylactic warning. However, the majority goes beyond the issue raised to hold the search of petitioner's pocketbook exceeded the scope of her consent. I dissent from this holding.

Following an in limine hearing, the trial court denied petitioner's motion to suppress the crack cocaine found in her purse, expressly ruling the search was consensual. That ruling was not appealed and is therefore the law of the case. ML-Lee Acquisition Fund v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (an unchallenged ruling, right or wrong, is the law of the case). Petitioner has never argued, below or to this Court, that the search of her pocketbook exceeded the scope of her consent. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review); see also Rule 207(b)(1)(B), SCACR (no point will be considered which is not set forth in the statement of the issues on appeal).

Because of the majority's sua sponte disposition of this issue, the State has been denied the opportunity to argue a contrary position. The majority raises for petitioner an issue never argued by her at any point, gives the State no opportunity to refute the argument, and *expressly refuses* to consider whether

the search was justified under any other theory, such as Terry v. Ohio,[10] which, contrary to the majority's assertion, the State argued as an additional sustaining ground. (See footnote 9). The majority's action ignores long-settled preservation rules and severely prejudices the State. See I'On v. Town of Mt. Pleasant, Op. No. 25048 (S.C. Sup. Ct. filed Jan. 17, 2000) (Shearouse Adv. Sh. No. 2 at 1). In I'On, we explained an appellate court may affirm for any reason appearing in the record, but may reverse only for a reason raised to and ruled upon by the trial court and argued on appeal.

Finally, I also disagree with dicta in the majority opinion concerning the significance of the right to privacy provision in the South Carolina Constitution. Article I, section 10 states: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated." S.C. Const. art. I, § 10. I disagree with the majority's assertion this language "favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." On the contrary, I believe our constitution's protection against unreasonable invasions of privacy operates separately from the search and seizure provisions and provides distinct protection. See Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993) (state constitutional right of privacy would be violated by forced medication of inmate to facilitate execution). Like the protections offered by the Fourth Amendment, the privacy protections in the state constitution are textually based on reasonableness. See U.S. Const. amend. IV; S.C. Const. art. I, § 10. I would not interpret Article I, section 10 to offer greater protection in the search and seizure context than that offered by the Fourth Amendment's "totality of the circumstances" test. See State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977); Schneckloth v. Bustamonte, 412 U.S. 218

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[10]392 U.S. 1 (1968) (officer may briefly detain and question a suspect upon reasonable suspicion that the person is involved in criminal activity and may frisk the suspect upon reasonable suspicion of danger). The officer here testified he initially asked permission to search petitioner's purse because of his concern, based on the way she was clutching it, that the purse might contain a weapon.

(1973).

I would affirm petitioner's conviction for trafficking in crack cocaine because the only argument made for reversal is without merit.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jeffery Higgenbottom, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Aiken County
Gary E. Clary, Circuit Court Judge

Opinion No. 25248
Heard December 6, 2000 - Filed February 12, 2001

REVERSED

Assistant Appellate Defender Aileen P. Clare, of the South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Assistant Deputy Attorney General G. Robert Deloach, III, Assistant Attorney General Melody J. Brown, all of Columbia,

and Solicitor Barbara R. Morgan, of Aiken, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in State v. Higgenbottom, 337 S.C. 637, 525 S.E.2d 250 (Ct. App. 1999). We reverse.

FACTS

Petitioner entered an Alford[1] plea to possession of cocaine, first offense.[2] The trial court sentenced him to two years imprisonment and a $5,000 fine, suspended upon the service of thirty days imprisonment or payment of $750, and 18 months probation.

The next day, petitioner moved for reconsideration of the probationary sentence. As he had at the plea, petitioner requested twelve months probation. The following colloquy then occurred:

> Trial Court: Mr. Landry, **Mr. Higgenbottom is lucky. Maybe I ought to reconsider his sentence completely.**
>
> Mr. Landry [defense counsel]: I discussed that with him before I came.
>
> The Court: **It takes a lot of courage for a lawyer to come back to ask for a reconsideration like that.** Since this term of court has not expired **and since he is asking for a**

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[1] North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

[2] The possession charge arose out of petitioner's arrest for disorderly conduct. According to the State, while petitioner was being booked, police asked petitioner to empty his pockets. Petitioner then pulled a spoon out of his pocket, told the police that he might as well get one last piece of it, and put the spoon in and out of his mouth. The police seized the spoon, and it tested positive for traces of cocaine. According to petitioner, he picked up the spoon while cleaning the parking lot of the tire shop where he works. He placed the spoon in his pocket when a customer pulled up and then forgot about it.

> **reconsideration maybe I ought to just reconsider it on my own and extend his sentence . . . have his [sic] picked up to do jail time.**
>
> Mr. Landry: I understand that, Your Honor. I discussed it with him before he asked for this.
>
> The Court: **He just about talked himself into jail as it was.** No, sir; I'm going to give him twenty-four months probation. **We're going to see if he can do probation.** Maybe he'll be cleaning up his lot again. **Since you made the motion to reconsider, I'm denying that motion and I'm reconsidering my sentence and extending his probation to twenty-four months.**

(Emphasis added.)

Petitioner appealed, arguing that the harsher sentence constituted a due process violation because the trial court increased his sentence in response to his motion to reconsider. A divided Court of Appeals affirmed. Higgenbottom, supra.[3]

ISSUE

> Did the Court of Appeals err in finding no due process violation where the trial court, without any explanation or new evidence, increased petitioner's sentence on a motion to reconsider?

DISCUSSION

Petitioner argues that his due process rights were violated when, in response to his motion for reconsideration and without any reasons on the

[3]There was no majority opinion on the merits. Judge Anderson wrote an opinion affirming on the merits which we will refer to as the "lead opinion;" Judge Goolsby concurred in result only, finding the issue procedurally barred; Judge Connor dissented.

record, the trial court increased his probationary sentence from 18 to 24 months. We agree.[4]

It is a due process violation to punish a person for exercising a protected statutory or constitutional right. State v. Fletcher, 322 S.C. 256, 471 S.E.2d 702, 704 (Ct. App. 1996) (citing United States v. Goodwin, 457 U.S. 368, 372, 102 S.Ct. 2485, 2488, 73 L.Ed.2d 74 (1982)). In the landmark opinion of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the Court held that the Due Process Clause of the Fourteenth Amendment prevented a trial court from penalizing a defendant for choosing to exercise his right to appeal. The Pearce decision involved a defendant who successfully attacked his conviction on appeal and then upon conviction at the retrial, a harsher sentence was imposed. The Court stated that "[d]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Id. at 725, 89 S.Ct. at 2080, 23 L.Ed.2d at 669.

The Pearce Court therefore held that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear . . . so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." Id. at 726, 89 S.Ct. at 2081, 23 L.Ed.2d at 670. This rule became known as the Pearce presumption. Thus, without objective evidence of a proper motivation to increase the sentence, the Pearce presumption applies to find a due process violation.

As we noted in State v. Hilton, 291 S.C. 276, 353 S.E.2d 282, cert. denied, 484 U.S. 832, 108 S.Ct. 106, 98 L.Ed.2d 66 (1987), the Supreme Court has restricted the Pearce rule in subsequent cases. For instance, the Pearce presumption does not apply when the harsher sentence is imposed by the higher court in a two-tiered trial system. Colten v. Kentucky, 407 U.S. 104, 92 S.Ct.

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[4]Initially, we note that petitioner's argument is not procedurally barred for appellate review. Although the State contends that petitioner should have objected at the motion hearing in order to preserve this issue, we agree with the lead opinion's analysis and find that it would have been futile for petitioner to have raised this issue after the trial court had just increased his sentence. See Higgenbottom, 337 S.C. at 640, 525 S.E.2d at 251 (if petitioner would have objected to his sentence, he would have placed himself in a "perilous posture").

1953, 32 L.Ed.2d 584 (1972). The Court in Colten noted that the higher court which conducted Colten's trial and imposed the final sentence "was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; **and it is not the court that is asked to do over what it thought it had already done correctly**." Id. at 116-17, 92 S.Ct. at 1960, 32 L.Ed.2d at 593 (emphasis added).

In several other cases, the Supreme Court has held that the Pearce presumption was inapplicable. E.g., Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) (the Pearce presumption does not apply when a second jury on retrial imposes a harsher sentence than the first jury); Texas v. McCullough, 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986) (the Pearce presumption does not apply when the first sentence was imposed by a jury and the second, harsher sentence was imposed by a judge); Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) (the Pearce presumption does not apply when a defendant is sentenced to a harsher sentence upon retrial after successfully appealing from a guilty plea). Moreover, we held in Hilton that when the second sentencing judge is someone other than the original trial judge, the Pearce presumption does not apply. Hilton, 291 S.C. at 279, 353 S.E.2d at 284.

Nonetheless, we disagree with the lead opinion's conclusion in Higgenbottom that the Pearce rule has been "emasculated" by these subsequent cases. Higgenbottom, 337 S.C. at 643, 525 S.E.2d at 253. Indeed, the Supreme Court has continued to apply the Pearce presumption where the circumstances warrant its application. See Wasman v. United States, 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).[5] Furthermore, in Alabama v. Smith, the most recent Supreme Court case to address Pearce, the Court stated that the Pearce presumption remains applicable under circumstances "in which there is a

[5]The defendant in Wasman received a greater sentence, by the same judge, at retrial after a successful appeal. The Court stated plainly that these circumstances were "sufficient to engage the presumption of Pearce." Wasman, 468 U.S. at 569, 104 S.Ct. at 3223, 82 L.Ed.2d at 433. The Court did not, however, find a due process violation. Instead, the Court held that the presumption had been rebutted because the trial judge stated, on the record, that he increased the sentence because the defendant at retrial had two prior convictions, whereas at the original trial, he had only one prior conviction.

'reasonable likelihood' . . . that the increase of sentence is the product of actual vindictiveness on the part of the sentencing authority." Alabama v. Smith, 490 U.S. at 799, 109 S.Ct. at 2205, 104 L.Ed.2d at 873 (citation omitted).

Additionally, in situations similar to the instant case, two other jurisdictions have applied the Pearce presumption. As discussed in Judge Connor's dissent, the Court of Appeal of Louisiana in State v. Hidalgo, 684 So. 2d 26, 31 (La. Ct. App. 1996), found a due process violation because the trial court "failed to provide adequate justification on the record for its decision to increase the defendant's sentence." In Commonwealth v. Serrano, 727 A.2d 1168 (Pa. Super. 1999), the Superior Court of Pennsylvania found that an increase in sentence on a motion to modify a sentence was subject to the Pearce presumption. Id. at 1170. Because the trial court had the "same facts and information" at the motion to modify as it had at the time of the original sentence, and there were "no objective findings from which the sentencing increase [could] be explained," the Serrano court found the presumption was not rebutted. Id.

With the principles of Pearce in mind, we turn to the instant case. One day after the guilty plea, petitioner exercised his right to make a motion for reconsideration of his probationary sentence. See, e.g., State v. Smith, 276 S.C. 494, 497, 280 S.E.2d 200, 201 (1981) (a trial court has the authority to alter, amend or modify a sentence imposed by him within the same term of court as long as the State is afforded due notice); see also Rule 29, SCRCrimP (post trial motions shall be made within 10 days after the imposition of the sentence). The motion was brought before the same trial court which had imposed the sentence, and the trial court had the same information before it as it had the day before. Effectively, therefore, petitioner asked the trial court "to do over what it thought it had already done correctly." Colten, 407 U.S. at 117, 92 S.Ct. at 1960, 32 L.Ed.2d at 593. The trial court denied petitioner's request to reduce the sentence, and instead, increased the probationary sentence by six months. Under these circumstances, the Pearce presumption applies. See Alabama v. Smith, supra; Wasman, supra.

Because the trial court failed to put on the record objective reasons for the harsher sentence, the presumption cannot be rebutted. Accord Serrano, supra; Hidalgo, supra. Accordingly, we reverse the Court of Appeals, vacate the increased sentence, and reinstate petitioner's original 18-month probation sentence.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

William David Douglass, a minor under the age of fourteen (14) years, by his Next Friend, Herbert W. Louthian, Esquire, Petitioner,

v.

Daniel F. Boyce, Yvonne Boyce, Robert Charles Brown, Donna Seegars Givens, Sandra Dooley Parker, Jonas and Wiggins, Attorneys at Law, and Stephen R. Fitzer, as substitute Personal Representative of the Estate of Christopher Daniel Boyce, deceased, Defendants,

Of whom
Robert Charles Brown, Donna Seegars Givens, Sandra Dooley Parker, and Jonas and Wiggins, Attorneys at Law are Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
L. Henry McKellar, Circuit Court Judge

Opinion No. 25249
Heard January 9, 2001 - Filed February 12, 2001

AFFIRMED

Robert L. Hallman, of Columbia, for petitioner.

Susan Taylor Wall and Mary Legare Hughes, both of Nexsen, Pruet, Jacobs, Pollard & Robinson, of Charleston, for respondents Brown and Givens.

Joel W. Collins, Jr., and Rebecca M. Monroy, both of Collins & Lacy, P.C.; and Arthur K. Aiken, of Hammer, Hammer, Carrigg & Potterfield, all of Columbia, for respondent Parker.

Warren C. Powell, Jr., of Bruner, Powell, Robbins, Wall & Mullins, of Columbia, for respondent Jonas and Wiggins, Attorneys at Law.

JUSTICE MOORE: We granted a writ of certiorari to review

the Court of Appeals' decision[1] affirming dismissal of the various causes of action against respondents. We affirm.

FACTS

Seventeen-year-old Christopher Boyce was killed in an automobile accident on April 27, 1991. His parents, defendants Daniel and Yvonne Boyce, were appointed personal representatives of his estate and pursued a wrongful death action which they eventually settled. The Boyces were the sole beneficiaries of the wrongful death action.

Petitioner (Child) commenced this action in 1993 against the Boyces alleging they breached their fiduciary duty to him by failing to include him as a statutory beneficiary in the wrongful death action. Child alleged he was Christopher's biological son and was therefore entitled to recover in the wrongful death action as the sole statutory beneficiary.[2]

Child was born less than a year before Christopher's death to Melodye Shampine who was married at the time to Robert Douglass. Robert Douglass was listed on Child's birth certificate as his father. Melodye and Robert divorced shortly after Child's birth.

In April 1997, Child amended his complaint in the action against the Boyces to include a negligence cause of action against respondent Parker and respondent Jonas and Wiggins (Divorce Attorneys) who represented Melodye and Robert in their divorce proceeding. Child also alleged causes of action against respondents Brown and Givens (Tort Attorneys) for conspiracy and intentional interference with inheritance rights arising from their representation of the Boyces in the wrongful death action.

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[1]336 S.C. 318, 519 S.E.2d 802 (Ct. App. 1999).

[2]Under S.C. Code Ann. § 15-51-20 (Supp. 1999), the beneficiaries in a wrongful death action are the spouse and children of the decedent, and if there is no spouse or child, then the parents of the decedent.

The trial judge dismissed with prejudice the causes of action against all the attorneys essentially ruling they had no duty to Child. The Court of Appeals affirmed.

ISSUES

1. Did Divorce Attorneys owe Child a duty of care under S.C. Code Ann. § 20-7-952(E) (1985) such that they could be held liable for professional negligence?

2. Did Tort Attorneys owe Child a duty of care such that they could be held liable for conspiracy and intentional interference with inheritance?

DISCUSSION

1. Divorce Attorneys

Child's amended complaint alleged Divorce Attorneys were professionally negligent in failing to follow procedural requirements to establish Child's paternity in the Douglass divorce proceedings when Melodye and Robert had acknowledged he was not a child of their marriage. Child asserted Divorce Attorneys owed him a duty of care under S.C. Code Ann. § 20-7-952(E) (1985) which provides:

> Whenever an action threatens to make a child illegitimate, the presumed legal father and the putative natural father must be made parties respondents to the action. A child under the age of eighteen years must be represented by a guardian ad litem appointed by the court. Neither the mother nor the presumed or putative father of the child may represent him as guardian ad litem.

The trial judge found this section did not apply to the divorce proceeding in

this case and the Court of Appeals affirmed. We agree.

Section 20-7-952(E) is part of subarticle 4, article 9, of the Children's Code which is entitled "Determination of Paternity." As specified in subsection (A) of § 20-7-952, "the purpose of this subarticle is to establish a procedure to aid in the determination of the paternity of an individual." Subsection (C) provides which parties may bring "an action to establish the paternity of an individual."

Reading the statute as a whole, we find subsection (E) is intended to apply in actions brought for the purpose of determining paternity when there is a presumed legal father because the mother was married at the time of the child's birth. Section 20-7-952(E) does not apply to the divorce proceeding between Melodye and Robert because that proceeding could not have the effect of making Child illegitimate. Absent a paternity action, Child remains the presumed legitimate child of Robert. *See* Chandler v. Merrell, 291 S.C. 224, 353 S.E.2d 133 (1987). We conclude the Court of Appeals properly affirmed dismissal of this cause of action because Divorce Attorneys owed Child no duty under § 20-7-952(E).[3]

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[3]The Court of Appeals also held Child had failed to appeal the trial judge's alternative ground for dismissal and therefore this ruling was the law of the case. *See* In re: Morrison, 321 S.C. 370, 468 S.E.2d 651 (1996) (unappealed ruling is law of the case). In addition to holding § 20-7-952(E) did not apply, the trial judge ruled in the alternative that Divorce Attorneys owed no duty under § 20-7-952(E) pursuant to the rule set forth in Rayfield v. South Carolina Dept. of Corrections, 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988). The rule discussed in Rayfield, however, is the public duty rule which by definition applies only to determine whether a government entity can be held liable for breach of a statutory duty. *See* Steinke v. South Carolina Dept. of Labor, Licensing, and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999). While the Court of Appeals' holding regarding the law of the case is procedurally correct, the public duty rule does not apply in this case.

2. Tort Attorneys

Child's amended complaint alleged Tort Attorneys knew Child was Christopher's biological son and they intentionally interfered with his inheritance rights by failing to notify him of the wrongful death action. The trial judge granted Tort Attorneys' motion to dismiss on the ground they were immune from liability to third parties for injuries allegedly arising from the performance of their professional duties under Gaar v. North Myrtle Beach Realty, Inc., 287 S.C. 525, 339 S.E.2d 887 (Ct. App. 1986), and Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). The Court of Appeals affirmed holding South Carolina has never recognized a cause of action for intentional interference with inheritance rights and, in any event, Tort Attorneys had no duty to Child.

We have not adopted the tort of intentional interference with inheritance,[4] however, we need not decide whether to recognize this cause of action here since we find Tort Attorneys owed Child no duty as a matter of law. As noted by both the trial judge and the Court of Appeals, an attorney is

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[4]We have adopted the closely analogous tort of intentional interference with prospective contractual relations. Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990); *see also* Allen v. Hall, 974 P.2d 199 (Or.1999) (intentional interference with inheritance closely analogous to intentional interference with economic relations). Most jurisdictions adopting the tort of intentional interference with inheritance have required the plaintiff to prove the following elements: (1) the existence of an expectancy (2) an intentional interference with that expectancy through tortious conduct (3) a reasonable certainty that the expectancy would have been realized but for the interference and (4) damages. *See, e.g.*, Nemeth v. Banhalmi, 425 N.E.2d 1187 (Ill. Ct. App. 1981); Morrill v. Morrill, 712 A.2d 1039 (Me. 1998); Doughtery v. Morris, 871 P.2d 380 (N.M. Ct. App. 1994); Firestone v. Galbreath, 616 N.E.2d 202 (Ohio 1993); Wickert v. Burggraf, 570 N.W.2d 889 (Wis. 1997); *see also* Restatement (Second) of Torts § 774B (1979).

immune from liability to third persons arising from the attorney's professional activities on behalf and with the knowledge of the client, absent an independent duty to the third party. Stiles v. Onorato, *supra*.[5] Accordingly, in this case, the question is whether an attorney representing the personal representative in a wrongful death action has an independent duty to the statutory beneficiaries.[6]

Under our Probate Code, S.C. Code Ann. § 62-1-109 (Supp. 1999), the legislature has provided the following:

> Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary[7] shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

This statute expressly negates any duty to persons interested in "other fiduciary property," which includes the proceeds of a wrongful death action since such an action is brought by a fiduciary. Further, the legislature has expressed its clear intent that this statute be applied retroactively. *See* South

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[5]There is no allegation the attorneys were acting for their own personal interests, another exception to the immunity rule. Stiles, *supra*.

[6]*See* S.C. Code Ann. § 15-51-20 (Supp. 2000) requiring that an action for wrongful death "shall be for the benefit of" the enumerated statutory beneficiaries.

[7]A "fiduciary" is defined to include a personal representative under § 62-1-201(13) (1987).

Carolina Dept. of Revenue v. Rosemary Coin Machines, Inc., 339 S.C. 25, 528 S.E.2d 416 (2000) (statute will not be given retroactive effect absent specific provision in the enactment or clear legislative intent). Accordingly, § 62-1-109, which was enacted in 1994, applies in this case to Tort Attorneys' employment by the Boyces which commenced at some time before that date.[8]

In reaching this conclusion, we emphasize that attorneys must conduct themselves ethically in all matters. The fact the legislature has seen fit to limit an attorney's responsibility to third parties when representing a fiduciary does not diminish this overriding ethical obligation.

We hold under § 62-1-109 the Court of Appeals properly affirmed the dismissal of the causes of action against Tort Attorneys because they owed Child no duty in connection with their representation of the Boyces as personal representatives of Christopher's estate.

AFFIRMED.

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

[8]The record indicates only that the wrongful death action brought by Tort Attorneys was settled in 1993.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of J. Allen Lewis, Jr., Respondent.

Opinion No. 25250
Submitted January 11, 2001- Filed February 12, 2001

DISBARRED

Henry B. Richardson, of Columbia, for the Office of Disciplinary Counsel.

John Delgado, of Columbia, for respondent.

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 disbarment.[1] We accept the

[1]Respondent was placed on interim suspension by order of this Court dated February 9, 2000. In the Matter of Lewis, 339 S.C. 6, 528 S.E.2d 79 (2000).

agreement for disbarment. The facts in the agreement are as follows.

Facts

Disciplinary Counsel directed inquiries to respondent related to reported irregularities in his operating and trust accounts which raised concerns about check kiting and his compliance with financial record keeping requirements. Respondent addressed correspondence to Disciplinary Counsel denying those problems and assuring Disciplinary Counsel that client funds were never in jeopardy. Respondent had, in fact, engaged in check kiting and other improper banking practices. Client funds were in jeopardy and, thus, respondent's representations to Disciplinary Counsel to the contrary were false. As a result of respondent's improper banking practices, a bank incurred a loss of $19,368, which respondent has repaid in full. This loss was the result of misappropriations by respondent and respondent's irregular and misleading banking practices contrary to banking regulations and the requirements of Rule 417, SCACR.

Respondent served as local counsel for a large corporation and was entrusted with $1,000,000 of the corporation's funds to be used for payment of mechanics' liens. Respondent misappropriated $250,000 of the corporation's funds. When the misappropriation was discovered by the corporation, respondent wrote a letter to the corporation in which he apologized for his actions and promised to repay the funds. Respondent repaid the funds to the corporation with interest. However, respondent misappropriated some of the funds used to repay the corporation from the trust accounts of other clients. Respondent continued to misappropriate funds from his clients after repaying the corporation.

In fifty-one instances where respondent represented clients in personal injury claims, respondent misappropriated all or a significant portion of the settlement proceeds. In the majority of those cases, respondent signed his clients' names to settlement documents and checks without the

knowledge or consent of the client. Respondent transmitted the settlement documents to the insurance carriers or their counsel and then negotiated the settlement check for respondent's own uses. In many instances, respondent misrepresented to his clients that their cases were still pending when, in fact, respondent had settled their case and misappropriated their settlement funds without their knowledge or consent. As a result of respondent's actions, $368,000 in client funds misappropriated by respondent remain outstanding and unpaid to the clients involved.

In two instances, respondent's clients discovered that respondent had misappropriated funds. When respondent was confronted by one client, respondent repaid the entire amount misappropriated and, in an effort to conceal his misconduct, waived all attorney's fees in connection with the matter and personally paid the client's medical expenses. When respondent was confronted regarding misappropriation of another client's funds, respondent agreed in writing to pay the client $100,000, an amount greatly in excess of the amount misappropriated, in an effort to conceal his misconduct. Respondent repaid that client the amount misappropriated and made some payments toward the additional amount he had agreed to pay.

Respondent's acts of misappropriation were part of an on-going scheme. In addition to the previous instances of misconduct, there were other instances of misappropriation committed by respondent which were repaid prior to becoming known to the Office of Disciplinary Counsel. Respondent failed to keep adequate records and, when records were kept, the information contained in them was false.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation); Rule 1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are pursued; a lawyer shall abide by a client's decision whether to accept an offer of settlement of a

matter); Rule 1.4 (a lawyer shall keep a client reasonably informed about the status of a matter and shall explain a matter to the extent necessary to permit a client to make informed decisions regarding representation); Rule 1.15 (a lawyer shall keep a client's property separate from the lawyer's own property, shall keep records of such account funds, and shall promptly deliver to a client or third person funds that the client or person was entitled to receive, and shall render a full accounting); Rule 8.1(a) (in connection with a disciplinary matter, a lawyer shall not knowingly make a false statement of material fact); Rule 8.1(b) (in connection with a disciplinary matter, a lawyer shall not fail to disclose a fact necessary to correct a misapprehension, and shall not knowingly fail to respond to a lawful demand for information); Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional conduct); Rule 8.4(b) (it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); Rule 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving moral turpitude); and Rule 8.4(d) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Respondent has also violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (violating the Rules of Professional Conduct); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice or bringing the legal profession into disrepute); and Rule 7(a)(6) (violating the oath of office).

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

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent. 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, and shall also surrender his Certificate of

Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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 STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Gregory
Lance Morris, Respondent.

Opinion No. 25251
Submitted January 11, 2001 - Filed February 12, 2001

DISBARRED

Henry B. Richardson, Jr., Susan M. Johnston, and Barbara M. Seymour, all of Columbia, for Office of Disciplinary Counsel.

James H. Price, III, of Greenville, for respondent.

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 disbarment from the practice of law in this state. We accept the agreement and disbar respondent.[1] The

[1]Respondent was transferred to incapacity inactive status by order of this Court dated July 3, 2000. In the Matter of Morris, 341 S.C. 405, 535 S.E.2d 430 (2000).

facts as admitted in the agreement are as follows.

Facts

I. Client Fees

Respondent accepted retainers from several clients, yet never performed any work on their behalf. In at least three of these instances, respondent accepted retainers while he was suspended from the practice of law.

II. Failure to Communicate with Clients

Respondent failed to return telephone calls and properly communicate with several of his clients about the status of their cases.

Respondent failed to notify his clients that he would be unavailable while being treated at an in-patient drug and alcohol rehabilitation program. Respondent also failed to withdraw from the representation of his clients, as required by Rule 1.16(a)(2) of the Rules of Professional Conduct.

III. Accounting of Fees and Settlements

On several occasions, respondent refused, upon request of the client, to supply an accounting of his fees earned or settlements obtained on behalf of the client.

Further, on at least one occasion, respondent did not return unearned retainer fees to the client.

IV. Guardianship

Respondent was retained to represent a minor. He obtained a settlement on behalf of his client, but failed to establish a guardianship for his

client for approximately eighteen months.

V. Misuse of Settlement Funds

On one occasion, respondent failed to pay the client's medical bills from the settlement proceeds.

On another occasion, respondent obtained a settlement on behalf of a minor client, but never deposited the settlement proceeds into the guardianship account established on her behalf.

VI. Medicare Settlement Funds

On four occasions, respondent retained funds from settlements in order to pay Medicare's statutory lien for benefits paid on behalf of his clients. Respondent failed to notify Medicare that he settled the cases and held these funds in trust. Respondent failed to negotiate a settlement of the Medicare lien. Respondent made no payments to Medicare on his clients' behalf. At the time respondent was placed on incapacity inactive status, these retained settlement funds were not in his trust account.

Respondent failed to return these funds to his clients or otherwise ensure their safekeeping upon his suspension from the practice of law.

VII. Termination of Representation without Notice

Respondent obtained a default judgment for his client. Not only did respondent not collect that judgment, but he terminated the representation of the client without notice to the client. Respondent did not take the necessary steps to adequately protect the interests of the client.

VIII. Failure to Commence Actions

On two occasions, respondent was retained to commence

lawsuits. In one case, respondent failed to file the action before the statute of limitations expired. In the other case, respondent received several continuances, but failed to take any action on the client's behalf.

Respondent also failed to file an appeal on behalf of a client.

IX. Failure to Supervise Non-Lawyer Staff

Respondent authorized a non-lawyer investigator to retain clients, provide legal advice, refer clients to physicians, and negotiate and accept settlement agreements. These duties were undertaken by the non-lawyer without any supervision by respondent.

Respondent authorized his non-lawyer assistant to be a signatory on his trust account. The assistant was authorized to issue checks drawn from this account without consulting respondent.

Further, respondent's office staff was unable to contact him while he was being treated at the in-patient drug and alcohol rehabilitation program. During that time, respondent left approximately 300 client files with his unsupervised, non-lawyer staff.

X. Practice of Law While Under Suspension

Respondent was suspended from the practice of law on January 31, 2000, for failure to pay bar dues. Respondent was again suspended from the practice of law on May 22, 2000, for failure to meet continuing legal education requirements. During respondent's suspension, he continued to retain clients and represent them in court. Respondent failed to inform the clients, opposing counsel, or the court that he was suspended from the practice of law.

XI. Trust Account

Respondent withdrew funds from his trust account that were not

directly attributable to any fee earned. At the time respondent was placed on disability inactive status, settlement funds and unearned retainer fees from various clients were not in his trust account.

Law

By his conduct, respondent has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1)(violating the Rules of Professional Conduct); 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); Rule 7(a)(6)(violating the oath of office taken upon admission to practice law in this state); and Rule 30 (duties following an administrative suspension).

Respondent has also violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation and consult with the client as to the means by which they are to be pursued; a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter); 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 and promptly comply with reasonable requests for information; a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); Rule 1.15 (a lawyer shall hold and safeguard property of clients or third persons separate from the lawyer's own business or personal property); Rule 1.16 (failure upon termination of representation to protect clients' interests, surrender papers and property to which the clients are entitled and refund any advance payment of fees that has not been earned); Rule 3.2 (failure to make reasonable efforts to expedite litigation consistent with the interest of a client); Rule 5.3 (a lawyer shall be responsible for the conduct of a non-lawyer assistant); Rule 5.5 (allowing a

non-lawyer assistant to perform an activity that constituted the unauthorized practice of law); Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(c) (engage in conduct involving moral turpitude); Rule 8.4(d) (engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (engage in conduct prejudicial to the administration of justice). Finally, respondent has violated Rule 417, SCACR, by failing to maintain financial records.

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state. 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, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

In re: Amendment to Rule 401, SCACR.

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 401(b), SCACR, is amended by inserting the following after the first sentence:

> If referred to the clinical legal education program by a state or federal court, department, agency, institution, or other department of the University, an eligible law student may also appear in an inferior court or before an administrative tribunal on behalf of a non-indigent person or non-profit organization with the written consent of the person or the written approval of the organization's governing body or executive officer.

This amendment 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
February 12, 2001

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Nathaniel Williams,

Appellant.

Appeal From Beaufort County
Luke N. Brown, Jr., Circuit Court Judge

Opinion No. 3294
Heard December 11, 2000 - Filed February 5, 2001

AFFIRMED

Deputy Chief Attorney Joseph L. Savitz, III, and Assistant Appellate Defender Ellen Cleary, both of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh and Assistant Deputy Attorney General Robert E. Bogan, all of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for respondent.

STILWELL, J.: Nathaniel Williams appeals his convictions for possession of a stolen vehicle and failure to stop for a blue light on the ground that the trial court's Allen[1] charge was unduly coercive. We affirm.

FACTS

Williams was tried on Tuesday, April 20, 1999. The jury began deliberations at 3:45 p.m. At 5:10 p.m. the jury requested the arresting officer's testimony be replayed, then resumed its deliberations at 5:30 p.m. At 6:00 p.m. the judge sent the jury home for the evening. The jury resumed deliberations at 9:30 a.m. the following day. At 11:00 a.m. they sent the judge a note stating they could not reach a verdict. The note in its entirety read, "The jury has come to a deadlock at 11 to 1 and its (sic) not going to change," and was signed by the jury foreman.

Williams moved for a mistrial and contended an Allen charge would be inappropriate because the jury was "hopelessly deadlocked." The judge denied the motion, brought the jury in, and gave them the following instruction:

> When you tell me–you use the word deadlocked. It's always unfortunate when juries can't reach a verdict. I practiced law now for–I practiced law 30 years and now I've been a judge for 19 years and in all of that time all the trials I've been involved in and you can count the number of mistrials on these two hands because jurors almost always reach a verdict.
>
> You haven't been deliberating that long and it's always so unfortunate because if I declare a mistrial, then in this same courtroom, in all probability; with the same witnesses; in all probability, the same lawyers, 12 other people in this county will

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[1] Allen v. United States, 164 U.S. 492 (1896) (defining charge used to encourage a deadlocked jury to reach a verdict).

have to decide this issue and I don't know of 12 better people to decide this issue than you 12.

Now, the law doesn't require that a juror violate his or her conscience just to agree with the other jurors but the law does ask that each juror listen to the other jurors with an open mind, willing to be convinced, keeping in mind that you don't have to violate your conscience just to agree on a verdict.

As I say, you haven't been deliberating very long. I'll make provisions. If anybody smokes, you can smoke. When lunchtime comes, if you're still deliberating, I can get you lunch. This afternoon if any of you get tired, you all decide you want to get a motel room, we can make arrangements to send home for your clothes and things. I can make arrangements for any kind of telephone calls, those kind of things. I don't have a thing in the world to do. We're gone (sic) be working anyway. Be working today, be working tomorrow.

Now, I'm gone (sic) ask–I'm gone (sic) send you back and ask you to begin deliberating. If you make any–if you need anything to make you comfortable be sure to tell the bailiffs. They're fine people and they're delighted to make you comfortable. I'm gone (sic) send you back to room and tell you to begin your–continue deliberations.

Any testimony you want to hear again or any law that you want to tell me, just tell me about it. Continue your deliberations and let me know ahead of time whether or not you want lunch, and remember what I said about if you get tired. I realize jurors very often cooped up in a room get tired. If you need–feel like you need to rest some, let me know, we'll make some arrangements for you.

Williams objected to the charge, arguing it was a sweat box instruction, and requested an additional charge which the judge denied. At 11:20 a.m. the

jury once again asked to hear the testimony of the arresting officer. The jury then deliberated from 11:35 a.m. until they reached a verdict at 1:15 p.m.

LAW/ANALYSIS

Williams argues on appeal the trial judge's charge coerced the verdict due to the time the jury deliberated and because the charge implied the jurors would have to deliberate indefinitely. We disagree.

"The trial judge has a duty to urge the jury to reach a verdict, but he may not coerce it." State v. Pauling, 322 S.C. 95, 99, 470 S.E.2d 106, 108-09 (1996); see State v. Darr, 262 S.C. 585, 587, 206 S.E.2d 870, 870 (1974) ("It is the duty of the trial judge to urge the jury to agree upon a verdict provided he does not coerce them."). Review of an Allen charge requires this court to consider the charge in light of the accompanying circumstances. See generally State v. Hale, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985).

Factors to be considered in determining whether a charge is coercive include the length of the deliberations prior to the charge,[2] the length of the deliberations following the Allen charge,[3] and the total length of deliberations.[4]

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[2] See State v. Tillman, 304 S.C. 512, 521, 405 S.E.2d 607, 612-13 (Ct. App. 1991) (stating the Allen charge given after four hours of deliberations was not coercive).

[3] Hale, 284 S.C. at 355, 326 S.E.2d at 422 (finding the Allen charge taken as a whole, given after four and a half hours of deliberations, was not coercive, even though the jury returned a guilty verdict three minutes after the charge was given).

[4] State v. Lynn, 277 S.C. 222, 228-29, 284 S.E.2d 786, 790 (1981) (finding trial judge did not force a verdict when the jury deliberated for nine hours prior to the Allen charge, and asked for further instructions two hours after the charge was given before reaching a verdict). See also State v. Stephenson, 54 S.C. 234, 238-39, 32 S.E. 305, 307 (1899) (concluding trial

The trial judge may not indicate to or threaten the jury that they must agree or, failing to agree, they will remain in the jury room for a specified length of time. See State v. Simon, 126 S.C. 437, 445-46, 120 S.E. 230, 233 (1923) (stating trial judge erred by telling the jurors they must remain overnight in a small jury room for fifteen and a half hours unless they could agree on a verdict).

In addition, a trial judge may not direct the Allen charge towards the minority voter(s) on the panel. See State v. Elmore, 279 S.C. 417, 424, 308 S.E.2d 781, 785-86 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). However, it is not necessarily coercive to give an Allen charge even though the jury reports it is deadlocked eleven to one. See State v. Jones, 320 S.C. 555, 558-59, 466 S.E.2d 733, 734-35 (Ct. App. 1996) (concluding the trial court gave a proper Allen charge even though the jury sent a note stating it was "hung 11 to 1" because the charge, taken as a whole, was not coercive).

The jury deliberated for approximately two hours on Tuesday before the trial judge sent them home for the evening. They resumed deliberations for one hour and a half the following morning before notifying the trial judge they were deadlocked. After the Allen charge, the jury deliberated less than twenty minutes, reheard testimony, and deliberated for approximately two more hours before reaching a verdict. The total deliberations took less than six hours. We find no coercion in the timing of the Allen charge or in the total length of deliberations. See Tillman, 304 S.C. at 521, 405 S.E.2d at 612-13 (concluding the Allen charge was not coercive when given after four hours of deliberation and the verdict was rendered one and a half hours after the charge).

Williams invites our attention to the recent Fourth Circuit Court of Appeals case of Tucker v. Catoe, 221 F.3d 600 (4th Cir. 2000). In Tucker, the Fourth Circuit found an Allen charge unduly coercive, noting that "South Carolina has yet to specify circumstances under which an Allen charge is

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court did not err in declaring a mistrial after jury deliberated for sixteen hours, did not ask for further instructions, and stated they could not reach a verdict).

coercive, but there are numerous decisions from the federal courts that guide our consideration [of] Tucker's argument." 221 F.3d at 609. Any reliance on Tucker is misplaced for several reasons, not the least of which is that the Allen charge in question was given during the sentencing phase of a capital murder case and that fact, coupled with other factual distinctions, clearly compelled the decision in Tucker.

We also find the trial judge did not coerce a verdict by implying the jury would have to deliberate indefinitely. The judge informed the jurors he would make arrangements for their comfort should the jurors get tired or become hungry. In State v. Ayers, this court reviewed the propriety of an Allen charge similar to that given by the trial judge in this case. 284 S.C. 266, 325 S.E.2d 579 (Ct. App. 1985). In Ayers, the jury deliberated for a little over two hours, requested a recharge of a statute, and deliberated further for more than an hour. Id. at 268-69, 325 S.E.2d at 580-81. The jury then reported they could not reach a verdict. Id. at 269, 325 S.E.2d at 581. The forelady told the judge, "no matter how long we stay in that room, or if we stayed in here two long weeks or forever, we would never be able to change some of the convictions." Id.

In Ayers, the judge responded, "I am prohibited from declaring a mistrial until a substantial time has elapsed in terms of the jury being able to consider the evidence and the testimony." Id. The judge went on to say he could either make hotel accommodations for the jury or let them continue deliberating, and he commented on the expense of operating the judicial system and the importance of bringing matters to a conclusion. Id. Defense counsel moved for a mistrial, arguing the verdict was being coerced. Id. This court reviewed the Allen charge as a whole and concluded the trial judge's instructions were not coercive. Id.

Considering the Allen charge as a whole, it is clear that the judge was solicitous of the welfare of the jurors and his remarks concerning getting a motel room for them or providing a rest period for them were not calculated to be of a threatening nature, but were genuine expressions of concern for their comfort and welfare. We therefore conclude that the charge was not coercive.

AFFIRMED

HEARN, C.J., and ANDERSON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Denise Smith-Cooper,

Respondent,

v.

James L. Cooper, Jr.,

Appellant.

Appeal From Richland County
Walter B. Brown, Jr., Family Court Judge
Donna S. Strom, Family Court Judge

Opinion No. 3295
Heard December 13, 2000 - Filed February 12, 2001

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

James G. Long, III, of Nexsen, Pruet, Jacobs & Pollard, of Columbia, for appellant.

Frank B. Register, Jr., of Cooper, Register & Krajack, of Lexington, for respondent.

HEARN, C.J.: James L. Cooper, Jr. (Husband) appeals from a family court order finding the provisions of a property settlement and support agreement nonmodifiable and holding him in contempt for failure to comply with the provisions of the agreement. We affirm in part and reverse and remand.

Husband and Denise Smith-Cooper (Wife) were married in 1987 and divorced on September 26, 1994. On August 26, 1994, the parties executed a property settlement and support agreement which the family court approved and incorporated into the divorce decree. The agreement obligates Husband to pay $260 in alimony to Wife every other week, as well as numerous other expenses for Wife, including: the mortgage on Wife's residence, assistance with the costs of repairs and maintenance on Wife's residence, land option payments, automobile insurance, health insurance, uninsured medical expenses, and life insurance.[1] The agreement further provides:

> As any of the above expenses are paid in full or the obligation no longer exists, Husband is no longer obligated to make these payments and the total amount of his monthly obligation to Wife will be reduced accordingly.
>
> . . .
>
> If at any time Wife receives social security disability benefits or becomes employed in a full time capacity, all amounts received from the sources, after 6 months of such receipt, shall be reduced from Husband's total obligation at that time by the amount Wife receives from the sources. . . . The ultimate goal of both parties

[1] Husband asserted in his brief and Wife's counsel agreed at oral argument that Husband had been paying Wife $17,000 to $18,000 per year pursuant to the agreement.

> is that at some future time, Wife will become totally self-sufficient and will not require any assistance from Husband.

The parties also expressly agreed that "this agreement shall not be modifiable by any court without the consent of both parties" and that all modifications must be in writing and signed by both parties.

In October 1995, Wife applied for social security disability benefits, claiming she became disabled in January 1991, due to irritable bowel syndrome and depression. In February 1996, the Social Security Administration denied her application. She did not appeal. After the commencement of this action, Wife hired an attorney to pursue a second claim for social security benefits. In October 1998, the Social Security Administration again denied her claim.

In January 1998, Husband lost his job. He received two weeks severance pay, payment for his accrued sick leave, and unemployment benefits in the amount of $224.00 per week for several months. Wife's health insurance, which was acquired through Husband's employment, expired in January 1998.

Wife petitioned the family court for a rule to show cause why Husband should not be held in contempt for failure to comply with the support provisions of the agreement. Prior to the hearing, Husband brought an action against Wife for modification or termination of his alimony obligation.

The consolidated cases were tried before the family court on January 4, 5, and 6, 1999. By order dated March 11, 1999, the family court found the agreement was not modifiable and held Husband in contempt. The court ordered Husband (1) to continue paying Wife's mortgage and be responsible for the upkeep, maintenance and repairs on the property, and (2) to continue paying Wife alimony and satisfy an alimony arrearage of $1,720.

The court further found Husband allowed Wife's health insurance to lapse without informing her of her right to obtain COBRA coverage from his former employment. The court ordered Husband to pay all of Wife's

outstanding medical and dental expenses, including reimbursing her for medical bills she paid and for outstanding bills due. In addition, the family court ordered Husband to obtain health insurance for Wife, provided that his liability for her uninsured medical expenses would continue until he obtained insurance coverage on her behalf. Additionally, the family court directed Wife to undergo psychiatric counseling "in order that she overcome her medical and psychological problems in an effort to become employed." The court ordered Husband to contribute $70 every other week to Wife for the cost of counseling. Finally, the family court awarded Wife $7,500 in attorney fees. The family court denied Husband's post-trial motion for reconsideration. This appeal followed.

SCOPE OF REVIEW

In appeals from the family court, this court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not, however, require this court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Neither are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

DISCUSSION

I. Judicial Modification of Agreement

Husband asserts the family court erred in finding the agreement may not be judicially modified. We agree.

Generally, where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement. Bogan v. Bogan, 298 S.C. 139, 142, 378 S.E.2d 606, 608 (Ct. App. 1989). However, where an agreement

is ambiguous, the court should seek to determine the parties' intent. Ebert v. Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995); Mattox v. Cassady, 289 S.C. 57, 60-61, 344 S.E.2d 620, 622 (Ct. App. 1986). A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. Bruce v. Blalock, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962); 17A Am. Jur. 2d Contracts § 338, at 345 (1991).

Here, one portion of the agreement reads: "The parties agree that this agreement shall not be modifiable by any court without the consent of both parties." However, the alimony portion of the agreement clearly and unambiguously envisions that Husband's alimony obligation will be reduced as Wife receives social security disability benefits or becomes employed. Moreover, the alimony provision states: "The ultimate goal of both parties is that at some future time, Wife will become totally self-sufficient and will not require any assistance from Husband."

The family court judge found he could not modify the alimony provisions of the agreement because of the clause relating to non-modifiability. However, this construction of the agreement completely eviscerates the portions of the agreement concerning the reduction of Husband's alimony obligation as Wife receives social security disability benefits or becomes employed. It is clear that the parties intended their agreement regarding alimony would be modified downward as Wife became more self-sufficient. In fact, during the hearing to approve the parties' agreement, Wife's counsel stated that Husband would continue to pay alimony "until disability kicks in or until she becomes capable of going back to work." In the face of such clearly expressed intent, we hold it was error for the family court judge to rule that he was without authority to modify the alimony provisions of the agreement.

The family court's ruling regarding non-modifiability places Husband in the untenable position of being unable to obtain relief so long as Wife neither receives social security disability benefits nor becomes gainfully employed. It also encourages Wife to exert little or no effort to become employed. Our reading of the agreement convinces us that it specifically and

unequivocally provided for the downward modification of Husband's alimony obligation.

While the family court refused Husband's request for modification, it *increased* Husband's alimony obligation beyond that contemplated by the parties' agreement. This was error. The agreement provided that, with respect to the marital residence, "Husband will assist in paying costs of maintenance and repairs." The family court established a procedure whereby Wife was to provide Husband with estimates from contractors concerning any repairs to the property, and further provided that if Husband did not find a contractor himself within thirty days, he "shall then be required to pay the estimated costs to the contractor upon completion of the job." Thus, despite the family court's ruling that the agreement was non-modifiable, the court modified the agreement by requiring Husband to be 100% responsible for the payment of the repairs. This was clearly error.

Under our reading of the agreement, the parties contemplated that any modification to the agreement would be a downward modification of Husband's obligations, not an upward modification. The family court's order is reversed to the extent it provides a procedure to facilitate Husband's assistance with repairs and maintenance of the home and requires Husband to be fully responsible for these expenses.

Likewise, the family court's mandate that Husband pay Wife $70 every other week towards the cost of Wife's counseling was erroneous. In the provision relating to Husband's maintenance of health insurance for the benefit of Wife, the agreement provides that "Husband will be responsible for all deductible amounts incurred by Wife on the applicable health insurance policy for any physical exam, any diagnostic proceeding and any necessary treatment up to a total amount equal to the insurance deductible per year." Although the agreement provides that "Husband is to be responsible for uncovered medical, dental and prescriptions," counseling is not included within this language. The family court's order thus impermissibly enlarges Husband's alimony obligation to Wife, something which was not contemplated by the parties' agreement. Accordingly, that portion of the order is reversed.

II. Imputation of Income

Husband also asserts the family court erred in failing to impute income to Wife. He alleges Wife has acted in bad faith and that her "delay and unwillingness to pursue her claim has irreparably prejudiced her ability to acquire disability benefits as contemplated by the parties." While we do not reach Husband's allegations of bad faith, we agree that the family court failed to consider the question of Wife's employability.

Since the time of the agreement, Wife asserts she has unsuccessfully sought employment in her field of expertise on at least three occasions, and has twice attempted to work outside that field. At the time of trial, Wife was being treated for depression, chronic fatigue syndrome, irritable bowel syndrome, and gastro-esophageal reflux disease. She also has the Epstein-Barr virus, which causes symptoms similar to mononucleosis in adults. Her conditions are treated with three antidepressants and medications prescribed to treat anxiety, abdominal discomfort, abdominal spasms and acidity, diarrhea, and nausea. Dr. Ronald Steen testified that a person suffering from these medical disorders would generally not be able to maintain employment. Dr. Steen opined Wife would never be able to work outside her home due to her illnesses.

Husband presented the testimony of Joel Leonard, a vocational consultant, regarding Wife's capacity to work. Leonard based his opinion on his review of Wife's medical records, her social security file, and her deposition testimony. Leonard testified Wife could perform at a level of employment with a median gross income of $17,160. However, he stated she needed vocational rehabilitation and would benefit from mental health counseling. Apparently because the family court thought to do so would constitute an impermissible modification of the parties' agreement, the court refused to impute income to Wife.

The Social Security Administration found Wife was not disabled and refused her disability benefits. However, Wife claims she is disabled and therefore cannot secure employment. Quite simply, Wife cannot have it both ways. In other words, she cannot accept the decision of the Social Security

Administration that she is not disabled and yet claim she is too disabled to work, forcing Husband to continue providing her full support. See Ebert, 320 S.C. at 338-39, 465 S.E.2d at 125-26 (finding that Husband is not required to continue paying Wife's mortgage where the parties intended Wife would sell the home but settlement agreement does not specify when she must sell it). Taking our own view of the preponderance of the evidence, we believe that Wife is capable of some employment as Joel Leonard testified. However, because there was not a full evidentiary hearing on Wife's employability, we remand this issue to the family court for a hearing with instructions to impute income to Wife and to reduce Husband's alimony obligation accordingly, pursuant to the terms of the parties' agreement. See Micheau v. Micheau, 285 S.C. 527, 529, 331 S.E.2d 348, 349 (1985) (stating that disputed factual issue must be remanded back to the family court for factual findings); Condon v. Condon, 280 S.C. 357, 360, 312 S.E.2d 588, 589-90 (Ct. App. 1984) (finding that the court of appeals must remand issues to the family court for a hearing if the record is insufficient for adequate review on appeal).

III. Health Insurance

Husband next contends his obligation to provide Wife with medical insurance and to pay her uninsured medical expenses terminated when he lost his job in January 1998. We disagree.

Paragraphs 4 and 13 of the parties' agreement set forth Husband's obligation to provide health insurance to Wife and pay her uninsured medical costs. The relevant language reads as follows:

> 4. Husband will be responsible for all deductible amounts incurred by Wife on the applicable health insurance policy for any physical exam, any diagnostic proceeding and any necessary treatment up to a total amount equal to the insurance deductible per year.
>
> Husband agrees to pay to Wife, on a monthly basis, as alimony, the following bills to wit;

. . .

> F) Health insurance covering Wife as an insured, payable directly to insurance company. Husband to be responsible for uncovered medical, dental and prescriptions.
>
> . . .
>
> 13. Husband shall maintain at his expense a group major medical hospitalization and health insurance policy with Wife listed as an insured thereof through his place of employment. This obligation shall continue until Wife becomes self sufficient as set out above.

Husband was employed at the time of the agreement and was insured under a company insurance policy. He later became employed at H2Options and continued to insure Wife under that company's policy. Wife's coverage under Husband's policy at H2Options expired in January 1998 when Husband's employment was terminated.

From a plain reading of the agreement, we cannot conclude that Husband's obligation to provide Wife with health insurance terminated upon his unemployment. "Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it." Ebert, 320 S.C. at 338, 465 S.E.2d at 125. The court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). The agreement unambiguously obligates Husband to provide Wife with medical insurance coverage regardless of his employment. However, depending upon the family court's decision regarding the amount of income to impute to Wife, Husband's

obligation to continue paying Wife's insurance may decrease according to the parties' agreement.

IV. Contempt

Husband contends the family court erred in finding him in contempt for failing to comply with the provisions of the agreement. We agree.

Wife conceded in her testimony that the mortgage obligation on her home was current at the time of trial. Further, she testified the applicable life insurance premiums were paid at the time of trial and had never lapsed. The family court found Wife abandoned her claims for automobile expenses and the land upon which the agreement obligated Husband to make option payments. Wife has not appealed these findings and they are therefore the law of the case. Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (holding an unchallenged ruling, " right or wrong, is the law of this case and requires affirmance").

Our reading of the record and order reveals the family court found Husband in contempt for failure to maintain Wife's health insurance, failure to pay Wife's medical expenses, and failure to pay spousal support.

"Contempt results from the willful disobedience of a court order." Henderson v. Henderson, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989). A willful act is defined as one "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done." Spartanburg County Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988) (quoting Black's Law Dictionary 1434 (5th Ed. 1979)). Where a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt. Hicks v. Hicks, 280 S.C. 378, 381, 312 S.E.2d 598, 599 (Ct. App.1984); see also Moseley v. Mosier, 279 S.C. 348, 351, 306 S.E.2d 624, 626 (1983) (parent who is unable to make child support payments as ordered is not in contempt).

We find Husband's failure to comply with the agreement was not willful. The testimony at trial reveals Husband's failure to comply with his support obligations under the agreement was due to his financial inability. It is uncontested Husband underwent periods of involuntary unemployment in 1998. During these periods, Husband continued to fulfill his support obligations and to make mortgage payments on Wife's home to the extent he was financially able. Moreover, Husband was employed at the time of trial and expressed a willingness to repay the accumulated arrearage in accordance with a judicially ordered schedule.[2] Thus, we hold the facts and circumstances of this case do not support a finding of contempt.

V. Attorney Fees

Husband argues the family court erred in awarding Wife $7,500 in attorney fees. We agree.

The factors to be considered in awarding reasonable attorney fees and costs include: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Particularly in light of our disposition regarding the family court's error in refusing to impute income to Wife and its finding of contempt, we hold the award to Wife of $7,500 in attorney fees was excessive. Nonetheless, we recognize Wife incurred expenses instituting these proceedings. Based on our own view of the facts of this case, we reduce the award of attorney fees to $2,500.

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[2] We also remand the issue of Husband's request for a $360 credit against the amount of his arrearage. Husband claims that he made a $360 payment on the Thursday prior to the trial of this case, which had not been received by Wife as of the date of trial.

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

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

ANDERSON and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Yukoto Eugene Cherry,

Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 3296
Heard October 11, 2000 - Filed February 12, 2001

AFFIRMED

Jeanne A. Pearson, of Kennedy, Covington, Lobdell & Hickman; Thomas F. McDow, both of Rock Hill; and Chief Attorney Daniel T. Stacey, of SC Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Assistant Attorney General Toyya Brawley Gray, all of Columbia; and Solicitor Thomas E. Pope, of York, for respondent.

STILWELL, J.: A jury convicted Yukoto Eugene Cherry for possession of crack cocaine with intent to distribute. The trial court sentenced him to five years imprisonment, imposed a fine of $25,000, and recommended he receive drug abuse treatment while in prison. Cherry appeals. We affirm.

FACTS/PROCEDURAL BACKGROUND

Just before midnight on July 31, 1998, Officer Steven Parker of the Rock Hill Police Department stopped a car driven by Cherry's sister for two traffic violations. Cherry was a passenger in the back seat. While Officer Parker sat in his patrol car writing citations, another backup officer arrived and saw Cherry's sister stuff a pistol into a diaper bag. After arresting her, the officers ordered the passengers out of the car to check for additional weapons. Cherry had no weapons, but Officer Parker discovered a small bag containing approximately eight rocks of crack cocaine in his watch pocket. He also seized $322 in cash from Cherry.

Cherry was indicted for possession of crack cocaine with intent to distribute and possession of crack cocaine within proximity of a public park. At the conclusion of the State's case, the trial court granted Cherry's motion for a directed verdict on the charge of possession within proximity of a public park. The court denied his motion for a directed verdict on the charge of possession with intent to distribute and the jury found him guilty. Cherry asserts a number of alleged errors on appeal.

DISCUSSION

I. Seating Arrangements

Cherry asserts the trial court erred in denying his request to sit at the table closest to the jury. We disagree.

Immediately after the prosecutor called Cherry's case, his counsel made a motion for the defense to sit at the table closest to the jury. At the time, the prosecution occupied that table. After entertaining argument from both sides, the court denied Cherry's request, finding the parties were seated "very appropriately."

Cherry correctly notes this precise issue was raised on appeal to our supreme court in State v. Corn, 215 S.C. 166, 54 S.E.2d 559 (1949). However, his reliance on that case is misplaced. The supreme court reversed the conviction, but specifically declined to address several issues, including the question of whether the defense was improperly required to relinquish the seats closest to the jury. Id. at 172, 54 S.E.2d at 561. We are convinced that nothing in the supreme court's opinion can be construed as a ruling on that issue.

We find the trial court did not abuse its discretion in refusing to allow Cherry to occupy the table closest to the jury. It is tradition and custom in this state that the party with the primary burden of proof sits at the table in closest proximity to the jury. Furthermore, "[t]he general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way." State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). Clearly, the court's discretion extends to the parties' seating arrangements. See also State v. Lee, 255 S.C. 309, 313, 178 S.E.2d 652, 654 (1971) (holding court did not abuse its discretion by refusing defendant's request to remove the victim's brother from the prosecution's table). The trial court's ruling did not prejudice Cherry's rights. His motion was properly denied.

II. Voir Dire Questions

Cherry argues the trial court erred in refusing to ask his proposed voir dire questions. We disagree.

Prior to jury selection, Cherry's counsel submitted eight written questions which he requested the court ask the potential jurors on voir dire. The questions

asked whether the jurors understood the importance of juror honesty; whether they would report a juror who engaged in misconduct; whether they were willing to presume a defendant innocent until proven guilty despite the fact that he had been arrested by the police; whether they believed police officers are more honest than other citizens; whether the defendant's failure to testify would affect their views of his guilt or innocence; whether they were biased against African-Americans; whether they were biased for or against any of the attorneys; and whether they had ever had more than $300 on their person. The court denied the request, ruling the questions regarding potential biases involving African-Americans or the attorneys involved were covered by the court's standard voir dire questions, and that the others were inappropriate.

The questions to be asked on voir dire are provided by S.C. Code Ann. § 14-7-1020 which states in pertinent part:

> The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein . . . .

S.C. Code Ann. § 14-7-1020 (Supp. 2000).

The trial court has the responsibility to focus the scope of voir dire examination as described in section 14-7-1020. Wilson v. Childs, 315 S.C. 431, 438, 434 S.E.2d 286, 291 (Ct. App. 1993). "After the statutory questions have been asked and answered, any further examination of [the jury] on voir dire must be left to the discretion of the trial judge, which is subject to review only for abuse thereof." State v. Bethune, 93 S.C. 195, 199, 75 S.E.2d 281, 282 (1912). As a general rule, "the trial court is not required to ask all voir dire questions submitted by the attorneys." Wall v. Keels, 331 S.C. 310, 317, 501 S.E.2d 754, 757 (Ct. App. 1998). It appears Cherry's proposed questions were designed to establish a juror profile and to influence those jurors who would be selected rather than to uncover bias. Cherry does not argue that the court failed to ask the statutorily required questions. We are confident the court met the

requirements of section 14-7-1020 and find no abuse of discretion in its refusal to ask the additional questions.

III. Batson Motion

Next, Cherry maintains the trial court erred in its denial of his Batson[1] motion. We disagree.

After jury selection, Cherry moved to quash the jury, arguing the State used its peremptory challenges in a racially discriminatory manner by striking non-whites. The assistant solicitor responded that the three strikes Cherry complained of were exercised against persons with criminal convictions for assault and battery, passing fraudulent checks, and driving under the influence. The court found those reasons racially neutral and asked if Cherry had any evidence that the stated reasons were mere pretext.

Cherry's counsel asked to conduct additional voir dire to determine whether any member of the jury had been convicted of the same offenses. After the court denied that request, the assistant solicitor offered the defense an opportunity to look at the NCIC background checks performed on each juror. Although defense counsel indicated he wanted to examine those documents, it does not appear he did so immediately as offered. The assistant solicitor then informed the court that none of the seated jurors had a record of the criminal convictions in question, and the court announced the reports would be made a part of the record. The parties dispute whether this was ever done. In a post trial motion, Cherry argued that because the NCIC reports dated the day of jury selection were not immediately admitted into the record, the court's order that those specific reports become part of the record was an impossibility.

The trial court must hold a Batson hearing when members of a cognizable racial or gender group are struck and the opposing party requests a hearing. State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999). During the

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[1] Batson v. Kentucky, 476 U.S. 79 (1986).

hearing, the proponent of the peremptory strikes must present a racially neutral explanation. Id.; State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). Once this is done, the burden shifts to the strike's opponent to show the reason or reasons given were merely pretextual. Haigler, 334 S.C. at 629, 515 S.E.2d at 91; Adams, 322 S.C. at 124, 470 S.E.2d at 372. Thus, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Adams, 322 S.C. at 124, 470 S.E.2d at 372 (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995)). If "the record does not support the solicitor's stated reason upon which the trial judge has based his findings, however, those findings will be overturned." State v. Tucker, 334 S.C. 1, 9, 512 S.E.2d 99, 103 (1999).

We agree with the trial court that the reasons the assistant solicitor offered to explain the strikes were facially race-neutral. Thus, the burden shifted back to Cherry to prove pretext. He offered no evidence of pretext and thus simply failed to meet his burden. The record supports the State's explanations for the strikes. Moreover, we are not persuaded to reverse the court's ruling because the proper documents bearing certain dates were never admitted into the record. The record reflects the State offered Cherry an opportunity to review the exact documents it used to strike the jurors and that he failed to seize this opportunity. Furthermore, the court's ruling that the State's explanations were race-neutral is supported by the assistant solicitor's statement as an officer of the court, which the court accepted and which Cherry has not proven false or pretextual. See, e.g., State v. Patterson, 307 S.C. 180, 182-83, 414 S.E.2d 155, 157 (1992) (noting the trial court's findings regarding purposeful discrimination rest largely upon its evaluation of the prosecutor's credibility and are afforded great deference).

IV. Evidence

Cherry also challenges the trial court's admission of the video tape of his arrest as well as the money and drugs seized from his person during the arrest. We find no abuse of discretion.

The decision to admit or exclude evidence is within the trial court's sound discretion, and its ruling will be not be disturbed unless an abuse of discretion is shown. State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995). Additionally, to warrant reversal, the defendant must show the erroneous admission resulted in prejudice. State v. Thompson, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991).

A. Arrest Tape

Officer Parker's patrol car was equipped with a camera which records both audio and video. During his testimony, the State attempted to show the original video tape containing Cherry's arrest to the jury. Although the State had previously given the defense a tape of the arrest, Cherry objected on the ground that he had not been given an opportunity to view the original tape. Defense counsel explained: "we would need an opportunity to see [what the original portrays] before we pass on it." After a bench conference, the court admitted the tape into evidence over Cherry's objection. When the State then attempted to publish the tape to the jury, Cherry insisted that the court reporter play it in its entirety. The record reflects the tape was played in its entirety, although Cherry now questions the record's accuracy on this point.

Cherry argues the court erred in denying his request to view the original tape before admitting it into evidence. He maintains its admission prejudiced him because it shows Officer Parker making other traffic stops which could have biased the jury in favor of Officer Parker.[2]

Although the tape depicts events defense counsel did not have an opportunity to review prior to trial, we do not find the court abused its discretion in admitting it into evidence. Moreover, even though much of the tape does not

[2] The original tape and the copy containing only Cherry's arrest which the State provided to defense counsel before trial are among the exhibits on file in this case. The original tape shows numerous stops Officer Parker made over several days.

involve Cherry's case and is therefore irrelevant, we believe it did not prejudice him. Furthermore, it appears the State only intended to play the portion of the tape containing Cherry's arrest. The tape was admitted into evidence only after Cherry's counsel suggested it be admitted into evidence rather than simply marked for identification. Furthermore, it was then played in its entirety only upon his counsel's demand. Cherry will not be heard to complain of an error of his own creation. State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) (noting a party cannot be heard to complain of an error his own conduct induced).

B. Money Seized from Cherry

Officer Parker seized $322 in mostly twenty dollar bills from Cherry during his arrest. Cherry attempted to suppress the money in a motion in limine, arguing it was irrelevant. The State argued the money was relevant to show Cherry intended to sell the crack on his person because crack is commonly sold for $20 per rock. The court decided to refrain from ruling on the admissibility until after it heard the testimony. When Officer Parker began to testify about the money, Cherry objected and the court overruled his objection. Cherry now argues that ruling was error.

We first address the State's argument that this issue is not preserved because Cherry made only a general objection to the officer's testimony. In light of his earlier motion in limine, we believe the nature of Cherry's objection was contextually apparent and this issue is therefore preserved. Rule 103, SCRE (timely objection on a specific ground is necessary if the specific ground is not apparent from the context).

We do, however, agree with the State that the money was properly admitted. Cherry was charged with possession of crack cocaine with the intent to distribute. Evidence is relevant, and therefore admissible, when it tends to make the existence of a fact in controversy more or less probable than it would be without the evidence. Rule 401, SCRE. The money was relevant to the contested question of whether Cherry intended to distribute the crack rocks in his possession. In light of the officer's testimony regarding the price of crack

rocks, the $322 in mostly twenties was some indication that Cherry had sold crack earlier in the evening and thus, its admission into evidence tended to make the allegation he intended to distribute the crack in his watch pocket more probable. The money was properly admitted.

C. Crack Cocaine Seized from Cherry

The defense also made a motion in limine to suppress the crack cocaine Officer Parker found in Cherry's watch pocket, arguing it was obtained pursuant to an unlawful search and seizure. Cherry argued the officer conducted an improper stop of the vehicle and thus any search of its passengers was also improper. After hearing a proffer from the officer, the court ruled the drugs were admissible. Cherry now argues the court erred in admitting the drugs because Officer Parker's testimony, that he immediately knew upon touching the outside of Cherry's watch pocket that it contained narcotics, was not believable because he also testified he thought the box of cigars he felt in another of Cherry's pockets might be a weapon. Because this argument is different from the one Cherry raised to the trial court, it is not preserved for our review. State v. Byram, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (holding a party may not assert one ground at trial and another on appeal).[3]

V. Directed Verdict

Cherry argues the trial court improperly refused his motion for a directed verdict on the charge of possession with intent to distribute because there was no evidence he intended to distribute the crack cocaine. We disagree.

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[3] In any event, this evidence was admissible under the "plain feel doctrine," which permits the warrantless seizure of items an officer immediately identifies by touch as contraband during a pat-down search. See State v. Smith, 329 S.C. 550, 561, 495 S.E.2d 798, 804 (Ct. App. 1998) (applying the plain feel doctrine).

When considering a motion for a directed verdict in a criminal case, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Burdette, 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999); State v. Morgan, 282 S.C. 409, 411, 319 S.E.2d 335, 336 (1984). It has been recently held that this remains true even when the State relies exclusively on circumstantial evidence. State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). Some cases have held that if the State presents any evidence which reasonably tends to prove the defendant's guilt, or from which the defendant's guilt could be fairly and logically deduced, the case must go to the jury. Burdette, 335 S.C. at 46, 515 S.E.2d at 531; State v. Poindexter, 314 S.C. 490, 493, 431 S.E.2d 254, 255-56 (1993). Other cases indicate that where the evidence is circumstantial, there must be substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Martin, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000) (citing State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996)). Still other cases indicate some distinction between direct evidence and circumstantial evidence in considering whether a directed verdict should be granted. State v. Patterson, 337 S.C. 215, 232, 522 S.E.2d 845, 853 (Ct. App. 1999) ("If there is any direct evidence or any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced, an appellate court must find the case was properly submitted to the jury." (emphasis added)) (citing State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999)). If the trial court must make a determination that the circumstantial evidence is substantial, that would seem to require a weighing of the evidence which, of course, all cases agree, is forbidden.

Clearly, the trial judge should grant a directed verdict motion when the evidence merely raises a suspicion that the accused is guilty. Martin, 340 S.C. at 602, 533 S.E.2d at 574 (citing State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978)). It is equally clear, however, that on appeal from the denial of a motion for directed verdict, this court must view the evidence in the light most favorable to the State. Burdette, 335 S.C. at 46, 515 S.E.2d at 531.

The State submitted testimony that Cherry's arrest occurred in a high crime area known for violence and drug activity. Cherry had a small bag

containing approximately eight rocks of crack cocaine on his person. He had no crack pipe or other drug paraphernalia with him indicating the crack was for his personal consumption. He did, however, have $322 cash on his person in mostly twenty dollar bills. Officer Parker testified a single rock of crack cocaine is typically sold for twenty dollars. Viewing this evidence in the light most favorable to the State, as we must, and without passing on the weight of the evidence, the combination of these factors constitutes evidence which would reasonably tend to prove Cherry intended to distribute the crack cocaine and, thus, justifies the trial court's decision to submit the case to the jury for its determination.[4]

VI. Circumstantial Evidence Instruction

During its jury charge, the trial court issued the circumstantial evidence instruction recently approved and recommended by our supreme court in State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997). After the jury was charged, defense counsel requested the court issue Judge Ervin's charge on the difference between direct and circumstantial evidence. Tom J. Ervin, Ervin's South Carolina Requests to Charge-Criminal § 3-4 (1994). The court refused to re-charge the jury as requested.

We note that Judge Ervin's model charge on circumstantial evidence is similar to the traditional language our supreme court approved in State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989). The traditional charge distinguishes between direct and circumstantial evidence, whereas the new charge adopted in Grippon specifically states there is no legal distinction between the two types of evidence. Compare Edwards, 298 S.C. at 275, 379 S.E.2d at 889 ("[E]very circumstance relied upon by the State [must] be proven beyond a reasonable doubt; and . . . all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of

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[4] We have not factored in nor considered the presence of the pistol in the vehicle because the trial judge, in analyzing whether to submit the case to the jury, specifically stated that he did not consider it in his deliberations.

the accused to the exclusion of every other reasonable hypothesis."), with Grippon, 327 S.C. at 83-84, 489 S.E.2d at 464 ("The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence."). Although the supreme court noted in Grippon, 327 S.C. at 82, 489 S.E.2d at 463, and reiterated in State v. Needs, 333 S.C. 134, 156 n.13, 508 S.E.2d 857, 868 n.13 (1998), that the traditional Edwards charge is still a legally correct and appropriate jury instruction, we cannot fault the trial court for utilizing a charge recently specifically approved by the supreme court. It obviously is a correct statement of the law of circumstantial evidence. "The judge properly instructs the jury if he adequately states the applicable law. A jury charge which is substantially correct and covers the law does not require reversal." State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) (citation omitted). We find no error.

CONCLUSION

Because all three judges of the panel are in agreement on Issues I through IV, two of the three judges of the panel are in agreement as to Issue V, and two, albeit different, judges of the panel are in agreement on Issue VI, Cherry's conviction for possession of crack cocaine with intent to distribute is

AFFIRMED.

HOWARD, J., concurs in part and dissents in part in a separate opinion.

SHULER, J., concurs in part and dissents in part in a separate opinion.

HOWARD, J., concurring in part and dissenting in part: I concur in Parts I through IV of Judge Stilwell's opinion. Part V of the opinion involves the sufficiency of the evidence to establish an intent to distribute. I do not agree with the majority on this point, and respectfully dissent. As to Part VI, I concur, but write separately to address Judge Shuler's dissenting opinion.

Part V - Sufficiency of the Evidence

I conclude the circumstances do not present facts from which a jury could reasonably and logically conclude Cherry intended to distribute crack cocaine. Therefore, I would rule the trial judge erred in failing to grant a directed verdict on this charge.

In a case which is based solely upon circumstantial evidence, the evidence is not "substantial" if the jury must speculate to conclude guilt, even though all of the evidence is taken as true. See State v. Martin, 340 S.C. 597, 602, 533 S.E.2d 572, 574 (2000); State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). If the circumstances, alone and in combination, are as consistent with innocence as with guilt, then no valid conclusion can be drawn from them. See In re Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); see also Jackson v. Virginia, 443 U.S. 307, 318 (1979) ("After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt."); Martin, 340 S.C. at 602-03, 533 S.E.2d at 574-75 (holding the State failed to meet the "any substantial evidence" standard, and motion for directed verdict should have been granted where State had no proof either defendant held drowning victim's head under water, or that the two acted in concert, and, although evidence provided the likely possibility that the defendant's car was at the scene of the murder, the vehicle could not be identified with sufficient certainty to rule out the alternative possibility that it was merely a similar vehicle).

The majority identifies the following circumstances as the factual basis for denying Cherry's directed verdict on the distribution charge:

> 1) Cherry's arrest occurred in a high crime area known for violence and drug activity;
>
> 2) Cherry had a small bag containing approximately eight rocks of crack cocaine;
>
> 3) Cherry had no crack pipe or other drug paraphernalia with him indicating the crack was for his personal consumption;
>
> 4) Cherry had $322 cash on his person, mostly in twenty dollar bills;
>
> 5) Officer Parker testified a single rock of crack cocaine is typically sold for twenty dollars.

The majority does not discuss why the above circumstances provide inferences which could reasonably support a finding of guilt beyond a reasonable doubt on the distribution charge. For the following reasons, I conclude these circumstances do not provide a factual basis to submit the charge of possession with intent to distribute to the jury.

1) High Crime Area - There is no evidence that a person who possesses crack cocaine in a high crime area is more likely to distribute the crack cocaine than to purchase it. Indeed, logic defeats the conclusion. If there is a greater incidence of street level crack cocaine distribution in a high crime area, it is only logical to conclude that a concentrated number of drug users are in that area as well. Consequently, this circumstance does not provide a logical basis for concluding Cherry intended to distribute the crack cocaine, as opposed to using it. For the same reason, this circumstance adds nothing to any of the other predicate facts to establish an intent to distribute.

2) Eight rocks of crack cocaine - The second circumstance involves the crack cocaine itself. Cherry had eight rocks of crack cocaine weighing less than

one gram, contained in one small bag. The crack cocaine was not packaged in multiple bags, and unlike State v. Robinson, Op. No. 3287 (S.C. Ct. App. filed January 22, 2001) (Shearouse Adv. Sh. No. 3 at 73), there was no testimony from police officers to establish that drug users typically would not possess this much crack cocaine, either by weight or number of individual pieces. Furthermore, the significance of possessing multiple rocks is not within the common knowledge of jurors. Absent additional evidence, such as multiple packaging or supporting testimony from police officers trained or experienced in drug enforcement, there is no reasonable inference of intent to distribute derived from this evidence which is sufficient to support a finding of guilt beyond a reasonable doubt. S.C. Code Ann. § 44-53-375(B) (Supp. 2000) (a permissible inference of an intent to distribute arises from "possession of one or more grams of . . . cocaine" (emphasis added)); see also State v. Young, 99-1264, p.11 (La. Ct. App. 1 Cir. 3/31/00), 764 So. 2d 998, 1006 (holding "mere possession of a drug does not amount to evidence of intent to distribute, unless the quantity is so large that no other inference is possible"); Fox v. Mississippi, 756 So. 2d 753, 759 (Miss. 2000) ("When the quantity is such that an individual could use it alone, then that quantity is not in and of itself sufficient to create an inference of intent [to distribute]."); State v. Becerra, 817 P.2d 1246, 1250 (N.M. Ct. App. 1991) ("[W]here there was no evidence of the concentration of the drug, and no evidence of how long it would normally take a single drug user to consume a given quantity, the weight of the amount recovered could not in itself enable a fact finder to conclude, beyond a reasonable doubt, that defendant intended to distribute the substance.").

3) No visible means of smoking the crack cocaine - The third circumstance is the lack of a crack cocaine pipe or other drug paraphernalia needed for immediate use, from which the majority implies that Cherry did not intend to consume the crack cocaine. An inference can reasonably be drawn that Cherry did not intend to immediately use the drug. Thus, if time was the issue, that is, immediate use versus use at some later time, this fact would be substantial evidence. However, it is insufficient to provide a logical basis for concluding it is more likely Cherry intended to distribute the crack cocaine than to use it at some future time. At the very most, it is incomplete information, because it only proves he had no method for immediate use. Therefore, neither

a conclusion of intent to distribute nor a conclusion of personal use is reasonably premised upon this circumstance.

4 & 5) $322 in cash and police officer's testimony - Lastly, there is the $322 in cash seized from Cherry, coupled with the police testimony that crack cocaine is often sold in twenty dollar amounts. The amount of money is certainly not noteworthy. See Young, 99-1264, p.13, 764 So. 2d at 1006 ($370.00 in cash "[was] not so large that no other inference was possible. Accordingly, a rational trier of fact could not have concluded beyond a reasonable doubt that the State proved the 'intent to distribute' element of the crime." (citation omitted)). Many people carry cash, and many people cash their entire paychecks, choosing not to maintain a checking account. Certainly the fact of possession of a relatively small amount of currency does not, in and of itself, allow an inference of illegal activity.

This amount of currency is not consistent with the amount related by law enforcement as the value of multiple rocks of crack cocaine. There is no testimony that crack cocaine is sold for $2, $12, $22 or in any other multiple of two dollars, which would help explain the additional $2. Furthermore, twenty dollar bills are not unusual denominations to carry. They are the predominant bills used at banks and automatic teller machines for cash withdrawals of hundred dollar multiples. To be sure, the money Cherry possessed is consistent with a guilty intent to distribute. But it is no less consistent with possession for personal use. To base a conclusion on it, then, is to rest on pure speculation.

None of these circumstances provides a basis for reasonably inferring an intent to distribute.[5] Furthermore, they are not substantial in combination. As Judge Shuler points out in his concurring and dissenting opinion:

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[5] As the majority points out, the trial judge declined to consider any implications from the presence of the weapon, because police attributed it exclusively to Cherry's sister. In any event, there was no expert testimony to provide an evidentiary basis for inferring an intent to distribute from the presence of the weapon.

> [T]he use of circumstantial evidence calls on the jury to employ analytical tools in a complex reasoning process not otherwise needed when reviewing direct evidence alone. In so doing, it invites the danger of 'logical gaps' legitimately associated with circumstantial evidence - that the jury may surmise guilt from 'subjective inferential links based on probabilities' and thereby elevate coincidence or suspicion into permissible inference.

(citing People v. Cleague, 239 N.E.2d 617, 619 (N.Y. 1968)).

I conclude the evidence required the jury to employ this impermissible method of arriving at its determination of guilt. Each of the predicate facts is completely consistent with simple possession of crack cocaine, and they remain consistent with simple possession in combination. When added together, it might be said that they more completely tend to prove possession of crack cocaine, but they do not provide a reasonable basis for concluding that the crack cocaine was possessed with the intent to distribute it.

Where the amount of drugs is less than the threshold amount giving rise to the permissible statutory inference of intent to distribute, our courts have required more than mere possession and the general circumstances found here as a basis for concluding guilt. "Possession of *any* amount of controlled substance when coupled with sufficient indica of intent to distribute will support a conviction for possession with intent to distribute." State v. Goldsmith, 301 S.C. 463, 466, 392 S.E.2d 787, 788 (1990); see Matthews v. State, 300 S.C. 238, 239, 387 S.E.2d 258, 259 (1990); State v. Adams, 291 S.C. 132, 134, 352 S.E.2d 483, 485 (1987). However, I find no cases in South Carolina which have upheld a conviction for possession with intent to distribute without some specific indicia of the required intent. See State v. Brown, 317 S.C. 55, 57, 451 S.E.2d 888, 890 (1994) ($2,320 in cash); Fernandez v. State, 306 S.C. 264, 266, 411 S.E.2d 426, 427 (1991) ($13,000 in cash); Goldsmith, 301 S.C. at 465-66, 392 S.E.2d at 788 (search revealing drugs, portable scales for weighing grams, five grams of cocaine in foil-wrapped packages in freezer); Adams, 291 S.C. at 133, 352 S.E.2d at 485 (agents seized large inventory of drug paraphernalia, residue, thirty guns, and $134,000 in cash); State v. Simpson, 275 S.C. 426, 427-28, 272 S.E.2d 431, 431 (1980) (pilot's possession of aircraft containing

drug residue and maps, coupled with police officer's testimony opining that the residue indicated large shipment of marijuana had been transported in airplane); State v. Durham, 266 S.C. 263, 267-68, 222 S.E.2d 768, 769-70 (1976) (police seized fifty pounds of marijuana and delicate scales used to weigh small amounts of chemicals and police testified at trial as to significance of the scales); State v. Muhammed, 338 S.C. 22, 25, 524 S.E.2d 637, 638-39 (Ct. App. 1999) (police found $1085 in cash in a large roll, forty-two bullets, three pagers, a cell phone, and a razor blade with traces of cocaine on it in a car and two pistols and 19.7 grams of crack cocaine in the house); State v. Peay, 321 S.C. 405, 411, 468 S.E.2d 669, 672 (Ct. App. 1996) ($10,500 in cash); State v. Mollison, 319 S.C. 41, 44, 459 S.E.2d 88, 90 (Ct. App. 1995) (crack cocaine individually packaged in eighteen separate baggies and marijuana packaged in separate bags in one larger bag, found with defendant at motel).

Our case law is in accord with other jurisdictions, as well. See, e.g., United States v. Marszalkowski, 669 F.2d 655, 662 (11th Cir. 1982) ("the high purity of the cocaine found . . . , along with the recovery from [defendant's] apartment of substance used to cut cocaine, a large amount of cash ($10,500.00) and a weapon . . . constitute[d] surrounding circumstances from which [defendant's] intent to distribute [was] readily inferrable"); Buffington v. State, 538 S.E.2d 528, 529 (Ga. Ct. App. 2000) ($1400.00 in cash, written ledger containing names and initials, with numerical amounts in pounds and ounces, coupled with expert testimony deciphering the ledger, provided sufficient evidence of intent to distribute the large amount of marijuana possessed by defendant to support conviction for possession with intent to distribute marijuana); State v. Konfrst, 556 N.W.2d 250, 263 (Neb. 1996) (police expert testimony that individually wrapped baggies of drugs found in defendant's possession contained amounts normally sold on the street, that amount of drugs recovered was more than is commonly kept for personal use, that cash found is usual mode of payment, that triple scale found in defendant's possession is commonly used to weigh the drugs, and that the empty baggies found in defendant's possession were the same type as those used to hold the recovered drugs was evidence sufficient to support conviction for possession with intent to distribute); State v. Zitterkopf, 463 N.W.2d 616, 621 (Neb. 1990) (evidence including large quantity of marijuana, the type of packaging, sophisticated scales found at residence, along with other equipment and supplies, coupled

with testimony as to the significance of the items by police officers trained and experienced in drug enforcement, provided sufficient evidence of an intent to distribute to support conviction).

In contrast to our prior cases on this subject, there is no evidence in this case indicating actual distribution activity, pre-cut purity of substance, individual packaging, scales, possession of an amount greater than that normally held by a user, paraphernalia used for distributing, ledgers, or any other indication Cherry intended to distribute the crack cocaine he possessed.

Part VI - Circumstantial Evidence Charge

As to Part VI of Judge Stilwell's opinion, dealing with the sufficiency of the circumstantial evidence charge, I share the concerns Chief Justice Toal expressed in her concurring opinion in State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997), as reflected in Judge Shuler's dissent. However, I believe we are bound by the majority opinion of our supreme court in Grippon. See S.C. Const. art. V, § 9; Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993).

In Grippon, our supreme court specifically approved and recommended a circumstantial evidence charge which omits the phrase "to the exclusion of every other reasonable hypothesis," found in State v. Littlejohn, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955), and State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989). See Grippon, 327 S.C. at 83-84, 489 S.E.2d at 464 (recommending in "a criminal case relying in whole or in part on circumstantial evidence" a charge found in 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 12.04 (4th ed. 1992)). For that reason, we are required to affirm on this point.

Furthermore, I do not believe the charge on circumstantial evidence, which is in the nature of a burden of proof charge, changes with the facts of the case. For this reason, I do not believe the cases cited by Judge Shuler in support of his position are applicable in this context.

The first three cases, State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000), State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000), and Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991), involve self defense charges. As our case law has recognized, there are different legal principles which may apply within the umbrella of this defense, depending upon the facts presented. State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989). For example, "defense of others" may be factually raised in one case, and have no applicability in a case involving an altercation solely between the alleged victim and the accused. Although the trial judge may be required to charge "self defense" in each case, only in the first example would the judge be required to charge the law regarding the defense of others.

But unlike the legal principles underlying self defense, the burden of proof is a structural part of the trial process, Sullivan v. Louisiana, 508 U.S. 275, 282 (1993); State v. Jefferies, 316 S.C. 13, 21, 446 S.E.2d 427, 432 (1994), and the minimum Due Process requirements remain the same in each criminal case. See Winship, 397 U.S. at 364.

The last two cases cited, State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987) and State v. Brownlee, 318 S.C. 34, 455 S.E.2d 704 (1995), are also inapplicable, because they deal with a complete failure to charge "mere presence" in drug cases where the facts required the charge.

CONCLUSION

In conclusion, I agree with Judge Stilwell's determination that the jury charge fully complied with the requirements of South Carolina law, as set forth in Grippon. However, there is an absence of any direct or substantial circumstantial evidence reasonably tending to prove an intent to distribute, or from which the intent to distribute crack cocaine can fairly and logically be deduced. For this reason, I would reverse the conviction for distribution of crack cocaine.

SHULER, J., concurring in part and dissenting in part: While I concur in Parts I through V of Judge Stilwell's thorough opinion, I disagree with the conclusion reached in Part VI and therefore respectfully dissent.

The trial court instructed the jury pursuant to State v. Grippon, 327 S.C. 79, 84, 489 S.E.2d 462, 464 (1997) ("The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence . . . ."). Upon realizing the court failed to give the conventional charge on circumstantial evidence, Cherry's counsel, noting that Grippon "does not preclude a more thorough charge," requested further instructions. As Judge Stilwell correctly observes, the charge requested is comparable to the traditional language enunciated by our supreme court in State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955) and later quoted with approval in State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989) ("[E]very circumstance relied upon by the State [must] be proven beyond a reasonable doubt . . . and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis."). Because I agree that a fuller Edwards-type instruction was both appropriate and warranted under the circumstances, I would find the court's failure to so instruct the jury was error.[6]

There is no question the charging language set forth in both Grippon and Edwards is valid. See State v. Needs, 333 S.C. 134, 159 n.13, 508 S.E.2d 857, 870 n.13 (1998) (reaffirming the "well established" Edwards charge and stating that the court recently approved a charge in Grippon "that makes no distinction between direct and circumstantial evidence"). However, while I concur in the view that the law does not discriminate between the relative weight or probative value of direct versus circumstantial evidence, I must disagree with Judge

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[6] Judge Howard correctly asserts that a charge on the State's burden of proof "is a structural part of the trial process" which, by constitutional mandate, must remain the same in each criminal case. However, I fail to see how a charge on circumstantial evidence is "in the nature of a burden of proof charge." In my view, the two are unrelated.

Stilwell's assertion that the traditional Edwards instruction "distinguishes" between the two. Edwards, in fact, makes no mention of direct evidence; it merely outlines the *test* which the jury should use in *evaluating* circumstantial evidence. See Littlejohn, 228 S.C. at 328, 89 S.E.2d at 926 (describing the charge as the "test by which circumstantial evidence is to be measured by the jury in its deliberations").

In a criminal case, the test set forth in Edwards may be critical to a just resolution because of the *nature* of circumstantial evidence. See Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 338 n.6, 534 S.E.2d 672, 681 n.6 (2000) (wherein the court, while concluding circumstantial and direct evidence are equally valid and convincing, recognized that Edwards "indicates circumstantial evidence requires greater scrutiny than direct evidence in a criminal proceeding"). Unlike direct evidence, which the jury may accept or reject on its face, a proper assessment of circumstantial evidence requires the jury to decide not only whether the facts and circumstances presented are true, but also whether the defendant's guilt logically can be inferred. Thus, the use of circumstantial evidence calls on the jury to employ analytical tools in a complex reasoning process not otherwise needed when reviewing direct evidence alone. In so doing, it also invites the danger of "logical gaps" legitimately associated with circumstantial evidence—that the jury may surmise guilt from "subjective inferential links based on probabilities" and thereby elevate coincidence or suspicion into permissible inference. People v. Cleague, 239 N.E.2d 617, 619 (N.Y. 1968).

The validity of circumstantial evidence, therefore, rests on "whether common human experience would lead a reasonable man, putting his mind to it, to reject or accept the inferences asserted for the established facts." People v. Wachowicz, 239 N.E.2d 620, 622 (N.Y. 1968). The problem with the charge recommended in Grippon, however, is that it fails to alert the jury to the unique nature of circumstantial evidence.[7] The Edwards charge, on the other hand,

[7] Interestingly, the Grippon charge stems from the Supreme Court's decision in Holland v. United States, 348 U.S. 121 (1954). While it is true that

provides a framework for focusing the jury's deliberative process in circumstantial evidence cases.

Without question, the law to be charged in a particular case is determined by the evidence presented at trial. State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996). Accordingly, it is well settled that a trial court commits reversible error when it fails to give a requested charge on an issue raised by the evidence. See State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999); State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). As our supreme court has stated, "[a] request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." State v. Austin, 299 S.C. 456, 385 S.E.2d 830, 831 (1989); see also State v. Addison, Op. No. 25217 (S.C. Sup. Ct. filed December 11, 2000) (Shearouse Adv. Sh. No. 43); State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987). Although the refusal to give a specific charge may not be error "*when the given instructions use the proper test for determining the issues before the jury*," State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), such is not the case when the charge as given fails to cover the substance of the request. See State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000) (failure to tailor jury instructions to adequately reflect facts and theories presented by the defendant constituted reversible error); State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000) (court must fashion an appropriate

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Holland, a tax evasion case involving the "net worth" method of circumstantial proof, proposed as the "better rule" the charging language later articulated in Grippon, it was not without qualification. Id. at 139. To the contrary, the Holland Court referenced the "great danger" associated with equivocal circumstantial evidence---that once the prosecution established the necessary circumstances a jury might assume the inferential crime automatically followed, despite reasonable explanations offered by the defense. Id. at 127-28. Accordingly, the Court warned that jury charges in such cases "should be especially clear, including, in addition to the formal instructions, a summary of the nature of the [circumstantial evidence] method . . . *and the inferences available both for and against the accused*." Id. at 129.

charge when defendant requests more than the standard self-defense charge and the evidence supports the request); Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991) (counsel was ineffective in failing to request additional jury instructions on self-defense when warranted by the evidence, despite fact that judge had instructed jury in accordance with prior court-approved self-defense charge); State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989) (court erred in giving a prior-approved charge exclusively without considering the facts and circumstances of the particular case when defense counsel repeatedly requested additional charges based in common law); State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987) (reversing conviction for cocaine trafficking where the charge requested was a correct statement of the law but charge given did not adequately cover the substance of the request); State v. Brownlee, 318 S.C. 34, 38, 455 S.E.2d 704, 706 (Ct. App. 1995) (reversing conviction for possession with intent to distribute because, "although the charge as given correctly stated the elements of the offense, it did not adequately cover the substance of [the defendant's] request").

Here, the charge requested by Cherry is a correct statement of the law on circumstantial evidence. See Needs, 333 S.C. at 159 n.13, 508 S.E.2d at 870 n.13; Edwards, 298 S.C. at 275, 379 S.E.2d at 889. Viewing the evidence in the light most favorable to Cherry,[8] I believe the jury could have found the sum of the circumstantial facts asserted by the State to be as consistent with Cherry's innocence *of intent to distribute* crack cocaine as with his guilt. Hence, I would find the unique inferential nature of the circumstances presented in this case justified additional instructions to guide the jury in making appropriate logical inferences and thus preclude a finding of guilt based on mere probability. See Grippon, 327 S.C. at 87-88, 489 S.E.2d at 466-67 (Toal, J., concurring in result only) (In "clarif[ying] the jury's responsibility to evaluate circumstantial evidence carefully," the Edwards charge forecloses the possibility that the jury "'may leap logical gaps in the proof offered and draw unwarranted conclusions based on probabilities of low degree.'") (quoting People v. Ford, 488 N.E.2d 458, 465 (N.Y. 1985)).

[8] See State v. Byrd, 323 S.C. 319, 474 S.E.2d 430 (1996).

It must be noted that nothing in Grippon or Needs precludes a trial court from giving the more detailed Edwards charge, including the language that all of the circumstances proffered by the State must "point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis." Edwards, 298 S.C. at 275, 379 S.E.2d at 889. Indeed, in Grippon the court reiterated it has "never rejected the 'reasonable hypothesis' phrase or found [that it] shifted the burden of proof" from the State. Grippon, 327 S.C. at 82, 489 S.E.2d at 462; see also State v. Harry, 321 S.C. 273, 279, 468 S.E.2d 76, 80 (Ct. App. 1996) (approving use of "reasonable explanation" phrase). Furthermore, continued approval of the Edwards charge is rendered superfluous if the charge is not given when necessitated by the factual posture of the case.

As our supreme court has said, "[t]he purpose of a charge is to enlighten the jury. This purpose is accomplished by a statement of the law which fits the concrete case . . . ." State v. Fair, 209 S.C. 439, 445, 40 S.E.2d 634, 637 (1946) (quoting State v. DuRant, 87 S.C. 532, 534, 70 S.E. 306, 307 (1911)). In my view, while the Grippon charge "obviously is a correct statement of the law," it does not cover the substance of Cherry's requested instruction. It was therefore error to refuse the request.

Moreover, the court's failure to give the additional instruction cannot be considered harmless, because there exists a reasonable likelihood the jury was unaware it should acquit if it found the combined circumstances relied upon by the State equally susceptible of an inference inconsistent with guilt of the crime charged. See, e.g., State v. Jefferies, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994) ("In making a harmless error analysis, our inquiry is not what would the verdict have been had the jury been given the correct charge, but rather did the erroneous charge contribute to the verdict rendered."). In my opinion, Cherry was prejudiced by the court's refusal to give the requested charge, particularly in light of a clearly impermissible closing argument wherein the solicitor stated there was evidence Cherry "had already distributed some crack," and that there was "no evidence that he was going to use [the crack] personally for himself." Accordingly, I would reverse the conviction and remand for a new trial.