

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of General Sessions.

DeAndrea G. Benjamin, Circuit Court Judge

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Case Nos. 2012-GS-10-40032 and 2012-GS-10-40033

Appellate Case No. 2013-001238

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The State, ..... Respondent,

v.

Brett D. Parker, ..... Appellant.

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**INITIAL BRIEF OF APPELLANT**

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**SC Court of Appeals**

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## STATEMENT OF THE ISSUE ON APPEAL

- I. Did the trial court err by refusing Appellant's request to charge regarding circumstantial evidence in this matter in light of the Supreme Court's guidance set forth in *State v. Logan*?
  
- II. Did the trial court err in failing to restrict the main state expert from offering an opinion outside the qualified area agreed to by Appellant as a result of voir dire of the expert?

## STATEMENT OF THE CASE

This is a murder case. Brett Parker (Appellant) was indicted for two counts of murder following the shooting death of his wife, Tammy Parker, and a colleague, Bryan Capnerhurst, on April 13, 2012, at the Parkers' home in Richland County. The matter proceeded to trial before the Honorable Deandre Benjamin and a jury in May 2013 and concluded with a verdict of guilty on both counts on May 28th, 2013. Judge Benjamin sentenced Appellant to two consecutive life sentences. Appellant timely filed and served a Notice of Appeal.

## FACTS

Law enforcement officers from the Richland County Sheriff's Department responded to a residence at 12 Tackeria Court in the Ascot subdivision in Richland County shortly after 1:00 p.m. on Friday, April 13th, 2012, as a result of a 9-1-1 call from the Appellant. (Tr. P. 314). Upon arrival at the scene the officers found Appellant outside the residence where he was detained for security purposes. (Tr. p. 316). Law enforcement investigation soon revealed that the body of his wife, Tammy, and that of Mr. Capnerhurst, an employee in Appellant's illegal bookmaking enterprise, were inside on the second floor of the residence. (Tr. pp. 353, 357). Tammy was killed by 7 shots from a .9mm Smith & Wesson semi-automatic handgun. (Tr. p. 1550). Capnerhurst was killed by three shots from a revolver called "The Judge" by its manufacturer Tarus Firearms, loaded with .410 shotgun shells. (Tr. p. 876, 1556). Richland County Coroner Gary Watts and Richland County Medical Examiner, Dr. Bradley Marcus, went to the Tackeria Ct. location at the request of law enforcement. (Tr. pp. 647, 1513).

Tammy Parker was a medical sales representative who made as much as \$160,000 a year. (Tr. p. 307, l.18). Appellant, an admitted bookmaker, also worked for a durable medical equipment company making about \$40,000 a year. (Tr. p. 2791, ls. 4-7). Mr. Capnerhurst worked full time with the Lexington County Recreation Commission as his main job, had a second source of income from cleaning the Rec Commission Office once a week, and then took orders in the Appellant's illegal bookmaking enterprise as another side income. (Tr. p. 1992).

Appellant was substantially behind in paying Mr. Capnerhurst for his time

assisting in the bookmaking business; Mr. Capnerhurst's claim made to a number of others before April 13th was that the amount due him from Appellant for this accumulated time was \$21,300. (Tr. p. 1641, l. 12). Appellant claimed in a number of statements to the Richland County Sheriff's Department was that the sum was only about \$6,000.

In an attempt to have this matter resolved Mr. Capnerhurst told several individuals that he had been invited to Appellant's home at Tackeria Ct. on Friday, April 13, 2012. Telephone records show Mr. Capnerhurst received a call from Appellant before 8:00 a.m. on the morning of April 13th. (Tr. p. 1212, ls. 10-17). Mr. Capnerhurst was excited over being paid what was owed him but he was also apprehensive about the meeting with Appellant and, as a result, told his wife, Cindy Capnerhurst, that if Mr. Capnerhurst did not call her back within an hour after his 12:30 p.m. appointment with Appellant then to call 9-1-1. (Tr. p. 1994). Appellant told Mr. Capnerhurst, who then told others that same morning of April 13, that Appellant also asked him to bring his gym bag to the meeting. (Tr. p. 1646, l. 24-1647, l.2). Mr. Capnerhurst believed that the gym bag request by Appellant was made so as to hide the cash that was to be paid him. (Tr. p. 1647, ls. 1-2).

Appellant stated that Mr. Capnerhurst, pursuant to Appellant's request, came to the Tackeria Ct. home on April 13 around 12:30 p.m. and walked in through the garage door side entrance. An exterior security system with a time stamp video recovered by law enforcement from the residence shows Mr. Capnerhurst driving his car into the parking area of the residence a little after 12:30 p.m., slinging a workout bag over his shoulder and then proceeding to the side or garage door entrance to the home. (Tr. p. 1189, ls.

7-10). After recognition from Appellant, who was using a downstairs bathroom, Mr. Capnerhurst walked upstairs to the home office occupied by Tammy and shot her with 7 shots from the .9mm Smith & Wesson. (Tr. p. 2417).

Mr. Capnerhurst was then subsequently shot and killed while trying to rob Appellant who was directed to empty a safe in another room. The safe is also on the second floor but located in a relatively out of the way storage area over the garage. It was a distance from the "office" where Tammy lay dead. Both shootings occurred between 12:30 p.m. and 1:00 p.m.

The defense's theory was that Mr. Capnerhurst, outraged and obsessed by his non payments for a period of several years from Appellant, killed Tammy and then attempted to rob Appellant by forcing him to go to a safe where cash from the bookmaking was kept. Unbeknownst to Mr. Capnerhurst, Appellant had secreted "The Judge" revolver near the safe and he then used it to shoot Mr. Capnerhurst in self-defense. (Tr. p. 2814, ls. 1-14).

Upon law enforcement's clearing the home they first found Tammy's body in the office area of the home on the second floor and then Mr. Capnerhurst's body in the attic area over the garage where the safe was located. The first two law enforcement officers noted quickly that Mr. Capnerhurst's left hand was grasping the Smith & Wesson .9mm. semi-automatic. (Tr. p. 357, l. 2-24). The officers shook Mr. Capnerhurst's left hand vigorously three times to dislodge the gun as a matter of officer safety. The defense noted of the over 900 photographs taken by law enforcement at the scene that none were of the gun in Mr. Capnerhurst's left hand; the State said the officers acted reasonably and

professionally in making sure the gun was out of the victim's hand without having to wait to take pictures.

The State opined that because of the number of shots (three different .410 shotgun blasts that each fire several pellets and 3 metal discs) and the type of injuries Mr. Capnerhurst sustained to his left arm, this "grasping" was physically impossible and that Appellant had planted the .9mm in Mr. Capnerhurst's left hand after he was shot and down. Several law enforcement officers and the medical examiner, Dr. Marcus, opined that with the "ping pong ball" size hole in Mr. Capnerhurst's left forearm, it would have been physically impossible for the gun not to have fallen from his grasp. That is, Appellant staged the scene to support his claim of Mr. Capnerhurst's murder of Tammy and attempted armed robbery of himself. (Tr. p. 279, l.18).

The State further contended that Appellant's request to Mr. Capnerhurst to bring the gym bag was a ruse, not to cover the transfer of back payments in cash but to further Appellant's scheme to place the .9mm ammunition and empty magazine inside the bag after the killings. (Tr. p. 1190, ls. 3-7). The gym bag ruse was to also cover up who was in actual possession of the Smith & Wesson .9mm at the home: whether this gun that had been given to Appellant as a family heirloom was already in the home on the morning of April 13 or whether Appellant had given Mr. Capnerhurst the gun some months before the shooting and Mr. Capnerhurst brought it to the home hidden in the bag to commit the murders and armed robbery.

Appellant stated that he had given the .9mm Smith & Wesson with the ammunition and a magazine clip to Capnerhurst some months before. (Tr. p. 2809, ls.

18-19). Appellant and Tammy's fourteen year old daughter, Brooke Parker, testified for the defense that she was present when her father gave the Smith & Wesson to Mr. Capnerhurst at the home office on the second floor. (Tr. p. 2733, ls. 16-20). The prosecution presented witnesses that Mr. Capnerhurst disliked firearms and had no such gun, and that having the gun would have been common knowledge to his family if true. (Tr. p. 2025, ls. 4-8; p. 2041, ls. 10-14).

The State's theory was that Appellant was desperate for money and unwilling to leave a loveless marriage. The State asserted Appellant shot Tammy and lured Mr. Capnerhurst to the residence where he then killed Mr. Capnerhurst to cover the dual homicide by claiming self defense because Mr. Capnerhurst had tried to rob him. Appellant was in debt in the total amount of \$181,000 to fellow bookmakers and a private lender. (Tr. p. 1817, l. 8; p. 1902, l. 20).

Insurance proceeds on Tammy's death, including cash and annuities, to which Appellant would have been personally entitled was \$868, 000. (Tr. p. 2421, l. 7). Another alleged motive for the killings was sexual; Appellant initially claimed that his marriage was in good shape but he was involved in two sexual relationships wherein he claimed to one of his paramours that he could never leave his wife although he desired to do so. (Tr. p. 1362).

## ARGUMENTS

### **I. THE TRIAL COURT ERRED BY REFUSING APPELLANT'S REQUEST TO CHARGE REGARDING CIRCUMSTANTIAL EVIDENCE IN THIS MATTER IN LIGHT OF THE SUPREME COURT'S GUIDANCE SET FORTH IN *STATE V. LOGAN***

In this overwhelmingly circumstantial evidence prosecution the trial court erroneously instructed the jury on the law relating to circumstantial evidence when the court omitted the language now required by the supreme court's most recent decision on the issue. Appellant is therefore entitled to a new trial.

#### **A. The Trial Court Had No Dearth of Substantial Circumstantial Evidence to Consider at Either of the Directed Verdict Stages, at the Conclusion of the State's Case in Chief, and after Conclusion of the State's Case in Reply**

##### **1. The existence of circumstantial evidence in the trial.**

There was a substantial amount of circumstantial evidence at the conclusion of the State's case in chief. See generally (Tr. pp. 2621-2625). As a result of applying the correct standard of review at this stage pursuant to Rule 19, SCRCrimP, the trial court correctly ruled that considering the nature of circumstantial evidence, and citing *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004), Appellant's motion for a directed verdict must be denied. (Tr. 2627, l. 21- 2628, l.20).

Defense counsel articulated and argued, at the two Directed Verdict stages, that it was not the absence of circumstantial evidence that warranted judicial focus; rather counsel argued via *State v. Edwards*, 298 S.C. 272, 275, 379 S.E.2d 888, 889 (1989), *cert. denied*, 493 U.S. 895 (1989), that the connection up of all the collateral facts and

circumstances constituting circumstantial evidence did not match up and connect beyond a reasonable doubt thus allowing a jury to reach a guilty verdict: “This case is basically a circumstantial case, Your Honor, and under *State v. Bostick* we know that they have to prove each one of the circumstances connecting him beyond a reasonable doubt, and they can’t do that in this case.” (Tr. p. 2620, ls. 3-7). Relying on the failure to connect up each of the circumstances of the non-direct evidence counsel argued below: “Your Honor , again, going back to *State v. Bostick*, every single thing that they just stated and listed the litany of it, each one of those witnesses also testified, Your Honor, to a version or to a set of facts that would prove that he is not guilty in this case. Each one of those witnesses did.” (Tr. p. 2626, ls. 3-9).

**2. *State v. Edwards* was the correct conceptual context to charge circumstantial evidence to the jury in this case.**

This was the first of many times defense counsel would ask, and argue, that the traditional concept, context and language of *Edwards* should control the court’s instruction for the jury’s consideration of circumstantial evidence. See (Tr. p. 3009, ls. 5-9 (“I tell you we are going to need a *State v. Edwards*, we will be making a request.”); “I believe we are entitled to it.”); p. 3009-1. 23- Tr. 3010, l. 6; (“Again, we renew our motion to dismiss this case on the grounds that it is a circumstantial evidence case and that they can’t prove - - there is not evidence beyond a reasonable doubt that each circumstance that the State is relying upon to convict this man of murder and ask the Court to dismiss it for insufficiency of the evidence based on that”); p. 3032, ls. 18-20 (“Your Honor, we would request that you charge that. That is – I know that *State v.*

*Edwards* has apparently been --it has been tinkered with, no doubt about that, but we would request it, Your Honor, because I think it is -- it is fair and it is accurate. And I think legally speaking it is a correct statement of the law as it should be or going to be.”); p. 3216, ls. 18-25 (“Mr. Whitlark: May it please the Court, Your Honor? The Court: Yes, sir. Mr. Whitlark: Just the request to charge Number 1, *The State v. Edwards*. The Court: Yes, sir. Mr. Whitlark: I take exception. Thank you, Your Honor.”) and p. 3228, ls. 9-14 (Mr. Whitlark: “I’m sorry, Your Honor, sorry to interrupt you. I do want to put down there that we do want to renew our circumstantial evidence motion pursuant to *The State v. Edwards*. That is talking about a 1989 -- that is 379 S.E.2d 888’ Just to specify that one in particular, Your Honor.”)

In denying the defendant’s Directed Verdict motion at the conclusion of the State’s case in chief, the trial court acknowledged that the case was primarily circumstantial and that the court had in fact already researched the issue. (Tr. p. 2627-28). Relying, however, on *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) relating to circumstantial evidence consideration at the Rule 19 stage, the court denied the direction of a not guilty verdict in the case; the court implicitly so ruled that under either the *Bostick* or *Edwards* holdings any other decision was improper. (Tr. p. 2628, ls.18-19).

### **3. The circumstantial evidence admitted in trial**

By the conclusion of all evidence in the trial, including the State’s case in reply, the following key items constituted the sum and substance of the circumstantial evidence presented:

- a- The time of death of Tammy Parker occurred between 12:30 and 1:00 p.m. (Tr. 1556, ls. 5-8)
- b- The Smith & Wesson .9 mm semiautomatic was used to first murder Tammy (See generally Tr. 2290)
- c- The Smith & Wesson .9 mm semiautomatic was then placed in Mr. Capnerhurst's hand by Appellant after shooting him; (Tr. 2248).
- d- The Smith & Wesson .9 mm semiautomatic was placed in Mr. Capnerhurst's hand to underscore Appellant's theory of self defense; (see generally, Tr. 2611)
- e- The Smith & Wesson .9 mm semiautomatic had not been given to Mr. Capnerhurst; rather, the gun was in Appellant's possession in the Tacqeria Ct. home when Mr. Capnerhurst drove up;
- f- Appellant told Mr. Capnerhurst in an earlier conversation to bring a gym bag to the home. (Tr.2261)
- g- The ammo box to the .9mm was placed in the gym bag by Appellant after the dual murders to underscore his theory of self defense. (Tr. 2264)
- h- The existence of gunshot residue on Mr. Capnerhurst's hands was consistent with his being on the receiving end of being fired upon (Tr. 2275)
- i- The motive for the killing of Tammy Parker was to obtain insurance proceeds to pay off Appellant's gambling debts; (Tr. 2243 and 2247).
- j- Appellant could not afford a divorce as Tammy made more money than he; (Tr. 2243);
- k- Tammy had threatened to leave Appellant if he continued his own gambling.

(Tr. p. 2867);

l- Video evidence shows downstairs blinds opening and closing before Mr.

Capnerhurst arrived, and some gunshot residue was found on those blinds;

m- The Parkers were nearly \$1 million in debt, including nearly \$200,000 in gambling related debt that Tammy did not know about;

n- Brett stood to receive nearly \$1.1 million dollars in proceeds from insurance and retirement accounts due to Tammy's death.

The trial court was thus not confronted with the existence or non-existence of substantial circumstantial evidence; Appellant cannot now argue with the court's denial of a directed verdict at either of the two different stages at which a directed verdict was sought notwithstanding trial counsel's obligation to make those motions. (Tr. pp. 2619, 3010).

What defense counsel argued at these stages instead was for a return to the proper charging context and for a properly structured instruction which would guide the jurors' decision when evaluating the deductive nature of circumstantial evidence.

**B. The supreme court has never been able to divorce itself, unalterably and irrevocably, from its traditional *Edwards* contextual language or import**

*Edwards*, based on the supreme court's holding in *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924 (1955), was the tradition for decades in this state's case law. *Edwards* incorporated language from *Littlejohn* noting that to the extent circumstantial evidence is considered by a jury guilt must be then be proven "...to the exclusion of every other reasonable hypothesis." See also *State v. Harry*, 321 S.C. 273, 468 S.E.2d 76 (Ct. App.

1996)(finding no error in circumstantial evidence charge nearly identical to that given in *Edwards*), *cert. denied* Aug. 22, 1996.

It was this specific *Edwards-Littlejohn* phrasing, however, that was later denoted by the court's seminal decision in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997) to possibly translate as a burden shifting requirement. Relying on *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), a 3-2 majority of the court held "if a proper reasonable doubt instruction is given, a jury need not be instructed that circumstantial evidence must be so strong as to exclude every reasonable hypothesis other than guilt." *Grippon*, 327 S.C. at 83, 489 S.E.2d at 464. As a result, the *Grippon* court ruled that the phrasing "to the exclusion of every other reasonable hypothesis" was no longer required for jury instructions when charging circumstantial evidence. The *Grippon* court determined that once a trial court provided a proper reasonable doubt instruction, the jury need not be instructed regarding whether the circumstantial evidence introduced at trial proved the defendant's guilt to the exclusion of every reasonable hypothesis. *Grippon*, 327 S.C. at 83-84, 489 S.E.2d at 464.

Over a compelling dissent noting that circumstantial evidence proof requires careful reasoning by the triers of fact to avoid reaching unwarranted conclusions and noting a rush to join the ill-considered state and federal bandwagon forming behind *Holland*, the majority in *Grippon* recommended what it denoted as a "better rule" through the following charge:

There are two types of evidence which are generally presented during a trial-direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual

knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

327 S.C. at 83-84, 489 S.E.2d at 464.

However, the significance of *Edwards* in guiding jurors through evaluation of circumstantial evidence has continued to significantly erode *Grippon* in several subsequent cases over the intervening seventeen years. In truth the totality of the *Edwards* insistence on a recognition of the distinction between direct and circumstantial evidence, with the inherently different requirement of the deductive demand of circumstantial evidence by a jury, has never changed. Nor should it.

**1. The attempt to clarify *Grippon* resulted in the acknowledged unevenness of *Cherry I* and *Cherry II***

The supreme court noted the lack of symmetry and hesitancy in the lower courts' use of the suggested *Grippon* charge. In several post-*Grippon* decisions, there was a *de facto* recognition of the continued vitality of *Edwards* in the lower courts: See, e.g., *State v. Hernandez*, 382 S.C. 620, 626, n.2, 677 S.E.2d 603, 606 n.2 (2009) (citing *State v. Edwards*); *State v. Graddick*, 345 S.C. 383, 548 S.E.2d 210 (2001); *State v. Needs*, 333 S.C.134, 156 n. 13, 508 S.E.2d 857, 868, n. 13 (1998) (noting that there were two appropriate ways to charge a jury on circumstantial evidence). See also *Moriatory v. Garden Sanctuary Church of God*, 341 S.C. 320, 338 n. 6, 534 S.E.2d 672, 681 n. 6

(2000) (noting that the traditional circumstantial evidence charge requires greater scrutiny than direct evidence in a criminal case).

Acknowledging the lay of the judicial landscape and the reluctance of the lower trial courts to give up *Edwards* entirely (notwithstanding the *Grippon* suggestion that “to the exclusion of every other reasonable hypothesis” was no longer required), the supreme court attempted to clarify once again what impact circumstantial evidence had in a criminal jury trial. What resulted was a circuitous route of six separate opinions with a crazy quilt holding emanating from this Court in its *Cherry* decision, 348 S.C. 281, 559 S.E.2d 297 (Ct. App. 2001) (*Cherry I*), including a three-judge panel decision, and an *en banc* rehearing. This was subsequently followed by a 3-2 decision of the supreme court. 361 S.C. 588, 606 S.E.2d 475 (2004) (*Cherry II*).

The unintended consequence of the *Cherry I* and *Cherry II* decisions has been to create a more uneven and unsure application of a circumstantial evidence charge in the courts below. This legal quagmire was exactly the point of contention in the instant case due to the nature and totality of the circumstantial evidence presented against the Appellant. The unevenness cannot be blamed on whether the case presented against a criminal defendant is entirely circumstantial or partially circumstantial. Accord *Cherry II*, 361 S.C. at 597-601, 606 S.E.2d at 480-482 (discussing the history of the language).

While the *Cherry II* majority decision claims in its holding that “*Grippon* is the sole remaining charge to be utilized by the courts of this state instructing juries in cases relying, in whole or in part, on circumstantial evidence” *id* at 597, 606 S.E.2d at 480; the dissent notes that the *Grippon* holding itself “did not overrule the traditional

circumstantial evidence charge. *State v. Graddick*, 345 S.C. 383, 388, 548 S.E.2d 210, 212 (2001).” *Cherry II*, 361 S.C. at 603 n. 16, 606 S.E.2d at 483 n. 16 (Toal, CJ, dissenting). The court’s ruling in *Cherry II* was due to what could be objectively considered as a division of judicial opinion as to how to assist lower courts in their circumstantial evidence charges. In all, *Cherry I* and *Cherry II* totaled four years of total appellate decisional length due to the care both courts took in attempting to correctly hold. It appears, however, that the internal inconsistencies inherent in a circumstantial evidence charge continue to taint the appellate courts’ efforts.

There exists post-*Cherry II* a continued uncertainty as to the correct, unified and mandated instruction to be given where circumstantial evidence is to be charged in a criminal case. This uncertainty emanated not from that portion of the judicially recognized instruction on evidence that a jury be charged that both direct and circumstantial types of evidence are recognized by the law or, further, that both types of evidence are to be accorded equal weight. Rather the distinction flows from the distinctive, inherent qualities of each type of evidence (direct versus circumstantial) which in turn requires a different evaluation of circumstantial evidence by a jury that only a guided instruction could provide.

This was evidenced in the *Cherry II* dissent:

But unlike direct evidence, circumstantial evidence establishes *collateral* facts from which the main facts may be *inferred*. *State v. Salisbury*, 343 S.C. 520, 525 n. 1, 541 S.E.2d 247, 249 n. 1 (2001) (citations omitted). The evaluation of circumstantial evidence, therefore, requires jurors to connect *collateral* facts in order to reach a conclusion—a process *not* required when evaluating direct evidence.

*Cherry II*, 361 S.C. at 603, 606 S.E.2d at 483 (Toal, CJ, dissenting) (emphasis in original and added). This is reflective of the court's repeated and innumerable semantic discourses underscoring the disenchantment in the *Grippon* marriage in spite of the *Cherry* intervention. "Analysis of circumstantial evidence is plainly a *more* intellectual process." *Grippon*, 327 S.C. at 87–88, 489 S.E.2d at 466 (emphasis added).

Likewise the continued written disenchantment underscores the court's apparent reluctance to kick to the curb once and for all the traditional charge relating to circumstantial evidence: "[t]his Court recognized that the jury's evaluation of circumstantial evidence requires a *particular and discrete* instruction." *State v. Logan*, 405 S.C. 83, 95, 747 S.E.2d 444, 450 (2013) (citing *State v. Littlejohn*, 228 S.C. 324, 89 S.E.2d 924 S.C. 1955 (1955)) (emphasis added).

In a footnote in *State v. Odems*, an opinion reversing the trial court's Rule 19 decision, the supreme court's unease with its open marriage to *Cherry* ripened when the decision cited to *Cherry* and opined:

However, the evaluation of circumstantial evidence requires the connection of collateral facts in order to reach a conclusion, and this process is not required when evaluating direct evidence. [*Cherry II*] at 603, 606 S.E.2d at 483. Thus, the traditional circumstantial evidence definition provides more detailed information about the relation of circumstantial evidence to the determination of guilt. *Id.* The definition does not, however, change the standard for evaluating evidence: every circumstance must be proved beyond a reasonable doubt. *Id.*"

395 S.C. 582, 591 n. 4, 720 S.E.2d 48, 53 n. 4 (2011).

**C. Defense Counsel Articulated Correctly That the Circumstantial Evidence Presented to the Jury Did Not Connect up to the Degree of Certainty Necessary for Them to Accurately Analyze Circumstantial Evidence and Objected That the Instructed Jury Charge Omitted the**

**Now Required Guidance from the Court as to the Distinctive Inquiry  
Necessitated from the Use of Circumstantial Evidence.**

Presaging the supreme court's decision in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013), which was pending a decision during the instant trial, defense counsel preserved the "connecting up" language aspect of "to the exclusion of every other reasonable hypothesis" of the traditional *Edwards* circumstantial evidence charge:

Mr. Whitlark: We still - - we request - - we'll take -- we'll do the procedural exception on that.

The Court: Okay.

Mr. Whitlark: I don't know what is going to happen. I've got a gut feeling about this one, Your Honor.

The Court: About the charge?

Mr. Whitlark: About what is going to happen in the future. I've got a gut feeling about it.

The Court: Okay.

(Tr. 3035, ls. 6-15).

At the Rule 19 stage at the close of state's evidence in chief (Tr. 2619); again at the close of all evidence on a motion for a directed verdict (Tr. 3010); at the jury charge conference prior to deliberations (Tr. 3035); after jury charge but before jury deliberation and verdict (Tr. 3216) and, lastly, in post trial motions after conviction (Tr. 3228), the defense maintained not simply the failure to present substantial circumstantial evidence itself but that the the state's failure to connect the circumstantial evidence up through the "to the exclusion of every other reasonable hypothesis" language, as has long been precedent under *Edwards*, was prejudicial error.

As an example, in closing argument defense counsel was prevented by the state's objection, immediately sustained by court, relating to any discussion of the connecting up the circumstantial evidence:

Mr. Fedor: And the circumstantial evidence, the Prosecutor tried to show you that circumstantial evidence is just as good as direct evidence. Well, think that if you want to. But in circumstantial evidence you have got to connect all the dots. And there must not be another reasonable hypothesis

...

Ms Campbell: Objection, Your Honor.

The Court: Sustained.

(Tr. 3118, ls. 8-16).

As a result the jury was not given the instruction, underscored by a defense jury argument, as to the connective and deductive nature necessary in the use of circumstantial evidence.

**D. *State v. Logan* affirmatively, and finally, acknowledged that there is a distinction with a difference between direct and circumstantial evidence and that juries had to be so instructed on that difference in their use of circumstantial evidence in coming to a verdict.**

Terming it “an opportunity to revisit our past discussions regarding the circumstantial evidence charge,” the supreme court in *State v. Logan* found it necessary to clarify what it had meant by its decisions in *Grippon* and *Cherry II*. Succinctly put, the court reasoned “However, *at times*, a separate framework is necessary to the jury’s analysis of circumstantial evidence.” *Logan*, 405 S.C. at 100, 747 S.E.2d at 453 (emphasis added).

The *Logan* decision linguistically modified the traditional circumstantial evidence

instruction of *Edwards* to insert 'beyond a reasonable doubt' for 'to the exclusion of every other reasonable hypothesis' and then required instruction by trial courts on the four-tiered manner in which jurors should henceforth evaluate and use circumstantial evidence. With a nod to *Holland*, the new *Logan* charge thereby deflected any notion of a burden-shifting problem by its simple insertional mechanics. There are four additional aspects now required by an instruction on circumstantial evidence:

- 1- all the aspects of circumstantial evidence must be consistent with all other circumstantial evidence aspects, *i.e.*, the circumstantial evidence must not be internally inconsistent;
- 2- all the circumstantial evidence must be taken together and viewed in totality;
- 3- the circumstantial evidence so evaluated must then point conclusively to the guilt of the accused beyond a reasonable doubt;
- 4- the circumstantial evidence so evaluated must prove more than an arousal of suspicion.

*Logan*, 405 S.C. at 99, 747 S.E.2d at 452. *Logan*, in effect an acknowledgement of the *Grippon-Holland -Cherry II* trilogy, created a new circumstantial evidence charge without the necessity of confronting, and without having to change, the traditional history and import of its legal predecessors.

In the instant case, however, none of these four-tiered items were charged to the jury even over continued requests and repeated reiteration by defense counsel to do so. It would be injudicious to argue that counsel below did not so argue to the extent even

permitted by court and before sustained objections by state. Additionally, the *Logan* decision held that defense counsel was within its purview to so argue, "This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon and Cherry*. However, trial courts *may not* exclusively rely on that charge over a defendant's objection." *Logan*, 405 S.C. at 100, 747 S.E.2d at 453 (Emphasis added).

The trial court's circumstantial evidence charge in the instant case, however, was taken directly from *Grippon and Cherry II*. The charge contained none of the four-way evaluational building blocks concerning the use of circumstantial evidence to help focus the jury on excluding any other reasonable hypothesis which their deduction may have considered:

Ladies and gentlemen of the jury, there are two types of evidence which are generally presented during a trial : Direct evidence and circumstantial evidence, Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness . It is evidence which immediately establishes the main fact to be proved.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation.

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

You should weigh all of the evidence in the case. After weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant not guilty.

(Tr. 3198-3199). This instruction violates the mandate laid down in *Logan*.

**E. The more significant the amount of circumstantial evidence introduced in trial the greater the necessity for the “connection up” language now required by the four-tiered language of *Logan*.**

As argued above, there was a plethora of circumstantial evidence introduced before the jury; due to its nature the jury below had to consider all of the circumstances together, it had to be evaluated as to its internal consistency, and it had to point conclusively to the guilt of the defendant beyond simply suspicion. None of this could have reasonably or fairly been undertaken without judicial guidance and as a result the court’s charge on the issue failed to meaningfully assist the jury. Illustrative of this point was the jury’s request for a rehearing of evidence from the first two law enforcement officers responding to the scene, Lt. Odom and Officer Ryan. See generally (Tr. 3217-3220).

**1. The defense contended as a mainstay of its not guilty plea and its theory of defense that Mr. Capnerhurst had killed Tammy Parker with the previously acquired Smith & Wesson .9mm semiautomatic pistol and then used it to tried to rob Appellant who, in turn, acted in self-defense**

From opening statement to cross examination of virtually every law enforcement witness, to direct examination of Appellant and his daughter to closing argument, defense counsel made the prior location, possession and subsequent used of the Smith & Wesson .9mm semiautomatic a central issue. In requesting the playback of testimony the jury agreed with the essentialness of these law enforcement officers’ testimony.

Time and again, the defense had questioned witnesses on the failure of the

innumerable officers to adequately preserve the scene as they found it on April 13th: Mr. Capnerhurst gripping the .9mm in his left hand. See generally (Tr. 302, ls. 19-23; Tr. 336, ls. 14-16; Tr. 368, ls. 14-25 (“Q. Let’s go to the reports that your office from the Sheriff’s Department has: When Odom shook the 9-milimeter hand from Cap’s left hand, you shook it from his left hand. A. Yes. I grabbed his shoulder and shook it, yes, sir .Q. The left hand held the pistol with at least the bottom two fingers wrapped around the butt, isn’t that true? A. I observed more than two fingers around the butt. Q More than two?A It appeared to be more than two.”; See also Tr. 287, ls. 16-25; Tr. 375, ls. 7-12; Tr. 394, ls. 17-24; Tr. 433, ls. 23-434, l.1; Tr.805, ls.17-24; Tr.892, ls. 20-24; Tr. 952, ls. 12-20; Tr. 970, ls. 23-25; Tr. 1090, 12-15; Tr. 1136, ls. 20-24; Tr. 1159, ls. 23-25; Tr. 1618, ls. 23-Tr. 1619, l. 20; Tr. 2060, ls. 5-10; Tr. 2105, ls. 3-9; Tr. 2106, ls. 14-16; Tr. 2248- 1.21 –Tr. 2249, l.10; Tr. 2385, ls.14-16; Tr.2441. ls.7-9; Tr. 2529, 3-6; 2601, ls. 17-21; 2638- ls.9-21; Tr 2733, l.5- Tr. 2734, l.16; Tr. 2740, ls. 16-19; Tr. 2817, ls. 7-17 and Tr. 3077, ls. 18-23).

The jury’s request for playback of the most significant aspect of the state’s circumstantial case - the testimony of the first two responding officers and their subsequent shaking of Mr. Capnerhurst’s left hand to dislodge the semiautomatic- shows the prejudice afforded Appellant without the “connecting up” charge that was requested time and again by his counsel. (Tr. 3217-3219). This followed the state’s Opening some four weeks previously when the State insinuated that the ultimate conclusion that would be inferred by the evidence was that the gun was found in the victim’s hand, “as though it had been planted there” (Tr.279. ls. 9-10). This was followed in turn by law enforcement

testimony that concluded, all circumstantially, that Appellant had placed the gun where it was found- in Mr. Capnerhurst's left hand. (Tr. 2248, 2607, 2608, 2610). Major Stan Smith in charge of the Richland County Sheriff's Department's Investigation and Major Crimes Division added his two cents to this proof-less allegation on recross examination by Mr. Whitlark:

Q. Yes, And you have absolutely no evidence you can show us that he planted that gun, can you?

A. I think the totality of the circumstances demonstrated he planted that gun.

Q. I'm talking about evidence.

A. That's evidence.

(Tr. p. 2611, ls. 7-14). See also the Court's reflection on Smith's testimony: "And Major Smith had testified as to his theory of the case, he is the lead detective in the case, and that is his theory of the case as to how it got there. For that reason the objection was overruled." (Tr. p. 2616, ls. 2-8).

In closing argument the Solicitor opined "So the whole thing is the time that he was actually shot, could he have held onto this, because he wouldn't be dead yet." (Tr. p. 3172, l.2-22); and then one page later concluded in her evaluation and her connection of the evidence "But it could be placed there once he is down and once he knows he's gone." (Tr. p. 3173. l. 10-11). The State argued further that there was a substantial bit of circumstantial evidence presented in the case and then went on to say that "nor is a greater degree of certainty required of circumstantial evidence than of direct evidence," which was a necessary contradiction of the *Logan* appeal that was pending decision at the

time. (Tr. pp. 3062-3063). Defense counsel tried to return to the traditional context and language of the circumstantial evidence charge and noted in his closing immediately afterward “But in circumstantial evidence you have got to connect all the dots. And there must not be another reasonable hypothesis...., Ms Campbell: Objection. The Court: Sustained.” (Tr. p. 3118, ls. 11-16).

Without any guidance from the court in its jury charge as to the manner of deductive usage and connective use of circumstantial evidence this placed defense counsel in front of the triers of fact without the meaningful ability to give and relate his own countering evaluation of the plainly more “intellectual” qualities of circumstantial evidence. *Grippon*, at 87088, 489 S.E.2d at 466 (Toal, CJ, dissenting). The discreet instruction of connecting up should have been given in the instant case as “...the evaluation of circumstantial evidence requires the connection of collateral facts in order to reach a conclusion.” *Logan*, 405 S.C. at 99, 747 S.E.2d at 452.

Failure to give the requested jury instruction was substantive and reversible error in this case. This Court should grant Appellant a new trial.

**F. This Court’s recent decision in *State v. Jenkins* is inapposite and contrary to the facts below**

This Court’s recent decision in *State v. Jenkins*, 408 S.C. 560, 759 S.E.2d 759 (Ct. App. 2014) is legally and factually distinguishable in a meaningful way. Initially, the State must be constrained to admit that since this case was pending on appeal at the time of the *Logan* decision in August, 2013, that the *Logan* holding relates back and applies

retroactively. See *State v. Belcher*, 385 S.C. 597, 612-13, 685 S.E. 2d 802, 810 (2009) and *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

As noted herein, the instant case is largely, if not completely and totally, circumstantial in nature while the *Jenkins* facts show the exact opposite: The defendant's wife Carmen Jenkins, testifying as a cooperating state witness and as a co-defendant, noted in detail his direct involvement. In an attempt to isolate the Supreme Court's holding in *Logan* to its own facts and affirm the trial court's failure to correctly charge, the Respondent's Brief in *Jenkins* notes "Moreover, the *Logan* charge is specifically tailored to a case relying upon circumstantial evidence... Clearly the *Logan* charge is most applicable in cases where circumstantial evidence is center stage." Respondent's Brief, *State v. Jenkins*, page 16. See *Stanley Smith & Sons v. Dumas*, 315 S.C. 30, 33, 431 S.E.2d 595, 596 (Ct. App.1993) (this Court took notice of the contents of the appellate record in another, unrelated case). Also advocated by the State in its Reply Brief in *Jenkins* is the claim that the newly minted *Logan* charge is an alternate and/or supplemental charge to *Grippon* where circumstantial evidence is factually found: "But again, it is an alternative charge. The charge is not designated the sole charge available nor even mandatory, though a trial judge should use the above charge when requested by the defendant." Respondent's Brief, *State v. Jenkins*, page 16. As noted above defense counsel had meticulously advocated for a circumstantial evidence charge that would guide the jury in the deductive process necessitated by circumstantial evidence and to steer clear of the impulse to deliberate on the basis of suspicion.

Additionally, this Court would conclude in error in the instant case if it opined, as

in *Jenkins*, that “Further, the trial court’s instruction on circumstantial evidence (see supra) immediately followed the reasonable doubt instruction.” *Jenkins*, 408 S.C. at 573, 759 S.E.2d at 766. In truth the trial court’s circumstantial evidence charge below was given before any mention of reasonable doubt or any instruction and definition of reasonable doubt. Compare (Tr. 3198, l. 10-3199, l. 5. with 3201, l. 2).

This court’s *Jenkins* decision citing to *Logan* avers that “Notably, other language from the *Edwards* instruction was recently reaffirmed, slightly modified, and recommended in future jury instructions” 408 S.C. at 570, 759 S.E.2d at 764. Regrettably, none of the *Logan* modifications, however, were afforded Appellant in the trial below: no nod to the quicksand of suspicion was made in the trial court’s charge below; no instruction was given below on the necessity for the internal consistency of the circumstantial evidence; no requirement made that the jury’s evaluation of circumstantial evidence when taken together point conclusively to guilt. The factual distinctions present in the *Jenkins* case, direct evidence by Jenkins’ wife and co-defendant as to kidnaping and murder, as opposed to the entirely circumstantial case presented below against Appellant, require this court to distinguish this case from the *Jenkins* decision in a meaningful way.

Accordingly, this Court should reverse Appellant’s conviction and remand the matter for a new trial.

**II. THE COURT ERRED IN FAILING TO RESTRICT THE MAIN STATE EXPERT FROM OFFERING AN OPINION OUTSIDE THE QUALIFIED AREA AGREED TO BY APPELLANT AS A RESULT OF VOIR DIRE OF THE EXPERT**

**A. Mr. Capnerhurst's actual possession of the .9mm Smith & Wesson was crucial to Appellant's theory of defense that Appellant fired and killed Mr. Capnerhurst who had used the same semi-automatic to kill Tammy Parker and was now using it to rob Appellant**

The possession of the .9mm Smith & Wesson by Mr. Capnerhurst as argued above was essential to Appellant's protection of himself, causing him to fire another weapon ("The Judge") and kill Mr. Capnerhurst. The State, again as argued above, theorized that Appellant killed both Tammy and then Mr. Capnerhurst and planted the .9mm in Mr. Capnerhurst's left hand. (Tr. 2945, l.24 –Tr. 2946, l. 18). The Solicitor advanced this theory based on the state's interpretation of the physical evidence as evaluated by an expert, Dr. Bradley Marcus, a forensic pathologist employed at the Palmetto Richland Hospital, that the nature of the wound caused by "The Judge's" gunshot disabled Mr. Capnerhurst to the extent that he could not have continued to hold onto the .9mm after being shot. "I believe that Mr. Capnerhurst due to the injuries sustained to his left arm, that he was unable to have carried a weapon based on the injuries to his left arm, based on the circumstances of falling backward and downward. That is my opinion." (Tr.1602. ls. 23- Tr. 1603, l. 3).

The state contended that Appellant had planted the Smith & Wesson in Mr. Capnerhurst's left hand after killing both victims. (Tr.279, ls. 9-10; Tr. 1600, l. 23-Tr. 1601, l.3). While Dr. Marcus had visited the scene of the homicides on April 13th, he did

not evaluate the body or the nature of the scene of the Capnerhurst killing, only that of Tammy Parker in the second floor office. (Tr. 1514-Tr. 1516).

During the voir dire of Dr. Marcus, the defense did not object to his being qualified as a forensic pathologist, but only as to a specific issue: the cause of death of Bryan Capnerhurst as a result of gunshots. The trial court agreed and qualified him accordingly:

Q. Alright, Doctor, other than -- is there another cause of death in this case other than gunshots

A. No, sir.

Q. Okay. Is that what your expected testimony is?

A. Yes, sir .

MR. WHITLARK: I don't have - - based on that, I have no problem with him being qualified.

THE COURT: All right. Ladies and gentlemen, of the jury, Dr. Bradley Marcus will be offered as an expert in forensic pathology. Is that it, just forensic pathology?

MS. CAMPBELL: For purposes of what we are here for today, Your Honor. He does have additional certifications, again, in all those other areas. But for what we need today, forensic pathology is the cause and manner of death.

THE COURT: All right. And he will be testifying and able to give opinion testimony in that area. Yes, ma'am.

MS. CAMPBELL: Thank you, Your Honor.

(Tr. 1510, l. 24 –Tr. 1511, l. 19). The defense raised objections when Dr. Marcus testified outside the scope of the qualification and agreement, but those objections were overruled.

(Tr. p. 1535, ll. 12-20; p. 1589, l. 25 - p. 1590, l. 18; p. 1598, l. 23 - p. 1611, l. 14).

**B. The reliability of the expert's testimony was not evaluated prior to admission for the jury**

The cause of death was admittedly a homicide; the manner of death was as a result of gunshots- both of which had thus been agreed to by the defense. (Tr. 1522, ls. 23-25; Tr. 1524, ls. 8-10 and Tr. 1528, ls. 5-7). However, when the state needed to discount the self defense posited by Appellant and to contradict his right to eject a trespasser, the possession of the Smith & Wesson in Mr. Capernhurst's left hand became an issue not voir dired upon by defense counsel. The state basically conceded as much: "MS. CAMPBELL: Cause and manner of death. He has a right to testify to -- in his expert opinion as a forensic pathologist -- to cause and manner of death and how that happened." (Tr. 1521, ls. 23 --Tr. 1522, l.1).

The trial court mistakenly expanded its previous limited ruling on the breadth of Dr. Marcus's testimony and allowed him to testify as to a completely different matter, one that had not been either voir dired upon or accepted by the defense. The issue of the circumstances surrounding the death was a matter outside the need for expert testimony especially as it had already been testified to by others. "THE COURT: All right. The objection will be overruled. I do believe that it goes to the weight of the evidence. I do believe that he is testifying to the manner of death, the cause of death, and the circumstances surrounding the death. *That is what he was qualified as an expert on yesterday.*" (Tr. p. 1609, ll. 13-19) (Emphasis added).

By allowing this third aspect, the court added an imprimatur of respectability and

gravitas to testimony which was, in truth, not previously ruled upon. Defense counsel obviously was objecting on the contamination of the scene by the first two reporting officers who dislodged the gun from Mr. Capnerhurst's hand by shaking it vigorously three times. (Tr. 368, ls. 14-25). While Dr. Marcus had visited the scene on the afternoon of the shootings he had not gone to the area where the safe was located and did not view the Smith & Wesson .9 mm either in the hand of Mr. Capnerhurst or beside his body, nor was he able to determine the amount of rigor mortis that had begun at death. As a result the reliability of the expert's opinion was questionable.

The concept of reliability of the expert's testimony, prior to the allowance and acceptance of consideration of this specialized evidence by the jury is at the core of Rule 702, SCRE. See *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) ("The familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence."); *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012) (same). While admittedly the language of Rule 702, SCRE, addresses the issue of relevance, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise," the rule presupposes the concept of reliability, whether it be scientific or non-scientific evidence, as a gate keeper function of the trial court.

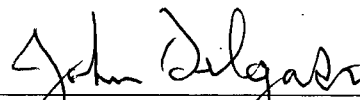
It was an abuse of discretion to allow this expert testimony in the absence of the reliability of the testimony. This Court should reverse and remand for a new trial.

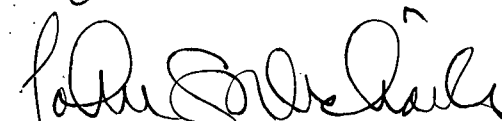
**CONCLUSION**

For the reasons stated the Court should reverse Appellant's conviction and remand the matter for a new trial.

Respectfully submitted,

September 30, 2014

  
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