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EVIDENCE

I. MOTIONS FOR JUDGMENT OF ACQUITTAL

In three 1976 cases, *State v. Brown*,[1] *State v. Chandler*,[2] and *State v. Williams*,[3] the supreme court reiterated the South Carolin rule that is used to determine whether a motion for acquittal in a criminal case should be granted or denied when that motion is based upon a claim that there is an insufficiency of incriminating evidence. The key issue in ruling on such a motion is whether the state has produced sufficient evidence of the accused's guilt to warrant submitting the case to the jury. In *State v. Williams*[4] the court expressed this well-settled South Carolina rule as follows:

> When a motion for a directed verdict is made, the trial judge is concerned with the existence or nonexistence of evidence, not with its weight, and although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there is evidence, either direct or circumstantial, which reasonably tends to prove the guilt of the accused, or from which guilt may be fairly and logically deduced.[5]

In *State v. Chandler*,[6] the defendant had been convicted of common law murder. On appeal, the defendant argued that the circumstantial evidence on which he was convicted was insufficient to submit his case to the jury and, therefore, that the trial judge had committed error by denying his motion for acquittal. The supreme court affirmed the defendant's conviction, determining that the trial judge had not erred in denying the motion for acquittal. In so finding, the court narrowly defined its scope of review of the sufficiency of the state's evidence and the denial of the motion for acquittal: "[O]ur review of the evidence is

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1. 267 S.C. 311, 227 S.E.2d 674 (1976).
2. 267 S.C. 138, 226 S.E.2d 553 (1976).
3. 266 S.C. 325, 223 S.E.2d 38 (1976).
4. *Id.*
5. *Id.* at 333-34, 223 S.E.2d at 42 (citing State v. Wheeler, 259 S.C. 571, 193 S.E.2d 515 (1972); State v. Jordan, 255 S.C. 86, 177 S.E.2d 464 (1970)). *Accord*, State v. Green, ___ S.C. ___, 230 S.E.2d 618 (1976); State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976); State v. Chandler, 267 S.C. 138, 226 S.E.2d 553 (1976); State v. Pauling, 264 S.C. 275, 214 S.E.2d 326 (1975); State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93 (1974), *cert. denied*, 420 U.S. 945 (1975).
6. 267 S.C. 138, 226 S.E.2d 553 (1976).

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limited to whether it is susceptible of a reasonable inference that could have convinced a jury, properly charged on the burden of proof and the law relative to circumstantial evidence, that appellant was the murderer."[7] Furthermore, the court noted the accepted rule that in determining whether a trial judge has erred in refusing to grant a motion for acquittal, the appellate court is required to "view the testimony in the light most favorable to the State."[8]

In *State v. Brown*,[9] the defendant had been convicted of simple possession of marijuana and possession with intent to distribute marijuana. At the close of the state's case and again at the close of the evidence, the defense had made a motion for acquittal based upon the insufficiency of the evidence presented by the prosecution. Both motions were denied. On appeal, the supreme court applied the same test for evaluating the sufficiency of the evidence as had been applied in numerous prior cases.[10] The court reversed Brown's conviction, finding that since the prosecution had offered *no* evidence on which the jury could find that Brown had possessed[11] the marijuana, it had failed to submit sufficient evidence to make a jury issue of the defendant's dominion and control of the marijuana, an essential element of both crimes.

Simply stated, the present rule in South Carolina appears to be that as long as the state produces any competent evidence from which a reasonable juror could justifiably conclude that an accused is guilty, then a motion for acquittal should be denied.[12] The trial judge should only be concerned with the question of whether or not there exists evidence to support a jury's finding

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7. *Id.* at 140, 226 S.E.2d at 554.

8. *Id.* (quoting State v. Wheeler, 259 S.C. 571, 578, 193 S.E.2d 515, 518 (1972)); State v. Brown, 267 S.C. at 316, 227 S.E.2d at 677. *Accord,* State v. Williams, 266 S.C. at 331, 223 S.E.2d at 41; State v. Wharton, 263 S.C. 437, 442, 221 S.E.2d 237, 239 (1975).

9. 267 S.C. 311, 227 S.E.2d 674 (1976).

10. *See* cases at note 5 *supra* and accompanying text.

11. State v. Brown, 267 S.C. at 315, 227 S.E.2d at 676. The court expressed the controlling law in South Carolina on the issue of what constitutes possession of marijuana: " '[P]roof of possession requires more than proof of mere presence,' and 'the state must show defendant had dominion and control over the thing allegedly possessed or had the right to exercise dominion and control over it.' " *Id.* at 316, 227 S.E.2d at 677 (quoting State v. Tabory, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973)).

12. *See* State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955); State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945); State v. Rush, 129 S.C. 43, 123 S.E. 765 (1924); State v. Roddy, 126 S.C. 499, 120 S.E. 359 (1923).

of guilt;[13] however, if the prosecution's evidence merely raises a suspicion as to the accused's guilt, then the motion for acquittal must be granted.[14]

This standard for determining the sufficiency of the evidence in ruling on a motion for acquittal is less[15] than, (or is at most, equal[16] to) the standard applied in ruling on a nonsuit in a civil case. This is disturbing when one considers that an accused has much more at stake in a criminal case than does a defendant in a civil action. Whereas the civil defendant may suffer a pecuniary loss, the criminally accused may suffer a loss of life or liberty, as well as a financial loss. In any event, the accused becomes irreparably stigmatized by the criminal justice system. In view of these potential penalties, one would expect South Carolina to have adopted a stricter test of evaluating the evidence on motions for acquittal.

The rule which guides the trial court judge in determining whether he should grant or deny a motion for acquittal is essentially based on the traditional concept that the judge and jury should play distinct roles in the setting of a trial.[17] The judge should only be concerned with the existence or nonexistence of evidence; the jury should be concerned with the weight of the evidence. Accordingly, the rule serves to maintain the separate provinces of judge and jury by assigning different duties to each in dealing with evidence submitted at trial.

It is the judge's duty to make the initial determination as to whether the state has produced sufficient evidence to submit the case to the jury.[18] If the motion for acquittal is granted, the judge

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13. *See* cases at note 5 *supra* and accompanying text.

14. *Id.*

15. *See, e.g.*, Davis v. Upton, 250 S.C. 288, 290, 157 S.E.2d 567, 568 (1967), where the court held that "[a] dismissal or nonsuit is proper when a plaintiff's evidence does not warrant a verdict in his favor."

Since the usual civil case requires proof by a preponderance of the evidence, then it follows that a nonsuit is proper when a plaintiff has failed to offer sufficient evidence to convince a reasonable juror by a preponderance of the evidence that the defendant should be found liable. Thus the burden of production imposed on the plaintiff in a civil suit to avoid a nonsuit is greater than the burden imposed on the state to avoid a motion for acquittal. *See also* note 43 *infra.*

16. *See, e.g.*, Armstrong v. Weiland, 267 S.C. 12, 16, 225 S.E.2d 851, 853 (1976), where the court stated: "It is elementary that in ruling on a motion for a nonsuit, the court must consider plaintiff's evidence in the light most favorable to her and unless the evidence gives rise to more than conjecture or speculation, the motion must be granted."

17. *See* State v. Littlejohn, 228 S.C. at 328-29, 89 S.E.2d at 926.

18. *See id.* at 329, 89 S.E.2d at 926.

has indicated that the state has failed to satisfy its burden of production; if the motion is denied, the state has apparently carried its burden. When the judge denies the motion, then the question of guilt or innocence will be ultimately determined by the jury.[19] The jury, acting in accordance with the judge's instructions of law, must weigh the evidence, determine the credibility of testimony, make decisions of fact, and finally return a verdict.

There are two distinct tests to be applied when evaluating the sufficiency of the evidence.[20] Which test is to be applied depends on whether one is referring to the burden of producing evidence or to the burden of persuasion. "[T]here is one test by which . . . evidence is to be measured by the jury in its deliberations, and quite another by which it is to be measured by the trial judge in his consideration of the accused's motion for a directed verdict."[21] As to the test to be applied by the jury in considering the evidence, "it is necessary that every circumstance relied upon by the State be proven beyond a reasonable doubt. . . ."[22] As to the test to be applied by the judge on a motion for acquittal, "the trial judge is concerned with the existence or nonexistence of evidence, not with its weight . . ." and "it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused . . . ."[23]

The limitations on the trial judge in ruling on a motion for acquittal further the supreme court's desire to maintain the distinct functions of judge and jury. However, by restricting the trial judge to determining merely whether there exists or does not exist evidence upon which a reasonable juror could find the accused guilty, some confusing problems and anomalous situations have been created. Some of these problems include: (1) A confusing situation in which the trial judge must determine whether the state's evidence produces more than a suspicion of guilt; yet, he is not permitted to weigh the evidence;[24] (2) an unreasonably restrictive view of the trial judge's role in ruling on a motion for acquittal;[25] (3) an illogical relation between the burden of produc-

19. *See id.* at 328, 89 S.E.2d at 926.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 329, 89 S.E.2d at 926 (citing State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945)).

24. *See* note 5 *supra* and accompanying text. *See also* text accompanying note 28 *infra*.

25. *See* text accompanying notes 29-31 *infra*.

ing evidence and the burden of persuasion;[26] and (4) an emasculation of the presumption of innocence and the proof beyond a reasonable doubt standard.[27]

There is an inherent inconsistency in the supreme court's rule regarding the trial judge's consideration of the evidence when ruling on a motion for acquittal. On one hand, a trial judge should be concerned only with the existence or nonexistence of evidence, and not with the weight of such evidence. On the other hand, the motion must be denied where the evidence merely raises a suspicion that the accused is guilty.[28] There is simply no feasible way that a trial judge could ascertain whether the evidence merely raises a suspicion of guilt, without his also considering the weight of such evidence. To make such determination, he must also consider, at least minimally, the convincing power and credibility of the evidence. A determination of one necessarily involves the other.

The court has adopted an unreasonably restrictive view of the trial court judge's role in evaluating evidence upon a motion for acquittal. He should be afforded more discretion in determining the sufficiency of the state's evidence, because it is he who has the duty of deciding whether a party has satisfied its burden of producing evidence.[29] Furthermore, by limiting his determination to the existence or nonexistence of evidence, his effort to screen out the bad cases is seriously hampered.[30] If the state's evidence were of such a poor persuasive quality, that based upon such evidence no reasonable juror could find the accused guilty beyond

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26. *See* text accompanying notes 32-38 *infra*.

27. *See* text accompanying notes 39-46 *infra*.

28. *See* note 5 *supra* and accompanying text.

29. Professor James has noted:

> Since it is the judge who passes upon such motions [motions for acquittal], it is the judge who determines questions of the sufficiency of evidence and who allocates the production burden on each issue. Thus these concepts may be viewed as part of the apparatus for controlling the jury. The court screens all cases initially to see whether they will even go to the jury.

James, *Burdens of Proof*, 47 VA. L. REV. 51, 56 (1961).

30. One commentator has stressed that it is essential that a trial judge assume a broader role in passing on a motion for acquittal:

> Assertion of that power [the power to keep cases from the jury], with its insistence upon a "fact" role for court as well as jury, serves not only to minimize "convicting the innocent" but also to keep the pressure on judge, prosecutor and police to act as responsibly as possible in screening out cases not fit for trial.

Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1161 (1960).

a reasonable doubt, then there is no justifiable reason that a motion for acquittal should be denied. The judge is fully capable of making such an initial determination, and he should be permitted to do so.

If a judge withholds a case from a jury because, based upon the evidence produced, no reasonable juror could find the accused guilty beyond a reasonable doubt, there still exist separate roles and respective duties for judge and jury. In such a case, the judge neither transgresses his traditional duty to rule on the production of evidence nor encroaches on the jury's duty to evaluate the evidence. "The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond a reasonable doubt within the fair operation of a reasonable mind."[31] It follows that South Carolina should readily grant the trial judge additional discretion in evaluating the state's evidence when ruling on a motion of acquittal.

When a judge determines the sufficiency of the evidence in ruling on a motion for acquittal, he is, in effect, ruling on the burden of producing evidence.[32] Under South Carolina law this burden is satisfied when the state has submitted any competent evidence from which the accused's guilt can be inferred.[33] In contrast, the burden of persuading the jury is satisfied when "every circumstance relied upon by the State [is] proven beyond a reasonable doubt."[34] The great difference between the two standards, the standard of production and the standard of persuasion, is illogical. The South Carolina rule on motions for acquittal fails to recognize that the " 'duty of bringing forward evidence' is *not* so very different from [the] 'burden of persuasion,' "[35] and that

31. Curley v. United States, 160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). In *Curley* the court succinctly stated that the judge's function is "to deny the jury any opportunity to operate beyond its province." *Id.* at 232. Furthermore, "[i]f the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration." *Id. See also* Judge Frank's strong concurring opinion in United States v. Masiello, 235 F.2d 279 (2d Cir.), *cert. denied*, 352 U.S. 882 (1956), where he maintained that the *Curley* test does not require the judge to find that the defendant is guilty beyond a reasonable doubt before he can submit the case to the jury; he must only be able to conclude that reasonable minds could find the defendant guilty beyond a reasonable doubt. *Id.* at 286.

32. *See* note 18 *supra* and accompanying text.

33. *See* note 12 *supra* and accompanying text.

34. 228 S.C. at 328, 89 S.E.2d at 926.

35. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382, 1382 (1955) [hereinafter cited as McNaughton]. For a detailed analysis of the distinction between the burden of production and the burden of

"the duty of bringing forward evidence, or burden of production of evidence, is a derivative function of the burden of persuasion of a jury."[36] It is derivative because "[p]ersuasion—or belief, or probability—is the basic ingredient of both . . . ."[37] Therefore, the burden of production should be commensurate with the burden of persuasion.

If a jury must be convinced beyond a reasonable doubt that an accused is guilty, then it is only logical to require that the evidence, upon which such guilt must be based, be sufficient to support such a finding. Accordingly, a motion for acquittal should be granted if no reasonable juror could find the accused guilty beyond a reasonable doubt, based on the evidence of the case.[38] South Carolina should adopt such a rule to apply to motions for acquittal, and thereby incorporate the proof beyond a reasonable doubt standard into the burden of producing evidence.

The motion for acquittal, when applied with a beyond a reasonable doubt standard, serves to safeguard an accused's due process rights. Under the present South Carolina rule, there is no viable means of judicial evaluation of the application of the reasonable doubt standard by the jury. The judge is denied the opportunity to prevent the jury from operating beyond its province, for he does not have any efficient means to prevent the jury from reaching a verdict that is clearly based on conjecture, speculation, passion or prejudice.[39] The use of the reasonable doubt standard would grant a trial judge a pre-verdict or post-verdict check

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persuasion, see J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 355-64 (1898); 9 J. WIGMORE, EVIDENCE §§ 2485 & 2487 (3d ed. 1940); James, *Burdens of Proof*, 47 VA. L. REV. 51 (1961).

36. McNaughton at 1382.

37. *Id.* at 1390-91.

38. In Curley v. United States, 160 F.2d at 232-33, Judge Prettyman delivered a classic statement of the rule which should be applied in ruling on a motion for acquittal:

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted.

39. *See* United States v. Gonzales Castro, 228 F.2d 807, 808 (2d Cir. 1956) (Frank, J., concurring); Curley v. United States, 160 F.2d at 232. Comment, *Criminal Procedure—Use of Reasonable Doubt Standard in Ruling on a Motion for Judgment of Acquittal*, 51 N.C.L. REV. 891, 898 (1973).

on a jury decision that could otherwise be based on insufficient evidence. The stricter standard serves not only to minimize convicting the innocent, but also acts to screen out cases not fit for trial.[40]

The fact that the South Carolina rule does not incorporate the proof-beyond-a-reasonable-doubt standard in considering motions for acquittal suggests a restriction of an accused's constitutionally protected due process rights. In *In re Winship*,[41] the United States Supreme Court held: "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof of every fact necessary to constitute the crime with which he is charged."[42] If the beyond a reasonable doubt standard is not considered when ruling on a motion of acquittal, as well as when determining the ultimate issue of guilt or innocence, then the due process rights protected by the standard become terribly diluted. Furthermore, the policies upon which the stricter standard of proof is based become meaningless.

The judge's charge to the jury that an accused may be found guilty only upon proof beyond a reasonable doubt should not absolve the court from taking an additional precaution to ascertain that the evidence upon which the accused is tried is in fact sufficient to support a finding of guilty beyond a reasonable doubt. If the reasonable doubt standard is not used in considering a motion for acquittal, then it is highly possible that an accused

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40. *See* note 30 *supra*.

41. 397 U.S. 358 (1970).

42. *Id.* at 364. The Supreme Court found that the proof beyond a reasonable doubt standard should apply to the jury's final determination of the accused's guilt or innocence. It did not specifically address the question whether the same standard should be applied by a judge in ruling on a motion for acquittal. However, it is reasonable to assume that the Court would have so found if the question had been raised, because the Court expressly sought to minimize factual errors in a criminal trial to protect the accused's presumption of innocence: "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363.

Thus, it would also be desirable to reduce the risk of convictions resting on factual error before the case is even submitted to the jury, at the motion for acquittal stage of the trial. In another United States Supreme Court case, the Court determined that "the verdict in a criminal case is sustained only when there is 'relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt,' that the accused is guilty." American Tobacco Co. v. United States, 328 U.S. 781, 787 n.4 (1946) (quoting Mortensen v. United States, 322 U.S. 369, 374 (1944)).

may be found guilty upon evidence that would not even be sufficient to prove that the accused was guilty by a preponderance of the evidence.[43] If an accused were found guilty based upon such weak and unsupportive evidence, then the entire criminal justice system would be disparaged.[44]

The fact that an accused is presumed to be innocent until proven guilty, and that this presumption continues throughout the course of a criminal trial, should guide South Carolina in fashioning a more satisfactory test to apply to motions for acquittal.[45]

To conclude:

> The motion for acquittal is of utmost importance in a criminal case. It should operate as a screening device to prevent the accused's case from going to the jury when the prosecution has failed to introduce evidence of a certain quantum from which the jury can find him guilty beyond a reasonable doubt. This power to keep the case from the jury serves (1) to protect the innocent, (2) to keep the pressure on the judge, prosecutor and police to perform their duties in screening out cases not fit for trial, and (3) to maintain the criminal sanction as one of a serious nature which requires higher standards of proof than a civil action.[46]

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43. "[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." *In re* Winship, 397 U.S. at 363 (citing the dissent at lower court, Samuel W. v. Family Court, 24 N.Y.2d 196, 205, 247 N.E.2d 253, 259 (1969)).

The South Carolina rule does not even require the judge to apply a proof by a preponderance of the evidence standard to evaluate the sufficiency of the evidence in ruling on a motion for acquittal. "This means . . . that a man may be jailed or put to death, although the trial judge and the upper court are clearly convinced that the man's guilt has not been proved beyond a reasonable doubt." United States v. Castro, 228 F.2d 807, 808 (2d Cir. 1956) (Frank, J., concurring).

See also United States v. Vuitch, 402 U.S. 62 (1971), where the Court stated that "a court should always set aside a jury verdict of guilt when there is not enough evidence from which a jury could find a defendant guilty beyond a reasonable doubt." *Id.* at 72 n.7.

44. "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *In re* Winship, 397 U.S. at 364.

45. *See* State v. Stuart, 51 Haw. 656, 466 P.2d 444 (1970) (Levinson, J., concurring).

46. *Id.* at____, 466 P.2d at 449 (citing Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1161-62 (1960); Note, *The Motion for Acquittal: A Neglected Safeguard*, 70 YALE L.J. 1151 (1961)).

It should be noted that United States v. Taylor, 464 F.2d 240 (2d Cir. 1972), brought uniformity among all of the circuits with regard to the appropriate standard to be applied

II. Competency of a Witness—Age and Belief in God

In *State v. Green*[47] the South Carolina Supreme Court clarified the present law in South Carolina concerning the competency of a child to offer testimony as a witness in a trial. Moreover, the court finally settled the issue of whether a trial judge is required to question a witness about his belief in God or His providence in order to test the witness's competency to give truthful testimony.

The facts of *Green* are relatively simple. Anthony "Pop" Green was tried and convicted for the murder of Aurelia Sumter. At the trial, the judge permitted six year old Tommy Sumter, the brother of the victim, to testify about the murder. When the state offered the child as a witness, and the only known eyewitness, counsel for the defendant objected on the ground that Tommy was too young to respond competently to the questions asked of him. Thereafter, the trial judge held a hearing, out of the presence of the jury, to determine the child's competency to testify. The court extensively questioned the child to determine whether he could understand the questions asked of him and whether he could adequately communicate information in response to the questions. Satisfied that Tommy was in fact competent, the court proceeded to allow him to testify to the jury.

On appeal, the appellant-defendant maintained that the trial judge abused his judicial discretion in allowing the child to testify.[48] The appellant raised two main objections concerning the witness's competency: (1) The witness could not adequately relate his observations concerning his sister's death in a coherent way to the jury, *i.e.*, he did not exhibit an understanding of the questions asked of him; he did not specify what he had seen; and he could only answer questions which suggested the desired answers to him; and (2) the trial judge failed to inquire whether Tommy believed in God and whether he feared punishment if he

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in considering motions for acquittal. Presently, all of the circuits apply the strict proof beyond a reasonable doubt standard, as expressed in the *Curley* test (*see* note 38 *supra*). Comment, 51 N.C.L. Rev. at 891-94, note 39 *supra*.

47. ___S.C.___, 230 S.E.2d 618 (1976).

48. Appellant also argued, unsuccessfully, that the evidence presented by the state was insufficient to support the verdict of guilty on the murder charge. If the supreme court had found that Tommy Sumter's testimony should have been excluded on the basis of incompetency, then the court may have determined that the evidence was in fact insufficient. However, since the court found that Tommy was competent, the charge that the evidence was insufficient never evolved into a serious challenge.

were to lie.[49]

In answer to the appellant's allegation of the child's incompetency based on his age, the court found: "The mere fact that Tommy was but a six year old boy at the time of the trial did not in itself make him incompetent to testify. There is no fixed age which an individual must attain in order to be competent to testify as a witness."[50] Additionally, the court noted that the decision of whether a witness is competent is one which the trial court judge must make[51] and, once made, is one which is customarily treated with great deference by appellate courts. The court further explained that the "determination will not be reversed unless a clear showing of abuse of discretion can be made."[52]

After finding that the trial court did not abuse its discretion in determining that Tommy was generally competent to testify, the court then addressed the appellant's charge that the trial court erred by failing to examine the witness as to his belief in God.[53] The court clearly found:

> We hold that it is not required of a trial judge to ask questions respecting a belief in God or His providence. As long as the challenged witness answers that he knows the difference between right and wrong, that it is right to tell the truth and wrong to lie, that he will tell the truth if permitted to testify, and that he fears being punished if he does lie, even if that fear is motivated solely by the perjury statute, he satisfies the requirement regarding "moral accountability."[54]

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49. ___S.C. at___, 230 S.E.2d at 619.

50. *Id.* (citing Wheeler v. United States, 159 U.S. 523 (1895) (where a five and one-half year old child was permitted to testify); Pecatelle v. United States, 394 F.2d 115 (9th Cir. 1968) (where witnesses of five and seven years of age testified); Webster v. Peyton, 294 F. Supp. 1359 (E.D. Va. 1968) (where an eight year old was allowed to testify)).

Dean McCormick states the following rule regarding the age of a witness as it relates to the question of competency: "There is no rule which excludes . . . a child of any specified age, from testifying, but in each case the traditional test is whether the witness has intelligence enough to make it worthwhile to hear him at all and whether he feels a duty to tell the truth." C. MCCORMICK, EVIDENCE § 62, at 140 (2d ed. 1972) [hereinafter cited as MCCORMICK] (footnotes omitted).

See also 2 J. WIGMORE, EVIDENCE § 478 (3d ed. 1940) [hereinafter cited as WIGMORE] (The general competency of a witness depends on an ability to observe, recollect, and communicate; there is no specific age requirement).

51. ___S.C. at___, 230 S.E.2d at 619. *Accord*, 2 WIGMORE § 487.

52. ___ S.C. at___, 230 S.E.2d at 619 (citing Peyton v. Strickland, 262 S.C. 210, 203 S.E.2d 388 (1974); 97 C.J.S. *Witnesses* § 58 (1957)).

53. For a general discussion of the South Carolina law prior to *Green*, concerning the required belief in God for a witness to be deemed competent to testify, *see* Note, *The Requirement of a Religious Belief for Competency of a Witness*, 11 S.C.L.Q. 548 (1959).

54. ___S.C. at ___, 230 S.E.2d at 621.

The court, however, did not merely settle the question of whether a trial judge is required to ask a witness if he believes in God; it took a further step and decided that "it is not essential that a challenged witness state a belief in God or His providence before being allowed to testify."[55] In the former situation the judge is relieved from examining the witness as to a belief in God. In the latter situation, even if the judge does undertake an examination into the witness's belief in God, the witness does not have to state such a belief in order to be found competent. It is only required that the witness know the difference between "right and wrong and the probability of punishment for lying."[56]

The court distinguished *Green* from an earlier decision, *State v. Hicks*.[57] In *Hicks* the court held that "despite the declaration of a codefendant testifying for the State that he was agnostic, he was nonetheless competent to testify."[58] The *Hicks* case was the

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55. *Id.*

56. *Id.* The court quoted with approval the following passage from C.J.S., which is apparently the basis for its holding:

> At common law, one who did not believe in the existence of a Supreme Being and consequently was under no apprehension of future punishment for his falsehood was incompetent to testify, but the constitutions or laws of most American states, if not all, have abolished religious tests as to the competency of witnesses, and *it is now generally held that religious belief is not a test of the competency of a witness.* A belief in the inspired character of the Bible is not essential.

Id. at ____, 230 S.E.2d at 620-21 (quoting 97 C.J.S. *Witnesses* § 62 (1947) (emphasis added by the court)).

See also S.C. CODE ANN. § 19-1-40 (1976), which permits a witness to attest, by either oath or affirmation, that he will tell the truth. This section provides:

> Any witness or party to any proceeding, in any and all courts of this State, may make solemn and conscientious affirmation and declaration, according to the form of his religious belief or profession, as to any matter or thing whereof an oath is required. Such affirmation and declaration shall be held as valid and effectual as if such person had taken an oath on the Holy Evangelists.

Id.

On the subject of requiring oaths, one commentator has noted that some "courts deem to regard the requirement of understanding the nature and obligation of an oath as intended not to inject a religious requirement, but to require that each witness recognize some moral obligation to speak the truth." Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53, 57-58 (1965) (footnote omitted).

57. 257 S.C. 279, 185 S.E.2d 746 (1971).

58. State v. Green, ____S.C. at ____, 230 S.E.2d at 620 (citing State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971)). *See also* State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971), where the court affirmed a trial court's decision to permit an admitted agnostic to testify because "[t]he question of [the] competency of a witness is a question for the court, and . . . it is the duty of the court to determine that question upon a careful examination of the witness as to age, capacity, and moral and legal accountability." *Id.* at 430, 182 S.E.2d at 743 (quoting State v. Comstock, 137 W. Va. 152, 176, 70 S.E.2d 648, 661 (1952)).

last case, prior to *Green*, that dealt specifically with the issue of whether a witness must state a belief in God to be declared competent to testify. The *Hicks* decision was largely based on the fact that the witness had stated that he respected the idea of God, was aware of the perjury law, and was conscious of the fact that if he did not tell the full truth that he would be punished, here, if not hereafter.[59]

It is evident that *Green*, as contrasted with *Hicks*, takes a more liberal view of the common law requirement that one must believe in God to be a competent witness. Under the *Green* decision, not only is an agnostic competent to testify, but an atheist is also allowed to be a witness, provided that the witness attest to the fact that he will tell the truth and that he exhibits an understanding of right from wrong. There is no firm rule that one must believe in God or His providence to be considered a competent witness.[60]

In *Green* there was yet another issue raised by the appellant in regard to the examination of the child to test his competency as a witness. In his brief, the appellant noted that in order to test the young witness's competency, the trial judge unduly led the witness and "an answer had to be suggested before a definite answer to the question was given."[61] Therefore, the questions asked by the judge should be found to be improper, and the answers which were thereby elicited should be excluded from the evidence. The appellant cited the following passage from the record in support of his contention that the witness's answers were unfairly attained:

> The Court: Have you ever been to Sunday School?
> Master Sumter: (He nods yes).
> The Court: You have been to Sunday School. What do they teach you in Sunday School? You don't know what they teach you in Sunday School?
> Master Sumter: (He nods yes).
> The Court: You do know?
> Master Sumter: (He nods yes).
> The Court: What do they teach you in Sunday School?

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59. 257 S.C. 279, 279-80, 185 S.E.2d 746, 746 (1971).

60. *See* text accompanying note 55 *supra*.

61. Brief for Appellant at 9, State v. Green, ___ S.C. ___, 230 S.E.2d 618 (1976). For the general rule in South Carolina regarding leading questions and related judicial discretion, see State v. Hughey, 214 S.C. 111, 51 S.E.2d 376 (1949); State v. Cook, 204 S.C. 295, 28 S.E.2d 842 (1944).

Master Sumter: Same
The Court: The same? They teach you the same. Do they ever teach you in Sunday School that you are suppose [*sic*] to be a good boy? Do they teach you that?
Master Sumter: (He nods yes).[62]

In view of the preceding passage, the questions asked by the trial judge do indeed appear to be highly suggestive of the desired answers. However, considering the fact that the judge was examining a young child, who was probably frightened, the trial judge did not abuse his discretion by asking the particular questions in the manner that he did. Dean McCormick states that in questioning a child witness it is usually necessary to ask leading questions, and the judge must be able to exercise wide discretion in such matters: "It is recognized, especially as to children, that in those cases the danger of false suggestion is at its highest, but it is better to face that danger than to abandon altogether the effort to bring out what the witness knows."[63]

Under the facts and circumstances of the *Green* case, it appears that the trial judge effectively questioned Tommy Sumter to ascertain whether the child should have been allowed to testify. Furthermore, the record fully supports the judge's ultimate decision in finding the witness to be competent. It is evident that the child knew the difference between right and wrong and that he could answer and understand the questions asked of him reasonably well. The decision of the judge to allow the child to testify was further necessitated since Tommy was the only eyewitness to the homicide. It was the jury's duty to determine later the credibility and weight to be given to such testimony once it was admitted into evidence.

In *State v. Green* the court has effectively adopted a more liberal and rational view of the common law requirement that only an affirmed believer in God should be declared competent as a witness. The better and more reasonable approach to the issue of witness competency is the rule which has been espoused by the court: if a witness knows that it is right to tell the truth and if he attests to the fact that he will tell the truth, then the mere fact that he does not believe in God or His providence should not prevent him from testifying as a witness.

Carl H. Jacobson

62. Brief for Appellant at 8-9 (quoting Record at 68-69).
63. McCormick § 6, at 10 (footnotes omitted). *Accord*, 3 Wigmore § 778 (Chadbourn rev. 1970).