# OPINIONS

OF

# THE SUPREME COURT

AND

# COURT OF APPEALS

OF

# SOUTH CAROLINA

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**FILED DURING THE WEEK ENDING**

**November 25, 2000**

**ADVANCE SHEET NO. 41**

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

# Supreme Court of South Carolina

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

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The State of South Carolina, Respondent,

v.

Bayan Aleksey, Appellant.

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Appeal From Orangeburg County
Edward B. Cottingham, Circuit Court Judge

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Opinion No. 25212
Heard September 19, 2000 - Filed November 13, 2000

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**AFFIRMED**

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Assistant Appellate Defender Robert M. Dudek, of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Walter M. Bailey, of Summerville, for respondent.

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**JUSTICE BURNETT**: Appellant was convicted and sentenced to death for the murder of a state trooper. We affirm.

## State v. Aleksey

## FACTS

On New Year's Eve 1997, Sergeant Franklin Lingard of the South Carolina Highway Patrol stopped a white Ford Mustang with a Delaware license plate for speeding on Interstate 95. Sergeant Lingard approached the driver's side of the Mustang and was shot to death by a gun fired from inside the car on the driver's side. Officer Lin Shirer, a narcotics officer with the Calhoun County Sheriff's Office, accompanied Sergeant Lingard on patrol that night. Officer Shirer witnessed the shooting, but was unable to see inside the car to identify the shooter because of its dark tinted windows.

A multi-car chase ensued. An officer stopped the Mustang long enough for Gloryvee Perez Blackwell (Blackwell) and her two children to exit from the passenger side of the vehicle. While Blackwell and the children were exiting the car, appellant held a gun to his head and threatened to kill himself if the officers came any closer to him. Appellant sped away and was eventually stopped again when an officer deliberately collided his vehicle with the Mustang.

Appellant was pulled unconscious from the car, treated at the scene by EMS, then taken to the hospital, and from there to the Orangeburg/Calhoun Regional Detention Center on New Year's Day. A background check on appellant revealed an extensive record of arrests for fraud-related activities, outstanding warrants, and numerous aliases. In addition, both the Mustang and its license tag were stolen.

On January 2nd, appellant gave two statements to officers from the State Law Enforcement Division (SLED). In the first, he claimed Blackwell was driving and shot Sergeant Lingard, after which they stopped and changed seats. In the second, appellant confessed to the shooting.

## ISSUES

I. Did the trial court's instruction that the jury had "one single objective and that is to seek the truth" violate appellant's due process rights by shifting the burden of proof to appellant and diluting the reasonable doubt standard of proof?

> II. Did the trial court err by refusing to suppress appellant's confession and by impermissibly delegating a portion of his Miranda duties to the jury?
>
> III. Did the trial court err in refusing to allow appellant to cross-examine Blackwell concerning dismissed indictments on narcotics charges?
>
> IV. Did the trial court err by refusing to redact from appellant's statement references to a contract on his life?

## DISCUSSION

> I. Did the trial court's instruction that the jury had "one single objective and that is to seek the truth" violate appellant's due process rights by shifting the burden of proof to appellant and diluting the reasonable doubt standard of proof?

Appellant argues the trial court erred in instructing the jury its "one single objective" was "to seek the truth." Appellant contends this instruction violated his due process rights by shifting the burden of proof and diluting the reasonable doubt standard. In the context in which the instruction was given, we disagree.

The trial court gave a lengthy, complete, and proper instruction on reasonable doubt, the presumption of innocence, and the State's burden of proof. Next, the judge instructed the jury concerning its role as finder of facts. In concluding his remarks on determining the credibility of witnesses, the judge stated:

> Obviously you do not determine the truth or falsity of a matter by counting up the number of witnesses who may have testified on one side or the other.
>
> Ladies and gentlemen, throughout this entire process, you have but one single objective, and that is

> to seek the truth, to seek the truth regardless of from what source that truth may be derived.
>
> Now, all of these things, ladies and gentlemen, you will consider, bearing in mind that you must give the defendant the benefit of every reasonable doubt.

Jury instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they "[run] the risk of unconstitutionally shifting the burden of proof to a defendant." State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998). However, jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994). The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution.[1] Estelle v. McGuire, 502 U.S. 62 (1991); Boyde v. California, 494 U.S. 370 (1990).

While we have urged trial courts to avoid using any "seek" language when charging jurors on either reasonable doubt or circumstantial evidence (see State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998)), the "seek" language here did not appear in either the reasonable doubt or circumstantial evidence charges, but in the instructions on juror credibility. Both the reasonable doubt and circumstantial evidence charges were complete and proper.

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[1]In State v. Manning, 305 S.C. 413, 416, 409 S.E.2d 372, 374 (1991), we cited Cage v. Louisiana, 498 U.S. 39 (1990) for the rule that an instruction is defective if a reasonable juror *could* interpret it to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. This standard has since been repudiated by the United States Supreme Court. See Estelle v. McGuire, 502 U.S. 62 (1991) (clarifying that proper and only standard is whether there is a reasonable likelihood the jury applied the challenged instruction in a way that violated the constitution). To the extent that it follows the Cage "could" standard instead of the Estelle "reasonable likelihood" standard, the Court of Appeals' subsequent opinion in State v. Clute, 324 S.C. 584, 594, 480 S.E.2d 85, 90 (Ct. App. 1996), is overruled.

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The Fifth Circuit Court of Appeals found no error in a nearly identical situation, where the trial court instructed the jury: "Remember, at all times, you are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in this case." United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir. 1994). Like appellant, Gonzalez-Balderas argued instructing the jury that its "sole interest is to seek the truth" dilutes the reasonable doubt standard of proof. The court held:

> As an abstract concept, "seeking the truth" suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a preponderance of evidence standard. Such an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt. The district court, however, did not use it in this way. Rather, the trial court began its instructions with a clear definition of the government's burden of proof in which it repeatedly stated that the defendant could not be convicted unless the jury found that the government had proven him guilty beyond a reasonable doubt. It correctly defined proof beyond a reasonable doubt as "proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs." There is no reasonable likelihood that the jury inferred that the single reference at the end of the charge to "seeking the truth," rendered as it was in the context of an admonition to "not give up your honest beliefs," modified the reasonable doubt burden of proof.

Id. We find the reasoning of the Gonzales-Balderas court very persuasive.[2]

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[2]See also Watkins v. Ponte, 987 F.2d 27, 32 (1st Cir. 1993) (instruction defining reasonable doubt as "doubt that resides in the mind of a reasonable man who is earnestly seeking truth" did not shift burden to defendant, even though it was poor formulation); United States v. Gray, 958 F.2d 9, 13 (1st Cir. 1992) (jury's sole interest to find truth from the evidence did not shift

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There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt. The trial court's instructions concerning seeking the truth were given in the context of the jury's role in determining the credibility of

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burden of proof); United States v. Winn, 948 F.2d 145, 159-60 (5th Cir. 1991) (sole interest of jury to seek the truth from the evidence not plain error); Andrews v. State, 511 S.E.2d 258, 259 (Ga. Ct. App. 1999) ("it is a doubt of a fair-minded, impartial juror honestly seeking the truth" does not shift burden); Commonwealth v. Allard, 711 N.E.2d 156, 159-60 (Mass. 1999) (trial court's characterization of jury's function as "search for the truth" did not result in prejudicial error); State v. Weisbrode, 653 A.2d 411, 417 (Me. 1995) ("your sole interest is to seek the truth from the evidence" did not shift burden); State v. Hudson, 668 A.2d 457, 459 (N.J. App. Div. 1995) ("search for the truth" did not dilute reasonable doubt standard); People v. Walos, 645 N.Y.S.2d 695, 696 (N.Y. App. Div. 1996) (reference to trial as "search for truth" did not dilute reasonable doubt standard); People v. Reed, 624 N.Y.S.2d 693 (N.Y. App. Div. 1995) (charge as a whole conveyed reasonable doubt standard; "search for truth" was given in context of credibility instruction, not reasonable doubt); People v. Hill, 618 N.Y.S.2d 641, 642 (N.Y. App. Div. 1994) (reference to determination of "the truth" in connection with credibility and factual issues did not alter reasonable doubt standard); State v. Streich, 658 A.2d 38, 53 (Vt. 1995) (jury's role to "seek the truth," viewed with instructions as a whole correctly conveyed burden of proof); State v. Benoit, 609 A.2d 230, 232 (Vt. 1992) (jury's role to "seek the truth" not improper instruction on burden of proof in light of other instructions conveying reasonable doubt standard); State v. Avila, 532 N.W.2d 423, 429-30 (Wis. 1995) ("you should search for truth" did not dilute burden of proof).

Even the cases relied upon by appellant support the state's position. See United States v. Pine, 609 F.2d 106 (3d Cir. 1979) (conviction affirmed; trial court's full and forceful charge on reasonable doubt assured jury properly applied burden of proof); State v. Medina, 685 A.2d 1242 (N.J. 1996) (conviction affirmed; "on balance, the instruction passes muster").

Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of "the truth" in jury charges is unconstitutional.

witnesses.[3] The remarks were prefaced by a full instruction on reasonable doubt and followed by an additional exhortation to bear in mind the State's heavy burden of proof. Under the standards articulated in Smith and Boyde, the instruction as a whole properly conveyed the law to the jury and there is not a reasonable likelihood the jury applied the judge's instructions to convict appellant on less than proof beyond a reasonable doubt.

> II. Did the trial court err by refusing to suppress appellant's confession and by impermissibly delegating a portion of his Miranda duties to the jury?

The day after his arrest for the trooper's murder, appellant asked to speak with a SLED agent. He was taken to the Orangeburg County Law Enforcement Center where he met with Agents George Darnell and Kenny Mears. They informed appellant of his Miranda rights and he signed a waiver. Appellant then gave a tape recorded statement in which he told the agents that Blackwell shot the trooper. When appellant concluded his narrative, Agent Darnell asked, "Is that all?," to which appellant responded, "That's all I got to say." The agents then turned off the tape recorder.

As the agents prepared to return appellant to the detention center, appellant said he wanted to talk further and asked if the agents could help his friend Elena Batkilina, who was in trouble in Florida. The agents told appellant Florida was outside their jurisdiction and there was nothing they could do to help her. Appellant then asked about the status of Blackwell and the children. Finally, he asked if he could be moved out of the infirmary into the general prison population. After several phone calls, the agents were able to obtain permission for appellant to move into the general prison population. Appellant then gave the statement at issue, inculpating himself in the trooper's death.

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[3]This was clearly the judge's understanding, as evidenced by a later colloquy with defense counsel. After closing arguments, appellant asked the judge to re-charge the jury on reasonable doubt "in the same way you did the first time, leaving [the "seek the truth" language] out." The judge replied, "No sir, I didn't do that. I didn't charge finding of the truth in the context of reasonable doubt. I used that language as to the credibility of the witnesses."

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Appellant's second issue on appeal raises several questions:

(a) Did appellant unambiguously invoke his right to remain silent when he said, "That's all I've got to say" at the end of his first statement?

(b) If so, was his request scrupulously honored?

(c) Did the trial court err in not specifically ruling on whether appellant invoked his right to remain silent?

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda v. Arizona, 384 U.S. 436 (1966). United States v. Dickerson, __ U.S. __, __, 120 S.Ct. 2326, 2331 (2000). The voluntariness of a statement is determined from the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Furthermore, the conclusion of the trial judge on issues of fact as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998).

When a suspect invokes his right to remain silent, law enforcement officers must scrupulously honor it. Michigan v. Moseley, 423 U.S. 96 (1975). However, before law enforcement officers are required to discontinue questioning, the suspect must clearly articulate his desire to end the interrogation. Davis v. United States, 512 U.S. 452, 459 (1994); State v. Reed, 332 S.C. 35, 42, 503 S.E.2d 747, 750 (1998). Moreover, law enforcement officers may certainly speak with a suspect who reinitiates communication subsequent to an invocation of rights. See Edwards v. Arizona, 451 U.S. 477, 485 (1981) (once an accused requests counsel, police interrogation must cease unless the accused himself "initiates further communication, exchanges, or conversations with the police").

We conclude appellant's statement "That's all I've got to say," was not an unequivocal invocation of his right to discontinue questioning. In context, the statement was ambiguous, indicating either a desire to

discontinue questioning or simply the end of his story.[4] See State v. McCorkendale, 979 P.2d 1239, 1247-48 (Kan. 1999) ("That's all I got to say" not an unequivocal invocation of right to remain silent; it could just as easily have been interpreted as a statement that he had finished his explanation of the matter). However, even if the statement is interpreted to be an invocation of appellant's right to remain silent, it is uncontroverted that appellant himself reinitiated conversation with the agents after the tape recorder was turned off. The principle underlying Michigan v. Moseley is that the suspect, rather than the police, controls the time, duration, and subject matter of an interrogation. 423 U.S. at 103-104. Officers do not fail to "scrupulously honor" an invocation of rights when they engage in conversation initiated by the suspect. See State v. Kennedy, 333 S.C. 426, 430, 510 S.E.2d 714, 716 (1998) ("[E]ven if this were a proper invocation of the right to counsel, petitioner waived this right when he initiated further discussions."). The trial court did not err in ruling appellant's second statement voluntary.

Appellant asserts the trial court erred as a matter of law in failing to specifically rule on whether he invoked his right to remain silent when he said, "That's all I've got to say." Appellant's objection arises from the following comment made by the judge during the Jackson v. Denno[5] hearing:

> It is clear to me, it would be for the jury to determine, that this defendant did not say, "I terminate the conversations," he said, "I have concluded my statement," and that the testimony if believed by the jury, who will be the ultimate finder of the facts on the issue, that this defendant began the conversation again and not the interrogation by the officers.

Appellant argues this constitutes an impermissible delegation to the jury of a portion of the trial court's Miranda duties. We disagree. In the first place,

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[4]The trial court also found appellant's statement ambiguous: "Well, let me interrupt you. Did he invoke his right to silence or does that indicate that he had concluded telling the story? . . . It sounds to me like it can be interpreted to mean, 'I have told you my story.'"

[5]378 U.S. 368 (1964).

appellant never requested a more specific ruling from the court as to whether his statement, "That's all I got to say" invoked his right to remain silent.

In any case, the trial judge ruled appellant was advised of his Miranda rights, knowingly and intelligently waived those rights, and that his statement was, beyond a reasonable doubt,

> freely and voluntarily given without duress, without coercion, without undue influence, without reward, without promise or hope of reward, without promise or hope of leniency, without threat of injury, and without compulsion or inducement of any kind, and that such alleged incriminating statement or confession was the voluntary product of the free and unconstrained will of the defendant.

The trial judge's extensive ruling regarding the voluntariness of the challenged statement fulfilled his duties under Miranda. The critical issue was not whether appellant invoked his right to remain silent after his first statement, but rather whether the second, inculpatory statement was voluntarily given. Even if one assumes appellant invoked his right to remain silent, his subsequent reinitiation of conversation validly waived that right. The judge did not err in failing to rule explicitly on the invocation issue because that issue was subsumed by the issue of the voluntariness of the statement. See State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998) (appellant contended his invocation of the right to remain silent was not honored; the Court held the trial court did not err in denying the motion to suppress as the State met its burden of showing appellant's statement was voluntarily and freely given); see also Woods v. Armontrout, 787 F.2d 310, 315 (8th Cir. 1986) (because trial court record was sufficient to establish voluntariness, subsidiary findings that police did not induce confession by coercion or promises implicitly made).

Furthermore, read in context, the judge's comment "it would be for the jury to determine" clearly referred to the jury's role as the ultimate fact finder on the issue of the voluntariness of appellant's statement. See State v. Davis, 309 S.C. 326, 342, 422 S.E.2d 133, 143 (1992), overruled on other grounds by State v. Brightman, 336 S.C. 348, 520 S.E.2d 614 (1999) ("Once the court determines that a defendant received and understood his

rights, the court allows a confession into evidence. It then is for the jury ultimately to decide whether the confession was voluntary."). The trial court properly ruled appellant's confession voluntary, then submitted it to the jury for the final determination of voluntariness.

> III. Did the trial court err in refusing to allow appellant to cross-examine Blackwell concerning dismissed indictments on narcotics charges?

Blackwell testified for the State as an eyewitness to the trooper's death. Appellant sought to cross-examine Blackwell concerning her indictments on ten separate narcotics charges. Blackwell had pled guilty to one indictment, possession of cocaine, and the other nine indictments were dismissed. The trial court refused to permit appellant to cross-examine Blackwell concerning the dismissed charges, but permitted appellant to proffer the questions for the record. During the proffer, Blackwell answered "I don't recall" to each of appellant's questions concerning the dismissed indictments.

The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994). This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. See State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981) (a trial court's ruling concerning the scope of cross-examination of a witness to test his credibility should not be disturbed on appeal absent a manifest abuse of discretion). On the contrary, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

The trial court did not abuse its discretion in limiting the scope of cross-examination to comply with the South Carolina Rules of Evidence. Rule 609 permits impeachment of a witness by evidence of *conviction* of certain crimes. Rule 609, SCRE. Prior bad acts which are not the subject of conviction, such as the dismissed indictments here, may only be inquired into, "in the discretion of the court, if probative of truthfulness or untruthfulness."

Rule 608(b), SCRE. Narcotics offenses are generally not considered probative of truthfulness. See, e.g., United States v. Turner, 104 F.3d 217, 223 (8th Cir. 1997) ("Misconduct involving violations of narcotics laws is not an act involving dishonesty or untruthfulness and therefore may not be inquired into under Federal Rule of Evidence 608(b)."). Nor are the dismissed indictments evidence of "bias, prejudice or any motive to misrepresent" under Rule 608(c). The trial court properly limited the scope of cross-examination to Blackwell's actual convictions.

> IV. Did the trial court err by refusing to redact from appellant's statement references to a contract on his life?

In his original statement to police, the one in which he blamed Blackwell for the trooper's murder, appellant said "I'm running from somebody who's got a contract on my life in New York." The trial court refused appellant's request to redact the statement as suggestive of mafia contacts. Appellant argues the reference was intended by the State to suggest appellant was a bad person with a propensity to commit murder.

All relevant evidence is admissible. Rule 402, SCRE; State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999). Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). The trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion. Alexander, supra. Although evidence is relevant, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value. Id.; Rule 403, SCRE.

The trial court did not abuse its discretion in admitting appellant's statement he was running from someone with a contract on his life. The statement was relevant because it suggested appellant's motive for shooting the trooper. See People v. Hayes, 989 P.2d 645, 677 (Cal. 2000) (appellant's statement regarding mafia connections introduced to establish effect on hearers, not to suggest bad character). Moreover, the single reference to someone with a contract on appellant's life does not necessarily suggest appellant is "a bad person with a propensity to commit murder" as

argued by appellant in his brief. If it suggests mafia contact at all, it suggests appellant was perhaps an informant *against* the mafia. In that sense, it is clearly distinguishable from Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989), where the solicitor introduced impermissible evidence of devil worship and mafia *membership* to suggest that Mitchell was a bad person with a propensity to commit the crime. See also Commonwealth v. Scarfo, 611 A.2d 242, 271 (Pa. 1992), superseded by statute on other grounds, (references to being "made" member of mafia, coupled with testimony that one must kill to become a "made" member, was prejudicial error).

Appellant also asserts the State had abundant evidence of his motive to commit the crime, including his statement he "panicked because I have problems in New York and Philadelphia that's why I ran," the existence of outstanding arrest warrants, and the stolen car and stolen license plate. Thus, appellant argues, the reference to a contract on his life was unnecessary to prove motive. We disagree. Part of appellant's defense was that his *modus operandi* when arrested was to use fake identification, make bond, and then fail to appear in court. In other words, he asserted to the jury that it would not make sense or be in character for him to shoot the trooper to avoid arrest. However, appellant's statement, "Katherine said man, turn yourself in, OK it's minor crimes, but that's not what I'm really running from. I'm running from somebody who's got a contract on my life in New York," refutes this defense theory. The State was entitled to present this additional motive evidence because appellant argued the other motives suggested by the State were insufficient motives to kill a police officer.

We conclude appellant's statement was relevant to establish motive and this relevance was not outweighed by any prejudicial effect. 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) (appellate court may affirm for any reason appearing in the record).

## PROPORTIONALITY REVIEW

We have reviewed the entire record pursuant to S.C. Code Ann. § 16-3-25 (1985) and conclude the death sentence was not the result of passion, prejudice, or other arbitrary factors, and the evidence supports the jury's finding of the aggravating circumstance. The death sentence is not excessive or disproportionate to the penalty imposed in similar cases, where, as here,

the single aggravating circumstance was death of a police officer. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991); State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985).

**AFFIRMED**.

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

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

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Ex Parte: J. P. Strom, Jr., Petitioner,

In Re: Collins Entertainment Corporation, Respondent,

v.

Columbia "20" Truck Stop, Inc. d/b/a Columbia "20" Truck Stop, Vern Adkins and Union Oil of California, Defendants.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

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Opinion No. 25213
Heard October 5, 2000 - Filed November 20, 2000

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**AFFIRMED**

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Tom Young, Jr., of Strom & Young, L.L.P., of Columbia; and Richard Mark Gergel and W. Allen

Nickles, III, both of Gergel, Nickles & Solomon, P.A., of Columbia, for petitioner.

O. W. Bannister, Jr. and James W. Bannister, of Bannister & Wyatt, L.L.C., of Greenville, for respondent.

Desa Ballard, of Desa Ballard, P.A., of West Columbia, as amicus curiae.

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**CHIEF JUSTICE TOAL:** We granted certiorari to review the decision of the Court of Appeals reversing a Circuit Court order which granted J.P. Strom, Jr's motion to be retroactively relieved as counsel of record in the captioned matter.

## FACTUAL/ PROCEDURAL BACKGROUND

Respondent Collins Entertainment Corporation ("Collins") retained Petitioner J.P. Strom, Jr. ("Strom") and Eric Bland ("Bland") to represent it in a contract dispute with Columbia "20" Truck Stop. On February 9, 1996, Strom and Bland filed a circuit court action entitled *Collins Entertainment Corporation v. Columbia "20" Truck Stop, Inc., et al*, C/A No. 96-CP-40-0527 ("*Columbia "20""*). On February 12, 1996, the circuit court issued a temporary restraining order in the case to prevent the sale of Columbia "20" to a third party. On February 20, 1996, prior to the scheduled injunction hearing, the parties entered into a consent order which held the matter in abeyance while Collins negotiated with the third party. Strom alleges he was contacted via telephone by Collins' in-house counsel, Timothy Youmans ("Youmans") in March of 1996, and told to close his file. Youmans and co-counsel Bland deny Strom was relieved of any obligations. Strom claims he closed his file in March and mailed a final bill to Collins in April 1996. Strom contends he has performed no work on the *Columbia "20"* file since that time. It is uncontested, however, that the *Columbia "20"* case remained on the trial docket, with Strom shown as counsel of record, until July 1997. Strom has produced no written documentation of his discharge. However, he has not billed Collins for any work since the *Columbia "20"* action was held in abeyance.

On June 10, 1997, Strom and several other attorneys, filed *Joan Caldwell Johnson, et al. v. Collins Entertainment, Inc. et al.*, C/A No. 3:97-2136-17 (D.S.C.) ("*Johnson*"), a federal class action challenging the legality of the video poker industry in South Carolina. When Strom filed this action against Collins, he

was still the attorney of record for Collins in the *Columbia "20"* action. In June 1997, the parties received notice that the *Columbia "20"* case was on the docket for trial during the week of July 8, 1997. However, *Columbia "20"* was dismissed pursuant to Rule 41(a), SCRCP and an executed Stipulation of Dismissal on July 11, 1997, before the case went to trial.

On June 19, 1997, Strom filed a motion requesting that the circuit court delete his name as counsel of record in the *Columbia "20"* action, retroactive to March of 1996. Collins contested the motion, claiming it had not discharged Strom in March of 1996, or anytime thereafter. Following a hearing in August 1997, the Honorable L. Casey Manning issued an order dated August 8, 1997, granting Strom's motion. Judge Manning's Order retroactively relieved Strom as counsel of record pursuant to Rule 60(a), SCRCP, based on clerical mistake. Judge Manning affirmed his findings in a further Order denying Collins' motion for reconsideration. Collins appealed.

The Court of Appeals overturned Judge Manning's Order, holding there was no clerical mistake and that Rule 11(b), SCRCP, is the only proper method for an attorney to withdraw as counsel of record. This Court granted certiorari, and the issues before this Court are:

> I. May Strom raise the principle of estoppel as an additional sustaining ground?
>
> II. Did the Court of Appeals correctly hold that once an attorney becomes the attorney of record in an action, withdrawal can only be accomplished by order of the court pursuant to Rule 11(b), SCRCP?

## LAW/ ANALYSIS

### I. Estoppel

Strom argues this Court should apply the principle of estoppel as an additional sustaining ground to overrule the Court of Appeals' decision and to uphold the trial court's decision. We disagree.

As discussed below in Section II, there are strong policy reasons which impel us to require strict adherence to Rule 11. Therefore, we can not allow Strom to interpose estoppel to prevent the enforcement of Rule 11, even if the record indicates Collins did not suffer any prejudice. To allow the use of estoppel in this instance would defeat the strong public policy behind the enforcement of

Rule 11.[1]

In light of this ruling on the merits, it is not necessary for this Court to address Collins' contention that Strom's estoppel argument was not properly raised as an additional sustaining ground.

## II. Rule 11(b), SCRCP

Strom argues the Court of Appeals erred in holding that an attorney can only be relieved as counsel by obtaining a court order utilizing the procedure set forth in Rule 11(b), and may not retroactively be relieved pursuant to Rule 60(a). We disagree.

Rule 11, SCRCP, provides: "An attorney may be changed by consent, or upon cause shown, and upon such terms as shall be just, upon application, by order of Court, *and not otherwise*." (emphasis added). We hold that after entering an appearance with the court, an attorney must receive a court order pursuant to Rule 11(b) in order to be relieved as counsel. As this Court stated in *Culbertson v. Clemens*, 322 S.C. 20, 25, 471 S.E.2d 163, 165 (1996):

> In all actions, it is of vital importance, not only to the parties involved but to the court as well, that the correct attorneys are listed as the attorneys of record. The best way to achieve this is by strict adherence to Rule 11(b), which was designed to eliminate any confusion regarding which attorneys are representing parties by requiring that any changes be made by application to the court.

It is irrelevant whether the attorney is discharged or seeks to withdraw for his own reasons. A client has the absolute right to trust and rely upon attorneys whom he believes to be his counsel of record. In the instant case, the only evidence that Strom was discharged by Collins is the testimony of Strom himself and the absence of billing records during a time when the matter was held in abeyance. Contrarily there is evidence that Collins still believed Strom would continue to represent it if and when the case proceeded to trial. As the text of Rule 11(b) implies, either the attorney, the replacement attorney, or the

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[1]The conduct between the parties is not at issue in this appeal. Although this Court expresses no opinion as to the merits of any subsequent litigation between Collins and Strom, we note nothing in this opinion would prevent Strom from presenting his estoppel argument in a subsequent civil suit.

client may apply for a court order changing or removing an attorney. If an attorney is discharged, and the client or the new attorney fails to apply for a court order, it is incumbent upon the discharged attorney to do so himself. In a situation such as this one where the client claims not to have discharged the attorney, strict adherence to Rule 11(b) would have solved the confusion. If Strom had filed a Rule 11(b) motion at the time he believed he was discharged, Collins would have been notified and could have corrected Strom's belief.

Strong policy considerations dictate that a client and the court must be unequivocally informed when an attorney intends to withdraw from representing a party, for whatever reason. Equally strong policy considerations dictate that the court must, by order, approve a client's discharge of an attorney of record in a court proceeding. The conflict in understanding between Collins and Strom in this case is a perfect illustration of the need for adherence to Rule 11's requirement of a court order. Here, Strom and Collins' in-house counsel, Youmans, both testified credibly about their understanding of their telephone conversation. Unfortunately each lawyer interpreted the conversation differently.

We hold that in order to be removed as counsel of record, an attorney must receive a court order pursuant to 11(b), SCRCP. In a case where an attorney believes he has been discharged, if the client fails to request a court order changing attorneys, the attorney is required to request such an order on his own motion.[2] In *Smith v. Bryant*, 141 S.E.2d 303 (N.C. 1965), the North Carolina Supreme Court articulated the policy behind placing such an obligation on an attorney. The Court held that an attorney who has entered a formal appearance in an action is "not at liberty to abandon [the client's] case without (1) justifiable cause, (2) reasonable notice to [the client], and (3) permission of the court." *Id.* at 305. The court explained: "[a]n attorney not only is an employee of his client but also is an officer of the court. This dual relation imposes a dual obligation." *Id.* at 306. Based on case law and policy, once an attorney has made a formal appearance and becomes attorney of record in an action, withdrawal can only be

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[2]Strom cites *In re Tillman*, 319 S.C. 461, 462 S.E.2d 283 (1995), in support of his argument that a discharged attorney does not have an obligation to file a Rule 11(b) motion. Strom accurately cites *Tillman* for the proposition that an attorney who is discharged can no longer perform work on the client's case. However, requiring an attorney to file a motion to change attorneys under Rule 11(b) does not constitute "continuing representation after discharge."

accomplished by order of the court.[3]

Since a court order is required to relieve an attorney of record, the trial court erred in relieving Strom pursuant to Rule 60(a), SCRCP. Rule 60(a), SCRCP, provides: "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time." Failure to file a motion to be relieved as counsel of record does not amount to a clerical error. A clerical error "is a mistake or omission by a clerk, counsel, judge or printer, *which is not the result of exercise of judicial function*." *Dion v. Ravenel, Eiserhardt Assocs.*, 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct. App. 1994) (emphasis added).

Furthermore, the trial court's order removing Strom as counsel of record should not have been granted *nunc pro tunc*. *Nunc pro tunc* is a phrase applied to acts allowed to be done after the time when they should have been done, with a retroactive effect. Black's Law Dictionary 737 (7th ed. 1991). *Nunc pro tunc* orders can only be used to place in the record evidence of judicial action that has actually taken place. "A prerequisite for a *nunc pro tunc* order . . . is some previous action by the court that is not adequately reflected in its record." *Dewees v. Sweeney*, 947 S.W.2d 861 (Tenn. Ct. App. 1996), *app. den'd* (1997); *see also Simons v. Atlantic Coast Line R.R. Co*, 235 F.Supp. 325, 330 (D.S.C. 1964) (*nunc pro tunc* entry cannot be made to serve the office of correcting a decision or of supplying non-action on the part of the court); *Carroll v. Carroll*, 338 S.W.2d 694, 695 (Ky. 1960) ("The error could not be corrected by *nunc pro tunc* order because such an order can be used only for the purpose of placing in the record evidence of judicial action that has actually been taken, not to correct an

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[3]Many other states follow similar rules requiring that attorneys of record, even those who are discharged, can only be relieved as counsel upon filing with the court. *See, e.g., Farkas v. Sadler*, 375 A.2d 960 (R.I. 1977) (effective withdrawal, at the insistence of either counsel or client, is dependent upon consent of the court); *Sweet v. Sweet*, 676 N.Y.S.2d 853 (N.Y. Fam. Ct. 1998) (even after discharge, there are only two ways an attorney who has made an appearance in a case can withdraw: (1) by service on other parties and filing a consent to change attorneys with the court and (2) by motion to the court); *Reddic v. State*, 976 S.W.2d 281 (Tex. Ct. App. 1998) (either the attorney or the client must justify severance of the attorney-client relationship to the trial court); *Dunn v. Duke*, 456 S.E.2d 65 (Ga. Ct. App. 1995) (formal withdrawal by attorney cannot be accomplished until after trial court issues an order permitting withdrawal).

error or supply an omission of judicial action."); 20 Am. Jur. *Courts* § 29 (1995) (the order cannot supply the record with action that the court failed to take).

Strom needed a court order under Rule 11(b), SCRCP, to be relieved as counsel. Since such action was not taken, Strom could not be relieved as counsel of record by a *nunc pro tunc* order.[4]

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is **AFFIRMED**.

**MOORE, WALLER, BURNETT AND PLEICONES, JJ., concur.**

[4]There are also strong policy reasons not to allow the circuit court to retroactively relieve a lawyer of all responsibility for things not done during the period of retroactivity. For example, an attorney could fail to file a pleading, to submit discovery when due, or to attend a hearing, and then claim he was absolved of any responsibility for that failure or neglect because a court relieved him as counsel retroactive to a time prior to the misconduct.

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

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In the Matter of Russell S. Stemke, Respondent.

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Opinion No. 25214
Submitted October 23, 2000 - Filed November 20, 2000

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DEFINITE SUSPENSION

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

Coming B. Gibbs, Jr., of Gibbs & Holmes, of Charleston, for respondent.

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**PER CURIAM:** In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension of three months. The facts as admitted in the agreement are as follows.

## Facts

Respondent was arrested in January 1999 for shoplifting and receiving stolen goods after he replaced the UPC price stickers on merchandise valued at $130.95 with price stickers from other items valued at $10.99.

Respondent was also charged with two counts of forgery and two

counts of unlawful use of a license after two counterfeit South Carolina driver's licenses were found during an inventory search of his vehicle. Respondent admitted using the driver's licenses to obtain prescription drugs.

Respondent has identified several personal, physical and emotional problems that may have distorted his judgment in a manner that led to this incident. Respondent has successfully completed the Pre-Trial Intervention program and his arrest record has been expunged. Respondent is currently undergoing outpatient treatment for depression and drug dependency.

## Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(b) (committing a criminal act reflecting adversely on his honesty, trustworthiness, or fitness as a lawyer); Rule 8.4(c) (engaging in conduct involving moral turpitude); and Rule 8.4(d) (engaging 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 engaging in conduct demonstrating an unfitness to practice law); and Rule 7(a)(6) (violating the oath of office taken upon admission to practice law in this state).

## Conclusion

Respondent has acknowledged that his actions were in violation of the Rules of Professional Conduct, and has taken steps to prevent any further infractions. Prior to this incident, respondent had never been disciplined by this Court, and had never been sanctioned or issued a letter of caution by the Commission on Lawyer Conduct. Accordingly, we accept the Agreement for Discipline by Consent and hereby suspend respondent from the practice of law for three months.

**IN THE MATTER OF STEMKE**

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

DEFINITE SUSPENSION.

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

# THE SOUTH CAROLINA COURT OF APPEALS

## PUBLISHED OPINIONS



## UNPUBLISHED OPINIONS

## UNPUBLISHED OPINIONS
Continued



## PETITIONS FOR REHEARING

## PETITIONS FOR REHEARING
Continued

| | |
|---|---|
| 3249 - Nelson v. Yellow Cab | Denied |
| 3250 - Collins v. Doe | Pending |
| 3251 - SCDSS v. Smith | Pending |
| 3252 - Barnacle Broadcast v. Baker Broadcast | Pending |
| 3253 - Howard v. SCDOT | Withdrawn |
| 3254 - Carolina First v. Whittle | Pending |
| 3255 - State v. Larry Covington | Pending |
| 3256 - Mitchell v. Horton | Pending |
| 3257 - State v. Scott Harrison | Pending |
| 2000-UP-260 - Brown v. Coe | Pending |
| 2000-UP-509 - Allsbrook v. Robert | Denied |
| 2000-UP-530 - Richardson v. Doe | Denied |
| 2000-UP-564 - State v. John P. Brown | Pending |
| 2000-UP-567 - State v. Alfred D. Joyner | Pending |
| 2000-UP-588 - Durlach v. Durlach | Denied |
| 2000-UP-592 - State v. James L. Smith | Pending |
| 2000-UP-593 - SCDOT v. Moffitt | Pending |
| 2000-UP-595 - Frank Brewster v. State | Pending |
| 2000-UP-596 - Liberty Savings v. Lin | Pending |
| 2000-UP-600 - State v. Leroy Doral Branch | Pending |
| 2000-UP-601 - Johnson v. Williams | Pending |
| 2000-UP-602 - Reaves v. Marion County | Pending |
| 2000-UP-603 - Graham v. Graham | Denied |
| 2000-UP-606 - Bailey v. Bailey | Pending |
| 2000-UP-607 - State v. Lawrence Barron | Pending |
| 2000-UP-608 - State v. Daniel Alexander Walker | (2) Pending |
| 2000-UP-609 - Campbell v. Campbell | Pending |

## PETITIONS FOR REHEARING
Continued

| | |
|---|---|
| 2000-UP-611 - St. Clair v. Nalley | Pending |
| 2000-UP-613 - Norris v. Soraghan | Pending |
| 2000-UP-615 - Bradford v. Bradford | Pending |
| 2000-UP-620 - Jerry Raysor v. State | Pending |
| 2000-UP-621 - Williams v. Self | Pending |
| 2000-UP-627 - Smith v. SC Farm Bureau | Pending |
| 2000-UP-631 - Margaret Gale Rogers v. State | Pending |
| 2000-UP-645 - Long v. City of Sumter | Pending |
| 2000-UP-647 - Marrero v. Waterman | Pending |
| 2000-UP-648 - State v. Walter Alan Davidson | Pending |
| 2000-UP-649 - State v. John L. Connelly | Pending |
| 2000-UP-650 - State v. James E. Henderson, III | Pending |
| 2000-UP-651 - Busbee v. Benton | Pending |
| 2000-UP-653 - Patel v. Patel | Pending |
| 2000-UP-654 - State v. Phillip Daniel Hills | Pending |
| 2000-UP-655 - State v. Quentin L. Smith | Pending |
| 2000-UP- 657 - Lancaster v. Benn | Pending |
| 2000-UP-658 - State v. Harold Sloan Lee, Jr. | Pending |
| 2000-UP-659 - State v. Peter Henkins | Pending |
| 2000-UP-662 - Cantelou v. Berry | Pending |
| 2000-UP-664 - Osteraas v. City of Beaufort | Pending |
| 2000-UP-669 - Patton v. Sitte Plumbing Co. | Pending |
| 2000-UP-672 - Williams v. Jones | Pending |
| 2000-UP-674 - State v. Odom | Pending |

## PETITIONS - SOUTH CAROLINA SUPREME COURT

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|---|---|
| 2000-OR-062 - Ackerman v. 3-V Chemical | Pending |

## PETITIONS - SOUTH CAROLINA SUPREME COURT
Continued

| | |
|---|---|
| 3059 - McCraw v. Mary Black Hospital | Pending |
| 3069 - State v. Edward M. Clarkson | Pending |
| 3093 - State v. Alfred Timmons | Pending |
| 3097 - Lanham v. Blue Cross Blue Shield | Pending |
| 3101 - Fleming v. Rose | Pending |
| 3102 - Gibson v. Spartanburg Sch. Dist. | Pending |
| 3116 - Loadholt v. SC Budget & Control Board | Pending |
| 3119 - Gray v. The Club Group | Pending |
| 3125 - State v. Thomas Kennedy | Pending |
| 3126 - Hundley v. Rite Aid | Pending |
| 3128 - St. Andrews PSD v. City of Charleston | Pending |
| 3130 - State v. Albert Garvin | Pending |
| 3134 - Mizell v. Glover | Pending |
| 3137 - Hendricks v. Clemson University | Granted |
| 3145 - Wade v. Berkeley County | Pending |
| 3156 - State v. Gary Grovenstein | Pending |
| 3160 - West v. Gladney | Pending |
| 3161 - Gordon v. Colonial Ins. | Pending |
| 3162 - Paparella v. Paparella | (2) Pending |
| 3167 - Parker v. Shecut | Pending |
| 3168 - Grillo v. Speedrite Products, Inc. | Pending |
| 3170 - Richardson v. City of Columbia | Pending |
| 3171 - State Farm v. Gunning | Pending |
| 3173 - Antley v. Shepherd | Pending |
| 3175 - Williams v. Wilson | Pending |
| 3176 - State v. Franklin Benjamin | Pending |
| 3178 - Stewart v. State Farm Mutual | Pending |
| 3183 - Norton v. Norfolk | Pending |

## PETITIONS - SOUTH CAROLINA SUPREME COURT

Continued

| | |
|---|---|
| 3189 - Bryant v. Waste Managment | Pending |
| 3190 - Drew v. Waffle House, Inc. | Pending |
| 3192 - State v. Denise Gail Buckner | Pending |
| 3195 - Elledge v. Richland/Lexington | Pending |
| 3197 - State v. Rebecca Ann Martin | Pending |
| 3198 - Haselden v. Davis | Pending |
| 3200 - F & D Electrical v. Powder Coaters | Pending |
| 3204 - Lewis v. Premium Investment | Pending |
| 3205 - State v. Jamie & Jimmy Mizzell | Pending |
| 3207 - State v. Randall Keith Thomason | Pending |
| 3214 - State v. James Anthony Primus | Pending |
| 3215 - Brown v. BiLo, Inc. | Pending |
| 3217 - State v. Juan Carlos Vasquez | Pending |
| 3218 - State v. Johnny Harold Harris | Pending |
| 3220 - State v. Timothy James Hammitt | Pending |
| 3221 - Doe v. Queen | Pending |
| 3225 - SCDSS v. Wilson | Pending |
| 3228 - SC Farm Bureau v. Courtney | Pending |
| 3235 - Welch v. Epstein | Pending |
| 3241 - Auto Now v. Catawba Ins. | Pending |
| 99-UP-652 - Herridge v. Herridge | Pending |
| 2000-UP-039 - Riley v. Cone Mills Corp. | Denied |
| 2000-UP-054 - Carson v. SCDNR | Pending |
| 2000-UP-059 - State v. Ernest E. Yarborough | Pending |
| 2000-UP-075 - Dennehy v. Richboug's | Pending |
| 2000-UP-097 - State v. Willard D. Mann | Denied |
| 2000-UP-137 - Livengood v. J&M Electric Services | Pending |
| 2000-UP-143 - State v. Larry Edward Hendricks | Pending |

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|---|---|
| 2000-UP-145 - Stephen Ellenburg v. State | Pending |
| 2000-UP-170 - State v. George E. White, III | Denied |
| 2000-UP-173 - Satterfield v. Dillard Dept. Stores | Pending |
| 2000-UP-197 - Lane v. Patrick's Mobile Home Park | Denied |
| 2000-UP-220 - Lewis v. Inland Food Corp. | Pending |
| 2000-UP-230 - State v. Patricia Hudson | Pending |
| 2000-UP-236 - Beacham v. Wangner Systems, Inc. | Pending |
| 2000-UP-243 - State v. James F. Dingle | Pending |
| 2000-UP-257 - State v. Tracy McMillian | Pending |
| 2000-UP-277 - Hall v. Lee | Pending |
| 2000-UP-288 - Kennedy v. Bedenbaugh | Pending |
| 2000-UP-323 - Beach Arbor v. Bair | Denied |
| 2000-UP-341 - State v. Landy V. Gladney | Pending |
| 2000-UP-353 - State v. Cleveland "Skip" Sanders | Denied |
| 2000-UP-354 - Miller v. Miller | Pending |
| 2000-UP-367 - Thomasko v. Poole | Pending |
| 2000-UP-368 - State v. John Paul Sansbury | Pending |
| 2000-UP-373 - Metal Trades v. SC Second Injury Fund | Pending |
| 2000-UP-382 - Earl Stanley Hunter v. State | Pending |
| 2000-UP-384 - Navlani v. Bhambhani | Pending |
| 2000-UP-386 - Wood v. Wood | Pending |
| 2000-UP-404 - State v. Phillip Scott Furr | Pending |
| 2000-UP-426 - Floyd v. Horry County School | Pending |
| 2000-UP-433 - State v. Willie Erskine Johnson | Pending |
| 2000-UP-441 - Harrison v. Bevilacqua | Pending |
| 2000-UP-442 - Wagner v. Wagner | Granted |
| 2000-UP-452 - Tidwell v. Stonehedge Const. | Dismissed |
| 2000-UP-453 - Wallace v. Capital Security | Pending |

## PETITIONS - SOUTH CAROLINA SUPREME COURT
Continued

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|---|---|
| 2000-UP-455 - MacDonald v. SCDLLR | Pending |
| 2000-UP-462 - Pyle v. Pyle | Pending |
| 2000-UP-479 - In the Interest of Monshea | Pending |
| 2000-UP-481 - Hall v. Keels | Pending |
| 2000-UP-500 - State v. Daryl Johnson | Pending |
| 2000-UP-504 - State v. James Leroy Burnett | Pending |
| 2000-UP-510 - Tukes v. Lee | Pending |
| 2000-UP-512 - State v. Darrell Bernard Epps | Pending |
| 2000-UP-516 - Dearbury v. Dearbury | Pending |
| 2000-UP-523 - Nationwide Ins. v. Unisun Ins. | Pending |
| 2000-UP-524 - Jones v. Greenville County | (2) Pending |
| 2000-UP-528 - Ingram v. J & W Corporation | Pending |
| 2000-UP-533 - Atlantic v. Hawthorne & Mundy | Pending |
| 2000-UP-540 - Charley v. Williams | Pending |
| 2000-UP-544 - Cox v. Murrell & Cox | Pending |
| 2000-UP-546 - Obstbaum v. Obstbaum | Pending |
| 2000-UP-547 - SC Farm Bureau v. Chandler | Pending |
| 2000-UP-550 - McKittrick v. Sheriff Chrysler | Pending |
| 2000-UP-552 - County of Williamsburg v. Askins | Pending |

## PETITIONS - U. S. SUPREME COURT

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|---|---|
| 1999-UP-418 Bartell v. Francis Marion Univesity | Pending |

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

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The State,

Respondent,

v.

Brett Loring Butler,

Appellant.

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Appeal From Horry County
Paul M. Burch, Circuit Court Judge

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Opinion No. 3258
Heard October 12, 2000 - Filed November 13, 2000

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**REVERSED AND REMANDED**

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

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Attorney General Charles H. Richardson, all of Columbia; and Solicitor John Gregory Hembree, of Conway, for Respondent.

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**GOOLSBY, J.:** A grand jury indicted Brett Loring Butler for possession of cocaine with intent to distribute. A jury convicted him of the lesser included offense of possession of cocaine. Before sentencing, the trial judge ordered Butler to submit to a drug test. When the test returned positive for marijuana,

the judge revoked five years of Butler's suspended sentence on a prior conviction and sentenced him to four years imprisonment on his conviction for possession of cocaine. Butler appeals. We reverse and remand.

## FACTS/PROCEDURAL BACKGROUND

On March 8, 1998, William Lynch, a police office with the North Myrtle Beach Police Department, stopped Butler. Butler was driving a red BMW with an Atlantic Chevrolet "temporary paper tag" on the back. Lynch testified that he stopped Butler to check to make sure the car was properly registered and had insurance. After approaching Butler's car, Lynch noticed an overturned cup in the passenger-side floorboard. Suspecting the cup contained alcohol, Lynch asked Butler to open the passenger-side door so that Lynch could examine the cup. Upon examination, Lynch determined that the cup contained Coca-Cola mixed with alcohol. Lynch arrested Butler for having an open container. Lynch then transported Butler to the police station where a search uncovered 1.17 grams of cocaine hidden in Butler's sock. Butler was then arrested on charges of possession of cocaine with intent to distribute.

At trial, Butler moved to have the cocaine suppressed on the ground that Officer Lynch lacked reasonable suspicion that Butler was involved in criminal activity, and thus the stop was unconstitutional. At the suppression hearing, Lynch testified that the reason he pulled Butler over was because Butler's car had a temporary tag on it, and that in his experience, cars bearing these tags could be unregistered, uninsured, or stolen. On cross-examination, Lynch admitted that other than the presence of the temporary tag, there was no indication that Butler was involved in criminal activity or that his car was unregistered or unlicensed.[1] Moreover, Lynch did not testify that Butler had committed any traffic violation, that there were any deficiencies with Butler's car, or that he had received a report of a stolen BMW.

The trial court denied Butler's motion to suppress. A jury convicted Butler of possession of cocaine. Butler appeals.

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[1] Q.: . . . And you are testifying you had suspicion he was involved in criminal activity, based upon his paper tag?
A.: I wouldn't say he was involved in criminal activity.
Q.: . . . So you did not believe he was involved in criminal activity, correct?
A.: I can't say for sure if he was or wasn't. I mean, I deal with paper tags on a daily basis, and some people are and some people aren't.

**STATE v. BUTLER**

## LAW/ANALYSIS

On appeal, Butler argues the trial court erred in denying his motion to suppress. Butler contends that the stop was unconstitutional because Lynch failed to establish that he had a reasonable suspicion that Butler was violating registration or insurance laws. We agree.

The Fourth Amendment guarantees "the right of the people to be secure . . . [from] unreasonable searches and seizures."[2] "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of this provision."[3] As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.[4] The police, however, may also stop and briefly detain a vehicle if they have a reasonable suspicion that the occupants are involved in criminal activity.[5]

In Delaware v. Prouse,[6] the Supreme Court declared unconstitutional random stops of individual cars for the purposes of checking the driver's license and the car's registration, holding:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the

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[2] U.S. Const. amend. IV.

[3] Whren v. United States, 517 U.S. 806, 809 (1996); see also Sikes v. State, 323 S.C. 28, 448 S.E.2d 560 (1994).

[4] Whren, 517 U.S. at 809.

[5] Knight v. State, 284 S.C. 138, 325 S.E.2d 535 (1985).

[6] 440 U.S. 648 (1979).

> automobile are unreasonable under the Fourth Amendment.[7]

Reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion"[8] and requires a particularized and objective basis that would lead one to suspect another of criminal activity.[9] "Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause."[10] The burden is on the State to articulate facts sufficient to support reasonable suspicion.[11]

The State argues that the mere presence of a "temporary tag" on a car is reasonable suspicion that the car is either unregistered, uninsured, or is otherwise involved in criminal activity. We disagree and hold that the mere presence of a temporary tag on the back of a car, without more, is insufficient to provide a reasonable suspicion that the driver is violating registration or insurance laws or that the driver is otherwise involved in criminal activity.

South Carolina Code section 56-3-210, titled "Grace period for procuring registration and license," reads as follows:

> Persons newly acquiring vehicles and owners of foreign vehicles being moved into this State and required to be registered under this chapter may have not more than forty-five days in which to register and license them.[12]

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[7] Id. at 663 (emphasis added).

[8] Terry v. Ohio, 392 U.S. 1, 21 (1968); see also State v. Lesley, 326 S.C. 641, 486 S.E.2d 276 (Ct. App. 1997).

[9] United States v. Cortez, 449 U.S. 411, 417 (1981).

[10] Nebraska v. Soukharith, 570 N.W.2d 344, 354 (Neb. 1997).

[11] Brown v. Texas, 443 U.S. 47 (1979).

[12] S.C. Code Ann. § 56-3-210 (Supp. 1999).

Under the statute, a South Carolina resident has forty-five days to register his car and obtain his state-issued license plate.

Unlike other states, South Carolina has not implemented a legislative scheme to temporarily register "newly acquired" cars pending receipt of a permanent tag. If such legislation were in place, the expiration of the forty-five day grace period would be ascertainable by any law enforcement officer and any failure to display the state-issued temporary tag could provide a reasonable suspicion that the car was not registered. Because South Carolina has no such system in place, however, we must decide whether the presence of a temporary tag gives an officer reasonable suspicion that the car has exceeded the forty-five day grace period provided for by statute. We think it does not.

We note that at least two other states have addressed a similar argument made by the State in this case. In Ohio v. Chatton,[13] the Ohio Supreme Court addressed the issue of whether the officer's statement that temporary tags are often used in criminal activity provided sufficient reasonable suspicion to stop a motorist.[14] In holding that the mere presence of a temporary tag did not provide a reasonable suspicion of criminal activity, the court stated:

> If we were to uphold the detention of appellee . . . upon the generalized statement that temporary tags are sometimes used in criminal activity, we would be sanctioning, in effect, the detention of the driver of any vehicle bearing temporary tags. We are unwilling to place our imprimatur on searches of the citizens of this state and their vehicles simply because of the lawful and innocuous presence of temporary tags. The potential for abuse if such a rule were in effect, through arrogant and unnecessary displays of authority, cannot be ignored or discounted.[15]

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[13] 463 N.E.2d 1237 (Ohio 1984).

[14] At the time Chatton was decided, Ohio had state-issued temporary tags, but had no law that governed how the tags had to be displayed. The officer who stopped Chatton justified his stop based on two grounds: the tag was not visibly displayed, and cars with temporary tags are often used in criminal activity.

[15] Id. at 1239-40.

The Nebraska Supreme Court likewise rejected a similar argument in Nebraska v. Childs.[16] In Childs, the court noted that to allow temporary tags to create a reasonable suspicion of criminal activity would result in the presumption that every motorist lawfully on the highway with a paper tag was involved in criminal activity, a presumption that goes against the firmly ingrained principle that we presume compliance with the law absent indication to the contrary.[17]

We cannot sanction the random stop of any and every car bearing a temporary tag, leaving in the hands of law enforcement officers the freedom to detain whomever they desire without having to justify why they chose to stop one motorist over another. Requiring law enforcement to articulate a particularized and objective reason as to why they believed the car was unregistered, uninsured, or otherwise involved in criminal activity would alleviate this potential for abuse.

Finally, we refuse to create the suspect presumption in this state that every motorist traveling the highways with a temporary tag is guilty of driving an unregistered or uninsured car and is subject to detention until he or she can prove otherwise. Even the statute that empowers the South Carolina Highway Patrol commands that there be a reasonable belief that a vehicle is being operated in violation of the law prior to stopping the driver.[18]

We understand the problem faced by law enforcement officers who are unable to determine whether a car bearing a temporary license tag is registered, insured, stolen, or otherwise involved in criminal activity. Given the legislative solutions available, however, we cannot conclude that mere compliance with the current law results in a reasonable suspicion of criminal activity.

To lawfully stop and detain Butler, Officer Lynch needed an objective, particularized, and articulable reason as to why he thought Butler was no longer

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[16] 495 N.W.2d 475 (Neb. 1993). At the time Childs was decided, Nebraska issued "In Transit" stickers to newly acquired cars. The expiration date was not visible, however, without pulling the car over to examine the sticker.

[17] See State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980) (noting that all presumptions of law are in favor of innocence until proven otherwise).

[18] S.C. Code Ann. § 56-3-2420 (1991).

within his forty-five grace period or was otherwise involved in criminal activity.[19] Lynch provided no such reason. Because the detention of Butler was unconstitutional, the trial court erred in refusing to suppress the evidence obtained as a result of the stop.[20]

**REVERSED AND REMANDED.**

**HUFF, J., concurs**.

**ANDERSON, J., concurs in result only in a separate opinion.**

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[19] See United States v. Wilson, 205 F.3d 720 (4th Cir. 2000) (holding that absent an articulable, reasonable suspicion of unlawful conduct, the Fourth Amendment forbids stopping a car simply because it has a temporary tag).

[20] See State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) ("The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality.") (citing Wong Sun v. United States, 371 U.S. 471).

**ANDERSON, J. (concurring in result only):** Although this case presents a difficult and troubling conundrum in regard to the enforcement of registration and licensing laws in South Carolina, I am persuaded by the logic and analysis of the en banc opinion of the Fourth Circuit Court of Appeals in United States v. Wilson, 205 F.3d 720 (4th Cir. 2000). Wilson enunciates:

> The government argues that South Carolina law authorizes the police to stop any car with temporary tags to determine whether the owner is in compliance with the state's requirement that permanent tags be obtained within thirty days of purchase. The government, however, cannot point to any statute, regulation, or court decision from South Carolina that authorizes such an investigatory stop. The government relies solely on our conclusory statement in United States v. McDonald, 61 F.3d 248, 254 (4th Cir. 1995), that under South Carolina law the presence of temporary tags on a car "entitle[s] [police] to conduct an investigatory stop in order to determine whether the car's owner [is] in violation of state law requiring permanent tags within thirty days of a vehicle's purchase." The problem with McDonald is that it cited no authority for the purported statement of South Carolina law (for that matter, neither did the United States cite any authority when it briefed that case). We have made an independent search, and we find nothing in South Carolina's law to support the statement in McDonald. At this point, we can only conclude that McDonald misstated the law of South Carolina. Of course, any state law that authorized a search or seizure would be subject to the requirements of the Fourth Amendment. See United States v. Manbeck, 744 F.2d 360, 382 (4th Cir.1984)(holding that statute authorizing customs officials to board vessels "must be interpreted in a manner consistent with limitations imposed by the Fourth Amendment").
>
> The Fourth Amendment does not allow a policeman to stop a car just because it has temporary tags. . . . .

Wilson, 205 F.3d at 724 (footnote omitted).

The reasoning in Wilson succinctly identifies the constitutional limitation imposed by the Fourth Amendment in this factual scenario.

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

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Ronald W. Lyerly,

Appellant,

v.

American National Fire Ins. Co.,

Respondents.

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Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

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Opinion No. 3259
Heard October 10, 2000 - Filed November 20, 2000

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**REVERSED AND REMANDED**

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Louis D. Nettles, of Nettles, McBride & Hoffmeyer, of Florence, for appellant.

Richard B. Ness, of Early & Ness, of Bamberg, for respondent.

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**GOOLSBY, J.:** Ronald W. Lyerly brought this action to collect benefits under a crop insurance policy issued by American National Fire Insurance Company. The circuit court granted summary judgment to American National, finding Lyerly's action was not timely filed in accordance with the terms of the policy. Lyerly appeals. We reverse and remand.

## LYERLY v. AMERICAN NATIONAL FIRE INS. CO.

### FACTS/PROCEDURAL BACKGROUND

In 1995, Lyerly purchased a Multiple Peril Crop Insurance policy from American National, a private insurer, to insure his tobacco crop against losses due to certain natural causes, including adverse weather, fire, and plant disease. The policy covered the 1995 crop season and was issued in accordance with the provisions of the Federal Crop Insurance Act (FCIA).[1] The policy was reinsured by the Federal Crop Insurance Corporation (the Corporation). The Corporation is a federal agency established to carry out the purposes of the FCIA by regulating the premiums for coverage and the terms of the policies.[2]

The policy in this case consisted of two sections: "General Provisions" and "Special Provisions, Tobacco Guaranteed Production Plan." The General Provisions limited the right to sue to one year after a loss is sustained:

> **8. SUIT AGAINST US.**
> You cannot bring suit or action against us unless you have complied with all of the policy provisions. If you do enter suit against us you must do so within 12 months of the occurrence causing the loss or damage.
>
> (State law exceptions to the 12 months limitation, if any, are contained in the State Endorsement.)

(Emphasis added.)

In addition, the American National policy also contained a state law exception in Paragraph 16, which provided:

> **16. CONFORMITY TO STATUTES.**
> If any terms of this policy are in conflict with statutes of the state in which this policy is issued the policy will conform to such statutes. Printed terms in this policy which are in conflict with state statutes and are made to conform will not be a basis for voidance of the policy.

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[1] 7 U.S.C.A. §§ 1501 to 1521 (1999 & Supp. 2000).

[2] 7 U.S.C.A. §§ 1503, 1508(d) (1999).

## LYERLY v. AMERICAN NATIONAL FIRE INS. CO.

Lyerly completed harvesting his tobacco crop in September 1995 and thereafter submitted a claim to American National alleging a crop loss. Lyerly received a letter dated October 23, 1995, from Great American Insurance Company, on behalf of American National, advising him a prior 1993 claim was "under investigation by FCIC Compliance" and that it was "holding [his] 1995 tobacco claims . . . until a decision has been made on their findings."[3] According to Lyerly, American National never formally denied his claim.

Lyerly filed this complaint in the circuit court on October 23, 1996, alleging "[t]hat during the 1995 crop season, [he] incurred certain covered losses to his crops and made a valid claim therefore." Lyerly asserted American National failed to pay the sums due under the 1995 crop insurance policies, and he sought actual damages of $45,000.00. In his response to American National's requests to admit, Lyerly admitted his loss, at the latest, "occurred on or before September 27, 1995."[4]

American National moved for summary judgment, arguing in part that Lyerly "failed to timely commence his action" within "twelve months after the occurrence causing the loss or damage to the crop" as required by the policy. American National asserted the loss, if any, occurred prior to September 28, 1995, based on Lyerly's admissions, but this action was not filed until October 23, 1996, some thirteen months later. American National also argued any state law causes of action were preempted by federal law and Lyerly's only remedy was the "construction and enforcement of the policies of insurance pursuant to the terms thereof."

In response, Lyerly argued (1) that the statute of limitations applicable to this action is 7 U.S.C.A. § 1508(j)(2)(B) (1999), which allows the plaintiff twelve months after the final denial of the claim to file an action; and (2) the period for filing an insurance claim could not be contractually shortened, relying on section 15-3-140 of the South Carolina Code.[5] Lyerly asserted his claim was not

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[3] American National is within the fleet of insurance companies doing business together as Great American Insurance Company.

[4] American National propounded a series of questions to Lyerly concerning the date of the loss which asked him variously to admit that the loss occurred before the 6th, 19th, 26th, and 27th of September 1995. Lyerly admitted all four dates in his response.

[5] "No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time

untimely because he had one year after the letter from the insurer, or until October 23, 1996, which is the date he filed this action.

The circuit court granted summary judgment to American National based on its determination that Lyerly's action was not timely filed "within 12 months of the occurrence causing the loss or damage" as required by the policy. The court found section 15-3-140 of the South Carolina Code was not applicable as "all state laws otherwise applicable to or governing this action are preempted by operation of federal law." The court then concluded, "While . . . this court has concurrent jurisdiction with the federal district court to adjudicate this action, I find this court must apply the federal laws applicable to such actions in making that adjudication, and [section] 15-3-140, Code of Laws of South Carolina, does not apply to this action." Lyerly appeals.

## STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[6] "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences arising therefrom must be viewed in the light most favorable to the non-moving party."[7]

## LAW/ANALYSIS

Lyerly contends the circuit court erred in granting summary judgment to American National on his 1995 claim for crop losses. We agree.

The FCIA was enacted "to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and

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prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the action may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action." S.C. Code Ann. § 15-3-140 (1977) (emphasis added).

[6] Rule 56(c), SCRCP.

[7] Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

establishing such insurance."[8] The Corporation was created to carry out the purposes of the FCIA by regulating premiums and policies.[9] It has the power to insure farmers against losses due to drought, flood, or other natural disasters.[10] The FCIA authorizes two types of crop insurance policies: (1) policies directly issued by the Corporation; and (2) policies issued by private insurance companies, which are reinsured by the Corporation.[11] To encourage coverage, a portion of the farmer's insurance premium is paid by the Corporation.[12]

Reinsured policies must be on terms approved by the Corporation and are subject to the FCIA and Corporation regulations:

> Federal Crop Insurance Corporation will offer Standard Reinsurance Agreements to eligible Companies under which the Corporation will reinsure policies which the Companies issue to producers of agricultural commodities. The Standard Reinsurance Agreement will be consistent with the requirements of the Federal Crop Insurance Act, as amended, and provisions of the regulations of the Corporation found at Chapter IV of Title 7 of the Code of Federal Regulations.[13]

The regulations are issued to "prescribe the procedures for federal preemption of State laws and regulations not consistent with the purpose, intent, or authority of the Act."[14] They apply to "all policies of insurance, insured or reinsured by the Corporation, contracts, agreements, or actions authorized by

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[8] 7 U.S.C.A. § 1502(a) (1999).

[9] 7 U.S.C.A. §§ 1503, 1508(d)(1) (1999).

[10] 7 U.S.C.A. § 1508(a)(1) (1999) ("To qualify under a plan of insurance, the losses of the insured commodity must be due to drought, flood, or other natural disaster (as determined by the Secretary).").

[11] 7 U.S.C.A. § 1508(a)(1) (1999).

[12] 7 U.S.C.A. § 1508(e) (1999).

[13] 7 C.F.R. § 400.164 (2000); see also 7 U.S.C.A. § 1508(h)(3)-(4) (1999) (prescribing the procedures for the submission, review, and approval of policies).

[14] 7 C.F.R. § 400.351 (2000) (emphasis added).

the Act and entered into or issued by [the Corporation]."[15] Specifically, the regulations provide:

> No State or local governmental body or non-governmental body shall have the authority to promulgate rules or regulations, pass laws, or issue policies or decisions that directly or indirectly affect or govern agreements, contracts, or actions authorized by this part unless such authority is specifically authorized by this part or by the Corporation.[16]

The regulations also provide that no policy of insurance reinsured by the Corporation shall provide a basis for a damages claim against the company issuing the policy, other than damages to which the Corporation would be liable under federal law if the Corporation had issued the policy of insurance under its direct writing program, unless the claimant establishes such damages were caused by the culpable failure of the company to substantially comply with the Corporation's procedures or instructions in the handling of the claim or in servicing the policy.[17]

Section 1508(j)(2) of the FCIA sets forth a one-year statute of limitations for bringing an action after denial of a claim:

> **(2) Denial of claims**
>
> **(A) In general**
>
> Subject to subparagraph (B), if a claim for indemnity is denied by the Corporation or an approved provider, an action on the claim may be brought against the Corporation or Secretary only in the United States

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[15] Id. (emphasis added).

[16] 7 C.F.R. § 400.352 (2000); see also 7 U.S.C.A. § 1506(l) (1999) ("State and local laws or rules shall not apply to contracts, agreements, or regulations of the Corporation or the parties thereto to the extent that such contracts, agreements, or regulations provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts, agreements, or regulations.") (emphasis added); see, e.g., Horn v. Rural Community Ins. Servs., 903 F. Supp. 1502, 1505 (M.D. Ala. 1995) (stating that 7 U.S.C.A. § 1506(l) "provides a preemption defense where state or local laws conflict with provisions in a contract made pursuant to the FCIA") (emphasis added).

[17] 7 C.F.R. § 400.176(b) (2000).

> district court for the district in which the insured farm is located.
>
> **(B) Statute of limitations**
> A suit on the claim may be brought not later than 1 year after the date on which final notice of denial of the claim is provided to the claimant.[18]

Under the FCIA, the federal district courts "have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation."[19] As to reinsured policies issued by private insurers, the circuit court found that, although state and federal courts have concurrent jurisdiction over claims involving reinsured policies, federal law preempts any state law provisions that would affect the claim and federal statutes and regulations enacted in this area are controlling.

The circuit court stated, "Federal regulations codified in 7 C.F.R. § 400.351 and § 400.352 preempt state law causes of action as to all policies of insurance issued or reinsured by [the Corporation]." The court then noted that § 400.351 provides the Corporation's regulations govern all policies insured or reinsured by the Corporation. The court concluded: "I find plaintiff's state law causes of action, and the state laws which would otherwise be applicable to this action, are completely preempted by the Federal Crop Insurance Act and the FCIA regulations enacted pursuant thereto."[20]

Authority supports the circuit court's finding that state courts have concurrent jurisdiction to hear actions against private insurers;[21] however,

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[18] 7 U.S.C.A. § 1508(j)(2)(A)-(B) (1999).

[19] 7 U.S.C.A. § 1506(d) (1999).

[20] See Owen v. Crop Hail Management, 841 F. Supp. 297 (W.D. Mo. 1994) (holding that the FCIA completely preempts state law); Brown v. Crop Hail Management, Inc., 813 F. Supp. 519, 526 (S.D. Tex. 1993) ("Congress and the USDA have clearly demonstrated that the FCIC and FCIC reinsured entities are immune from suit based on state law.").

[21] O'Neal v. CIGNA Property & Cas. Ins. Co., 878 F. Supp. 848 (D.S.C. 1995) (holding that the FCIA's provision for exclusive original federal jurisdiction in 7 U.S.C.A. § 1506(d) refers only to suits brought by or against the Corporation, not to other parties, such as private insurers); see also Holman v. Laulo-Rowe Agency, 994 F.2d 666, 669 (9th Cir. 1993) ("[T]he FCIA does not have the extraordinary preemptive force necessary for the application of the doctrine of complete preemption."); Bullard v. Southwest Crop Ins. Agency, Inc., 984 F. Supp.

contrary to the circuit court's finding the FCIA does not entirely preempt state law.

> The Federal Crop Insurance Act does not create a federal cause of action by an insured against a private crop insurer which is reinsured by the Federal Crop Insurance Corporation (FCIC), based on the insurer's denial of [an] insured's claims. Further, the Federal Crop Insurance Act (FCIA) does not completely preempt state law; thus, the FCIA does not give rise to federal question jurisdiction by super preemption when it is raised as [a] defense.[22]

Although there is no South Carolina appellate decision on point, several courts recently addressing the issue have held that the FCIA does not preempt state law causes of action in suits against private companies on reinsured policies.[23]

In Williams Farms of Homestead, Inc. v. Rain & Hail Insurance Services, Inc.,[24] the Eleventh Circuit analyzed the legislative history of the FCIA and held that section 1508(j)(2)(A) does not preclude state law claims in suits against private insurance companies. The court explained that, under the original FCIA enacted in 1938, only the Corporation issued crop insurance policies and handled policies, but when the FCIA was amended in 1980, Congress authorized private insurance companies to sell insurance policies that were reinsured by the Corporation. As part of the 1980 amendment, section 1508(j)(2)(A) was changed to state that exclusive original federal jurisdiction is granted as to claims against the Corporation. The Eleventh Circuit stated this provision does not apply to private insurance companies and state law claims against them are not preempted. We agree.

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531 (E.D. Tex. 1997); Horn v. Rural Community Ins. Servs., 903 F. Supp. 1502 (M.D. Ala. 1995); Hyzer v. CIGNA Prop. Cas. Ins. Co., 884 F. Supp. 1146 (E.D. Mich. 1995).

[22] 21A Am. Jur. 2d Crops § 8 (1998) (emphasis added); see also Holman, 994 F.2d at 669 ("The jurisdictional issue of whether complete preemption exists . . . is very different from the substantive inquiry of whether a 'preemption defense' may be established.").

[23] Meyer v. Conlon, 162 F.3d 1264 (10th Cir. 1998); Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Servs., 121 F.3d 630 (11th Cir. 1997); Bullard v. Southwest Crop Ins. Agency, Inc., 984 F. Supp. 531 (E.D. Tex. 1997).

[24] 121 F.3d 630 (11th Cir. 1997).

Section 400.351 of the FCIA regulations states the regulations were issued "to prescribe the procedures for Federal preemption of state laws and regulations not consistent with the purpose, intent, or authority of the Act."[25] In this case, under section 1508(j)(2)(B), the Act provides twelve months after the denial of a claim to bring suit, and under state law, American National would be prohibited from shortening this period.[26]

Although American National asserts the terms of its policy should be controlling regarding the time to file suit rather than the FCIA's provision, it nevertheless argues its policy term conforming the policy to state law should be of no force and effect because the FCIA preempts state law. We find this argument to be unavailing. American National cannot enforce the policy terms in a piecemeal fashion, adopting only the terms it chooses to enforce.

Under the circumstances present here, state law is not inconsistent with the intent of the FCIA. To prohibit access to the courts before a claim is ever denied would be contrary to the FCIA's statute of limitations and its purpose of "promot[ing] the national welfare by improving economic stability of agriculture through a sound system of crop insurance."[27] Because we find consistent state law provisions are not completely preempted and the terms of American National's own policy provide that the policy would be conformed to state law, we conclude Lyerly should not be prevented from proceeding with his suit against American National. This is especially appropriate in light of the fact that American National apparently has never formally denied the claim.[28] Accordingly, we reverse the grant of summary judgment to American National and remand for further proceedings consistent with this opinion.

**REVERSED AND REMANDED.**

**ANDERSON and HUFF, JJ., concur.**

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[25] 7 C.F.R. § 400.351 (2000) (emphasis added).

[26] See S.C. Code Ann. § 15-3-140 (1977) (a party may not contractually shorten the otherwise applicable statute of limitations for bringing suit).

[27] 7 U.S.C.A. § 1502(a) (1999).

[28] Lyerly asserts that American National delayed payment of the 1995 claim because of problems stemming from a 1993 claim under which Lyerly was not the insured. On page four of his brief Lyerly states "[t]here is nothing in the record to establish that [American National] ever denied the claim. To allow the insurer to escape payment of benefits under the time to sue clause, when the delay is a result of the insurer's fault . . . would be unjust."

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

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The State,

Respondent/Appellant,

v.

Larry Green,

Appellant/Respondent.

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Appeal From Hampton County
Rodney A. Peeples, Circuit Court Judge

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Opinion No. 3260
Submitted October 9, 2000 - Filed November 20, 2000

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**VACATED**

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Sally G. Calhoun, of Beaufort, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, both of Columbia; and Solicitor Randolph Murdaugh, III, of Hampton, for respondent.

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**SHULER, J.**: Larry Green appeals his conviction and sentence for third degree criminal sexual conduct (CSC), arguing the trial court lacked subject matter jurisdiction to convict him of the offense. We agree and vacate Green's conviction.[1]

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

**STATE v. GREEN**

## PROCEDURAL HISTORY

On October 21, 1996, a Hampton County grand jury indicted Larry Green on one count of first degree CSC with a minor in violation of S.C. Code Ann. § 16-3-655(1) (1985). Following a mistrial, Green was retried in June 1998. Over Green's objection, the trial court submitted several allegedly lesser included offenses for the jury's consideration. The jury subsequently convicted Green of CSC in the third degree and the court sentenced him to ten years imprisonment, suspended upon the service of eight years and five years probation. This appeal followed.

## LAW/ANALYSIS

Green first argues the trial court lacked subject matter jurisdiction to convict him of third degree CSC because it is not a lesser included offense of first degree CSC with a minor, the crime for which he was indicted. We agree.[2]

Without question, "[a] defendant cannot be convicted of a crime for which he is not indicted if it is not a lesser included offense to that charged in the indictment." State v. Roof, 298 S.C. 351, 354, 380 S.E.2d 828, 830 (1989); State v. Elliott, 335 S.C. 512, 513, 517 S.E.2d 713, 714 (Ct. App. 1999) ("[The] circuit court does not have subject matter jurisdiction to convict a defendant 'unless there has been an indictment, a waiver of indictment, or unless the charge is a lesser included offense of the crime charged in the indictment.'") (quoting Murdock v. State, 308 S.C. 143, 144, 417 S.E.2d 543, 544 (1992)). The test for determining whether an offense is a lesser included of that charged in the indictment is "whether the greater of the two offenses includes all the elements of the lesser offense." Carter v. State, 329 S.C. 355, 363, 495 S.E.2d 773, 777 (1998). Thus, "[i]f the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." Hope v. State, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997) (quoting State v. Bland, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995)).

Here, the indictment charged Green with CSC with a minor in the first

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[2] Although Green failed to make this precise argument below, we address it on appeal because issues involving subject matter jurisdiction may be raised at any time. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995).

degree, an offense committed by engaging in a sexual battery with a victim less than eleven years of age. See S.C. Code Ann. § 16-3-655(1) (1985). Among other offenses, however, the trial court instructed the jury on CSC third in the following manner:

> A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if the following circumstance is proven[:] [T]he actor knows or has reason to know the victim is physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.

See S.C. Code Ann. § 16-3-654(1)(b) (1985).

On its face, the lesser offense of third degree CSC contains an element not found in the greater offense of first degree CSC with a minor; specifically, that the actor knew or had reason to know that the victim was physically helpless. Accordingly, CSC third is not a lesser included offense of CSC first with a minor and the trial court lacked subject matter jurisdiction to convict Green of this offense. See State v. McFadden, Op. No. 25202 (S.C. Sup. Ct. filed Oct. 23, 2000) (Shearouse Adv. Sh. No. 39) (in affirming vacation of defendant's conviction for third degree CSC pursuant to § 16-3-654(1)(b) where defendant was indicted only for first degree CSC, court stated former was not a lesser included offense of latter because it contained two additional elements not included in the latter); State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987) (defendant indicted for criminal sexual conduct in the second degree may not be convicted of criminal sexual conduct with a minor in the second degree because the latter is not a lesser included offense as it required the additional element of an age requirement).

Green's conviction for third degree CSC is therefore

**VACATED.**[3]

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

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[3] Because our decision on this issue is dispositive of Green's appeal, we need not discuss the remaining issues raised in the brief.

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

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Tritech Electric, Inc., . . . . . Respondent,

v.

Frank M. Hall & Company, The American Insurance Company, and Fireman's Fund Insurance Company, . . . . . Appellants.

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

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Opinion No. 3261
Heard September 11, 2000 - Filed November 20, 2000

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**REVERSED AND REMANDED**

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Vincent A. Sheheen and Moultrie B. Burns, Jr., both of Savage, Royall & Sheheen, of Camden, for appellants.

Wheeler M. Tillman, of The Tillman Law Firm, of N. Charleston, for respondent.

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**PER CURIAM**: In this contract dispute, Frank M. Hall and Company ("Hall & Co.") appeals from the trial court's refusal to dismiss the instant action and compel Tritech Electric, Inc. ("Tritech") to arbitrate their dispute pursuant to the parties' contractual agreement. We reverse and remand.

## FACTS/PROCEDURAL HISTORY

Hall & Co. is a general contractor domiciled in Atlanta, Georgia. Tritech is an electrical subcontractor from Summerville, South Carolina. On June 24,

1996, the parties executed two separate agreements whereby Tritech would install wiring in two Hall & Co. projects: a Comfort Suites Hotel in Peachtree City, Georgia and a Food Lion grocery store in Winston-Salem, North Carolina. Several months later, on September 10, 1996, the parties executed a third contract for Tritech to perform all the electrical work on another Food Lion which Hall & Co. was building in Bishopville, South Carolina. All three contracts contained the following provision regarding disputes:

> b. Where the Subcontractor's work or entitlement to payment is not an issue between the Contractor and Owner, all claims and disputes shall be decided by arbitration conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. This agreement to arbitrate shall be specifically enforceable under prevailing arbitration laws. The parties hereto agree that such Arbitration shall take place int he [sic] City and State of Contractor's domicile as set forth in the Subcontract in accordance with the laws of the state. [T]he award rendered by the arbitrator(s) shall be final, and judgement [sic] may be entered upon it in accordance with the applicable law in any court having jurisdiction thereon.

After completing both Food Lion projects, Tritech sued Hall & Co. on or about August 19, 1997 for breach of contract and foreclosure of a mechanic's lien. Tritech alleged that Hall & Co. had failed to make monthly and final payments as required by the applicable contracts. On or about March 23, 1998, Tritech amended its complaint to include Hall & Co.'s construction surety, Fireman's Fund Insurance Company, and Fireman's parent corporation, The American Insurance Company. In its amended answer, Hall & Co., Fireman's Fund, and American (collectively referred to as "Hall") argued the issues underlying Tritech's suit were subject to arbitration and thus not ripe for litigation. Thereafter, Hall filed a motion to dismiss the suit and compel arbitration because the Federal Arbitration Act (FAA) preempted state law and several other grounds.[1]

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[1]The motion to dismiss is not in the record; however, its existence and contents may be inferred from other documents in the record, namely the

The trial court heard Hall's motion on January 20, 1999, and denied it by order dated April 6, 1999. Hall subsequently filed a motion to reconsider which the court also denied. This appeal followed.

## LAW/ANALYSIS

Hall argues the trial court erred by failing to dismiss Tritech's action and compel arbitration according to the arbitration provisions of the applicable contracts. We agree.

"The policy of the United States and this State is to favor arbitration of disputes." Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). The requirement to arbitrate does not arise spontaneously, but must be contractually agreed to by the parties involved. Towles v. United Healthcare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999); General Drivers, Local Union No. 509 v. Ethyl Corp., 68 F.3d 80 (4th Cir. 1995). The existence of such a contract is a question of law. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Havird, 335 S.C. 642, 518 S.E.2d 48 (1999); Johnson v. Circuit City Stores, Inc. 148 F.3d 373 (4th Cir. 1998), cert. denied, 2000 U.S. Lexis 4555. A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. Towles, 338 S.C. 29, 524 S.E.2d 839; Zandford v. Prudential-Bache Sec., 112 F.3d 723 (4th Cir. 1997); see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) ("[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense . . . .").

Although the trial court acknowledged that the applicable contracts provided for arbitration of the instant dispute, the court refused to compel arbitration because it found the arbitration provisions to be violative of S.C.

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Memorandum in Support of Defendant's Motion to Dismiss and the trial court's reference to the motion in its April 6, 1999 order. The inference is also borne out by the representations of counsel for both parties at oral argument. See State v. Southern Farm Bureau Life Ins. Co., 265 S.C. 402, 219 S.E.2d 80 (1975) (recognizing an issue on appeal which its proponent claimed to have raised orally below and was addressed in the trial court's order).

Code Ann. § 15-7-120 (Supp. 1994) which provides in pertinent part that "[a] provision in an arbitration agreement that arbitration proceedings must be held outside this State is not enforceable . . . ."

The trial court erred by applying § 15-7-120 to the arbitration clauses sub judice because state law is preempted by the Federal Arbitration Act (FAA) under the circumstances presented by this action. Where a contract evidencing interstate commerce contains an arbitration clause, the FAA preempts conflicting state arbitration law.[2] Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996); Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989); Moses H. Cone, 460 U.S. 1; Osteen v. T.E. Cuttino Constr. Co., 315 S.C. 422, 434 S.E.2d 281 (1993); Trident Technical College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 333 S.E.2d 781 (1985). This prohibition specifically prevents state courts from requiring a judicial resolution of a conflict which the parties agreed to arbitrate. Osteen, 315 S.C. 422, 434 S.E.2d 281. Accordingly, the trial court erred by refusing to dismiss the state contract action and compel arbitration.

For the aforementioned reasons, the trial court erred by failing to grant Hall's motion to dismiss and compel arbitration according to the arbitration provisions of the applicable contracts. We therefore reverse and remand the proceeding for entry of such an order.

**REVERSED AND REMANDED.**

**CURETON, GOOLSBY and STILWELL, JJ., concur.**

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[2]The contracts sub judice involve interstate commerce. See Am. Home Assurance Co. v. Vecco Concrete Constr. Corp., 629 F.2d 961 (4th Cir. 1980) (holding that a written contract between a Delaware contractor, a Virginia subcontractor, and a New York surety to construct a portion of a wastewater treatment plant in Virginia evidenced a transaction involving interstate commerce as envisioned by the FAA).