

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

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

Appellate Case No. 2013-001238

The State, Respondent,

v.

Brett D. Parker, Appellant.

BRIEF OF APPELLANT

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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. (R. p. 266). Upon arrival at the scene the officers found Appellant outside the residence where he was detained for security purposes. (R. p. 268). 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. (R. pp. 305, 309). Tammy was killed by 7 shots from a .9mm Smith & Wesson semi-automatic handgun. (R. p. 1503). Capnerhurst was killed by three shots from a revolver called "The Judge" by its manufacturer Tarus Firearms, loaded with .410 shotgun shells. (R. p. 828, 1509). 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. (R. pp. 599, 1466).

Tammy Parker was a medical sales representative who made as much as \$160,000 a year. (R. p. 259, 1.18). Appellant, an admitted bookmaker, also worked for a durable medical equipment company making about \$40,000 a year. (R. p. 2745, 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. (R. p. 1945).

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 \$21,000. (R. p. 1594, 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. (R. p. 1165, 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. (R. p. 1947). 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. (R. p. 1599, l. 24-1600, 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. (R. p. 1600, 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. (R. p. 1142, 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. (R. p. 2370).

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. (R. p. 2768, 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. (R. p. 309, 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. (R. p. 231, 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. (R. p. 1143, 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. (R. p. 2763, 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. (R. p. 2687, 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. (R. p. 1978, ls. 4-8; p. 1994, 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. (R. p. 1770, l. 8; p. 1855, l. 20).

Insurance proceeds on Tammy's death, including cash and annuities, to which Appellant would have been personally entitled was \$868, 000. (R. p. 2374, 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. (R. p. 1315).

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 (R. pp. 2574-2578). 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. (R. 2580, l. 21- 2581, 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.” (R. p. 2573, 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.” (R. p. 2579, 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 (R. p. 2964, 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. 2964, l. 23- p. 2965, 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. 2987, 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. 3171, 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. 3183, 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. (R. pp. 2580-2581). 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. (R. p. 2581, 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. (R. p. 1509, ls. 5-8)
- b- The Smith & Wesson .9 mm semiautomatic was used to first murder Tammy (See generally R. p. 2243)
- c- The Smith & Wesson .9 mm semiautomatic was then placed in Mr. Capnerhurst's hand by Appellant after shooting him; (R. p. 2201).
- d- The Smith & Wesson .9 mm semiautomatic was placed in Mr. Capnerhurst's hand to underscore Appellant's theory of self defense; (see generally, R. p. 2564)
- 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. (R. p. 2214)
- 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. (R. p. 2217)
- h- The existence of gunshot residue on Mr. Capnerhurst's hands was consistent with his being on the receiving end of being fired upon (R. p. 2228)
- i- The motive for the killing of Tammy Parker was to obtain insurance proceeds to pay off Appellant's gambling debts; (R. pp. 2196 and 2200).
- j- Appellant could not afford a divorce as Tammy made more money than he; (R. p. 2196);
- k- Tammy had threatened to leave Appellant if he continued his own gambling.

(R. p. 2822);

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. (R. pp. 2572, 2965). 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.

(R. 2990, ls. 6-15).

At the Rule 19 stage at the close of state's evidence in chief (R. p. 2572); again at the close of all evidence on a motion for a directed verdict (R. p. 2965); at the jury charge conference prior to deliberations (R. p. 2990); after jury charge but before jury deliberation and verdict (R. p. 3171) and, lastly, in post trial motions after conviction (R. p. 3183), the defense maintained not simply the failure to present substantial circumstantial evidence itself but that 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.

(R. p. 3073, 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.

(R. pp. 3153-3154). 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 (R. pp. 3172-3175).

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 (R. p. 254, ls. 19-23; R. p. 288, ls. 14-16; R. p. 320, 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 R. p. 239, ls. 16-25; R. p. 327, ls. 7-12; R. p. 346, ls. 17-24; R. p. 385, ls. 23-386, l.1; R. p. 757, ls.17-24; R. p. 844, ls. 20-24; R. p. 905, ls. 12-20; R. p. 923, ls. 23-25; R. p. 1043, 12-15; R. p. 1089, ls. 20-24; R. p. 1112, ls. 23-25; R. p. 1571, ls. 23- p. 1572, l. 20; R. p. 2013, ls. 5-10; R. p. 2058, ls. 3-9; R. p. 2059, ls. 14-16; R. p. 2201- l.21 – p. 2202, l.10; R. p. 2338, ls.14-16; R. p. 2394. ls.7-9; R. p. 2482, 3-6; R. p. 2554, ls. 17-21; R. p. 2591- ls.9-21; R. p. 2687, l.5- p. 2688, l.16; R. p. 2694, ls. 16-19; R. p. 2772, ls. 7-17 and R. p. 3032, 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. (R. pp. 3172-3174). 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” (R. p. 231, 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. (R. pp. 2201, 2560-2561, 2563). 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.

(R. p. 2564, 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." (R. p. 2569, 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." (R. p. 3127, 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." (R. p. 3128, 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. (R. pp. 3017-3018). 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.” (R. p. 3073, 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, thought 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 (R. pp. 3153, l. 10-3154, l. 5. with 3156, 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. (R. pp. 2900, l.24 -2901, 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." (R. pp. 1555. ls. 23- 1556, l. 3).

The state contended that Appellant had planted the Smith & Wesson in Mr. Capnerhurst's left hand after killing both victims. (R. p. 231, ls. 9-10; R. pp. 1553, l. 23-1554, 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. (R. pp. 1467-1469).

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.

(R. pp. 1463, l. 24 -1464, l. 19). The defense raised objections when Dr. Marcus testified outside the scope of the qualification and agreement, but those objections were overruled.

(R. p. 1488, ll. 12-20; p. 1542, l. 25 - p. 1543, l. 18; p. 1551, l. 23 - p. 1564, 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. (R. p. 1475, ls. 23-25; R. p. 1477, ls. 8-10 and R. p. 1481, 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." (R. pp. 1474, ls. 23 -1475, 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.*" (R. p. 1562, 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. (R. p. 320, 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 .9mm 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,



May 29, 2015

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ORIGINAL

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Richland County
Honorable DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case No. 2013-001238**

RECEIVED

JUN 02 2015

THE STATE,

Respondent Court of Appeals

vs.

BRETT D. PARKER,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. 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*?
2. 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?

COUNTER STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial judge properly denied Parker's request to charge the outdated *State v. Edwards*, 298 S.C. 272, 275-76, 379 S.E.2d 888, 889 (1989) "reasonable hypothesis" language in the circumstantial evidence charge, where the South Carolina Supreme Court has found that this language is confusing and has directed that it should not be used. Instead, the trial judge properly gave the then-current and instruction approved of in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), which the Supreme Court of South Carolina had found is the sole appropriate charge in *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004)? And whether, at worst, any error in not giving the requested charge was harmless beyond a reasonable doubt?
- II. Whether the trial judge properly allowed Dr. Bradley Marcus, the forensic pathologist who performed the autopsy on Bryan Capnerhurst, to opine that "[b]ased on ... the injuries sustained to his left arm and the way he fell back ... [Bryan could not] have held onto anything that was in his hand" because (1) the science was forensic pathology (2)

Dr. Marcus was properly qualified as an expert in forensic pathology; (3) his duties as a forensic pathologist include determining the cause of death, the manner of death and the circumstances surrounding it; (4) his training as a forensic pathologist included training as to what could or could not have occurred at a suspected crime scene; and (5) his training as a medical doctor included specific training as to how certain wounds could affect a person's ability to move and to handle things. Also, the probative value of his opinion was not substantially outweighed by its prejudicial value; and Parker could not have been prejudiced by its introduction because it was merely cumulative to Dr. Marcus' earlier opinion that was admitted without objection?

STATEMENT OF THE CASE

Appellant, Brett D. Parker (Parker) is currently serving two life sentences for murdering Tammy Jo Parker (his wife) and Bryan Capnerhurst, his “friend” and employee, at the Parkers’ Richland County home on April 13, 2012. The Richland County Grand Jury indicted him in August 2012 for two counts of murder (2012-GS-40-4379) and (2012-GS-40-4380). **R. pp. 1-6.** David A. Fedor and J. Marcus Whitlark, Esquires, represented him in the trial court. Senior Assistant Fifth Circuit Solicitor K. Luck Campbell, and Assistant Solicitors Nicole Simpson and Meghan Walker prosecuted the case.

On May 6-28, 2013, he received a jury trial before the Honorable Deandre Benjamin. The jury convicted him of both murders and Judge Benjamin imposed two consecutive life sentences. Parker timely served and filed a notice of appeal.

STATEMENT OF FACTS

The present case underscores that there is much truth to the old saying that no one knows you quite like your mother. When Brett Parker’s father told his mother, Linda, that Tammy was dead, her immediate response was, “Did Brett kill her? Did Brett kill Tammy?” **R. p. 415, ll. 7-10; p. 1102, ll. 15-23.** The answer to her questions is an unqualified, “Yes, and it was just one step in a maliciously diabolical plan in which he attempted to frame his second victim, Bryan Capnerhurst, for her murder so that he could (1) prevent Tammy from discovering that he was \$176,000.00 in debt because of online gambling, since she had threatened to leave him if he incurred another huge gambling debt as he had several years earlier; (2) get out of a marriage that he no longer wanted to be in but from which he could not afford a divorce; (3) get the proceeds of the life insurance policy on Tammy’s life and her other assets which exceeded \$1,000,000.00, in order to pay his debts which were almost that high; (4) avoid having to pay

Cap \$21,300.00 that he did not have; (5) end a cycle of constantly borrowing significant amounts of money to pay portions of his debt; and (6) spend more time in the company of his paramours.”¹

The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, reasonably tended to show that members of the Richland County Sheriff's Department were dispatched to the Parkers' Richland County residence at 12:41 p.m. on Friday, April 13, 2012. The dispatch was based on Parker's 911 call (*see* State's Ex. 399) reporting that shots had been fired and that both his wife, Tammy, and Bryan Capnerhurst had been struck. When responding officers arrived, beginning around 1:00 p.m., they found Parker outside the residence, in the driveway and holding a cordless phone. He was detained briefly for security reasons and he was advised of his *Miranda* rights.² He was not crying and neither his hands nor his face were bloody. Also, EMS arrived shortly thereafter and provided care for him. **R. pp. 265-74.**

Inside the residence, officers found Tammy Parker and Bryan Capnerhurst dead upstairs. Tammy's body was laying face-down “halfway into a bathroom,” with her feet in a room used for an office. Officers saw 9 mm. shell casings in an entertainment area adjacent to the office, immediately around Tammy's body and in the office. Bryan's body was lying on the attic floor and he had a 9 mm. semi-automatic pistol in his left hand. An officer had to tug three times on Bryan's shoulder before the weapon fell out of his hand.³ The officers then saw that Bryan had a

¹ This Statement of Facts highlights most of the evidence presented against Parker. However, Respondent would direct the Court to the closing arguments by the prosecution, where the evidence is discussed in much greater detail. *See R. pp. 2998-3031; 3079-3144.*

² *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

³ The gun was dislodged from Bryan's hand without photographing it first for the officers' safety, which was the chief concern.

head wound and was obviously dead. The 9 mm. pistol was seized at that point. **R. pp. 304-18; 320-22; 331-32; 335-45; 363-65; 372-75.**

Outside of the residence, Parker spoke to Maj. James Smith, as officers and family members began to arrive. Several other individuals also heard portions of their conversation, in which he unconsciously and inadvertently began alerting others to the fact that he murdered both victims. Upon being told that his father, Jack Parker, had arrived, Parker asked, "What does my dad think happened?" **R. pp. 402; 428-29; 2149.**

Parker gave a non-custodial statement to Maj. Smith at the scene after again receiving his *Miranda* rights.⁴ Parker admitted that he was a bookie, said that Bryan was an employee, and indicated that earlier in the week they had planned to meet on Friday because he owed Bryan some money and Bryan wanted to borrow money from him. They had also spoken earlier Friday and arranged to meet that in the middle of the day because Parker and Tammy were going to have lunch at home. He had stopped at Firehouse Subs in Irmo and bought subs, which he brought home for them to eat. After lunch, they went into the office and Tammy called her doctor. While she was on the phone, he went downstairs and eventually took a bowel movement.⁵ He heard Bryan enter the house⁶ as he was finishing up in the bathroom and yelled for Bryan to go upstairs to the office where Tammy was because he would be there soon. **R. pp. 382-385; 2407-11.**

Parker heard gunshots within "a short period of time." He immediately ran to the top of the stairs, where Bryan met him. Bryan held a gun on him and told him to "open the M.F. safe."

⁴ Parker was seated on a cooler, he was not handcuffed and EMS had finished attending to him.

⁵ He used a common and more vulgar expression.

⁶ The door has a bell, and when door opens you can hear it. Also, Bryan knew the security code for the house.

Parker claimed that he could not understand what was happening and asked Bryan what he was doing. After Parker led Bryan to the safe, he recalled that he had a pistol of his own secreted in that area. He was able to get that pistol, and he turned and shot Bryan. He jumped over Bryan and ran back to Tammy. He heard her making a noise. He realized she was dead or dying and he checked her neck for a pulse, but did not engage in any life-saving efforts. Then, he ran downstairs, got the cordless headset, and called 911. **R. pp. 385-86; 2411-12.**

When Maj. Smith questioned him about the facts, Parker was upset, but, he was angry and not crying. Also, he did not have blood on him. He kept saying, "I guess it is my fault because I gave him the gun. He repeatedly acted as if he was going to throw up, but he would only spit." At Maj. Smith's request, Parker agreed to give a written statement. **R. pp. 2075; 2412-15.**

At some point after this oral statement, he also lamented, "[M]y God, I have killed my best friend." Coroner Gary Watts and Lt. Scott McDonald overheard this comment and thought that it was odd both because he did not express concern for the death of his wife and because if Bryan had killed Tammy, as Parker claimed, then Bryan was not a "friend." **R. p. 1103; 1281-82.**

Parker was subsequently taken to a nearby Richland County Sheriff's Department substation. After being advised of and making a written waiver of his *Miranda* rights, he gave a written statement, State's Ex. 2. In this statement, he described the events leading up to the shootings, as well as the shootings, in the same manner as he had orally. Additionally, he claimed that he had gotten home at 11:45 a.m. and Tammy got there at 12:00 p.m.; that the shots upstairs occurred about a minute after he heard Bryan arrive; that Bryan had "a glazed look in his eyes" when Parker saw him; and that the pistol he had used to shoot Bryan was a Taurus .38

“Judge” that he kept behind a headboard and on top of the safe.⁷ Also, Parker indicated that when he led Bryan to the safe, “Bryan was standing behind me” in the closet. I knelt down, grabbed my pistol. I turned as quick as I could, and I shot him. I'm not sure how many times I fired, but I think three or four.” Also, he claimed that he had asked Tammy if she could hear him when he checked on her and that she did not respond. He further claimed that he ran back upstairs to check on Bryan because the dispatcher had asked him if Bryan was alive; and he put his finger under Bryan’s nose to check for breathing. **R. p. 2077; 2083-88; 2098-99; 2416-17; State’s Ex. 2 – on file with this Court.**

Parker said that he had thrown the Judge down on a rug by the front door when the dispatcher told him to put the gun down; that he met Bryan as the result of Bryan betting with him; that Bryan had worked for him for five years; Bryan had never threatened him before; that Tammy got along with Bryan and “[s]he would actually cook for us if we worked on Sundays;” that he had given Bryan the 9 mm. because Parker it was dangerous and Parker did not want it in the house; that he, nevertheless, kept the Judge on the safe because “[i]t was a good place to hide in case something ever happened and I could get to it there;” and that he also kept another gun in the downstairs bathroom; that he purchased the Judge at the suggestion of his preacher. **R. pp. 2088-91; State’s Ex. 2 – on file with this Court.**

Parker eagerly explained that the Capnerhursts had financial problems because Ms. Capnerhurst had “maxed out” their credit cards and was not paying bills, which she had done in the past. Also, their daughter attended the Governor’s School and this was also a big financial burden. Parker stated that he owed Bryan between \$13,000.00 and \$14,000.00 for past work, that he had planned to pay Bryan \$5,000.00 that day, and that he would pay the rest when - and only

⁷ This weapon also fires .410 shells.

if - he had collected from the people that owed him money. Parker also claimed that, in a conversation the previous Monday, Bryan had said that "he was tired of living off of a credit card. Bryan had supposedly borrowed money from Parker in the past and Parker assumed he would ask to borrow money when they met. Further, Parker claimed that "I know he has borrowed money from her parents. And he tried to refinance his house, but her credit was so bad ... [t]hey couldn't even refinance their house."⁸ R. pp. 2091-94; 2101-02; 2417-18; State's Ex.

2- on file with this Court.

Parker claimed that he kept \$20,000.00 in the safe for his booking operation. Bryan knew the location of the safe but did not know the combination or how much money was in it. Parker stated that he only had roughly \$4,500.00 in his pocket⁹ and that he would have to get the rest of the money from the safe. Parker denied that he and Tammy had any financial or marital problems, he denied having a gambling debt, he denied even using the computers, and he denied suspecting her of infidelity. R. pp. 2094-97; 2100-01; 2104-06; State's Ex. 2- on file with this Court.

Maj. Smith and Parker had a discussion after he completed his formal statement. When asked whether there was any infidelity, Parker "indicated that he had not had any affairs." However, "Tammy had found some text messages of kind of a flirtatious nature" that he received in late December of 2011. They were from a woman named Natasha, whom he had met through work. He said that the issue had been resolved and that Natasha would verify that this was "harmless flirtation." Also, he described the noise he heard Tammy make shortly before he

⁸ Parker contended that he was so concerned about Bryan's financial problems that he spoke to his own father about the matter, asking for advice as to he should do if Bryan asked to borrow money. His father asked if he thought that Bryan could repay him but he was unsure. As a result, he "wasn't sure what my answer was going to be." R. p. 2093.

⁹ He showed the officers the money that was in his pocket. It was \$4,511.00. R. p. 2517.

called 911 as "gurgling," and he admitted, for the first time, that he had shot Bryan in the face. He also said that he kept a loaded .38 "in the towel area on the top shelf in the master bathroom."

R. p. 2419-20; 2422.

By this time, officers at the scene had learned about Parker's prior suicide attempt several years earlier in Las Vegas. When asked about it, he denied that it was a suicide attempt. Instead, he claimed that he had taken "sort of a getaway trip to get away from it all in Vegas. He ... called Tammy while he was there and said he wasn't coming home, but he was on a plane the next day." He did not reveal how much debt he incurred before going to Las Vegas. Major Smith asked Parker for the combination to the safe and he provided the supposed combination. **R. pp. 2422-23.**

Following the discussion, Parker was transported to his parents' residence, as were his fourteen year old daughter and five year old son.¹⁰ Parker was told that he needed to tell his children what had happened because they still did not know. He then went into the house and informed his children of their mother's death in the presence of Sgt. Maria Yturria, the supervisor of the Department's victim services unit, an Inv. Talkish, and Parker's parents. Rather than showing compassion, Parker "blurt[ed] out ['] Your mom is dead.[']" When his daughter put her hands in her face and started crying, he briefly hugged her at his mother's insistence. Then, he immediately ordered her to "Stop crying," and he became very agitated. **R. pp. 415-23; 2424.**

He did not respond to Sgt. Yturria's comment that his daughter should be allowed to react in any manner she wanted because she had just learned that her mother was dead. Neither he nor

¹⁰ The Sheriff's Department had gotten them at their respective schools so that they would not learn of the murders at the Parkers' home through some source other than their father. No one from the Sheriff's Department broke the news to them. **R. p. 416-19; 2423.**

- He claimed that he gave Bryan the 9 mm. because it was supposedly too dangerous to keep around the house; but he kept two weapons in the house. Also, he supposedly left the Judge where his five year old son could gain access to it, sitting on top of the safe and only 2' off the floor. This did not make sense. *See R. pp. 2384-85.*
- The prosecution's investigation showed that 7 shots were fired at Tammy by the 9 mm.

- That day, he described his co-worker, Al Muncey, how he had killed Bryan. Unlike the stories that he had told to law enforcement and Tammy's family, this time he claimed that Bryan gave him a stunned look after the first shot and Parker "shot him a couple more times. And he said the last shot [Bryan] was laying on the ground and he got directly over [Bryan] and shot him right between the eyes." **R. pp. 2020-21.**
- Still another problem with State's Ex. 2 is that Parker did not reveal that he had three paramours, whose identities investigators uncovered: Lindsay Mullins, Dana Allpress and Natasha Nadkarni. **R. pp. 1315-33; 2319.** While the affairs with Allpress and Nadkarni had ended by the time of the murders, Parker was actively involved with Ms. Mullins, a bank teller whom Parker met at the bank.
- Mullins was separated from her husband in 2012 and was divorced by the time of trial. She had sex with Parker in February and again towards the end of March. On that occasion, they had sex in the bedroom of Parker's five year old son. **R. p. 1319-21; 2499-2500.**
- While they were in the Parker residence, Parker showed Ms. Mullins the upstairs office. He told her he kept a gun in it and pointed to the desk. **R. pp. 1321-22.**
- They had sex at a local motel on April 10th, and they were exchanging text messages about their next rendezvous on the day of the murders. **R. pp. 948; 957-59; 1322-28.**
- Parker had deleted these text messages from his phone but investigators were able to obtain copies of them from Verizon Wireless' records for his phone **R. pp. 1145-47.**
- Natasha Nadkarni testified that Parker told her that he and Tammy did not sleep together. He was looking at getting a divorce but said that getting a divorce "would be complicated just because of the salary on paper versus the other business and how they would work that out." **R. pp. 1799-1800.** He also told her that balancing his two jobs "was taking a toll on him." **R. pp. 1801-02.**
- Nadkarni confirmed that she and Parker had exchanged flirtatious text messages in December 2011. Although she denied that they had a sexual relationship, she admitted calling and leaving him three voicemails (State's Ex. 509) in the span of 2 minutes on June 20, 2012. In these voicemails, she told him that he owed her an explanation. His response was that the evidence does not match my story. He gave her a similar explanation in a face-to-face conversation. **R. pp. 1807-08; 1817-18.**
- Parker also misled officers about the Capnerhursts' financial problems in State's Exhibit 2. It is true that Cindy Capnerhurst had stolen \$35,000.00 from the bank

where she worked in the past and that she thereafter pled guilty to embezzlement. **R. pp. 1952; 1956.**

- She received probation and ultimately repaid the money that she had taken. **R. pp. 1953-54.**
- She had also run up \$25,000.00 of credit card debt within a year and one-half of the murder, much of which was paying for remodeling the family's kitchen; and they had borrowed \$3,000.00 from Cindy's father. **R. pp. 1622-23; 1847; 1867-68; 1970-73.**
- However, the embezzlement plea was in 2000 and, contrary to the representations of her attorney at the time, the now-disbarred Richard Breibart, she had not taken the money to pay off Bryan's gambling debt. Rather, Bryan had stopped gambling when his daughter was born, in 1995. **R. 1844; 1866; 1953-54; 1956-58; 1960.**
- Unknown to Parker, Bryan had a "walk away plan," so that he could pay off this debt even if Parker did not pay him. In addition to working for Parker, Bryan worked for Alvin Kelley, at the Lexington County Recreation Commission, and he cleaned the office there as well. **R. pp. 1626-1630; 1826-27; 1861.**
- Further and as noted, Jack Parker had promised to pay Bryan whatever Parker failed to pay and he promised to hire Bryan to work for him. **R. p. 1830.**
- Bryan was "pretty open" about his financial problems and discussed them with Jim Headley, and (apparently) Parker. Moreover, Bryan was very meticulous about timely paying bills, and he could have and would have paid off this debt without the \$20,300.00 that Parker owed him. *See* **R. 1838-1840; 1971-74.**
- Instead of lying and trying to deceive law enforcement as Parker had done, Cindy Capnerhurst and her family were completely honest when questioned by investigators about Cindy's prior conviction and the family's current financial problems. **R. p. 1952-53; 2155.**
- When asked about the credit card debt, Cindy immediately produced the Visa bill, and Mr. Barnes provided credit reports for both Bryan and Cindy. **R. pp. 1980-82; 2155; 2159-60.**
- The amount owed on the card was 20,000.00 and they were over \$4,000.00 below the credit limit. **R. pp. 2159-60.**
- Moreover, on April 19, 2012, both of Parker's children participated in an ARC interview.¹⁵ Lt. Scott McDonald and another officer observed this interview, in

¹⁵ This is The Assessment and Resource Center, which is a child advocacy center that is not affiliated with the

which Parker's fourteen year old daughter "indicated that her father had shown her a gun that he kept in the office area, [he] also told her about a gun he kept in the master bedroom closet, ... [and] she indicated to the woman that was interviewing her that she had never seen Mr. Capnerhurst with a gun. **R. pp. 1170-71; 2924.**

- Terri Gleason, the firearms expert, testified that she determined that Bryan was most likely shot from a distance of three to four feet, but she put the range at two to five feet to give Parker the benefit of the doubt. Also, Bryan did not have gunpowder residue on him, which should have been present if he had shot the 9 mm. **R. pp. 1713-35; 1743-49.** This was another discrepancy between State's Ex. 2 and the evidence.
- Parker gave a number of other statements to investigators and he spoke to Sheriff Leon Lott at least five times before his arrest,¹⁶ in an effort to explain away many of the problems with his original statement and to try and provide an account that was consistent with the facts uncovered in the investigation. Respondent will not discuss each statement, other than to note that on every occasion, he was unable to make his story fit the facts. **R. pp. 2124-32; 2140-41; 2318-35; 2430-39; 2466-53; 2493-98; 2504-08; 2514-22.**
- For instance, officers spoke to him when he went back to his residence on April 14th to open the safe. Officers asked him about a gun case that they had found in the office. Parker stated that the 9 mm. pistol had come in the case. When asked why he had not given the case to Bryan when he gave Bryan the gun, he said, "[W]ell, I just didn't¹⁷." **R. p. 2128.**
- He was also asked about why he had left the toilet seat up after he finished his bowel movement and "he said sometimes he just does that." **R. pp. 2128-29.**
- He told another lie on the 14th when he said that he knew nothing about Tammy's life insurance policy. Further, he could not articulate a motive for Bryan to kill Tammy. **R. pp. 2131-32.**
- Also, Parker was asked about his bookie on April 14th, and he refused to give a name. when asked why there was not \$20,000.00 in the safe, Parker "explained" that "I have got the booking sheets in my car. And he goes out to the car and he shows us these booking sheets. He says, well, this is really roughly \$20,000

Richland County Sheriff's Department. The purpose of the interview is not simply to gather information about the crime, but to try and provide referrals for counseling and otherwise assist children who are either victims or may be traumatized by crime, **R. pp. 2160-61; 1916-18.**

¹⁶ Investigators spoke to him on April 14, April 17, April 18, and April 25, 2012. Parker met with Sheriff Leon Lott on May 21, June 6, July 6, July 11, and July 19, 2012.

¹⁷ He also did not give Bryan the holster for it.

worth. I'm just waiting to get it collected.” **R. p. 2133-34.**

- However, “he was supposed to have a meeting with Mr. Capnerhurst where they are going over all this, yet he has got [the sheets] in his car.” **R. p. 2134.**
- Officers also asked him on the 14th if he had told Bryan to bring a bag. He said that he had “so the neighbors wouldn't see the money, even though the money he was going to give [Bryan] fit quite easily in Brett's own pocket.” Parker did not have an answer for why the bag was necessary to carry the money. **R. pp. 2140-41.**
- When Parker’s father told his mother that Tammy was dead, her immediate response was, “Did Brett kill her? Did Brett kill Tammy?” **R. p. 415, ll. 7-10; p. 1102, ll. 15-23.**

Indeed, the State’s case against Parker was so compelling that he persuaded his daughter to testify at trial that she was present in the office area of the Parkers’ home one day before April 13, 2012 and overheard her father and Bryan talking about how it would be good for Bryan to get a gun for his protection. **R. pp. 2686-88.** However, her testimony is inconsistent with not only Lt. McDonald’s testimony concerning the information provided in the ARC interview (**R. pp. 1170-71; 2924**) but Parker’s failure to mention this in State’s Ex. 2. Further, the State impeached her testimony with Defendant’s 4, the transcript of audiotaped recordings between Parker and others while he was in jail awaiting trial. The transcript reflected a conversation between Parker and his father in which Jack Parker told his son that they needed to get the daughter to change the story. There was another conversation between Parker and his daughter, in which they discussed what she was supposed to say because she could not remember it correctly. **R. p. 2693; Defendant’s Ex. 4- on file with this Court.**

ARGUMENTS

I. The trial judge properly denied Parker’s request to charge the outdated *Edwards* “reasonable hypothesis” language in the circumstantial evidence charge because the Supreme Court of South Carolina has found that this language is confusing and has

directed that it should not be used. Instead, the trial judge properly gave the then-current and correct instruction approved of in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), which the Supreme Court of South Carolina had found is the sole appropriate charge in *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). At worst, any error in not giving the requested charge was harmless beyond a reasonable doubt.

Notwithstanding Parker's argument to the contrary, Respondent submits that the trial judge properly denied Parker's request to charge the outdated "reasonable hypothesis" language from *State v. Edwards*, 298 S.C. 272, 275-76, 379 S.E.2d 888, 889 (1989), in the circumstantial evidence charge because the Supreme Court of South Carolina has found that this language is confusing and has directed that it should not be used. Instead, she properly gave the then-current and correct instruction approved of in *State v. Grippon*, 327 S.C. 79, 489 S.E.2d 462 (1997), which the Supreme Court of South Carolina had found is the sole appropriate charge in *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). At worst, any error in not giving the requested charge was harmless beyond a reasonable doubt.

A. How issue was presented in the trial court.

Before the charge conference, Parker indicated that "we are going to need a *State v. Edwards* [charge], we will be making a request. ... I think we are entitled to it." **R. p. 2964, ll. 5-9.** The State noted that *Grippon* was controlling precedent (**R. p. 2964, ll. 7-11**) and the trial judge stated that "[w]e'll take a look at it." **R. p. 68, ll. 17-23.**

In the charge conference held the following day, Parker's Request-to-Charge Number 1 was the "reasonable hypothesis" language from *Edwards*. Counsel acknowledged that *Edwards* had been "tinkered with, no doubt about that, but we would request it." Counsel stated that this instruction "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." **R. p. 7; p. 2987, ll. 13-20.**

The State opposed the requested instruction in light of *State v. Cherry*, 361 S.C. 588,

601-602, 606 S.E.2d 475, 482 (2004), which expressly stated that the “reasonable hypothesis” language in *Edwards* should not be used and that the correct instruction was that set forth in *Grippon*. **R. p. 2988, l. 6 – p. 2989, l. 2.** In response, counsel argued that “I’m simply requesting that the law that has been the law of this state since 1850, I think is where this originated ... about, to the exclusion of any other reasonable hypothesi[s].” **R. p. 2989, ll. 9-13.** When counsel conceded that “it may have been changed,” the trial judge indicated that she was bound by the current law. Counsel then noted his “procedural exception” and stated that he had a “gut feeling” that the law would change. **R. p. 2989, l. 13 – p. 2990, l. 22.**

The trial judge thereafter gave the following circumstantial evidence charge:

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.

R. p. 3153, l. 10 – p. 3154, l. 9.

Parker took exception to the failure to charge *Edwards*. **R. p. 3171, ll. 13-25.** He renewed his exception in a post-trial motion. The trial judge denied his motion because she found that *Cherry* had overruled *Edwards* and that her charge, as given, accurately stated the law. **R. p.**

3183, l. 9 – p. 3184, l. 5.

B. Discussion.

Initially, Respondent submits that much of what Parker argues before this Court is not properly before it on appeal because he failed to present the same arguments to the trial judge.¹⁸ *State v. Bailey*, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (a party cannot argue one ground at trial and then an alternative ground on appeal); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error); *State v. Watts*, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct.App. 1996) (“To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court”). Thus, he is confined to asserting those arguments that he actually presented to the trial judge. *Id.*

Further, the trial judge’s refusal to give the requested charge was not reversible error. In reviewing jury charges for error, an appellate court considers the trial judge’s jury charge as a

¹⁸ For instance, he did not argue in the trial court that “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.” Likewise, he did not argue at trial that “[t]here 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 ... 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.” Rather, he conceded that law had changed and that the trial judge’s charge was the current law to be instructed, but he still wanted the requested charge given.

Nor did he argue at trial that “[t]he more significant the amount of circumstantial evidence introduced in trial the greater the necessity for [a reasonable hypothesis instruction].” Finally, he did not argue that the trial judge erred by sustaining the State’s objection to his efforts to argue the reasonable hypothesis language in closing argument. *See R. p. 3073, ll. 11-16*. As a result, these arguments are not preserved for appellate review. *Id.* *See also State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) (“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal”). If this Court addresses these arguments on appeal, Parker would effectively be allowed to end-run the contemporaneous objection requirement. *Contra State v. Torrence*, 305 S.C. 45, 64, 406 S.E.2d 315, 326 (1991) (Toal, J., concurring in result) (“a contemporaneous objection requirement to preserve legal errors operates to procedurally preclude a defendant from allowing error to occur at trial and then complaining of it on appeal”); *State v. Mayfield*, 235 S.C. 11, 23-24, 109 S.E.2d 716, 724 (1959) (“One may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered”).

whole and in light of the evidence and issues presented at trial. “A jury charge is correct if when read as a whole, the charge adequately covers the law.” *State v. Drayton*, 769 S.E.2d 254, 260, 2015 WL 446693, *6 (S.C. Ct.App., Feb., 4, 2015). “A jury charge that is substantially correct and covers the law does not require reversal.” *Id.* (citing *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)). Further, a trial judge generally “is required to charge only the current and correct law of South Carolina.” *State v. Jenkins*, 408 S.C. 560, 569, 759 S.E.2d 759, 764 (Ct.App. 2014), *cert. denied*, Feb 4, 2015.

In *State v. Cherry*, 361 S.C. 588, 601-602, 606 S.E.2d 475, 482 (2004), the Supreme Court held that the traditional circumstantial evidence charge served to confuse juries by leading them to erroneously believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence. As a result, the Court held “that the recommended language in *Grippon* is the sole and exclusive charge to be given in circumstantial evidence cases in this state, along with a proper reasonable doubt instruction.” The Court in *Cherry* also expressly eliminated the confusing “reasonable hypothesis” language found in the *Edwards* instruction, and which Parker adamantly requested. *Cherry*, 361 S.C. at 601, 606 S.E.2d at 482 (“[T]he reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not”).

The Court again approved that charge in *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). Indeed, the Court in *Logan* addressed the argument that Parker raises here, *i.e.* that their recent cases referencing the *Edwards* charge signaled disapproval of the *Grippon* charge. In rejecting that argument, the Court found that its recent cases referencing the *Edwards* language did not address the jury instructions given. Rather, those cases – including *Hernandez*, and *State*

v. *Odems*, 395 S.C. 582, 720 S.E.2d 48 (2011) - the cases upon which Parker relies - as well as *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011), had only made reference to the *Edwards* language in the context of the trial judge's ruling on a directed verdict motion.

In short, none of these recent Supreme Court cases citing the *Edwards* language addressed the *Grippon* jury charge at all. *Logan*, 405 S.C. at 91-94 & n. 7, 747 S.E.2d at 448-49 & n. 7. Thus, the cases cited by Parker did not announce a retreat from the *Grippon* charge.¹⁹ Also, relevant precedent at the time of trial dictated that only the *Grippon* charge be used. *Cherry*, *supra*. That charge does not include the "reasonable hypothesis language" requested here. (See **Request to Charge No. 1, R. p. 7**). The "reasonable hypothesis language" charge from *Edwards* was specifically rejected in *Cherry* and the Supreme Court had directed that the charge no longer be used. *Id.* Indeed, consistent with *Holland v. United States*, 348 U.S. 121 (1954), the Court in *Cherry* found that the "reasonable hypothesis" instruction merely served to confuse juries.²⁰ *Cherry*, 361 S.C. at 601-602, 606 S.E.2d at 482. See also *Grippon*, 327 S.C. at

¹⁹ Instead, both *Hernandez* and *Odems* addressed the presence or absence of sufficient evidence to send the case to the jury, not the sufficiency or clarity of a charge to the jury. See *Logan*, 405 S.C. at 91-94 & n. 7, 747 S.E.2d at 448-49 & n. 7. See also *State v. Hernandez*, 382 S.C. at 625 n.2, 677 S.E.2d at 605-606 n.2 ("Although in [*Cherry* ...] the Court abandoned this charge and held that it may confuse the jury by leading it to believe that the standard for measuring circumstantial evidence is different from that for measuring direct evidence, it nonetheless *illustrates the lack of evidence* against Petitioners") (emphasis added); *Odems*, 395 S.C. at 590, 720 S.E.2d at 52 ("Despite the Court's abandonment of the use of this particular definition as a jury charge in *State v. Cherry*, the definition *illustrates the lack of evidence* against Petitioner") (emphasis added).

The evaluation of evidence for a directed verdict motion is not the same as the jury's evaluation of evidence in determining whether the State had met its burden of proof beyond a reasonable doubt. The "trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Cherry*, 361 S.C. at 594, 606 S.E.2d at 478 (emphasis in original). See also *State v. Schrock*, 283 S.C. 129, 134, 322 S.E.2d 450, 453 (1984) ("The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict and a corresponding duty is imposed on this Court."). Critically, there is no mention in either *Hernandez* or *Odems* of the adequacy of the *Grippon* instruction. Thus, like the challenge in *Logan*, Parker's argument fails for the same reasons.

²⁰ In *Holland v. United States*, the United States Supreme Court, when considering a complaint that the trial judge failed to charge when "the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt," acknowledged that some jurisdictions allowed the charge, but concluded that "the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional

85, 489 S.E.2d at 465 (Toal, J., concurring) (“Relying on *Holland*..., the federal courts and a majority of state courts have abandoned the ‘reasonable hypothesis’ language in favor of an approach that does not differentiate between direct and circumstantial evidence, but simply provides that a defendant’s guilt must be proven beyond a reasonable doubt”); *State v. Manning*, 305 S.C. 413, 417, 409 S.E.2d 372, 374 (1991) (“In deviating from the *Edwards* charge, the charge given in this case turns the State’s burden of proof on its head by requiring the jury find a ‘reasonable explanation’ of the evidence inconsistent with appellant’s guilt before it can find him not guilty”).

While the Court in *Logan* did state that trial courts may not exclusively rely on [the *Grippon*] charge over a defendant’s objection,” *Logan*, 405 S.C. at 100, 747 S.E.2d at 453, the Court in *Logan* reaffirmed both the correctness of the *Grippon* charge and the impropriety of the “reasonable hypothesis” language in rejecting the claim that *Cherry* had been implicitly overruled. *Id.* at 94, 747 S.E.2d at 449 (“the trial court did not err in providing a circumstantial evidence charge consistent with *Grippon*”). This language remains disapproved. *Id.* at 98, 747 S.E.2d at 451-52 (“requiring a jury to inquire as to whether there is any other reasonable explanation other than the defendant’s guilt comes perilously close to shifting the burden of proof from the State to the defendant”). *See also Jenkins*, 408 S.C. at 572-73, 759 S.E.2d at 766; *Drayton*, 2015 WL 446693 at *6. Parker did not want an instruction such as that set forth in *Logan*.²¹ Rather, he wanted the trial judge to instruct jurors on the “reasonable hypothesis”

instruction on circumstantial evidence is confusing and incorrect.” 348 U.S. at 139-140. Given the United States Supreme Court disapproval of the language, any possible constitutional argument, if ever made, would find no support. *See also Logan*, 405 S.C. at 100-01, 747 S.E.2d at 453 (Kittredge, J., concurring in result).

²¹ In *Logan*, the Court stated that the following alternative charge may be given upon counsel’s request:

There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not

language of *Edwards*. Therefore, the requested charge was properly rejected because it did not and still does not accurately state the applicable law.

Nor is there merit to Parker's claim that "[t]he more significant the amount of circumstantial evidence, the greater the need for a *Logan* charge" and, as a result, this Court's Opinion in *Jenkins* is inapposite. The suggestion that there is a greater need for a *Logan* charge here because of the amount of circumstantial evidence presented is inconsistent with both *Logan* and *Cherry*. See *Logan*, 405 S.C. at 99, 747 S.E.2d at 452 (proposed charge stating that "The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence"); *Cherry*, 361 S.C. at 601, 606 S.E.2d at 482 ("[T]he reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not"). Also, the State would note that *Drayton* was almost entirely a circumstantial evidence case. See *Drayton*, 2015 WL446693 at *1-*5.

Finally, Respondent notes that the Court in *Logan* recognized that "erroneous jury instructions are subject to a harmless error analysis," and it found that any error in the failure to give the requested circumstantial evidence instruction was harmless because "[t]he trial court's

require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Logan, 405 S.C. at 99, 747 S.E.2d at 452.

jury instruction, as a whole, properly conveyed the applicable law” in light of the instruction on “reasonable doubt burden of proof.” *Logan*, 405 S.C. at 94, 747 S.E.2d at 449. In both *Jenkins* and *Drayton*, this Court likewise concluded that the failure to give an instruction such as that requested by Parker “was harmless beyond a reasonable doubt because the trial court’s instruction, as a whole, properly conveyed the applicable law,” in light of the trial judge’s correct “reasonable doubt” charge. *Jenkins*, 408 S.C. at 573-74, 759 S.E.2d at 766; *see also Drayton*, 2015 WL 446693 at *7.

Here, the trial judge gave the same reasonable doubt instruction (R. p. 3156, l. 13 – p. 3157, l. 5) as the trial court in *Logan*. The charge in question is taken almost *verbatim* from that endorsed by the Federal Judicial Center, *see* Federal Judicial Center, Pattern Criminal Jury Instructions 17-18 (1987) (Instruction 21); and it has been approved by the Court’s decision in *State v. Darby*, 324 S.C. 114, 115-16, 477 S.E.2d 710, 710-11 (1996), and in Justice Ginsburg’s concurring opinion in *Victor v. Nebraska*, 511 U.S. 1, 26-27(1994) (Ginsburg, J., concurring in part and in judgment) (“This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly”). As a result, any error was harmless beyond a reasonable doubt.

II. The trial judge did not abuse her discretion by allowing Dr. Bradley Marcus, the forensic pathologist who performed the autopsy on Bryan Capnerhurst, to opine that “[b]ased on ... the injuries sustained to his left arm and the way he fell back ... [Bryan could not] have held onto anything that was in his hand” because (1) the science was forensic pathology (2) Dr. Marcus was properly qualified as an expert in forensic pathology; (3) his duties as a forensic pathologist include determining the cause of death, the manner of death and the circumstances surrounding it; (4) his training as a forensic pathologist included training as to what could or could not have occurred at a suspected crime scene; and (5) his training as a medical doctor included specific training as to how certain wounds could affect a person’s ability to move and to handle things. Also, the probative value of his opinion was not substantially outweighed by its prejudicial value and Parker could not have been prejudiced by its introduction because it was merely cumulative to Dr. Marcus’ earlier opinion that was admitted without objection.

Parker also contends that the trial judge erred by allowing Dr. Bradley Marcus, the forensic pathologist who performed the autopsy on Bryan Capnerhurst, to opine that “[b]ased on ... the injuries sustained to his left arm and the way he fell back ... [Bryan could not] have held onto anything that was in his hand.”²² Respondent submits that the trial judge did not abuse her discretion because (1) the science of forensic pathology is so well accepted in South Carolina jurisprudence that it is unnecessary for testimony relating thereto to “be vetted for its reliability prior to its admission at trial,” except in the most unusual circumstances that do not apply in this case; (2) Dr. Marcus was properly qualified as an expert in the field of forensic pathology; (3) his duties as a forensic pathologist include determining the cause of death, the manner of death and the circumstances surrounding it; (4) his training as a forensic pathologist included training as to what could or could not have occurred at a suspected crime scene; and (5) his training as a medical doctor included specific training as to how certain wounds could affect a person's ability to move and to handle things. Also, the probative value of his opinion was not substantially outweighed by its prejudicial value. Finally, he could not have been prejudiced by its introduction because it was merely cumulative to Dr. Marcus' earlier opinion that was admitted without objection. *See R. p. 1534, l. 12 – p. 1535, l. 17.*

A. How issue arose at trial.

Dr. Marcus performed both autopsies in this case. He testified that he is a forensic pathologist and the Chief Medical Examiner in Richland County. He and his colleague, Dr. Amy Durso, are responsible for performing all of the forensic autopsies in Richland County, and he performs medical autopsies of individuals who die in hospitals when requested to do so. He

²² This alleged error does not relate to or impact Parker's conviction for murdering Tammy Parker, only his conviction for murdering Bryan Capnerhurst.

obtained his medical degree in 2001 and, following his residency, he spent six years at the Medical University of south Carolina acquiring expertise in “all aspects of anatomic pathology, clinical pathology, forensic pathology, and ... cytopathology.”²³ R. p. 1455, l. 2 – p. 1459, l. 2; p. 1460, l. 15 – p. 1462, l. 15.

Dr. Marcus explained that “[f]orensic pathology is the study of pathology in relation to the autopsy. So I do an autopsy to determine the cause of death.” Additionally, a pathologist “determine[s] the manner of death, which is either natural; suicide; accidental; homicide; or undetermined. There are ten possible board certifications in pathology, but practitioners are limited to four certifications. Dr. Marcus is board certified in forensic pathology, anatomic pathology, clinical pathology, and cytopathology. Also, he had previously been qualified to testify as an expert in forensic pathology over twenty times. The State then moved to have him qualified as an expert in forensic pathology. R. p. 1459, l. 4 – p. 1463, l. 18.

Parker’s voir dire of Dr. Marcus established that he began medical school at the American University of the Caribbean. After two years there, he attended school in Ireland for a year and his fourth year was in a school in Chicago. Because of his high scores on his board exams, he “was able to get my choice of MUSC.” Dr. Marcus testified that he found no other cause of death in this case other than gunshots, and that he expected that this would be his testimony. Parker did not object to his qualification and the trial judge qualified him as an expert in forensic pathology. R. p. 1462, l. 24 – p. 1464, l. 17.

After Dr. Marcus had explained his autopsy findings and conclusions for Tammy (R. p. 1464, l. 22 – p. 1473, l. 1; p. 1482, l. 1 – p. 1509, l. 11), he explained his autopsy findings and conclusions for Bryan. The admission of most of his testimony, three diagrams (State’s Ex.s 486-

²³ “Cytopathology is the study of cells.” R. p. 1458, l. 17.

87 & 490) and the x-rays of Bryan's injuries (State's Ex. 484), are not being challenged on appeal. *See R. p. 1509, l. 18 – p. 1514, l. 19; p. 1517, l. 11 – p. 1551, l. 15.*

However, Parker objected when the State asked Dr. Marcus if “[b]ased on the multiple gunshots and the areas that were shot and everything, in your expert opinion, would Mr. Capnerhurst have been able to maintain a grip on anything[?]” The trial judge excused the jury. *R. p. 1551, l. 19 – 1552, l. 5.*

Parker argued *in camera* that Dr. Marcus was not qualified to give an opinion in response to this question because “[h]e is not an orthopedic doctor. He is not an orthopedic surgeon.” Parker further argued that Dr. Marcus did not base this opinion on “any study or science or anything that has been peer reviewed or anything that would support ... what they are trying to get him to say.” Parker further argued that the opinion would be contrary to the eyewitness testimony, and that his opinion went to “the ultimate issue in the case.” Although the State had an orthopedic doctor who might be qualified to testify to this issue, Dr. Marcus was not qualified. *R. p. 1552, l. 6 – p. 1553, l. 5.*

The State argued that Dr. Marcus was qualified to give this opinion because as a forensic pathologist, he “is trained ... to determine the cause and manner of death and what did happen and what didn't happen at crime scenes.”²⁴ Also, Dr. Marcus had reviewed the crime scene photos and “consulted with doctors. He did everything.” The State further noted that any doctor may express an opinion “if it is within [his] training” and asserted that this was within Dr. Marcus' training. *See Rule 702, SCRE. R. p. 1553, ll. 7-18.*

The State explained that its theory was, after Parker shot Bryan “in the head with the final head shot, [Parker] then went and got the gun that he had used to kill his wife and placed it in

²⁴ The State also noted that he was the chief medical examiner.

[Bryan's] hand." However, Parker did not know that Bryan's "arm was broken, and [that] he could not hold that gun in the manner in which it was placed so the police would find it to show guilt." **R. p. 1553, l. 23 – p. 1554, l. 7.**

The trial judge then heard the State's proffer that, as a forensic pathologist, Dr. Marcus was trained to determine the cause of death and the manner of death; that he also had training as to "what could or couldn't have happened in a [purported] crime scene;" and that he had training, as a medical doctor, on "how certain wounds could affect a person's ability to move, to handle things, or to do anything of that sort." The State also established that Dr. Marcus had an opinion as to whether Bryan would he have been able to keep a grip on any object in his hand, based upon Dr. Marcus' findings as to the cause and manner of Bryan's death and the injuries that Bryan had. Dr. Marcus' opinion was that "I believe that Mr. Capnerhurst, due to the injuries sustained to his left arm, ... was unable to have carried a weapon based on the injuries to his left arm, based on the circumstances of falling backward and downward." **R. p. 1554, l. 23 – p. 1556, l. 3.**

In response, Parker first stated that he had no objection to Dr. Marcus' qualifications to testify to the cause of death. The trial judge stated that "I think he testified when she asked him that he has to determine cause of death, manner of death, and something else. There were three different things [to which] he testified." Parker stated that he did not object to those matters. However, Parker objected to this opinion because "[t]his man is a doctor and [he] is telling the jury in his opinion something that flies in the face of the facts found here by the first two officers ... [who] said the gun was in his hand with his fingers wrapped around it." Thus, the objection did not merely go to the weight that the jury should give the opinion. **R. p. 1556, l. 7 – p. 1557, l. 3.**

The trial judge noted that she would charge the jury that they can give opinion testimony any weight they wish to or no weight and that, if Parker presented his own expert with a different opinion, then the jury would have to decide which expert was more credible. Further, she thought that the objection went to the weight of Dr. Marcus' opinion and not its admissibility because he is a forensic pathologist and "[t]his is the kind of work they do." **R. p. 1557, ll. 4-19.**

On voir dire of Dr. Marcus' qualifications, Parker established that he was "not board certified in orthopedic medicine ... [a]nd ... not a board certified orthopedic surgeon." Also, the only thing that he had listed in the autopsy report that supported his conclusion was that Bryan had a broken ulna; he did not have "a study" upon which he based his conclusion; and he had never encountered a similar factual situation. **R. p. 1557, l. 25 – p. 1558, l. 15.**

Based upon these responses, Parker renewed the objection because Dr. Marcus' opinion was not based "on any type of science;" he had never encountered a similar scenario in another case; it went to "the ultimate issue in this case;" and [h]e is not an orthopedic surgeon." He again noted that the State had an orthopedic doctor through whom it could attempt to introduce this opinion, but he would object to that as well. **R. p. 1558, l. 18 – p. 1559, l. 7.**

In response, the State asserted that his argument went to the weight of Dr. Marcus' opinion and not the admissibility, and that Parker could fully cross-examine Dr. Marcus. Also, the defense could present its own expert. However, Dr. Marcus was qualified, he had testified that he had the necessary training to render this opinion; and his opinion was based upon both his training, his review of the crime scene evidence, and his findings as to the gunshot wounds and Bryan's broken arm. **R. p. 1559, l. 9 – p. 1560, l. 8.**

When Parker indicated that Dr. Marcus had to be qualified to render an opinion under *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), the trial judge stated that he had already

been qualified as a forensic pathologist, without objection. She found that according to his testimony, part of his job “is to decide the cause of death and the manner of death and the circumstances surrounding the death.” She then found that Dr. Marcus was qualified to give his opinion and that Parker’s objection went to the weight that he felt the jury should give the opinion and not to its admissibility. Again, the trial judge indicated that she would instruct the jury that it is “up to the jury to determine whether or not they want to believe that opinion.” In response to further argument by Parker, she overruled the objection and reiterated her reasons for doing so. **R. p. 1560, l. 9 – p. 1562, l. 19.**

Following a break, Parker noted that he also objected to Dr. Marcus’ opinion under Rule 403, SCRE, because the probative value of his conclusion was substantially outweighed by its prejudicial effect. **R. p. 1563, ll. 8-20.** The trial judge explained that she had not placed it on the record. However, when she made her ruling, she had considered “the probative value as to the manner of death and circumstances of the death outweigh the prejudicial effect in terms of his testimony or him giving his opinion.” **R. p. 1563, l. 23 – p. 1564, l. 14.**

Dr. Marcus then testified before Parker’s jury that based upon his review of the crime scene evidence, his autopsy findings “and everything,” he had opinion that as to whether or not Bryan would have been able to hang on to anything in his left hand when he was shot. Dr. Marcus opined that “Based on ... the injuries sustained to his left arm and the way he fell back, I don’t believe he could have held onto anything that was in his hand.” **R. p. 1565, ll. 5-15.**

B. Discussion.

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

“An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *Id.* See also *State v. Collins*, 409 S.C. 524, 530, 763 S.E.2d 22, 25 (2014) (same); *State v. Stephens*, 398 S.C. 314, 319, 728 S.E.2d 68, 71 (Ct.App. 2012). Generally, all relevant evidence is admissible. Rule 402, SCRE.

“The trial [judge] ... has wide discretion in determining the relevancy of evidence....” *Davis v. Traylor*, 340 S.C. 150, 155, 530 S.E.2d 385, 387 (Ct.App. 2000).²⁵ Likewise, “[a] trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We ... are obligated to give great deference to the trial court's judgment [regarding Rule 403].” *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App. 2003) (internal citation omitted).

Likewise, “[t]he qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion.” *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997) (citation omitted). An appellate court will not disturb the trial judge's determination regarding a witness's qualifications to testify as an expert absent a showing of an abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); *State v. Schumpert*, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993); *State v. Henry*, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct.App.1997). See also *Mizell v. Glover*, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002) (“A trial court’s ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion”).

The trial judge did not abuse her discretion in this case. The Supreme Court’s decision in *White* requires that “[a]ll expert testimony must satisfy the Rule 702[, SCRE,] criteria, and that

²⁵ “ ‘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 401, SCRE.

includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *White*, 382 S.C. at 270, 676 S.E.2d at 686. Forensic pathology is clearly a science, and it has been defined as the "branch of medicine that applies the principles and knowledge of the medical sciences to problems in the field of law." Dominick J. DiMaio & Vincent J.M. DiMaio, *Forensic pathology* 1 (2d ed., CRC Press 2001).

Nevertheless, the science of forensic pathology is so well accepted in South Carolina jurisprudence that it is unnecessary for testimony relating thereto to "be vetted for its reliability prior to its admission at trial," except in the most unusual circumstances that do not apply in this case. Indeed, Parker does not attack the trial judge's admission of Dr. Marcus' opinion testimony generally, only that he was supposedly not qualified to render the opinion on whether it was possible for Bryan to hold the 9 mm. pistol in his left hand in light of the crime scene evidence and his findings at autopsy.

Yet, Dr. Marcus fully provided the trial judge with his educational and other experience in the field of forensic pathology, and Parker did not object to his qualifications as an expert in the field of forensic pathology. **R. p. 1455, l. 1 – p. 1464, l. 5.** Consistent with Dr. Marcus' description of his duties, learned treatises explain that the duties of a forensic pathologist include determining the time, cause, and manner of injury or death, documenting injuries and deducing how they occurred, determining or excluding other contributory or causative factors of death, collecting evidence from the body that can be used to prove or disprove an individual's guilt or innocence and to confirm or deny the account of how the death occurred, and providing expert testimony if the case goes to trial. *See Id. See also* 40 Am.Jur. *Trials* 501 § 46 ("Bases for

pathologist's opinion").²⁶

Also, there was further voir dire of Dr. Marcus regarding this specific line of testimony, including Parker's *in camera* cross-examination of him, before the jury heard the challenged opinion. R. p. 1554, l. 23 – p. 1556, l. 3; p. 1557, l. 25 – p. 1558, l. 15. Notwithstanding Parker's contrary argument, Respondent submits that the State's voir dire provided a sufficient foundation for the introduction of this opinion because it was relevant to the cause and manner of Bryan's death, which is unquestionably within the realm of forensic pathology. See *State v. Allen*, 2013 WL 5926964, 11 (Hawai'i App., Oct. 31, 2013) ("because defensive wounds relate to discovering the cause and manner of death, which is within the realm of forensic pathology, the matter falls within the scope of Dr. Goodhue's expertise. The Circuit Court did not abuse its discretion in allowing Dr. Goodhue to testify as a forensic pathologist and to address the topic of

²⁶ This treatise states that:

There are four main steps that a forensic pathologist takes in all cases in forming an opinion about a homicide:

1. *Gathers evidence.* The forensic pathologist first gathers all available information concerning the physical evidence, such as that relating to bullets, hair, fingerprints, dirt, fibers, paint chips, and glass fragments.

2. *Considers theories.* The forensic pathologist then considers the various theories that have been advanced, systematically accepting or rejecting them based on the autopsy findings and the results of laboratory and other tests.

3. *Develops theory of crime.* It is not outside the forensic pathologist's duties to develop a crime scene scenario if an acceptable theory has not already been advanced. It is possible that none of the advanced theories explain the evidence, in which case a new theory is needed. There also may be so little evidence that it is impossible to make any statements as to the circumstances of the death.

4. *Forms final opinion.* In working with the physical evidence and the theories proposed, a fairly clear sequence of events usually becomes obvious. If the physical evidence and autopsy findings support the sequence of events, it becomes the opinion of the forensic pathologist. The pathologist's opinion seldom changes, however, unless new evidence turns up that was kept from the forensic pathologist.

'defensive wounds' ").²⁷

Parker cites *White, supra*, for the proposition that 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." This contention, however, is inconsistent with the Supreme Court's explanation in *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012), that "the reliability of a witness's testimony is not a pre-requisite to determining whether or not the witness is an expert. The expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined prior to determining the reliability of the testimony." *Id.* at 388, 728 S.E.2d at 474-75 (footnote omitted). Appellate courts in this State and other jurisdictions have upheld the introduction of similar opinion testimony from properly qualified pathologists. *See, e.g., State v. Lopez*, 306 S.C. 362, 367, 412 S.E.2d 390, 393 (1991) (treating physician and pathologist properly allowed to testify regarding "battered child syndrome" and "shaken baby syndrome"); *State v. Von Dohlen*, 322 S.C. 234, 471 S.E.2d 689 (1996) (upholding trial court's decision to allow forensic pathologist to testify, during sentencing, about the amount of pain victim suffered); *State v. Tyner*, 273 S.C. 646, 652, 258 S.E.2d 559, 562 (1979) (holding that the trial court acted within its discretion in allowing a forensic pathologist to give his opinion concerning the distance of the shotgun blast and the absence of powder burns on the clothing of victim over objection that only a ballistics expert could testify

²⁷ Again, the State established that, as a forensic pathologist, Dr. Marcus was trained to determine the cause of death and the manner of death; that he also had training as to "what could or couldn't have happened in a [purported] crime scene;" and that he had training, as a medical doctor on "how certain wounds could affect a person's ability to move, to handle things, or to do anything of that sort." The State also established that Dr. Marcus had an opinion as to whether Bryan would he have been able to keep a grip on any object in his hand, based upon Dr. Marcus' findings as to the cause and manner of Bryan's death and the injuries that Bryan suffered. R. p. 1554, l. 23 – p. 1555, l. 20. On redirect in front of the jury, the State established that he had consulted with the other colleagues in his group who are board certified in forensic pathology, as well as an orthopedic surgeon in arriving at his opinion. R. p. 1586, ll. 9-22.

about distance and lack of powder burns); *United States v. Ebron*, 683 F.3d 105 (5th Cir. 2012) (expert's testimony, in defendant's murder trial, opining that the wounds found on murder victim's body were consistent with a victim being restrained from behind while being stabbed from the front, was reliable, for purposes of the expert witness rule where expert witness used his many years of experience as a forensic pathologist in providing his opinion regarding the cause and manner of victim's death, and, in arriving at his opinion, the witness relied on a couple of articulable facts: the cluster of stab wounds and the quantity and placement of defensive wounds); *Government of V.I. v. Sampson*, 94 F. Supp. 2d 639 (D.V.I. 2000) (once forensic pathologist was determined to be competent to testify as expert, he could testify as to reasonableness of medical care given to victim before her death from complications of stab wound, even though pathologist was not a surgeon; any doubts about qualifications went to weight, not admissibility).²⁸ Therefore, Dr. Marcus' qualification as a forensic pathologist was sufficient to permit him to render the challenged opinion, which related to the manner of death (*i.e.*, the death was a homicide), and Parker's complaint goes to the weight that he thinks jurors should have assigned to that opinion as opposed to its admissibility. *See id.*

Nor was the probative value of Dr. Marcus' testimony substantially outweighed by its prejudicial effect under Rule 403, SCRE. " 'Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by

²⁸ See also *Pagan v. State*, 830 So.2d 792 (Fla. 2002), *cert. denied*, 539 U.S. 919, 123 S.Ct. 2278 (2003) (in murder trial, medical examiner was properly allowed to give expert testimony concerning likelihood that breaking through tempered glass would cause injuries, where his qualifications were explored prior to his testimony, testimony was connected to facts already introduced, and his scientific knowledge was useful to assist jurors in understanding whether perpetrators would have been injured by breaking through sliding glass doors of victims' home; medical examiner testified to his years of experience with glass and with injuries caused by it, and opinion was based in scientific principle and explained testimony indicating that neither perpetrator was injured during break-in); *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550 (1997) (pathologist's opinion concerning direction from which bullets were fired and possible position of victim was admissible in murder prosecution, as pathologist was in best position to assist jury in understanding angles of wounds and determining whether angles of wounds were consistent with circumstances at crime scene); *State v. Allen*, 2013 WL 5926964 at 11.

the trier of fact.’ ” *State v. Fripp*, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct.App.2012) (quoting Rule 704, SCRE). *See also State v. Mitchell*, 399 S.C. 410, 416-17, 731 S.E.2d 889, 893 (Ct.App. 2012). Further, whether he is the “best” qualified doctor to provide such testimony is a matter of weight for the jurors. *Holbrook v. Lykes Bros. Steamship Co., Inc.*, 80 F.3d 777, 782 (3rd Cir. 1996). First, whether or not Parker killed Bryan in self-defense or murdered him in an effort to frame him for Tammy’s murder, as the prosecution theorized, was a central issue in the case; and the State bore the burden of disproving self-defense by proof beyond a reasonable doubt. *See State v. Burkhardt*, 350 S.C. 252, 262, 565 S.E.2d 298, 303 (2002). Second, Dr. Marcus’ opinion was extremely probative on this issue because it helped to circumstantially establish that Bryan was murdered and was not killed in self-defense, despite the testimony from the first two officers who saw Bryan’s body that he was holding the .9 mm. in his left hand, since he would not have been able to grip the weapon in his left hand.

Third, this opinion was not prejudicial in the evidentiary sense of the term. To the contrary, although an x-ray depicting the fractured ulna was introduced, Parker had successfully moved to exclude autopsy photographs of Tammy’s injuries. **R. 1471, l. 23 – p. 1481, l. 14**. As a result, the State did not offer the autopsy photographs of Bryan’s injuries (State’s Ex.s 465-82) into evidence. **R. p. 1512, ll. 2-23**. Also, this portion of Dr. Marcus’ direct examination was very brief. More importantly, Parker cross-examined Dr. Marcus at length and exposed every perceived weakness in his opinion.

Parker established that Dr. Marcus prepared a six page written report, but he did not include the opinion that Bryan could not have held a gun; he heard that Parker was a bookie when he went to the scene on April 13th; he was aware that some of the investigators felt that there were “suspicious circumstances” surrounding the two deaths; there was “a full-fledged”

investigation” ongoing at the time that he prepared his report; he had never met Parker before; he did not go in the attic when he went to the Parkers’ house on the 13th; Dr. Marcus was aware that Bryan was found with a gun in his hand but Dr. Marcus had not spoken to the first two officers who found Bryan’s body; although Dr. Marcus opined that Bryan had flexor and extensor muscles in the left arm, he could not name all of the muscles that were injured and would have to refer to a book on anatomy to name them; he had never heard of the term “cataleptic rigidity,” but he had heard of “cadaveric spasm” or “death grip;” the investigators in this case had consulted with him and had mentioned the term death grip; he had searched relevant literature for articles related to holding a weapon but did not find any; the description of Bryan’s killing as provided to him was consistent with a “highly emotional circumstance,” which is also present in cases involving cadaveric spasm, as explained by a Wikipedia article utilized by Parker on cross-examination;²⁹ he agreed that a cadaveric spasm could result in a person grasping a gun, but in his “medical opinion, based on the shots to ... the forearm, and falling over,” he opined that “the gun fell out of [Bryan’s] hand;” and he probably first expressed his opinion in this regard at the time he performed the autopsy, but he was never asked to prepare diagrams supporting it. **R. p. 1569, l. 1 – p. 1575, l. 25; p. 1578, l. 23 – p. 1585, l. 20.**

Further, the trial judge instructed jurors that simply they were not bound to accept an expert’s opinion simply because the opinion was admissible. Rather, she explained that “it is evidence for you to use in any way you see fit and give it the weight and credibility you believe is appropriate.” **R. p. 3158, ll. 3-15.**

Even assuming *arguendo* that Dr. Marcus’ opinion was improperly admitted, Parker still cannot show any prejudice from its introduction, since admission of his opinion could not

²⁹The article that counsel utilized is found at http://en.wikipedia.org/wiki/Cadaveric_spasm.

reasonably have affected the result of the trial. *See State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) (“Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial”); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (“When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result”). There was overwhelming evidence of Parker’s guilt for both crimes. Also, the introduction of this opinion does not have any effect on his guilt for murdering Tammy Parker. There was also the instruction on jurors’ consideration of expert opinions.

Moreover, at worst, his opinion was cumulative to his other opinion testimony that established the same point and to which Parker did not object. *See State v. Kirton*, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct.App. 2008) (“The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence”); *State v. Haselden*, 353 S.C. 190, 196-97, 577 S.E.2d 445, 448-49 (2003) (holding the admission of improper evidence is harmless when the evidence is merely cumulative to other evidence); *State v. Patterson*, 290 S.C. 523, 528, 351 S.E.2d 853, 856 (1986) (finding any error in the exclusion of evidence that was cumulative to other evidence entered was harmless beyond a reasonable doubt).

Specifically, Parker did not object to Dr. Marcus’ opinion that a gunshot wound that went through Bryan’s forearm fractured his left ulna, left “a hole that looked like disks [from the .410 shell] were coming through and then where the BB-type shot went through.” The gunshot then continued and caused a grazing wound to Bryan’s thigh and a grazing wound to the chest. Dr. Marcus recovered “numerous ... BB-type shots” and a fragmented disk from the arm. Parker likewise did not object to testimony that this wound “severed soft tissue and so forth.” **R. p.**

1532, l. 16 – p. 1535, l. 12.

Of greatest importance, he did not object to the following questions and answers:

Q And what would that have done to his ability to use his arm?

A Well, it would have been very, very difficult, if not impossible. He has got a broken arm. A broken arm is a painful thing.

Q There was also other damage, other than just the break in the bone?

A Well, you get soft tissue. Any time you have a projectile going through tissues, soft tissues, you're going to get some, you know, hemorrhage, destruction of the tissues, and so forth, that are also in that vicinity because of the energy and the disruption that occurs.

R. p. 1535, ll. 13-25.

Additionally, the prosecution introduced other evidence, without objection, that finding the gun in Bryan's left hand was inconsistent with the injury to his forearm. Inv. Travis Holdorf explained on cross-examination that "[i]n defensive tactics they teach you that the way you can disarm someone is by punching right there (indicating). Just a punch. Not making a golf ball size hole in someone's arm. It will dislodge it." **R. p. 2264, ll. 3-8.** Likewise, Maj. James Smith testified that he had seen the wound, which he described as "substantial." He also indicated that "you could literally put a golf ball through the hole in [Bryan's] forearm." **R. p. 2448, ll. 7-10.**³⁰

Further, Maj. Smith testified that investigators found blood on Bryan's left palm that was not associated with a wound to his hand. "There should have been a void there. If the gun was pressed against that palm, there should have been a void where that gun was, but there was no void, there was blood in that area. That ... one of these forensic details that was problematic to us." **R. p. 2450, l. 21- p. 2451, l. 6.**

³⁰ Parker also did not object when Maj. Smith repeated Dr. Marcus' opinion. **R. p. 2447, ll. 17-22.** Further, on cross-examination Lt. Scott McDonald described the wound as the size of a "ping pong ball," and he testified that "[m]edical experts said that "there is no way a person could have held that gun at that point." **R. 1249, ll. 2-5.**

Because the challenged opinion was merely cumulative to this other evidence that was admitted without objection, including an almost identical opinion by Dr. Marcus, there could not be any prejudice from the trial judge's ruling and her ruling must be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that his Court should dismiss certiorari as improvidently granted or affirm the decision of the Court of Appeals and the judgment of conviction.

Respectfully submitted,

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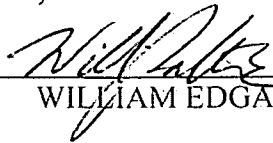
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June 2, 2015.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case No. 2013-001238

THE STATE,

Respondent,

vs.


BRETT D. PARKER,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 2nd day of June, 2015.



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable DeAndrea G. Benjamin, Circuit Court Judge
Appellate Case No. 2013-001238

THE STATE,

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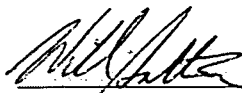
Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, John S. Nichols, Esq., Bluestein, Nichols, Thompson, Delgado, LLC, P.O. Box 7965, Columbia, SC 29202; John D. Delgado, Esq., Bluestein, Nichols, Thompson, Delgado, LLC, P.O. Box 7965, Columbia, SC 29202, and Ernest Latony Dessausure, Esq., Dessausure Law Firm; 1928 Barnwell Street, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 2nd day of June, 2015.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

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

Appellate Case No. 2013-001238

The State, Respondent,

v.

Brett D. Parker, Appellant.

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ARGUMENT

DEFENDANT'S ARGUMENTS REGARDING THE "CIRCUMSTANTIAL EVIDENCE" INSTRUCTION ARE PRESERVED FOR THIS COURT'S REVIEW

The State contends that the arguments Appellant presented regarding the circumstantial evidence instruction are not preserved for this Court's review. (Rep. Br. pp. 20-22 and n. 18). The Court should not be persuaded by these assertions.

Error preservation rules are not so exacting as the State would have them be. Instead, "a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 596 (2010) (noting error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review). The policies underlying the rules requiring issues to be raised and ruled upon below are to enable a trial judge to make a reasoned decision by appropriately developing issues by way of argument and to prevent or cure potential error. *State v. Torrence*, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (noting this policy as underlying the contemporaneous objection requirement). "Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law and arguments." *Queen's Grant II Horizontal Property Regime v. Greenwood Devel. Corp.*, 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.").

When the trial court has made its decision clear, counsel is not required to harass

the judge by making continued objections after an issue has been ruled upon. *See Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 45–46, 426 S.E.2d 756, 758 (1993) (noting that where a trial judge has fair opportunity to consider and rule upon an issue, it is not incumbent upon counsel “to harass the judge by parading the issue before [the trial judge] again”). *See also Bennett v. State*, 383 S.C. 303, 308, 680 S.E.2d 273, 276 (2009) (citing *State v. McDaniel*, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App.1995) for the rule that “so long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again.”); *State v. Liberte*, 336 S.C. 648, 652 n. 1, 521 S.E.2d 744, 746 n. 1 (Ct. App. 1999) (same). *Cf. Atlantic Coast Builders and Contractors, LLC, v. Lewis*, 398 S.C. 323, 332-333, 730 S.E.2d 282, 287 (2012) (Toal, CJ, dissenting) (Chief Justice Toal in dissent noted “an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice” and stated she believed “where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation; the majority noted it shared the Chief Justice’s “concerns about a hypertechnical application of a procedural bar to appellate arguments”)

Appellant’s counsel repeatedly raised the request that the trial court give the circumstantial evidence instruction from *State v. Edwards*, anticipating the decision in *State v. Logan*. (R. pp. 2573, 2579, 2913-2914, 2964, 2987, 3171, 3183). As set forth in the Brief of Appellant, 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.

(R. p. 2990, ls. 6-15).

At the Rule 19 stage at the close of state's evidence in chief (R. p. 2572); again at the close of all evidence on a motion for a directed verdict (R. p. 2965); at the jury charge conference prior to deliberations (R. p. 2990); after jury charge but before jury deliberation and verdict (R. p. 3171) and, lastly, in post trial motions after conviction (R. p. 3183), the defense maintained not simply the failure to present substantial circumstantial evidence itself but that 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.

The trial court repeatedly denied Appellant's arguments. The court also sustained objections the State made when Appellant's counsel attempted to argue the *Edwards* standard to the jury. (R. p. 3073). Everyone was well aware that the circumstantial evidence charge was hotly contested, and the trial court made it clear, in uncertain terms,

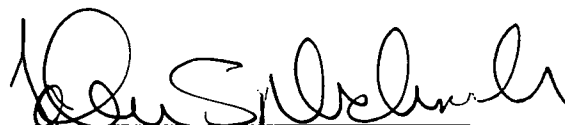
that it believed *Cherry* overruled *Edwards* and no amount of argument would persuade the court differently.

Accordingly, this Court should reject the State's contention that the arguments Appellant presents in his Brief of Appellant as to the jury instruction issue are not preserved for review.

CONCLUSION

For the reasons stated the Court should not refuse to address Appellant's arguments on error preservation grounds. Instead, the Court should reverse Appellant's conviction and remand the matter for a new trial.

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