The Supreme Court of South Carolina

In the Matter of Adrian C. Polit, Peittioner.

Appellate Case No. 2014-000010

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 2007, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 1, 2014, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Adrian C. Polit shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 13, 2014

The Supreme Court of South Carolina

In the Matter of Jonathan Paul Dyer, Petitioner

Appellate Case No. 2013-002719

ORDER

The records in the office of the Clerk of the Supreme Court show that on January 15, 1993, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 24, 2013, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Jonathan Paul

Dyer shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 13, 2014

The Supreme Court of South Carolina

In the Matter of Laura Beth Corless York, Petitioner

Appellate Case No. 2013-002740

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 15, 2004, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a petition, dated December 19, 2013, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Laura Beth Corless York shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 13, 2014

The Supreme Court of South Carolina

In the Matter of Kathleen M. Spann, Petitioner

Appellate Case No. 2014-000013

ORDER

The records in the office of the Clerk of the Supreme Court show that on October 6, 1982, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 2, 2014, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Kathleen M. Spann shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 13, 2014

The Supreme Court of South Carolina

In the Matter of Christine L. Poston, Petitioner

Appellate Case No. 2014-000003

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 8, 1978, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 30, 2013, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Christine L. Poston shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 13, 2014

The Supreme Court of South Carolina

In the Matter of Alan J. York, Petitioner

Appellate Case No. 2013-002723

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 14, 2004, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a petition dated December 20, 2013, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Alan J. York shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

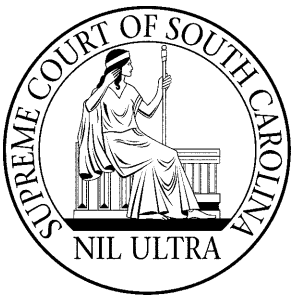
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 13, 2014



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 2
January 15, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

The State, Respondent,

v.

Steven Barnes, Appellant.

Appellate Case No. 2010-178247

ORDER

The petition for rehearing is denied, however, the original opinion and dissent are withdrawn and the attached opinions substituted.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 15, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Steven Barnes, Appellant.

Appellate Case No. 2010-178247

Appeal from Edgefield County
R. Knox McMahon, Circuit Court Judge

Opinion No. 27322
Heard February 5, 2013-Refiled January 15, 2014

REVERSED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka and Senior Assistant Attorney General Melody Jane Brown, all of Columbia, and Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE PLEICONES: Appellant was convicted of kidnapping and murdering Samuel Sturrup (victim). The jury found two aggravating circumstances, kidnapping[1] and physical torture,[2] and recommended a death sentence. The judge sentenced appellant to death for the murder, and imposed no sentence for the kidnapping. On appeal, appellant contends the trial court erred in permitting his attorney to call a defense psychiatrist to testify regarding appellant's right to represent himself and in denying his *Faretta*[3] request, in limiting *voir dire* and in qualifying Juror #203, and in refusing to dismiss the indictments because of the State's failure to comply with the Interstate Agreement on Detainers (IAD) Act.[4] We find the trial judge applied the incorrect competency standard in denying appellant's *Faretta* request and reverse.

FACTS

Appellant was approximately twenty-three years old and living in Augusta, Georgia, where he surrounded himself with high school students. Two of the high school boys, Richard Cave and Antonio (Tony) Griffin testified that on Labor Day 2001, appellant called them to meet him at his "green house" in Augusta. The boys were high school seniors, who enjoyed hanging out with appellant because, as Cave testified, appellant had money, girls, and cars. When Cave and Griffin arrived, they found victim already there, along with Charlene "China" Thatcher and appellant's younger half-brother William Harris.

Appellant accused victim of stealing appellant's money, and was beating the victim with his fists, a pole, and a shock absorber. China was also accused and hit, and Griffin obeyed appellant's order to beat victim. As the night progressed, Harris left and appellant called two South Carolina brothers, the Hunsbergers, to come to the green house in Augusta. After the Hunsbergers arrived, everyone left for South Carolina. Appellant, China, Griffin, and Cave followed the Hunsbergers in appellant's car, with the victim in their car trunk, to a remote area of Edgefield County. There, appellant ordered China, Griffin, and Cave to shoot the victim, with appellant administering the *coup de grace*. Appellant told the others they

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[1] S.C. Code Ann. § 16-3-20(B)(b) (Supp. 2011).
[2] S.C. Code Ann. § 16-3-20(B)(i) (Supp. 2011).
[3] *Faretta v. California*, 422 U.S. 806 (1975).
[4] S.C. Code Ann. §§ 17-11-10 *et seq.* (2003).

were as guilty as he, and all kept quiet until parts of victim's skeleton and other identifying information were found in November 2001.

China, Griffin, and Cave, all of whom testified in the guilt phase, were serving eighteen-year sentences in Georgia for their assault of victim and faced the potential for additional charges in Georgia and South Carolina.

ISSUE

Did the trial judge commit reversible error in denying appellant's request to waive counsel and proceed *pro se*?

ANALYSIS

Appellant, whose competency to stand trial has never been in question, moved to be allowed to proceed *pro se* on the Friday before the trial was to commence on Monday, citing *Faretta*. Appellant was unequivocal that he was not seeking a delay or a continuance. He asked for all relevant documents to be provided for his review, and asked if he could possibly subpoena the Hunsbergers who were incarcerated in Georgia. After being placed under oath, appellant told the court he was thirty-two years old, had an 11th grade education, had been self-employed, and that he understood the charges against him and the possible sentences. He acknowledged having had an attorney in his other criminal cases, including one before this same judge.[5] Appellant acknowledged he understood he would be held to the same standards as an attorney regarding the rules of court and of evidence.

The trial judge questioned appellant under oath about a specific rule of evidence, his understanding of the prohibition of hybrid representation, his current mental health status,[6] and his familiarity with courtroom procedure and prior experience as

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[5] This is a reference to appellant's conviction for throwing urine on an Edgefield jailer. This Court granted certiorari to review the Court of Appeals' affirmance of appellant's conviction and reversed. *State v. Barnes*, 402 S.C. 135, 739 S.E.2d 629 (2013).

[6] Appellant acknowledged having been treated for post-traumatic stress disorder after being tased by jailors. He testified that while that incident had led to counseling, and that he had suffered "mental health while [he] was younger," he was currently well.

a criminal defendant. Appellant demonstrated an understanding of the process of capital *voir dire*, stated his intention to pursue a third-party guilt defense at trial and discussed the relevant case law, the burden of proof, and his right to testify. Appellant also appeared to be familiar with the niceties of error preservation, for example, the need to place objections and the court's rulings on the record.

The judge then inquired into appellant's reasons for wanting to proceed *pro se*. Appellant answered that his request to proceed *pro se* was driven by trust issues, and that he had another attorney or two in mind to use as standby counsel in lieu of his appointed attorneys. As an example of the disagreement between appellant and his attorneys leading to his loss of trust in them was their decision not to subpoena the Hunsberger brothers because of counsels' belief that the brothers would invoke their Fifth Amendment right not to testify. Appellant explained that if the brothers did decline to testify, then he would use transcripts of their sworn testimony in the Georgia proceedings under Rule 804(3), SCRE. Appellant also explained his intent to refer to himself in the third person when examining witnesses. Finally, appellant explained that he lost trust in his appointed attorneys because while he had instructed them not to move for a continuance in order to preserve his IAD Act request, he had learned that they had made such requests.

The judge concluded by telling appellant, "I think you're making a mistake, but you have the right to make a mistake. I think you're making an unwise choice, but you have the right to make an unwise choice. I would advise you not to do this . . . ." The judge asked appellant to reconsider the decision and discuss it again with his appointed attorneys. Appellant agreed to do so. After a break, the judge told the attorneys to provide the discovery materials to appellant for his review over the weekend, and announced he was taking the *Faretta* motion under advisement until Monday.

On Monday, the judge qualified the *venire* and set up *voir dire* panels before taking up the *Faretta* request.

At the commencement of the hearing, one of appellant's attorneys (Tarr) referred the court to *Indiana v. Edwards*, 554 U.S. 164 (2008), which holds that a state may hold a defendant who seeks to represent himself at trial to a higher competency standard than that required to stand trial. Tarr stated that "a couple of different experts that we've hired to evaluate [appellant] for purposes of the sentence phase are of the opinion that he is very competent to stand trial, but he lacks the

competency to waive his right to counsel and conduct the proceedings on his own." Tarr had Dr. Price, a psychologist previously retained by the defense as a mitigation witness, present and ready to testify regarding appellant's competency.

Appellant immediately objected to Dr. Price's testimony. First, he based his objection on the "doctor/client" relationship and the attendant privilege. He explained that he talked to Dr. Price only for penalty phase mitigation purposes, and stated, "If I'd have known that he was going to be adverse to me, I wouldn't have talked to him." Appellant then distinguished *Edwards*, pointing out that the defendant in that case was before the trial judge on his second or third competency to stand trial hearing when the waiver of counsel issue arose. Appellant continued:

> In this case here, you know, this was never an issue. I brung forth to you – I explained to you in detail when you asked me questions the last time we spoke and I brought forth everything, you know, just like you asked me to do. And the Edwards case is totally different from the factual situation of my case.
>
> And I object to Dr. Price getting on the stand, because, like I say, I'm not giving him no permission to say anything in regards to me, talking about me, because like I say, my attorneys, that's part of my defense, you know, when we get to the penalty phase. Once we get to that phase, then, you know, I consent for him to furnish that information to the jury for migation [sic].

The judge then asked if appellant was asking him to make a decision without adequate information. Appellant answered with a qualified yes, saying that he was entitled to due process and specifically denying his permission for Dr. Price to testify about "things that had been in [appellant's] mental records for years." He again emphasized the doctor/client relationship, and that Dr. Price represented him. Tarr stated that neither he nor Mr. Harte (the lead attorney) nor Dr. Price were "trying to be adversarial" but were instead trying to make the court aware of all the issues. Appellant again objected to any expert testimony from Dr. Price except in the penalty phase and suggested, "if you appoint a state official to conduct that [competency to waive counsel] review, then that's a different story." The judge

responded that he did not know of any procedure that would allow him to do so.[7] Attorney Harte responded that since *Edwards* failed to state the standard for competency to waive, it did not seem possible to order an evaluation. Appellant reiterated that the question was *Faretta* because his was not an *Edwards* situation as there is no indication that he, unlike the defendant Edwards, is "sick."

Following Dr. Price's testimony, the trial judge denied appellant's request to proceed *pro se* based upon a finding that appellant did not meet the heightened *Edwards* standard for competency to represent himself at trial. The judge then noted that despite appellant's responses to the *Faretta* inquiry on Friday, the judge was concerned by Dr. Price's testimony regarding appellant's competency. Ultimately he ruled:

> Given the doctor's testimony and his expert opinion that the defendant has not knowingly and intelligently waived his right to counsel,[8] I find the defendant does not have a clear understanding of the dangers of self-representation in the guilt nor the sentencing phase of the trial.
>
> I further find that the defendant does not knowingly, intelligently understand the dangers inherent in self-representation. I feel like I would not be fulfilling my responsibilities under the law to an individual that deserves a fair trial if I allow on this record, and I might add, my observations of Mr. Barnes.
>
> Mr. Barnes has always been during these proceedings respectful to this Court and I've noted him to appear to be respectful, although not necessarily pleased at times, with his attorneys. However, he is prone to ramble. He's prone to act extra-

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[7] A trial judge has the inherent authority to order an independent examination of a criminal defendant where necessary. *Cf. State v. Cooper*, 342 S.C. 389, 536 S.E.2d 870 (2000) (trial judge has inherent authority to require expert examination of defendant and order state to pay in order to maintain integrity of judicial process).

[8] Note this is not the proper inquiry under *Edwards*, which does not involve the merits of the *Faretta* waiver but rather the defendant's competency to represent himself at trial.

> judicious, and by that I mean not appropriate, but to act as if he were conducting his defense on the streets, so to speak, and as we all know, the courtroom is not the place for that kind of decorum or demeanor. I think it would be abuse of my discretion to allow him to represent himself in trying to do all I can do to make sure Mr. Barnes in this very serious matter gets a fair trial. So I'm denying your motion.
>
> And I might add, I have not seen anything but his attorneys acting in his best interest throughout the proceedings, both during the requests or expertise, motion hearings, status conferences and otherwise.
>
> Further, I would find that it appears Dr. Price also to be acting not in Dr. Price's best interest but in Mr. Barnes' best interest.
>
> With that being said, I will deny Mr. Barnes' motion under Faretta versus California and deny his right to self-representation and reaffirm the Court's appointment of Mr. Tarr and Mr. Harte.

The dispositive issue in this appeal is whether South Carolina will adopt the higher competency standard permitted by *Edwards* and thus alter the traditional *Faretta* threshold inquiry which permits any defendant competent to stand trial to waive his right to counsel. Since we choose not to adopt *Edwards*' higher standard for competency to represent oneself at trial, and since the trial judge's denial of appellant's request was predicated on this competency standard, we are compelled to reverse. *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (erroneous denial of *Faretta* request is a structural error requiring automatic reversal).

A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions.[9] *State v. Starnes*, 388 S.C. 590, 698 S.E.2d 604 (2010). A capital defendant, like any other criminal defendant, may waive his right to counsel. *State v. Starnes*, *supra*; *State v. Brewer*, 328 S.C. 117, 492 S.E.2d 97 (1997). So long as the defendant makes his request

[9] U.S. Const. am. 6; S.C. Const. art. I, § 14.

prior to trial, the only proper inquiry is that mandated by *Faretta*. *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596 (2010).

Recognizing that it may be to the defendant's detriment to be allowed to proceed *pro se*, his knowing, intelligent and voluntary decision "must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta*, 422 U.S. at 834. Under *Faretta*, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel. *State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998).

In *Edwards*, the United States Supreme Court held that "the Constitution permits states to insist upon representation by counsel for those competent enough to stand trial under *Dusky*[10] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Edwards*, 554 U.S. at 178. Since the Court merely agreed that states could set a higher standard for self-representation at trial without offending the federal constitution, it declined to adopt a federal constitutional competency standard. *Id*.

We decline to impose a higher competency standard upon an individual who wishes to waive his right to an attorney and represent himself at trial than that required for the waiver of other fundamental constitutional rights afforded a criminal defendant, such as the right against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers. *See Boykin v. Alabama*, 395 U.S. 238 (1969). A defendant who is competent to stand trial is also competent to waive these fundamental rights and plead guilty. *Sims v. State*, 313 S.C. 420, 438 S.E.2d 253 (1993). We do not find public policy supports a distinction between a defendant who wishes to plead guilty and the defendant who wishes to proceed to trial as the Sixth Amendment guarantees every criminal defendant the "right to proceed *without* counsel when he voluntarily and intelligently elects to do so." *Faretta*, 422 U.S. at 807.[11]

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[10] *Dusky v. United States*, 362 U.S. 402 (1960).

[11] The dissent does not adopt the *Edwards* standard, which is predicated on the defendant's severe mental illness, but instead crafts a new test for capital cases only where the trial judge is to assess the defendant's "mental and psychiatric history, demeanor, and the importance of the impending trial" and weigh those findings against the defendant's request that he be allowed to waive his right to counsel.

The judge erred in applying the *Edwards* competency standard to appellant's request to waive his right of counsel and proceed *pro se*. Accordingly, we are constrained to reverse. *McKaskle*, *supra*.

CONCLUSION

Since the *Faretta* error mandates reversal, we need not reach any of appellant's other issues save that alleging he was entitled to dismissal of all charges under the IAD Act. On the face of this record, it appears appellant waived his speedy trial rights under this Act, and we therefore decline to reverse on this ground. *See New York v. Hill*, 528 U.S. 110 (2000).

Appellant's convictions and sentence are

REVERSED.

BEATTY and HEARN, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

The dissent would allow the trial judge to deny a capital defendant's request to proceed *pro se* if the trial judge believes that allowing self-representation would make the proceeding less fair or the verdict not "especially reliable." The dissent's formulation of the analytical framework for deciding whether to allow a capital defendant to waive his right to counsel is not constitutionally sound, and reflects the rationale we rejected in *State v. Brewer*, 328 S.C. 117, 492 S.E.2d 97 (1997).

CHIEF JUSTICE TOAL: I respectfully dissent. I would affirm Appellant's conviction and sentence.

ISSUES PRESENTED

I. Whether the trial court erred in denying Appellant's pre-trial request to represent himself pursuant to *Faretta v. California*.

II. Whether the trial court violated Appellant's Due Process rights by relying on the pre-trial testimony of a doctor retained by Appellant's defense counsel in anticipation of exclusive use during the trial's mitigation phase.

III. Whether the trial court erred by limiting Appellant's trial counsel's voir dire regarding the views of potential jurors regarding the death penalty.

IV. Whether the trial court erred in finding Juror #203 unqualified to sit as a juror.

V. Whether the trial court erred in refusing to dismiss the State's indictments against Appellant due to the State's alleged failure to comply with the Interstate Agreement on Detainers Act (IAD).

ANALYSIS

I. *Faretta v. California*

The majority concludes that the trial court erred in applying the *Indiana v. Edwards* competency standard to Appellant's request to waive his right to counsel and proceed pro se. I disagree.

In *Indiana v. Edwards*, the United States Supreme Court clarified the limits of a defendant's right to self-representation and made it clear that *Faretta v. California*, 422 U.S. 806 (1975), and its progeny, do not stand for the proposition that the right to self-representation trumps other valid constitutional considerations. 554 U.S. 164, 175 (2008) ("[T]he nature of the problem before us cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself."). Instead, self-representation rights must be assessed against the judiciary's responsibility to ensure the fundamental fairness and integrity of trial proceedings.

The Supreme Court's decision in *Indiana v. Edwards* explained that a defendant may be competent to stand trial, but not competent to conduct her defense at trial, and that trial courts may investigate this variance in competency. In my view, this principle applies uniformly across the spectrum of criminal trials. The facts and circumstances of *Indiana v. Edwards* did not concern a capital proceeding but, from my perspective, these competency considerations become even more pronounced in the capital context in view of the Supreme Court's mandate that these trials include heightened reliability. *See, e.g., Woodson v. North Carolina, infra* ("Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

The framework and determinations examined by the majority in *Indiana v. Edwards* not only guard against compromising the rights of capital defendants whose mental competency is at issue, but protect the integrity of the judicial system as a whole. Thus, I would hold that South Carolina trial courts may "insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from mental illness to the point where they are not competent to conduct trial proceedings by themselves." *See Edwards*, 554 U.S. at 177–78.

In *Faretta*, the United States Supreme Court explained that "the Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." In that case, Anthony Faretta sought to represent himself against charges of grand theft. 422 U.S. at 807. Questioning by the trial court revealed that Faretta had previously represented himself in a criminal prosecution, possessed a high school education,

and that Faretta did not want representation from what he described as a public defender office "very loaded down with . . . a heavy case load." *Id.* The trial court granted Faretta's waiver of assistance of counsel, but indicated that the court would reverse the ruling if it later appeared that Faretta could not adequately represent himself. *Id.*

Several weeks later, the trial court held a hearing and inquired into Faretta's ability to conduct his own defense, questioning Faretta specifically regarding the hearsay rule, and state law covering jury voir dire. *Id.* at 808. The trial court ruled that based on Faretta's answers and demeanor, he had not made an intelligent and knowing waiver of his right to assistance of counsel. *Id.* at 808–09. The trial court also held that Faretta did not have a constitutional right to conduct his own defense. *Id.* at 809–10. The trial court rejected Faretta's subsequent requests to represent himself, and required that only a public defender conduct Faretta's defense. *Id.* at 810–11. The jury found Faretta guilty. *Id.* at 811. The California Court of Appeal affirmed the trial court's ruling, and the California Supreme Court denied review. *Id.* at 811–12. The United States Supreme Court reversed, holding:

> There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. And a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant . . . . But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.

Id. at 832–33. The Supreme Court held that an accused who manages his own defense relinquishes many of the benefits associated with counsel, and thus, must "knowingly and intelligently" resign those benefits. *Id.* at 835. However, the

Supreme Court explained that the defendant's technical legal knowledge is not relevant to an assessment of his "knowing exercise of his right to defend himself." *Id.* at 835–36 ("In forcing Faretta, under these circumstances to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense.").

In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Supreme Court analyzed an important limitation on a defendant's right to self-representation: the role of standby counsel. In that case, the defendant, Carl Wiggins, claimed that a pro se defendant could insist on presenting his own case completely free from any involvement by standby counsel. *Id.* at 176. Wiggins's argument relied on the *Faretta* decision's sole reference to standby counsel:

> Of course, a State may—even over objection by the accused—appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.

Id. (citation omitted). Wiggins argued that the "if and when" language defined the limits on standby counsel's role, and that *Faretta* did not allow standby counsel to argue with the defendant, make motions to the court contrary to the defendant's wishes, or take other steps not specifically approved by the defendant. *Id.*

The Supreme Court disagreed, and held that the *Faretta* decision did not intend for an absolute bar on standby counsel's unsolicited participation. *Id.* at 176–77 ("The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. Both of these objectives can be achieved without categorically silencing standby counsel."). However, the Supreme Court did set two bright line rules for the participation of standby counsel: first, the pro se defendant is entitled to preserve actual control over the case presented to the jury, and second, participation by standby counsel must not destroy the jury's perception that the defendant is representing himself. *Id.* at 178.

From my perspective, in setting a limitation on a defendant's Sixth Amendment right to self-representation, the Supreme Court recognized that this important trial right must be balanced against the overarching principles that the defendant receive a fair trial, and that courts be allowed to conduct reasonable and orderly proceedings. *See McKaskle*, 465 U.S. at 183–84 ("Nor does the

Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course. *Faretta* recognized as much. The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." (citation omitted)); *see also Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000) ("[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting in his own lawyer.").

In addition to the self-representation overlay supplied by *Faretta*, *McKaskle*, and *Martinez*, the facts of the instant case must be analyzed in light of the Supreme Court's requirement that capital trials carry an element of enhanced reliability distinct from other criminal proceedings.

In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the United States Supreme Court explained:

> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 305 (concluding that capital cases required an individualized sentencing determination encompassing the character and record of the accused); *see also Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) ("Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality."); Jonathan DeSantis, *David Versus Goliath: Prohibiting Capital Defendants From Proceeding Pro Se*, 49 No. 1 Crim. Law Bulletin ART 5, at 1 (2013) ("It has long been recognized that a capital trial requires 'heightened reliability' with regards to both guilty verdicts and death sentences." (citing *Beck v.*

Alabama's[12] extension of the "heightened reliability" doctrine originally required for capital sentences to capital verdicts.)).

The heightened reliability required of capital verdicts and sentences has led states to adopt stringent requirements for attorneys representing defendants facing the ultimate punishment. For example, Florida requires attorneys serve as lead counsel in at least nine jury trials of "serious and complex cases which were tried to completion," have demonstrated "necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases," and attend a continuing legal education program, within the last two years, devoted to capital defense. Desantis, *supra*, at 3. In South Carolina, section 16-3-26 of the South Carolina Code provides that indigent defendants facing a capital trial must receive at least two court-appointed attorneys. One of the attorneys must have at least five years' experience as a licensed attorney, and at least three years in the actual trial of felony cases. S.C. Code Ann. § 16-3-26 (B)(1) (2003). That section also vests this Court with the authority to "promulgate guidelines on the expertise and qualifications necessary for attorneys to be certified as competent to handle death penalty cases." *Id.* § 16-3-26(F); *see* Rule 421, SCACR ("There shall be two classes of attorneys certified to handle death penalty cases: lead counsel and second counsel . . . . Lead counsel shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases.").

Obviously, a criminal defendant who waives his right to counsel, and elects to proceed pro se, loses the benefit of counsel equipped with the type of special qualifications discussed *supra*, and this fact could make the difference in the conduct and outcome of his trial. However, this decision is constitutionally permissible provided the defendant makes a knowing and intelligent waiver of the benefit. Nevertheless, in my view, the defendant's right to self-representation is not absolute, and as discussed *supra*, courts may place reasonable restrictions on that right. For example, the Supreme Court has held that trial courts may curtail that right in the interest of providing the defendant with a fair trial, and ensuring that the proceedings do not become a mockery of the criminal justice system. *See, e.g.*, *Martinez*, 528 U.S. at 162 (holding that states may restrict a defendant's self-representation guarantees in recognition of the government's interests in preserving the integrity and efficiency of the process).

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[12] 447 U.S. 625, 638 (1980).

These considerations become even more pronounced in the capital context where trials must contain an indicia of reliability higher than any other criminal trial, and where a criminal defendant is likely at a significant disadvantage in meeting the demands of adequate representation. *See, e.g.*, Desantis, *supra*, at 4 ("Incarcerated capital defendants electing to proceed pro se also face the prospect of conducting a mitigation investigation from within the confines of prison . . . . [S]ome of the requirements for capital defense counsel detailed in the ABA Standards, such as visiting the scene of the alleged crime, are inherently unavailable to incarcerated defendants.").

In the instant case, Appellant's trial counsel began the self-representation colloquy with the trial court by explaining that different experts hired to evaluate Appellant believed he was "very competent" to stand trial, but lacked the competency to waive his right to counsel and conduct the proceedings on his own. One of these experts, Dr. David Price, testified that Appellant failed to finish high school, and has an intelligence quotient at the "very low part of the low/average range of intellectual functioning." Price also stated that Appellant had a significant psychiatric history including psychiatric disorders, admissions, post-traumatic disorder, paranoia, cognitive difficulties and lapses, and issues with judgment and decision-making. According to Price, these issues interacting with each other impaired Appellant's ability to knowingly and intelligently waive his right to counsel in this case. The trial court denied Appellant's motion to proceed pro se, holding:

> Given the doctor's testimony and his expert opinion that the defendant has not knowingly and intelligently waived his right to counsel, I find the defendant does not have a clear understanding of the dangers of self-representation in the guilt nor the sentencing phase of the trial. I further find that the defendant does not knowingly, intelligently understand the dangers inherent in self-representation. I feel like I would not be fulfilling my responsibilities under the law to an individual that deserves a fair trial if I allow on this record, and I might add, my observation of [Appellant]. . . . [Appellant] has always been during these proceedings respectful . . . . However, he is prone to ramble. He's prone to act extra-judicious, and by that I mean not appropriate, but to act as if he were conducting his defense on the streets, so to speak, and as we all know, the courtroom is not the place for that kind of decorum or demeanor. I think it would be an abuse of

> my discretion to allow him to represent himself in trying to do all I can to make sure [Appellant] in this very serious matter gets a fair trial. So I'm denying your motion.

In my opinion, the trial court did not err. The trial court's order exemplifies the balancing that must take place in a capital trial when a defendant desires to represent himself.

The majority acknowledges that in *Indiana v. Edwards*, the Supreme Court held that the United States Constitution does not forbid a state from insisting that a defendant proceed to trial with counsel if the defendant is found mentally competent to stand trial but mentally incompetent to conduct the trial herself. *Id.* at 167. In so finding, the Supreme Court relied in part on undisputed medical opinions regarding the effects of mental illness of a defendant's ability to effectively represent herself. *Id.* at 176 ("The American Psychiatric Association (APA) tells us (without dispute) in its *amicus* brief filed in support of neither party that '[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant.'" (citation omitted)). Additionally the Supreme Court noted the right to self-representation will not "affirm the dignity," of a defendant without the mental capacity to conduct her defense. *Id.* ("To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial."). Moreover, the Supreme Court observed the significant concern that "proceedings must not only be fair, they must 'appear fair to all who observe them.'" *Id.* (citing *Wheat v. United States*, 486 U.S. 153, 160 (1988)); *see also Massey v. Moore*, 348 U.S. 105, 108 (1954) ("No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.").

Consistent with the Supreme Court's reliance on medical opinions in *Indiana v. Edwards*, the trial court in the instant case relied on expert opinions in finding that Appellant was mentally incompetent to represent himself at trial. The majority, however, chooses to ignore Dr. Price's thoughtful testimony applying

Appellant's mental conditions to his ability to waive his right to counsel and represent himself at trial. Instead, the majority highlights only Appellant's familiarity with court procedure. In my opinion, the majority's analysis is insufficient to ensure the fairness mandated by the Supreme Court.

We must be mindful that state authorities charged the defendant in *Indiana v. Edwards* with attempted murder, battery with a deadly weapon, criminal recklessness, and theft. *Edwards*, 554 U.S. at 167. These are serious crimes, but none can leave a criminal defendant susceptible to a sentence of death upon conviction. If based on these facts our nation's highest court found the curtailment of self-representation rights permissible, it is clearly constitutionally acceptable to allow South Carolina trial courts to make this determination for defendants facing the ultimate punishment. *See id.*, 554 U.S. at 177–78 ("We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so.").

I strongly disagree with the majority's characterization of my analysis as a reflection of the rationale that this Court rejected in *State v. Brewer*, 328 S.C. 117, 492 S.E.2d 97 (1997). In *Brewer*, this Court reversed the denial of a defendant's motion to proceed pro se because the trial court found that the decision to waive counsel was knowing, intelligent, and voluntary and thus, the trial court violated the defendant's 6th Amendment right to self-representation by denying the motion. *Id.* at 120–21, 492 S.E.2d at 99. In *Brewer*, decided before *Indiana v. Edwards* and unlike the present case, there was no question about the defendant's mental competence. Instead, the trial court denied the motion merely because it was a death penalty case, concluding that allowing the defendant to represent himself was "fraught with inherent disastrous consequences." *Id.* at 119–20, 492 S.E.2d at 98–99.

Trial courts are in the proper position to determine a defendant's capability to adequately represent himself given their opportunity to hear testimony and review evidence about a defendant's mental competence before he may proceed pro se. A trial court is permitted to engage in an evaluation intended to balance a defendant's rights to self-representation and a fair trial, especially after *Indiana v. Edwards*. Such an evaluation eliminates unfairness on the front end of a trial and is in no way contrary to this Court's opinion in *Brewer*.

In addition, the majority is simply wrong to suggest that the foregoing reasoning ignores applicable constitutional mandates. My view of this case is firmly entrenched in precedent providing for a balancing of the constitutional right to self-representation and the heightened reliability required of capital trials. From my perspective, the aim of a comprehensive self-representation analysis is not to shield competent capital defendants from adverse outcomes, but instead to ensure that trial courts possess the authority to deal appropriately with cases where the mental competence of the defendant is at issue. *Id.* at 178–79 ("[I]nstances in which the trial's fairness is in doubt may well be concentrated in the 20 percent or so of self-representation cases where the mental competence of the defendant is also at issue." (citing Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C.L. Rev. 423 (2007)).

The importance of a "knowing, intelligent, and voluntary waiver" is without question. However, in the criminal context, it is far from the sole question. Defendants very clearly have a constitutional right to self-representation, however, this right must bow to the competing concern that "death is different," and trial courts must do everything legitimately within their power to ensure that these trials are fair and that the proceedings and verdict are especially reliable.

In the instant case, the trial court assessed Appellant's mental and psychiatric history, demeanor, and the importance of the impending trial in deciding that Appellant could not adequately represent himself. An abuse of discretion occurs when the decision is controlled by some error of law or based on findings of fact that are without evidentiary support. *See Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654–55 (2011). In my view, neither of these reversible circumstances occurred in the instant case.

II. Pre-Trial Testimony

Appellant asserts that the trial court violated his due process rights by relying on Price's testimony. I disagree.

As discussed, *supra*, Appellant's trial counsel indicated that experts hired to evaluate Appellant held the view that Appellant lacked the competency to waive his right to counsel and conduct the trial proceedings on his own. Appellant's trial counsel then sought to have Price testify to that view. Appellant objected,

asserting that Price's testimony would violate "doctor/client" privilege and Appellant's due process rights. The trial court viewed Appellant's objection as an attempt to force the trial court to rule on Appellant's competency without having all information concerning Appellant's mental history.

In my view, Appellant did not fully disclose his mental history and other relevant information regarding his mental state during the trial court's initial inquiry into Appellant's competency to waive his right to counsel. The trial court could not make an accurate ruling on the issue of Appellant's waiver without proper access to all relevant information. Appellant misapprehends the issue as turning on his personal feelings regarding whether he was competent to conduct his own trial proceedings. Instead the issue actually centers on whether the trial court objectively viewed him competent to present a defense that comports with the reliability and integrity of a death penalty trial.

Appellant's argument relies in part on this Court's decision in *State v. Jones*, 383 S.C. 535, 681 S.E.2d 580 (2009). However, in my view, Appellant incorrectly interprets that case.

In *Jones*, the State informed the defense that it intended to introduce "barefoot insole impression" evidence. *Id.* at 540, 681 S.E.2d at 582. In response, the defense retained a renowned expert on this evidence. *Id.* The defense did not intended to call the expert at trial, but the State subpoenaed the expert to testify at trial. *Id.* The defense filed pre-trial motions seeking to quash the State's subpoena and suppress introduction of "barefoot insole impression" evidence. *Id.* The trial court denied both motions, and the jury ultimately convicted the defendant of two counts of murder. *Id.*

The defendant argued on appeal that the State's subpoena violated the work-product doctrine, attorney-client privilege, and his Sixth Amendment right to effective assistance of counsel. *Id.* at 540, 681 S.E.2d at 582–83. The State countered that the trial court did not abuse its discretion in permitting the subpoena given that expert only testified during a pre-trial, *in camera* hearing, the State did not question the expert regarding any matters produced by attorney-client privilege or work-product doctrine, and it would be fundamentally unfair to the State for the defendant to challenge the scientific reliability of "barefoot insole impression" evidence while withholding non-privileged testimony from one of the two renowned experts who the State initially attempted to retain. *Id.* at 541, 681 S.E.2d at 583.

This Court affirmed the trial court's ruling, holding:

> Here, there were only two available expert witnesses on the "barefoot insole impression" evidence. The trial judge recognized this anomaly and properly limited the State to only eliciting non-protected information . . . . Moreover, the State only called [the expert] during an *in camera* hearing for the benefit of the trial judge's ruling on the admissibility of the "barefoot insole impression" evidence. Because [the expert] did not testify during the trial, the State's decision to call [the expert] as a witness could not have affected the jury's assessment of the evidence . . . . Additionally, the State's questioning of [the expert] was confined to general testimony regarding his expertise and his opinion regarding the scientific reliability of the evidence. Significantly, the State did not question [the expert] concerning the specifics of the crime scene evidence . . . . Based on the foregoing, we hold the trial judge's decision denying [the defendant's] motion to quash the State's subpoena of [the expert] did not constitute reversible error.

Id. at 546–47, 681 S.E.2d at 586. In my opinion, the facts and circumstances of the instant case are similar. The trial court allowed the testimony of a witness, presented by the defense, for the benefit of the trial court's ruling on Appellant's competency to waive his right to counsel. This testimony took place following the Appellant's own minimization of his significant psychiatric dysfunction. However, this testimony occurred *in camera*, and the trial court did not permit the State to participate. Therefore, from my perspective, the trial court's decision to allow Price's testimony does not constitute reversible error.

However, the warning this Court issued in *Jones* applies with equal force here. In *Jones*, the Court cautioned that its decision should not be interpreted as establishing a general rule permitting the State to compel the testimony of a non-testifying, consultative defense agent. *Id.* at 547, 681 S.E.2d at 548 ("Taken to its extreme, we believe such a rule could be used by the State as a subversive tactic to circumvent discovery rules."). Thus, the Court limited the *Jones* decision to the specific facts of that case, and adopted a "substantial need" rule for instances where the State seeks to compel a defendant's non-testifying consultative expert. *Id.* In that same vein, the trial court could have ordered a separate evaluation of Appellant instead of allowing Appellant's counsel to present Price's testimony. In my view, this would have been unnecessarily duplicative given that the foundation

of the trial court's decision relied on Price's analysis of Appellant's uncontroverted medical history, rather than any type of relationship between Price and Appellant. After all, Appellant's counsel retained Price for mitigation, not for treatment.[13] Nevertheless, trial courts should avoid confusion and order a competency evaluation when necessary to provide further support for the court's ruling regarding a defendant's competency to waive his right to counsel. Moreover, attorneys, especially those providing counsel to defendants facing a capital trial, must take care to be forthright and honest with their clients concerning the use of expert witnesses.

III. Improper Limitation of Voir Dire

Appellant argues that the trial court violated his Sixth, Eighth, and Fourteenth Amendment[14] rights by improperly limiting defense counsel's attempt to voir dire potential jurors regarding their views of the death penalty. In my opinion, this argument is without merit, and the trial court's voire dire limitations did not render Appellant's trial fundamentally unfair.

"The scope of voir dire and the manner in which it is conducted are generally left to the sound discretion of the trial court." *State v. Bixby*, 388 S.C. 528, 542, 698 S.E.2d 572, 579 (2010) (citing *State v. Stanko*, 376 S.C. 571, 575, 658 S.E.2d 94, 96 (2008)). Furthermore, "[i]t is well established that a trial court has broad discretion in conducting the *voir dire* of the jury and particularly in phrasing the questions to be asked." *Id.* (citing *United States v. Jones*, 608 F.2d 1004, 1009 (4th Cir.1979)). A limitation on juror questioning will not constitute reversible error unless the limitation renders the trial fundamentally unfair. *Id.*

[13] Contrary to Appellant's position, the trial court is not a state actor for purposes of a *Jones* analysis, and thus, application of the "substantial need" test would be nonsensical.

[14] U.S. Const. amends. VI, VIII, XIV.

A. Procedurally Barred

Where counsel fails to exhaust all strikes, appellate review of juror qualification issues is barred. *Bixby*, 388 S.C. at 542, 698 S.E.2d at 579; *see also State v. Tucker*, 324 S.C. 155, 163, 478 S.E.2d 260, 264 (1996) (holding "[f]ailure to exhaust all of a defendant's peremptory strikes will preclude appellate review of juror qualification issues"). In the instant case, Appellant's defense counsel used only nine of the ten available strikes during jury selection, thus in my opinion, the Court's consideration of this issue is barred. *See Bixby*, 388 S.C. at 542, 698 S.E.2d at 579 ("Because defense counsel used only seven of the ten available strikes during jury selection, review of this issue is barred.").

B. Trial Court's Permissible Limitations

However, even if this Court's precedent did not bar review of Appellant's arguments, in my view the trial court properly limited the scope of defense counsel's examination of jurors #146, #157, and #183.

1. Juror #157

Appellant's trial counsel attempted to question Juror #157 regarding "some of the factors" that the juror would consider important in making a determination of whether to impose the death penalty. The State objected, and the trial court sustained the State's objection. Appellant's trial counsel then attempted to question the juror regarding her understanding of the term murder. The trial court did not allow the question, finding the juror's opinions of "what the law of murder is" inappropriate for voir dire. Appellant's trial counsel objected to the trial court's refusal to allow him to "instruct the jurors on the definition of murder in the voir dire." The trial court overruled the objection, holding that jurors could not be questioned regarding their conceptions, or misconceptions, regarding the law, citing this Court's decision in *Bixby*, *supra*.

2. Juror #146

During voir dire, Appellant's trial counsel and Juror #146 engaged in the following colloquy:

Trial counsel: Now, if you were on the jury and you found that there was a murder that there was absolutely no excuse for, you could give meaningful consideration to a life sentence?

Juror #146: Quite honestly, if there was no excuse for it, cold blooded, I couldn't. I've just got to be honest with you. If there are mitigating circumstances or situations, I mean yes, but I'd be lying if I said differently.

Under the State's cross-examination, Juror #146 stated that he would have no predisposition on whether or not he could vote for life or death, and that if he could vote for a death sentence or life imprisonment depending on what the facts of the case warranted.

Trial counsel argued that the juror was not qualified because of his reference to murder committed in "cold blood," and requested further examination of the juror. The trial court allowed trial counsel to re-question Juror #146. Trial counsel then asked Juror #146, "If you found beyond a reasonable doubt that there was a murder with no excuse in cold blood, would it matter to you—would anything else matter to you?" The trial court did not allow this question, finding that it constituted an impermissible question based on a "particular hypothetical," or a "particular set of facts." Trial counsel then explained that he felt the juror had a "misconception" of murder, and that this misconception would interfere with the juror's impartiality. The trial court agreed to provide the definition of murder and explained:

> Before I go back to allowing the lawyers to ask you a few more questions, I do want to tell you that as far as murder is concerned, murder in South Carolina is the unlawful killing of a human being by another human being with malice aforethought, express or implied.

Trial counsel then questioned Juror #146, and the juror explained that he would not make up his mind on a particular case simply because he had convicted the person of murder:

Trial counsel: It's not an automatic decision; you're not one of those jurors that if you find a person guilty of murder, you'd automatically sentence a person to death?

Juror #146: No.

Trial counsel: And if you get—in a death penalty trial an individual's found guilty of murder and you go into that penalty phase, you'd go in there with an open mind because there'd be different types of evidence in that penalty phase, evidence of aggravation, evidence of mitigation, evidence that may show something good or more of the circumstances of the nature of the crime or the particular defendant, or evidence of aggravation that may increase the enormity of the crime, you would consider that.

Juror #146: Yes, sir.

Trial counsel: Before you made your decision?

Juror #146: Yes, sir. And I apologize. I assumed that's what I said.

The trial court found the juror qualified, and as Appellant concedes in his brief, trial counsel used a peremptory challenge to strike Juror #146.

3. Juror #183

Trial counsel attempted to question Juror #183 regarding her religious and moral beliefs in relation the death penalty. Defense counsel asked Juror #183 for her thoughts on the Biblical axiom, "eye for an eye," and whether the juror believed that the death penalty helped to "protect society." The State objected to these questions and the trial court sustained the objections.

Following the conclusion of the voir dire, the trial court excused the juror and heard the State's objection. The State argued that religion is not a proper basis for voir dire, and prospective juror should not have to explain or interpret the Bible. The State also asserted that jurors should not be questioned regarding their view of the death penalty's purposes, and this line of questioning ran afoul of the general prohibition on hypotheticals as part of voir dire. The trial court ruled that trial counsel could legitimately question the juror as to firmly held beliefs for or against the death penalty, but that it was not appropriate to investigate philosophical distinctions and differences *within* a juror's religious belief. The trial court stated explicitly that the court was not prohibiting defense counsel from questioning jurors regarding certain religious or moral beliefs. Notably, the trial court and defense counsel engaged in the following colloquy:

> Trial court: I thought her responses were very clear and that she'd be a good juror when she talked about a case-by-case basis. Further, she said it would be a serious decision. ***I believe you think she's qualified also you said?***
>
> Trial counsel: Yes, your Honor.

(emphasis added).

In my view, this Court's decisions in *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991) ("To the extent they require *in favorem vitae* review, the following cases, *inter alia*, are hereby overruled."), and *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985), *cert. denied*, 474 U.S. 888 (1985), provide the proper frame for viewing Appellant's arguments.

In *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982), a jury found the defendant guilty of two murders while committing larceny with a deadly weapon. The defendant appealed on three separate grounds, the issue most pertinent to the instant case being his absence from the courtroom during jury selection. *Id.* at 517, 521, 299 S.E.2d at 687, 689. In *Smart*, the clerk of court conducted the initial jury selection outside the presence of the parties and the presiding judge. *Id.* at 521, 299 S.E.2d at 689–90. The parties and the trial court then examined those jurors chosen. *Id.* The defendant did not object to this procedure at trial, and this Court found that the defendant did not suffer prejudice "by his absence during the simple

drawing of names." *Id.* at 521, 299 S.E.2d at 690 ("Moreover, there is no right of [a] defendant to be present when purely ministerial acts, preparatory to jury selection are performed. (alteration added)).

However, the Court found the voir dire that took place in *Smart* to be lengthy and "superfluous," providing the Court an opportunity to offer guidance regarding a capital defendant's right to examine jurors. *Id.* at 521, 299 S.E.2d at 690. The Court recognized that section 14-7-1020 of the South Carolina Code provided for a trial court's inquiry into "whether a juror is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein." *Id.* at 522, 299 S.E.2d at 690 ("The manner in which these questions are pursued and the scope of any voir dire beyond their bounds are matters of trial court discretion."). This Court observed that trial court examination prior to counsels' questioning could provide the basis for proper limitation of counsels' questions to relevant matters, holding:

> The unbridled examination of jurors by counsel serves to not only unnecessarily add to the length and expense of the trial, but also serves to antagonize jurors and lessen public respect for jury duty. The extent to which voir dire examination is being permitted by trial judges causes this Court concern and, therefore, this admonition.

Id. at 523, 299 S.E.2d at 691.

In *South*, the defendant argued that the trial court erred in refusing to permit defense counsel to ask the jurors hypothetical questions concerning the death penalty. 285 S.C. at 534, 331 S.E.2d at 778. The Court disagreed, holding that "[c]learly, the questions would have been improper since the purpose of voir dire is to insure each juror can make a decision based on the evidence presented, rather than hypothetical evidence." *Id.*; *see also State v. Patterson*, 290 S.C. 523, 525–26, 351 S.E.2d 853, 854–55 (1986), *cert. dismissed*, 482 U.S. 902 (1987) (relying on *South* to reject the claim that the trial court erred in refusing to allow the defendant to use hypothetical question on voire dire in an attempt to discover hidden biases or prejudices concerning the death penalty).

In my view, the United States Court of Appeals for the Fifth Circuit's decision in *King v. Lynaugh*, 850 F.2d 1055 (5th Cir. 1988), *cert. denied*, 489 U.S. 1093 (1989), is instructive.

In *King*, the defendant argued that the trial court violated his constitutional guarantees to a trial by a fair and impartial jury when the court refused defendant's request to question the jurors, or educate them through voir dire, concerning their knowledge of Texas parole laws. 850 F.2d at 1057. The defendant argued that if the jurors harbored misconceptions regarding Texas law, for instance regarding when a capital murder defendant might be eligible for parole, they would be biased toward imposing the death penalty. *Id.* ("On the other hand, he suggests, proper knowledge about the 20-year minimum prison term prior to parole eligibility in such cases will tend to reassure them that [the defendant] does not pose the future dangerousness to society contemplated by . . . Texas capital punishment law.").

The Fifth Circuit acknowledged that the United States Supreme Court, until that point, had only recognized racial prejudice and widespread and provocative pretrial publicity as acceptable grounds for a constitutional challenge to a trial court's voir dire procedure, and held:

> The Court has emphasized that "[t]he Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice him." *Ristaino* [*v. Ross*, 424 U.S. 589, 594 (1976)]. A graphic example of the Court's distinction appears in *Ham* [*v. South Carolina*, 409 U.S. 524 (1973)] where a seven-member Court majority rejected the defendant's contention that he was constitutionally entitled to inquire whether jurors were prejudiced toward people with beards . . . . Ham's trial and conviction occurred circa the late 1960's and early 1970's, at the apogee of student and political activism, when the wearing of a beard might well have been thought to prejudice many prospective jurors. Nevertheless, the Court refused to constitutionalize an inquiry which, in its view, would have suggested no principled limits on intrusive appellate review of voir dire. We, likewise, are unable to distinguish possible prejudice based on jurors' misconceptions about parole law from "a host of other possible similar prejudices." The views of a lay venireman about parole are no more likely to be both erroneous and prejudicial than are his views on the defendant's right not to take the stand, the law of parties, the reasonable doubt standard, or any other matter of criminal procedure. It is difficult to conceive how we could constitutionalize the inquiry concerning Texas parole while leaving these similar but also potentially influential matters to

> the broad discretion of the state trial court. In fact, we have previously declined to sanction constitutional challenges to the failure to conduct voir dire on the range of punishment for an offense and the meaning of certain words in the capital murder statute. Interrogating veniremen about Texas parole law raises, if anything, a more attenuated possibility of prejudice than does a question about jurors' attitudes toward people with beards. The specific inquiry does not approach a level of constitutional sensitivity.

Id. at 1059.[15]

In my view, the trial court's limitations in the instant case did not violate Appellant's constitutional rights and comport with this Court's established precedent regarding voir dire's proper contours. The trial court properly restrained Appellant's defense counsel from improperly questioning potential jurors regarding their interpretation of applicable law, or hypothetical situations, and thus there is no reversible error.

IV. Qualification of Juror #203

Appellant argues that the trial court erred in finding Juror #203 unqualified. I disagree.

A prospective juror may be excluded for cause when his views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with instructions and his oath. *State v. Sapp*, 366 S.C. 283, 290–91, 621 S.E.2d 883, 886 (2005). When reviewing the trial court's qualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire voir dire. *Id.* at 291, 621 S.E.2d at 886. The determination of whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. *Id.* A juror's disqualification will not be disturbed on appeal if there is a reasonable basis from which the trial court could have

[15] *See State v. Matthews*, 296 S.C. 379, 384, 373 S.E.2d 587, 590 (1988) (relying on *King* in holding that the defendant was not entitled to probe potential jurors' misconceptions regarding the definition of "life imprisonment").

concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. *Id.* at 291, 621 S.E.2d at 887.

The Record in this case demonstrates that Juror #203 provided conflicting and inconsistent answers regarding her ability to render a death sentence in response to questioning from the trial court, defense counsel, and the State. For example, Juror #203 initially stated that she could sentence a defendant to life imprisonment without parole or the death penalty depending on what the facts of the case "warranted." Juror #203 appeared to confirm her view during defense counsel's initial examination. The State noted during its examination of Juror #203 that she hesitated in answering the trial court whether she could render a death sentence. In response to the State's questions Juror #203 stated that she was "not positively sure," she could take part in a death sentence. However, Juror #203's answer changed during the defense's re-examination and she confirmed that she could "give meaningful consideration to a death sentence as well as a life sentence."

The trial court then re-examined Juror #203 and the juror stated she could be fair and impartial juror and could consider life without parole or the death penalty. Nevertheless, under another re-examination by the State, Juror #203 provided a conflicting answer:

The State:	Let me ask you this: Would your feelings about signing a death verdict do you think that would interfere with your ability to sit as a juror in a death penalty case? I know you've had a lot of hesitation about whether or not you could sign your name and do that. Do you think that your feelings on that would interfere with your ability to be an effective juror in a death penalty case?
Juror #203:	I do.
The State:	You think it would? I understand. Like I said, there's nothing right or wrong about it, it's just what you feel . . . .

Appellant's trial counsel attempted to clarify Juror #203's responses and inquired,

Trial counsel: No matter how it made you feel, if you felt like the death penalty was appropriate, you could sign your name to the form, correct?

Juror #203: Correct.

Trial counsel: Even if it made you feel a little uneasy, if that was your decision, you could sign your name?

Juror #203: Correct.

However, the trial court interceded and questioned Juror #203 further on her positive response to the State's question as to whether the juror's feelings would interfere with her ability to be an effective juror. The trial court and Juror #203 then engaged in the following exchange:

Trial court: Do you feel like because of your beliefs, because of your feelings, your hesitation given the death penalty, that your beliefs would be such that it would—your feelings would be such that it would interfere with your ability to perform your duties as a juror?

Juror #203: Yes, sir.

Trial court: And that's because of your beliefs; is that correct?

Juror #203: Correct.

Trial court: So you do not feel like you could adequately perform your duties as a juror because you would be hindered somewhat because of your beliefs?

Juror #203: Yes, sir.

Trial court: And that's your beliefs that are somewhat exhibited through your hesitancy in your responses to the death penalty questions?

Juror #203: Yes, sir.

The trial court then found Juror #203 unqualified to serve as a juror. The trial court's reasoning bears duplication here:

> I find that [Juror #203] is not qualified. Considering the entire colloquy, even going back to my initial questioning of [Juror #203], there was a very, very long pause when I asked her if she could return a sentence of death. Not only that, her—my observations of her demeanor, being within two feet, I guess, of her and looking down into her face, it appeared somewhat of concern to her, somewhat of a pained, emotional expression on her face . . . . Then beyond equivocation, as I recall, [the State] asked her about signing her name and then asked if she thought her feelings about the death penalty would interfere with her abilities to serve as a juror. And she said, "I do." I came back and attempted to clarify some of her responses because I think some of her responses were inconsistent between our various questioning. And she clearly stated that she felt that her feelings or her beliefs were such that it would interfere with her ability to perform her duties and follow her oath as a juror . . . . I think she did equivocate. I think her views and her responses as a whole would impair her ability to act as an impartial juror. Therefore, considering the voir dire as a whole, I find that [Juror #203] is not qualified.

In my view, this Court's decision in *State v. Lindsey*, 372 S.C. 185, 642 S.E.2d 557 (2007), *cert. denied*, 552 U.S. 917 (2007), is instructive.

In *Lindsay*, the appellant claimed the trial court erred in excusing a juror because of his views regarding the death penalty. *Id.* at 190, 642 S.E.2d at 559–60. During initial questioning, the trial court asked the juror if he could impose the death penalty, and the juror replied, "I really don't know. I really don't know if I could or not." *Id.*, 642 S.E.2d at 560. During the defense counsel's voir dire, the juror stated that he could listen to both sides and render what he felt was the appropriate penalty whether that was life imprisonment or death. *Id.* However, during the State's questioning, the juror equivocated, stating:

> Most of the time I feel it is a better punishment to be in prison for life. I believe that death is not as big of a punishment as going to prison for life and having to stay in prison for the rest of your life.

Id. at 191, 642 S.E.2d at 560. The juror explained that his belief that life without parole was a more serious punishment than death would "most likely," but not "necessarily," lead him to choose life imprisonment over death during the trial's sentencing phase. *Id.*

The trial court ruled that the juror's belief regarding life imprisonment and the death penalty would substantially impair the juror's ability to follow the law as instructed, and noted that when asked about the death penalty the juror "took a very big deep [breath] and exhaled as if he were very uncertain as to whether or not he could do that." *Id.* at 192, 642 S.E.2d at 561 ("The [trial court] concluded 'from watching' him and considering his inconsistent responses, that [the juror] should be excused.").

This Court found the juror's ambivalent views concerning the death penalty supported the trial court's ruling, holding:

> Juror K's equivocal views regarding the death penalty, his responses favoring a life sentence despite the facts of the case, and his noted hesitation when asked if he could vote for death, are a reasonable basis for the trial judge's conclusion that Juror K's views would substantially impair his ability to act as an impartial juror. Considering the voir dire as a whole, we find the trial judge did not abuse his discretion in excusing this juror.

Id. at 193, 642 S.E.2d at 561; *see also State v. Green*, 301 S.C. 347, 355, 392 S.E.2d 157, 161 (1990), *cert. denied*, 498 U.S. 881 (1990) (holding that a trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law).

Accordingly, in my view, the Record demonstrates evidence supporting the trial court's disqualification of Juror #203. Analogous to the juror in *Lindsay*, Juror #203 provided equivocal views regarding the death penalty, and at times expressly stated that these views would prohibit the juror's ability to perform the required duties. Thus, in my opinion, the trial court did not abuse its discretion in excusing a juror that explicitly stated that the juror's views on capital punishment would prevent the performance of his duties.

V. The Interstate Agreement on Detainers Act (IAD)

Appellant argues that the trial court erred by failing to dismiss the indictments against him because of the State's noncompliance with the Interstate Agreement on Detainers Act (the IAD). I disagree.

The IAD is a compact enabling participating states to obtain custody of prisoners incarcerated in other participating jurisdictions and bring those prisoners to trial. *Reed v. Farley*, 512 U.S. 339, 340 (1994). The central purpose of the IAD is to allow participating states to uniformly and expeditiously dispose of charges pending against prisoners held out-of-state. S.C. Code Ann. § 17-11-10 (2003); *State v. Adams*, 354 S.C. 361, 370, 580 S.E.2d 785, 790 (2004).

The IAD's third article addresses an inmate's request for a final disposition of outstanding charges against her in another state. S.C. Code Ann. § 17-11-10, art. III. Article III provides that an inmate shall be brought to trial within one hundred eighty days following the delivery of written notice to "the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction" of the inmate's place of his imprisonment and request for a final disposition of untried indictments or complaints. *Id.* However, the court having jurisdiction of the matter may grant any necessary or reasonable continuance provided that good cause supports the continuance. *Id.* Section 17-11-10's Article IV provides a similar method for a state to have an inmate incarcerated in another state delivered for the purposes of resolving any untried indictments or complaints. *Id.* § 17-11-10, art. IV. However, article IV's subsection (c) provides that any proceedings enacted via article IV must be commenced within one hundred twenty days of the inmates arrival in the receiving state. *Id.* Nevertheless, as in article III, the presiding court may grant any necessary or reasonable continuance supported by good cause. *Id.*

In the instant case, Appellant made an initial demand pursuant to the IAD on February 12, 2005. Prior to that request, a Georgia court convicted Appellant for kidnapping and sentenced him to life imprisonment. The solicitor informed the trial court that the instant case would proceed as a death penalty case, and, on May 27, 2005, the trial court ruled good cause had been shown as to why the case could not be handled within 180 days. The case was later scheduled for trial in 2008. However, in March 2008, Appellant's defense counsel requested a continuance because of an issue with a mitigation specialist. The Record does not explain the

underlying reason for the significant delay in scheduling the instant case for trial. However, although this type of delay is unacceptable, Appellant fails to demonstrate that the delay resulted in any prejudice, and therefore, the trial court's refusal to dismiss the indictments against Appellant does not warrant reversal.

For example, in *State v. Allen*, 269 S.C. 233, 237 S.E.2d 64 (1977), the State charged the defendants with burglary. The burglary occurred on October 11, 1973, and thirteen days later, Georgia police arrested the defendants in that state on unrelated bank robbery charges. *Id.* at 236, 237 S.E.2d at 65. Subsequently, a Georgia court convicted the defendants and imposed a prison sentence. *Id.* In November 1973, South Carolina authorities issued arrest warrants for the defendants and a South Carolina grand jury indicted the defendants in September 1975. *Id.* at 236, 237 S.E.2d at 65–66. Authorities brought the defendants to South Carolina and provided notice of the charges pending in this state. *Id.* The defendants moved for a continuance, and authorities returned the defendants to Georgia to await trial. *Id.* at 236, 237 S.E.2d at 66. Thereafter, the defendants were brought to South Carolina and tried in March 1976. *Id.* The defendants were convicted and sentenced to life imprisonment. *Id.* at 235, 237 S.E.2d at 65.

The defendants argued, *inter alia*, that their transfer to Georgia prior to trial violated the IAD's article IV (e) which provides:

> If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment . . . such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

S.C. Code Ann. § 17-11-10, art. IV(e). This Court disagreed, noting that the defendants could not demonstrate that the delay in their case resulted in any prejudice:

> Where a prisoner seeks and obtains a delay of his trial in the receiving State and is returned to the sending State to await trial, it does not mean that he waives his constitutional right to a speedy trial, but it does remove his case from the scope of the automatic dismissal provisions of the statute. In the absence of a showing of prejudice from his return to the sending State after his request for a continuance is granted, the prisoner would not be entitled to a dismissal of the

> charges against him, as a matter of right, under the provisions of the statute. *The record in this case fails to show any prejudice to appellants* from their return to Georgia to await trial, after the trial of the present charges was continued at their request. The trial judge, therefore, properly refused appellants' motions to dismiss the indictments in this case because of the alleged failure to grant a speedy trial.

Allen, 269 S.C. at 239, 237 S.E.2d at 67 (emphasis added).

I also find the United States Supreme Court's decision in *Reed v. Farley*, 512 U.S. 339 (1994), instructive. In that case, the Supreme Court analyzed whether a violation of the IAD's time limitations could serve as the basis of a state prisoner's habeas corpus petition. In December 1982, Orrin Reed was confined to a federal prison in Terre Haute, Indiana, when Indiana state prosecutors charged him with theft. *Id.* at 342. Indiana authorities lodged a detainer against Reed and took custody of him on April 27, 1983. According to the IAD, absent any continuances, Reed's trial should have commenced on or before August 25, 1983. *Id.* The trial court held two pretrial conferences, on June 27 and August 1, 1983. *Id.* At the June 27 conference, the court set a September 13, 1983 trial date, exceeding the IAD's 120-day limit. *Id.* at 343. However, neither the prosecutor nor Reed brought this to the trial court's attention or asked for a different trial date. *Id.* At the August 1 conference, Reed explained his imminent release from federal custody and requested the trial court set bond. *Id.* The trial court set bond at $25,000 and because of a calendar conflict, reset the trial date to September 19. *Id.* Reed did not express any objection to the September 19 trial date. *Id.*

On August 29, four days prior to trial, Reed alleged that Indiana failed to try him within 120 days of his transfer and had therefore violated the IAD. *Id.* at 344. The trial court rejected Reed's argument, explaining:

> Today is the first day I was aware that there was a 120 day limitation on the Detainer Act. The Court made its setting and while there has been a request for moving the trial forward, there has not been any speedy trial request filed, nor has there been anything in the nature of an objection to the trial setting, but only an urging that it be done within the guidelines that have been set out.

Id.

On the morning of the trial date, September 19, Reed filed a motion for continuance, arguing he needed additional time for trial preparation as a result of a newspaper article detailing the 1954 to 1980 timeframe of Reed's prior felony convictions. *Id.* The trial court, recognizing the possible prejudice, offered Reed three options: (1) start the trial on schedule; (2) postpone the trial for one week; or (3) continue the trial to a late October date. *Id.* at 345. Reed chose the third option and the trial began on October 18, 1983. The jury convicted Reed of theft, and found him to be habitual offender. *Id.* Reed received consecutive sentence of four years' imprisonment for theft and thirty years imprisonment for the habitual offender conviction. *Id.* One of Reed's primary assertions was that the IAD's time limit effectuated the Sixth Amendment's guarantee of a speedy trial right. *Id.* at 352. Thus, according to Reed, the Supreme Court should view the alleged violation of the IAD as a "fundamental defect," entitling Reed to habeas relief. *Id.*

The Supreme Court disagreed. Much of the Supreme Court's reasoning centered on the appropriate standard for federal habeas relief, and therefore is not related to the instant case. However, in my opinion, the Court's acknowledgement that Reed suffered no prejudice is pertinent. The Court explained:

> Reed's trial commenced 54 days after the 120-day period expired. He does not suggest that his ability to present a defense was prejudiced by the delay. Nor could he plausibly make such a claim. Indeed, asserting a need for more time to prepare for a trial that would be "fair and meaningful . . . . Reed himself *requested* a delay beyond the scheduled September 19 opening. A showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause, and that necessary ingredient is entirely missing here.

Id. at 353.

Appellant fails to establish any prejudice resulting from the delay in this case. The Record does not indicate that Appellant requested the trial court clarify the length of the original continuance, or that Appellant renewed his motion during the three year period following the trial court's continuance. More importantly, Appellant does not demonstrate that the delay adversely impacted his case, or that an earlier trial would have resulted in a different verdict and sentence. *Cf. id.* at 353 n.11 ("As the Court of Appeals noted: 'Had Indiana put Reed on trial within

120 days of his transfer from federal prison, everything would have proceeded as it did. Reed does not contend that vital evidence fell into the prosecutor's hands (or slipped through his own fingers) between August 26 and September 19, 1983.'" (citing *Reed v. Clark*, 984 F.2d 209, 212 (7th Cir. 1993)).

In my opinion, the State complied with the IAD's requirements, and the trial court's continuance satisfied the IAD's continuance provisions. Thus, I would find Appellant's argument regarding the IAD without merit.

CONCLUSION

For the foregoing reasons, I respectfully dissent. In my opinion, this Court should affirm Appellant's conviction and sentence.

KITTREDGE, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Shana Denice Jones-Burgess,
Respondent

Appellate Case No. 2013-002353

Opinion No. 27349
Submitted November 22, 2013 – Filed January 15, 2014

DEFINITE SUSPENSION

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

Shana Denice Jones-Burgess, of Conway, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand or definite suspension not to exceed twelve (12) months, and she requests any suspension be made retroactive to July 26, 2012, the date of her interim suspension. In the Matter of Jones-Burgess, 399 S.C. 1, 731 S.E.2d 592 (2012). In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of discipline. She further agrees to pay restitution prior to seeking reinstatement or returning to the active practice of law. We accept the Agreement and suspend respondent from the practice of law in this state for twelve (12) months, retroactive to the date of her interim suspension, and impose the conditions as specified hereafter in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

In March 2009, respondent was retained to represent Client A in a domestic matter and was paid $1,900.00 of the agreed $3,000.00 representation fee. Respondent failed to keep Client A reasonably informed about the status of Client A's case and failed to diligently represent Client A. Client A terminated respondent's service prior to the filing of the action. Respondent failed to refund Client A's fees and expenses that were not yet earned or incurred.

On October 11, 2010, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982), again requesting respondent's response. Respondent's written response was received by ODC on December 22, 2010, fifty-seven (57) days after the original due date.

Matter II

Respondent was retained to represent Client B in a social security disability matter. Respondent failed to keep Client B reasonably informed about the status of Client B's case. Respondent also failed to act diligently and failed to file a disability appeal claim pursuant to Client B's request. Client B terminated respondent's service and hired new counsel to complete her case. Client B did not pay respondent advance fees or costs.

On December 7, 2010, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, id., again requesting respondent's response. Respondent failed to file a written response to the Notice of Investigation despite the Treacy letter. Respondent did appear and give testimony under oath concerning the complaint on March 31, 2011.

Matter III

In January of 2009, respondent was retained to represent Client C in an adoption action. Respondent was paid in full for her representation. Respondent failed to

adequately communicate with Client C and failed to act diligently and failed to timely finalize the adoption.

Matter IV

In July of 2007, respondent was retained to represent Client D in a domestic action. Respondent was paid $3,200.00 for the representation.

Respondent failed to adequately communicate with or return Client D's telephone calls. Respondent also failed to diligently pursue Client D's domestic action.

When respondent became ill, the Family Court enlisted the help of the Horry County Bar to take over respondent's active cases. A substitute attorney was appointed on Client D's case and the case has now been resolved.

On August 17, 2011, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, id., on September 6, 2011, again requesting respondent's response. Respondent's written response was received by ODC on September 21, 2011, twenty (20) days after the original due date.

Matter V

As outlined in Matter IV, respondent was retained to represent a client in a domestic action. The client paid respondent $1,000.00 for Guardian ad Litem fees. Respondent failed to pay the Guardian the collected fees, failed to keep the collected fees in her trust account, and failed to safeguard the fees belonging to the client and/or Guardian ad Litem.

On September 11, 2012, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, id., again requesting respondent's response. Respondent failed to respond to the Notice of Investigation despite the Treacy letter.

Matter VI

In January of 2011, respondent was retained to represent Client E in a domestic action. Respondent was paid $1,200.00 for the representation. Respondent failed

to adequately communicate with Client E and failed to diligently pursuant Client E's domestic action.

Respondent closed her law office but failed to timely notify Client E of a new address or contact number. She also failed to return Client E's file. When respondent became ill, the Family Court enlisted the help of the Horry County Bar to assist with respondent's active cases. A substitute attorney was appointed on Client E's case and the case has now been resolved.

Matter VII

Respondent was retained to represent Client F in a disability action. Respondent failed to keep Client F reasonably informed about the status of the client's case. Respondent also failed to diligently pursue Client F's disability action. Respondent closed her law office but failed to timely notify Client F of a new address or contact number. Client F terminated respondent's service and hired new counsel to complete his case. Client F did not pay respondent any advance fees or costs.

On February 28, 2012, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. At respondent's request, a thirty (30) day extension was granted and respondent was notified her response would be due on or before March 29, 2012. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, id., again requesting respondent's response. Respondent failed to respond to the Notice of Investigation despite the Treacy letter.

Matter VIII

On May 29, 2008, respondent was retained to represent Client G in a domestic action. Respondent was paid $1,650.00 for the representation. In January of 2009, Client G paid respondent an additional $1,125.00 to file for a change of venue. Respondent failed to adequately communicate with Client G and failed to return numerous telephone calls to Client G. Respondent also failed to diligently pursue the divorce action and to comply with the client's reasonable requests for information.

In October of 2011, Client G terminated respondent's services and requested her file, a time sheet, and any unearned retainer fees. Client G received her file but never received a time sheet or any reimbursement of fees from respondent.

On March 6, 2012, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. At respondent's request, a thirty (30) day extension was granted and respondent was notified that her response would be due on or before April 20, 2012. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, id., again requesting respondent's response. Respondent failed to respond to the Notice of Investigation despite the Treacy letter.

Matter IX

In October 2011, respondent was retained to represent Client H in a domestic action. Respondent failed to adequately communicate with Client H, failed to return numerous telephone calls to Client H and failed to diligently pursue Client H's divorce action. Respondent closed her law office but failed to timely notify Client H of a new address or contact number.

When respondent became ill, the Family Court enlisted the help from the Horry County Bar to take over respondent's active cases. A substitute attorney was appointed on Client H's case and the case is now completed.

On March 6, 2012, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. At respondent's request, a thirty (30) day extension of time was granted and respondent was notified that her response would be due on or before April 20, 2012. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, id., against requesting respondent's response. Respondent failed to respond to the Notice of Investigation despite the Treacy letter.

Matter X

In March 2010, respondent was retained to represent Client I in a domestic action. Respondent was paid $1,400.00 for the representation. Client I met with respondent in November 2011 and has had no contact with respondent since that time. Respondent closed her law office but failed to timely notify the client of a new address or contact number.

On March 27, 2012 respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy,

id., again requesting respondent's response. Respondent failed to respond to the Notice of Investigation despite the Treacy letter.

Matter XI

In March 2009, respondent was retained to represent Client J and her husband in an adoption action. It was agreed, Client J would make monthly payments towards the quoted fee of $3,150.00 before respondent would begin work on the case. In April 2010, respondent agreed to begin the adoption proceedings. In September 2010, Client J paid the balance of the quoted retainer fee in full.

Respondent failed to adequately communicate with Client J and failed to keep Client J reasonably informed regarding the status of the case. In April 2012, Client J went to respondent's office and discovered the law office was closed. Respondent had closed her law office but failed to notify Client J of a new address or contact number. Respondent also failed to refund Client J's fees and expenses that had yet been earned or incurred.

On March 13, 2013, respondent was mailed a Notice of Investigation requesting a response to the complaint within fifteen (15) days. When no response was received, respondent was served with a letter pursuant to In the Matter of Treacy, id., again requesting respondent's response. Respondent failed to respond to the Notice of Investigation despite the Treacy letter.

Law

Respondent admits that by her conduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of case and promptly comply with reasonable requests for information); Rule 1.15 (lawyer shall hold property of clients or third persons that is in lawyer's possession in connection with a representation separate from lawyer's own property and shall promptly deliver funds deliver to client or third person any funds or other property that the client or third person is entitled to receive); Rule 1.16 (upon termination of representation, lawyer shall take steps to the extent reasonably practicable to protect client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred); Rule 8.1(b) (lawyer shall not knowingly fail to respond to

lawful demand for information from a disciplinary authority); Rule 8.4(a) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct); and Rule 8.4(e) (it shall be ground for discipline for lawyer to engage in conduct that is prejudicial to the administration of justice).

Respondent also admits she has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

While we do not condone respondent's failure to diligently protect the interests of her clients and timely respond to inquiries from ODC, we recognize that, during the period of time reported in this opinion, respondent was battling several serious and recurring health concerns and related treatment. Accordingly, we accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for twelve (12) months retroactive to date of her interim suspension.[1] In addition, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this order.

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[1] Respondent's disciplinary history includes a 2010 confidential admonition citing Rules 1.4, 5.3, and 8.1, RPC, upon which the Court may rely in imposing a sanction. See Rule 7(b)(4), RLDE (admonition may be used in subsequent proceedings as evidence of prior misconduct solely upon issue of sanction to be imposed). In addition, respondent received a letter of caution in 2007 warning her to be careful to adhere to the requirements of Rules 1.3, 1.4, and 8.4(a), RPC, indicating misconduct relevant to the misconduct in the current Agreement. See Rule 2(r), RLDE (fact that letter of caution has been issued shall not be considered in a subsequent disciplinary proceeding against lawyer unless the caution or warning contained in letter of caution is relevant to the misconduct alleged in proceedings). Respondent also entered into a Deferred Discipline Agreement in 2009 citing Rules 1.2, 1.3, 1.4, 8.1(b), and 8.4(a), RPC, indicating misconduct relevant to the misconduct in the current Agreement. See In the Matter of Toney, 396 S.C. 303, 721 S.E.2d 437 (2012) (Court considered prior Deferred Discipline Agreement involving similar misconduct in concluding that lawyer's disciplinary history demonstrated a pattern of misconduct).

Prior to filing a Petition for Reinstatement, respondent shall pay restitution as follows: a) Client A - $1,900.00; b) Client G - $1,650.00; c) Client I - $1,400.00; d) Guardian ad Litem (Matter V)- $1,000.00; and e) Client J - $3,150.00. The amount due to these individuals shall be reduced by any payments made to the individuals by the Lawyers' Fund for Client Protection (Lawyers' Fund). Should the Lawyers' Fund reimburse any of these individuals, respondent shall reimburse the Lawyers' Fund for all payments before filing a Petition for Reinstatement.

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

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Scott Christen Allmon, Respondent

Appellate Case No. 2013-002446

Opinion No. 27350
Submitted November 22, 2013 – Filed January 15, 2014

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Scott Christen Allmon, of Easley, pro se.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension of no less than nine (9) months to no more than three (3) years. He requests any period of suspension be made retroactive to January 16, 2013, the date of his interim suspension. In the Matter of Allmon, 402 S.C. 224, 741 S.E.2d 694 (2013). In addition, respondent agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of discipline. He further agrees to complete all terms of his criminal sentence, including payment of restitution and completion of probation, prior to filing a Petition for Reinstatement. Finally, respondent agrees to complete the Legal Ethics and Practice Program Ethics School prior to reinstatement. We accept the Agreement and suspend respondent from the practice of law in this state

for one (1) year, retroactive to the date of his interim suspension. In addition, we impose the conditions as stated hereafter in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Respond self-reported his arraignment on an information alleging a violation of 18 U.S.C. § 1001(a), alleging he knowingly and willfully made a false, fraudulent, and fictitious material statement to a federal agency. Specifically, respondent was accused of indicating on a settlement statement that a purchaser made a $15,000 deposit towards the purchase of property when no deposit had been made. Respondent later waived indictment and pled guilty without a plea agreement. On August 8, 2013, he was sentenced to five (5) years of probation and ordered to pay a $100 assessment and $134,999.95 in restitution to the lender.

Although not specifically indicated in the information or during the guilty plea, respondent falsely attributed the payment of the $15,000 to the purchaser who was his wife. The purchase was for property located in a now defunct subdivision. Respondent explains he had provided legal service for the subdivision's developer and was owed a substantial amount of money in legal fees. The day before the closing, the developer advised respondent that his wife was required to make a 10% earnest money deposit. Respondent had previously been told the purchase would be 100% financing and replied that it would take two weeks to get the earnest money deposit. Anxious to close the loan, the developer proposed treating the earnest money deposit as an exchange of services and said they could "settle up" any outstanding amount owed at the end of the project. Respondent proceeded with the developer's proposal even though he knew it rendered the settlement statement false and misleading.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 4.1(a) (in course of representing client, lawyer shall not make false statement of material fact to third person); Rule 8.4(b) (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (it is

professional misconduct for lawyer to engage in conduct prejudicial to the administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it is ground for discipline for lawyer to violated Rules of Professional Conduct); Rule 7(a)(4)(it is ground for discipline for lawyer to be convicted of a serious crime); and Rule 7(a)(5) (it is ground for discipline for lawyer to engage in conduct tending to pollute the administration of justice or bring the courts or legal profession into disrepute).

Conclusion

We accept the Agreement for Discipline by Consent and suspend respondent from the practice of law for one (1) year, retroactive to the date of his interim suspension. Respondent shall complete all terms of his criminal sentence, including payment of restitution and completion of probation, prior to filing a Petition for Reinstatement. Further, respondent shall provide proof of completion of the Legal Ethics and Practice Program Ethics School to the Commission prior to his reinstatement, if any, to the practice of law. Within thirty (30) days of the date of this opinion, respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission. Within fifteen (15) 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., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

White Oak Manor, Inc. and White Oak Manor - York, Inc., Petitioners,

v.

Lexington Insurance Company, Caronia Corporation, and Certain Underwriters at Lloyd's London, subscribing to Certificate No. UP02US382030, Defendants,

of whom Lexington Insurance Company is the Respondent.

Appellate Case No. 2011-201666

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge
Roger L. Couch, Circuit Court Judge

Opinion No. 27351
Heard September 17, 2013 – Filed January 15, 2014

REVERSED

Matthew A. Henderson and Joshua M. Henderson, both of Henderson, Brandt & Vieth, PA, of Spartanburg, for Petitioners.

Peter H. Dworjanyn and Christian Stegmaier, both of Columbia, Amy Lynn Neuschafer, of Murrells Inlet, all of Collins & Lacy, PC, for Respondent.

JUSTICE HEARN: This case requires us to determine the validity of a service-of-suit clause in an insurance policy in light of Section 15-9-270 of the South Carolina Code (2005) which provides for service of process on an insurer through the Director of the Department of Insurance. The circuit court upheld the service-of-suit clause and refused to relieve the insurer from default judgment. The court of appeals reversed, holding section 15-9-270 provides the exclusive method for serving an insurance company. *White Oak Manor, Inc. v. Lexington Ins. Co.*, 394 S.C. 375, 382, 715 S.E.2d 383, 387 (Ct. App. 2011). We disagree that section 15-9-270 provides the exclusive means of service on an insurer and hold that insurance policy provisions creating alternative methods of service are valid and binding on insurers. Accordingly, we reverse the court of appeals.

FACTUAL/PROCEDURAL HISTORY

White Oak Manor, Inc. owns and operates a nursing home in York, South Carolina. After sustaining injuries from the improper replacement of a feeding tube, a White Oak resident filed a lawsuit against the nursing home. White Oak ultimately settled the lawsuit without the involvement of its insurer, Lexington Insurance Company.

White Oak subsequently filed this declaratory judgment action against Lexington to determine coverage for the malpractice claim. The policies between White Oak and Lexington contained a service-of-suit clause which provided:

> It is further agreed that service of process in such suit may be made upon Counsel, Legal Department, Lexington Insurance Company, 200 State Street, Boston, Massachusetts 02109 or his or her representative, and that in any suit instituted against us upon this Policy, we will abide by the final decision of such court or of any appellate court in the event of any appeal.

In compliance with the policy provision, White Oak served Lexington by

mailing the summons and complaint by certified mail, return receipt requested, to "Lexington Insurance Company, 200 State Street, Boston, MA 02109, ATTN: LEGAL DEPARTMENT." According to the return receipt, service was accepted May 20, 2005, and signed for by a Thomas W. Dinam. After Lexington failed to respond within thirty days, a default judgment was entered against Lexington on July 15, 2005. Approximately two months later, White Oak amended its complaint, alleging Lexington was in default and moving for damages. It again served the amended summons and complaint on Lexington by mail.

Thereafter, Lexington filed an answer and counterclaim as well as a motion to set aside the entry of default, alleging insufficient service of process. At the hearing, Lexington offered three alternative arguments in support of its motion. Initially, Lexington argued service on an insurance company could only be effectuated pursuant to section 15-9-270, which requires service of process be through the Director of the Department of Insurance, and any contrary contractual provisions were invalid. Additionally, Lexington argued that even if White Oak legally served it pursuant to the contract, service was nevertheless ineffective because White Oak did not substantially comply with the contractual provisions. In particular, Lexington noted that although it had documentation that it received the summons and complaint, it had no record of an employee named Thomas W. Dinam, and he was neither counsel nor counsel's "representative." Furthermore, Lexington argued good cause existed to set aside the default.

The circuit court denied the motion, holding Lexington and White Oak agreed contractually to another means of service and therefore, service through the Director was not required. It further held White Oak substantially complied with the service-of-suit clause in the policy and noted Lexington in fact received the original summons and complaint, but lost them. The court also found Lexington failed to demonstrate good cause for setting aside the default, citing caselaw providing that losing a complaint is not a basis to set aside default. Thereafter, the circuit court considered White Oak's motion for damages and entered a judgment against Lexington for $153,266.

The court of appeals reversed, holding the "service of suit clause did not absolve White Oak of the responsibility to comply with the requirement in section 15–9–270 that it deliver two copies of its summons and complaint to the Director of the Department of Insurance in order to serve process on Lexington." *White Oak*, 394 S.C. at 382, 715 S.E.2d at 387. Specifically, it noted that service on the

Director was "a right granted to the Department to enable it to fulfill the responsibilities with which it has been charged" and Lexington's policy could not waive the Department's right. *Id.* at 382, 715 S.E.2d at 386.

ISSUES PRESENTED

I. Did the court of appeals err in holding service on an insurance company can only be accomplished by compliance with section 15-9-270?

II. Did the circuit court err in failing to set aside the entry of default?

LAW/ANALYSIS

I. SOUTH CAROLINA CODE SECTION 15-9-270

White Oak argues the court of appeals erred in holding service pursuant to section 15-9-270 was the only legally sufficient manner of service on an insurance company. We agree.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature, and the text of a statute is considered the best evidence of legislative intent. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Statutory language "must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose." *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011) (internal quotations omitted). Where a statute's language is plain and unambiguous, the Court has no right to impose another meaning. *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. Nevertheless, "[h]owever plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

Section 15-9-270 states:

> The summons and any other legal process in any action or proceeding against it must be served on an insurance company . . . by delivering

> two copies of the summons or any other legal process to the Director of the Department of Insurance . . . . A company shall appoint the director as its attorney pursuant to the provisions of Section 38-5-70. This service is considered sufficient service upon the company. When legal process against any company with the fee provided in this section is served upon the director, he shall immediately forward by registered or certified mail one of the duplicate copies prepaid directed toward the company at its home office . . . .

Additionally, Section 38-5-70 of the South Carolina Code (2002) provides: "Every insurer shall, before being licensed, appoint in writing the director and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it must be served . . . ."

The court of appeals found the above quoted language mandated that any process served on an insurance company must be made through the Director. Specifically, the court found section 15-9-270 provides the Director with the right to receive copies of any pleadings served on an insurance company and Lexington could not waive a right it did not possess. In so concluding, the court noted the Director was responsible to

> (1) "see that all laws of this State governing insurers or relating to the business of insurance are faithfully executed[,]" (2) "report to the Attorney General or other appropriate law enforcement officials criminal violations of the laws relative to the business of insurance or the provisions of this title which he considers necessary to report[,]" and (3) institute civil actions when appropriate.

White Oak, 394 S.C. at 381, 715 S.E.2d at 386 (quoting S.C. Code Ann. § 38-3-110 (2002) (alterations in original)). Accordingly, the court reasoned "the Director needs to be informed when an insurer's misconduct is alleged to be sufficiently serious to warrant litigation" and requiring service on "the Director as a prerequisite to acquiring jurisdiction over the insurer is a reasonable and efficient way to achieve this objective." *Id.* at 381–82, 715 S.E.2d at 386.

White Oak argues the court of appeals' holding ignores the settled principle that parties are free to agree to alternative methods of service, just as they may waive service altogether. Furthermore, White Oak contends the conclusion that the

Director has a right to receive copies of the pleadings is not supported by any evidence or legislative history. We agree on both points.

"The purpose of the summons is to acquire jurisdiction of the person of the defendant and to give him notice of the action and an opportunity to appear and defend." *State v. Sanders*, 118 S.C. 498, 502–03, 110 S.E. 808, 810 (1920). Consistent with this purpose, parties are generally permitted to agree to particular methods of service or waiving service altogether. *See Fin. Fed. Credit Inc. v. Brown*, 384 S.C. 555, 565, 683 S.E.2d 486, 491 (2009) ("[W]here service is accomplished in a manner consented to by the defendant, service of process is valid and a court has jurisdiction over the defendant for purposes of entering judgment."); *Myrtle Beach Lumber Co. v. Globe Int'l Corp.*, 281 S.C. 290, 292, 315 S.E.2d 142, 143 (Ct. App. 1984) ("[A] defendant may waive personal service by consent or by designating an agent to receive service of process."). Furthermore, allowing for the waiver of service is consistent with the principle that a defendant can waive personal jurisdiction. *See Bakala v. Bakala*, 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003) ("Objections to personal jurisdiction, unlike subject matter jurisdiction, are waived unless raised."); *see also* Rule 4(d), SCRCP ("Voluntary appearance by defendant is equivalent to personal service . . . .").

We therefore cannot agree it was the intent of the legislature to circumvent the long-standing rule that service can be consented to by the parties or waived entirely. Service of process is intended to provide notice and obtain personal jurisdiction, and Lexington designated in its policy a method for an insured to accomplish both those goals. We hold Lexington is bound by its own policy's terms. We reject the notion that the statute is intended to allow an insurance company to prescribe a method of service in its policy and then declare its *own* provision invalid under section 15-9-270. We have previously interpreted insurance service statutes as "designed by the legislature to provide a simple and easy method of obtaining jurisdiction over a foreign insurance company." *Equilease Corp. v. Weathers*, 275 S.C. 478, 483, 272 S.E.2d 789, 791 (1980). Thus, their purpose is to provide an insured with a method to obtain service of process on insurance companies; it is not to serve as a shield for insurance companies, protecting them from their own policy terms.

Furthermore, we find no support for the court of appeals' holding that service on the Director is a requirement that cannot be waived because the Director has a right to receive this information. Although the receipt of any legal process

involving insurance companies might be helpful to the Director in carrying out his duties, we disagree that the plain language of the statute dictates personal jurisdiction is contingent upon the Director's receipt of the pleadings. That holding would lead to the absurd result that an insurance company could never waive a claim of defective service, even by a voluntary appearance, because to do so would abridge the Director's right to be served.

Accordingly, we reverse the court of appeals and hold section 15-9-270 does not provide the exclusive method of service on an insurance company.

II. FAILURE TO SET ASIDE THE ENTRY OF DEFAULT

Lexington contends even if the service-of-suit clause is valid, the entry of default should be set aside on other grounds. We disagree.

Determining whether to set aside an entry of default lies solely within the sound discretion of the circuit court and that decision will not be overturned absent a clear showing of an abuse of discretion. *Richardson v. P.V., Inc.*, 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009). The Court has never required exacting compliance with the rules to effect service of process, but instead looks to whether the plaintiff substantially complied with the rules such that the court has personal jurisdiction over the defendant and the defendant has notice of the proceedings. *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209–10, 456 S.E.2d 897, 899 (1995).

A. Compliance with the Service-of-Suit Clause

Lexington argues White Oak did not comply with the terms of the service-of-suit clause. Specifically, Lexington asserts the provision required service be directed to "Counsel . . . or his or her representative" whereas White Oak addressed the pleadings to "Attn: LEGAL DEPARTMENT." Lexington also contends the person who signed the return receipt was not authorized to receive service as required by Rule 4(d)(8). We disagree.

The circuit court determined White Oak substantially complied with the service-of-suit clause set forth in the insurance policy. The court found that although the pleadings were not addressed to "Counsel," because the clause allowed for service on counsel's "representative," White Oak addressing the

pleadings to the legal department constituted substantial compliance. The court also found it significant that Lexington acknowledged the complaint was received by its claims counsel.

We find the circuit court did not abuse its discretion in holding White Oak substantially complied with the service-of-suit clause. The communication was directed to the legal department, and the mere omission of the word "Counsel" in the address did not render service ineffective.

B. Good Cause

Lexington also argues the circuit court erred in failing to set aside the default because it has shown good cause to grant relief under Rule 55(c). We disagree.

The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* at 607–08, 681 S.E.2d at 888.

Lexington asserts it replied promptly after discovering the default, it presented evidence of a meritorious defense, and White Oak would suffer no prejudice if the relief was granted. The circuit court held Lexington provided no reasonable explanation for why it failed to respond to the initial complaint. The court found the only excuse offered was that Lexington lost the pleadings and concluding that ground was insufficient, denied the motion.

Lexington argues the circuit court erred in relying on this Court's holding in *Roche* that losing a summons and complaint is never a ground to set aside a default judgment. It notes the standard for reviewing a motion for relief from default under Rule 55(c) and a motion for relief from a default judgment under 60(b) are distinct. Although we acknowledge the standard under Rule 60(b) is more rigorous than "good cause" under Rule 55(c), we find no error in the court's holding that losing the complaint was not "good cause." The circuit court acted within its

discretion in concluding that losing a complaint was not a satisfactory explanation for failing to timely respond.

C. Other Equitable Considerations

Lexington finally argues the Court should set aside the entry of default because White Oak failed to serve a courtesy copy of the complaint on Lexington's attorney. We disagree.

As Lexington acknowledges, nothing in the South Carolina Rules of Civil Procedure requires the service of a courtesy copy of the summons and complaint on opposing counsel. Furthermore, we find no inequity in White Oak's actions. We fail to see how serving an insurance company in accordance with its own service-of-suit clause can be characterized as unfair or an attempt to take advantage of the attorney. Instead, we find it would be inequitable to fault White Oak for not serving an additional courtesy copy in case the insurance company lost the pleadings.

CONCLUSION

Based on the foregoing, we reverse the court of appeals' opinion and affirm the circuit court's order.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent and would affirm the decision of the Court of Appeals. First, the statutes and case law are clear: the exclusive method for service of process on a foreign insurance company is by service on the Director of the Department of Insurance. Pursuant to S.C. Code Ann. § 38-5-70 (2002), every foreign insurer appoints the director as its agent for service of process. Substituted service upon the director "is [the]exclusive [method], and service made in any other way upon such corporations is invalid." *Murray v. Sovereign Camp, W.O.W.*, 192 S.C. 101, 108, 5 S.E.2d 560, 562 (1939 (construing predecessor to § 38-5-70). Further, S.C. Code Ann. §15-9-270 (2005) provides, "The summons and any other legal process in any action or proceeding against [an insurance company] must be served on an insurance company . . . by delivering two copies . . . to the Director . . ." Compliance with this statute "is the proper and exclusive method of obtaining jurisdiction over the insurance company." *Equilease Corp. v. Weathers*, 275 S.C. 478, 484, 272 S.E.2d 789, 792 (1980). An action is not commenced unless these statutory mandates are met, and all parties agree they were not complied with here. *See also Couch on Insurance § 3:30 (3rd ed. 2013)* (recognizing South Carolina as a jurisdiction where service on statutory agent is exclusive). The trial court erred in refusing to set aside entry of default.

I also agree with the Court of Appeals that the policy underlying these statutes is to protect the public by informing the Director of allegations of insurer misconduct. *See* S.C. Code Ann. § 38-3-110(2002). I therefore conclude it would violate public policy to permit an insurance company to contract out of these mandatory substituted service statutes.

While it is unfortunate that an insurance company that received actual notice of the petitioners' suit is taking advantage of these substituted service statutes, this result is compelled by our precedents and by the public policy that the statutes serve. For the reasons given above, I would affirm the decision of the Court of Appeals.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gloria Pittman, Respondent,

v.

Jetter Pittman and Pittman Professional Land Surveying, Inc., Defendants,

of whom Jetter Pittman is, Petitioner.

Appellate Case No. 2011-203269

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
The Honorable Brian M. Gibbons, Family Court Judge

Opinion No. 27352
Heard November 5, 2013 – Filed January 15, 2014

AFFIRMED AS MODIFIED

Thomas F. McDow, IV, and Erin K. Urquhart, both of Law Office of Thomas F. McDow, Rock Hill, for Petitioner.

Daniel D. D'Agostino, of York, for Respondent.

JUSTICE KITTREDGE: In this domestic action, we granted a writ of certiorari to review the court of appeals' decision affirming the family court's finding of transmutation, which resulted in the inclusion of Petitioner Jetter Pittman's premarital land surveying business in the marital estate. *Pittman v. Pittman*, 395 S.C. 209, 717 S.E.2d 88 (Ct. App. 2011). Although we find the court of appeals erred in affirming the family court's reliance on the parties' premarital conduct in the transmutation analysis, we affirm based on the parties' conduct during the marriage. We find the evidence preponderates in support of a finding that the parties intended the land surveying business to be the common property of the marriage.

I.

Jetter Pittman (Husband) and Gloria Pittman (Wife) were married in April 2000 and separated in March 2007. It was a second marriage for both, and they have no children together. Wife instituted this divorce action against Husband in May 2007, on the grounds of adultery. In addition, Wife argued to the family court that Husband's land surveying business, Pittman Professional Land Surveying, Inc., was transmuted into marital property and was thus subject to equitable apportionment.

Husband and Wife met and began their relationship in 1991. Wife worked as a registered nurse in Rock Hill, South Carolina. Husband, a licensed professional land surveyor, was living and working in Winston-Salem, North Carolina. The parties' relationship was long-distance at first, but in May 1993, Husband's job was transferred to Albemarle, North Carolina, and Husband then moved in with Wife in her Fort Mill, South Carolina home. From the time the parties began living together and throughout the marriage the parties pooled their funds in a joint checking account, and Wife paid all of the parties' personal and household expenses from their joint account.

In addition to his full-time job, Husband regularly took side jobs as a surveyor. Throughout the parties' relationship, Wife assisted Husband with his surveying jobs by handling all the billing and accounting tasks and by performing light field duties on occasion. In 1996, Husband quit his full-time job and became self-employed, incorporating his surveying business (Business)[1] and initially operating

[1] The Business was incorporated as a statutory close corporation, or "S-Corp." Husband owned 100% of the shares. However, the Business's income tax returns

from the upstairs bedroom of Wife's home.[2] Both parties had day-to-day responsibilities for the Business; Husband managed the surveying jobs and the employees, and Wife continued to handle all the financial and bookkeeping tasks for the Business, in addition to maintaining her employment as a registered nurse. Although this arrangement began at the inception of the Business—before the parties were married—it also continued during the marriage and did not cease until approximately six months after Wife filed for divorce.

After the parties married in 2000, they agreed for Wife to take on an increased role and participation in the Business and work only part-time at the hospital. As the Business grew, Wife increased her commitment to the Business, often working 35-hour weeks, while ultimately decreasing her nursing job to one day per week.[3] When the Business first began, the parties were sometimes unpaid for their work; however, by the time of separation, both Husband and Wife both drew a salary from the Business, with Wife receiving $4,200 per month. From the date of marriage to the date of separation, Wife's income steadily increased each year. The parties agreed to raise Wife's salary to increase her social security income because Wife was older than Husband[4]—a decision the parties made for their mutual benefit so they would have more money during their retirement.

Additionally, before the Business was firmly established and producing significant income, the parties purchased three surveying geodimeters at a cost of more than $30,000 each. The record reveals that, at the time of marriage, the parties were

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listed Wife as the Secretary and the audit contact for the Business.

[2] In 2003, the parties purchased with marital funds a property located at 314 Tom Hall Street in Fort Mill and operated the Business from there.

[3] The parties agreed for Wife to continue working at the hospital to maintain health insurance coverage for both parties. However, as a result of her decreased work schedule at the hospital, Wife was unable to participate in the hospital's 401(k) match program. When Wife further reduced her hospital work schedule to one day per week, she was no longer eligible to receive health insurance benefits. Thus, beginning in 2006, both parties obtained health insurance coverage through the Business.

[4] Wife is approximately fourteen years older than Husband.

still servicing debt associated with the geodimeters. Further, in November 2002, both Husband and Wife signed an unlimited personal guaranty agreement to secure the Business's financial obligations.[5]

The family court granted Wife a divorce on the ground of adultery; ordered Husband to pay Wife $600 per month in permanent, periodic alimony; identified, valued, and equitably apportioned marital property and debts; and awarded wife $12,500 in attorney's fees. In identifying marital property, the family court found the Business was transmuted into marital property and was properly included in the marital estate. Specifically, the family court found:

> The [Wife] and [Husband] both worked in the company, increased its value, had a plan for growing and developing the business, jointly made decisions as to the business, jobs, loans, and employees. The [Wife] signed an unlimited guarantee for the business. The [Husband] clearly treated the business as a martial [sic] asset during the entirety of the marriage.

The family court emphasized that Husband was able to become self-employed in 1996 "because he was able to fall back on the [Wife's] full-time guaranteed income

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[5] Husband claims "the" loan for which the guarantee was executed was timely repaid, so "the guaranty agreement expired by its own terms." However, the document is titled "Unlimited Guaranty Agreement" and reads:

> [T]o induce First Citizens Bank and Trust Company of South Carolina . . . at its option, *at any time or from time to time* to make loans . . . or to engage in any other transactions with [the Business], the Guarantor hereby absolutely guarantees to the Bank the timely prompt and complete payment . . . of any and all indebtedness, obligations and liabilities of the [Business] to the Bank, and all claims of the Bank against the [Business], *now existing or hereafter arising* . . . .

(emphasis added). Moreover, the fact that a loan associated with this guaranty was timely repaid before the date of filing does not render Wife's act in signing the personal guaranty meaningless. As discussed in more detail below, we find the fact that the parties used Wife's credit to assist the Business during the marriage is relevant in determining the parties' intent in the transmutation analysis.

and the parties, prior to the marriage, pooled their money and paid all bills jointly."

In ascertaining the marital estate, the family court found the parties intended the Business to be a joint asset of the marriage. In including the value of the Business in the marital estate,[6] the family court rejected Husband's argument that he was entitled to a special equity in the value of Business as of the date of the marriage. The family court weighed the statutory factors and determined a 50/50 division of the marital estate was appropriate and equitable. The marital estate was apportioned accordingly.

Husband filed a motion for reconsideration pursuant to Rule 59(e), SCRCP, arguing the family court's finding that the Business was transmuted was unsupported by any evidence in the record demonstrating Husband's intent to treat the Business as a marital asset. The family court rejected Husband's argument, reiterating that the credible evidence objectively established transmutation. Husband appealed.

The court of appeals affirmed in part and reversed in part. Concerning the transmutation issue, the court of appeals found that Wife met her burden of showing the parties intended to treat the Business as a marital asset. Following the denial of Husband's petition for rehearing, this Court granted Husband's petition for a writ of certiorari to review the court of appeals' decision regarding the transmutation finding.

II.

"'In appeals from the family court, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. However, this broad scope of review does not require this Court to disregard the findings of the family court.'" *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011) (quoting *Eason v. Eason*, 384 S.C. 473, 479, 682 S.E.2d 804, 807 (2009)). "[T]he appellate court is not required to disregard the findings of the trial judge who was in a superior position to make credibility determinations." *Id*. at 385, 709 S.E.2d at 651–52.

[6] At trial, Wife contended the Business was worth $575,000. However, the family court found the Business was properly valued at $237,404. The family court's valuation of the Business is not challenged on appeal.

A.
Transmutation

Husband argues the finding of transmutation was error because Wife presented no evidence that the parties intended the Business to be transmuted into marital property. Husband further claims the family court committed legal error in considering the parties' premarital conduct in the transmutation analysis. We agree with Husband on this latter point, but we find the record is replete with evidence of the parties' conduct during the marriage to support a finding of transmutation.

The term "marital property" means "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of the marital litigation . . . regardless of how legal title is held." S.C. Code Ann. § 20-3-630(A) (Supp. 2013). However, "[p]roperty acquired prior to the marriage is generally considered nonmarital." *Pirri v. Pirri*, 369 S.C. 258, 269, 631 S.E.2d 279, 285 (Ct. App. 2006) (citing S.C. Code Ann. § 20-7-473(2) (Supp. 2004)). Nevertheless, "[p]roperty that is nonmarital when acquired may be transmuted into marital property if it becomes so commingled with marital property that it is no longer traceable, is titled jointly, or is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property." *Wilburn v. Wilburn*, 403 S.C. 372, 384, 743 S.E.2d 734, 740 (2013) (citing *Trimnal v. Trimnal,* 287 S.C. 495, 497–98, 339 S.E.2d 869, 871 (1986)).

"As a general rule, transmutation is a matter of intent to be gleaned from the facts of each case." *Johnson v. Johnson*, 296 S.C. 289, 295, 372 S.E.2d 107, 110 (Ct. App. 1988). "The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." *Jenkins v. Jenkins*, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001) (citing *Pool v. Pool*, 321 S.C. 84, 86, 467 S.E.2d 753, 756 (Ct. App. 1996)).

In terms of evidence tending to establish transmutation, "the use of property in support of a marriage is relevant to transmutation[; however] the mere use of income from nonmarital assets does not transmute those assets into marital property." *Wilburn*, 403 S.C. at 385, 743 S.E.2d at 741 (citing *Peterkin v.*

Peterkin, 293 S.C. 311, 313, 360 S.E.2d 311, 313 (1987)).[7] Husband seeks to characterize this case as nothing more than the mere use of income from the Business to support the marriage. Contrary to Husband's characterization and assertions, Wife has presented evidence objectively establishing an intent by both parties to treat the Business as the common property of the marriage.

The court of appeals stated:

> Wife was listed as secretary for the corporation. After the parties married in 2000, Wife, with Husband's consent, reduced the hours she worked at her nursing job to work full-time in the business and thus contributed less to her 401K and retirement accounts. Most significantly, Husband and Wife agreed that the business would pay Wife a higher salary for her services than what her services warranted with the expectation that this business decision would benefit both parties during their retirement together. Under these circumstances, we decline to disturb the finding that [the Business] had been transmuted.

Pittman, 395 S.C. at 222–23, 717 S.E.2d at 95 (citing *Lewis v. Lewis*, 392 S.C. at 392, 709 S.E.2d at 655).

The court of appeals' opinion is correct but the record contains further evidence in support of the transmutation finding. Wife's credible testimony establishes that the parties treated the Business as *their* business—not just Husband's business. Wife testified that all of the business decisions were made jointly and stated, "I can't really think of anytime that anything important happened or somebody was hired

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[7] *See also Smallwood v. Smallwood*, 392 S.C. 574, 579–81, 709 S.E.2d 543, 546 (Ct. App. 2011) (finding rental properties purchased by husband before marriage were not transmuted because all mortgages were paid with rental income, not marital funds, and wife provided only temporary and insubstantial assistance to husband in managing the rental properties); *Pirri v. Pirri*, 369 S.C. 258, 269, 631 S.E.2d 279, 285 (Ct. App. 2006) (finding rental properties purchased by husband before common law marriage were not transmuted because wife did not assist in managing the property during the marriage and had no control over the rental income, which was not consistently placed in the parties' joint bank account).

that we didn't discuss it together." We find Wife's testimony credible in every material respect. Moreover, Husband admitted that he and Wife worked together in the Business during the marriage.[8] The credible evidence is that Husband performed the field work and Wife handled all other aspects of the business, including running the office, scheduling jobs, handling payables and receivables, and maintaining the books.

Wife's role and authority in the Business was pervasive and ubiquitous, notwithstanding Husband's post-separation protestations to the contrary. We acknowledge that Husband never expressly declared the Business to be a marital asset, a fact on which Husband heavily relies. Yet, where the transmutation question is litigated, one does not expect to find an admission. A family court judge, unlike any other judge, is accustomed to resolving emotionally-charged and intensely personal issues. A family court judge understands well that the emotionally-charged issues encountered daily are not limited to matters concerning children. Day in and day out, the demanding and taxing service on the family court bench requires the judge to carefully consider the competing evidence and make credibility determinations and findings of fact.

Here, Husband is adamant that he never intended the Business to become the common property of the marriage, and as noted, transmutation is ultimately a matter of discerning the parties' intent. We note that the record is scant concerning Husband's testimony on the transmutation issue, for portions of his testimony were omitted from the record on appeal. It appears the omitted testimony related to the transmutation question. What we are left with is Husband's conclusory claim that he never intended the Business to become a marital asset. The record before this Court preponderates otherwise and leads us to agree with the able family court judge that the conduct of the parties during the marriage objectively demonstrates a mutual intent to regard the Business as a marital asset.

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[8] By the time of the separation, the Business had become so profitable that "money really wasn't that much of an object" and the parties used Business revenue to directly pay personal, marital expenses. For example, the parties used Business revenue to pay for many items, including alcohol, groceries, vacations, a laptop computer, Carolina Panthers PSL tickets, and over $25,000 in repairs to an antique vehicle. We, of course, recognize that the use of nonmarital funds in support of the marriage, by itself, is not sufficient to establish transmutation.

To be clear, the family court committed an error of law in relying on Wife's premarital contributions to the Business in support of its transmutation finding. S.C. Code Ann. § 20-3-630(A) (Supp. 2013) (defining the term "marital property" as "all real and personal property which has been acquired by the parties *during the marriage*" (emphasis added)); *see also Pirri*, 369 S.C. at 270, 631 S.E.2d at 286 (noting that any transmutation must have occurred, if at all, *after* the date of the common law marriage). However, the record reveals ample evidence to support a finding that the parties' actions *during the marriage* manifested intent for the Business to be transmuted. We find both parties' significant day-to-day involvement in the business—including the parties' decision for Wife to all but forfeit her nursing career, coupled with Wife's credible testimony that all major business decisions were made jointly, including the parties' decision to structure Wife's pay to benefit both parties at the time and upon Wife's retirement—demonstrates the parties' intent to treat the Business as a marital asset. *See Edwards v. Edwards*, 384 S.C. 179, 185, 682 S.E.2d 37, 40 (Ct. App. 2009) (finding transmutation of Husband's life estate in a produce stand where facts established the following: profits from the produce stand provided the parties with their main source of income, marital funds were used to build equity in the produce stand, Wife participated in the daily operations of the produce stand, and both parties' names were listed on the building permit for the produce stand); *Simpson v. Simpson*, 377 S.C. 527, 538, 660 S.E.2d 278, 284 (Ct. App. 2008) (finding land upon which marital home was built was transmuted where the parties used it in support of the marriage, cleared the land together, and built the marital residence together with marital funds); *Jenkins*, 245 S.C. at 98–100, 545 S.E.2d at 537 (finding acreage and rental home Husband inherited were transmuted into marital property where the parties strategically made the property part of their joint retirement plan, Wife was substantially involved in the general care and maintenance of the property, and the parties expended marital funds on improving the property); *cf. Odom v. Odom*, 141 P.3d 324, 333 (Alaska 2006) (finding Husband's separate business was not transmuted into marital property because Wife played no role in the day-to-day operation or management of the business, Wife's name was not on any bank accounts and her credit was never used for any bank loans, and she never owned any stock).

Additionally, marital funds were expended in discharging the indebtedness of the geodimeters, and Wife's personal credit was used in support of the Business. We find this fact is further evidence of intent to transmute, beyond the mere use of the Business in support of the marriage. *Frank v. Frank*, 311 S.C. 454, 456–57, 429

S.E.2d 823, 825 (Ct. App. 1993) (finding premarital home belonging to Wife was transmuted where Husband personally guaranteed the note secured by a mortgage on the property); *see Canaday v. Canaday*, 296 S.C. 521, 374 S.E.2d 502 (Ct. App. 1988) (finding use of property in support of the marriage and joint discharge of indebtedness evidenced intent for property to be transmuted); *Wyatt v. Wyatt*, 293 S.C. 495, 497, 361 S.E.2d 777, 779 (Ct. App. 1987) (finding joint efforts to discharge indebtedness may transmute previously acquired property into marital property).

In sum, while the court of appeals erred in affirming the family court's reliance on premarital conduct to support the transmutation finding, we find ample evidence of the parties' conduct during the marriage to warrant a finding of transmutation concerning the Business.

B.
Special Equity

Alternatively, Husband presents two arguments. First, Husband argues that even if the Business was properly transmuted, he is entitled to receive a special equity for the value of the Business as of the date of marriage. We disagree.

Husband's argument is inconsistent with the law of this state. "When property is determined to have been transmuted, the entire property, not just a portion of the property, is included in the parties' marital property which is thereafter apportioned by the family court using the criteria set forth in [the equitable apportionment statute.]" *Calhoun v. Calhoun*, 339 S.C. 96, 106, 529 S.E.2d 14, 20 (2000). The proper way to account for such a direct financial contribution is in the overall division of the marital estate. More to the point, such a direct financial contribution should be taken into account in determining the percentage division of the marital estate. *See Dawkins v. Dawkins*, 386 S.C. 169, 687 S.E.2d 52 (2010) (stating "[w]e approve of the approach announced in *Toler* . . . as the sole method in accounting for a spouse's special equity in marital property"), *abrogated on other grounds by Lewis*, 392 S.C. at 384, 709 S.E.2d at 65; *Toler v. Toler*, 292 S.C. 374, 380 n.1, 356 S.E.2d 429, 432 n.1 (Ct. App. 1987) (finding error where the family court separated and subtracted the asset's nonmarital value from the marital estate and awarding that "special equity" to the inheritor in addition to his or her portion of the marital estate and stating "[t]he correct way to treat the [nonmarital property] is as a contribution by the [inheritor] to the acquisition of marital

property. This contribution should be taken into account in determining the percentage of the marital estate to which the [inheritor] is equitably entitled upon distribution."). Indeed, once the Business was determined to have been transmuted, the full value of the Business was appropriately included in the marital estate.

Second, in recognition of the law rejecting a special equity under these circumstances, Husband asserts he was entitled to a credit for the premarital value of the Business. We agree with Husband in the abstract, but we are unable to conclude that the family court erred. At the Rule 59(e), SCRCP hearing when this argument was presented, the family court noted the parties stipulated to a "50/50 division." Although there is disagreement as to whether the parties stipulated to an equal division, we have carefully reviewed the parties' respective contributions to the acquisition of the marital estate and find the equitable apportionment ordered by the family court to be reasonable. *See Wilburn*, 403 S.C. at 390, 743 S.E.2d at 744 ("On appeal, we must review the fairness of the overall apportionment, and if equitable, we will uphold it regardless of whether we would have weighed specific factors differently." (citing *Roberson v. Roberson*, 359 S.C. 384, 389, 597 S.E.2d 840, 842 (Ct.App.2004))); *Thomas v. Thomas*, 346 S.C. 20, 25–26, 550 S.E.2d 580, 583 (Ct. App. 2001) ("On review, this Court looks to the overall fairness of the apportionment, and if the end result is equitable, that this Court might have weighed specific factors differently than the family court is irrelevant." (citing *Johnson*, 296 S.C. at 300, 372 S.E.2d at 113)).

III.

We affirm as modified. The family court erred in considering the parties' premarital conduct in the transmutation analysis, but we find the evidence during the marriage establishes that the Business was transmuted into marital property.

AFFIRMED AS MODIFIED.

TOAL, C.J., PLEICONES, BEATTY, and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

James A. Giles, Petitioner.

Appellate Case No. 2010-161546

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 27353
Heard September 21, 2011 – Filed January 15, 2014

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Senior Assistant Deputy Attorney General Salley W. Elliott, all of Columbia, and Kevin Scott Brackett, of York, for Respondent.

CHIEF JUSTICE TOAL: Petitioner James A. Giles was convicted of first-degree burglary, strong arm robbery, and kidnapping. He was sentenced to thirty years', thirty years', and fifteen years' imprisonment, respectively, to be served concurrently. On certiorari, he challenges the Court of Appeals' affirmation of his convictions and sentences on the basis that the trial court improperly sustained the solicitor's *Batson* motion. *State v. Giles*, Op. No. 2010-UP-154 (S.C. Ct. App. filed Feb. 23, 2010). We affirm.

FACTS

Petitioner was indicted on charges of burglary in the first degree, strong-arm robbery, and kidnaping. He represented himself at trial, with the assistance of standby counsel.

During jury selection, petitioner used his peremptory challenges to strike eight white males and two white females from the jury venire. The State requested, pursuant to *Batson v. Kentucky*,[1] that the trial judge conduct an inquiry as to whether petitioner had a race neutral reason for striking the ten white jurors. When asked if there was a race neutral reason for the strikes, standby counsel explained petitioner did not feel the jurors were right for the jury. At that point, the trial judge asked the State to respond. The State maintained the reason given was not racially neutral, but "highly race based." The trial judge agreed, noting that while on its face the reason given by petitioner for the strikes was obviously race neutral, it gave the judge nothing by which to determine if the reason was pretextual. The judge stated a defendant must provide some racially neutral reason other than simply stating the stricken venirepersons were not right for the jury. The judge found that if such a reason were sufficient, the parties would be given "unfettered strikes . . . for no reason other than that they don't want to put them on the jury." The judge concluded that while the reason given by petitioner for the strikes was racially neutral on its face, it was not a sufficient reason under *Batson*. Accordingly, the trial judge granted the State's motion to quash the jury panel.

Following the selection of a new jury panel, the trial judge further expounded on his ruling, reiterating that striking a juror because the juror is not right for the jury is no reason. He again noted that while it may be "technically, semantically,

[1] 476 U.S. 79 (1986).

intellectually racially neutral," for purposes of articulating a reason for striking a juror, it was not race neutral. Referring to the *Batson* process, the judge found the reason given by petitioner for striking the jurors was not sufficient to move the process to the third step, where the burden would be on the State to show the reason given was mere pretext. The trial judge found that if the process proceeded to the third step, it would be impossible for the State to prove petitioner did not strike another venireperson from the jury venire on the basis the venireperson was not right for the jury. The trial judge repeated his initial holding that petitioner was required to give some reason for the strikes and petitioner's belief that the stricken venirepersons were not right for the jury was no reason.

The issue before the Court of Appeals and now before this Court is whether the trial judge erred in failing to follow the three-step process outlined in *Batson* for determining whether a peremptory challenge was based on race. Specifically, petitioner contends that because the trial judge found petitioner's reason for striking the venirepersons was race neutral, he should have proceeded to step three of the *Batson* process and required the solicitor to prove the reason given was mere pretext and that petitioner engaged in purposeful discrimination in exercising his peremptory challenges. We disagree.

LAW/ANALYSIS

In *Batson*, the United States Supreme Court outlined a three-step process for evaluating claims that peremptory challenges have been exercised in a manner violative of the Equal Protection Clause. First, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race. 476 U.S. at 97. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. *Id.* If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination. 476 U.S. at 98. The ultimate burden always rests with the opponent of the challenge to prove purposeful discrimination.

In addressing the second step of the process, the United States Supreme Court held that general assertions, such as a mere denial of discriminatory motive or assurance the challenges were exercised in good faith, are not sufficient to rebut a prima facie showing of a race based challenge. 476 U.S. at 97-98. The Court noted that if

such general assertions were sufficient, "the Equal Protection Clause 'would be but a vain and illusory requirement.'" 476 U.S. at 98 (quoting *Norris v. Alabama*, 294 U.S. 587, 598 (1935)). Accordingly, the Court, while not requiring the explanation to rise to the level of justifying the exercise of a challenge for cause, held the proponent of the strike must give a clear and reasonably specific explanation of legitimate reasons for exercising the challenge. 476 U.S. at 98 n.20.

Approximately nine years later, the United States Supreme Court further elaborated on the explanation required at the second step of the *Batson* process. *Purkett v. Elem*, 514 U.S. 765 (1995). In *Purkett*, the Court clarified that the issue at that step is the facial validity of the explanation provided by the proponent of the strike, and the explanation need not be persuasive or even plausible. 514 U.S. at 768. The Court went so far as to state the reason does not have to make sense, and even a silly or superstitious reason may suffice because it is not until the third step of the *Batson* process that the persuasiveness of the explanation becomes relevant. *Id.* The Court noted that it is at that stage that the trial court determines whether the opponent of the strike has met the burden of proving purposeful discrimination and will probably find implausible or fantastic justifications to be pretexts for discriminatory intent. *Id.*

The Court found that the Court of Appeals for the Eighth Circuit erred by combining *Batson*'s second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive.[2] The Court held that it is not until the third step of the *Batson* process, at which the trial court determines whether the opponent of the strike has carried the burden of proving purposeful discrimination, that the *persuasiveness* of the justification becomes relevant.

The Court surmised that the Eighth Circuit seized on the admonition in *Batson* that in order to rebut a prima facia case of a racially discriminatory challenge, a clear and specific explanation must be given of *legitimate reasons* for exercising the

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[2] The Eighth Circuit found that "where the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror." 25 F.3d 679, 683 (1994).

challenge. However, the Court explained that warning was meant to refute the notion that a proponent of a strike could satisfy the burden of providing a race neutral explanation for the strike by merely denying a discriminatory motive or by asserting it was made in good faith.[3] 514 U.S. at 769. The Court further explained that while in order to be *legitimate,* the reason need not make sense, it must be *legally sufficient* such that it does not deny equal protection. *Id*.

A more recent decision of the United States Supreme Court on the *Batson* front indicates the Court did not, in *Purkett*, abandon the requirement set forth in *Batson* that at the second stage of the *Batson* process a proponent of a strike "give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge." *Miller-El v. Dretke,* 545 U.S. 231 (2005).

Indeed, courts in other jurisdictions have found *Batson* error at the second step of the analysis, post-*Purkett*, on the ground that the explanation given was not sufficiently clear and specific to provide a factual basis *that courts can review for legitimacy*. *Moeller v. Blanc*, 276 S.W.3d 656 (Tex. App. 2008). *See e.g.*, *Robinson v. U.S.*, 878 A.2d 1273 (D.C. 2005)(finding prosecutor's statement that he "just didn't like" the stricken venireperson did not furnish the clear and reasonably specific explanation of his legitimate reasons for striking that juror that was required); *People v. Carillo*, 780 N.Y.S.2d 143 (N.Y. App. Div. 2004)(finding prosecutor's explanation that his peremptory challenge of a prospective juror was not based on anything in particular, he "just did not get a good feel from her," "amounted to, in essence, no explanation at all"); *Zakour v. UT Med. Grp., Inc.*, 215 S.W.3d 763 (Tenn. 2007)(finding explanation that six prospective female jurors were stricken because of their body language, without providing more detail, was not clear, reasonably specific, legitimate and reasonably related to the particular case being tried).

Addressing "gut feeling" explanations, the Louisiana Supreme Court found that such an explanation, standing alone, does not constitute a race neutral explanation because it is ambiguous and "falls far short of an articulable reason that enables the trial judge to assess the plausibility of the proffered reason for striking a potential

[3] In *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996), this Court adopted the "standard" delineated in *Purkett*, noting that pursuant to that standard, the proponent of the peremptory challenges "will not have any burden of presenting reasonably specific, legitimate explanations for the strikes," but instead need only present a racially neutral explanation.

juror. Whatever is causing the 'gut feeling' should be explained for proper evaluation of the proffered reason." *Alex v. Rayne Concrete Svc.*, 951 So.2d 138, 153 (La. 2007). The Louisiana Supreme Court held the neutral explanation must be clear, reasonably specific and legitimate in order for the opponent of the strike to have a full and fair opportunity to demonstrate pretext in the reason given for the peremptory strike. *Id.* The court further held a clear, reasonably specific and legitimate reason is necessary for the trial court to fulfill its duty to assess the plausibility of the proffered reason for striking the potential juror in light of all the evidence with a bearing on it; therefore, it is essential that the proponent of the peremptory strike fully articulate the reason so that a proper assessment can be made. *Id.* The court observed that "'[r]ubber stamp' approval of any non-racial explanation, no matter how whimsical or fanciful, would destroy [*Batson*]'s objective to ensure that no citizen is disqualified from jury service because of his race. 'If trial courts were required to find any reason given not based on race satisfactory, only those who admitted point-blank that they excluded veniremen because of their race would be found in violation of the Fourteenth Amendment's guarantee of equal protection.'" 951 So.2d at 154 (quoting *State v. Collier*, 553 So.2d 815 (La. 1989)).

We likewise find, based on a harmonization of *Batson, Purkett* and *Miller-El*, that in order for the explanation provided by the proponent of a peremptory challenge at the second stage of the *Batson* process to be legally sufficient and not deny the opponent of the challenge, as well as the trial court, the ability to safeguard the right to equal protection, it need not be persuasive, or even plausible, but it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the evidence with a bearing on it. Reasonable specificity is necessary because comparison to other members of the venire for purposes of a disparate treatment analysis, which is often used at the third step of the *Batson* process to determine if purposeful discrimination has occurred, is impossible if the proponent of the challenge provides only a vague or very general explanation. The explanation given may in fact be implausible or fantastic, as noted in *Purkett*, but it may not be so general or vague that it deprives the opponent of the challenge of the ability to meet the burden to show, or the trial court of the ability to determine whether, the reason given is pretextual. The proponent of the challenge must provide an objectively discernible basis for the challenge that permits the opponent of the challenge and the trial court to evaluate it. The trial judge need not proceed to step three of the

Batson process when no constitutionally permissible reason has been proffered at step two.[4]

Turning now to the facts of this case, it is difficult to determine whether the trial court proceeded to the third step of the *Batson* process. While the trial court asked the State to respond to the explanation given by petitioner for the strikes, which would indicate the court was proceeding to the third step of the process, the ruling of the trial court, both initially and when clarified after the selection of the new jury panel, indicates the trial court ultimately concluded petitioner's explanation for the strikes was not sufficient to move to the third step of the process. For instance, the trial court stated the reason given by petitioner, while race neutral, gave the court "nothing on which to determine whether or not it was [pretextual]" and was "not a sufficient reason to allow the strikes to stand against a *Batson* motion." The trial court, noting the explanation must be clear and reasonably specific, found "if that can be satisfied by simply saying the jury wasn't right . . . *Batson* would have no meaning whatsoever." Following selection of the new jury panel, the trial court elaborated, stating, "The explanation of a strike[,] which is step two was where we were and I found that the explanation was not right for the jury. . . [while it may have been] technically, semantically, intellectually racially neutral[,] . . .it does not suffice to switch it to stage three because there the burden would be on the [S]tate to show that that was a mere pretext and that would be an impossibility. . . . That is if the defense or one side or the other argues that someone is quote not right for the jury it would be impossible for the other side to say that they did not strike someone else who was quote not right for the jury." The trial court acknowledged this Court's adoption of *Purkett* in *Adams*, but stated, "I still think there must be some reason and I think that someone is not right for the jury is no reason."

We find the trial court's conclusion was correct. The explanation given by petitioner was, as the trial court correctly found, "technically, semantically and intellectually racially neutral," but was not race neutral for *Batson* purposes. The explanation offered by petitioner fell far short of an articulable reason that would enable the trial court, in the third step of the *Batson* process, to assess the plausibility of the proffered reason for striking the potential jurors. Instead of being clear and reasonably specific, the reason given by petitioner was very

[4] To the extent we held in *Adams*, *supra*, that the proponent of a peremptory challenge has no burden of presenting a reasonably specific and legitimate explanation for the challenge at the second step of the *Batson* process, that decision is overruled.

general and based entirely on his overall subjective dissatisfaction with the venirepersons. As such, in the *Batson* context, petitioner provided no reason at all. *Batson* (a clear and reasonably specific explanation of legitimate reasons for exercising the challenge must be provided at step two of the process). The trial court therefore properly concluded that petitioner failed to meet the requirements for moving the *Batson* inquiry to the third step and that the State's *Batson* motion should be granted.

AFFIRMED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Natalie Elizabeth Crews Burgess, Respondent,

v.

William Arthur Burgess, Appellant.

Appellate Case No. 2012-213455

Appeal From Greenville County
Robert N. Jenkins, Sr., Family Court Judge

Opinion No. 5189
Heard December 12, 2013 – Filed January 15, 2014

AFFIRMED IN PART AND REMANDED

Oscar W. Bannister, of Bannister & Wyatt, LLC, of Greenville, for Appellant.

Joseph M. Ramseur, Jr., of Mitchell Ramseur, LLC, of Greenville, for Respondent.

LOCKEMY, J.: In this appeal from the family court, William Burgess (Husband) appeals the court's final order in his divorce from Natalie Burgess (Wife), arguing the court erred in: (1) imputing income to Husband; (2) dividing the marital estate; (3) awarding alimony to Wife; and (4) awarding attorney's fees to Wife. We affirm in part and remand to the family court.

FACTS/PROCEDURAL BACKGROUND

Husband and Wife were married in 1982. During their marriage, the parties had four children, all of whom are now emancipated. Wife received a B.A. in psychology and worked at a bank until having the parties' first child in 1986. Wife did not work again until 2008 when a downturn in the economy required that she return to the workforce. She went to work as the assistant director of advancement at St. Joseph's Catholic School and earned $28,000 per year, as well as reduced tuition for the parties' two youngest children. Wife was laid off in 2009 and enrolled at Clemson University to obtain a master's degree in student affairs. She was scheduled to earn her degree in May 2012 and had not secured a job at the time of trial.

Husband received a B.S. in business administration and worked for several commercial real estate brokerage firms before becoming a partner with NAI Earle Furman. Between 2001 and 2007, Husband earned between $91,789 and $675,374 annually. In February 2009, following the collapse of the real estate market, Husband was involuntarily bought out of his ownership in NAI Earle Furman. Subsequently, Husband founded his own commercial real estate firm, The Burgess Group. Husband's income fell from $384,237 in 2007 to approximately $32,000 in 2011.

Wife moved out of the marital residence on April 6, 2009, and filed a complaint for separate maintenance and support on April 7, 2009. According to Wife, she left Husband for multiple reasons including: (1) her belief that he was paying inappropriate attention to other women; (2) he was controlling and secretive with the family finances; and (3) he withdrew all of the money from their joint checking accounts and told her he would no longer be giving her a weekly allowance of $1,000. On March 24, 2010, Husband filed an answer and counterclaim in which he denied Wife's entitlement to alimony and attorney's fees. A trial was held before the family court on February 23 and 24, 2012.

In a March 9, 2012 final order, the family court granted the parties a divorce on the ground of one year's continuous separation. Subsequently, in a May 15, 2012 final order of equitable apportionment, alimony, and attorney's fees, the family court: (1) imputed $100,000 in annual income to Husband; (2) imputed $35,000 in annual income to Wife; (3) ordered Husband to pay Wife $2,150 per month in alimony; (4) divided the marital estate; and (5) ordered Husband to pay Wife $67,589 in attorney's fees and costs. Husband filed a motion to reconsider challenging the imputation of income and award of alimony to Wife, arguing there was no

evidence he was voluntarily underemployed. He also argued the attorney's fees award was improper because it was based on Husband's imputed income. The family court denied Husband's motion to reconsider. This appeal followed.

STANDARD OF REVIEW

The standard of review in an appeal from the family court is de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). This broad standard of review does not require the appellate court to disregard the factual findings of the family court or ignore the fact that the family court is in the better position to assess the credibility of the witnesses. *DiMarco v. DiMarco*, 399 S.C. 295, 299, 731 S.E.2d 617, 619 (Ct. App. 2012). An appellate court will affirm the decision of the family court unless the decision is controlled by an error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by the appellate court. *Id.*

LAW/ANALYSIS

I. Husband's Imputed Income

Husband argues the family court erred in imputing $100,000 in income to him without evidence he was voluntarily underemployed or that he could have earned that amount using his best efforts.

"[I]n determining child support or alimony obligations, the family court has the discretion to impute income to a party who is voluntarily unemployed or underemployed." *Lewis v. Lewis*, 400 S.C. 354, 361-62, 734 S.E.2d 322, 326 (Ct. App. 2012).

> If the obligor spouse has the ability to earn more income than he is in fact earning, the court may impute income according to what he could earn by using his or her best efforts to gain employment equal to his capabilities, and an award of [support] based on such imputation may be a proper exercise of discretion even if it exhausts the obligor spouse's actual income.

Id. at 362, 734 S.E.2d at 326 (quoting *Dixon v. Dixon*, 334 S.C. 222, 240, 512 S.E.2d 539, 548 (Ct. App. 1999)). "Whether termed voluntary underemployment, imputation of income, or the failure to reach earning potential, the case law is clear

that when a payor spouse seeks to reduce support obligations based on his diminished income, a court should consider the payor spouse's earning capacity." *Gartside v. Gartside*, 383 S.C. 35, 44, 677 S.E.2d 621, 626 (Ct. App. 2009) (citing *Kelley v. Kelley*, 324 S.C. 481, 488, 477 S.E.2d 727, 731 (Ct. App. 1996)). "The failure to reach earning capacity, by itself, does not automatically equate to voluntary underemployment such that income must be imputed." *Id.* "Although some of the precedents appear inconsistent, the common thread in cases when actual income versus earning capacity is at issue is that courts must closely examine the payor spouse's good faith and reasonable explanation for the decreased income." *Id.* "However, a payor spouse can be found to be voluntarily underemployed even in the absence of a bad faith motivation." *Id.* at 45, 677 S.E.2d at 626 (citing *Arnal v. Arnal*, 371 S.C. 10, 13, 636 S.E.2d 864, 866 (2006)). The South Carolina Child Support Guidelines (the Guidelines) address the issue of determining earning capacity. The Guidelines provide, "[i]n order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earnings level of the parent based on that parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community." S.C. Code Ann. Regs. 114-4720(A)(5)(B) (2012).

Based on Husband's education, training, experience, age, health, and other factors, the family court imputed a gross annual income of $100,000 to Husband. The court noted it was mindful of the deteriorated state of the commercial real estate market, but found that considering Husband's skill set and experience, he should be able to find employment either as a commercial real estate broker or as a property manager. The family court further noted Husband had a proven history of "putting together real estate deals with little or no money invested on his part," and, based on his testimony, he was inclined to continue pursuing such deals.

While the family court considered several factors in imputing income to Husband, including his work history and occupational qualifications, the court failed to consider prevailing job opportunities and earning levels in the community. In *Sanderson v. Sanderson*, 391 S.C. 249, 253, 705 S.E.2d 65, 66 (Ct. App. 2010), this court addressed a similar situation wherein the family court imputed an annual income of $64,000 to the husband after he lost his position earning $95,000 as a result of corporate downsizing. After noting there was no dispute that the husband lost his job through no fault of his own, this court then went on to review the evidence of record as related to the factors set forth in the [G]uidelines. *Id.* at 256-59, 705 S.E.2d at 68-69. The *Sanderson* court found the record was "bereft of any testimony establishing the job opportunities or earning levels in the community"

and determined the family court abused its discretion in imputing an annual income of $64,000 to Husband. *Id.* at 257, 705 S.E.2d at 69. The *Sanderson* court remanded the issue of the amount of income to be imputed to Husband to the family court to be determined in accordance with the evidence presented at trial. *Id.* at 260, 705 S.E.2d at 70.

Here, as in *Sanderson*, the family court failed to address the necessary factors delineated by the Guidelines concerning the prevailing job opportunities and earning levels in the community. Because the family court failed to address all of the factors required by the Guidelines, and because there is nothing in the record to suggest how the family court arrived at the annual income figure of $100,000 to be imputed to Husband, we remand the issue of Husband's imputed income to the family court pursuant to *Sanderson* for reconsideration based upon the factors set forth in the Guidelines.

II. Alimony

Husband asserts the family court erred in awarding Wife $2,150 per month in alimony because the award was based on the court's improper finding of Husband's imputed income. Additionally, Husband contends the family court placed too much weight on Husband's ability to assemble commercial real estate ventures in the future.

Alimony functions as a substitute for the support normally incident to the marital relationship and should put the supported spouse in the same position, or as near as is practicable to the same position, enjoyed during the marriage. *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). After finding an award of alimony is warranted, the family court must ensure its award is fit, equitable, and just. *Id.* When awarding alimony, the family court considers the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2012).

In light of our decision to remand the issue of Husband's imputed income to the family court, and because the parties' earnings is a factor the court must consider

when awarding alimony, we remand the issue of alimony to the family court for consideration of the effects of this appeal.

III. Division of the Marital Estate

Husband argues the family court erred in equitably dividing the marital estate.

Subject to certain exceptions, marital property is defined as "all real and personal property which has been acquired by the parties during marriage and which is owned as of the date of filing or commencement of marital litigation." S.C. Code § 20-3-630(A) (Supp. 2012). In making an equitable apportionment of marital property, the family court must give weight in such proportion as it finds appropriate to all of the following factors:

> (1) the duration of the marriage along with the ages of the parties at the time of the marriage and at the time of the divorce; (2) marital misconduct or fault of either or both parties, if the misconduct affects or has affected the economic circumstances of the parties or contributed to the breakup of the marriage; (3) the value of the marital property and the contribution of each spouse to the acquisition, preservation, depreciation, or appreciation in value of the marital property, including the contribution of the spouse as homemaker; (4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets; (5) the health, both physical and emotional, of each spouse; (6) either spouse's need for additional training or education in order to achieve that spouse's income potential; (7) the nonmarital property of each spouse; (8) the existence or nonexistence of vested retirement benefits for either spouse; (9) whether separate maintenance or alimony has been awarded; (10) the desirability of awarding to the spouse having custody of any children the family home as part of equitable distribution or the right to live in it for reasonable periods; (11) the tax consequences to either party as a result of equitable apportionment; (12) the existence and extent of any prior support obligations; (13) liens and any other encumbrances on the marital property and any other existing debts; (14) child custody

> arrangements and obligations at the time of the entry of the order; and (15) any other relevant factors that the family court expressly enumerates in its order.

S.C. Code Ann. § 20-3-620(B) (Supp. 2012). "These criteria guide the family court in exercising its discretion over apportionment of the marital property and are nothing more than equities to be considered in reaching a fair distribution of marital property." *Jenkins v. Jenkins*, 401 S.C. 191, 198, 736 S.E.2d 292, 296 (Ct. App. 2012) (citing *Johnson v. Johnson*, 296 S.C. 289, 297-98, 372 S.E.2d 107, 112 (Ct. App. 1988)). "The criteria subserve the ultimate goal of apportionment, which is to divide the marital estate, as a whole, in a manner which fairly reflects each spouse's contribution to the economic partnership and also the relative effect of ending that partnership on each of the parties. *Id.* at 198-99, 736 S.E.2d at 296 (citing *Sanders v. Sanders*, 396 S.C. 410, 418, 722 S.E.2d 15, 18 (Ct. App. 2011)).

The family court determined that divisions made through temporary orders prior to the final hearing constituted an equal division of assets. At the time of trial, the remaining assets to be divided included (1) Husband's real estate investments; (2) Paris Capital, a real estate investment LLC owned jointly by the parties; and (3) the marital residence. The family court held these assets should be sold and the proceeds divided equally between the parties.

On appeal, Husband argues (1) the division of the parties' real estate assets is inequitable because the family court did not account for the liabilities associated with these investments; (2) the family court's division of Paris Capital is inequitable because he is liable for all taxes related to the company; and (3) the family court's division of the marital residence is inequitable because it increased his liabilities.

Because Husband failed to raise any of these issues in his Rule 59(e), SCRCP, motion, we find these issues are not preserved for our review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding an issue must have been raised to and ruled upon by the trial court in order to be preserved for appellate review). Therefore, we affirm the family court's division of the marital estate.

As to the real estate investments and Paris Capital, which were discussed at oral argument, we find that even assuming they were preserved for review the family court did not err in dividing these assets.

At the time of trial, Husband held an interest in eight investment companies (the LLCs). The family court found an in-kind division of the LLCs was impossible due to the restrictions on Husband's ability to transfer his ownership interest. Therefore, the court granted Wife a 50% equitable interest in Husband's shares of these companies. The family court also ordered Husband to pay Wife 50% of the proceeds from the sale of the LLCs. Husband contends he is solely responsible for the debts associated with the LLCs. However, the family court order specifically provides:

> Husband shall be responsible for the payment of the debts and expenses associated with each real estate investment. Husband shall indemnify and hold Wife harmless therefrom. Husband shall be entitled to reimbursement from the net sales proceeds any principal reduction on any debt instrument related to the real estate investments from the date of this order forward made by him through his direct contribution of additional paid capital.

Therefore, although Husband is responsible for the payment of any debts associated with the LLCs, he is entitled to reimbursement for any debt paid or capital contribution upon the sale of the properties. Thus, the family court did not err in dividing these investments.

As to Paris Capital, the family court found Husband had received the direct benefits of the incomes derived from Paris Capital, and therefore, he should bear the tax liability arising from Paris Capital from January 1, 2011, forward. At oral argument, Wife agreed that Husband was only responsible for taxes on money he received as income from Paris Capital, and not on any money he reinvested in Paris Capital for operational necessities. This division was not inequitable, and, therefore, the family court did not err in dividing Paris Capital.

IV. Attorney's Fees

Husband argues the family court erred in awarding Wife attorney's fees based on his imputed income.

Section 20-3-130(H) of the South Carolina Code (Supp. 2012) authorizes the family court to order payment of litigation expenses, including attorney's fees, to either party in a divorce action. "The decision to award attorney's fees is within the

family court's sound discretion, and although appellate review of such an award is de novo, the appellant still has the burden of showing error in the family court's findings of fact." *Lewis v. Lewis*, 400 S.C. 354, 372, 734 S.E.2d 322, 331 (Ct. App. 2012). In determining whether to award attorney's fees, the following factors should be considered: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; (4) effect of the attorney's fee on each party's standard of living." *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). If an award of attorney's fees is appropriate, the reasonableness of the fees should be determined according to: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Because we have remanded the issues of imputed income and alimony to the family court, we remand the issue of attorney's fees as well for consideration of the effects of this appeal. *See Smith v. Smith*, 386 S.C. 251, 270-71, 687 S.E.2d 720, 731 (Ct. App. 2009) (remanding the issue of attorney's fees to the family court for reconsideration when the effects of the family court's decision on remand may alter its "analysis of the 'beneficial results obtained at trial'").

CONCLUSION

We remand the issues of imputed income, alimony, and attorney's fees to the family court for reconsideration. We affirm the family court's division of the marital estate.

AFFIRMED IN PART AND REMANDED.

HUFF and GEATHERS, JJ., concur.