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CRIMINAL LAW

I. THE PROSECUTORIAL DUTY TO DISCLOSE EXCULPATORY INFORMATION

A. Introduction

In the landmark decision of Brady v. Maryland, the United States Supreme Court held that a prosecutor's failure to divulge "evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The South Carolina Supreme Court has considered this duty to disclose exculpatory information in three recent decisions. In State v. Penland, the court concluded that the nondisclosure of a ballistics report favorable to the defendant did not warrant a new trial, because in light of the trial record as a whole, it did not create a reasonable doubt about defendant's guilt. In State v. Mixon, the court held that the nondisclosure of a former co-defendant's statement did not affect the outcome of the trial. In State v. Goodson, the court found that the nondisclosure of evidence which could have been used by the defendant to challenge the credibility of the State's sole witness raised sufficient questions about the trial results to warrant a new trial.

The underlying Brady issue in each of these cases is when and under what circumstances prosecutorial disclosure is necessary to ensure a fair trial. The South Carolina Supreme Court's narrow construction of the prosecutor's duty to disclose information to the defendant arguably has resulted from a misapplication of the standards for measuring a prosecutor's duty to disclose enunciated by the United States Supreme Court.

2. Id. at 87.
B. South Carolina Cases

In *Penland*, the defendant was charged with the murder of his live-in girlfriend. The defendant contended that the shooting was accidental and, at trial, offered testimony of a paid, out-of-state ballistics expert that the gun used had misfired and that accidental firing was a possible cause of the victim's death. Although the State's ballistics tests on the weapon substantially corroborated the defense expert's testimony, the State's ballistics expert did not testify at trial, and the solicitor did not divulge the favorable test results to the defendant. On the evidence before it, the jury returned a verdict finding defendant guilty of voluntary manslaughter.

Upon discovering that the prosecution had withheld the exculpatory information, the defendant moved for a new trial on the ground that the State's corroboration of his expert would have been material to the jury's deliberations, especially since the State based its case entirely on circumstantial evidence. The trial court denied the motion, and defendant appealed.

The South Carolina Supreme Court ruled that the trial court had not erred in denying the motion. The court offered

6. The defendant's statement related the following account of the shooting. Marcia McIntyre, the victim, was in the habit of keeping a cocked pistol with her when she was alone. The night of the shooting, defendant and McIntyre had gone to a few bars and returned home in the early evening. McIntyre lay down on the couch, complaining that the drinks were going to her head. The defendant went out again, but McIntyre stayed at home. When the defendant was returning home, his car became stuck and he was unable to free it. He walked home to get McIntyre's help, but was unable to awaken her from the couch. He cursed her and walked away. McIntyre then awoke and pointed the pistol, in a cocked position, at him. The defendant wrestled the gun away from her. The pistol accidentally fired while the defendant was uncocking it, killing McIntyre. Record at 68-69.

7. The defense expert testified that an accidental firing could occur during the uncocking procedure if one's thumb slipped off the hammer. He also said that the possibility of such an accidental firing would be increased if the handler's hands were wet. Record at 133. The defense contended that defendant's attempt to free his car and his wrestling the pistol away from his girlfriend, caused perspiration on the defendant's hands. Reply Brief for Appellant at 3-4.

8. The prosecution admitted this corroboration. Record at 254-55. At trial, the State presented the testimony of a police officer who emphasized the unlikelihood of a misfiring. The defense challenged the expert status of the officer and the State responded that the officer was not being presented as an expert. Further, the State claimed that expert testimony was forthcoming, but never presented it.

9. Record at 125; Brief for Appellant at 12.
two justifications for its decision: (1) the State's failure to disclose its own ballistics report to defendant did not create a reasonable doubt about defendant's guilt, and (2) because the "exculpatory evidence [was] equally available upon request to the accused, the State [had] no obligation to furnish such evidence."

In United States v. Agurs, the United States Supreme Court established two standards for determining when, under Brady, a prosecutor has a duty to disclose exculpatory information to a criminal defendant. The first standard applies to cases in which the defense has made a specific Brady request or demand; the other applies to cases in which no request or only a general request for information has been made. When the defense makes a specific Brady request for information favorable to the defendant and the prosecution does not respond, the conviction must be set aside if the nondisclosed information was material. This materiality standard requires a determination of whether the nondisclosed information might have affected the outcome of the trial, in effect, a "possible effect" standard.

The second standard applies to circumstances in which the defense has made no request, or has made only a general request for all Brady material or any exculpatory information. In these instances, a conviction will stand unless the nondisclosed information, in light of the entire trial record, creates in the mind of the trial judge a reasonable doubt about the defendant's guilt. Although this test acknowledges a duty to disclose without a request by the defendant, the test requires a much more substantial showing on appeal than does the standard for specific

11. 275 S.C. at 540, 273 S.E.2d at 767 (citations omitted).
12. 427 U.S. 97 (1976). The Brady duty developed through a series of plurality opinions, many rendered by Courts with very different memberships. The decision in Agurs, however, the most recent discussion of the prosecutorial disclosure duty, was a clear 7-2 decision by a Court with a membership much the same as today's Court. This Survey, therefore, will focus on the Agurs decision.
13. Id. at 104. The Court noted in Agurs that the defendant should not have to bear the burden of showing that the undisclosed information probably would have resulted in acquittal. Id. at 111.
14. The Court stated that the purpose of the request was to put the prosecution on notice. A general request does not do so, and therefore, is treated as if no request had been made. Id. at 106-07.
15. Id. at 112-13.
requests.\textsuperscript{16}

In \textit{Penland}, controversy existed over whether the defense made a \textit{Brady} request.\textsuperscript{17} Because the court applied the reasonable doubt test of \textit{Agurs}, it apparently decided that no request had been made. The court concluded that the nondisclosed information, viewed in light of the record as a whole, did not create a reasonable doubt about the defendant's guilt.\textsuperscript{18} Because the court reached this conclusion with little discussion,\textsuperscript{19} the \textit{Penland} opinion offers little insight into the court's treatment of the reasonable doubt test.

The United States Supreme Court has not directly considered the effect of a defendant's access to exculpatory information on the State's duty to divulge that information, but federal and state courts have developed and applied an availability test to \textit{Brady} appeals. The South Carolina Supreme Court first applied the test in \textit{Anderson v. Leake}:\textsuperscript{20} "[W]here evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved."\textsuperscript{21} In adopting this test, the court relied heavily on two federal

\begin{itemize}
\item 16. Neither the United States Supreme Court nor the South Carolina Supreme Court has addressed the question of when disclosure must be made. The lower federal courts that have considered this issue have reached varying conclusions, some requiring pretrial disclosure and others requiring disclosure before the end of trial. In the final analysis, the key consideration in these cases is the effect that the timing of disclosure had on the defendant's trial. See \textit{Whitebread, Criminal Procedure: An Analysis of Constitutional Cases and Concepts} 400-02 (1980).
\item 17. The defense stated that no formal \textit{Brady} motion was made because the defense and prosecution had reached a full disclosure agreement in a pretrial chambers meeting before a different judge. Further, the defense stated that the prosecution had turned over its file. Reply Brief for Appellant at 11. The prosecution's file, however, did not contain the ballistics report. That report was never written down, but the prosecution admitted knowing of the results through telephone conversations with the state expert. Record at 264-65. The prosecution, represented by a solicitor not present at the chamber's meeting, refused to stipulate the accuracy of the defense discovery contention. Thus, it was not included in the record, but the defense did bring this matter to the court's attention. Reply Brief for Appellant at 7 n.1.
\item This situation offers two lessons for the defense attorney. First, whenever the prosecution turns over its file, its contents should be carefully examined and its omissions noted. Second, despite an informal discovery agreement, a formal \textit{Brady} request should always be made for appeal purposes.
\item 18. 275 S.C. at 540, 273 S.E.2d at 766.
\item 21. \textit{Id.} at 439, 248 S.E.2d at 122.
\end{itemize}
court decisions\textsuperscript{22} that share with Anderson a common element not present in Penland: The undisclosed information in those cases was a matter of public record.\textsuperscript{23}

In Penland, the supreme court ruled that because the defendant's ballistics expert was aware that the State had conducted pretrial tests with the murder weapon, the results of those tests were "available" to the defendant.\textsuperscript{24} Thus, although the defendant himself had no actual knowledge of the State's tests until after the trial,\textsuperscript{25} the court appears to have imputed to him knowledge the defense expert may have had.\textsuperscript{26}

The procedure by which the court expected the defendant to obtain the exculpatory information is not clear. Arguably, the defense made a pretrial Brady request for the type of information contained in the ballistics tests;\textsuperscript{27} although the prosecution clearly knew the results of the tests, that information was not divulged.\textsuperscript{28} Moreover, because of the uncertainty of the testimony that might be given, defense counsel probably would not call a State ballistics expert as a witness. Thus, Penland raises several serious questions about South Carolina's availability test.

The defendant in Mixon was arrested with two co-defendants, Collins and Smith, and was charged with possession of the drug PCP with intent to distribute.\textsuperscript{29} Co-defendant Collins was not prosecuted;\textsuperscript{30} co-defendant Smith negotiated with the

\textsuperscript{22} Id. at 438, 248 S.E.2d at 122. The court cited DeBerry v. Wolff, 513 F.2d 1336 (8th Cir. 1975) and United States v. Soblen, 301 F.2d 236 (2nd Cir. 1962), cert. denied, 370 U.S. 944 (1962).
\textsuperscript{23} See DeBerry v. Wolff, 513 F.2d at 1340; United States v. Soblen, 301 F.2d at 242; Anderson v. Leake, 271 S.C. 435, 438, 248 S.E.2d 120, 121 (1978). In Penland, the ballistics report had never been written down and therefore was not in the record. Record at 254-55.
\textsuperscript{24} 275 S.C. at 540, 273 S.E.2d at 766-67.
\textsuperscript{25} Record at 125, 129.
\textsuperscript{26} The prosecution argued that the defendant knew that the State had tested the weapon, and the court apparently accepted this argument. Brief for Respondent at 5. A reading of the record, however, does not clearly show that the defendant knew that the State had conducted ballistics tests. Record at 8, 10. Moreover, it is not clear that the defense expert knew the actual results of the State's tests, or even that the State had conducted tests before or during the trial. The defense expert testified that the State's expert was present during his tests, Record at 125, 129, but his testimony did not reveal that he knew of the State's expert's tests or results.
\textsuperscript{27} See supra note 17.
\textsuperscript{28} Id.
\textsuperscript{29} 275 S.C. at 578, 274 S.E.2d at 407.
\textsuperscript{30} Id.
solicitor and pleaded guilty to the charge of simple possession.\textsuperscript{31}

Before her trial, the defendant made a \textit{Brady} demand requesting exculpatory statements made by co-defendants.\textsuperscript{32} In a statement to the police, Collins declared that he and the defendant had refused offers of the drug THC from Smith and that Smith had told him on several occasions that the seized PCP was his and his alone.\textsuperscript{33} Although the solicitor's office had a recording of Collin's statement,\textsuperscript{34} the prosecution did not disclose it to the defense before or during the trial.

After the defendant was convicted and sentenced, she learned of Collins' statement and successfully moved for a post-trial hearing on the matter. The trial judge reviewed only that portion of Collins' statement relating to the offer and refusal of THC, but misinterpreted Collins' statement to mean that PCP rather than THC had been offered and refused.\textsuperscript{35} In addition, Smith testified at the hearing that the PCP was for his personal use and that neither the defendant nor Collins knew anything about it.\textsuperscript{36} On the basis of this incomplete information, the trial court granted a new trial, and the State appealed.

On appeal, the South Carolina Supreme Court noted that the State's failure to respond to a specific and relevant request would seldom, if ever, be excused,\textsuperscript{37} but characterized defen-

\textsuperscript{31} Record at 11.

\textsuperscript{32} The defense served the following \textit{Brady} demand:

\textbf{YOU WILL PLEASE TAKE NOTICE} that the undersigned on behalf of the above named Defendant hereby demands that you provide him any and all exculpatory information which would tend to mitigate or lessen the offense charged and any sentence arising out of the offense charged.

The Defendant particularly demands the following:

\begin{enumerate}
  \item \ldots
  \item Any statements made by this Defendant's codefendants.
\end{enumerate}

\textsuperscript{33} Record at 178-79, 181.

\textsuperscript{34} 275 S.C. at 579, 274 S.E.2d at 408.

\textsuperscript{35} Record at 170; Brief for Respondent at 2. The record of Collins' statement, transcribed from tape, showed Collins saying THC. Record at 178. Yet, the interrogating officer, according to the printed record, referred to the offered substance as "PCP, [or] THC as you call it." Record at 181. The trial judge on record referred to the offered substance as PCP. Record at 170. The prosecutor played the recorded statement for the court but did not play the portion about Smith's confession. Record at 169.

\textsuperscript{36} Record at 160.

\textsuperscript{37} 275 S.C. at 583, 274 S.E.2d at 409 (quoting United States v. Agurs, 427 U.S. 97, 106 (1976)).
dant's *Brady* motion as a general request.\(^\text{38}\) Considering the materiality of the withheld information, the court found Collins' statement concerning the offer and refusal of THC insignificant because it concerned a drug other than the one for which defendant was charged.\(^\text{39}\) Even assuming that Collins had meant PCP rather than THC, the defendant had testified at trial that she and Smith had no conversations concerning PCP and Collins' statement would therefore challenge rather than enhance the defendant's credibility.\(^\text{40}\) The court concluded that the suppressed evidence would not have affected the result at trial and reversed the trial court's decision to grant defendant a new trial.\(^\text{41}\)

The supreme court's decision in *Mixon* is troublesome in several respects. The court did not discuss the exculpatory characteristics of Collins' statement about Smith's confession of sole ownership and control of the PCP.\(^\text{42}\) Moreover, although the court discussed several different standards for measuring the prosecutorial duty to disclose, which standard the court actually applied is unclear.

The supreme court initially stated that it would review the matter as it would a motion for a new trial based on after-discovered evidence.\(^\text{43}\) This standard requires a determination of

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38. The court stated:

[t]he *Brady* demand made in this case is somewhat of a blunderbuss shot into the air in hopes that some game would fall to the earth. If it is a valid demand, it can be argued that all police officers who know anything whatsoever conceivably favorable to a defendant should reveal the same for the benefit of defense counsel. *Brady* does not go this far.

*Id.* at 581, 274 S.E.2d at 408. There are three problems with the court's statement. First, the defendant's request was quite specific. *See supra* note 32. Second, the court implies that the prosecution did not know of the statement, but it clearly did. *See* 275 S.C. at 579-80, 274 S.E.2d at 408. Third, the officer taking the statement was the arresting officer, interrogating officer, and the State's main witness. As such, his relationship to the prosecution is arguably close enough to warrant charging the prosecution with the officer's knowledge even if the prosecution had no actual knowledge. *See*, Giglio v. United States, 405 U.S. 150 (1972). *See also* Evens v. Kropp, 254 F. Supp. 218 (D. Mich. 1966).

The court may have considered the request so specific that it was general due to its comprehensiveness. However, this consideration would be manifestly unfair to the defendant; it would place the defense in the position of having to make a *Brady* request that was specific, but not too specific.

40. *Id.*
41. *Id.* at 585, 274 S.E.2d at 410.
42. This is true despite the fact that the Record at 179, 181, and the Brief for Appellant at 2, were before the court and referred to Smith's confession.
43. 275 S.C. at 578, 274 S.E.2d at 407.
whether the new evidence would probably have changed the result at trial.\(^\text{44}\) The court then noted with approval the \textit{Brady} standard, which focuses on whether the suppressed evidence might have affected the result of the trial.\(^\text{45}\) The court also mentioned the reasonable doubt standard of materiality articulated in \textit{United States v. Agurs}.\(^\text{46}\) Finally, the court noted that its own equal availability test was applicable to the facts in \textit{Mixon}.\(^\text{47}\)

The court's simple conclusion that "the information alleged to have been withheld . . . would not have affected the result,"\(^\text{48}\) suggests that it did not apply the reasonable doubt standard. Its characterization of the \textit{Brady} request as a general request suggests that the court applied the \textit{probable effect} standard rather than the \textit{possible effect} standard. The degree to which the court's decision was influenced by the availability test is unclear.

The request for information in \textit{Mixon} seems sufficiently specific under \textit{Brady v. Maryland} to warrant application of the possible effect standard of \textit{Brady}. As in \textit{Mixon}, the defense request deemed "specific" in \textit{Brady} was to examine extrajudicial statements made by a co-defendant.\(^\text{49}\) The nondisclosed statement in \textit{Brady} was an admission of guilt by the co-defendant.\(^\text{50}\) Although the nondisclosed statement in \textit{Mixon} was not an admission of the declarant's own guilt, it related to an admission of guilt by another co-defendant.\(^\text{51}\) In addition, the nondisclosed statements in both \textit{Brady} and \textit{Mixon} directly supported the defendants' testimony at trial.\(^\text{52}\) These substantial similarities indicate that the request in \textit{Mixon} should have been considered specific and that the possible effect standard should have been applied.

The exculpatory evidence withheld in \textit{Mixon}, particularly

\begin{itemize}
\item \textit{Brady} v. \textit{Maryland} at 582, 274 S.E.2d at 409.
\item \textit{Id.} (quoting \textit{United States v. Agurs}, 427 U.S. 97, 104 (1976)).
\item \textit{Id.} at 584, 274 S.E.2d at 410.
\item \textit{Id.} at 585, 274 S.E.2d at 410.
\item \textit{Id.} at 584-85, 274 S.E.2d at 410.
\item \textit{373 U.S. at 84}.
\end{itemize}

\begin{itemize}
\item \textit{Id.}.
\item The defendant in \textit{Brady} admitted being guilty of murder. His codefendant also admitted guilt. Thus, the undisclosed information in \textit{Brady} went to punishment whereas the undisclosed information in \textit{Mixon} went to the defendant's guilt.
\item The defendant in \textit{Brady} testified that his codefendant had done the actual killing. \textit{373 U.S. at 84}. The defendant in \textit{Mixon} testified that she knew nothing about the PCP. Record at 125, 131.
\end{itemize}
Smith's confession at the hearing on sole possession of the PCP, clearly might have affected the outcome of the defendant's trial. No hard physical evidence established the defendant's possession of PCP. The State relied solely on the testimony of the arresting, interrogating officer. Mixon had challenged that officer's credibility and had accused him of blackmail. Smith's confession not only would have directly supported defendant's claim of innocence but also would have corroborated her challenge to the officer's credibility. Notably, in State v. Goodson, the third Brady case discussed in this Survey, the undisclosed information challenged the credibility of the State's main witness and the South Carolina Supreme Court recognized the defendant's right to a new trial. Thus, had the court applied what appears to be the appropriate standard—the possible effect standard—it might have reached a different result.

The availability test also does not appear to justify the non-disclosure of the information in Mixon. The defendant had no personal knowledge of Smith's admission of sole possession, and the record of Smith's plea did not reveal the admission. Moreover, the record of the defendant's trial does not reveal that any member of the defense team knew of Collins' statement or of its contents. Although, arguably, the defense could have called Collins as a witness and thereby made the information available, it had no reason to do so. The defense believed that the prosecution would call Collins to testify at trial and was unaware that Collins had made a statement. Moreover, Collins was out-of-

53. The arresting officer discovered the PCP on the ground between Mixon and Smith. 275 S.C. at 578, 274 S.E.2d at 407.
54. Record at 85-115. The critical part of the officer's testimony was that Mixon had admitted to him that she was going to sell the PCP for Smith.
55. Record at 126-27.
56. These credibility questions should be approached with caution and probably best left to the trial process of examination, cross-examination, and jury deliberation once the jury has all of the admissible evidence before it. Since Smith had already made a deal with the State, his confession of sole possession did not threaten him with punishment. In addition, if the defendant actually was selling drugs for Smith, keeping her out of jail might be in his best interest. It should be noted, however, that Smith apparently admitted sole possession before he made a deal with the State. See supra note 33 and accompanying text.
57. Admittedly the facts in that case are more compelling than those in Mixon. See infra notes 60-61 and accompanying text.
58. See Record at 16, 17, 140.
state at the time of trial. Consequently, it would appear to be unfair to consider his testimony as being equally available to the defendant.

In Goodson, the defendant was charged with housebreaking, grand larceny, and safecracking. In his defense, Goodson claimed that his brother, the State’s sole witness against him, committed the actual theft and that he was guilty only of receiving stolen goods. Before trial, the defense made a Brady motion for all physical evidence favorable to the defendant. The solicitor, however, failed to disclose a picture of defendant’s brother taken from film found in a camera stolen from the Allendale Highway Department. At trial, the brother testified that the defendant left one evening and returned later with property stolen from the Allendale Highway Department; defendant was convicted. The defendant subsequently learned of the suppressed photograph and moved for a new trial. The trial court denied the motion and the defendant appealed.

The South Carolina Supreme Court began its appraisal of Goodson’s appeal by finding the defendant’s Brady request too general to merit consideration under the possible effect standard. The court, therefore, applied the reasonable doubt test of Agurs, but concluded that the facts of Goodson satisfied that test. The court emphasized that the nondisclosed information challenged the credibility of the State’s only witness.

The Brady request in Goodson exemplifies a particularly difficult Brady question: how specific must the request be to be considered under the possible effect standard? The request in Goodson was for physical evidence—the photograph of the defendant’s brother certainly was favorable physical evidence. In

59. 275 S.C. at 580, 274 S.E.2d at 408.
60. 276 S.C. at 244, 277 S.E.2d at 603.
61. Id. at 246, 277 S.E.2d at 604.
62. The South Carolina Supreme Court heard this matter previously, see State v. Goodson, 273 S.C. 264, 255 S.E.2d 679 (1979), and remanded it for consideration under the reasonable doubt test of Agurs. The trial court’s treatment upon remand is the subject of the supreme court opinion considered in this Survey.
63. 276 S.C. at 246-47, 277 S.E.2d at 604.
64. Id. at 246, 277 S.E.2d at 604.
65. Id. at 244-45, 27 S.E.2d at 603 (citing State v. Goodson, 273 S.C. 265, 255 S.E.2d 679 (1979)).
66. Id. at 247, 277 S.E.2d at 604-05.
67. Id. at 247-48, 277 S.E.2d at 604-05.
Agurs, the United States Supreme Court indicated that a request is specific if it gives the prosecutor notice of exactly what the defense wants and does not require unlimited discovery of the State’s evidence.\(^68\) Whether the Goodson request served this notice function is uncertain. It is difficult to imagine how the defense might have made the physical evidence request more specific without actually knowing of the existence of the photograph of the defendant’s brother. Yet, the request was so general that, to comply, the prosecution would have had to review all of its physical evidence.

Perhaps the amount of physical evidence present in a case should be considered by courts in determining the scope of a prosecutor’s duty to disclose. Certainly this would mitigate the burden placed on prosecutors by Brady requests. If there is a substantial amount of physical evidence, and if the defense is generally aware of the amounts and types of physical evidence in the case, requiring the defense request to be more specific than a simple request for exculpatory physical evidence is not unreasonable.\(^69\)

The South Carolina Supreme Court in Goodson may have considered the amount of physical evidence. Many things were stolen from the Allendale Highway Department, the defense was generally aware of what was stolen, and the favorable evidence was contained in this physical evidence. However, how or why the court concluded that the defendant’s request for physical evidence was general rather than specific is not clear.

C. Conclusion

As illustrated by Penland and Mixon, the South Carolina Supreme Court has narrowly construed the duty of prosecutors under Brady v. Maryland to disclose exculpatory information.\(^70\)

\(^68\) 427 U.S. 97, 106 (1976).

\(^69\) This consideration presents at least two problems. First, how much physical evidence is sufficient to require such specificity? Second, what should the result be when there is a large amount of physical evidence and the undisclosed evidence is unknown to the defense or is of a different type? These problems question the use of this “amount of evidence” test.

\(^70\) Perhaps the court’s restrictive application of the Brady and Agurs standards is in defense of the state rule against criminal discovery. The South Carolina Brady cases and certain language contained therein support this conclusion. For example, in State v. Hill, 268 S.C. 390, 234 S.E.2d 219 (1977), the supreme court stated that “[a]lthough the
The court has been reluctant to find a *Brady* request specific enough to warrant applying the possible effects standard; in fact, the court has never clearly applied that standard. Although a new trial was granted in *Goodson*, that case does not appear to represent a trend away from the court's restrictive approach to *Brady* issues. Rather, *Goodson* indicates that a new trial will be deemed appropriate only when the evidence withheld from a defendant is highly exculpatory, such as information that seriously challenges the credibility of the State's main witness.

Thus, the recent decisions suggest that South Carolina defense attorneys should avoid relying too heavily on *Brady* appeals. Despite their unfavorable overtones, however, the cases do provide some guidance for structuring successful appeals. As a preliminary matter, defense counsel can enhance the probability of success on appeal by drafting *Brady* requests with great specificity and exhaustive comprehensiveness. Unfortunately, the South Carolina case law offers no guidance regarding how *Brady* requests can be made sufficiently specific to trigger the materiality standard of *Brady v. Maryland*. Thus, the defense attorney should always be prepared to argue alternatively the possible effect and the reasonable doubt standards. Moreover, whenever possible, a defense attorney should emphasize that the undisclosed information could have been used at trial to challenge the credibility of the State's witnesses.

Finally, when presenting a *Brady* appeal, the defense attorney should be prepared to satisfy the availability test although the scope and significance of this test are unclear. *Penland* indicates that pretrial vigilance may be the key to meeting the test. To avoid a determination that the suppressed evidence was

appellant does not have to show, and indeed may be unable to show, that the evidence which he seeks to have produced would be admissible at the trial, he does have to show some better cause for inspection than a mere desire." *Id.* at 394-95, 234 S.E.2d at 221. In Anderson v. Leeke, 271 S.C. 435, 248 S.E.2d 120 (1978), the court stated that "*Brady* does not shift to the State the burden of gathering evidence for the defense." *Id.* at 439, 248 S.E.2d at 122. In State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980), the court stated that "[a]ppellant's discovery motions were pursuant to *Brady v. Maryland*. . ., and a mutual discovery provision promulgated by the Thirteenth Judicial Circuit. That local rule was declared unconstitutional in State v. Duncan, (citation omitted)." *Id.* at 591, 266 S.E.2d at 81. In State v. Cox, 274 S.C. 624, 266 S.E.2d 784 (1980), the court stated that "where evidence is equally available to the accused, the State has no obligation to furnish such evidence." *Id.* at 629, 266 S.E.2d at 787, cited with approval in State v. Penland, 275 S.C. 537, 540, 273 S.E.2d 765, 766-67 (1981).
“equally available” to a defendant, the defense attorney should debrief any member of the defense team who comes into contact with the prosecution, to determine if that member’s knowledge might be imputed to the defendant.

Robert L. Widener

II. JUDICIAL PARTICIPATION IN PLEA BARGAINING

Within the past four years, the South Carolina Supreme Court has twice held that “a judge should not initiate or influence a plea bargain agreement, nor be a party to the negotiations.”71 This position was in accord with the Federal Rules of Criminal Procedure.72 However, in Harden v. State73 and Medlin v. State,74 the court75 discussed and approved judicial participation in the plea bargaining process prior to the judge’s taking of the actual plea. Noting significant factual distinctions between the two sets of cases, the court took the opportunity in Harden and Medlin to first reinterpret its holdings in the prior cases, State v. Cross76 and Beaver v. State,77 and second, to adopt the American Bar Association (ABA) Standard for judicial participation in the plea bargaining process.78 These decisions

72. See Fed. R. Crim. P. 11. The rule provides in part that “the court shall not participate in any such [pleabargaining] discussions.” Id.
75. Four justices participated in the per curiam Harden decision affirming the finding of the post-conviction relief hearing that the guilty plea was voluntary. Two justices advocated the adoption of Standard 14-3.3 and discussed the policy considerations of judicial participation in plea bargaining. The court quoted the entire standard in the plurality opinion. 276 S.C. at 283-55, 277 S.E.2d at 694-95. In Medlin, the supreme court adopted Standard 14-3.3 as the guideline for judicial participation in the plea bargaining process. — S.C. at ___, 280 S.E.2d at 648. The majority in Medlin did not restate the plurality position in Harden, but did adopt the standard on the basis of that decision. Thus, subsequent references to “the court’s” reasoning may be to the Harden decision, even though the court did not adopt the standard until the later Medlin case.
78. — S.C. at ___, 280 S.E.2d at 648. The court adopted the standard set forth in Standards for Criminal Justice, Pleas of Guilty § 14-3.3. (ABA 2d ed. 1980), which provides as follows:
Standard 14-3.3. Responsibilities of the Judge
(a) The judge should not accept a plea of guilty or nolo contendere
place South Carolina in a minority position because the ABA

without first inquiring whether the parties have arrived at a plea agreement and, if there is one, requiring that its terms, conditions, and reasons be disclosed.

(b) If a plea agreement has been reached by the parties which contemplates the granting of a charge or sentence concessions by the judge, the judge should:

(i) order the preparation of a preplea or presentence report, when needed for determining the appropriate disposition;

(ii) give the agreement due consideration but notwithstanding its existence reach an independent decision on whether to grant charge or sentence concessions; and

(iii) in every case advise the defendant whether the judge accepts or rejects the contemplated charge or sentence concessions or whether a decision on acceptance will be deferred until after the plea is entered and/or a preplea of presentence report is received.

(c) When the parties are unable to reach a plea agreement, if the defendant's counsel and prosecutor agree, they may request to meet with the judge in order to discuss a plea agreement. If the judge agrees to meet with the parties, the judge shall serve as a moderator in listening to their respective presentations concerning appropriate charge or sentence concessions. Following the presentation of the parties, the judge may indicate what charge or sentence concessions would be acceptable or whether the judge wishes to have a preplea report before rendering a decision. The parties may thereupon decide among themselves, outside of the presence of the court, whether to accept or reject the plea agreement tendered by the court.

(d) Whenever the judge is presented with a plea agreement or consents to a conference in order to listen to the parties concerning charge or sentence concessions, the court may require or allow any person, including the defendant, the alleged victim, and others, to appear or to testify.

(e) Where the parties have neither advised the judge of a plea agreement nor requested to meet for plea discussion purposes, the judge may inquire of the parties whether disposition without trial has been explored and may allow an adjournment to enable plea discussions to occur.

(f) All discussions at which the judge is present relating to plea agreements should be recorded verbatim and preserved, except that for good cause the judge may order the transcript of proceedings to be sealed. Such discussions should be held in open court unless good cause is present for the proceeding to be held in chambers. Except as otherwise provided in this standard, the judge should never through words or demeanor either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

(g) In cases where a defendant offers to plead guilty and the judge decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, the judge shall so advise the defendant and permit withdrawal of the tender of the plea. In cases where a defendant pleads guilty pursuant to a plea agreement and the court, following entry of the plea, decides that the final disposition should not include the contemplated charge or sentence concessions, withdrawal of the plea shall be allowed if:

(i) prior to the entry of the plea the judge concurs, whether tentatively or fully, in the proposed change [sic] or sentence concessions; or
Standards have been adopted in principle by only one other state, although a few states have recognized judicial participation in the plea bargaining process through their court rules or statutes.

The appellant in Harden v. State pleaded guilty to distribution of marijuana to a minor and contributing to the delinquency of a minor. Prior to his plea, the appellant's attorney told him the judge was under time pressure and a decision had to be made soon about the plea. The attorney also informed the appellant of a proposed sentence range suggested by the trial judge.

In Medlin v. State, the appellant pleaded guilty to three indictments and was sentenced to concurrent terms of imprisonment. Again, the trial judge participated in the plea bargaining process.

On appeal to the supreme court, both appellants argued

(ii) the guilty plea is entered upon the express condition, approved by the judge, that the plea can be withdrawn if the charge or sentence concessions are subsequently rejected by the court.

In all other cases where a defendant pleads guilty pursuant to a plea agreement and the judge decides that the final disposition should not include the contemplated charge or sentence concessions, withdrawal of the plea may be permitted in the discretion of the judge.

79. In State v. Pouncey, ___ Wash. App. ___, 630 P.2d 932 (1981), the Washington Supreme Court stated the following:

[W]e accept the principles of ABA Standards 14-3.3(c)-(f) until a more explicit rule is promulgated locally. Those standards limit the trial judge's involvement in the process to an inquiry whether the adversaries have explored disposition of the cause [sic] without trial with the admonition that the judge should never, directly or indirectly, communicate to defendant or his counsel that a guilty plea should be entered or that an agreement (or proposal) should be accepted.

Id. at ___, 630 P.2d at 936.


81. 276 S.C. at 251, 277 S.E.2d at 693.

82. Id.

83. ___ S.C. at ___, 280 S.E.2d at 649.

84. Id. at ___, 280 S.E.2d at 649.
that the decisions in Cross and Beaver mandated invalidation of the guilty pleas. The appellant in Harden maintained that Cross and Beaver established a per se rule that "participation by the trial judge in plea bargaining prior to sentencing is, in and of itself, sufficient to render the entry of any plea of guilty subsequent to such participation involuntary and hence one the withdrawal of which must be allowed." The appellant in Medlin argued his plea was involuntary because the judge's participation in the plea negotiations put undue influence on him to plead guilty and accept the plea that was discussed by the judge, solicitor, and defense counsel.

The State in both cases emphasized the factual differences between the two prior cases and Harden and Medlin. In both Cross and Beaver, the judge clearly implied that he would be more severe in sentencing if the appellant continued with the trial and was found guilty. The State attempted to distinguish the coerciveness of the judge's behavior in those cases from the judge's comments in Harden, which arguably indicated only his awareness of the ongoing plea discussions. In Medlin, the court noted that the record was "devoid of any threats of any credible showing that the Appellant gave up any constitutional rights due to the trial court's participation.

Thus, the supreme court in Harden and Medlin was faced with either confirming the apparent per se ruling of Cross and

85. Brief for Appellant at 4.
86. Brief for Appellant at 1-2.
87. 270 S.C. at 47, 240 S.E.2d at 514; 271 S.C. at 382, 247 S.E.2d at 449.
88. Brief for Respondent at 5. The State argued that the supreme court had not created a per se ruling that any involvement, however slight, by the trial court in the plea bargaining process constituted undue coercion as a matter of law. The State quoted the supreme court's statement in Cross that "[w]e hold under the facts of this case that the defendant was unduly coerced." Id. at 3-4, (citing State v. Cross, 270 S.C. 44, 50, 249 S.E.2d 514, 517 (1977)).

A commentator on the Cross and Beaver decisions discussed the conflicts and attending problems of a broad versus narrow construction of their holdings, and criticized the cases as not being clear or precise, urging the following:

[a] detailed opinion or court-promulgated rule is needed to delineate the exact purpose and extent of judicial participation in plea negotiations. When the court, legislature, and bar association develop definite procedures that will make plea negotiations uniform, fair, and public, examples of coercion and misuse such as those in Cross hopefully will not arise.

Beaver that the judge should never be involved in the plea bargaining process, or limiting Cross and Beaver as decisions that simply corrected an after-the-fact finding of actual coercion by the trial judge. The court chose the latter approach and adopted American Bar Association Standard 14-3.3, which allows judicial participation in plea bargaining and establishes guidelines for such participation. These guidelines include provisions regarding, inter alia, presentencing reports; judicial moderation of the plea conference provided both parties request it and the judge consents; the presence of the defendant, alleged victim and others at the plea conference; the judge's neutral demeanor at the conference; and verbatim records of the discussions with the judge.

The supreme court acknowledged the controversy surrounding plea bargaining and the advantage of preventing judges from participating in the plea bargaining process. However, the court was concerned that if the trial judge is prevented from participating in plea bargaining both the defendant and the prosecutor will be deprived of the information they need to know when discussing the plea bargain—the upper limit of the sentence contemplated by the judge. This concern prompted the court to adopt the American Bar Association position, which it considered a reasonable approach to plea bargaining: "It [ABA Standard 14-3.3] provides access by the State and the defendant to the judge, and yet provides standards to guide all concerned so that the fear of coercion in the plea-bargain process . . . should

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89. The court referred to this position as the "insurance approach" By never allowing the judge to participate in plea bargaining, the court could insulate against judicial coercion. As the court noted, many commentators favor this approach as enhancing general respect for the neutrality of the court and helping judicial economy. 276 S.C. at 253, 277 S.E.2d at 693-94. Accord United States ex rel Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966).


91. ___ S.C. at ____, 280 S.E.2d at 648. The Harden plurality observed that the language in Cross and Beaver was broader than the factual situation warranted, 276 S.C. at 252, 277 S.E.2d at 693, and specifically discontinued adherence to the apparent position of Fed. R. Crim. P. 11, 276 S.C. at 256, 277 S.E.2d at 695.

92. See supra note 78 for the full text of the standard.

93. 276 S.C. at 253, 277 S.E.2d at 694.
be minimal."  

The strong dissent in *Medlin* questioned the abrupt introduction of these as yet untested standards and argued that a change of this magnitude should not occur without input from the Attorney General and members of the legal community. The dissent reasoned that the rule allowing judicial initiation of or participation in the plea bargaining process is "inherently bad," observing that it gives an accused and his attorney "one more weapon in pursuit of leniency." The dissent also believed that the rule would encourage judge shopping, increase the disparity in sentences, and undermine, if not destroy, the ability of the trial court judge to remain impartial to a defendant who has admitted guilt in a bargaining session. Other objections cited by the dissent were that the presence of a judge at a plea bargaining conference is inherently coercive, that a negotiation between a judge and defendant impairs the former's ability to rule on the voluntariness of the latter's confession, and that the rule weakens the bargaining power of the prosecutor.

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94. *Id.* at 256, 277 S.E.2d at 695.  
95. *S.C.* at —, 280 S.E.2d at 650 (Littlejohn and Gregory, JJ., concurring and dissenting).  
96. *Id.* at —, 280 S.E.2d at 650 (Littlejohn and Gregory, JJ., concurring and dissenting).  
97. *Id.* at —, 280 S.E.2d at 651 (Littlejohn and Gregory, JJ., concurring and dissenting). Alschuler quotes one justice's comment on the problem of a judge's remaining impartial after participating in plea bargaining:  
Judges frequently rule on potentially prejudicial matters in advance of trial. They may even suppress evidence that would, if admitted, conclusively establish a defendant's guilt without disqualifying themselves from further participation. A judge's participation in plea bargaining need not be treated differently from other activities that could conceivably give rise to prejudice in the conduct of a trial but that usually do not pose significant problems. Alschuler, *supra* note 90 at 1110.  
98. *S.C.* at —, 280 S.E.2d at 651 (Littlejohn and Gregory, JJ., concurring and dissenting). In regard to the coerciveness of the trial judge, one author makes the point that a judge who participates in a plea bargaining conference would not necessarily influence a defendant to any greater degree than would a prosecutor. Certainly the point of the standards is to structure the judicial participation in a noncoercive manner. See Schlesinger and Malloy, *Plea Bargaining and the Judiciary: An Argument for Reform*, 30 Drake L. Rev. 581, 590 (1981). Another concern expressed in the *Medlin* dissent was that these standards would require judges to testify in many more post-conviction relief hearings. *Id.* at —, 280 S.E.2d at 650 (Littlejohn and Gregory, JJ., concurring and dissenting). With a verbatim record of the plea conference, however, the number of appeals based on coerciveness should decrease. See Schlesinger and Malloy, *supra* note 96 at 589; Alschuler, *supra* note 90 at 1132.
The *Harden* and *Medlin* decisions represent an attempt to impose structure and limitations on an acknowledged part of plea bargaining—the informal, indirect, or even secret knowledge of or participation by the trial judge in the plea bargaining process. South Carolina now has a formal procedure for trial judges to follow if they want to be involved in this process. To echo the *Medlin* dissent, however, exactly what the court adopted is unclear; the boundaries of these standards are untested. In fact, by adopting only Standard 14-3.3, South Carolina has isolated one part of an interrelated set of principles. How well this standard will function apart from the correlative standards for the defense counsel and the prosecutor is unknown.99

Several questions remain unanswered even by the ABA Standards. For instance, may statements of record at a plea bargaining conference be used for impeachment purposes at trial if the plea bargaining fails and the guilty plea is withdrawn? Should a judge present at a plea bargaining conference in which a proposed guilty plea is withdrawn excuse himself from sitting on that case? Why must defense counsel and the prosecutor agree on requesting a meeting with the judge?100 Arguably, these standards leave too much discretion with the trial judge instead of requiring him to participate if both parties so request, and requiring him to disclose the sentence before entry of a plea.101

With the *Harden* and *Medlin* decisions, South Carolina is in the forefront of states that allow structured judicial participation in plea bargaining. The ABA Standards call for on-the-record and dispassionate judicial participation in plea negotiation—a worthy objective. The use of these standards as rules of court procedure in South Carolina will be followed closely by other states, scholars, and the legal community.102 Because of the strong dissent in *Medlin* and the untested nature of these

99. For instance, Standard 14-3.3(b)(i) states that in accepting the plea bargain, the judge should order the preparation of a preplea or presentence report to aid him in determining the appropriate disposition of the case. In another ABA Standard not adopted in this decision, Standard 18-5.2, the defendant must consent to the preparation of the presentence report.

100. *See* Lefstein, *supra* note 80, at 518-19.

101. *Id.* at 516-18.

102. Professor James F. Flanagan, of the University of South Carolina School of Law, discussed the effects of the ABA Standards on judicial involvement in plea bargaining in a S.C. Bar-C.L.E. treatise. J. FLANAGAN, CURRENT DEVELOPMENTS IN CRIMINAL LAW at 76-86 (October 2, 1981).
standards, some trial judges may refuse to participate, or the supreme court may retreat from its newly adopted position. In light of their worthy objectives and in spite of the unanswered questions the standards raise, not giving the standards on judicial participation in plea bargaining a fair trial themselves would be unreasonable and unwarranted.

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III. HEARSAY TESTIMONY OFFERED BY STATE AT PRELIMINARY HEARING

In State v. Thompson,103 the South Carolina Supreme Court considered a myriad of overlapping constitutional and procedural issues regarding the conduct of criminal proceedings. The court held, in part,104 that probable cause may be based solely on hearsay testimony offered by the State at a preliminary hearing.105 This holding places South Carolina in the majority of jurisdictions that have considered this issue,106 but raises questions about the usefulness and potential abuse of a preliminary hearing at which only hearsay evidence is offered.

The appellant was arrested for armed robbery. At the preliminary hearing attended by defense counsel,107 the State offered only one witness, a police officer, who read the testimony of an accomplice into the record. This statement was the only

104. The court also held: (1) a motion for mistrial based on the receipt of incompetent evidence is properly refused when there exists overwhelming evidence against the defendant and the trial court instructs the jury to disregard the testimony; (2) evidence properly admitted to demonstrate a defendant’s attempt to avoid detection, apprehension, and identification may not be excluded merely because it incidentally reflects upon the defendant’s character; (3) a conversation between the defendant and a police officer initiated by the defendant during which the officer gives answers not intended to elicit an incriminating response does not constitute an impermissible interrogation; (4) the withholding of a list of the State’s witnesses does not deprive the defendant of a fair trial; (5) absent a showing of “when, how often and under what circumstances the particular prosecutor had been responsible for striking members of a particular race,” a jury will not be quashed because the State exercises its preemptory strikes to remove members of the defendant’s race; and (6) an improper admission of in-court eyewitness identification can be harmless error when the identification is merely cumulative to independent and overwhelming evidence of guilt. Id. at ___, 281 S.E.2d at 218-20.
105. Id. at ___, 281 S.E.2d at 220.
106. See infra notes 119-20.
107. ___ S.C. at ___, 281 S.E.2d at 220.
testimony offered against the appellant. The trial court subsequently convicted the appellant of armed robbery and the South Carolina Supreme Court affirmed.

The appellant argued on appeal that the admission of the accomplice's hearsay statement as the sole evidence of probable cause deprived him of the right to cross-examination and discovery of the State's witnesses, and thus denied him effective assistance of counsel. The supreme court rejected appellant's claim, relying upon State v. Jones, in which the court ruled that the chief investigating officer may read statements of absent witnesses into the record. The court in Thompson noted, however, that the officer in Jones offered direct testimony in addition to hearsay statements. The court did not find this distinction significant and held that the lack of direct testimony "would not change the results of Jones since the appellant was apprised of the nature of the State's evidence." The court thus implied that the use of hearsay as the sole evidence of probable cause may be unacceptable when it does not adequately inform the defendant of the State's case against him.

The scope of preliminary hearings in South Carolina is governed by section 22-5-320 of the South Carolina Code. The

108. Id. at __, 281 S.E.2d at 220.
110. Id. at 726-27, 259 S.E.2d at 122.
111. ___ S.C. at __, 281 S.E.2d at 220.
112. Id. at __, 281 S.E.2d at 220.
Any magistrate who issues a warrant charging a crime beyond his jurisdiction shall grant and hold a preliminary hearing of it upon the demand in writing of the defendant made within twenty days of the hearing to set bond for such charge; provided, however, that if such twenty-day period expires on a date prior to the convening of the next term of General Sessions Court having jurisdiction then the defendant may wait to make such request until a date at least ten days before the next term of General Sessions Court convenes. At the preliminary hearing, the defendant may cross-examine the state's witnesses in person or by counsel, have the reply in argument if there be counsel for the State, and be heard in argument in person or by counsel as to whether a probable case has been made out and as to whether the case ought to be dismissed by the magistrate and the defendant discharged without delay. When such a hearing has been so demanded the case shall not be transmitted to the court of general sessions or submitted to the grand jury until the preliminary hearing shall have been had, the magistrate to retain jurisdiction and the court of general sessions not to acquire jurisdiction until after such preliminary hearing. Provided, however, that the defendant shall not be required to appear in person at the appointed time, date and place set for the hearing if he is repre-
preliminary hearing serves two purposes: first, an accused person is entitled to a preliminary hearing in order to be apprised of the nature of the State's evidence;\(^{114}\) and second, the hearing determines whether the State has probable cause of guilt.\(^{115}\) This statute has not been interpreted to afford defendants significant discovery of the State's case: "[Defendants] are not entitled to expand the hearing into a discovery proceeding wherein they may cross-examine all the State's witnesses, nor does the language of Section 22-5-320 require the State to come forward with all its witnesses and evidence at this stage."\(^{116}\) Therefore, the State need only produce enough evidence to establish probable cause\(^{117}\) and hearsay evidence may be used to partially meet this burden.\(^{118}\) The decision in Thompson goes further by allowing a hearsay statement to be the only evidence of probable cause.

The supreme court's decision that a finding of probable cause may be based wholly on hearsay evidence is in accord with both the Federal Rule of Criminal Procedure\(^{119}\) and the practice in most states.\(^{120}\) The propriety of relying on hearsay evidence has been questioned in the federal system,\(^{121}\) however, and several states have imposed decisional or statutory limitations on its admissibility.\(^{122}\) New York, for example, prohibits the use of hearsay evidence, including the recitation of investigational reports at the preliminary hearing in felony cases.\(^{123}\) Arizona al-

\(^{116}\) State v. Jones, 273 S.C. at 727, 259 S.E.2d at 122.
\(^{119}\) "[T]he finding of probable cause may be based upon hearsay evidence in whole or in part." Fed. R. Crim. P. 5.1(a).
\(^{121}\) See Fed. R. Crim. P. 5.1(a) and the accompanying advisory notes.
\(^{123}\) People v. Bonilla, 74 Misc. 2d 971, 347 N.Y.S. 2d 130 (Crim. Ct. N.Y. 1973). "These are self-serving records, created in part in the anticipation of legal proceedings. . . ." Id. at 973, 347 N.Y.S. 2d at 133 (citation omitted).
allows preliminary hearings to be based in whole or in part on hearsay, but the testimony of witnesses concerning the declarations of others is admissible only when there are reasonable grounds to believe that the actual declarants will be available at the trial. The Supreme Court of Colorado, perhaps the most articulate court on this subject, has held that:

[H]earsay evidence is admissible at a preliminary hearing, but we admonish the courts to be aware of the excessive use of hearsay in the presentation of the government cases. The inordinate use of hearsay . . . foils the protective defense against unwarranted prosecutions that preliminary hearings are designed to afford to the innocent. . . . Better prosecutorial practice entails the presentation of a residuum of competent, non-hearsay evidence at the preliminary hearing to support probable cause.

Since the unreliability of hearsay evidence is a major concern, arguably from a policy standpoint evidence inadmissible at trial should not be admitted at a preliminary hearing to establish probable cause. The court in Thompson, however, focused on the preliminary hearing’s function of apprising the defendant of the State’s evidence, concluding that if a defendant is informed of the nature of the State’s case, he has no ground to challenge the form of the evidence. Consequently, although the court did not set forth detailed, substantial limitations on the use of hearsay testimony at preliminary hearings, the court has at least required that the hearsay evidence be sufficiently informative of the nature of the State’s case.

Because questioning the court’s position in Thompson is difficult, in the future the court may want to consider whether allowing proof of probable cause by only hearsay testimony impairs the fairness and efficacy of a preliminary hearing beyond the impact of the testimony on the defendant’s ability to discern the nature of the State’s claim.

127. ___ S.C. at ___, 281 S.E.2d at 220.
In *State v. Capps*, 128 the South Carolina Supreme Court held that an assistant solicitor may appear as a witness before the grand jury to provide a summary of the evidence in a case which he had been assigned for prosecution. 129 This approach has been adopted by at least one other jurisdiction.130 The court in *Capps* also reaffirmed the validity of indictments based entirely on hearsay evidence.131 On this issue, South Carolina stands in agreement with a number of jurisdictions, including the federal courts.132

The appellant was convicted of assault and battery with intent to kill and criminal sexual conduct in the first degree. At the Greenville County grand jury hearing the assistant solicitor appeared as a witness to present a summary of the evidence. The State presented no other witnesses and the grand jury did not request to hear other witnesses.133 The assistant solicitor did not examine or cross-examine any witnesses before the grand jury, nor did he participate in or present himself during the

129. Id. at 62, 275 S.E.2d at 873.
131. 276 S.C. at 60-61, 275 S.E.2d at 872.

In South Carolina, this issue was decided in *State v. Williams*, 263 S.C. 290, 210 S.E.2d 298 (1974). In *Williams*, the supreme court held that an indictment based on hearsay violated no right of the accused under S.C. Const. art. I, § 11. 263 S.C. at 295-96, 210 S.E.2d at 301. This section of the Constitution states: "[n]o person shall be held to answer for any crime where the punishment exceeds a fine of two hundred dollars or imprisonment for thirty days, unless on a presentment or indictment of a grand jury. . . ." The court in *Williams* relied extensively on Costello v. United States, 350 U.S. 359 (1959), involving an indictment based upon the testimony of three investigating officers with no firsthand knowledge of the facts. The United States Supreme Court concluded that "[a]n indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits." *Id.* at 363.

The South Carolina Supreme Court has also held that the secrecy of grand jury proceedings precludes any inquiry into the factual basis of indictments. Margolis v. Telech, 239 S.C. 232, 241, 122 S.E.2d 417, 421 (1961). For a discussion of the secrecy of grand jury deliberations, see *State v. Rector*, 158 S.C. 212, 155 S.E. 385 (1930).

133. Record at 16. Other witnesses would have been subpoenaed and testimony presented had the grand jury so requested. *Id.*
grand jury deliberations. At trial, the appellant moved to quash the indictment, arguing that the appearance by the solicitor improperly influenced the grand jury and violated the court's previous holding in Ex parte McLeod. The South Carolina Supreme Court, with vigorous dissent by Chief Justice Lewis, affirmed the trial court's denial of the appellant's motion.

The supreme court noted that a solicitor has a right and duty to communicate with the grand jury concerning the procedural aspects of its hearings. Extending this rule, the majority reasoned that the grand jury's calling of an assistant solicitor "as an investigating witness did not thereby render him legally incompetent nor was it an improper attempt to influence the grand jury." The majority distinguished its earlier decision in Ex Parte McLeod in which it had barred prosecutors from examining or cross-examining grand jury witnesses on the grounds that the assistant solicitor in Capps appeared only as a witness, not as a prosecutor. The court specifically held that the only capacity in which any person may be called before or attend a grand jury session is that of a witness during the taking of his testimony.

The majority in Capps cautioned that prosecutors appearing as witnesses must avoid the appearance or reality of a conflict of interest and should appear as the sole witness only if there is no other alternative. Prosecutors may only appear as witnesses if they will not improperly influence the grand jury. The supreme court concluded that the assistant solicitor's appearance as a witness to summarize evidence did not improperly influence the grand jury.

134. Id.
136. 276 S.C. at 60, 275 S.E.2d at 872 (citing State v. McNinch, 12 S.C. 89 (1879)).
137. 276 S.C. at 61, 275 S.E.2d at 872-73 (citing People v. Bissonnette, 20 Ill. App. 3d 970, 313 N.E.2d 646 (1974)).
138. 276 S.C. at 62, 275 S.E.2d at 873.
139. Id. at 61, 275 S.E.2d at 873.
140. Id. at 61-62, 275 S.E.2d at 873. Chief Justice Lewis went further than the majority by advocating that: (1) an indictment may not be based solely on the testimony of a solicitor; and (2) assuming the solicitor could act as a witness, an indictment should not be routinely acquired solely on the basis of hearsay evidence. Id. at 64-65, 67, 275 S.E.2d at 874, 876 (Lewis, C.J., dissenting).
141. Id. at 61, 275 S.E.2d at 872-73 (citing People v. Bissonnette, 20 Ill. App. 3d 970, 313 N.E.2d 646 (1974)).
142. 276 S.C. at 62, 275 S.E.2d at 873.
The *Capps* court also found that basing the grand jury's indictment upon hearsay testimony of the assistant solicitor did not thereby render it invalid.\(^{143}\) This finding is consistent with an earlier decision of the court\(^{144}\) and is the approach taken by the United States Supreme Court.\(^{145}\)

The majority and dissent in *Capps* present two views on the role of the prosecutor in grand jury proceedings. The majority apparently viewed the appearance of a prosecutor as a witness as an aid to the grand jury's understanding of the case before it.\(^{146}\) The dissent, however, favored retreating from *Ex parte McLeod* and allowing attorneys for the State to be present while the grand jury is in session.\(^{147}\) Prosecutors would be allowed to examine and cross-examine witnesses, but would not be able to appear as witnesses because of the potential conflict in interest between these two roles.\(^{148}\) Chief Justice Lewis argued that a prosecutor has a duty to prosecute vigorously and cannot be an objective witness.\(^{149}\) He reasoned that the opportunity and temptation to tailor testimony to the prosecution's needs is especially great when a experienced trial attorney takes the stand for the prosecution.\(^{150}\) Further, he considered the authoritative credibility which surrounds a prosecutor and the need for preserving the public trust in grand jury proceedings as additional reasons to prohibit, except in rare cases, the appearance of a prosecutor as a witness.\(^{151}\)

The concerns expressed by Chief Justice Lewis in his dissent in *Capps* are well-founded. The potential for a prosecutor to tailor his testimony to favor indictment clearly exists. Further, "[t]he roles of an advocate and of a witness are inconsis-

\(^{143}\) *Id.* at 62, 275 S.E.2d at 872.


\(^{146}\) This interpretation is consistent with the court's view that solicitors have a "duty to communicate with the grand jury relative to the manner in which they conduct their business and . . . the appellant cannot claim prejudice by the mere fact evidence was presented by the prosecution. 275 S.C. at 60-61, 276 S.E.2d at 872 (citing *State v. Bramlett*, 166 S.C. 323, 164 S.E. 873 (1932); *State v. McNinch*, 12 S.C. 89 (1879)).

\(^{147}\) 276 S.C. at 65, 275 S.E.2d at 874.

\(^{148}\) *Id.* at 65, 275 S.E.2d at 874-75 (citing *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975)).

\(^{149}\) *Id.* *See also* United States v. Treadway, 445 F. Supp. 959 (N.D. Tex. 1978).

\(^{150}\) 276 S.C. at 66, 275 S.E.2d at 875 (quoting United States v. Alu, 246 F.2d 29, 33 (2d Cir. 1957)).

\(^{151}\) *Id.* at 66-67, 275 S.E.2d at 875.
tendent; the function of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively. The majority apparently gave less weight to these concerns. It chose instead to adopt a rule which may expedite the grand jury process, but may ultimately produce some unjust results if prosecutors abuse the privilege extended to them in Capps.

Prosecutors and practitioners should not assume that the supreme court's decision in Capps gives the State an absolute right to present its attorneys as witnesses. The majority's caveats concerning the potential conflict of interest and use of a prosecutor as a sole witness indicate that the court will not look favorably upon overuse of this privilege. Further, Chief Justice Lewis' strong dissent suggests that the holding in Capps may be narrowly interpreted or modified when this issue is again presented to the supreme court.

Randall H. Johnson

V. COMPETENCY TO STAND TRIAL EXAMINATION AND HEARING

In State v. Blair, the South Carolina Supreme Court clarified the statutory procedure for an examination and hearing on the issue of competency to stand trial. The court held that the criminal defendant's failure to request a competency hearing did not waive his right to such a hearing when the defendant had a history of mental illness and had previously been judged incompetent to stand trial for the same offense.

The defendant was charged with fatally shooting his grandmother in October 1977. In accordance with section 44-23-410 of the South Carolina Code, the court committed the defendant

154. Id. at 532-33, 273 S.E.2d at 538.

Whenever a judge of the circuit court, county court, or family court has reason to believe that a person on trial before him, charged with the commission of a criminal offense, is not fit to stand trial because such person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of lack of mental capacity, the judge shall:

(1) Order examination of such person by two examiners designated
to the state mental facilities for examination and observation to determine his fitness to stand trial.\textsuperscript{156} He was found incompetent to stand trial in January 1978. In June 1978, however, after a probate sanity hearing, the defendant was determined to be no longer mentally ill and was returned to General Sessions Court jurisdiction. The circuit court judge ordered another competency examination in August 1979, and the report of the Department of Mental Health in November 1979 concluded that the defendant was schizophrenic but capable of standing trial.\textsuperscript{157} Although the South Carolina Code provides that competency examinations are to be followed by an examiner’s report\textsuperscript{158} and a hearing on fitness to stand trial,\textsuperscript{159} neither party requested, and the court did not order a hearing following the November 1979 examiner’s report. Because insanity was the defendant’s sole defense at his January 1980 trial,\textsuperscript{160} he was convicted. He appealed the trial court’s failure to conduct the competency hearing prior to the trial.

On appeal, the State argued that defendant had waived his right to a competency hearing by not requesting one and by failing to raise a timely objection to stop proceedings until a hear-

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\textit{by the Department of Mental Health or the Mental Retardation Department or both; such examination shall be made within fifteen days after the court’s order, or}
\end{flushright}

\begin{flushleft}(2) Order such person committed for examination and observation to an appropriate facility for a period not to exceed fifteen days. . . . The report of such examination shall be admissible as evidence in subsequent hearings pursuant to § 44-23-430. . . .
\end{flushleft}

The South Carolina statutory guidelines for determining competency to stand trial resemble the federal guidelines set forth in Dusky v. United States, 362 U.S. 402 (1960) (per curiam), which are “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.” \textit{Id.}

\textsuperscript{156} Brief for Appellant at 2.

\textsuperscript{157} \textit{Id.}


\textsuperscript{159} In pertinent part, S.C. Code Ann. § 44-23-430 (1976) provides:

Upon receiving the report of the designated examiners the court shall set a date for and notify the person and his counsel of a hearing on the issue of his fitness to stand trial. The person shall be entitled to be present at such hearing and to be represented by counsel.

\textsuperscript{160} 275 S.C. at 532, 273 S.E.2d at 537. Competency to stand trial should not be confused with a defendant’s plea of insanity during the commission of the crime. Competency is concerned with the defendant’s mental condition at the time of trial and deals with his ability to participate in the judicial proceedings and not with his responsibility for the criminal act. \textit{See} W. LaFAVE & A. SCOTT, JR., CRIMINAL LAW § 39 (1972).
ing was ordered.\textsuperscript{161} The South Carolina Supreme Court, however, upheld the defendant’s procedural due process rights by strictly construing the pertinent provisions of the South Carolina Code.\textsuperscript{162} Focusing on the language “[u]pon receiving the report . . . the court shall set a date for . . . a hearing,”\textsuperscript{163} the court held that the word “shall” must be regarded as mandatory when the duty to which “shall” relates involves the protection of an individual’s right—here the right to a fair trial.\textsuperscript{164}

In reaching its decision, the South Carolina Supreme Court relied on two decisions by the United States Supreme Court, \textit{Pate v. Robinson}\textsuperscript{165} and \textit{Drope v. Missouri}.\textsuperscript{166} In \textit{Pate}, the Court held that a defendant does not waive his right to a competency hearing by failing to request the hearing if the evidence in the case is sufficient to raise a bona fide doubt concerning the defendant’s competence to stand trial.\textsuperscript{167} \textit{Drope} clarified the evidentiary standards a court should use in deciding whether to order a competency examination and hearing for a defendant. “[E]vidence of a defendant’s irrational behavior, his demeanor at trial, and prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient.”\textsuperscript{168}

In \textit{Blair}, the defendant’s mental history and the past adjudication of his incompetence to stand trial coupled with the mandatory wording of the South Carolina statute persuaded the court to remand \textit{Blair} for a competency hearing.\textsuperscript{169} If this hearing reveals that the defendant was competent at his trial in January 1980, the conviction will stand.\textsuperscript{170} If, however, the \textit{nunc pro tunc} hearing\textsuperscript{171} reveals that defendant was incompetent at that

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{161}
\item Brief for Respondent at 1.
\item 275 S.C. at 532, 273 S.E.2d at 538.
\item 383 U.S. 375 (1966).
\item 420 U.S. 162 (1975).
\item 383 U.S. at 384-85.
\item 420 U.S. at 180.
\item 275 S.C. at 534, 273 S.E.2d at 538.
\item \textit{Id.}
\item \textit{Nunc pro tunc} signifies a thing done now which has the same legal force and effect as if done at the time when it ought to have been done. \textit{Black's Law Dictionary} 964 (5th ed. 1979).
\end{enumerate}
\end{footnotesize}
date to stand trial, an order reversing the conviction will be entered, and a new trial will be granted when he becomes competent to stand trial.172 The court based this retrospective remand procedure on State v. Hamilton173 and State v. Cannon.174 These cases were remanded by the court for nunc pro tunc hearings on the respective issues of probable cause for an arrest and the voluntariness of a defendant’s confession. In both Hamilton175 and Cannon,176 the court found that the defendant suffered no actual prejudice because of the retrospective determination.

Blair clearly establishes that once a competency examination is ordered, a hearing must follow. The court’s remand of the case to determine retrospectively the defendant’s competency at his earlier trial, however, does not appear to be consistent with the decisions of the United States Supreme Court. In Pate177 and Drope,178 the Court suggested that because “[t]he jury would not be able to observe the subject of their inquiry, and expert witnesses would be required to testify solely from information contained in the printed record,”179 retrospective determination of defendant’s competency to stand trial may not adequately protect the defendant’s due process rights.180 The court in Pate also noted that the need for concurrent determination of competency to stand trial at the time of the trial and not years later distinguishes a competency hearing from a separate re-

172. 275 S.C. at 534, 273 S.E.2d at 538.
174. 248 S.C. 506, 151 S.E.2d 752 (1966). Cannon followed Jackson v. Denno, 378 U.S. 368 (1964), which required that the voluntariness of the confession be determined by a tribunal other than the jury charged with initially deciding guilt or innocence.
175. 251 S.C. at 5, 159 S.E.2d at 609.
176. 248 S.C. at 515, 151 S.E.2d at 756.
179. 383 U.S. at 387.
180. 420 U.S. at 183. But see Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976), in which the court noted that a nunc pro tunc competency hearing does not per se preclude intelligent retrospective resolution of the competency issue if there is a sufficient quantity and quality of nonconflicting evidence and testimony available. In Bruce, the court overturned the finding of a retrospective competency hearing held nine years after the trial because the value of the transcript as evidence had to be discounted; it could not reflect tone, demeanor, inflections of speech and other indicia of mental state and the opinions of attorneys and medical experts regarding the defendant’s competency were irreconcilable. See also Silten and Tullis, Mental Competency in Criminal Proceedings, 28 Hastings L.J. 1052 (1977).
mand hearing on the voluntariness of a confession. In Dusky v. United States, the Court indicated that the proper procedure for competency determinations is to remand the case for a new hearing to ascertain a defendant’s present competency to stand trial; if the defendant is found presently competent, a new trial will be granted.

Thus, although the court in Blair recognized that due process rights attach to competency to stand trial examinations and hearings, the court may have incorrectly defined the scope of these rights. The United States Supreme Court has suggested that nunc pro tunc procedures for determining competency such as those employed in Blair offer inadequate protection of a defendant’s rights. Blair, therefore, leaves open the substantial question of whether the court has sufficiently protected the defendant’s constitutional right to a trial in which he is capable of understanding the proceedings against him and of assisting in his own defense.

Susan O. McNamee

VI. MODIFYING THE COMMON LAW DEFINITION OF BURGLARY

South Carolina has long accepted and applied the common law definition of burglary: breaking and entering the dwelling house of another in the nighttime with the intent to commit a felony therein. In State v. Brooks, the South Carolina Supreme Court held that, given the existence of the other essential elements, the intent to commit any crime, whether felony or misdemeanor, is sufficient to establish burglary. In so doing, the

181. 383 U.S. at 387 (citing Jackson v. Denno, 378 U.S. 368 (1964)).
183. Id. at 403.
184. As the Supreme Court stated in Drope:
[g]iven the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances, [citation omitted] we cannot conclude that such a procedure would be adequate here [citation omitted]. The State is free to retry petitioner, assuming, of course, that at the time of such trial he is competent to be tried.
court joined a substantial number of other jurisdictions that have similarly altered this element.\textsuperscript{187} However, in contrast to the lighter sentences imposed by other jurisdictions,\textsuperscript{188} South Carolina’s burglary statute still mandates life imprisonment absent a jury recommendation for mercy.\textsuperscript{189}

In \textit{Brooks}, the defendant was convicted of burglary, criminal sexual conduct, and larceny. He appealed the burglary conviction on two grounds: first, that there was no evidence of a


\textsuperscript{189} S.C. Code Ann. § 16-11-310 (1976) provides:

Any person who shall commit the crime of burglary at common law shall, upon conviction, be imprisoned in the State Penitentiary at hard labor, during the whole lifetime of the prisoner; provided, however, that when a prisoner is found guilty the jury may find a special verdict, recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary at hard labor for a term of not less than five years.

Although no other jurisdiction imposes a mandatory life sentence for burglary, a life sentence is optional in a few jurisdictions. E.g., Ala. Code § 13A-5-6 (1977)(10 to 99 years or life); Mass. Gen. Laws Ann. ch. 266, § 14 (West 1970)(life or not less than 10 years); R.I. Gen. Laws § 11-8-1 (1969)(life or not less than 5 years); Tex. Penal Code Ann. tit. 3, § 12.32 (Vernon Supp. 1982)(life or not more than 99 years or less than 5 years).

Most jurisdictions that provide a possible life sentence for burglary require aggravating circumstances before that sentence can be imposed. E.g., Mass. Gen. Laws Ann. ch. 266, § 14 (West 1970)(requires that: (1) the burglar be armed with a dangerous weapon or that he assault another, (2) he intend to commit a felony, and (3) the dwelling be occupied at the time of the burglary); Vt. Stat. Ann. tit. 13, § 1203 (1974)(the building must be occupied at the time as a sleeping apartment and the burglar must "intend" to commit murder, rape, robbery, larceny, or other felony"); Va. Code § 18.2-89 (1950)(the burglar must be armed with a deadly weapon and intend to commit a felony or larceny).

Of all the jurisdictions which allow life sentences for burglary, Texas has the broadest definition of burglary. Tex. Penal Code Ann. tit. 7, § 30.02 (Vernon 1974). The statute does not require that there be a breaking or that the burglary be committed at night. The premises burglarized must be a habitation or a building, but the term habitation encompasses vehicles adapted for overnight accommodation as well as garages and other outbuildings. Id. § 30.01. If the premises is not a habitation, a burglar may still be sentenced to life if he is armed with explosives or a deadly weapon, or if he injures or attempts to injure another. Id. § 30.02.
breaking, and second, that the indictment was insufficient on its face because it did not specify the felony he allegedly intended to commit. The court first found that a reversal was required because the State failed to present any proof of a breaking. The supreme court then considered the second ground of appeal and modified the common law by replacing the element of felonious intent with criminal intent.

The court based its holding in Brooks on its view of burglary as a crime against the security of the home, rather than simply a crime against a person's property. The supreme court reasoned that one who breaks into a house at night intending to commit petit larceny, a misdemeanor, threatens its occupants' security as seriously as one intending to commit grand larceny, a felony. The court found that the dollar value of the goods intended to be stolen was irrelevant.

The supreme court's decision in Brooks to eliminate the common law requirement of intent to commit a felony in burglary actions probably was unnecessary. The same result could have been reached under present law without altering the definition of burglary. In South Carolina, "privily entering and stealing from any house, in the nighttime or daytime" is grand lar-

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190. The court never addressed the question of whether the indictment was insufficient because it did not specify the felony the defendant intended to commit. This leaves open the question of whether an indictment must now name the specific crime a defendant intended to commit. In a well-reasoned dissent, Chief Justice Lewis indicated that a burglary indictment that does not specify the intended felony is not sufficient and must be quashed. See ___ S.C. at ___, 283 S.E.2d at 832.

191. Id. at ___, 283 S.E.2d at 831. The court noted that there is no evidence stating that the windows or doors were closed or how the appellant gained entry into the dwelling house. While it is ludicrous to assume appellant was invited to enter the residence and commit this crime upon an unsuspecting victim, the law of this State requires some proof of a "breaking."

192. Id. The court rather tardily followed this declaration with the statement that "[n]o further exceptions need be considered since the conviction has been reversed for lack of evidence." Id.


ceny,¹⁹⁷ regardless of the value of the good stolen. Consequently, one who privily steals from a house commits a felony and the intent to do so provides the requisite intent for common burglary.¹⁹⁸

Previously, the court has ignored the difference in grand and petit larceny in a case involving a burglary. In State v. Lambert,¹⁹⁹ the defendant stole an "item"²⁰⁰ and was convicted of burglary. On appeal, the court found sufficient evidence of felonious intent, although the only intent recognized was to "enter and steal,"²⁰¹ with no reference to the value of the item stolen. The court ignored the distinction between a felony and a misdemeanor in Lambert, and, thus, need not have considered the distinction in Brooks.

Although eliminating the element of felonious intent in Brooks was unnecessary, the court's action is consistent with its view of burglary as a breach of the home's security. The safety of one whose home has been broken into is threatened equally regardless of whether the intruder intends to steal a valuable item, an inexpensive item, or nothing at all. Nevertheless, there are compelling reasons why any changes in the definition of burglary should have been made by the legislature, rather than the court.

First, the supreme court's decision in Brooks redefined the crime of burglary with no apparent reference to the penalty previously imposed by the legislature. The legislature apparently considered a burglar's felonious intent as justifying the harsh penalty of life imprisonment.²⁰² Comparing the burglary statute with the breaking and entering statute reinforces this assumption.²⁰³ The breaking and entering statute eliminates some of the elements of the common law crime and provides penalties of on-

¹⁹⁸ Although the definitions of burglary and privily stealing are quite similar, the penalty for the latter is only three months to ten years. State v. Huffstetler, 213 S.C. 319, 49 S.E.2d 555 (1949); S.C. Code Ann. § 17-25-20 (1976).
²⁰⁰ Id. at 579, 225 S.E.2d at 342. The "item" was a piece of ladies' underwear. Record at 8.
²⁰² "[I]t is to be presumed that no change in the common law was intended by any statute unless the language employed clearly indicates such intention." Coakley v. Tidewater Constr. Corp., 194 S.C. 284, 287, 9 S.E.2d 724, 726 (1940).
ly five or ten years imprisonment. The reduced penalties suggest that the legislature would have reduced the penalty for burglary had it chosen to statutorily eliminate or modify the requirement of felonious intent.

A second reason for leaving the alteration of the definition of burglary to the legislature is that a legislative rather than judicial redefinition might have avoided some unjust results that are now possible. Presently no requirement exists that a trial judge instruct the jury that it "may find a special verdict recommending [the convicted defendant] to the mercy of the court." Thus, absent a recommendation of mercy, anything less than a life sentence is illegal, even when the burglar had no intent to commit a serious crime within the dwelling. Furthermore, a defendant who pleads guilty to burglary may be sentenced to life imprisonment, even though he lacked an intent to commit a felony within the dwelling. The judge is not required to equate a guilty plea with a recommendation of mercy and if he does not, of course, a life sentence is mandatory.

Finally, a legislative rather than judicial alteration of the common law is more appropriate in view of the court’s recent conclusion that the common law can be changed only by “clear

204. Subsection (1) eliminates the requirement that the breaking and entering of the dwelling house be in the nighttime and reduces the requisite intent to that “to commit a felony or crime of a lesser grade.” The punishment for this form of breaking and entering cannot exceed ten years imprisonment. S.C. CODE ANN. § 16-11-320(1) (Supp. 1980).

Subsection (2) eliminates the requirement of any criminal intent upon entering any house, other than a dwelling, in the daytime. This subsection also makes it a felony to break and enter any house, other than a dwelling, in the nighttime with “intent to commit a felony or crime of a lesser grade.” The punishment for this form of breaking and entering cannot exceed five years. S.C. CODE ANN. § 16-11-320(2)(Supp. 1980).


206. McGee, 268 S.C. 618, 235 S.E.2d 715. Where a jury has recommended mercy, a sentence of 30 years has been held to be too severe. State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948).


208. Id. at 242-43, 262 S.E.2d at 735. Defendant Criminger had argued that although S.C. Code Ann. § 17-25-130 (1976), requiring that a guilty plea be received as if there had been a recommendation of mercy, had been declared unconstitutional in death penalty cases, it remained applicable to cases that could result in life imprisonment. The court disagreed, ruling that the state statute was unconstitutional in all cases.

and unambiguous legislative enactment." Although this statement by the court has been criticized, it remains as an indication of the court's previously held position on the issue.

The South Carolina Supreme Court's decision in Brooks to modify the common law definition of burglary is not, standing alone, a particularly startling decision. Yet, when this new definition is coupled with the statutory punishment for burglary, the result may be extremely harsh. The General Assembly must review this possibility and eliminate the mandatory life sentence or restructure the burglary statute entirely, providing for graduated degrees of the crime with commensurate penalties.

Laura Callaway Hart

VII. FOURTH AMENDMENT RIGHTS

A. Prison Escapees

In State v. Hiott, the South Carolina Supreme Court applied the legitimate expectation of privacy doctrine to determine whether two prison escapees could challenge the propriety of a search and seizure. The court held that the escapees had surrendered any legitimate expectation of privacy and thus could not assert a violation of their fourth amendment rights. Application of the legitimate expectation of privacy standard is consistent with the approach currently taken by the United States Supreme Court in search and seizure cases. The South Carolina Supreme Court's decision in Hiott, however, leaves unanswered the extent to which prisoners retain any fourth amendment rights and whether the forfeiture of a legitimate expectation of

210. State v. Carson, 274 S.C. 316, 319, 262 S.E.2d 918, 920 (1980). Only one of the three legal authorities cited in Brooks as giving the court power to modify the common law actually stands for this proposition—15A Am. Jur. 2d, Common Law, § 16 (1976). The second authority cited, State v. Clamp, 225 S.C. 89, 80 S.E.2d 918 (1954) neither modified nor held that the court had the power to modify the common law. The final cited authority, State v. Sampson, 12 S.C. 567 (1879), merely discussed a statute which had enlarged the meaning of "dwelling house" as the definition was used in burglary cases.


213. Id. at 77, 276 S.E.2d at 165.

214. See infra note 220.
privacy applies to all prisoners, or only escapees.

Prisoners Hiott and Ruff escaped from Wateree Correctional Institution and attempted to rob John Wates Pharmacy in Columbia. During the robbery attempt, a pharmacist was shot and killed. Four days later, police were called to the residence of Ruff's girlfriend where they saw Ruff leaving the home. The police entered the house to search for Hiott\(^{215}\) and observed drugs lying in open view on a table. An officer was then sent to obtain a search warrant and a revolver was discovered during the subsequent search. At trial, both the revolver and drugs were introduced as evidence against Hiott and Ruff\(^{216}\) who were both eventually convicted of murder, attempted robbery, and conspiracy. On appeal, the South Carolina Supreme Court affirmed the convictions.

Appellants argued on appeal that the entry and subsequent search of the residence violated their fourth amendment rights.\(^{217}\) The supreme court refused to analyze the substance of this argument, holding that Hiott and Ruff did not have a legitimate expectation of privacy subject to protection under the fourth amendment.\(^{218}\) The court also found that the escapees could not legitimately be on any premises other than a prison and thus were not entitled to challenge the search and seizure at the home of Ruff's girlfriend.\(^{219}\) The court noted in conclusion

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215. Unknown to the police, Hiott had accompanied Ruff. Both men were later arrested at a convenience store. 276 S.C. at 75, 276 S.E.2d at 265.


217. 276 S.C. at 76, 276 S.E.2d at 165. Appellants also alleged the trial judge erred in admitting the drugs and gun, permitting the jury to pass upon the charge of attempted armed robbery, upholding a lineup procedure, and allowing an in-court identification. Id. The court found all exceptions to be without merit. Id. at 86, 276 S.E.2d at 170.

218. Id. at 77, 276 S.E.2d at 165.

219. Id. at 77, 276 S.E.2d at 165-66. The legitimately on the premises doctrine was first announced and applied in Jones v. United States, 362 U.S. 257 (1960). This doctrine denies an accused who was wrongfully on a premises the right to challenge evidence discovered during a search of the premises. The doctrine apparently was discarded in Rakas v. Illinois, 439 U.S. 128, 137 (1978), in favor of an approach examining whether the accused had a legitimate expectation of privacy in the area searched. The Supreme Court, however, recently may have revived the legitimately on the premises doctrine to a limited extent in Rawlings v. Kentucky, 448 U.S. 98 (1980). In a concurring opinion in Rawlings, Justice Blackmun concluded that "property interests" may still be "weighty factors in establishing Fourth Amendment Rights," and that "the right to exclude" often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest." Id. at 112 (Blackmun, J., concurring). Thus, Rawlings suggests
that "[o]nce the defendants had escaped from prison, they abandoned their only legitimate premises and surrendered any future legitimate expectation of privacy."220

The legitimate expectation of privacy standard is the approach currently taken by the United States Supreme Court to determine if an accused has the right to challenge the constitutionality of a search and seizure.221 The standard is subjective, requiring courts to determine, based on the particular facts before it, whether the accused had a legitimate expectation of privacy in the area searched. While the South Carolina Supreme Court correctly applied this standard in Hiott, it also sought to revive the legitimately on the premises standard. The United States Supreme Court, however, appears to have rejected this approach because of its difficulty in application.222

The court’s decision in Hiott does not provide a clear indication of whether the forfeiture of a legitimate expectation of privacy applies to only escapees, or to all prisoners. There is language early in the court’s opinion which suggests that only escapees forfeit this right.223 Further, the court later speaks of escapees surrendering their legitimate expectations of privacy, thus implying that they had such rights while prisoners.224 However, the court also quotes a Mississippi Supreme Court decision, Robinson v. State,225 in support of its decision in Hiott. The quoted passage states that "Appellant’s Fourth Amendment

that whether the accused was legitimately on the premises will be considered in determining the existence of a legitimate expectation of privacy.

220. 276 S.C. at 77, 276 S.E.2d at 165-66.

221. See, e.g., Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Chadwick, 433 U.S. 1 (1978); United States v. White, 401 U.S. 745 (1971). The Supreme Court first expressed the legitimate expectation of privacy doctrine in Katz v. United States, 389 U.S. 347 (1967). An accused may challenge a search or seizure only if he had a legitimate expectation of privacy in the premises searched. The Katz court defined legitimate expectation of privacy in terms of whether the accused exhibited an actual expectation of privacy and whether this expectation was one which society recognizes as reasonable. 389 U.S. at 361 (Harlan, J., concurring).

222. See supra note 219.

223. The court stated that "we hold at the outset that the defendants-escapees were not protected by the Fourth Amendment in this case." 276 S.C. at 76, 276 S.E.2d at 165. A very narrow reading of this holding could limit it to the particular escapees in Hiott.

224. The supreme court noted that "[o]nce defendants had escaped unlawfully from prison, they . . . surrendered any future legitimate expectation of privacy." 276 S.C. at 77, 276 S.E.2d at 165-66 (footnote omitted).

225. 312 So. 2d 15 (Miss. 1975).
rights were no greater while he was an escapee than they were while he was a prisoner . . . [;][h]e had lost his constitutional protection against the invasion of his privacy." 226 This quotation appears to deny all prisoners any legitimate expectation of privacy. 227 Thus, the Hiott decision does not provide a clear rule as to those defendants who will be able to assert a violation of this right, and those who will not.

The Hiott court also declined the opportunity to state the extent to which prisoners or escapees forfeit their fourth amendment rights. This cautious approach is understandable, since there is little precedent to guide courts in this area. The United States Supreme Court has not held specifically that a prisoner retains his fourth amendment rights, but has recognized other constitutional protections for prisoners. 228 The Supreme Court has implied, however, that prisoners do retain at least diminished fourth amendment rights. 229 Lower federal courts have gone further, expressly recognizing the existence of these rights and their necessity in protecting the prisoner against abusive or intrusive conduct. 230

Although the court in Hiott did not define the scope of fourth amendment protection for prisoners, it did provide some

226. 276 S.C. at 78, 276 S.E.2d at 176 (quoting Robinson v. State, 312 So. 2d 15, 18 (Miss. 1975)).
227. But see infra notes 232-60 and accompanying text.
229. In Bell v. Wolfish, 441 U.S. 520 (1979), the court assumed that prisoners retain some fourth amendment rights to reach the question of the reasonableness of a search and seizure. Id. at 556-57. Further, in Lanza v. New York, 370 U.S. 139 (1962), the Supreme Court stated:
Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day. Though it may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection.
Id. at 143-44. Thus, while the Supreme Court has avoided a direct holding on point, there is some recognition of a diminished right to privacy of prisoners.
230. See, e.g., United States v. Lilly, 576 F.2d 1240 (5th Cir. 1978); Bonner v. Caughlin, 517 F.2d 1311 (7th Cir. 1975). In Bonner, the court held that "a prisoner enjoys the protection of the Fourth Amendment against unreasonable searches, at least to some minimal extent." 517 F.2d at 1317.
indication of how future cases may be decided. The court noted that appellants, as prisoners, "had only severely diminished rights."\footnote{231} Practitioners should be aware that the South Carolina Supreme Court's decision in \textit{Hiott} will likely deny escapee's any legitimate expectation of privacy under the fourth amendment. A broad reading of this case could also result in all prisoners being denied this right. Although the court recognized that prisoners do retain certain constitutional rights, its decision in \textit{Hiott} implies that these rights are only minimal.

\section*{B. Probationers}

In \textit{State v. Franks},\footnote{232} the South Carolina Supreme Court held that probation officers did not violate probationers' fourth amendment rights by issuing arrest warrants for the probationers pursuant to section 24-21-450 of the South Carolina Code.\footnote{233} More importantly, by allowing probationers to object to the issuance of a warrant, the court recognized a right, though diminished, of probationers to fourth amendment protection from unreasonable invasions of privacy. Since the court considers a probationer to be "still in custody because he faces significant confinement and restraint even though he is [not] within the four walls of a prison,"\footnote{234} the decision may be a significant step toward recognizing prisoners' constitutional rights.

On February 26, 1979, Stanley L. Franks was sentenced to five years imprisonment for attempted housebreaking with in-

\footnote{231} 276 S.C. at 77, 276 S.E.2d at 165.  
233. S.C. CODE ANN. § 24-21-450 (1976). In pertinent part, the statute provides: At any time during the period of probation or suspension of sentence the court, or the court within the venue of which the violation occurs, may issue or cause the issuing of a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. \textit{Any police officer or other officer with power of arrest, upon the request of the probation officer, may arrest a probationer. In case of an arrest the arresting officer shall have a written warrant from the probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation and such statement shall be warrant for the detention of such probationer in the county jail or other appropriate place of detention. . . .}  
\textit{Id.} (emphasis added). Other states have similar statutes which allow probation officers to have probationers arrested. \textit{See, e.g.}, GA. CODE ANN. § 27-2713 (1978).  
234. ___ S.C. at ___, 281 S.E.2d at 228 (citing \textit{Jones v. Cunningham}, 371 U.S. 236 (1963)).
tent to commit a crime. The sentence was suspended upon service of one year in prison and four years probation, and he was released on probation on October 1, 1979. On February 11, 1980, a probation officer issued an arrest warrant for Franks, charging him with various violations of his probation conditions including conviction for drunk and reckless driving. At the probation revocation hearing, the hearing officer denied Franks' motion to dismiss the warrant on the ground that it was not issued by a neutral and detached magistrate, as required by the fourth amendment, and entered a revocation order. On appeal, the supreme court affirmed the denial of the motion to dismiss.

Franks argued on appeal that section 24-21-450 could be interpreted one of two ways: (1) only a court could issue an arrest warrant for a probationer; or (2) either a court or a probation officer could issue an arrest warrant for a probationer. Since a warrant must be issued by a neutral and detached magistrate, and a probation officer is not a magistrate, Franks maintained that only the first interpretation was constitutional.

In reaching its decision, the South Carolina Supreme Court applied a two-step analysis. First, the court concluded that a probation revocation proceeding is not a criminal trial but rather an "informal proceeding with respect to notice and proof of the alleged violations," since no additional punishment can be invoked other than a forfeiture of the "act of grace extended and reimposition of the unserved portion of the original sentence." Thus, the rights of a probationer in a probation revocation hearing are not the same as those extended him by the Constitution upon the trial of the original offense. The court further determined that probationers are in fact prisoners, though not confined within the "four walls of a prison," and as such do "not enjoy the same unfettered constitutional privileges available to those not so confined." Based on the view of the diminished

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236. Id. at ___, 281 S.E.2d at 228.
238. ___ S.C. at ___, 281 S.E.2d at 228.
239. Id. at ___, 281 S.E.2d at 228. In Franks, the South Carolina Supreme Court extended the determination in Jones v. Cunningham, 371 U.S. 236, 242-243 (1963), that parolees are still in custody to include probationers. Although there are some minor differences between probation and parole, the United States Supreme Court in Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973), recognized that constitutionally the two are indistin-
constitutional rights of probationers as stemming from the nature of the proceeding and the status of probationers as prisoners, the court concluded that "the probationer's rights are adequately protected by the requirement that his arrest for a probation violation charge be preceded by the issuance of a warrant from the court or a probation officer as provided by section 24-21-450." The court thus affirmed the constitutionality of the interpretation of section 24-21-450 that allows either a court or a probation officer to issue an arrest warrant for a probationer.

The fourth amendment recognizes "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures. . . ." The United States Supreme Court has determined that in order to protect people from unreasonable searches and seizures, arrest warrants must be issued by neutral and detached magistrates. The Court's enforcement of the fourth amendment is not the same for prisoners as it is for other citizens, however, for what would be an unreasonable search and seizure for other citizens could be reasonable for a prisoner.

Since a probationer is considered a prisoner, the South Carolina Supreme Court looked beyond the "neutral, detached magistrate" standard set for the arrest of citizens in general and concluded that the arrest standard of section 24-21-450 is reasonable for the arrest of probationers. The requirement that the probation officer be able to state that "in his judgment, the

guishable for revocation purposes. Thus, the extension of the Jones view of parolees to include probationers is logical and constitutionally sound.

240. ___ S.C. at ___, 281 S.E.2d at 228.

241. U.S. CONST. amend. IV. These same protections are also found in Art. I, § 10 of the South Carolina Constitution.

242. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 453 (1970); Johnson v. United States, 333 U.S. 10, 13-14 (1947). In determining the validity of a warrantless search in Johnson, the Court stated:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

333 U.S. at 13-14 (emphasis added).


244. ___ S.C. at ___, 281 S.E.2d at 228. See supra note 239.
probationer has violated the conditions of probation . . ." provides adequate protection from arbitrary and unreasonable invasion of a probationer’s privacy.

*Franks* is also consistent with United States Supreme Court decisions on the due process requirements of probation revocation. In *Morrissey v. Brewer*, the United States Supreme Court set forth minimal due process requirements for parole revocation and in *Gagnon v. Scarpelli*, the Court extended the same due process requirements to probation revocation. Both cases recognized that “[t]he first stage [of revocation] occurs when the parolee [probationer] is arrested and detained, usually at the discretion of his parole [probation] officer.” While the cases required that there be a preliminary hearing to insure that there was probable cause for the arrest, the Court found that the parolee’s/probationer’s rights are not violated when the parole/probation officer issues an arrest warrant.

The importance of *State v. Franks*, however, goes beyond the holding that probation officers may issue arrest warrants. In determining that “the probationer’s rights are adequately protected,” the court recognized a prisoner’s standing to question the constitutionality of a search and seizure. Unwilling to take this step in *State v. Hiott*, the court held in that case that two escaped prisoners did not have standing to challenge the constitutionality of a search and seizure since, as escaped prisoners, they could not have any “legitimate expectation of privacy.” Although the applicability of the holding to prisoners in general was unclear, the court stated that

It follows that appellant’s Fourth Amendment rights were no greater as an escapee than they were while he was within the

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246. 408 U.S. 471 (1972).
249. _Id._ at __, 281 S.E.2d at 228. The current requirement for standing is that the complainant have a legitimate expectation of privacy in the area searched or the property seized. To determine if the claimant has a legitimate expectation of privacy, the Court adopted a two-fold test: (1) the claimant must have exhibited an actual expectation of privacy; and (2) the expectation must be one which society recognizes as reasonable. See, e.g., Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Chadwick, 433 U.S. 1 (1977); and United States v. White, 401 U.S. 745 (1971).
251. _Id._ at 77, 276 S.E.2d at 165.
confines of the penitentiary. He had lost his constitutional protection against the invasion of his privacy and had no standing to object to a search of his [motel] room and his effects by the officers.\footnote{282}

Yet the court in \textit{State v. Franks} cited \textit{State v. Hiott} as standing for the proposition that "[i]t is elementary that while conviction and imprisonment do not strip the violator of his rights, those privileges are severely diminished."\footnote{283} By its interpretation of \textit{State v. Hiott} and its recognition of a probationer's standing, the court in \textit{State v. Franks} implicitly recognizes prisoners' fourth amendment rights, though diminished, to protection against unreasonable invasions of privacy. This position is consistent with the earlier opinion of \textit{State v. Ellefson},\footnote{284} in which the South Carolina Supreme Court stated that "[e]ven a convicted prisoner does not shed basic constitutional rights at the prison gate. Rather, he 'retsains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.'"\footnote{285}

The positions of the United States Supreme Court and the South Carolina Supreme Court on the fourth amendment rights are similar. While the United States Supreme Court has recognized other constitutional protection for prisoners,\footnote{286} and has carefully avoided rejecting the applicability of the fourth amendment to a prisoner's interest in privacy,\footnote{287} the Court has not specifically held that a prisoner retains his fourth amend-

\begin{itemize}
  \item \footnote{252. Id. at 78, 276 S.E.2d at 166 (citing Robinson v. State, 312 So. 2d 15 (Miss. 1976)).}
  \item \footnote{253. \textit{S.C.} at \textit{281} S.E.2d at 228.}
  \item \footnote{254. 266 S.C. 494, 224 S.E.2d 676 (1976).}
  \item \footnote{255. \textit{Id.} at 500, 224 S.E.2d at 669 (citing Procurier v. Martinez, 416 U.S. 396 (1974); Coffin v. Reichard, 143 F.2d 445 (6th Cir. 1944)).}
  \item \footnote{257. \textit{See}, e.g., Bell v. Wolfish, 441 U.S. 520, 556-57 (1979); Stroud v. United States, 251 U.S. 15, 21-22 (1919). The court in \textit{Bell v. Wolfish} postulated that a person confined in a detention facility may have no reasonable expectation of privacy in his room or cell and is therefore unprotected by the fourth amendment. For the purpose of the decision, however, the Court assumed that detainees did enjoy such a right. 441 U.S. at 556-57. Although the Court's remarks were addressed to the fourth amendment claims of pre-trial detainees, the failure to recognize a fourth amendment right for detainees is, in effect, a failure to recognize the right for all prisoners, since pre-trial detainees enjoy rights at least equal to those of convicted prisoners. 441 U.S. at 545.}
\end{itemize}
ment rights. Nevertheless, several lower federal courts have taken the final step and expressly recognized a diminished fourth amendment right of prisoners.258

The merit of recognizing diminished fourth amendment rights of prisoners can be found by examining the potential damage of denying fourth amendment protection to prisoners, as pointed out in United States v. Lilly:259

Denial of any fourth amendment protection to a prisoner potentially would subject him to any form of search and seizure, no matter how abusive or intrusive, conducted at the hands of any prison employee who is so inclined, provided only that the search and seizures do not rise to the level of cruel and unusual punishment. . . . Therefore, as the fourth amendment mandates, searches and seizures conducted on prisoners must be reasonable under all the facts and circumstances in which they are performed.260

While law enforcement officials, such as prison guards and probation officers, should have the maximum possible freedom in controlling prisoners and protecting society, this freedom should never be allowed to go beyond the bounds of reasonableness.

The decision in State v. Franks, interpreting section 24-21-450 as constitutionally allowing probation officers to issue arrest warrants for probationers, is therefore consistent with the United States Supreme Court decisions on the rights of probationers and prisoners. While Franks clarified the position of the court regarding prisoners' rights in general, this position may still be subject to varied interpretations in regard to the fourth amendment claims of prisoners and probationers. The court should thus take the final step and expressly recognize the rights of prisoners to diminished fourth amendment protections.

Robert W. Hayes, Jr.

258. See, e.g., United States v. Lilly, 576 F.2d 1240, 1244 (5th Cir. 1978); Bonner v. Caughlin, 517 F.2d 1311, 1317 (7th Cir. 1975).
259. 576 F.2d 1240 (5th Cir. 1978).
260. Id. at 1244 (citations omitted).
VIII. CAPITAL PUNISHMENT

A. Fifth Amendment Privilege in Bifurcated Capital Trials

In *State v. Adams*, the South Carolina Supreme Court defined the scope of the fifth amendment privilege against self-incrimination at the two stages of a capital trial and applied an "arbitrary factor" standard to the guilt phase of the trial. The court held that the solicitor's cross-examination of the defendant regarding his punishment at the guilt stage of the bifurcated trial violated the defendant's fifth amendment privilege against self-incrimination and constituted an arbitrary factor requiring reversal.

The defendant was charged with murder, kidnapping, housebreaking and armed robbery. He subsequently signed a confession in the presence of police officers and his attorney. During the guilt phase of the trial, the solicitor repeatedly asked the defendant on cross-examination whether he thought that anyone who committed the cruel, brutal acts contained in his confession should die. Defendant's counsel made no timely objection to these questions about punishment. At the conclusion of the sentencing phase of the trial, the defendant was sentenced to death upon the jury's recommendation. The South Carolina Supreme Court, on appeal, ruled that the solicitor's cross-exami-

262. The South Carolina Death Penalty Act, S.C. CODE ANN. §§ 16-3-20 to -28 (Supp. 1980) provides for a bifurcated trial in capital cases. Upon conviction for murder in the first stage of the proceeding, a separate sentencing proceeding is held to determine whether the defendant shall be sentenced to death or life imprisonment. S.C. CODE ANN. § 16-3-20(B)(Supp. 1980).
263. Record at 950, 951.
264. ___ S.C. at __, 283 S.E.2d at 585. The fifth amendment to the United States Constitution provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." In *Malloy v. Hogan*, 378 U.S. 1 (1964), the Supreme Court ruled that the fifth amendment privilege against self-incrimination is applicable to the states through the due process clause of the fourteenth amendment.
265. S.C. CODE ANN. § 16-3-25 (Supp. 1980), provides in part: "(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal. (C) With regard to the sentence, the court shall determine: (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor . . . ."
266. Record at ii.
267. *Id.* at 724-25.
268. ___ S.C. at __, 283 S.E.2d at 584.
nation questions during the guilt phase of the trial violated the defendant’s fifth amendment privilege against coerced self-incrimination and constituted an arbitrary factor, resulting in prejudicial error. The court reversed the convictions, vacated the death sentence and remanded the case for a new trial.269

In Adams, the court explained that each phase of the bifurcated proceeding required by statutory law must address a separate issue.270 The issue in the first phase of a capital trial is whether the defendant is innocent or guilty of murder. The issue in the second phase is whether the defendant should live or die.271 The court reasoned that a defendant who waives his privilege against self-incrimination by taking the witness stand in the guilt or innocence phase of the trial may only be impeached regarding issues related to his guilt or innocence. The court further indicated that in a bifurcated proceeding, the defendant may elect to exercise his privilege against self-incrimination by refusing to testify at the sentencing proceeding even after testifying at the guilt stage.272 The court concluded that the solicitor’s persistent questioning about punishment during the guilt phase violated the defendant’s privilege against coerced self-incrimination.

It is well settled that the death penalty may not be imposed under procedures that create a substantial risk that the punishment will be inflicted in an arbitrary or capricious manner.273 In upholding the constitutionality of the Georgia death penalty statute in Gregg v. Georgia,274 the United States Supreme Court noted that the statutory requirement of automatic appeal of death sentences to the state’s supreme court provides an important safeguard against the arbitrary imposition of the death penalty.275 Because of the finality of the death penalty, state supreme courts review the trial record and transcript whenever the death sentence is imposed.

The South Carolina Supreme Court’s previous applications

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269. Id. at ___, 283 S.E.2d at 588.
270. Id. at ___, 283 S.E.2d at 584; S.C. Code Ann. § 16-3-20 (Supp. 1980).
271. ___ S.C. at ___, 283 S.E.2d at 584.
272. Id. at ___, 283 S.E.2d at 585.
275. Id. at 198.
of the "arbitrary factor" language in section 16-3-25(C)(1) of the South Carolina Code\textsuperscript{276} have concerned errors in the sentencing phase of a bifurcated trial.\textsuperscript{277} These applications have been consistent with a careful reading of section 16-3-25(B) and (C)(1).\textsuperscript{278} The arbitrary factor language applies only to the sentencing phase. In \textit{Adams}, the court applied the arbitrary factor standard to the guilt phase as well. This interpretation, although not consistent with a strict reading of the statute, seems appropriate considering the language in section 16-3-25(B) providing for review of "any errors."\textsuperscript{279} The same violations that would offend an arbitrary factor standard at the sentencing stage might well be considered prejudicial error at the guilt phase.

The South Carolina Supreme Court has made a sound decision in \textit{Adams} by strengthening the procedural protection intended in bifurcated capital trials. The addition of a further protection to defendants by expanding the application of the arbitrary factor standard is warranted by the finality of the death penalty. As a result of the \textit{Adams} decision, prosecuting attorneys must confine cross-examination of defendants to issues related to the accused's guilt or innocence in the first phase of a bifurcated trial.

\textit{Wendy B. Harvey}

\textbf{B. Doctrine of Implied Acquittal and Capital Sentencing}

In \textit{State v. Gilbert (Gilbert II)},\textsuperscript{280} the South Carolina Supreme Court considered the application of the double jeopardy prohibition\textsuperscript{281} to the sentencing stage of capital cases. The court

\textsuperscript{276} S.C. Code Ann. § 16-3-25(C)(1)(Supp. 1980); see supra note 265.

\textsuperscript{278} See supra note 265.
\textsuperscript{279} Id.
\textsuperscript{280} ___ S.C. ___, 283 S.E.2d 179 (1981).
\textsuperscript{281} The fifth amendment of the Constitution states in part that no person shall "be subject for the same offense to be twice put in jeopardy. . . ." The traditional rationale for the prohibition has been that the State should not be allowed to use its resources and
held that the doctrine of implied acquittal\textsuperscript{282} did not apply to lesser included aggravating circumstances.\textsuperscript{283} Few courts have considered this issue.

The defendants were convicted of murder by the jury in the guilt phase of their first trial (\textit{Gilbert I}).\textsuperscript{284} The State's evidence tended to establish the following course of events.\textsuperscript{285} The defendants shot and stabbed a service station attendant, who subsequently died from the wounds. They then attempted to steal the contents of the cash register but were unsuccessful in opening it. During their flight, a wallet belonging to the victim's wife was taken from the back storage room. After the conviction, a sen-

\textsuperscript{282} The doctrine of implied acquittal was announced in \textit{Green v. United States}, 355 U.S. 184, 187-88 (1957). Recent cases, however, have indicated a shift to a different rationale, i.e. whether or not the ending of the trial was based on an adjudication of innocence. \textit{United States v. Scott}, 437 U.S. 82 (1978); \textit{Burks v. United States}, 437 U.S. 1 (1978). The prohibition was held to be applicable to the states via the fourteenth amendment in \textit{Benton v. Maryland}, 395 U.S. 784, 794 (1969). The prohibition is also applicable to the sentencing stage of bifurcated capital cases. \textit{Bullington v. Missouri}, 101 S. Ct. 1852 (1981).

\textsuperscript{283} The court also upheld the validity of submitting lesser included aggravating circumstances. The defendants challenged this practice as being an arbitrary factor influencing the jury's recommendation of death. Amicus Brief at 6. The court reasoned that this practice was not reversible error because the other aggravating circumstance was sufficient standing alone to justify imposing the death penalty. The court apparently concluded that the second jury would have recommended death with instruction on armed robbery only. \textit{Gilbert II}, __ S.C. at __, 283 S.E.2d at 182. The court cited \textit{Gerberding v. Swenson}, 435 F.2d 368 (8th Cir. 1970), in support of this reasoning. The South Carolina Supreme Court's reliance on \textit{Gerberding} may be misplaced. That case involved mandatory sentencing, whereas \textit{Gilbert II} involved discretionary sentencing. \textit{Gerberding} concerned an enhanced sentencing procedure wherein three prior convictions were submitted, one invalidly so. This was not constitutional error, however, because the other two were validly submitted and established. Once one prior conviction was established the maximum sentence for the present crime was \textit{required}. No such requirement exists in the South Carolina statute. In fact, the jury is always free to give life imprisonment rather than death regardless of how heinous the murder may have been.


\textsuperscript{284} 273 S.C. 690, 258 S.E.2d 890 (1979).

\textsuperscript{285} Record at 1353, 1358-60 (\textit{Gilbert II}, vol. 6).
tencing trial was held before the same jury. Two aggravating circumstances were submitted to the jury: (1) larceny with the use of a deadly weapon and (2) armed robbery.\textsuperscript{286} The jury found armed robbery beyond a reasonable doubt and sentenced the defendants to death.\textsuperscript{287} The jury made no specific finding as to larceny with the use of a deadly weapon.\textsuperscript{288}

The case was automatically appealed to the South Carolina Supreme Court.\textsuperscript{289} The court affirmed the conviction, but vacated the death penalty on its own motion because of improper closing arguments by the solicitor.\textsuperscript{290} The court remanded the case for a new sentencing trial.

The second sentencing jury was also given a charge of armed robbery and larceny with the use of a deadly weapon as aggravating circumstances.\textsuperscript{291} Defense counsel did not object to this charge.\textsuperscript{292} The second jury found both aggravating circumstances to exist beyond a reasonable doubt and sentenced the defendants to death.\textsuperscript{293} The case was again automatically appealed to the South Carolina Supreme Court. On appeal, the defendants challenged the validity of the death penalty on grounds of the double jeopardy doctrine of implied acquittal. The court denied this challenge and affirmed the death sentences.\textsuperscript{294} The court concluded that the larceny with the use of a deadly weapon charge was a lesser included offense of the armed robbery charge under the particular facts of this case. Thus, the first jury's finding of armed robbery necessarily involved a finding of larceny with the use of a deadly weapon, and there was no implied acquittal in \textit{Gilbert} I. Therefore, the resubmission of the larceny charge in \textit{Gilbert} II did not violate the double jeopardy prohibition.\textsuperscript{295}

The United States Supreme Court has not yet addressed the implied acquittal issue raised in \textit{Gilbert} II. At least two

\begin{itemize}
\item \textsuperscript{286} \textit{Gilbert} II, \textit{---} S.C. at \textit{---}, 283 S.E.2d at 182.
\item \textsuperscript{287} Id.
\item \textsuperscript{288} Id.
\item \textsuperscript{289} \textit{Gilbert} I, 273 S.C. at 692, 258 S.E.2d at 891.
\item \textsuperscript{290} Id. at 697-98, 258 S.E.2d at 894.
\item \textsuperscript{291} \textit{Gilbert} II, \textit{---} S.C. at \textit{---}, 283 S.E.2d at 182.
\item \textsuperscript{292} Additional Brief for Respondent at 4 (State's Brief, \textit{Gilbert} II).
\item \textsuperscript{293} \textit{Gilbert} II, \textit{---} S.C. at \textit{---}, 283 S.E.2d at 182.
\item \textsuperscript{294} Id. at \textit{---}, 283 S.E.2d at 181.
\item \textsuperscript{295} Id. at \textit{---}, 283 S.E.2d at 182.
\end{itemize}
states, North Carolina and Georgia, have done so under death penalty statutes similar to the South Carolina statute. The Georgia Supreme Court decided that double jeopardy did not bar resubmission, whereas the North Carolina Supreme Court reached a contrary decision.

The Georgia Supreme Court relied on two rationales in reaching its decision. First, the court drew a distinction between conviction and punishment, concluding that double jeopardy bars only a second attempt at conviction, not punishment. In addition, the court drew a distinction between offenses and aggravating circumstances, concluding that double jeopardy applies only to offenses and that aggravating circumstances are not offenses. The North Carolina Supreme Court concluded that the first jury's failure to find an aggravating circumstance amounted to an acquittal and its resubmission was thereby precluded by the double jeopardy prohibition.

The South Carolina Supreme Court did not consider the Georgia rationales and rejected the North Carolina rationale of implied acquittal. However, the South Carolina Supreme Court's rejection may have been a limited one. The court's lesser included offense rationale began with the limiting phrase of "[u]nder the particular facts of this case." Thus, the court might still find an implied acquittal in a case with aggravating circumstances which do not involve a fact situation of lesser included offenses. Therefore, defense counsel should not abandon the implied acquittal argument.

Defense counsel should also object to the resubmission of previously submitted but unfound aggravating circumstances. Defense counsel in Gilbert II did not object. The court did not discuss this failure to object, but the state did bring it to the court's attention in its brief. In any event, this possible waiver

300. Id.
301. State v. Silhan, 302 N.C. at ___, 275 S.E.2d at 482.
303. See supra note 292.
304. Id.
issue should always be prevented by objection.

Finally, either the court or the legislature should consider the promulgation of a rule amending the South Carolina capital punishment statutory complex. The proposed amendment would require the sentencing jury to affirmatively find for or against the defendant as to each aggravating circumstance submitted. Such a rule would prevent the double jeopardy issue of implied acquittal from arising in the sentencing phase of capital cases.

Robert L. Widener

C. Limitation on Scope of Examination; Multiple Aggravating Circumstances; Arbitrary Factors Influencing a Death Sentence

In *State v. Woomer*,305 the South Carolina Supreme Court addressed three procedural issues in the area of criminal law. The court held first that the defendant had a right to rely on a limitation on the scope of examination while testifying, even though the limitation was erroneously granted. Second, the court held that submitting multiple aggravating circumstances to the sentencing jury was permissible under the South Carolina death penalty statute, even though two of the aggravating circumstances were lesser included offenses of the third.306 Finally, the solicitor's expression of personal opinion in his closing argument was held to be a violation of the state statute requiring that a death sentence be free from the influence of any arbitrary factor.307 This case is one of several recent decisions in which the court has interpreted and applied the South Carolina death penalty statute308 and represents part of the court's continuing effort to clarify procedural standards for death penalty cases.

In *Woomer*, the defendant was charged with robbery and murder. Woomer’s trial was separated into guilt and sentencing

306. *Id.* at ___, 284 S.E.2d at 358-59.
307. *Id.* at ___, 284 S.E.2d at 358-59.
phases pursuant to the South Carolina death penalty statute. During the guilt phase of the trial, Woomer agreed to testify after the trial judge limited the scope of examination to the question of the voluntariness of his confession. The judge allowed the jury to remain in the courtroom during this testimony. During cross-examination, the solicitor asked Woomer two questions regarding his guilt or innocence. The trial judge sustained objections to these questions but Woomer was subsequently found guilty.

During the sentencing phase of the trial, the solicitor, in his closing argument, told the jury that the solicitor was "the only person in the world that [could] decide whether a person is going to be tried for his life or not." The solicitor apparently made this statement in an attempt to reduce the jurors' feeling of responsibility for imposing the death penalty.

In instructing the sentencing jury, the trial judge submitted three aggravating circumstances for the jury's consideration: (1) robbery with a deadly weapon; (2) murder for the purpose of receiving money or any other thing of monetary value; and (3) larceny with a deadly weapon. The jury found that all three circumstances were present and sentenced Woomer to death.

On appeal, Woomer claimed that the solicitor's violation of the limitation on the scope of examination was fundamentally unfair. He also asserted that the trial judge erred in submitting the three aggravating circumstances to the sentencing jury

310. ___ S.C. at ___, 284 S.E.2d at 358.
311. Id. at ___, 284 S.E.2d at 359. The solicitor's comments were made during the following address to the jury:

"You know, the initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. I mean I had the same thing you all did. I had to make up my mind in regards to this and under the law, if there is any question about it, you ask the judge, I have to make the first decision as to whether or not a person is going to be tried for the electric chair. If I didn't want him tried for the electric chair, there is no way the Sheriff or anybody else can make it happen. I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy."

Id.

312. Id. at ___, 284 S.E.2d at 358.
313. Id. at ___, 284 S.E.2d at 358.
when two were lesser included circumstances of the third.\(^{314}\) Finally, Woomer claimed that the solicitor's closing argument during the sentencing phase of the trial was so prejudicial that it denied him a fair trial.\(^{315}\) In holding that the solicitor's cross-examination of Woomer was improper, the court acknowledged the general rule that a defendant waives his privilege against self-incrimination when he takes the stand in his own behalf and concluded that there is no basis for granting a limitation on the scope of examination.\(^{316}\) The court also observed that the voluntariness of Woomer's confession should have been decided out of the jury's presence.\(^{317}\) The court ruled, however, that the propriety of granting the limitation was not at issue. The trial court's assurance of a limited scope of examination induced the defendant to testify and the defendant therefore had a right to rely on the limitation. The court held that the solicitor's violation of the limitation was fundamentally unfair\(^{318}\) and the trial court's curative instruction could not remedy the unfairness.\(^{319}\)

The court could have disposed of this issue by relying on its conclusion that an in camera hearing was necessary for consideration of the voluntariness of Woomer's confession. The court, however, chose to base its holding on the proposition that a defendant has the right to rely on a limitation on the scope of examination once the limitation is granted. Apparently the court was attempting to set guidelines to protect against future abuses and costly second trials in those cases in which limitations are erroneously granted. Whatever the possible bases for the holding, the court properly was concerned with maintaining the integrity and fairness of a capital trial.

The court next considered the appellant's claim that the trial judge erred in submitting three aggravating circumstances to the sentencing jury when two of the circumstances charged

\(^{314}\) Id. at ___, 284 S.E.2d at 358.

\(^{315}\) Id. at ___, 284 S.E.2d at 359. In addition, the appellant asserted that the trial judge failed to instruct the jury that they could impose life imprisonment instead of the death penalty. The court agreed and remanded partly on this basis. Id.


\(^{317}\) ___ S.C. at ___, 284 S.E.2d at 358.

\(^{318}\) Id. at ___, 284 S.E.2d at 358 (citing Johnson v. United States, 318 U.S. 189 (1943), as cited in Doyle v. Ohio, 426 U.S. 610 (1976)).

\(^{319}\) ___ S.C. at ___, 284 S.E.2d at 358.
were lesser included offenses of the third. The court ruled that since all three circumstances were listed in the death penalty statute\textsuperscript{320} as aggravating circumstances and the statutory language allowed submission of “any” enumerated circumstances supported by the evidence, submission of all three circumstances was proper.\textsuperscript{321}

The issue before the court was the legislature’s intent in enumerating several closely related aggravating circumstances, all of which could apply to the same incident of behavior. The court, however, did not address the legislative intent beyond a cursory examination of the wording of the statute and failed to find it significant that each of the aggravating circumstances submitted in \textit{Woomer} could apply to conduct that would not include the other two.\textsuperscript{322} This possibility lends support to the argument that the legislature intended to list distinct aggravating circumstances for submission to the jury rather than allow submission of multiple aggravating circumstances arising from one incident.\textsuperscript{323}

South Carolina law requires any sentence of death to be free from the influence of any arbitrary factor.\textsuperscript{324} Arguably, submit-

\textsuperscript{320} S.C. CODE ANN. § 16-3-20(c) (Supp. 1980) provides in pertinent part: “(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence. . . .

\textsuperscript{321} ___ S.C. at ___, 284 S.E.2d at 358. The court cited State v. Gilbert, ___ S.C. ___, 283 S.E.2d 179 (1981) (\textit{Gilbert II}), in support of its decision to uphold submission of multiple aggravating circumstances. In \textit{Gilbert II}, however, the court relied upon an entirely different rationale. \textit{See supra} note 283.

\textsuperscript{322} The charge of committing murder for pecuniary gain applies to the situation in which someone commits murder in an attempt to collect insurance or an inheritance. It is possible to commit larceny without committing robbery, but robbery will always include larceny. State v. Gilbert, ___ S.C. ___, 283 S.E.2d 179 (1981).

\textsuperscript{323} Florida is apparently the only other state that has addressed this issue. The Florida Supreme Court consistently has held that it is error to submit multiple aggravating circumstances for jury consideration in sentencing when they refer to a single incident of conduct. \textit{See, e.g.}, White v. State, 403 So. 2d 331 (Fla. 1981); Maggard v. State, 399 So. 2d 973 (Fla. 1981); Gafford v. State, 387 So. 2d 333 (Fla. 1980); Provence v. State, 337 So. 2d 783 (Fla. 1976).

\textsuperscript{324} S.C. CODE ANN. § 16-3-25 (1980 Supp.) provides that:

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. . . .

(C) With regard to the sentence, the court shall determine:
ting lesser included aggravating circumstances to a jury of lay people is such an arbitrary factor. The trial judge has the ability to make the defendant's conduct seem more reprehensible to the jury by submitting multiple charges because the jury may not realize that only one act is involved. It is doubtful that the legislature intended such a result when it drafted the provisions on aggravating circumstances. Whatever the legislative intent, the court should construe the statute to avoid any possibility that a death sentence will be handed down under the influence of an arbitrary factor.

Finally, the court found that the solicitor's closing argument to the sentencing jury was an improper attempt to reduce the jury's sense of responsibility for the defendant's fate. The court rejected this strategy, observing that "[w]hen a solicitor's personal opinion is explicitly injected into the jury's deliberation as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor" as required by South Carolina law and the eighth amendment. This decision reflects the court's effort to ensure the jury's independent decision based solely on admissible evidence and unaffected by outside opinion and bias. Woomer thus adds to the developing South Carolina law on what constitutes an arbitrary factor requiring reversal of a death sentence.

As South Carolina nears the time when death sentences will be carried out, the courts will be subject to closer judicial and public scrutiny to ensure that such sentences are imposed impartially. It is therefore important that any death sentence be handed down in a manner free from all error and arbitrary factors. In Woomer, the court advanced this goal by holding that the solicitor's improper cross examination and closing argument denied the defendant a fair trial. The court, however, did not adequately consider the legislative intent underlying the statutory enumeration of aggravating circumstances and therefore

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, . . .

325. __ S.C. at __, 284 S.E.2d at 359.
left open the possibility that future death sentences may not be free from arbitrariness when multiple aggravating circumstances are submitted in reference to a single incident of conduct.

R. Kent Porth