# The Supreme Court of South Carolina

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# N O T I C E

IN THE MATTER OF JAMES C. "TEE" FERGUSON, PETITIONER

On May 9, 1994, Petitioner was indefinitely suspended from the practice of law, retroactive to September 22, 1992. In the Matter of Ferguson, 314 S.C. 278, 443 S.E.2d 905 (1994). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than September 24, 2001.

Columbia, South Carolina

July 24, 2001

# The Supreme Court of South Carolina

In the Matter of E.
Carew Rice, III, Deceased.

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ORDER

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Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Disciplinary Counsel seeks an order appointing an attorney to assume responsibility for Mr. Rice's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Rice may have maintained.

IT IS ORDERED that H. Grady Brown, Esquire, is hereby appointed to assume responsibility for Mr. Rice's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Rice may have maintained. Mr. Brown shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Rice's clients and may make disbursements from Mr. Rice's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

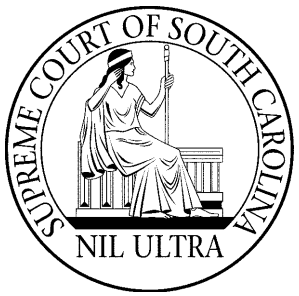
This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of E. Carew Rice, III, Esquire, shall serve as notice to the bank or other financial institution that H. Grady Brown, Esquire, has been duly appointed by this Court.

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

s/ Jean H. Toal C.J.

Columbia, South Carolina

July 23, 2001




# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**July 30, 2001**

**ADVANCE SHEET NO. 27**

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

www.judicial.state.sc.us

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

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In the Matter of Gerald P. Konohia, Respondent.

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Opinion No. 25328
Submitted June 12, 2001 - Filed July 23, 2001

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DEFINITE SUSPENSION

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Henry B. Richardson, Jr., and Assistant Attorney General Tracey Green, both of Columbia, for the Office of Disciplinary Counsel.

Gerald P. Konohia, of Chattanooga, Tennessee, pro se.

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**PER CURIAM:** In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a definite suspension of sixty days. We accept the agreement and hereby suspend respondent. The facts as set forth in the agreement are as follows.

## Facts

On two occasions, respondent allowed a paralegal to close a real estate transaction in his absence. In both cases, respondent's clients were charged an appraisal fee that exceeded the amount charged by the appraiser.

In a third matter, several checks drawn on respondent's trust account were dishonored due to insufficient funds. Although the lack of funds was caused by an inadequate wire transfer, respondent failed to use diligent accounting practices that would have detected this problem sooner.

In a fourth matter, respondent withheld $4,019.50 from the sale of real estate to satisfy a lien against the property. Although the sellers later negotiated a reduction in the lien, respondent failed to reply to their inquiries regarding disbursement. Respondent eventually disbursed the full amount to the lienholder, despite having been notified that the amount of the lien had been reduced.

In a fifth matter, respondent delayed a real estate closing without communicating the reason for the delay to the client. Respondent caused further delays by failing to ensure that the closing statement was correct. Respondent also failed to ensure that his client's homeowners' policy was paid and failed to provide the client with the deed or the completed HUD statement in a timely manner.

In a sixth matter, respondent failed to file a lawsuit until two years after he was retained, despite the fact that his client had collected a significant amount of evidence. Respondent eventually filed the suit in the wrong forum, causing additional delays. Respondent failed to respond to his client's phone calls about this matter.

## Law

Respondent admits that his conduct violated the following Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (failing to provide

competent representation); Rule 1.3 (failing to act with reasonable diligence and promptness while representing a client); Rule 1.4(a) (failing to keep a client reasonably informed about the status of a matter and failing to promptly respond to reasonable requests for information); Rule 2.1 (failing to properly serve as an advisor to a client); Rule 3.2 (failing to properly expedite litigation consistent with the interests of a client); Rule 5.3 (failing to properly execute responsibilities regarding nonlawyer assistants); Rule 5.5 (assisting other persons in the unauthorized practice of law); and Rule 8.4 (violating the Rules of Professional Conduct).

Respondent also admits that he violated Rule 7(a)(1), RLDE, Rule 413, SCACR (violating the Rules of Professional Conduct), and Rule 417, SCACR (requirements of financial recordkeeping).

## Conclusion

We find that respondent's misconduct warrants a definite suspension. Accordingly, we accept the Agreement for Discipline by Consent and hereby suspend respondent from the practice of law for sixty days.

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

DEFINITE SUSPENSION.

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

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

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In the Matter of Walter Bilbro, Jr., Respondent.

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Opinion No. 25329
Submitted June 12, 2001 - Filed July 23, 2001

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PUBLIC REPRIMAND

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Henry B. Richardson, Jr. and Assistant Attorney General Tracey C. Green, both of Columbia, for the Office of Disciplinary Counsel.

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

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**PER CURIAM:** In this attorney disciplinary matter, respondent and Disciplinary Counsel have entered into an agreement pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to a public reprimand. We accept the agreement.

The facts as stated in the agreement are as follows. Respondent undertook representation of a client in a workers' compensation matter when he had previously, and was currently, representing the client's employer. Respondent did not fully disclose the conflict to the client nor did he obtain the client's consent to continue representation despite the conflict. Respondent also gave the client advice with respect to the workers'

compensation claim without having conducted an adequate factual and legal investigation of the claim.

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (failing to provide competent representation to a client); Rule 1.3 (failing to act with reasonable diligence in representing a client); Rule 1.4 (failing to properly communicate with a client); and Rule 1.7 (representing a client when representation of the client is directly adverse to another client). By violating the Rules of Professional Conduct, respondent has also violated Rule 7(a)(1) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

We find the facts as set forth in the agreement warrant a public reprimand. Accordingly, we hereby publicly reprimand respondent for his conduct.

PUBLIC REPRIMAND.

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

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

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The State, Respondent,

v.

Brenda Kay Peppers, Appellant.

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Appeal From Laurens County
Larry R. Patterson, Circuit Court Judge

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Opinion No. 25330
Heard June 20, 2001 - Filed July 23, 2001

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**VACATED**

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C. Rauch Wise, of Greenwood, and Lynn M. Paltrow, of National Advocates for Pregnant Women, of New York, for appellant.

Attorney General Charles M. Condon, Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Deputy Attorney General Harold M. Coombs, Jr., all of Columbia, and Solicitor W. Townes Jones, IV, of Greenwood, for respondent.

Judith K. Appel, Ayelet Waldman, and Daniel Abrahamson, of The Lindesmith Center, of San Francisco, and David T. Goldberg, of Brooklyn, New York, for amici curiae American Public Health Association, South Carolina Medical Association, American Nurses Association, South Carolina Nurses Association, American Academy on Physician and Patient, American Academy of Addictions Psychiatry, Association of Maternal and Child Health Programs, Institute for Health and Recovery, and Ira J. Chasnoff, M.D.

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**PER CURIAM**: Appellant appeals her guilty plea for violating S.C. Code Ann. § 20-7-50 (Supp. 1995). She attempts to raise a number of constitutional challenges to this Court's decision in Whitner v. State, 328 S.C.1, 492 S.E.2d 777 (1997), and alleges the trial court lacked subject matter jurisdiction to accept her plea. Because her guilty plea was a nullity, we decline to address the issues raised, and we vacate her plea and sentence.

## FACTS/PROCEDURAL HISTORY

After giving birth to a stillborn child, Brenda Peppers ("Peppers") was charged with violating S.C. Code Ann. § 20-7-50 (Supp. 1995).[1]

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[1]At the time of the alleged offense, section 20-7-50 provided that:

> It is unlawful for a person who has legal custody of a child or helpless person, without legal excuse, to refuse or neglect to provide the proper care and attention, as defined in Section 20-7-490, for the child or helpless person, so that the life, health, or comfort of the child or helpless person is endangered or is likely to be endangered.
>
> A person who violates the provisions of this section is guilty of

Prior to entering her guilty plea, Peppers made a motion to quash the indictment. Her attorney made the following objection:

> Judge, there's one matter that the defense has before you take the plea. Realizing that this court is bound by the case of State v. Whitner, [sic] which the court is very familiar with, and under the principles set forth in Blackledge v. Perry, [417 U.S. 21, 94 S. Ct. 2098 (1974)] a U.S. Supreme Court case which allows a [sic] to make a motion to quash an indictment if the motion to quash would end the case and preserve the issues for future review, I would move to quash the indictment . . . .

Counsel proceeded to argue that the indictment violated the Fourteenth Amendment to the United States Constitution, Article I, Section X of the South Carolina Constitution, and "the principles of Roe v. Wade." He further argued that the indictment was unconstitutional in that the term "viability," as used in the indictment, was vague such that a person of "common knowledge" would be unable to determine the point at which viability is attained. Finally, he moved to quash the arrest warrant on the grounds that Section 20-7-50 did not provide adequate notice of the conduct it prohibited. The trial court denied all motions, while assuring defense counsel that Peppers was "protected" on the record, and accepted Peppers' guilty plea.

## ANALYSIS

It was error for the trial court to accept Peppers' conditional plea. In State v. O'Leary, 302 S.C. 17, 393 S.E.2d 186 (1990), the trial court accepted the defendant's plea of guilty to the offense of driving under suspension ("DUS"), conditioned, however, upon the defendant's right to appeal his constitutional challenges of the DUS statute. This Court held that

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> a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.

> [g]uilty pleas are unconditional and, if an accused attempts to attach any condition, the trial Court must direct a plea of not guilty. . . . It is, thus, impermissible for a defendant to preserve constitutional issues while entertaining a guilty plea; the trial Court may not accept the plea on such terms.

Id. at 18, 393 S.E.2d at 187 (internal citation omitted).

In State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982), the Court reversed the defendant's conviction which followed his conditional guilty plea. The Court stated that the entrance of a conditional guilty plea

> is a practice not recognized in South Carolina and a practice which we expressly disapprove. Pleas of guilty are unconditional, and if an accused attempts to attach any condition or qualification thereto, the trial court should direct a plea of not guilty. . . . The basis for this rule is, of course, the settled doctrine that a guilty plea constitutes waiver of all prior claims of constitutional rights or deprivations thereof. . . . It was thus improper for appellant to seek to preserve the constitutional issues enumerated above while entering pleas of guilty. It was error of the trial court to accept the pleas on such terms.

Id. at 370, 296 S.E.2d at 529 (internal citations omitted).

We do not construe the holding of Blackledge v. Perry, supra, as broadly as Peppers. Perry was an inmate in North Carolina's correctional system. While incarcerated, he allegedly attacked a fellow inmate with a weapon, and was charged with the misdemeanor offense of assault with a deadly weapon. Under North Carolina law, the District Court Division of the General Court of Justice had exclusive jurisdiction for the trial of all misdemeanors. Any person convicted in the District Court had the right to a trial de novo in the Superior Court. When an appeal was taken, the prior conviction was annulled, and the prosecution began anew in the Superior Court.

The District Court convicted Perry in a bench trial and sentenced him to a six-month sentence. Perry appealed to the Superior Court. After Perry filed his notice of appeal, but prior to his trial in Superior Court, the prosecutor obtained an indictment against Perry, charging him with the felony of assault and battery with a deadly weapon with intent to kill and inflict serious bodily injury. This indictment covered the same conduct for which Perry had been convicted in District Court. Perry pleaded guilty to the charges contained in the indictment and was sentenced to a term of five to seven years imprisonment.

Against this backdrop, the United States Supreme Court held it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him. The Court held further that Perry's guilty plea to the charges in the indictment "did not foreclose him from attacking his conviction . . . through a federal writ of habeas corpus." Blackledge, 417 U.S. at 31, 94 S. Ct. at 2104.

Blackledge has no application to the facts of this case, and does not limit this Court's ability to prohibit conditional guilty pleas.

## CONCLUSION

Because a defendant's guilty plea must be unconditional, Peppers' purported plea and sentence are VACATED.

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

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

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Steven Arthurs, as Personal Representative of the Estate of Deborah Munn, Petitioner,

v.

Aiken County, South Carolina Sheriff's Department, Respondent.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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Appeal From Aiken County
Thomas J. Ervin, Circuit Court Judge

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Opinion No. 25331
Heard May 24, 2001 - Filed July 23, 2001

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**AFFIRMED AS MODIFIED**

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Robert T. Williams and Jonathan R. Hendrix, of

Williams, Hendrix, Steigner & Brink, of Lexington, for petitioner.

Vinton D. Lide, of Lexington, for respondent.

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**JUSTICE PLEICONES:** Petitioner sued respondent, the Aiken County Sheriff's Department (Department), for negligence leading to the murder of petitioner's sister (Deborah) by her estranged husband (Husband). The circuit court granted Department's directed verdict motion, and the Court of Appeals affirmed. Arthurs v. Aiken County, South Carolina Sheriff's Dep't, 338 S.C. 253, 525 S.E.2d 542 (Ct. App. 1999). We granted certiorari to consider issues of duty and the continued viability of the "public duty rule" in light of the South Carolina Tort Claims Act (TCA),[1] and now affirm the decision of the Court of Appeals as modified.

## FACTS

Deborah and Husband were living in separate trailers in a family enclave in rural Aiken County. Around 9 a.m. on September 30, 1994, Deborah called 911 and complained that Husband had tried to run her off the road that morning as she returned home from work. Their daughter testified that she observed Husband speaking to officers of the Department around 5 p.m. that same day as she and Deborah left the trailer for school band practice. No other evidence was offered regarding this conversation.

Around 6 p.m., Deborah was talking on her home phone to her sister, who was in her trailer about 500 feet away. The sister heard knocking on Deborah's trailer door, and told Deborah to hang up and call 911. Deborah did so, as did her sister. Investigator Coleman and Deputy Cain responded. While it is not clear who was knocking on the door, Deborah and her 17-year-old nephew reported to the officers that Husband had approached the

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[1]S.C. Code Ann. §§15-78-10 through -200 (Supp. 2000).

nephew and a neighbor (Rob) as they began to work on Deborah's water lines. Husband asked if they "were the gang that's supposed to jump on him." He tried to get nephew to hit him, threw a beer in the nephew's face, and gestured threateningly towards the gun in his back pocket. He was reported to have been "raising hell" in Deborah's front yard.

Husband was not present when the officers arrived. Deputy Cain continued to talk to Deborah and her nephew while Investigator Coleman left to try to locate Husband. In his report, Deputy Cain characterized the nephew as the victim and Deborah as the complainant, and he did not document it is a "serious" complaint. When Deborah expressed her fear of Husband, Deputy Cain advised her to go to a safe house. When she declined to leave, he told her she should stay inside behind locked doors and call 911 if Husband returned.

Sometime later that evening, nephew went to join his brother at Kneece's Body Shop to work on a race car. The shop was about 300 yards from nephew's trailer, which was less than 100 yards from Deborah's trailer. Husband was at the shop when nephew arrived, and again tried to start a fight. Nephew turned to walk home, and Husband said, "Go get your Mama and Daddy and I'll send both of them to hell." Husband and his truck were at the Body Shop when nephew left. Department responded to nephew's family's 911 call, but their search for Husband was unsuccessful. His truck remained parked at the shop.

Around 9:30 or 10 p.m. that night, family members heard screaming from Deborah's trailer followed by shots. Husband had forced the neighbor, Rob, to knock on Deborah's door by holding a gun to his back. When Deborah answered the door, Husband forced his way in and killed her by shooting her in the head.

## Issues

We granted certiorari to consider three issues:

(1) Whether the "public duty rule" survived the adoption of the TCA?;

(2) Whether the Court of Appeals misread the facts?; and

(3) Whether Department owed Deborah a duty of care?

We hold the public duty rule continues to play its role in our governmental tort liability jurisprudence. Further, we find no factual error in the Court of Appeals' decision although we characterize the evidence and its inferences somewhat differently. Finally, we hold petitioner has not shown a duty running from Department to Deborah. Accordingly, we affirm the Court of Appeals' decision as modified.

## A. Public Duty Rule and the TCA

In order to establish liability in a negligence action, the plaintiff must show (1) a duty of care owed by the defendant to the plaintiff; (2) breach of that duty; and (3) damages resulting from the breach. Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999). An affirmative legal duty to act may be created by statute, contract relationship, status, property interest, or some other special circumstance. Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999); Jensen v. Anderson County Dep't of Social Services, 304 S.C. 195, 403 S.E.2d 615 (1991). When, and only when, the plaintiff relies upon a statute as creating the duty does a doctrine known as the "public duty rule" come into play.[2]

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[2]See e.g., Douglass v. Boyce, ____ S.C. _____n.3, 542 S.E.2d 715n.3 (2001).

The enactment of the TCA effectively expanded the scope of actionable governmental duties beyond those predicated upon a statutory duty, as is clear from the language of the Act:

(i) Section 15-78-40 (Supp. 2000) provides:

> The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages contained herein.

(ii) Section 15-78-50 (Supp. 2000) provides:

> (a) Any person who may suffer a loss proximately caused by a tort of the State, an agency, a political subdivision, or a governmental entity, and its employee acting within the scope of his official duty may file a claim as hereinafter provided.
>
> (b) In no case is a governmental entity liable for a tort of an employee where that employee, if a private person, would not be liable under the laws of this state.

(iii) See also § 15-78-20(a)(Supp. 2000) " . . . Liability for acts or omissions under this chapter is based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty."

Today, a plaintiff alleging negligence on the part of a governmental

actor or entity may rely either upon a duty created by statute or one founded on the common law. As explained below, petitioner relies on both grounds in an effort to establish a duty owed by Department to Deborah.

"The 'public duty' rule presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public. Such statutes create no duty of care towards individual members of the general public." Summers v. Harrison Constr., 298 S.C. 451, 455-56, 381 S.E.2d 493, 496 (Ct. App. 1989). The public duty rule is a negative defense which denies an essential element of the plaintiff's cause of action: the existence of a duty of care to the individual plaintiff. Rayfield v. South Carolina Dep't of Corrections, 297 S.C. 95, 105-06, 374 S.E.2d 910, 916 (Ct. App. 1988), *cert. denied* 298 S.C. 204, 379 S.E.2d 133 (1989). It is not a matter of immunity, which is an affirmative defense that must be pleaded and which may be waived. Steinke, supra. Further, it is a rule of statutory construction, that is, a means of determining whether the legislative body that enacted the statute or ordinance intended to create a private cause of action for its breach. Jensen, supra.

The public duty rule insulates public officials, employees, and governmental entities from liability for the negligent performance of their official duties by negating the existence of a duty towards the plaintiff. Whether the adoption of the TCA affects the public duty rule has been mentioned, but not directly decided, in a number of cases. See, e.g., Steinke, supra, 336 S.C. at 388n.3, 520 S.E.2d at 149n.3 (since both parties have assumed public duty rule survives end of sovereign immunity and enactment of TCA, court did not decide import, if any); see also Brady Dev. Co., Inc. v. Town of Hilton Head, 312 S.C. at 76n.2, 439 S.E.2d at 268n.2 (1993); Jensen, supra.

The issue is, however, squarely raised in this case. The TCA does not create causes of action, but removes the common law bar of sovereign immunity in certain circumstances. Summers v. Harrison Constr., supra. Since the public duty rule is not grounded in immunity but rather in duty,

Steinke, supra; Rayfield, supra, we hold it has not been affected by enactment of the TCA.

The TCA and "public duty rule" are not incompatible and we retain the rule. When the negligence plaintiff's cause of action against a governmental entity is founded upon a statutory duty, then whether that duty will support the claim should be analyzed under the rule. On the other hand, where the duty relied upon is based upon the common law, e.g. the duty to warn in Rogers v. South Carolina Dep't of Parole & Community Corrections, 320 S.C. 253, 464 S.E.2d 330 (1995), then the existence of that duty is analyzed as it would be were the defendant a private entity. Id.

In addition, many "duties" appear to be limited or eliminated by what are termed "Exceptions to waiver of immunity" in S.C. Code Ann. §15-78-60 (Supp. 2000). Thus, even if negligence (including breach of a duty) is shown, the governmental entity may not be liable because of the immunities reinstituted by the TCA. Only if a duty is found, and the other negligence elements shown, will it ever be necessary to reach the TCA immunities issue.

B. Statutory Duties

Petitioner claims Department breached statutory duties owed to Deborah under the Criminal Domestic Violence (CDV) Act[3] and under a statute describing the duty of a deputy sheriff to patrol a county.[4] The Court of Appeals found no special duty of care under either statute, and thus upheld the grant of a directed verdict. We agree.

The "public duty rule" recognizes that, generally, statutes which create or define the duties of a public office create no duty of care towards

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[3]S.C. Code Ann. §§16-25-10 to -80 (Supp. 1994). We refer to the version in effect at the time of Deborah's murder since some sections of the CDV Act have been substantially revised since her death.

[4]S.C. Code Ann. §23-13-70 (1976).

individual members of the general public. An exception to the general rule exists when the statutory duty is owed to individuals rather than to the public at large. Our courts are reluctant to find a special duty. Tanner v. Florence County Treasurer, supra. In Jensen, supra, and Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991), this Court adopted a six part test developed by the Court of Appeals in Rayfield, supra, for determining when such a "special duty" exists:

> (1) an essential purpose of the statute is to protect against a particular type of harm;
>
> (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;
>
> (3) the class of persons the statute intends to protect is identifiable before the fact;
>
> (4) the plaintiff is a person within the protected class;
>
> (5) the public officer knows or has reason to know the likelihood of harm to members of the class if he fails to do his duty; and
>
> (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

Petitioner argues the CDV Act creates a special duty to Deborah because it is designed to protect against a particular harm, that is, threats or acts of violence directed by one household member against another (§§16-25-10 and -20). In this case, the officers responded to two calls on September 30 where Deborah's nephew, brother, and sister-in-law were designated the victims. To the extent her nephew was the victim, the CDV

Act is not even implicated.[5] While Deborah's brother and arguably his wife were related within the second degree to Husband, petitioner points to no breach of duty under the Act by Department towards these victims, much less a breach directed toward Deborah.

To the extent Deborah was identifiable as the true object of Husband's hostility, petitioner cannot show where any CDV Act duty was breached. Husband was not present at the scene when the officers arrived, and therefore was not subject to immediate arrest. Further, the evidence shows that Department searched for Husband but could not find him. Finally, Deputy Cain advised Deborah to leave and go to a shelter. Petitioner points to no section of the CDV Act requiring the law enforcement agency to post a guard under these circumstance. In short, assuming the CDV Act is implicated by the facts of this case, petitioner has failed to show the existence of a special duty owed to Deborah, much less breach of such a duty.[6]

Petitioner's second "special duty" argument is predicated on §23-13-70 which provides:

> **The deputy sheriffs shall** patrol the entire county at least twice a week by sections assigned to each by the sheriff, remaining on duty at night when occasion or circumstances suggest the propriety thereof to prevent or detect crime or to make an arrest. They shall always be on duty for not less than ten hours a day, except when granted occasional indulgences or leaves of absence by the sheriff. They shall frequent railroad depots, stores and other public places where people congregate, disorder is

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[5]See §16-25-10 defining "Household member" as "spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, persons who have a child in common, and a male and female who are cohabitating or formerly have cohabitated."

[6]We do not reach the question whether under different circumstances the CDV Act can be the basis of a "special duty."

> probable, vagrants may be loafing or alcoholic liquors may be sold, bartered or given away and they shall as often as practicable ride by houses that are off the public highways and in lonely parts of the county, especially such as are without male protectors, and shall **use every means to** prevent or detect, **arrest** and prosecute for breaches of the peace, drunkenness, using obscene language, boisterous conduct or discharging of firearms on the public highways or at any public place or gathering, carrying weapons contrary to law, gambling, vagrance, setting out fire, violation of the game and fish laws, cruelty to animals or children, violation of the child labor laws, lynching and **for the violation of every law which is detrimental to the peace, good order and morals of the community.**
> (emphasis petitioner's).

Petitioner contends this statute created a special duty on the part of Department to "use every means" to prevent violations of the CDV Act, and/or to arrest violators.

This general statute creates no "special duty," but instead, as the Court of Appeals held, "merely recites, in broad terms, the general duty of a deputy sheriff to patrol the county . . . . The requirements of the Rayfield test are not satisfied." Arthurs, supra.

We affirm the Court of Appeals' holding that petitioner has not shown a special duty owed to Deborah under either the CDV Act or under §23-13-70.

### C. Common Law Duty/Factual Error

Petitioner contends the facts of this case establish a legal duty arising from a "special circumstance" because Deputy Cain set Deborah up as "bait" to try to arrest Husband. See Jensen, supra (duty can arise from "special circumstance"). Petitioner argues, in connection with this issue, that the Court of Appeals "ignored" Deputy Cain's deposition testimony when it

concluded that Cain "did not convey to [Deborah] that he wanted to use her as 'bait' in an attempt to capture Husband." Arthurs, 338 S.C. at 268, 525 S.E.2d at 550.

The flaw in petitioner's theory is that there is no evidence that the Department was "baiting" a trap with Deborah. The evidence is undisputed that when Deputy Cain responded to the first incident, where Husband threatened Deborah's nephew in her yard, he told her that if she refused to go to a safe house, she should stay indoors behind locked doors and call 911 if Husband returned. In his deposition, he testified that **after Deborah refused his offer** " to help her get to a **safe house**" (emphasis added), he told her to stay behind a locked door and call 911 if Husband came back. He continued:

> Just call us and we'll come down here with all of us, we'll take care of him in the front yard. We'll take care of it. And [Deborah] told me young man, she called me young man or called me son, or something to [sic] that nature. I believe she said young man, he's got a gun, and my response to her was, so do I and my friends and we know what to do with ours and let us take care of a gun problem. **You stay inside but whatever you do, don't unlock the door for him. I wanted her to set him up so he was in the front yard when we show up. That's all I was trying to convey to her and we'll take care of the problem, you know, the way we were trained to, and after that I pretty much left.**
> (emphasis added).

Cain explained at trial that he did not convey the "set up" thought to Deborah, but was "insuring [sic] her that myself and my fellow law enforcement officers knew exactly what to do once we came in contact with this man and for her to stay behind a locked door if she did not want to leave the area."

The Court of Appeals relied on the fact that there was no evidence that

Deputy Cain conveyed to Deborah that he wanted to use her as bait in concluding no special circumstances here gave rise to a duty. In our opinion, it is more accurate to say there was no "baiting" here. Despite Deborah's fear of Husband and his armed appearance in her front yard, Deborah refused Deputy Cain's offer to get her away from there and to a safe location. In context, all that was "conveyed" was to stay indoors and call at the first sighting of Husband, not to wait for him to act provocatively. He did not encourage her to stay in an effort to lure Husband back - he encouraged her to leave. Husband lived one trailer over, and was therefore bound to return at some point; certainly if he were in Deborah's front yard when officers responded to her 911 call, he would be easy to pick out and arrest.

Since we find no evidence of baiting, there is no need to decide whether such conduct can constitute a "special circumstance" giving rise to a common law duty. In light of the lack of evidence, we decline to adopt a test for determining when such a duty may arise. Further, we vacate that part of the Court of Appeals' opinion which adopts the North Carolina test found in Braswell v. Braswell, 410 S.E.2d 897 (N.C. 1991). We do this in part because the issue is not before us, and in part because North Carolina characterizes this type of common law duty as a "special duty" exception to the "public duty rule." Id. at 902. We find the North Carolina language potentially confusing because, as explained above, we restrict the terms public duty/special duty to those arising from statutes.

## Conclusion

The circumstances surrounding Deborah's murder are tragic. Despite our sympathy, however, we cannot find the existence of any duty, much less the breach of such an obligation, under the facts presented here. Accordingly, the decision of the Court of Appeals is

**AFFIRMED AS MODIFIED**.

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

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

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Richard Anthony Tucker, Petitioner,

v.

William Catoe, Director, South Carolina Dep't of Corrections, and Charles M. Condon, Attorney General of South Carolina, Respondents.

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In the Original Jurisdiction

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Opinion No. 25332
Heard June 7, 2001 - Filed July 23, 2001

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Writ of Habeas Corpus Granted

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Thomas R. Haggard, of Ridgeway, and Teresa L. Norris, of Columbia, for petitioner.

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

Deputy Attorney General Donald J. Zelenka, of Columbia, for respondents.

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**PER CURIAM:** This matter is before the Court on a Butler[1] petition for a writ of habeas corpus. Petitioner, now on death row,[2] contends that errors in his capital sentencing proceeding warrant this Court's exercise of the writ. We find that the Allen[3] charge given to petitioner's sentencing jury was unconstitutionally coercive and "*in the setting*, constitute[d] a denial of fundamental fairness shocking to the universal sense of justice." Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). Accordingly, we grant the writ and remand for a new sentencing proceeding.

## A. Facts

We have adopted, with minor modifications, the findings of fact[4] made by the state post-conviction relief (PCR) judge:

- The jury begins sentencing deliberations at 1:33 p.m. on October 27, 1993.

- At 5:02 p.m., the jury returns with this question: "In the event of a decision for a life sentence - what is the possibility of parole, if any," and the trial court responds:

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[1]Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990).

[2]See State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995).

[3]Allen v. United States, 164 U.S. 492 (1896).

[4]These facts also appear in the Fourth Circuit's opinion denying petitioner federal habeas relief. Tucker v. Catoe, 221 F.3d 600 (4th Cir.) *cert. denied*, 121 S.Ct. 661 (2000).

> Whether or not the defendant would or would not be eligible for parole should not enter into your deliberations or factor into your decision. The terms a death sentence and a life imprisonment sentence are to be understood in their plain and ordinary meaning.

- Sometime between 5:03 p.m. and 5:55 p.m., the jury returns with a second note: "We are deadlocked at 10-2 for the death penalty. We are not making any further progress. We would like to hear [petitioner's] testimony, and then continue our deliberation until 10:00 PM - unless we reach a verdict before then." The trial judge does not read this note to counsel; he does tell counsel that the jury wanted to rehear testimony. The jury declines the judge's offer to order dinner, preferring to wait until after the testimony is replayed. Testimony is then replayed over the next hour, and the jury retires to deliberate at 6:53 p.m.

- Around 8:03 p.m., the jury sends another note: "We are not going to reach a decision tonight. We would like to go back to the motel and resume deliberations in the morning. (We can eat at the motel)." No party objects, and the jury is excused for the evening.

- The jury returns and begins deliberations the next day at 9:00 a.m. Around 10:44 a.m., the jury sends another note: "We are hopelessly deadlocked at 11-1 for the death penalty. I do not feel we will ever get an[sic] unanimous decision." Again, the trial court does not read the note in court although the judge informs the parties that he intends "to bring them back in to inquire and perhaps to give them additional instruction." The attorneys are made aware only that the vote is 11-1; no mention is made of "hopelessly deadlocked." Petitioner's counsel then objects:

> Well, let met [sic] state that I know that the Court is going to give additional instructions. Prior to anything that would be either a watered-down version of an Allen charge, we would ask that the Court inquire as to whether or not in the jury's opinion they feel that they are hopelessly deadlocked.
>
> Additionally, we would further submit that if the Court gives a charge that would be, again, a watered-down Allen charge we would also request that the Court instruct the jury that other consequences of not reaching a decision in a death-penalty case dealing specifically with the penalty phase, that the defendant would receive life imprisonment. Our authority is based primarily on some Florida cases. I can cite those to you, but that basically would be our position on that.

The trial court then gives this charge:

> Good morning, ladies and gentlemen. I understand from a note handed up by way of the bailiff that apparently came from the foreman, is [sic] that you are having some difficulty in arriving at a unanimous decision. I intend to give you a little further instruction, and then I am going to ask you to go back to the jury room to continue for some time with your deliberations.
>
> Now, as I told you in the beginning of the trial, you are the sole judges of the facts in the case and I am the judge of the law in this case. I am not permitted to in any fashion give you a hint as to how I feel about the verdict or how the case should be decided. That is not my decision; that is not my purpose.

It is your decision as to the appropriate sentence that should be imposed in this particular case based upon your view of the evidence as well as the application of the law; but I can say that when a matter is in dispute it isn't always easy for even two persons to agree, and when 12 men and women must agree as to a particular decision, it becomes correspondingly more difficult, but it's important that jurors reach a unanimous verdict if that may be accomplished without a juror doing violence to his or her own conscience.

At the same time no juror is expected to give up an opinion based on reasoning satisfactory to himself or herself merely for the purpose of being in agreement with others.

It was never intended that the verdict of the jury should be the view of any one person. On the other hand, the verdict of the jury is the collective reasoning of all of the men and women serving on the panel. That's why we have a jury, so that we have the benefit of collective thought and of collective reasoning.

Now, it becomes each of your duties as jurors to tell the other jurors how you feel about the case and why you think as you do. It becomes each of your duties to exchange views with the other jurors, and you should listen to each other and give to the other's thought such meaning as you think it should have.

So, ladies and gentlemen, at this time I am going to ask you to consider that further instruction. Go back into the jury room and continue your deliberations

and see if you can arrive at a unanimous verdict.

Petitioner's counsel then objects again:

> Your Honor, on the specific charge and on the Allen charge in and of itself, I object to the entire charge, per se. It's the very nature of an Allen charge outside of public policy, that it helps avoid the cost of another trial which would not be applicable here.
>
> The very nature of any sort of an Allen charge is coercive in nature. It is our position particularly at paragraph number - the third paragraph referred to by the Court is, in effect – it could be interpreted as singling out either one or two jurors and could lead to some coerciveness inside the deliberations.
>
> It could be interpreted by a juror that that juror has to switch over because of a particular charge. So we would object to the charge in toto as being coercive, and just renew again our request that they be given further instruction as to the consequences of not being able to reach a unanimous verdict. That would be it.

- At 12:27 p.m., the jury returns a unanimous recommendation of death.

## B. Procedural History

Petitioner's trial attorney asked that the jury be informed of the consequences of its inability to reach a sentencing decision. Following the Allen charge, which did not include a "consequences" charge, the trial attorney objected to the Allen charge as coercive "in toto" and "per se," and objected that the charge could be interpreted as singling out the minority juror. On direct appeal, petitioner argued (1) that the trial judge should have instructed the jury not to reveal its vote and (2) that the Allen charge was improper because the judge knew there was only one juror holding out. State v. Tucker, 319 S.C. at 427-28, 462 S.E.2d at 264-65. We found these claims

procedurally barred because petitioner was improperly altering the grounds raised at trial on appeal. Id. at 428, 462 S.E.2d at 265.[5]

At the PCR proceeding, petitioner claimed appellate counsel was constitutionally ineffective in altering the Allen charge argument. Appellate counsel acknowledged he had deliberately "blurred" the issues because his research convinced him that the objection at trial would not succeed on appeal. The PCR judge found no constitutional deprivation since appellate counsel has no duty to raise every non-frivolous issue, and must be allowed to exercise his reasonable professional judgment. Jones v. Barnes, 463 U.S. 745 (1983); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). We denied certiorari.

As the foregoing demonstrates, this Court has never addressed petitioner's allegation that the Allen charge was unconstitutionally coercive on the merits. Further, we consider for the first time petitioner's claim that his jury engaged in "reasonable deliberation" as a matter of law, thereby requiring the trial judge to direct a life sentence pursuant to S.C. Code Ann. §16-3-20(C) (Supp. 2000).[6]

In keeping with our policy of not reaching constitutional issues unless necessary to the resolution of the case, we first discuss petitioner's statutory

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[5]Inexplicably, the Fourth Circuit concluded that we erred in finding procedural defaults in the Allen charge issues. Tucker v. Catoe, supra. Even petitioner's direct appeal counsel testified at the PCR hearing that he intentionally "blurred" the trial objections in hopes of presenting a more persuasive argument on appeal. The procedural bar ruling was a routine application of state law; we do not understand the Fourth Circuit's gratuitous comments.

[6]"If members of the jury after a **reasonable deliberation** cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant . . . the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. . . ."(emphasis added).

claim. E.g., Fairway Ford, Inc. v. County of Greenville, 324 S.C. 84, 476 S.E.2d 490 (1996).

## C. Reasonable Deliberation

The interpretation of §16-3-20(C)'s instruction that the trial judge impose a life sentence if a capital sentencing jury cannot reach a recommendation after a "reasonable deliberation" presents a novel question. While "reasonable deliberation" is something less than the "due and thorough deliberation" standard of our "two return" statute,[7] we hold that the determination whether a particular jury has met such a standard is a matter committed to the trial judge's discretion. See, e.g., Buff v. South Carolina Dep't of Transportation, 342 S.C. 416, 537 S.E.2d 279 (2000) ("trial judge who is in the best position to observe the jury's demeanor should have some flexibility in guiding a case to its final resolution while protecting the parties' rights to a fair, impartial, and conscientious verdict").

The State contends that we should look at the time spent in face-to-face deliberations while petitioner contends we should look at the entire period. In our view, however, "reasonable deliberation" is not simply an elapsed-time dependent determination. In State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990), the Court held there was no error in requiring the re-sentencing jury to continue deliberating when it reported, after 3 ½ hours of deliberation, that it was "hung." The statutory "reasonable deliberation" issue was neither raised nor decided in Atkins, nor in State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), *subsequent history omitted* (judge sent jury back when it returned after 50 minutes and reported a deadlock; only appellate issue was whether it was error to refuse to charge effect of hung jury); see also State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (Allen charge given after four hours of deliberation was not coercive).

Here, a substantial period of time elapsed between the jury's beginning

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[7]S.C. Code Ann. §14-7-1330 (1976).

deliberations (1:33 p.m. on the 27th) and the time it informed the judge it was "hopelessly deadlocked" (10:44 a.m. on the 28th). Further, the evidence in the record demonstrates that petitioner's jury took its responsibility seriously, and that it was a jury working diligently to reach a verdict. Under these circumstances, had the issue been raised to him, the trial judge in his discretion may or may not have found the jury had engaged in a "reasonable deliberation." In order to grant relief on this ground we would be required to hold that, as a matter of law, this jury had done so. This we decline to do.

## D. Coercive Allen Charge

Neither the Due Process clause nor the Eighth Amendment forbid the giving of an Allen charge in the sentencing phase of a capital proceeding. Lowenfield v. Phelps, 484 U.S. 231 (1988); see also Jones v. United States, 527 U.S. 373 (1999) (no constitutional requirement that capital jury be informed of consequences of its failure to agree). Whether an Allen charge is unconstitutionally coercive must be judged "in its context and under all the circumstances." Lowenfield, supra. While recognizing the State's strong interest in having a jury determine the sentence, Lowenfield reaffirmed that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Id. (internal citations omitted). The Court also noted that the societal costs of a retrial are not a factor in those cases where, as in South Carolina, the law provides for a life sentence if a capital sentencing jury hangs. Id.

Lowenfield is the definitive United States Supreme Court decision on the constitutionality of an Allen charge in a capital sentencing proceeding. The test for determining whether a given charge is unconstitutionally coercive is very fact intensive. For that reason, we have discussed Lowenfield in some detail below.

After the jury convicted Lowenfield of two counts of manslaughter and three counts of murder, the initial charge in the sentencing phase admonished the jurors to consider the view of others with the object of reaching a verdict,

but also instructed them not to give up their own honest beliefs in order to do so. The jury deliberated late into the night and resumed the next day. During that afternoon, the foreman sent a note that the jury was unable to reach a verdict at that time and asked for a recharge on the jurors' responsibilities. In response to the judge's inquiry, eleven of the jurors responded that further deliberations would probably allow them to reach a verdict. The trial judge charged the jury:

> When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.
>
> Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Thirty minutes later, the jury returned a death sentence on all three murder counts.

In upholding the constitutionality of this charge, the Court considered:

(1) the charge did not speak specifically to the minority juror(s);

(2) the judge did not include in his charge any language such as "You have got to reach a decision in this

case"[8];

(3) there was no inquiry into the jury's numerical division, which is generally coercive; and

(4) while the jury returned a verdict shortly after the supplemental charge, which suggests a possibility of coercion, weighing against this is the fact that trial counsel did not object either to the inquiry into whether the jurors believed further deliberation would result in a verdict, nor to the supplemental charge.

The Lowenfield court concluded:

> We hold that on these facts the combination of the polling of the jury and the supplemental instruction was not "coercive" in such a way as to deny petitioner any constitutional right. By so holding we do not mean to be understood as saying other combinations of supplemental charges and polling might not require a different conclusion. Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body.

Lowenfield sets the standard by which petitioner's constitutional claim is to be judged. We therefore apply the Lowenfield factors to petitioner's facts.

1. Did the charge speak specifically to minority jurors?

While these jurors were told that they should not do "violence to his or her own conscience" in order to reach a verdict, and not to give up an opinion "based on reasoning satisfactory to himself or herself merely for the

[8]Jenkins v. United States, 380 U.S. 445 (1965).

purpose of . . . agreement . . .", the jurors were also charged:

> [W]hen 12 men and women must agree as to a particular decision, it becomes correspondingly more difficult, but it's important that jurors reach a unanimous verdict . . . .
>
> It was never intended that the verdict of the jury should be the view of any one person. On the other hand, the verdict of the jury is the collective reasoning of all of the men and women serving on the panel. That's why we have a jury, so that we may have the benefit of collective thought and of collective reasoning.
>
> Now, it becomes each of your duties as jurors to tell the other jurors how you feel about the case and why you think as you do. It becomes each of your duties to exchange views with the other jurors, and you should listen to each other and give to the other's thought such meaning as you think it should have.

Viewed as a whole, this jury charge was directed to the minority juror. The trial judge knew, and apparently the jury knew that he knew, that while there had been two hold-out jurors as of 5 p.m. the night before, there was now only one. See State v. Hughes, supra (an even-handed admonition to minority and majority to give consideration to each others' views not coercive); State v. Jones, 320 S.C. 555, 466 S.E.2d 733 (Ct. App. 1996) (viewed as a whole, Allen charge given when judge knew division was 11-1 not coercive where judge did not know alignment, urged dissenting jurors to consider whether their positions were unreasonable in light of majority's judgment, but told them the verdict must be juror's own, the result of his convictions, and not mere acquiescence in the others' conclusion).

2. "You must return a verdict" type language.

While no such mandatory language was used here, petitioner's jury was told of the importance of a unanimous verdict.

3. Inquiry into the jury's numerical division.

Petitioner's jury informed the trial judge of their numerical split, as well as their alignment, on the first evening. Not only did the judge fail to inform the attorneys of the note's contents, he failed to instruct the jurors not to disclose their division in the future. Cf. State v. Middleton, 218 S.C. 452, 63 S.E.2d 163 (1951) (improper for judge to require the jury to publicly reveal the nature or extent of their division).

While the trial judge did not engage in polling the jury as to its division, a practice condemned in Lowenfield, supra and in Brasfield v. United States, 272 U.S. 448 (1926), he did not act to prevent the jury's self-reporting. In Brasfield, the Court held that "the inquiry into the jury's numerical division necessitated reversal because it was generally coercive and always brought to bear 'in some degree, serious although not measurable, an improper influence on the jury.'" Lowenfield, supra (internal citation omitted). The Lowenfield Court noted Brasfield was not a constitutional decision but rather a "supervisory powers"case. None-the-less, knowledge of the jury's numerical division combined with knowledge of its decisional disagreement, followed by an Allen charge directed, at least in part, to minority jurors, is impermissibly coercive. Lowenfield, supra.

4. Time of return of verdict.

Petitioner's jury returned the death sentence at 12:27 p.m., approximately an hour and a half after receiving the Allen charge. This is a relatively short period of time given the fact the dissenting juror had been holding out since at least 5 p.m. the day before. Further, petitioner's attorney, unlike Lowenfield's, did object to the Allen charge, and had no opportunity to object to the jury's revelation of its divisions. This factor weighs in favor of a finding of coercion.

Comparing this case with Lowenfield, we find petitioner's Allen charge unconstitutionally coercive. We agree with the Fourth Circuit's holding that "the import of the charge was that the single juror (whom every member of the jury knew was holding out) should not prevent the majority from imposing the death penalty" and that the charge was therefore impermissibly coercive under the totality of the circumstances. Tucker v. Catoe, 221 F.3d at 612. We hold that the Allen charge given in this case violated petitioner's due process rights.

This conclusion, however, does not end our Butler inquiry, for relief is appropriate only where the violation "*in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice." Butler v. State, supra. We hold this standard has been met here.

Petitioner and his attorneys were denied a meaningful opportunity to protect petitioner's rights. The judge did not disclose the contents of the jury's first note, which revealed a 10-2 deadlock in favor of the death penalty, but rather told the attorneys only that the jury wished to rehear some testimony. When the jury sent a note the next day, the judge did inform the attorneys that the jury was divided 11-1, but again did not reveal that the jury was in favor of death, nor that the foreman had used the term "hopelessly deadlocked," nor that he had written "I do not feel we will ever get an unanimous verdict."

We find the combination of withholding pertinent information from the parties, thereby depriving them of the facts necessary to make informed decisions; failing to instruct the jury to omit from its future communication any reference to the nature of its division; and giving an unconstitutionally coercive Allen charge, with its emphasis on a collective result, shocking to the universal sense of justice. We emphasize that it is the combination of factors, *in the setting*, which compel us to grant petitioner a writ of habeas corpus and to order a new sentencing proceeding.

Writ granted.

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

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

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The State, Respondent,

v.

Sherinette Wannamaker, Appellant.

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Appeal From Richland County
Larry R. Patterson, Circuit Court Judge

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Opinion No. 25333
Heard May 23, 2001 - Filed July 23, 2001

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**AFFIRMED**

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

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Derrick K. McFarland; and Solicitor Warren B. Giese, all of Columbia, for respondent.

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**JUSTICE BURNETT**: Appellant was convicted of the armed robbery and murder of Amber Bone ("the victim"). We affirm.

## FACTS

The victim was stabbed in the back nine times and her skull was crushed. Appellant's friend LaShawn Roberts was separately tried and convicted for the same crimes. Appellant's defense was that Roberts was obsessed with appellant and killed the victim in a jealous rage because of the victim's sexual advances toward appellant. Appellant raises two alleged errors which, she asserts, undermine both convictions:

> I. Did the trial court err by refusing to suppress a custodial statement improperly obtained after appellant invoked her right to counsel?
>
> II. Did the trial court err by refusing to admit evidence that LaShawn Roberts wrote appellant a letter admitting she killed the victim because she was jealous?

## DISCUSSION

I. Invocation of Right to Counsel

Appellant argues the trial court erred by refusing to suppress a custodial statement improperly obtained after she invoked her right to counsel. We disagree.

Appellant gave the police three written statements, each admitting progressively more involvement in the crimes of which she was convicted. The admissibility of the third statement is at issue here. In it, appellant admits that (1) she hit the victim in the back of the head with a

pipe, (2) she covered the victim's back with a pillow (on Roberts' orders) because blood was shooting up, (3) she helped Roberts clean up after the murder, (4) the victim was still alive when she and Roberts left the scene, and (5) she helped Roberts dispose of evidence of the crime.

Appellant moved to suppress the statement on the ground it was improperly obtained after she had invoked her right to counsel. At the in camera suppression hearing, the police officer who questioned appellant testified as follows:

> After I advised her of her rights, the substance of the conversation was her involvement in this particular incident. . . . She requested to speak to either a lawyer or her mother. . . . I asked her if she had a lawyer in mind that she wanted me to call. She hesitated momentarily and said she didn't have a lawyer, just contact her mother for her and I said okay.

Thereafter, appellant's mother arrived at the police station and they were allowed to speak with each other privately.[1] In her mother's presence, the officer then advised appellant of her rights again, and appellant's mother signed the advice of rights form as a witness. Appellant's in camera testimony does not dispute the officer's version of events concerning her request for an attorney or lack thereof.

The trial court denied the motion to suppress. The court found appellant did not make an unequivocal request for an attorney. Furthermore, any defects, if they existed at all, were cured by the subsequent Miranda warnings given prior to taking the third statement.

This issue is unpreserved because trial counsel failed to make a

[1]Appellant was nineteen years old at the time.

contemporaneous objection to the statement being read into evidence. See State v. Hughes, 336 S.C. 585, 591, 521 S.E.2d 500, 503 (1999) (an in limine ruling is not final and does not preserve the issue for appeal).

In any case, the issue is without merit. The Fifth Amendment guarantees the right to speak with counsel upon request in a custodial setting. U.S. Const. amend V; Edwards v. Arizona, 451 U.S. 477 (1981). If a suspect invokes her right to counsel, police interrogation must cease unless the suspect herself initiates further communication with police. Id. However, police officers are not required to cease questioning a suspect unless her request for counsel is unambiguous. Davis v. United States, 512 U.S. 452, (1994) ("Maybe I should talk to a lawyer," was not a request for counsel); but see State v. Kennedy, 333 S.C. 426, 510 S.E.2d 714 (1998) ("I think I need a lawyer" was a request for counsel). The Supreme Court has noted that "if a suspect is 'indecisive in his request for counsel,' the officers need not always cease questioning." Davis, 512 at 460 (quoting Miranda v. Arizona, 384 U.S. 436, 485 (1966)). Furthermore, this Court has held an adult's request for someone other than an attorney does not invoke a Fifth Amendment right to speak with counsel. State v. Register, 323 S.C. 471, 477, 476 S.E.2d 153, 157 (1996) (request for mother).

Appellant's request for her mother or a lawyer was not an unambiguous invocation of her Fifth Amendment right to have counsel present during interrogation. On the contrary, the request was completely ambiguous, and when the officer sought clarification, appellant asked for her mother.[2] The trial court did not abuse its discretion in admitting appellant's statement. See Kennedy, 333 S.C. at 429, 510 S.E.2d at 715 (trial court's conclusion on issues of fact as to the voluntariness of a statement will not be disturbed unless so manifestly erroneous as to show an abuse of discretion).

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[2]The Davis Court specifically declined to adopt a rule requiring officers to ask clarifying questions, but described the practice of asking clarifying questions as "good police practice." 512 U.S. at 461-62.

II. Exculpatory Evidence

Appellant asserts the trial court erred by refusing to admit evidence that LaShawn Roberts wrote appellant a letter admitting she killed the victim because she was jealous. We disagree.

The defense proffered testimony from appellant's roommate in jail, Janet Suber, that Roberts delivered a letter to appellant threatening to kill Suber and admitting that "she did it for Sheri because she was in love with Sheri and Sheri didn't feel the same way about her as she did her, so that's the reason why she killed the other girl." Suber testified she gave the letter to a guard. The guard had no recollection of Suber or this particular letter. The trial court ruled the letter was inadmissible hearsay.

Appellant argues Suber's testimony concerning the letter should have been admitted as a statement against interest. Statements against interest made by an unavailable declarant[3] may be admissible as an exception to the hearsay rule. Rule 804(b)(3), SCRE. However, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Id.

The trial court correctly ruled the hearsay was not sufficiently corroborated to be admissible.[4] Twice recently this Court has explained the

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[3]Roberts invoked her Fifth Amendment privilege, and was therefore "unavailable" for hearsay purposes. See State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992).

[4]The trial court also ruled the testimony inadmissible because the letter, even if it existed, did not exculpate appellant. Trial counsel argued the rule requires the statement merely be "offered to exculpate"; whether the statement is exculpatory is "for the jury to decide." This issue is not argued on appeal.

corroboration requirement of Rule 804(b)(3). State v. McDonald, Op. No. 25225 (S.C. Sup. Ct. filed Dec. 18, 2000) (Shearouse Adv. Sh. No. 44, at p.37); State v. Kinloch, 338 S.C. 385, 526 S.E.2d 705 (2000). A defendant seeking to offer a statement pursuant to this exception bears the "formidable burden" of establishing that corroborating circumstances clearly indicate the trustworthiness of the statement. Kinloch, 338 S.C. at 389, 526 S.E.2d at 706 (citations omitted). Whether a statement has been sufficiently corroborated is a question "left to the discretion of the trial judge 'after considering the totality of the circumstances under which a declaration against penal interest was made.'" McDonald, at 40 (quoting Kinloch, 338 S.C. at 391, n.5, 526 S.E.2d at 708, n.5).

We emphasized in McDonald that the corroboration requirement "goes not to the truth of the statement's contents, but rather to the making of the statement." McDonald, at 41. The trial court here correctly ruled the statement uncorroborated. The guard who was expected to testify that Suber gave him the letter Roberts allegedly wrote threatening her and confessing to the murder had no recollection of Suber or the letter. Thus, Suber's proffered testimony is the only evidence the letter ever existed. Appellant did not carry her burden of showing circumstances clearly corroborating the making of the statement, and the trial court therefore did not abuse its discretion in refusing to admit the testimony.

Appellant's convictions are **AFFIRMED.**

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

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

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The State, Respondent,

v.

Louis English Fuller, Appellant.

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Appeal From Fairfield County
Paul E. Short, Jr., Circuit Court Judge

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Opinion No. 25334
Heard June 5, 2001 - Filed July 23, 2001

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**AFFIRMED**

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

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Tracey C. Green, of Columbia; and Solicitor John R. Justice, of Chester, for respondent.

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**JUSTICE BURNETT**: Appellant was convicted of murder and sentenced to life imprisonment. He appeals.

## FACTS

Appellant was indicted for the murder of Travelee Johnson (victim). At trial, appellant testified in his own defense. He stated he and victim were friends; appellant, Danny Murphy, and Robert Johnson were "associates."

Appellant explained he, victim, Johnson, and Murphy planned to rob Juan Williams' home. Using his roommate's car, appellant drove the men near Williams' home; they waited in the car for Williams to leave home. Appellant fell asleep.

Appellant awoke when he heard victim screaming. According to appellant, Murphy held victim while Johnson stabbed him. Murphy and Johnson exited the vehicle and pulled victim out of the car. Appellant drove off a short distance then returned, backing the car down the road. He testified he planned to run over Murphy and Johnson so they would leave victim alone, but instead, Murphy and Johnson jumped into the car. Appellant drove Murphy and Johnson back to town. Appellant wondered if they were going to kill him.

At Murphy's instruction, appellant stopped the vehicle at a dumpster; Murphy threw a knife inside. Appellant then drove the men to their apartment. Murphy and Johnson put their bloody clothing in a bag. Appellant put the bag behind a dumpster. He stated he took Murphy's boots to his own apartment. The next morning, appellant gave Johnson towels and sponges and Johnson washed the car. Appellant suggested Murphy and Johnson were angry at victim because they believed he had stolen items from their apartment.

## ISSUES

I. Did the trial court err by refusing to charge accessory after the fact to murder?

II. Did the trial court fail to give a complete and clear instruction on accomplice liability?

## DISCUSSION

Appellant requested the trial judge instruct the jury on accessory after the fact to murder. Noting appellant had not been indicted for accessory after the fact and that accessory after the fact was not a lesser-included offense to murder, the trial judge denied the request but stated appellant could argue accessory after the fact.[1]

Appellant now argues the trial judge erred by refusing his requested accessory after the fact charge. He claims because he did not know Johnson and Murphy planned to kill victim and he was asleep when the stabbing first occurred, "exclusionary" facts existed to warrant a charge on accessory after the fact. We disagree.

The elements of accessory after the fact to a crime are 1) the felony has been completed, 2) the accused must have knowledge that the principal committed the felony, and 3) the accused must harbor or assist the principal felon. State v. Collins, 329 S.C. 23, 495 S.E.2d 202 (1998) (Collins II). A defendant may not be found guilty as an accessory when indicted solely as a principal. State v. Collins, 266 S.C. 566, 225 S.E.2d 189 (1976) (Collins I).

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[1]In his closing statement, appellant suggested he could be guilty of accessory after the fact to murder but should be acquitted of murder.

When the defendant has not been indicted as an accessory, it is proper to charge the jury on the difference between accessory and principal "where the evidence points to an exclusionary offense which dictates that different proof is required as to each defendant." State v. Good, 315 S.C. 135, 139, 432 S.E.2d 463, 466 (1993). For instance, in Collins I, supra, the Court determined the defendant was entitled to an accessory before the fact charge when he was in jail at the time of the felony and therefore could only be guilty of accessory before the fact. In State v. Leonard, 292 S.C. 133, 355 S.E.2d 270 (1987), where co-defendants were charged with reckless homicide arising from the operation of a motor vehicle, the Court held because only one person could be the driver of the vehicle, a charge distinguishing principal and accomplice liability was required. On the other hand, in State v. Gates, 269 S.C. 557, 238 S.E.2d 680 (1977), the Court ruled the defendant who drove the getaway car but did not enter the convenience store during the robbery was not entitled to an accessory after the fact charge. The Court noted there is "a factual distinction between a crime where the defendant was physically unable to participate and one where the defendant acted as the 'getaway' driver." State v. Good, supra S.C. at 137, S.E.2d at 465. One authority explains "[b]y 'exclusionary offense' the Court means an offense which by law, or by the facts of the case, could have been committed by only one principal first."[2] WILLIAM SHEPARD MCANINCH, THE CRIMINAL LAW OF SOUTH CAROLINA, 369 (1996).

In Good, supra, the Court noted the reason for precluding an accessory instruction when an exclusionary offense does not exist:

> If accessory after the fact is not charged in the indictment, but is instructed to clarify mere presence, a finding of accessory after the fact is the equivalent to a finding of not guilty. The real impact of the instruction is that it permits the jury to reach a

[2]A "principal first" is one who actually does the felonious act or who causes the felonious act to be committed by an innocent agent such as a child or insane person. State v. Posey, 35 S.C.L. (4 Strob.) 142 (1849).

> compromise verdict on a non-charged offense. Moreover, to require an accessory instruction on these facts opens the door for every criminal defendant to create a lesser-included offense for which they could not be convicted.

Id. S.C. at 138, S.E.2d at 465.

Appellant was not entitled to a charge on accessory after the fact. First, he was not entitled to the charge because he was not indicted as an accessory and accessory after the fact is not a lesser-included offense to murder. Second, the evidence did not eliminate appellant as a principal first. To the contrary, appellant admitted being present during the stabbing. Unlike the co-defendants in State v. Leonard, supra, and Collins I, supra, appellant could have participated in victim's murder as a principal to the same extent as Johnson and Murphy.[3] If the jury believed appellant's claims that he had no knowledge of Johnson and Murphy's plan to kill victim and that he was asleep when victim was attacked, appellant would have been acquitted of murder.

This case is similar to State v. Good, supra, where two brothers were charged with double homicide. Each brother claimed the other committed the murders while he was outside the family's camper. The Court held there was no error in refusing to charge accessory after the fact because "there is no exclusionary situation which eliminates one brother or the other from having participated in the murder as the principal." Id. S.C. at 139, S.E.2d at 466.

The remaining issue is affirmed pursuant to Rule 220(b)(1), SCACR, and the following authorities: State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989) (charge on accomplice liability substantially covered

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[3]Johnson and Murphy were also indicted for murder. Murphy pled guilty to accessory after the fact. The record does not indicate the disposition of Johnson's charges.

language requested by defendant); State v. Barwick, 280 S.C. 45, 310 S.E.2d 428 (1983) (jury charge is adequate if it fully and fairly covers the substance of the requested charge); State v. Haney, 257 S.C. 89, 184 S.E.2d 344 (1971) (refusal to give requested charge not error where requested charge merely rephrases and repeats principles expounded in given charge); State v. Clary, 222 S.C. 549, 73 S.E.2d 681 (1952) (no error in refusing to charge the precise language requested where jury is correctly instructed in accord with the requested charge).

**AFFIRMED.**

**TOAL, C.J., MOORE and WALLER, JJ., concur.**
**PLEICONES, J. concurring in result only.**

# The Supreme Court of South Carolina

Glenn E. Kennedy, Charles Wolfe, Terry Knighton, and Jerry Landford, Individually and on Behalf of a Class of Persons Similarly Situated, Appellants,

v.

The South Carolina Retirement System and the South Carolina Budget and Control Board, Respondents.

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O R D E R

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Appellants have filed a petition for rehearing and a motion to allow oral argument. Respondents have filed a return, opposing appellants' petition and motion. We deny the petition and motion.

In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument. Rule 221(a), SCACR. The dissent argues the appellants' petition should be granted because of "one significant argument not previously considered by the Court." The argument was not considered because it was never presented to this Court. Further, there is no evidence contained in the Record on Appeal which supports the appellants' new argument. Appellants present this argument for the first time in this second petition for rehearing, even though this Court has heard this case twice before -- once on appeal and once on rehearing. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)). Appellants had the opportunity to present their arguments and evidence when this case was originally heard by the trial court. Therefore, contrary to the dissent's argument, this Court should not consider appellants' previously unpresented evidence when deciding whether to grant the petition for rehearing.

The dissent argues the Court "should accept some responsibility for itself overlooking the elimination of longevity raises in its interpretation of the legislature's intent in this matter and grant rehearing in this case." We reiterate this Court's longstanding principle of error preservation. "Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule." *Toal, supra* at 65. The appellants have the responsibility to identify errors on appeal, not the Court. South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal. *See Butler v. Town of Edgefield*, 328 S.C. 238, 493 S.E.2d 838 (1997). We, therefore, decline to depart from our standard issue preservation rules in order to address the longevity raises issue as the dissent suggests. As Chief Judge Alex Sanders so aptly stated, "[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991).

The appellants' petition for rehearing and motion for oral argument is denied.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

Justice Costa M. Pleicones, not participating.

Columbia, South Carolina

July 23, 2001

**JUSTICE BURNETT:** I would grant appellants' motion for argument on the petition for rehearing and the petition for rehearing. The critical issue presented in Kennedy v. South Carolina Retirement Sys., Op. No. 25133 (S.C. Sup. Ct. refiled May 21, 2001) (Shearouse Adv. Sh. No. 19 at 12) is whether, in 1986, the General Assembly intended to change the method of including accrued unused annual leave in the calculation of average final compensation in order to increase retirement benefits.[1] The petition for rehearing alleges at least one significant argument not previously considered by the Court in answering this question.

It is readily apparent that both the majority and dissent were greatly concerned about the impact of their decisions on the fiscal security of the State retirement system. As part of its reasoning, the majority even asserted that because the General Assembly did not provide funding, it could not have intended to change the method of including accrued unused annual leave in the calculation of average final compensation and thereby did not approve the

[1]While the majority of the Court answered this question affirmatively in its original opinion, it answered the question negatively in its recent decision. Kennedy v. South Carolina Retirement Sys., Op. No. 25133 (S.C. Sup. Ct. filed May 22, 2000) (Shearouse Adv. Sh. No. 20 at 18).

increase alleged by appellants. As argued for the first time in the petition for rehearing, the General Assembly eliminated the automatic longevity raises for state employees at the same time (by different provisions in the same Act) it allegedly altered the method of including accrued unused annual leave in the calculation of average final compensation for retirement benefits.[2] According to appellants, the elimination of longevity raises created the funding mechanism for the increase in retirement benefits, thereby establishing the General Assembly did intend to change the method of including accrued unused annual leave in the calculation of average final compensation and providing a corresponding increase in retirement benefits.[3]

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[2]Appellants assert that, in spite of applicable discovery requests, they were not apprised of the statutory amendment until after the Court issued its May 2001 opinion. Respondents' discovery responses are incomplete. For instance, when questioned about methods for funding the benefit increase without seeking additional funds from the General Assembly, respondents failed to mention any savings produced by the elimination of longevity raises. Instead, respondents stated increased retirement benefits would "most likely be funded through additional contributions from current employees, additional funding from the General Assembly, and probable reductions or eliminations of cost of living increases for current retirees."

[3]Appellants further assert that, due to the elimination of longevity raises, over the past fifteen years, the Retirement System, which has refused to interpret § 9-1-10(17) as changing the method of including accrued unused annual leave in average final compensation, has become significantly

I would grant the motion for argument on the petition for rehearing and the petition for rehearing because our Court has not had the opportunity to consider the effect of the elimination of longevity raises on its interpretation of whether the General Assembly intended to change the method by which accrued unused annual leave is included in the calculation of average final compensation. While the majority correctly notes a petition for rehearing is not to provide the losing party with a chance to try its case de novo, I believe the Court should accept some responsibility for itself overlooking the elimination of longevity raises in its interpretation of the legislature's intent in this matter and grant rehearing in this case.

s/E.C. Burnett, III J.

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overfunded, thereby allowing past and present state employees to unfairly fund future employees' retirement.

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

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Richard Dukes, Employee,

Respondent,

v.

Rural Metro Corporation, Employer, and Reliance National Indemnity Co., Carrier,

Appellants.

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Appeal From Colleton County
Diane S. Goodstein, Circuit Court Judge

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Opinion No. 3372
Heard October 11, 2000 - Filed July 23, 2001

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**AFFIRMED**

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Kirsten L. Barr, of Trask & Howell, of Mt. Pleasant, for appellants.

Daniel A. Beck, of Asbill & Beck, of Charleston, for respondent.

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**SHULER, J.**: Rural Metro Corporation and its carrier, Reliance National Indemnity Co., appeal the circuit court's order affirming a workers' compensation award to Richard Dukes. We affirm.

## FACTS/PROCEDURAL HISTORY

Rural Metro Corporation employed Richard Dukes as an emergency medical technician at its base in Walterboro, South Carolina. On October 7, 1997, Dukes, accompanied by his partner, Terry Salzman, left his office to take a smoking break in a designated area outside the building. Because Dukes and Salzman shared a mutual interest in guns, Salzman retrieved a newly purchased pistol and gave it to Dukes for inspection. Dukes looked the weapon over and handed it back. As he turned away, the pistol accidentally discharged and a bullet struck Dukes in the upper left thigh, fracturing his femur.

Dukes filed a Form 50 request for workers' compensation benefits and a hearing was held June 8, 1998. In his testimony, Dukes recounted the incident as described above, which Salzman confirmed. The single commissioner denied the claim, finding Dukes' injury "did not arise out of" his employment as there was "no causal connection" between his work conditions and the accidental gunshot wound. On appeal, the full commission reversed, stating Dukes suffered "a compensable injury by accident" because the shooting occurred during his "down time" and he was neither an aggressor nor involved in horseplay. On August 23, 1999, the circuit court affirmed the commission, concluding the gunshot wound "arose out of" Dukes' employment with Rural Metro, thereby entitling him to compensation. This appeal followed.

## LAW/ANALYSIS

### Standard of Review

The full commission is the ultimate fact finder in a workers' compensation case. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). However, when the facts are admitted or otherwise undisputed, the question of whether an accident is compensable is purely a question of law. Douglas v. Spartan Mills,

140 S.E.2d 173, 245 S.C. 265 (1965); Eadie v. H.A. Sack Co., 322 S.C. 164, 470 S.E.2d 397 (Ct. App. 1996). Under such circumstances, this Court may not reverse unless the commission's decision was controlled by an error of law. See Hamilton v. Bob Bennett Ford, 336 S.C. 72, 76, 518 S.E.2d 599, 601 (Ct. App. 1999) ("The appellate court's review is limited to deciding whether the [c]ommission's decision is unsupported by substantial evidence or is controlled by some error of law."); see also S.C. Code Ann. § 1-23-380(A)(6)(d), (e) (Supp. 2000).

In the context of workers'compensation law, an employee's injury must be caused by an "accident arising out of and in the course of the employment." S.C. Code Ann. § 42-1-160 (1985 & Supp. 2000). Since the facts of this case are not in dispute and Rural Metro concedes Dukes' injury occurred in the course of his employment, the sole issue on appeal is whether his accidental injury "arose out of" his employment with Rural Metro.

Our supreme court has stated often that "'[a]rising out of' refers to the origin of the cause of the accident . . . ." Baggott v. S. Music, Inc., 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998). In other words, the accident and ensuing injury "must be proximately caused by the employment." Broughton v. S. of the Border, 336 S.C. 488, 497, 520 S.E.2d 634, 638 (Ct. App. 1999). An accidental injury arises out of one's employment, therefore, "when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury." Id.; see Douglas, 245 S.C. at 269, 140 S.E.2d at 175.

In the instant case, Dukes' testimony reveals Salzman's firearm was in no way associated with his employment. As a result, Rural Metro argues Dukes' injury is not compensable because there was no causal connection between his job as a paramedic and the accidental shooting. This argument, however, fails to recognize that proof of a causative relationship is not required when an accident occurs during a clearly defined break from work within the parameters of the personal comfort doctrine.

Courts utilize the personal comfort doctrine to determine when an entirely

personal workplace activity is sufficiently incidental to the employment to permit recovery under our workers' compensation statute. See Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 508 S.E.2d 21 (1998); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000). As the court reiterated in Osteen:

> [It is] well settled that an employee, in order to be entitled to compensation, need not necessarily be engaged in the actual performance of work at the time of injury; it is enough if he is upon his employer's premises, occupying himself consistently with his contract of hire in some manner pertaining to or incidental to his employment.

Osteen, 333 S.C. at 47, 508 S.E.2d at 23 (quoting McCoy v. Easley Cotton Mills, 218 S.C. 350, 355-56, 62 S.E.2d 772, 774 (1950)). Simply put, the personal comfort doctrine judicially decrees that, because certain on-the-job acts of personal comfort are "necessarily contemplated," they are incidental to the employment itself and thereby encompass the inevitable attendant dangers. Id. As a consequence, an accidental work injury sustained during an activity covered by the doctrine is "*deemed* to have arisen out of the employment." Id. at 46, 508 S.E.2d at 23 (emphasis added) (quoting Mack v. Post Exch., 207 S.C. 258, 264, 35 S.E.2d 838, 840 (1945)).

Smoking is unquestionably a personal comfort activity under the doctrine. See id. at 47-48, 508 S.E.2d at 23 (stating the doctrine is limited to "imperative acts such as eating, drinking, smoking, seeking relief from discomfort [i.e., getting warm, getting fresh air or relief from heat, seeking toilet facilities], preparing to begin or quit work, and resting or sleeping"); Mack, 207 S.C. at 265, 35 S.E.2d at 841 ("[T]he employer must expect the employed to resort to the use of tobacco as a necessary adjunct to the discharge of his employment.") (citation omitted).

Here, Rural Metro acknowledges Dukes was on an authorized smoking break when the accident occurred. Because this activity falls squarely within the

personal comfort doctrine, we find Dukes' smoking break per se incidental to his employment. Accordingly, the gunshot wound sustained by Dukes is deemed to have arisen from his employment with Rural Metro and is therefore a compensable injury. Compare McCoy, 218 S.C. at 356, 62 S.E.2d at 774 (finding employee's injury, incurred when a co-worker threw a copper pipe and struck him in the eye, compensable because the accident occurred during a smoke break and therefore arose "out of" his employment), and Mack, 207 S.C. at 264, 35 S.E.2d at 840 ("[Since] the accidental [burn] injury resulted from [Mack's] effort to gratify his desire to smoke, such activity did not remove Mack from the protection of the compensation law."), with Osteen, 333 S.C. at 48, 508 S.E.2d at 24 (concluding that although employee sustained back injury during authorized break from work, accident was not compensable under personal comfort doctrine because employee was obtaining ice for an upcoming family picnic at the time, an activity not deemed a "natural incident" of employment since it did not involve "smoking, resting, sleeping, eating, drinking, seeking relief from discomfort, or preparing to begin or quit work").

**AFFIRMED.**

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

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

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The State of South Carolina,

Respondent,

v.

Eric R. Brouwer,

Appellant.

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Appeal From Cherokee County
R. Markley Dennis, Jr., Circuit Court Judge

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Opinion No. 3373
Heard June 4, 2001 - Filed July 23, 2001

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**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

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Rodman C. Tullis, of Spartanburg, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert E. Bogan, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; Solicitor Holman C. Gossett, of

Spartanburg, for respondent.

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**SHULER, J.**: A jury convicted Eric Brouwer of disseminating obscene material and the trial court sentenced him to four years imprisonment, suspended on service of six months, and three years probation. Brouwer appeals, arguing the court erred in failing to grant a directed verdict, in refusing to admit comparable materials into evidence, and in sentencing him more harshly than a co-defendant who pled guilty. We affirm in part, reverse in part, and remand.

## FACTS/PROCEDURAL HISTORY

In early February 1999, the Cherokee County Metro Narcotics Unit began an undercover investigation of Bedtyme Stories, an adult business, after receiving complaints from local citizens. Officer David Parker visited the store on several occasions, posing as a customer and inspecting videos potentially in violation of the state's obscenity laws. On February 18 Parker rented a videotape entitled AGB2 (ANAL GANG BANGERS 2) from Wendy Kaplan, a sales clerk. Parker and fellow Officer Christy White returned and purchased a copy of the movie on February 22 from another clerk, Eric Brouwer.

On the day of sale, Parker informed Brouwer he wanted to buy AGB2 and Brouwer accessed Parker's account on the store computer. When Brouwer asked Parker if he was buying the movie because he liked it, Parker replied he was starting a "little library." Brouwer explained he thought Parker might have been under the mistaken impression he was required to buy the movie because he had rented it. Brouwer then scanned the tape, placed it in a bag, and told Parker the price. Parker paid and signed a receipt certifying he was at least twenty-one years old, and Brouwer handed him the bag.

A Cherokee County grand jury indicted both Brouwer and Kaplan for disseminating obscene material. Scheduled for a joint trial, Kaplan ultimately pled guilty and the trial court sentenced her to two years plus a $5,000 fine, provided that upon payment of a fine of $750 plus costs the balance of the

sentence would be suspended. The court also placed Kaplan on probation for two years.

Brouwer proceeded to trial and the jury returned a verdict of guilty. The trial court sentenced him to four years imprisonment, balance suspended upon service of six months, and three years probation. In addition, the court imposed special conditions requiring Brouwer to "participate in such counseling as probation deems appropriate, which should include something about sensitivity counseling" and human relationships. This appeal followed.

## LAW/ANALYSIS

### I. Directed Verdict

Brouwer first argues the trial court erred in refusing his motion for a directed verdict because the State failed to prove he "knowingly" disseminated obscene material. We disagree.

In considering a directed verdict motion, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). On appeal of a criminal case, the reviewing court considers the evidence in the light most favorable to the State. State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). If any direct or substantial circumstantial evidence exists which reasonably tends to prove the defendant's guilt, or from which his guilt may be fairly and logically deduced, this Court must find the trial court properly submitted the case to the jury. State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000).

The indictment charged Brouwer pursuant to S.C. Code Ann. § 16-15-305(A) (Supp. 2000), which prohibits a person from "knowingly" disseminating obscene material.[1] The statute defines "knowingly" as "having general

[1] Material may be "obscene" if it depicts specifically defined sexual conduct, including *inter alia*: actual or simulated vaginal, anal, or oral

knowledge of the content of the subject material or performance, or failing [to have such knowledge] after reasonable opportunity to exercise reasonable inspection which would have disclosed the character of the material or performance." § 16-15-305(C)(5).

The record reflects Bedtyme Stories was located in a building with a "yellow awning" identifying the business as an "adult store." It also reveals Brouwer asked Parker to show an I.D. before entering the establishment, and made a copy of his driver's license because he appeared to be under the age of thirty. In addition, when Parker bought AGB2, Brouwer required him to sign a receipt attesting that he was at least twenty-one years old. This evidence suggests Brouwer possessed at least some general knowledge of the adult nature of the store's merchandise.

More important, during a transaction lasting several minutes, Brouwer handled the movie for a minimum of fifteen to twenty seconds, scanning it with an electronic device and placing it in a bag. The tape, in its original packaging with the full title appearing on the front and back, prominently displays "AGB2" in large print (with the words "ANAL GANG BANGERS 2" in smaller print underneath) on the top, bottom, and sides of the box. The back of the box also features three sexually explicit photographs, two of which depict a female engaged in simultaneous sexual activity with two men, along with a written summary of the movie's contents.

In our view, Brouwer's personal exposure to the video, even for a relatively short period of time, coupled with the obviously adult nature of the Bedtyme Stories business, is sufficient evidence tending to prove he knew or should have known the general character of the tape's content. See Commonwealth v. Dane Entm't Servs., Inc., 505 N.E.2d 892, 893 (Mass. App.

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intercourse; masturbation; lewd exhibition of male or female genitals; touching, caressing, or fondling of covered or exposed genital or anal regions for actual or apparent sexual stimulation or gratification. See S.C. Code Ann. § 16-15-305(C)(1) (Supp. 2000).

Ct. 1987) (holding evidence, including fact that film was billed as "X-Rated" on directory in theater lobby opposite ticket counter along with other adult movies, that a sign nearby stated no minors were allowed, and that the word "ADULT" appeared twice in boldface type on ticket face, sufficiently warranted conclusion by a rational trier of fact that the defendant "had a general awareness of the [obscene] character of the film"); compare State v. Bean, 327 S.C. 589, 490 S.E.2d 16 (1997) (finding the State failed to prove nightclub owners knowingly permitted obscene dancing on their premises where no evidence indicated owners, who were not present when police videotaped the allegedly lewd conduct, knew or had reason to know nude dancers were bending over and exposing themselves to customers); State v. Pendergrass, 13 S.W.3d 389, 394-95 (Tenn. Crim. App. 1999) (stating evidence video store proprietor stocked items of a sexual nature and advertised such on his building's signs was insufficient to establish he "knowingly distributed obscenity," where the prosecution failed to establish the degree of his involvement in the business and presented no evidence he was on the premises "*or engaged in activities such as assisting customers with purchases*, stocking shelves, receiving merchandise, or ordering merchandise") (emphasis added). The trial court, therefore, did not err in sending the case to the jury.

## II. Exclusion of Comparable Materials

Brouwer further contends the trial court erred in refusing to admit material comparable to AGB2 as evidence of the requisite community standard. We find no error.

The determination of whether certain materials are "obscene" lies within the province of the jury. For purposes of our dissemination statute, material is deemed obscene if:

> (1) to the average person applying contemporary community standards, the material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (C) of this section;

> (2) the average person applying contemporary community standards relating to the depiction or description of sexual conduct would find that the material taken as a whole appeals to the prurient interest in sex;
>
> (3) to a reasonable person, the material taken as a whole lacks serious literary, artistic, political, or scientific value; and
>
> (4) the material as used is not otherwise protected or privileged under the Constitutions of the United States or of this State.

§ 16-15-305(B). The "community standards" to be employed by the jury in "determining prurient appeal and patent offensiveness are the standards of the area from which the jury is drawn." Id. at (E).

Before trial, Brouwer requested a preliminary ruling on the admissibility of materials comparable to AGB2 to show the video fell within the ambit of Cherokee County's contemporary community standards. The trial court, finding the mere availability of similar materials in the community did not demonstrate community acceptance, refused to admit the exhibits but permitted Brouwer to proffer the evidence for appeal.[2]

The admissibility of allegedly comparable materials in an obscenity trial is an issue of first impression in this state. Although decisions from other jurisdictions are not entirely uniform, the vast majority of state and federal courts have concluded such evidence is admissible subject to the predicate test for admissibility found in Womack v. United States, 294 F.2d 204 (D.C. Cir.

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[2] The proferred items, all sexually explicit, included a compilation videotape recorded from satellite broadcasts via DirecTV; video clips downloaded from the internet onto compact disc; and two videos, Young Tails and The Squirt is on the Hunt, whose rental or purchase from Bedtyme Stories by undercover officers never resulted in any arrest or prosecution.

1961), *cert. denied*, 365 U.S. 859 (1961). We agree evidence of comparison material generally is admissible to assist a jury in determining the prevailing community standards it must employ in evaluating allegedly obscene material. See Hamling v. United States, 418 U.S. 87, 125 (1974) ("[J]ust as a defendant in any other prosecution, [a defendant in an obscenity case] is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried."); Smith v. California, 361 U.S. 147, 165 (1959) (Frankfurter, J., concurring) ("[I]n determining what constitutes obscenity, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are.") (internal citation omitted); Flynt v. State, 264 S.E.2d 669, 674 (Ga. Ct. App. 1980) ("[W]e are persuaded that evidence which satisfies the Womack test is relevant, probative evidence which should be admitted in an obscenity trial for the consideration of the trier of fact."). As our sister court stated in Flynt v. State:

> The rationale behind the admission of "comparative" evidence is to allow the defendant in an obscenity case the opportunity to attempt to persuade the trier of fact that the challenged material does not exceed contemporary community standards, as represented by the comparable material and against which the challenged material is judged. The comparative material is tangible evidence of contemporary community standards.

Flynt, 264 S.E.2d at 674.

Such evidence, however, should not be admitted in the absence of a proper foundation ensuring its probative nature. See United States v. Pinkus, 579 F.2d 1174, 1175 (9th Cir. 1978) ("[T]here are foundational requirements for admissibility of such evidence that have evolved as logical indicia of its materiality and relevance."); Womack v. United States, 509 F.2d 368, 377-78 (D.C. Cir. 1972) ("Womack merely requires an adequate foundation to be laid for the introduction of comparison evidence. . . . The burden is on the defendant and in the absence of such a showing, the evidence must be excluded as lacking

sufficient probative value.") (footnotes omitted); State v. Wages, 483 N.W.2d 325, 327 (Iowa 1992) ("[Womack] foundational requirements . . . are merely logical prerequisites under traditional concepts of materiality and relevancy."); State v. J-R Distrib., Inc., 512 P.2d 1049, 1083 (Wash. 1973) (en banc) ("To be relevant, the proferred [comparison] evidence must have something more than minimal probative value. It must have some actual probative weight upon the issue of fact under consideration."); see also Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided . . . .").

The "Womack test," as it has come to be known, requires a proponent of comparison materials to lay a foundation prior to introducing them into evidence by showing: (1) the materials being compared are in fact "similar," and (2) the comparison materials enjoy a "reasonable degree of community acceptance." Womack, 294 F.2d at 206. In determining "similarity," the trial court must review the proffered material to see if it reasonably resembles the material which the State alleges to be obscene. See Flynt, 264 S.E.2d at 676 (stating the "similarity" of comparable material is governed by its "reasonable resemblance" to the material at issue) (quoting Pinkus, 579 F.2d at 1175). Here, the State stipulated that the items Brouwer sought to introduce were sufficiently similar to AGB2 to meet the first prong of the Womack test.

The trial court also took judicial notice "that materials that may be very similar to [AGB2] are available to anybody." However, "[m]ere availability of similar material by itself means nothing more than that other persons are engaged in similar activities." United States v. Manarite, 448 F.2d 583, 593 (2d Cir. 1971); see Hamling, 418 U.S. at 125-26 ("The availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with circulating."). Consequently, evidence of "mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance." Manarite, 448 F.2d at

593. As a preliminary matter, therefore, the trial court must distinguish between a defendant's showing of "mere availability" and that of "a reasonable degree of community acceptance." Womack, 509 F.2d at 379-80; see State v. Johnson, 722 P.2d 681, 682 (N.M. Ct. App. 1986) ("The fact that sexually explicit material was obtained in a particular locality does not establish a reasonable degree of community acceptance."); Flynt, 264 S.E.2d at 673 ("[Availability] is no indication that the average person, applying contemporary community standards, would not consider the [] magazines [in a particular case] to be obscene.").

As noted in Womack, "a determination of the precise point at which a publication is so widely sold and is so generally available in the community as to warrant a finding of community acceptance is difficult to fix with assurance." Womack, 509 F.2d at 379. Clearly, it is insufficient to offer comparables alone, as such material is not relevant in the absence of additional evidence tending to prove its "acceptance" in the community.[3] See id. ("[I]t is not difficult to identify that which clearly does not even approach an appreciable level of community acceptance and to exclude that material as possessing so little probative value as to serve only to impede the resolution of the issues."); State v. Johnson, 722 P.2d 681, 682-83 (N.M. Ct. App. 1986) (affirming trial court's refusal to admit for comparison an adult magazine purchased from a bookstore near the defendant's establishment, where the defendant offered no evidence concerning the extent of the publication's local distribution; the court held defendant's evidentiary proffer "went to 'mere availability' rather than to 'a reasonable degree of community acceptance'"). Thus, courts have held the Womack foundation requirement may be met by supplementing the comparable

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[3] Applying the Womack test, numerous other states have come to the same conclusion. See, e.g., Baird v. State, 671 S.W.2d 191 (Ark. Ct. App. 1984); Flynt v. State, 264 S.E.2d 669 (Ga. Ct. App. 1980); State v. Wages, 483 N.W.2d 325 (Iowa 1992); State v. Carlson, 192 N.W.2d 421 (Minn. 1971); City of Sioux Falls v. Mini-Kota Art Theatres, Inc., 247 N.W.2d 676 (S.D. 1976); State v. Rice, 790 S.W.2d 296 (Tenn. Ct. App. 1989); State v. J-R Distrib., Inc., 512 P.2d 1049 (Wash. 1973).

material with expert testimony,[4] sales figures,[5] and possibly public opinion polls regarding the precise material in question.[6]

In the instant case, Brouwer attempted to introduce material similar to AGB2, which he claimed was widely available in Cherokee County via the internet and DirecTV. While we agree such evidence *could be admissible* in an obscenity prosecution, here Brouwer tendered no proof the items offered enjoyed a reasonable degree of acceptance in the local community, such as expert testimony or cable, internet or satellite television provider subscription and sales records.[7] Accordingly, because Brouwer failed to lay a proper

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[4] See Womack v. United States, 509 F.2d 368 (D.C. Cir. 1972); Pierce v. State, 296 So.2d 218 (Ala. 1974); Flynt v. State, 264 S.E.2d 669 (Ga. Ct. App. 1980); City of Sioux Falls v. Mini-Kota Art Theatres, Inc., 247 N.W.2d 676 (S.D. 1976).

[5] See Pierce v. State, 296 So.2d 218 (Ala. 1974); Flynt v. State, 264 S.E.2d 669 (Ga. Ct. App. 1980). A proponent must be careful, however, to offer appropriate sales figures as opposed to distribution. See Flynt, 264 S.E.2d at 676 (rejecting testimony from chief financial officer of magazine distributor regarding distribution figures for 324 county retail stores because such figures indicated only the number of magazines available at newsstands and other outlets and nothing more).

[6] See Flynt v. State, 264 S.E.2d 669 (Ga. Ct. App. 1980). Although Flynt affirmed the trial court's refusal to admit the results of a public opinion survey, the court indicated this was because the poll "merely inquired as to general opinions concerning the depiction of 'nudity and sex,'" and the results, therefore, "were not relevant to the issue" of whether the particular magazines at issue were obscene. Id. at 672.

[7] Although Brouwer did proffer a compilation of some thirty photocopied register receipts reflecting purchases and rentals of sexually-oriented items by Bedtyme Stories' customers, such "self-selected" evidence falls far short of the requisite showing to establish community acceptance.

foundation establishing the relevance of the proffered materials, the trial court did not err in excluding the evidence.[8] See Pinkus, 579 F.2d at 1175 ("Whether a foundational showing is sufficient to meet the second prong of the [Womack] test [in the first instance] is a matter for the trial judge to determine as he has 'wide discretion whether to permit the introduction' of comparable materials.") (quoting Womack, 509 F.2d at 378); see also State v. Fulton, 333 S.C. 359, 509 S.E.2d 819 (Ct. App. 1998) (an evidentiary ruling of the trial court will be reversed only upon a demonstrated abuse of discretion resulting in prejudice).

## III. Sentence

Finally, Brouwer claims the trial court, in passing sentence, improperly considered the fact that he exercised his right to a jury trial. We agree.

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See State v. J-R Distrib., Inc., 512 P.2d 1049, 1083 (Wash. 1973) (en banc) (finding defendant theater failed to show a reasonable degree of community acceptance by proffering a police officer's testimony that a dozen or so other local theaters were exhibiting similar films; court found proposed evidence "involved such a microscopic portion" of community residents, "severely limited both as to area and numbers of people," that it "could not have been relevant to establish contemporary community standards"). Moreover, Brouwer's attorney specifically declined the trial court's offer to allow expert testimony on the matter, stating "Well, I don't know if that's necessary at this time, Your Honor. I'll move on to the next issue."

[8] Brouwer also asserts other videos, "confiscated" from Bedtyme Stories and reviewed by Cherokee County law enforcement officials without subsequent prosecution, should have been admitted "as an accurate barometer of community acceptance." This contention is meritless. As the second Womack court noted, the "mere failure to prosecute does not begin to constitute a sufficient showing of [the Womack foundation requirement]." Womack, 509 F.2d at 380; see also State v. Thrift, 312 S.C. 282, 291-92, 440 S.E.2d 341, 346 (1994) ("Both the South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor's hands.") (footnotes omitted).

After the jury returned its verdict, Brouwer, pursuant to Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999), asked the court to impose a sentence comparable to that given Wendy Kaplan, his co-worker and co-defendant who pled guilty immediately before trial. Because the two were similarly situated in that both were newly hired and trained store clerks with no prior criminal record, and both were convicted of disseminating the exact same material, Brouwer argued for a proportionate sentence. The trial court declined the request, explaining that Kaplan received a more lenient sentence because she admitted guilt:

> I'm a judge that gives serious consideration for someone admitting their guilt. I think that's important. . . . I believe that's the first step towards rehabilitation. . . . [T]here is no way in rhyme or reason for us to ever give a sentence for someone pleading guilty the same sentence for a jury trial. Then we have ignored the fact that a person has admitted their guilt. . . . And . . . I will take [that] into consideration in imposing this sentence, because it is not an admission of guilt.

In Davis, our supreme court found an attorney rendered ineffective assistance of counsel when he failed to object to nearly identical comments by the trial court. In response to the defendant's request for a sentence comparable to two co-defendants who pled guilty, the court there stated:

> Yes, ma'am, but [Davis] didn't plead guilty. Those other two people, they pled guilty. They admitted what they had done and to me that's the first step towards rehabilitation . . . .

Davis, 336 S.C. at 332, 520 S.E.2d at 802. In granting Davis post-conviction relief, the supreme court held:

> In response to [Davis'] argument, the trial judge

> unequivocally stated that the other defendants had, in fact, pled guilty. The trial judge further expressed his preference for guilty pleas by explaining that such admissions of responsibility were the first steps toward rehabilitation. We find these statements clearly revealed that the trial judge, in sentencing [Davis], improperly considered [his] decision to proceed with a jury trial.

Id. at 333, 520 S.E.2d at 803.

We find the trial court's comments in this instance indistinguishable from those expressly disapproved in Davis. Although the court herein also stated it had never, and never would, "punish someone for exercising their right to a jury trial," we believe the mere disavowal of wrongful intent cannot remove the taint inherent in the court's commentary, especially since the record fails to reflect an otherwise appropriate basis for Brouwer's disparate sentence. See id. at 332, 520 S.E.2d at 802 (finding trial court's sentencing rationale impermissible, despite fact that court concluded comments by stating "and when a fellow wants a trial [—] which he's entitled to as a matter of law — [] that's fine"). Accordingly, we reverse Brouwer's sentence and remand for resentencing. See State v. Hazel, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995) (remanding case for resentencing hearing where the trial court "relied heavily on [Hazel's] exercise of his right to a jury trial" in refusing a YOA sentence by stating, "Well, it's one thing, if he'd pled guilty, I'd have considered that . . .").

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

**HUFF, J., concurs.**

**ANDERSON, J., dissents in a separate opinion.**

**ANDERSON, J. (dissenting):** I respectfully dissent as to the majority's reversal of Eric Brouwer's sentence. The majority concludes the trial court, in passing sentence, improperly considered the fact that Brouwer exercised his right to a jury trial. I disagree. I would AFFIRM Brouwer's sentence.

## I. SENTENCING CONSIDERATIONS

### A. Goals and Objectives of Sentencing

The goals of sentencing are to reflect the seriousness of the offense, promote respect for the law, provide appropriate punishment, deter criminal conduct, protect the public from the defendant's criminal conduct, and provide the defendant with needed care or treatment. See United States v. Gomez-Villa, 59 F.3d 1199 (11th Cir. 1995)(citing 18 U.S.C.A. § 3553(a)(2), the Federal Sentencing Guidelines). Punishment serves several purposes: retribution, rehabilitation, deterrence, and prevention. 24 C.J.S. Criminal Law § 1460 (1989). See also Merritt v. Commonwealth, 528 S.E.2d 743 (Va. Ct. App. 2000)(finding sentencing decision is a quest for a sentence that best effectuates criminal justice system's goals of deterrence, incapacitation, retribution and rehabilitation). In imposing sentence, the court should consider the various goals of punishment. 24 C.J.S. Criminal Law § 1460.

It is the responsibility of the trial judge to determine the priority and relationship of sentencing objectives in any particular case. Id. The primary criterion in sentencing is good order and protection of the public and society, and all other factors must be subservient to that end. Id.

Retribution is an appropriate objective of the sentencing process. Id. In a criminal prosecution, punishment of the offender is recognized as a proper motivation for a sentencing trial judge. State v. Fletcher, 322 S.C. 256, 471 S.E.2d 702 (Ct. App. 1996). Another legitimate interest at sentencing is the defendant's prospect for rehabilitation and restoration to a useful place in society. State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). See also 24 C.J.S. Criminal Law § 1460 (rehabilitation is considered to be one purpose of sentencing).

Generally, deterrence, both of the accused and of others, is a legitimate objective of a sentence. 24 C.J.S. Criminal Law § 1460. While deterrence may have to be considered in conjunction with other sentencing objectives, deterrent purposes may sometimes be emphasized over rehabilitative ones. Id. Penal laws are adopted and enforced for the preservation of peace and good order of the state by making a violator suffer for his wrong to society and to serve as an example to deter others who may desire to do likewise. Wilborn v. Saunders, 195 S.E. 723 (Va. 1938). Community condemnation or reaffirmation of societal norms for purposes of maintaining respect for those norms is an appropriate sentencing objective, as is development of respect for the law, and moral reinforcement. 24 C.J.S. Criminal Law § 1460.

At sentencing, a judge has an obligation to consider information material to punishment. Hayden v. State, 283 S.C. 121, 322 S.E.2d 14 (1984). See also Commonwealth v. Longval, 390 N.E.2d 1117 (Mass. 1979)(when imposing a sentence, the judge can consider a wide variety of factors, such as defendant's character, background and prior record). A sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited as to either the kind of information he may consider, or the source from which it may come. United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); Hayden, 283 S.C. at 123, 322 S.E.2d at 15; State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976). In determining a proper sentence, a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed. People v. Hernandez, 745 N.E.2d 673 (Ill. App. Ct. 2001).

## B. Sentence Imposed Upon a Co-Defendant

The sentence imposed upon a co-defendant for the same offense and upon others for similar offenses are among a wide variety of factors which may be considered in determining a proper punishment. State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976). There is no requirement of law that defendants charged with similar offenses be given the same punishment. State v. Garris, 144 S.E.2d 901 (N.C. 1965).

## C. Guilty Pleas

The State has a legitimate interest in encouraging the entry of guilty pleas. Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978); Gajdos v. State, 462 N.E.2d 1017 (Ind. 1984). A defendant who enters a guilty plea has extended a substantial benefit to the State and deserves to have a substantial benefit extended to him in return. Gajdos, 462 N.E.2d at 1025.

The United States Supreme Court has held a State may encourage a guilty plea by offering substantial benefits in return for the plea. Corbitt, 439 U.S. at 219, 99 S.Ct. at 497, 58 L.Ed.2d at 474. The plea may obtain for the defendant not only the possibility or certainty of a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury. Id. at 219-20, 99 S.Ct. at 497-98, 58 L.Ed.2d at 474-75.

For those who plead guilty, that fact itself is a constitutionally permissible consideration in sentencing, a consideration that is not present when one is found guilty by a jury. Id. at 223-24, 99 S.Ct. at 500, 58 L.Ed.2d at 477. See also Commonwealth v. Johnson, 543 N.E.2d 22 (Mass. App. Ct. 1989)(willingness to admit guilt may be a proper factor justifying more lenient sentencing). It cannot be said that defendants found guilty by a jury are penalized for exercising the right to a jury trial any more than defendants who plead guilty are penalized because they give up the chance of acquittal at trial. Corbitt, 439 U.S. at 226, 99 S.Ct. at 501, 58 L.Ed.2d at 478. In each instance, the defendant faces a multitude of possible outcomes and freely makes his choice. Id. Equal protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision. Id. The Supreme Court has unequivocally recognized the constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based. Id. at 224, 99 S.Ct. at 500, 58 L.Ed.2d at 477. See United States v. Jansen, 475 F.2d 312 (7th Cir.), cert. denied, 414 U.S. 826, 94 S.Ct. 130, 38 L.Ed.2d 59 (1973)(policy of leniency following guilty plea properly held by trial court to

be inapplicable to situation where defendant puts government to its proof in full trial).

Guilty pleas are recognized as a significant step toward rehabilitation. Hooten v. State, 442 S.E.2d 836 (Ga. Ct. App. 1994). A genuine admission of guilt may properly result in a lighter sentence than would be appropriate for an intransigent and unrepentant malefactor. United States v. Stockwell, 472 F.2d 1186 (9th Cir. 1973). See also Hooten, 442 S.E.2d at 840 (plea of guilty can be, and frequently is, considered in sentencing). The defendant who opts to go to trial rather than negotiating a plea runs the risk of a harsher sentence than he would have received by pleading guilty. United States v. Quejada-Zurique, 708 F.2d 857 (1st Cir. 1983). While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable–and permissible–attribute of any legitimate system which tolerates and encourages the negotiation of pleas. Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

There are numerous factors that a defendant must weigh in a case before he decides to insist on his right to a trial. State v. Williams, 337 N.W.2d 387 (Minn. 1983). The risk that the evidence adduced at trial will have an impact on the sentence the trial court imposes is a risk the defendant must be deemed to have accepted. Id. A trial judge may impose a greater sentence upon a defendant after the judge has heard the evidence at trial than he might have imposed in conjunction with a guilty plea. West v. State, 528 S.E.2d 287 (Ga. Ct. App. 2000).

The relevant sentencing information available to the judge after a plea will usually be considerably less than that available after a trial. Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). In the course of the proof at trial, the judge may gather a fuller appreciation of the nature and extent of the crimes charged. Id. The defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation. Id. On the other hand, many factors favor relative leniency for those who acknowledge their guilt–often expressing remorse–and thus help conserve scarce judicial and

prosecutorial resources for those cases that merit the scrutiny afforded by a trial. See Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). Many guilty pleas are motivated, at least in part, by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial. Id.

## D. Disparity of Sentences When Co-Defendant Pleads Guilty and Defendant Exercises Right to Stand Trial

When one defendant proceeds to trial and his accomplice pleads guilty, the sentences need not be identical. Gajdos v. State, 462 N.E.2d 1017 (Ind. 1984). A sentence imposed on a co-defendant who pleaded guilty does not provide a valid basis of comparison to a sentence imposed after a trial. People v. Taylor, 742 N.E.2d 357 (Ill. App. Ct. 2000); People v. Nutall, 728 N.E.2d 597 (Ill. App. Ct. 2000). Dispositional concessions are properly granted to defendants who plead guilty since the public interest in the effective administration of criminal justice is served. Taylor, 742 N.E.2d at 368; Nutall, 728 N.E.2d at 610. See also People v. Milton, 538 N.E.2d 1227 (Ill. App. Ct. 1989)(holding it is proper for a trial court to grant leniency in sentencing a defendant who by his plea ensured prompt and certain application of correctional measures to him, acknowledged his guilt and showed a willingness to assume responsibility for his conduct).

A criminal defendant has no constitutional right to be given a sentence equal in duration to that of his or her co-defendants. United States v. Smith, 839 F.2d 175 (3rd Cir. 1988). The sentence received by one joint defendant is irrelevant on the trial of another. Johnson v. State, 269 S.E.2d 18 (Ga. 1980).

Disparity between a sentence imposed on a defendant who pleads guilty and on another who is convicted after trial is not, standing alone, enough to establish that the latter has been punished for exercising his constitutional right to stand trial. United States v. Wilson, 506 F.2d 1252 (7th Cir. 1974). See also People v. Hernandez, 745 N.E.2d 673 (Ill. App. Ct. 2001)(disparity between sentence given to defendant convicted in jury trial and another imposed upon defendant who pled guilty, without more, does not mandate reduction in

sentence). The defendant has merely shown that he received a harsher sentence than a co-defendant who pleaded guilty. United States v. Harris, 761 F.2d 394 (7th Cir. 1985). Without more, the defendant has failed to demonstrate any constitutional violation. Id. Although a heavier sentence for one who has been convicted after trial and a lighter sentence for one who pleads guilty are in a sense two sides of the same coin, it is within proper bounds for the court to preserve some leeway so that it is able to extend leniency in consideration of the cooperation and at least superficial penitence evidence by one who pleads guilty. Wilson, 506 F.2d at 1259-60.

As a general rule, so long as a sentence is within the statutory maximum, the court will not exercise its supervisory powers to inquire into the propriety of a sentence, even when that sentence creates a disparity with the sentences of co-defendants. United States v. Rauhoff, 525 F.2d 1170 (7th Cir. 1975)(citing Hill v. United States, 368 U.S. 424, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962)). One exception to this rule exists where a trial judge has attempted to punish a defendant for the exercise of his Sixth Amendment right to a trial by jury. Id.

## II. JUDGE'S DISCRETIONARY AUTHORITY AS TO SENTENCING

A trial judge is allowed broad discretion in sentencing within statutory limits. Brooks v. State, 325 S.C. 269, 481 S.E.2d 712 (1997); Garrett v. State, 320 S.C. 353, 465 S.E.2d 349 (1995). See also State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976)(trial judge is given wide discretion in determining what sentence should be imposed). A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against a defendant. Brooks, 325 S.C. at 272, 481 S.E.2d at 713. Absent partiality, prejudice, oppression, or corrupt motive, this Court lacks jurisdiction to disturb a sentence that is within the limit prescribed by statute. Stockton v. Leeke, 269 S.C. 459, 237 S.E.2d 896 (1977); Franklin, 267 S.C. at 246, 226 S.E.2d at 898. See also Garrett, 320 S.C. at 356, 465 S.E.2d at 350 ("'It is well settled in this State that this Court has no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by statute unless: (a) the statute itself violates the constitutional injunction, Article I, Sec. 19, against cruel and unusual punishment, or (b) the sentence is the result of

partiality, prejudice or pressure or corrupt motive.'"); State v. Bolin, 209 S.C. 108, 39 S.E.2d 197 (1946)(length of prison sentence rests in sound discretion of trial court unless partiality, prejudice, oppression or corrupt motive is shown).

The role of appellate courts in reviewing sentences is to determine: (1) whether the exercise of discretion by the sentencing court was based upon findings of fact grounded in competent, reasonably credible evidence; (2) whether the sentencing court applied the correct legal principles in exercising its discretion; and (3) whether the application of the facts to the law was such a clear error of judgment that it shocks the conscience. State v. Megargel, 673 A.2d 259 (N.J. 1996). There is a strong public policy against interference with a trial court's sentencing discretion. See State v. Echols, 499 N.W.2d 631 (Wis. 1993).

The trial court has broad discretionary powers in imposing a sentence because it is generally in a better position than the reviewing court to determine the appropriate sentence by weighing such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. People v. Hernandez, 745 N.E.2d 673 (Ill. App. Ct. 2001). Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. People v. Stacey, 737 N.E.2d 626 (Ill. 2000).

## III. EXERCISE OF RIGHT TO JURY TRIAL

A trial court may not impose a greater sentence on a defendant because the defendant exercised his constitutional right to stand trial rather than plead guilty. See Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Article III, Section 2, Clause 3 and the Sixth Amendment to the United States Constitution, along with Article I, Section 14 of the South Carolina Constitution, grant every criminal defendant the absolute right to plead not guilty and to be tried by a jury.

## IV. LAW/ANALYSIS

After the jury announced the verdict, Brouwer's attorney and the trial judge engaged in the following colloquy regarding sentencing of Brouwer:

> [Defense Counsel]: I think that pursuant to Davis v. State, that other than some showing other than the fact that she chose to enter a guilty plea and he chose to go to trial, that it would be appropriate for the court to give this defendant the same sentence, a proportionate sentence, as Ms. Kaplan received. . . . We would ask that the court take that into consideration. . . .
>
> . . . .
>
> [The Court]: [Defense counsel], let me respond to your reference to the Davis case. . . . And you are talking about where the trial judge made a reference to the fact that because he exercised his right to a jury trial, now he has to impose a certain sentence.
>
> What I indicated to you in chambers was simply what I indicate to anyone who is there. The court wishes to say that we are not going to have that involved, then let them do it and we will put it on the record in this case, and I welcome the instruction, because I see–I distinguish that Davis case from what I said, because I never said to you that if he exercises his right to a jury trial, I would punish him more severely. I said to you, as I recall, and I think I said, because I say it just about every time I talk to someone, I'm a judge that gives serious consideration for someone admitting their guilt. I think that's important. It was told to me when I first started practicing law years ago by Judge Clarence Singletary, who was the judge in my circuit, that I believe that that's the first step towards rehabilitation. . . . .
>
> . . . [T]here is no way in rhyme or reason for us to ever give a sentence for someone pleading guilty the same sentence for a jury

> trial. Then we have ignored the fact that a person has admitted their guilt.
>
> **Now, I don't think a person needs to be punished because of their jury trial, because that's a Constitutional Right. And I, as a trial judge, have never, nor will I ever, punish someone for exercising their right to a jury trial.** I think that is something valuable. I take it very seriously as this. . . . But one of the factors that I will always consider, . . . is consider someone who admits their guilt.
>
> . . . .
>
> So the sentence of the court–and the court will take into consideration that it is his first offense in imposing this sentence and give him a chance, to some extent. But the sentence is that you be committed to the Department of Corrections for a term of four years, provided upon the service of six months, the balance is suspended, and I'm going to place you on probation for a period of three years.

(Emphasis added).

Relying upon State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995), and Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999), the majority concludes the trial court's sentencing determination for Brouwer was improper and requires reversal. The majority's reliance upon these cases is misplaced.

In State v. Hazel, the trial judge gave the following response to the defendant's request for sentencing under the Youthful Offender Act (YOA): "Well, it's one thing, if he'd pled guilty, I'd have considered that, but taking into consideration the age and where he was and the time it was, the sentence of the court is you be confined to the State Board of Corrections for a period of fifteen years and pay a fine of twenty-five thousand dollars." Hazel, 317 S.C. at 369, 453 S.E.2d at 879. The Supreme Court found the trial judge relied heavily on

Hazel's exercise of his right to a jury trial as weighing against sentencing under the YOA. The Hazel Court observed that courts have long adhered to the principle forbidding a trial court from improperly considering the defendant's exercise of his constitutional right to a jury trial as an influential factor in determining the appropriate sentence. The Court concluded the trial judge abused his discretion by considering the fact that Hazel exercised his right to a jury trial.

In Davis v. State, after the trial court sentenced the defendant, defense counsel moved to have the sentence reduced. The following discussion occurred between the trial court and defense counsel:

> [Defense Counsel]: It's for reduction, your honor. Your honor, as you know Mr. Adams couldn't be here today and he--as Mr. Davis--he's the one who represented Mr. Davis at trial and throughout the period since Mr. Davis was sent to us by the clerk of court. Mr. Adams has asked me to make this motion on Mr. Davis' behalf for a reduction in the sentence. There was no plea bargain offered. Mr. Adams, I understand, made several attempts to negotiate a plea and law enforcement refused. This is the reason that this case went to trial in the first place. There were two drug dealers who did plead guilty during the time that your honor has been here with us this past couple of weeks and they have received lower sentences. I think one got seven years, J.J. J.J. got seven years and Dubois got eighteen months and I believe both of those were negotiated pleas . . . .
>
> [State]: May it please the court, your honor? Cory Fleming from our office prosecuted the case at trial. I'm familiar with the case. One reason an offer was never extended in the case was the only discussion that Mr. Adams ever had with my office was for some type of probationary sentence and our office didn't agree to that, and it's accurate in regard to John Paul Thompson and Thomas Jefferson Dubois as to the sentences that they received.

> [Defense Counsel]: Mr. Davis has no prior drug convictions. I mean, he does have a record, but he has no drug convictions.
>
> [Court]: Yes, ma'am, but he didn't plead guilty. Those other two people, they pled guilty. They admitted what they had done and to me that's the first step towards rehabilitation is admitting that you did something wrong and you're pleading guilty and when a fellow wants a trial which he's entitled to as a matter of law--and that's fine.
>
> [Defense Counsel]: I believe that when Mr. Adams discussed it with Mr. Branham that Mr. Branham stated the fact that they wanted to hang him high.
>
> [Court]: Well, the jury found him guilty and I sentenced him and I'm not going to change my sentence. Thank you very much.

Davis, 336 S.C. at 332, 520 S.E.2d at 802.

Davis argued relief should be granted because his trial counsel failed to object when the trial judge, after sentencing Davis, indicated he considered Davis' decision to have a jury trial as a factor in sentencing. The Supreme Court agreed and determined:

> In the above colloquy, defense counsel argued to the trial court that similarly situated defendants had received lower sentences than [Davis]. In response to this argument, the trial judge unequivocally stated that the other defendants had, in fact, pled guilty. The trial judge further expressed his preference for guilty pleas by explaining that such admissions of responsibility were the first steps toward rehabilitation. We find these statements clearly revealed that the trial judge, in sentencing [Davis], improperly considered [Davis'] decision to proceed with a jury trial. See Hazel, supra.

Davis, 336 S.C. at 333, 520 S.E.2d at 803.

State v. Hazel and Davis v. State are distinguishable from the case at bar. In the instant case, unlike Hazel and Davis, the trial judge expressly stated that Brouwer's exercise of his right to a trial did not affect the sentence imposed by the judge.

By proceeding to trial, Brouwer must be deemed to have accepted the risk that he could receive a sentence longer than he would have received by pleading guilty or than that received by Kaplan. See State v. Williams, 337 N.W.2d 387 (Minn. 1983)(explaining that there are numerous factors that defendants must weigh before deciding to go to trial and that defendants who so choose are deemed to have accepted the risk of a longer sentence).

The judge's remarks in the case sub judice reflect a permissible extension of leniency towards the co-defendant, Kaplan, for taking a "first step towards rehabilitation," rather than an impermissible increase in Brouwer's sentence for exercising his right to trial. While an accused's punishment should not be increased due to his exercise of his right to a trial, it is not forbidden to extend a proper degree of leniency in return for guilty pleas, and to withhold leniency from those pleading not guilty. 24 C.J.S. Criminal Law § 1474 (1989)(citing Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978)).

The judge utilized the guilty plea in determining Kaplan's sentence by being lenient on her but not in determining what sentence to impose on Brouwer. Brouwer is not being punished for going to trial. However, Kaplan is properly being rewarded for admitting her guilt and pleading guilty. The judge referred to Kaplan's guilty plea only to point out that remorse and admission was a first and important step toward rehabilitation. The judge was articulating the rationale for Kaplan's–not Brouwer's–sentence. A show of lenience to those who exhibit contrition by admitting guilt does not carry a corollary that the judge indulges a policy of penalizing those who elect to stand trial. United States v. Araujo, 539 F.2d 287 (2d Cir. 1976); United States v. Thompson, 476 F.2d 1196 (7th Cir. 1973).

In sentencing Brouwer, the judge stated: "I have to assume that Brouwer found nothing wrong with [his conduct]." It is clear the potential for rehabilitation was a factor the judge considered when determining the sentence in this case. Rehabilitation is a proper sentencing consideration. See People v. Speed, 472 N.E.2d 572, 573 (Ill. App. Ct. 1984)("[I]t is . . . well established that the court may consider the lack of a penitent spirit in determining the appropriate sentence to be imposed upon a defendant, since this is a factor which may have a bearing on the defendant's potential for rehabilitation.").

The majority places a "judicial strait jacket" on a Circuit Judge in the sentencing procedure. A truthful, straight-forward disavowal by the Circuit Judge of any consideration of the exercise of the constitutional right of jury trial by a defendant is disregarded and absolutely ignored. Effectually, this case will implement "muted silence" in all sentencing activities. "Pass the sentence and move on" becomes the guideline.

In reviewing the entire sentencing procedure with exactitude, I come to the inescapable conclusion that factually and legally there is no evidence that the Circuit Judge used or considered in any manner the exercise of Brouwer's jury trial right when sentencing Brouwer. To the contrary, the evidentiary record demonstrates with remarkable clarity a pristine and salubrious sentencing procedure in the instant case. I reject the notion that the discussion in the record inter sese court, counsel, and defendant reveals any indicia of sentencing irregularity.

The policy articulated by the majority is infected with expository deficiency. Indubitably, appellate courts should not become "shrinking violets" in the exercise of appellate review, but appellate entities are restricted to constitutional parameters in reviewing sentencing procedures used by a Circuit Judge.

Here, the judge did not abuse his discretion in sentencing Brouwer. The dissemination of obscene material is a serious crime. A person convicted of violating § 16-15-305(A) is guilty of a felony. S.C. Code Ann. § 16-15-305(H) (Supp. 2000). The maximum sentence is five years in prison or a fine of

$10,000, or both. Brouwer was found guilty of this offense. The judge imposed a sentence on Brouwer which was less than the maximum sentence provided by the statute. Brouwer's sentence was well within the statutory limits.

Accordingly, I would AFFIRM the sentence of Brouwer.