Criminal Law

Ernest R. Reeves Jr.
Patricia M. Sabalis

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

Part of the Law Commons

Recommended Citation

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.
CRIMINAL LAW

I. SOUTH CAROLINA DEATH PENALTY LAW

A. Introduction

On May 25, 1979, the South Carolina Supreme Court affirmed the death sentences of Joseph Carl Shaw and James Terry Roach.1 State v. Shaw was the first case to be reviewed under the current South Carolina Death Penalty Act.2 The statute, enacted subsequent to several recent decisions by the United States Supreme Court concerning the constitutionality of state capital punishment laws, was drafted to conform to the standards enunciated in those precedents.

In the landmark decision of Furman v. Georgia,3 the United States Supreme Court held that the punishment of death is so unique in its severity and irrevocability that it cannot be imposed under any sentencing procedure creating a risk that the penalty will be applied in an arbitrary and capricious manner. The Court, reasoning that the death penalty statutes of Georgia and Texas failed to adequately guard against that defect, held those statutes to be violative of the eighth amendment proscription against cruel and unusual punishment made applicable to the states by the fourteenth amendment.4 The statutes granted

1. 273 S.C. 194, 255 S.E.2d 799 (1979). On November 3, 1977, Shaw, Roach, and Ronald Eugene Mahaffey were arrested; each was indicted for two counts of murder and conspiracy and single counts of rape, kidnapping, and armed robbery. The prosecution sought the death penalty for Shaw and Roach but not for Mahaffey, who, through the process of plea negotiations, agreed to testify against the other two defendants. On December 12, 1977, Shaw pleaded guilty to all charges. Roach pleaded guilty to two counts of murder and single counts of rape, kidnapping, and armed robbery. He pleaded nolo contendere to two counts of conspiracy. Following the requisite presentencing hearing, the trial judge imposed penalties of death on Shaw and Roach. Id. at 198-99, 255 S.E.2d at 801. The South Carolina Supreme Court's affirmance of these sentences upheld the validity of the state death penalty statute. Id. at 199-203, 255 S.E.2d at 802-04.
4. Id. The Court reviewed three cases—two from Georgia and one from Texas. One Georgia petitioner and the Texas petitioner had been convicted of rape; the second Geor-
the jury nearly unbridled discretion to decide whether a given defendant would be put to death. In response to the Furman decision, more than two-thirds of the states had, by 1976, adopted new death penalty statutes.

The South Carolina penalty law in effect at the time of Furman prescribed death as punishment for murder unless the jury recommended the defendant to the mercy of the court. In light of

gia petitioner had been convicted of murder. All three had been sentenced to death under the applicable state statutes. Id. at 239. Furman was decided per curiam, with the five concurring justices each writing separate opinions. Justices Marshall and Brennan took the position that the death penalty is per se unconstitutional; Marshall addressed the discriminatory operation of the penalty against certain socio-economic and racial groups, id. at 363-65 (Marshall, J., concurring), while Brennan contended that capital punishment is fatally offensive to human dignity. Id. at 282-305 (Brennan, J., concurring). Justice Douglas was not willing to adopt the per se unconstitutional position, although he recognized the discriminatory aspects of the penalty. Id. at 249-57 (Douglas, J., concurring). Justice White opined that the infrequent and erratic imposition of the penalty blurred any rational distinction between cases in which it is imposed and ones in which it is not, thus negating any possible retribution function. Id. at 311-12 (White, J., concurring). Finally, in a frequently quoted opinion, Justice Stewart compared the imposition of the death penalty to being struck by lightning, arguing that the uncontrolled nature of jury discretion permeating the statutes could result in the penalty being arbitrarily, wantonly, or freakishly imposed. Id. at 309-10 (Stewart, J., concurring). Justices Burger, Blackmun, Powell, and Rehnquist dissented. For an excellent survey of the opinions in Furman, see Karge, Capital Punishment: Death for Murder Only, 69 J. CRIM. L. 179, 182-87 (1978).

5. Justice Stewart, in his concurring opinion, commented on the statutes as follows:

Georgia law, at the time of the conviction and sentencing of the petitioner [convicted by rape] . . . , left the jury a choice between the death penalty, life imprisonment, or "imprisonment and labor in the penitentiary for not less than one year nor more than 20 years. Texas law . . . provides that a person guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five." 408 U.S. at 308 n.8. "Georgia law, under which the petitioner [was convicted of murder] . . ., left the jury a choice between the death penalty and life imprisonment." 408 U.S. at 308 n.9 (citations omitted).

6. These statutes followed several distinct patterns. Some retained sentencing discretion, but supplied standards to guide the exercise of this discretion by providing the sentencer with a list of aggravating circumstances, one of which must be found before the penalty could be imposed, by specifying certain aggravating and mitigating circumstances, along with a procedure for balancing the two, or by allowing the death penalty only when an aggravating circumstance is found and no mitigating circumstance exists. Others removed all discretion by mandating death for specific crimes. Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 HARV. L. REV. 1690, 1699-1701 (1974).

7. The state death penalty statute in effect from 1894 to 1974 provided as follows:

Whoever is guilty of murder shall suffer the punishment of death. Provided, however, that in each case where the prisoner is found guilty of murder, the jury may find a special verdict recommending him to the mercy of the
**Furman**, the South Carolina Supreme Court found this law to be unconstitutional because it gave the judge or jury impermissible discretion to determine which defendants received the death penalty. In turn, the General Assembly enacted a statute in 1974 designed to meet the standards of *Furman*. It required the death penalty only when the convicted defendant's criminal conduct fell within any one of certain designated categories.

The 1974 statute withstood judicial scrutiny when, in early 1976, the South Carolina Supreme Court affirmed a death sentence. In that same year, however, a flurry of activity by the United States Supreme Court added a new chapter to death penalty law. The Supreme Court, in five separate opinions, approved three state death penalty statutes and struck down two.

---

Court, whereupon the punishment shall be reduced to imprisonment in the penitentiary with hard labor during the whole lifetime of the prisoner.

1894 S.C. Acts 785, No. 530 (amending 14 S.C. Stat. 175, No. 91 (1869)).
9. The 1974 South Carolina law mandated the death penalty for specific crimes as follows:

Whoever is guilty of murder in the following circumstances shall suffer the penalty of death:

1. Murder committed while in the commission of the following crimes or acts: (a) rape; (b) assault with intent to ravish; (c) kidnapping; (d) burglary; (e) robbery while armed with a deadly weapon; (f) larceny with use of a deadly weapon; (g) housebreaking; (h) killing by poison; (i) lying in wait.

2. Murder committed for hire based on some consideration of value.

3. Murder of a law enforcement officer or correctional officer while acting in the line of duty.

4. The person convicted of committing the murder had previously been convicted of murder, or was convicted of committing more than one murder.

5. Murder that is willful, deliberate and premeditated.

Whoever is guilty of murder under any other circumstance shall suffer the penalty of life imprisonment. *Provided, however*, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

10. State v. Allen, 266 S.C. 175, 222 S.E.2d 287 (1976). The South Carolina Supreme Court observed:

The Legislature of this State, in amending Section 16-52 [the pre-1974 death penalty statute] apparently made a conscious, deliberate effort to comply with the mandate of *Furman*. We think that effort was successful . . . Section 16-52 allows no such discretion to the trial judge and the jury. The statute provides certain specific, narrow, well delineated circumstances in which one who is found guilty of murder must suffer the penalty of death. In compliance with *Furman*, neither the trial judge nor jury is given any discretion in the matter.

*Id.* at 185, 222 S.E.2d at 291.
In *Roberts v. Louisiana*¹¹ and *Woodson v. North Carolina*,¹² the Court found two state statutes fatally defective because each lacked objective standards to guide, regularize, and rationalize the sentencing process and failed to require consideration of the circumstances of the offense and the propensities of the offender.¹³ Both statutes provided mandatory death sentences for particular crimes. In *Gregg v. Georgia*,¹⁴ *Proffitt v. Florida*,¹⁵ and *Jurek v. Texas*,¹⁶ the Court upheld three death penalty statutes. According to the Court, these statutes implemented standards sufficient to guide the discretion of the sentencing authority by requiring the judge or jury to contemplate the circumstances of the crime and the character of the defendant before imposing the penalty of death.¹⁷ The Court distinguished these cases from *Furman* and explained that "when a life has been taken deliberately by the offender, we cannot say that the [capital] punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes."¹⁸ The Court, however, emphasized that when a defendant’s life is at stake, the judiciary must insure that all necessary safeguards are followed.¹⁹

The Court’s reasoning was explained in *Gregg*: “No longer can a Georgia jury do as *Furman*’s jury did: reach a finding of the defendant’s guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury’s attention is directed to the specific circumstances of the crime: ...”²⁰ Through these decisions the Court sought to alleviate

---

¹⁷ The three statutes require specific findings of aggravating circumstances and a weighing of aggravating and mitigating circumstances. In addition, all three schemes provide other safeguards, including automatic review of all death sentences and required review by the state’s highest court. Fla. STAT. ANN. § 921.141(2)-(4) (West 1974 & Supp. 1979); Ga. CODE ANN. §§ 27-2534.1 to -2537 (1978); Tex. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1979).
¹⁹ Id.
²⁰ 428 U.S. at 197. For an excellent summary of these cases, see Meagher, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 NOTRE DAME LAW. 261.
Justice White’s prior frustration at finding “no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.”

The South Carolina Supreme Court observed the fate of mandatory death statutes in Woodson and Roberts and stated: “As our statute does not permit the exercise of controlled discretion in imposing the death penalty required by the recent decisions, but mandates a death penalty upon a finding of murder . . . it too is constitutionally defective.” While invalidating the South Carolina statute, the court reiterated three principles announced in Woodson: First, the state’s power to punish must be exercised within the limits of civilized standards. Second, a death penalty statute cannot allow unguided, unchecked jury discretion. Finally, a death penalty statute must allow consideration of the individual character and record of each defendant.

In 1977, the South Carolina General Assembly revised the South Carolina Death Penalty Act, using as a model the Georgia statute that had been affirmed in Gregg. South Carolina’s present death penalty law resulted from this effort. It applies only to persons who are convicted of or plead guilty to murder and implements a bifurcated procedure separating the process of adjudicating guilt from the sentencing phase. During the latter proceeding, the sentencing authority, whether judge or jury, shall consider any relevant aggravating or mitigating circumstances specified in the statute before a capital defendant may

---

(1976).

23. Id. at 238-39, 226 S.E.2d at 895. The court based its decision primarily on Woodson, because of the similarities between the South Carolina and North Carolina statutes. See also Criminal Law and Procedure, Annual Survey of South Carolina Law, 29 S.C.L. Rev. 80, 86 (1977).
26. Id. § 16-3-20(B).
27. Id. § 16-3-20(C). The portion of the statute referring to those circumstances lists the considerations to be evaluated as follows:
(a) Aggravating circumstances:
(1) Murder was committed while in the commission of the following crimes or acts: (a) rape; (b) assault with intent to ravish; (c) kidnapping; (d)
be sentenced to death, at least one aggravating circumstance must be found beyond a reasonable doubt.28 Prior to imposing the death penalty, the sentencing authority must find the penalty to be supported by the evidence and not imposed as the result of passion, prejudice, or any other arbitrary factor.29 If a sentence of death is recommended, the judge or jury must designate in writing the aggravating circumstance found.30 All such sentences are reviewed automatically by the South Carolina Su-

burglary; (e) robbery while armed with a deadly weapon; (f) larceny with use of a deadly weapon; (g) housebreaking; (h) killing by poison; and (i) physical torture;

(2) Murder was committed by a person with a prior record or conviction for murder;

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of his official duty;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(b) Mitigating, [sic] circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person;

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;

(3) The victim was a participant in the defendant’s conduct or consented to the act;

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(5) The defendant acted under duress or under the domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired;

(7) The age of mentality of the defendant at the time of the crime;

(8) The defendant was provoked by the victim into committing the murder;

(9) The defendant was below the age of eighteen at the time of the crime.

Id.

28. Id.

29. Id.

30. Id.
The Supreme Court to determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
2. Whether the evidence supports the jury's or the judge's finding of a statutory aggravating circumstance as enumerated in § 16-3-20, and
3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.31

Although the South Carolina statute was patterned after the Georgia measure, the two statutes vary in several respects.32 First, the Georgia statute enumerates ten aggravating circumstances, some of which differ from the South Carolina statute. One deviation in the Georgia law, particularly interesting in light of Shaw, is that a murder that is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" is viewed as an aggravating circumstance.33 Under both statutes, however, at least one aggravating circumstance must be found before a sentence of death can be recommended. Second, the Georgia law does not specifically list any mitigating circumstances; rather, it requires the judge to consider, or to instruct the jury to consider, any mitigating circumstances or other aggravating circumstances.34 A Georgia jury need not find any mitigating circumstances to recommend mercy for the defendant. Provisions for appellate review, however, are identical in both statutes.35 This

32. Specific provisions in the Georgia statute that differ from the South Carolina law are the following: GA. CODE ANN. § 27-2534.1(b)(2) (1978)(murder committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree); id § 27-2534.1(b)(9) (murder committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement); id. § 27-2534.1(b)(10) (murder committed for the purpose of avoiding, interfering with or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another).
33. GA. CODE ANN. § 27-2534.1(b).
34. Id. § 27-2534.1(b)(7).
procedure in particular received the full support of the United States Supreme Court because it "serves as a check against the random or arbitrary imposition of the death penalty."36

While the Georgia statute specifically has received the United States Supreme Court's approval, differences between that statute and the South Carolina law would not appear to make the latter constitutionally infirm. The South Carolina statute's major difference, the enumeration of specific mitigating considerations, is faithful to the Supreme Court's guidance provided in Gregg, Proffitt, and Jurek. Justifiably, it may be inferred that the Court believes more specific guidelines are not required at this time.

B. The Decision—State v. Shaw

Shaw presented the first occasion for the South Carolina Supreme Court to utilize the appellate review provisions of the revised death penalty statute. Although the court's decision did not expressly refer to the statutory standards, apparently, its analysis was designed to satisfy them. The court focused on three main issues: first, whether the statute insures the particularization and individualization required by the United States Supreme Court; second, whether the statute provides for appropriate discretion in the sentencing process; and third, whether the sentence was fair in light of the specific circumstances of this case.

1. Particularization and Individualization.—The South Carolina Supreme Court remarked in Shaw that "[t]he new death penalty procedures focus the sentencing authority's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant."37 Before a death penalty is affirmed under the statute, the sentencing authority must find, beyond a reasonable doubt, the existence of at

37. 273 S.C. at 203, 255 S.E.2d at 804. The United States Supreme Court has long recognized that a fair and just system requires contemplation of the circumstances of the crime and the propensities of the offender. See, e.g., Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937). Additionally, the drafters of the Model Penal Code have concluded that "evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances . . . ." MODEL PENAL CODE § 210.6(2) (1974).
least one aggravating circumstance, balance it against any mitigating circumstances, and determine that the aggravating circumstance outweighs any extenuation. By this method, the unique and relevant qualities of the offense and the offender converge to focus the sentencing proceeding.

In Shaw, the guilt adjudication stage consisted solely of guilty pleas by Shaw and Roach; therefore, the "particularization" occurred in the sentencing half of the bifurcated capital proceeding. Pertinent data concerning the character of the defendants, the sentencing procedure, and the victims were transmitted to the supreme court through two reports from the trial judge. According to these documents, three statutory aggravating circumstances were found beyond a reasonable doubt against both defendants: assault with intent to ravish, kidnapping, and robbery while armed with a deadly weapon. Four statutory mitigating circumstances were in evidence for Shaw: his age and mentality, his lack of prior criminal history, his extreme mental and emotional disturbance at the time of the commission of the crime, and his substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to requirements of law. These four considerations, as well as the facts that Roach acted under duress or domination of another person and that he was below the age of eighteen at the time of the crimes, were introduced in mitigation of the case against Roach.

On review, the South Carolina Supreme Court held that the death penalty and the trial judge's findings of statutory aggravating circumstances were supported by the evidence beyond a reasonable doubt and that the death sentence had not been imposed as a result of passion, prejudice, or any other arbitrary factor. In the decision, the court made no reference to the age of the defendants (Roach was seventeen at the time of the crime; Shaw was twenty-two), or to results of psychiatric evaluations performed on the defendants (Roach was found to have a

38. The reports on Shaw and Roach are reproduced in Appendices B, 273 S.C. at 219, 255 S.E.2d at 811, and C, id. at 231, 255 S.E.2d at 819, of the opinion.
40. Id. § 16-3-20(C)(b)(1), (2), (6) & (7).
41. Id. § 16-3-20(C)(b)(5) & (9).
42. 273 S.C. at 210, 255 S.E.2d at 807.
degree of mental retardation and antisocial personality disorders, while Shaw was deemed a latent schizophrenic with possible toxic psychosis from alcohol and drug abuse).

The court ruled that the assignment of numerical values to the statutory mitigating and aggravating circumstances was not necessary to balance such factors properly. Indeed, the absence of fully objective criteria did not render the Georgia statute unconstitutional in Gregg:

While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

The South Carolina Supreme Court considered the provisions of the South Carolina statute “indistinguishable” from those approved in Gregg. The court thus affirmed the findings of the trial court and, in doing so, declined to embark upon a possibly futile attempt to precisely quantify, compare, and balance the relevant circumstances of this case.

2. Discretion in the Sentencing Process.—In their appeals, Shaw and Roach raised the discretion issue by arguing that the South Carolina statute unconstitutionally grants the solicitor unbridled discretion to extend mercy to any capital offenders. The Gregg decision had rejected this argument, and in the court’s view, the matter warranted no further discussion. In

---

43. Id. at 232, 255 S.E.2d at 820.
44. Id. at 220, 255 S.E.2d at 811.
45. Id. at 205, 255 S.E.2d at 804.
46. 428 U.S. at 193-95 (footnote omitted).
47. 273 S.C. at 203, 255 S.E.2d at 803-04.
48. Id. at 212, 255 S.E.2d at 807.
49. Id. at 204, 255 S.E.2d at 804.
50. The Supreme Court, in Gregg, observed: The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.
addition, Shaw and Roach characterized as capricious and arbitrary the decision of the solicitor to seek the death penalty against them but not against their co-defendant Mahaffey. The court disagreed, citing two distinguishing factors between Mahaffey and the two appellant-defendants. First, the court noted evidence indicating that both Shaw and Roach were triggermen, while no evidence linked Mahaffey with any use of the rifle. Second, Mahaffey had agreed to testify against Shaw and Roach. Since no other witness to the crime was alive, Mahaffey's testimony was an integral part of the state's case. The court remarked further that "[t]he Solicitor chose to bargain with Mahaffey because it was unlikely that the death penalty could have been imposed on him." Undoubtedly, the court was cognizant of the value of plea negotiating as a prosecutorial tool and was influenced by the pragmatic appeal of the state's arguments. Accordingly, the court quickly dismissed the defendant's objections relying on Gregg as sufficient authority.

The South Carolina Supreme Court's analysis of the factors distinguishing Shaw and Roach from Mahaffey suggests substantial statutory construction on its part. Although the statute calls for the sentencing authority to consider aggravating and mitigating circumstances, it does not authorize the supreme court to do so. The court is limited to a review of the influence of prejudice or arbitrariness, the imposition by the sentencer of excessive or disproportionate punishment, and the weight of evidence supporting the sentencer's finding of statutorily recognized aggravating circumstances.

3. The Standard of Review—Proportionality.—Finally, the court reviewed the death sentence to determine if it was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In the past, the court has used a two-pronged approach to test proportionality:

428 U.S. at 199.
51. 273 S.C. at 204, 255 S.E.2d at 804.
52. Id. In this discussion the court made a reference to a more recent case that lends some support to defendant's contention that the prosecutor's actions were arbitrary and capricious. The opinion in Lockett v. Ohio, 438 U.S. 586 (1978), however, did not discuss that issue in the context of a prosecutor's discretion to prosecute.
53. 273 S.C. at 204, 255 S.E.2d at 804.
55. See text accompanying note 31 supra.
"First, the historical principle that the cruel and unusual punishment clause is designed to prevent inhuman and barbarous treatment. Second, that the sentence must not be grossly out of proportion with the severity of the crime." The first test the court has acknowledged is a subjective one, requiring a determination of whether a death sentence in the specific case is "inhuman and barbarous treatment" in the context of law and society—an undertaking rife with normative and moral implications. The second test is more objective and requires the court to consider such factors as the characteristics of the defendant, the gravity of the offense, the legislative purpose behind the statute, and the severity of the defendant’s punishment relative to the punishments meted out for other offenses.

In Shaw the court recognized that the proportionality test necessitates a comparative analysis of the crime, the defendant, and the punishment in any capital case. Apparently, however, the court felt that this approach was not possible. "Any system of review that requires a comparison of each case with all similar prior cases must have a beginning. There will be a first case for each type or category of capital case that may appear and that first case necessarily cannot be compared to any other similar cases." Thus, the lack of any comparable cases renders impossible any proportionality analysis.

C. Conclusion

In this opinion, the supreme court did not engage in an extensive discussion of the mechanics of the state death penalty statute specifically, or of the arguments for and against the death penalty generally. Indeed, such a discussion may have been thought unnecessary, since the South Carolina statute is

56. Stockton v. Leeke, 269 S.C. 459, 462, 237 S.E.2d 896, 897 (1977). In Gregg, the United States Supreme Court averred that the requirement of proportionality insures that decisions will be uniform and that criminal law will parallel contemporary social thought. Thus, two tests must be met before a given death penalty law survives eighth amendment analysis: Contemporary opinion must support the use of the death penalty for the given crime and the court must conclude that the punishment is not disproportionate to the severity of the crime. 428 U.S. at 127. See also Murchison, Towards A Perspective on the Death Penalty Cases, 27 Emory L.J. 469, 549-50 (1978).
58. 273 S.C. at 211, 255 S.E.2d at 807.
59. Id.
apparently a "safe" one, fashioned after the Georgia law expressly deemed constitutional by the United States Supreme Court. In South Carolina, the last public executions took place almost two decades ago. This state now has a death penalty statute that appears to meet constitutional standards, its validity proclaimed by Shaw.

II. THE ROLE OF THE JURY IN CAPITAL CASES

Two cases after Shaw provided guidance for the role of the jury in this bifurcated process. While the cases dealt with several very different issues, each facilitated more specific definition of juror's responsibilities in trials for capital offenses.

In State v. Tyner and State v. Gilbert, the supreme court affirmed the convictions but set aside the death penalties that had been imposed at trial. In both cases, improper closing arguments by the solicitor during the sentencing phase provided the grounds for vacating the sentences. The solicitor had informed the jury in each case that any decision they reached would automatically be reviewed by the South Carolina Supreme Court. Further, he suggested that the case ultimately might be heard by the United States Supreme Court.

60. Gregg v. Georgia, 428 U.S. 153 (1976). Furthermore, such a discussion may have been unproductive. In Gregg, the United States Supreme Court noted that statistical studies on deterrence are inconclusive. Id. at 183-85. Plus, statistics themselves sometimes can be meaningless. Id. In a much publicized study, Isaac Ehrlich theorized that one additional execution per year between 1933 and 1969 may have resulted in, on the average, seven or eight fewer murders. Jon Peck countered with a contention that a one percent change in per capita income would produce a greater effect on the homicide rate than a one percent increase in the number of executions. Borowitz, Under Sentence of Death, 64 A.B.A.J. 1259, 1259 (1978). The mass of information and "facts" is likely to be incomprehensible to most citizens.


64. Defendants in Gilbert, J.D. Gleaton and Larry Gilbert, appeared in a rehearing on the sentence portion of their convictions. Their death penalty sentences were reimposed on February 26, 1980, in the Lexington Court of Common Pleas.

65. In Tyner, the solicitor made the following remarks: "If you make a recommendation of the death penalty, it does not stop there because you are making that recommendation to the Judge; he must review the facts of the case. He must review your recommendation and then he must decide if you are right or not in your recommendation. No other crime in South Carolina has that. Then, he makes his determination... It doesn't stop with
court reasoned that these references to the appellate review procedure by the prosecutor may have caused the jury to relax their caution in making findings of fact from the evidence and thereby surrender, in whole or in part, their sentencing responsibility to a higher court. 66 Consequently, the solicitors' actions in both cases constituted reversible error and mandated overturning the death sentences.

South Carolina has long recognized the "quasi-judicial nature of the duties imposed on the solicitor." 67 Yet no clear delineation "between legitimate argument[s] and unauthorized statement[s]" by a solicitor can be drawn. 68 Prosecutorial arguments should focus on a rational summation and analysis of the evidence and its bearing on the defendant's guilt. 69 If a party alleges that improper or unfair arguments were made at trial, the South Carolina Supreme Court has traditionally required a showing of four elements: (1) timely objection to the argument, (2) the substance of the objectionable language, (3) the failure of the court to sufficiently warn the jury not to consider the im-

66. State v. Behune, 104 S.C. 353, 357, 89 S.E. 153, 154 (1916). This view would seem to be consistent with the Code of Professional Responsibility. "[T]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-13 (1970).
68. State v. Robertson, 26 S.C. 117, 118, 1 S.E. 443, 444 (1887).
69. See Crump, The Function and Limits of Prosecution Jury Argument, 28 Sw. L.J. 505, 506-07 (1975). "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence by interjecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury's verdict." AMERICAN BAR ASSOCIATION, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 5.8(d) (1971).
proper argument, and (4) prejudice to the defendant’s right to obtain a fair and impartial trial.\textsuperscript{70} A review of case law reveals that the South Carolina Supreme Court has been reluctant to overturn decisions on the basis of improper arguments made by the solicitor.\textsuperscript{71} These cases, however, can be distinguished from\textit{Tyner} and\textit{Gilbert}. The alleged improper comments in the earlier cases pertained to characteristics of the defendant or the victim and were designed to arouse the passion or sentiment of the jury. In\textit{Tyner} and\textit{Gilbert}, on the other hand, the disputed statements referred, at least indirectly, to the jury’s duties and responsibilities. Logically, courts would be more inclined to disfavor jury arguments with such overtones; indeed the Supreme Court of Georgia has reversed sentences for this reason.\textsuperscript{72}

In\textit{Tyner}, the court also observed that the trial judge failed to instruct the jury that it could recommend life imprisonment even if it found beyond a reasonable doubt that one or more aggravating circumstances was present. This error, according to the court, also would have required vacating the death sentence.\textsuperscript{73} The Supreme Court of Georgia has reached a similar result.\textsuperscript{74}

\textsuperscript{70} State v. Meehan, 160 S.C. 111, 129, 158 S.E. 151, 158 (1931). The doctrine of\textit{in favorem vitae}, applied in capital cases, partially alters this test, since it permits the court to search for any prejudicial error in the record on its own initiative, without objection to or assignment of error by the appellant. State v. Allen, 266 S.C. 175, 187, 222 S.E.2d 287, 292 (1976).

\textsuperscript{71} In each of the following cases convictions were upheld: State v. McGill, 191 S.C. 1, 8, 3 S.E.2d 257, 260 (1939)(solicitor accused the defendant of acting like one of the “cannibals of Borneo” and wondered aloud why bystanders had not shot defendant down “like a dog” as he beat the victim); State v. McDonald, 184 S.C. 290, 299, 192 S.E. 365, 370 (1937)(solicitor stated that if defendant were not convicted of murder, he would be sent to the State Hospital, where he would probably later be found sane and released).\textit{Cf.} State v. Craig, 267 S.C. 262, 265-67, 227 S.E.2d 306-08 (1976)(statement made by prosecutor at the conclusion of the\textit{voir dire} examination of a prospective juror that “I’m not up here to give this defendant a Baby Ruth, I’m up here to put him in the electric chair” was held to be not inflammatory or prejudicial).

\textsuperscript{72} E.g., Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977); Previtte v. State, 233 Ga. 929, 214 S.E.2d 365 (1975). In Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977), the Georgia Supreme Court noted: “[T]his type of remark has an unusual potential for corrupting the death sentencing process. . . . Comments about appellate safeguards on the death penalty suggest to the jury that they can pass the responsibility for the death sentence on to this court.”\textit{Id.} at 146, 240 S.E.2d at 40 (citation omitted).

\textsuperscript{73} The court decided that omission of the necessary charge to the jury was an “arbitrary factor” under S.C. Code Ann. § 16-3-25(C)(1) (Cum. Supp. 1978). ___ S.C. at ___, 258 S.E.2d at 566.

\textsuperscript{74} The Georgia Supreme Court has observed that the jury must consider two sepa-
In *Gilbert*, defendants Gilbert and Gleaton expressed a desire to testify on their own behalf. By choosing this alternative, Gilbert and Gleaton waived their privilege against self-incrimination; defense counsel, however, had assured them that if they took the stand they could refuse to answer any questions that might incriminate them and the trial judge confirmed this advice.\(^7^6\) When the defendants subsequently took the stand, they answered no questions relating to the crime and responded only to inquiries about events occurring after they were taken into custody. During their testimony, the defendants invoked the Fifth amendment privilege and each time the trial judge upheld their right to do so.\(^7^6\) The majority found no reversible error in this procedure. Noting the risk that is always inherent when testifying on one's own behalf,\(^7^7\) the court pointed out that defendants were aware of their option to testify or not, and they voluntarily elected to take the stand. Although they were erroneously advised of their rights and even though the trial judge erred, the majority maintained that the trial judge took all available steps to safeguard the defendants' Fifth amendment rights. "We are unpersuaded the invocation of the Fifth Amendment privilege by appellants, albeit improper, worked any greater prejudice to them than would have resulted had they exercised their right not to testify or had they been required to answer all proper questions."\(^7^8\)

Justice Rhodes, in a dissent joined by Justice Lewis, took a different point of view. He stated that the repeated invocation of the privilege against self-incrimination by Gilbert and Gleaton while testifying in their own defense probably had a greater prejudicial impact on the jurors than if the defendants had opted not to testify at all. Justice Rhodes acknowledged that the trial judge was acting to protect the constitutional rights of the

rate issues during the sentencing phase of the death penalty proceeding. First, it must decide if the state has proved the existence of at least one aggravating circumstance. Second, it must consider the relevant aggravating and mitigating circumstances to determine whether the death penalty is appropriate in the case. Hawes v. State, 240 Ga. 327, 335, 240 S.E.2d 833, 839 (1977).

76. ___ S.C. at ___, 258 S.E.2d at 893-94.

76. For the defendants, the response became so reflexive that they even invoked the privilege in response to questions from their own attorney. Id. at ___, 258 S.E.2d at 895.

77. Id. at ___, 258 S.E.2d at 894.

78. Id. at ___, 258 S.E.2d at 894.
defendants, but argued that appellate review should focus on the existence of actual prejudice and not on the intentions of the trial judge. In a capital case, he contended, the effects of prejudice on the defendants cannot be minimized. Justice Rhodes explained:

Here, . . . the jury is confronted with the affirmative acts of the defendants in taking the witness stand but refusing to answer any questions that were directed to them concerning their guilt or innocence, even though their right to life depended on the outcome of the trial. . . . It is illogical to conclude other than that the jury was substantially influenced against the appellants by reason of the procedure here followed.79

Consequently, Justice Rhodes opined that the case should be reversed in its entirety and remanded for a new trial.

The fifth amendment issue was not raised on appeal by defendants in Gilbert but was addressed by the court under the principle of in favorem vitae.80 According to this rule, which is intended to avert miscarriages of justice in capital cases, the supreme court is required to search carefully for any prejudicial error that may have occurred in the prior capital trial, whether or not the error was made the subject of an appropriate objection, motion, or appeal by the defendant.81 The majority examined the fifth amendment issue and concluded that Gilbert and Gleaton were not prejudiced. The dissent, conversely, insisted that the procedure at trial constituted reversible error. While both groups appeared to agree that the doctrine of in favorem vitae is a viable and key component of death sentence review proceedings in South Carolina, the divergence of opinion resulted from disparate beliefs about the nature of appellate review of capital cases. The dissent advocated a "liberal policy of appellate review" and contended that the court has historically adhered to such an approach.82 The majority, though, would

79. Id. at __, 258 S.E.2d at 895 (Rhodes, J., dissenting).
80. Id. at __, 258 S.E.2d at 893.
81. The supreme court stated in State v. Allen, 266 S.C. 175, 222 S.E.2d 287 (1976): "As is our custom in cases of this nature, we have, in favorem vitae, carefully examined the record for any errors affecting the substantial rights of the accused, even though not made a ground of appeal." Id. at 187, 222 S.E.2d at 292. See generally McDonald, Capital Punishment in South Carolina: The End of an Era, 24 S.C.L. Rev. 762, 774-75 (1972).
82. Justice Rhodes, quoting from State v. Sharpe, 239 S.C. 258, 274-75, 122 S.E.2d
seem to require some greater showing of prejudice and error for
reversal of death sentences.

Defendant in Tyner also argued that the trial judge had
erred in excusing a prospective juror from duty because of the
juror's opposition to the death penalty. The following exchange
involving the defense attorney, the judge, and the juror occurred
at the voir dire examination:

"Q. Are you for or against the death penalty in South
    Carolina?
"A. Do I have to answer that?
"THE COURT: Yes, Sir. Just answer yes or no, are you for it
    or against it?
"A. I'm against it."
"THE COURT: Are there any circumstances under the law
    for which you would vote for the death
    penalty?
"A. I would say yes."83

The following examination subsequently took place between the
solicitor and the juror:

"Q. If evidence was presented to you in this case of aggrava-
    tion and aggravating circumstances, would you vote to
    give the defendant the death penalty?
"A. Say that to me again.
"Q. After all the evidence in the case where the state presents
    its testimony from witnesses on that stand and where the
defense presents testimony from witnesses from that
    stand and that evidence justified the death penalty,
    based on that evidence could you vote to give the defen-
    dant the death penalty?
"A. No."84

The court, citing the United States Supreme Court opinion in

622, 630 (1961), observed:

The power of the law to take the life of human beings for a violation
thereof is one which should be and is exercised with extreme caution. . . .
When it is made to appear that anything has occurred which may have im-
properly influenced the action of the jury, the accused should be granted a new
trial, although he may appear to be ever so guilty, because it may be said that
his guilt has not been ascertained in the manner prescribed by law.
83. Id. at __, 258 S.E.2d at 562 (citations omitted).
84. Id. at __, 258 S.E.2d at 562 (citations omitted).
Witherspoon v. Illinois, 85 held that this juror's unwillingness to impose the death penalty in any circumstance was a proper basis on which the juror could be excused. 86 In Witherspoon, the United States Supreme Court prescribed limits for excusing veniremen ruling that no juror could be dismissed because of general opposition to the penalty or scruples against its imposition. 87 The Court implied that the trial judge must make an "effort to find out whether their [the veniremen's] scruples would invariably compel them to vote against capital punishment." 88 This test is substantially the same as the one employed by South Carolina courts before Witherspoon or Tyner. 89

The issue in Tyner was whether the court went far enough to establish the juror's irrevocable commitment to vote against the death penalty without regard to the facts of the case. 90 Here, the trial judge directly asked the juror if there were circumstances under which he could vote for the death penalty, and he responded affirmatively. Later, however, the juror answered in the negative to the more lengthy and confusing query from the solicitor. This vacillation may have indicated a degree of indecision or consternation on the part of the juror, but it hardly seems sufficient to place him in the category of "invariably" opposed. The court could have required greater probing from the trial judge.

Surprisingly, the court failed to point out that the pertinent

86. — S.C. at —, 258 S.E.2d at 562.
87. 391 U.S. at 520-23. The Court did not say that the exclusion of jurors opposed to capital punishment necessarily results in an unrepresentative jury or an increased number of convictions, but it did hold that the Illinois procedure "crossed the line of neutrality" by making possible a "hanging jury." Id. In his dissent, Justice Black argued that asking jurors if they are automatically opposed to the death penalty without regard to the evidence was a "semantic illusion." Id. at 539 (Black, J., dissenting).
88. Id. at 515.
89. State v. Neely, 271 S.C. 33, 37, 244 S.E.2d 522, 525 (1978)(citing State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111 (1970) and Thomas v. Leeke, 257 S.C. 491, 186 S.E.2d 516 (1970)). In Thomas, the supreme court found that the jurors possessed "much more than a general opposition to the death penalty from which the judge could conclude only that their feeling about the death penalty had been predetermined." 257 S.C. at 502, 186 S.E.2d at 521. The trial judge questioned the prospective jurors extensively (asking one juror five separate times whether he was opposed to the death penalty) until the jurors unequivocally acknowledged that their objections could not be changed by the evidence. Id.
90. 391 U.S. at 515.
state statute specifies that a juror should not be excused unless he is "unable to return a verdict of guilty according to the law." This statutory standard appears to be substantially similar to the court's analysis under Witherspoon; it is interesting that the court did not find it relevant authority for its holding in Tyner.

Tyner and Gilbert defined certain boundaries for closing arguments by the prosecution, the privilege against self-incrimination, and grounds for excusing jurors in capital cases. The cases thus refined trial procedural rules and established more precisely jury participation in that process. As the death penalty statute makes clear, that role is a crucial one.

III. MISTAKE OF LAW DEFENSE

In State v. Bendoly, the Supreme Court of South Carolina ruled that defendants, who were charged with conspiracy and assault and battery, should have been permitted to testify regarding their good faith belief in the legality of their actions. At trial, they were not permitted to testify that they thought they were acting with lawful authority. The basis for this belief was their suspicion that the victim, Riess, a former employee and tenant, had broken into defendant Bendoly's home in Cleveland, Ohio, and stolen valuable items. Bendoly reported the theft to the local police and informed them that he suspected Riess. When Reiss was in Myrtle Beach, South Carolina, Bendoly and two of his employees came to South Carolina, allegedly to take Riess to the police for questioning. Their seizure of Riess was witnessed and reported to the police who quickly located defendants. Riess was found in the trunk of Bendoly's car.

Bendoly testified at trial that he had assumed that the complaint, which he signed in Ohio, automatically created an arrest

93. Brief of Respondent at vii. Defendants were charged with kidnapping, conspiracy to kidnap, and assault and battery of a high and aggravated nature. They appealed their convictions on the latter two counts.
94. Brief of Appellants-Respondents at 5.
95. Id. at 4.
96. Id. at 5.
97. Brief of Respondent at v.
warrant giving him authority to make a citizen’s arrest. The defense asserted that defendants’ intent to effect a valid citizen’s arrest and their good faith belief in the legality of their actions constituted a proper defense to the crime as defined in the statute.

The opinion of the supreme court in State v. Bendoly stated only the conclusion: “We are of the view appellants should have been permitted to present their side of the story.” Their story was that, in good faith, they believed they were acting with lawful authority. The supreme court implicitly adopted appellants’ theory by permitting defendants to present this story since otherwise the proffered evidence would have been properly excluded as irrelevant to any material issue in the case.

This defense, a good faith belief in the legality of an act, is known as mistake of law. “A defendant’s error as to his authority to engage in a particular activity, if based upon a mistaken view of legal requirements (or ignorance thereof), is a mistake of law.” Ignorance of law and mistake of law have been interchanged incorrectly by courts and commentators. The distinction between the two was made in an early South Carolina case: “The terms, in legal contemplation, do not impart the same significance and should not be confounded. Ignorance implies a total want of knowledge in reference to the subject matter. Mistake admits a knowledge, but implies a wrong conclusion.”

It is useful to make this distinction because a defense of ignorance of law traditionally is not permitted. The mistake of

98. Record at 207-10.
103. Id.
105. Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1909). The maxim, ignora-
tia legis neminem excusat, ignorance of the law excuses no man, has been an accepted legal doctrine for centuries. Support for the maxim is generally based on two grounds. First, to allow this excuse as a defense would encourage ignorance; thus, “public policy sacrifices the individual to the general good.” O. Holmes, The Common Law 48 (1881). Second, to honor the excuse would compel courts “to enter upon questions of fact, insoluble and interminable.” 2 J. Austin, Lectures on Jurisprudence 172 (1861). The early case of Lawrence v. Beaubien, 18 S.C.L. (2 Bail.) 623 (1831), reflects South Carolina’s reason for adherence to the rule: “[t]o allow one to shelter himself from the pun-
law defense, however, is permitted under circumstances in which the preclusion of the defense would be manifestly unjust. Those circumstances include: reliance upon a statute which might later be held unconstitutional; reliance upon a judicial decision prior to a different holding by a superior court; and reliance upon the apparent authority of a government official if the reliance was "objectively reasonable under the circumstances." The defense is also recognized when an offense requires special elements of proof for guilt to be found or it is determined from the statute that a specific intent is essential to constitute a crime.

ishment due to crime, . . . under a pretended, or even real ignorance of the law, would uproot the very foundation of society: and in this we see the reason and propriety of the maxim, and the fitness of its application." Id. at 648. Ignorance of law is allowed, occasionally, as a defense to violations of regulatory statutes. Lambert v. California, 355 U.S. 226 (1957). It has been held, however, that a person is charged with the responsibility to learn whether a statute applies to him. United States v. International Minerals & Chemical Corp., 402 U.S. 558 (1971). See generally United States v. Barker, 514 F.2d 208, 227-37 (D.C. Cir.)(Bazelon, C.J. concurring), cert. denied, 421 U.S. 1013 (1975); Hall & Seligman, Mistake of Law and Mens Rea, 8 U. Chi. L. Rev. 641 (1941); Keedy, Ignorance and Mistake in the Criminal Law, 22 HARV. L. REV. 75 (1908); O'Connor, Mistake and Ignorance in Criminal Cases, 39 MOD. L. REV. 644 (1976); Perkins, Ignorance and Mistake in Criminal Law, 88 U. PA. L. REV. 35 (1939) for extensive treatment of the origins and justifications of the maxim. But see Cass, Ignorance of the Law: A Maxim Reexamined, 17 WM. & MARY L. REV. 671 (1976) for the proposition that the rule no longer is justified.

109. R. Perkins, Criminal Law 931-35 (2d ed. 1969). There may be a requirement that the act be done maliciously, corruptly, willfully, or knowingly. Id.
110. United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977). The rationale for the defense in this situation is that a crime is committed "only if the defendant performs the actus reus with an intention to violate the law or without ground for believing his action is unlawful. A good faith mistake as to the legality of his activity, or failure to act, is a valid defense to prosecution for such a crime." Id. at 919. Indeed, the briefs in Bendoly focused on the language of the kidnapping statute, and argued over the elements essential to prove guilt, in particular, if the terms "unlawfully" and "without lawful authority" meant that specific unlawful intent was an essential element. It it was, then testimony relevant to negate unlawful or criminal intent should be permitted. Brief of Appellants-Respondents at 46-53. See notes 18 & 19 supra. South Carolina is the only state with a statute that demands the punishment of life imprisonment but does not specifically require that the prosecution prove intent. S.C. Code Ann. § 16-3-910 (Cum. Supp. 1979). This statute states:

Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by a parent thereof, shall be guilty of a felony and, upon conviction, shall suffer the punishment of life imprison-
Ultimately, the conclusion is correct. Unfortunately, the court failed to articulate the basis for and limitations of its decision.111 The reasons for the decision are not "concisely and briefly stated in writing and preserved in the record of the case" as required by law.112 In its policy-making discretion, the court

ment unless sentenced for murder as provided in § 16-3-20.

Id. Prior to 1976, the South Carolina statute included language that indicated an element of criminal intent. See 1937 S.C. Acts No. 106. In 1976, the statute took its present form, absent any express requirement of criminal intent. Yet the maximum penalty remains. Although the South Carolina kidnapping statute required some form of specific intent prior to the 1976 amendment, no South Carolina cases have focused on that element. The only two kidnapping cases that have been reported focused on the element of ransom, which was present in the statute at that time. See State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976); State v. Woods, 189 S.C. 281, 1 S.E.2d 190 (1939). In addition, no records exist to report if the legislative intent was to make a finding of criminal intent necessary for conviction under the statute.

The issue of specific intent as an element of the crime of kidnapping has been addressed by courts of other jurisdictions. See United States v. Healy, 376 U.S. 75 (1964); United States v. Barker, 514 F.2d 208 (D.C. Cir. 1975); People v. Mayberry, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975); State v. Holland, 120 La. 429, 45 So. 380 (1907); People v. Weiss, 276 N.Y. 384, 12 N.E.2d 514 (1938).

Two grounds support the conclusion that the intent of the General Assembly of South Carolina was to require specific intent under the present kidnapping statute: the history of the statute and the punishment it provides. For thirty-two years the statute required the intent to demand ransom; for eight years, it required "criminal intent" and "without lawful authority." The 1976 amendments struck the ransom requirement and added only "without authority of law," but retained the punishment of life imprisonment without exception. No state in the union has a statute which punishes kidnapping with life imprisonment unless it is an aggravated kidnapping, one that is done with criminal intent. Failure to change the punishment implies a legislative intent to continue to require a specific intent.

With this background and the requirement that a criminal statute "must be strictly construed against the state," it seems perfectly proper for the supreme court to have construed the "without lawful authority" language of the kidnapping statute to continue to require a showing of criminal intent. Such a construction of the kidnapping statute would allow the mistake of law defense, and thus, would have provided a reasoned basis for the court's holding that defendants were entitled to testify concerning their good faith-belief in the legality of their actions.

111. See note 110 supra.

When a judgment or decree is reversed or affirmed by the Supreme Court every point made and distinctly stated in the cause and fairly arising upon the record thereof shall be concisely and briefly stated in writing and preserved in the record of the case, except the Court may file memorandum opinions in unanimous decisions when the Court determines that a full written opinion would have no precedential value and any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the trial court is based on findings of fact which are not clearly erroneous; (2) that the evidence of a jury verdict is not insufficient; (3)
set a precedent by permitting the mistake of law defense in this case but did not perform its proper function of guidance by defining the parameters of the holding. The result is a lack of notice to the trial courts which may cause future errors and lost prosecutions and a "rough justice" approach to a complex area of criminal law.

Ernest R. Reeves, Jr. and Patricia M. Sabalis*

that the order of an administrative agency is supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; (4) that no error of law appears.

* Ernest R. Reeves, Jr. wrote the two sections on capital punishment; Patricia M. Sabalis authored the third section on mistake of law.