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Evidence

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EVIDENCE

I. DEFENDANTS' RIGHT TO AN OPENING STATEMENT

Practitioners in South Carolina have long believed that there is no absolute right to an opening statement.¹ In *State v. Brown*,² the South Carolina Supreme Court confirmed this belief by holding that allowing the opportunity to make an opening statement and the timing of the statement are decisions within the discretion of the trial judge.³ This decision represents the court's first definitive statement on these issues.⁴

Brown was accused of distribution of unlawful drugs.⁵ At trial, the State chose not to make an opening statement. Defense counsel's request for the opportunity to make an opening statement was denied. The trial judge based his ruling on the belief that, because the prosecution had declined to make an opening statement, the court had no authority to permit a statement by

1. *State v. Brown*, — S.C. —, 284 S.E.2d 778 (1981)(citing Lide, *Some "Uniques" in South Carolina Law*, 1 S.C.L.Q. 109 (1949)).

2. — S.C. —, 284 S.E.2d 777 (1981).

3. *Id.* at —, 284 S.E.2d at 778. It is unfortunate that the court emphasized this "belief" reported in 1949, instead of giving recognition to the desire evidenced by the South Carolina Bar in December 1979. According to a subcommittee memorandum, the Committee on Practice and Procedure of the South Carolina Bar had proposed the following rule in August of 1980: "At the beginning of the case or at the beginning of his side of the case, counsel for any party in the Circuit Court shall be entitled to make an opening statement setting out the facts the party will attempt to prove." Letter from the Subcommittee to Study the Scope and Content of Opening Statements to the Committee on Practice and Procedure of the South Carolina Bar (August 6, 1980). The Board of Governors of the South Carolina Bar approved the proposed rule at its meeting on October 27, 1979, and the House of Delegates approved it on November 15, 1979. *Id.* Although the proposed rule was submitted to the South Carolina Supreme Court by the Bar, the court has never taken action on the rule.

Further, in February 1980 a bill (H-3542) was introduced in the House of Representatives proposing a rule on opening statements that mirrored the rule submitted by the South Carolina Bar. The bill was not referred to a subcommittee, and it appears that no action was ever taken by the General Assembly. *Id.*

4. Brief for Appellant at 2; Brief for Respondent at 1. In *State v. Harris*, 275 S.C. 463, 272 S.E.2d 636 (1980), the court held that the scope of an opening statement is also within the discretion of the trial judge, whose decision will stand absent a showing of abuse of discretion and prejudice to the complaining party. *Id.* at 465, 272 S.E.2d at 638.

5. — S.C. at —, 284 S.E.2d at 778.

the defense. Brown was subsequently convicted and sentenced to thirty months imprisonment.⁶

The supreme court affirmed Brown's conviction, holding that the granting and timing of an opening statement are discretionary with the trial judge.⁷ The court concluded that although the trial judge was mistaken in his belief that he lacked authority to allow the defense to make an opening statement, the accused's right to be heard was not substantially impaired.⁸ In reaching its decision, the court gave special consideration to the prosecution's choice not to make an opening statement and the defense counsel's thorough closing statement.⁹

The generally agreed upon purposes of an opening statement are to inform the jury of the facts relied upon to establish the defense,¹⁰ the general nature of the legal issues involved,¹¹ and the relationship between law and fact, so that the jurors' understanding of the evidence will be enhanced.¹² Jurisdictions are, however, divided in their treatment of the issue of whether a defendant has a right to make an opening statement. Some confer an absolute statutory right to an opening statement,¹³ while others recognize this right even absent a statutory mandate.¹⁴ In the remaining jurisdictions, the issue is within the dis-

6. *Id.* at ___, 284 S.E.2d at 778.

7. *Id.* at ___, 284 S.E.2d at 778.

8. *Id.* at ___, 284 S.E.2d at 778-79.

9. *Id.* at ___, 284 S.E.2d at 779.

10. *See, e.g.*, *State v. Burrnell*, 98 Ariz. 37, 401 P.2d 733 (1965); *People v. Gomez*, 131 Colo. 576, 283 P.2d 949 (1955); *People v. McDowell*, 284 Ill. 504, 120 N.E. 482 (1918); *People v. Hampton*, 78 Ill. App. 3d 238, 397 N.E.2d 117 (1979).

11. *See, e.g.*, *People v. Gomez*, 131 Colo. 576, 283 P.2d 949 (1955); *Jennings v. United States*, 431 A.2d 552 (D.C. 1981).

12. *See, e.g.*, *Turley v. State*, 48 Ariz. 61, 59 P.2d 312 (1936); *Jennings v. United States*, 431 A.2d 552 (D.C. 1981).

13. *E.g.*, *State v. Guffey*, 205 Kan. 9, 468 P.2d 254 (1970); *Commonwealth v. Weeden*, 457 Pa. 436, 322 A.2d 343 (1974); *cert. denied*, 420 U.S. 937 (1975); *Crew v. State*, 387 S.W.2d 898 (Tex. Crim. App. 1965); *Dugan v. State*, 82 Tex. Crim. 422, 199 S.W. 616 (1917).

14. *E.g.*, *Turley v. State*, 48 Ariz. 61, 59 P.2d 312 (1936); *Jennings v. United States*, 431 A.2d 552 (D.C. 1981); *Hampton v. United States*, 269 A.2d 441 (D.C. 1970); *People v. McDowell*, 284 Ill. 504, 120 N.E. 482 (1918); *People v. Hampton*, 78 Ill. App. 3d 238, 397 N.E.2d 117 (1979); *People v. Chivas*, 322 Mich. 384, 34 N.E.2d 22 (1948). One of these courts has gone so far as to "take judicial notice that for many years both trial and appellate courts in this jurisdiction have assumed the right of both the prosecutor and defense counsel to make opening statements to the jury." *Hampton v. United States*, 269 A.2d 441, 442 (D.C. 1970).

cretion of the trial judge.¹⁵

Jurisdictions that subscribe to the absolute right of a defendant in a criminal trial to make an opening statement recognize the importance of affording the defendant an opportunity to outline his defense for the jury.¹⁶ The opening statement serves to clarify the facts and issues for the jury.¹⁷ If no opening statement is made, the jury has no framework within which to place the disjointed bits and pieces of testimony. Confusion is more likely to result than if the opening statement had been made. The defendant in a criminal trial must be afforded every opportunity to make the elements of his defense clear to the jury. Denial of the right to make an opening statement deprives the defendant of one of these opportunities and may substantially impair his defense.

Jurisdictions that subscribe to the discretionary rule do not perceive the opening statement as a fundamental element of a fair trial. The court's decision in *Brown* follows this reasoning and places South Carolina law in line with these jurisdictions.¹⁸

The timing of opening statements, when permitted, is also a matter of some disagreement among jurisdictions. In some states, the courts have held that statutory timing cannot be altered.¹⁹ Other courts have held that the statutes do not deprive the trial court of the power to vary the prescribed order.²⁰ The remaining group leaves the matter solely to the discretion of the trial judge.²¹ This discretionary approach is based on the princi-

15. *E.g.*, *Stewart v. State*, 245 Ala. 511, 17 So.2d 871 (1944); *Henderson v. State*, 158 Fla. 684, 29 So. 2d 698 (1947); *People v. April*, 97 Ill. App. 2d 1, 239 N.E.2d 285 (1968); *Black v. State*, 308 So. 2d 79 (Miss. 1975). *See*, *State v. Garlington*, 90 S.C. 138, 72 S.E. 564 (1911). *See also*, *Schwartz v. Fein*, 471 S.W.2d 679 (Mo. 1971).

16. *See, e.g.*, *People v. Chivas*, 322 Mich. 384, 392, 34 N.W.2d 22, 26 (1948).

17. *See supra* notes 10-12.

18. *State v. Brown*, — S.C. —, 284 S.E.2d 777.

19. *E.g.*, *Jackson v. State*, 249 Ark. 653, 460 S.W.2d 319 (1970); *Buise v. State*, 258 Ind. 321, 281 N.E.2d 93 (1972); *Ballard v. State*, 514 S.W.2d 267 (Tex. Crim. App. 1974). *But cf.* *State v. Olson*, 156 Mont. 339, 480 P.2d 822 (1971) (the statute the court relied upon expressly allowed the trial court to deviate from the designated timing).

20. *E.g.*, *Williams v. State*, 170 Ind. 644, 85 N.E. 349 (1908); *State v. Guffey*, 205 Kan. 9, 468 P.2d 254 (1970); *People v. Seiler*, 246 N.Y. 262, 158 N.E. 615 (1927); *Brown v. State*, 50 Okla. Crim. 103, 297 P. 303 (1931); *Commonwealth v. Weeden*, 457 Pa. 436, 322 A.2d 343 (1974); *cert. denied*, 420 U.S. 937 (1975).

21. *E.g.*, *State v. Hargrove*, 282 Ala. 13, 208 So. 2d 444 (1968); *Henderson v. State*, 158 Fla. 684, 29 So. 2d 698 (1947); *Berryhill v. Ricketts*, 242 Ga. 447, 249 S.E.2d 197 (1978); *Smith v. State*, 386 So. 2d 1117 (Miss. 1980). *Accord*, *State v. Lee*, 255 S.C. 309,

ple that allowing the judge to use his discretion in such matters results in an orderly and balanced approach to trial.²² Discretionary rulings are not disturbed by appellate courts absent a showing by the record of abuse of discretion.²³ The *Brown* decision adopts the discretionary rule, and evinces the court's deference to the trial court judge.²⁴

By failing to recognize the absolute right to an opening statement by a defendant and vesting the trial court with the discretion to decide if and when an opening statement can be made, the supreme court has made the trial judge an even more critical participant in a criminal trial. Judges must recognize the impact a denial of the right to an opening statement can have, and use this discretion to assure defendants the fairest trial possible.

II. INDEPENDENT CRIME OF THE ACCUSED

In *State v. Turbeville*,²⁵ the Supreme Court of South Carolina upheld admission of testimony concerning an independent crime committed by the accused. The court found that the independent crime was relevant to prove the accused's state of mind on the night he allegedly shot and killed another man.²⁶ *Turbeville* reaffirms the supreme court's intent to allow evidence of independent crimes if it falls within one of five exceptions to the general rule against its admissibility. While this approach lends a degree of certainty to South Carolina evidence law, it may result in trial courts overlooking the prejudicial effect of such evidence on the jury.

Turbeville, an off-duty deputy sheriff, killed his girlfriend's brother during a struggle and was indicted for murder.²⁷ At trial, the State was allowed to introduce testimony that proved the

178 S.E.2d 652 (1971).

22. *Commonwealth v. Weeden*, 457 Pa. 436, 448, 322 A.2d 343, 349 (1974), *cert. denied*, 420 U.S. 937 (1975)(quoting from the decision of the trial court).

23. *Frazier v. State*, 365 So. 2d 339, 341 (Ala. Crim. App. 1978).

24. — S.C. at —, 284 S.E.2d at 778-79.

25. 275 S.C. 534, 273 S.E.2d 764 (1981).

26. *Id.* at 536, 273 S.E.2d at 765.

27. Brief for Appellant at 3. The accused, the decedent, the girlfriend, and four other people were together during both the alleged night hunting and the homicide. *Id.* at 3-4. Turbeville stated that he and the victim were "close friends." Record at 221.

accused had committed an independent crime, night hunting,²⁸ on the evening of the murder. Turbeville was convicted of involuntary manslaughter²⁹ and appealed, charging that the trial court judge had erred in admitting the independent crime testimony. The South Carolina Supreme Court upheld the admission of the testimony and affirmed the conviction.

The supreme court in *Turbeville* relied upon earlier decisions³⁰ which had allowed evidence of other crimes to be introduced when offered to establish the following: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan involving two or more crimes; or (5) the identity of the accused.³¹ The court noted that while this evidence is to be strictly scrutinized in determining admissibility,³² it will not be found inadmissible "merely because it incidentally proves the defendant guilty of another crime."³³ The court concluded that the testimony was admissible to show state of mind, an essential element in the State's theory that Turbeville had either intentionally inflicted the wounds, or did so through criminal negligence.³⁴

As a general rule, evidence of other criminal acts of the accused is inadmissible unless "relevant for some other purpose than to show a probability that [the accused] committed the crime because he is a man of criminal character."³⁵ The reluctance of courts to admit such evidence is based upon the fear that it will predispose the jury to believe that the accused is

28. S.C. CODE ANN. § 50-11-20 (1976) provides in pertinent part:

There shall be no night hunting in this State except for racoons, opossums, foxes, mink and skunk. . . .

The use at night of artificial lights, except vehicle headlights while traveling in a normal manner on a public road or highway, while in possession of or with immediate access to both ammunition of a type prohibited for use at night by this section and a weapon capable of firing such ammunition shall constitute prima facie evidence of night deer hunting.

29. The jury deliberated for over eight hours. Brief for Appellant at 53.

30. See, e.g., *State v. Wilson*, 274 S.C. 635, 266 S.E.2d 426 (1980); *State v. Conyers*, 268 S.C. 276, 233 S.E.2d 95 (1977); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

31. *State v. Wilson*, 274 S.C. at 637, 266 S.E.2d at 427. *State v. Conyers*, 268 S.C. at 280-81, 233 S.E.2d at 96. *State v. Lyle*, 125 S.C. at 416, 118 S.E.2d at 807.

32. 275 S.C. at 536, 273 S.E.2d at 764.

33. *Id.* (quoting *State v. Lyle*, 125 S.C. at 417, 118 S.E. at 807).

34. 275 S.C. at 536, 273 S.E.2d at 765.

35. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 185 (2d ed. 1972) [hereinafter cited as MCCORMICK].

guilty. This would strip the defendant of his presumption of innocence.³⁶ Further, evidence of other crimes compels the accused to meet charges not raised in the indictment, confuses him in his defense, and diverts the jury's attention.³⁷

As the supreme court in *Turbeville* noted, there are exceptions to the traditional rule against admissibility of independent crime evidence. However, the exceptions are subject to the general proposition that the evidence must not unduly prejudice the jury against the accused.³⁸ Although the court stated that evidence of the other crimes is to be subjected to strict scrutiny,³⁹ the language of the case suggests that the focus of the examination is to be upon the connection between the two crimes,⁴⁰ not the potential prejudicial effect of the evidence on the jury.

If the prejudicial effect of the testimony concerning night hunting in *Turbeville* had been given full consideration, the testimony may have been held inadmissible. The circumstantial connection between the two crimes seems tenuous at best.⁴¹ The gun used by *Turbeville* was different from the one used in the homicide, did not belong to the accused,⁴² and was fired only once at a deer.⁴³ Further, the prosecution had five witnesses to the homicide.⁴⁴ Thus, the testimony appears to have little proba-

36. See, e.g., *State v. Conyers*, 268 S.C. 276, 233 S.E.2d 95 (1977); *State v. Gamble*, 247 S.C. 214, 146 S.E.2d 709 (1966), cert. denied, 390 U.S. 927 (1968); *State v. Sharpe*, 239 S.C. 258, 122 S.E.2d 622 (1961); *State v. Thompson*, 230 S.C. 473, 96 S.E.2d 471 (1957); *State v. Gregory*, 191 S.C. 212, 4 S.E.2d 1 (1939); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

37. *State v. Lyle*, 125 S.C. at 416, 118 S.E. at 807 (citing *Commonwealth v. Jackson*, 132 Mass. 15 (1882)).

38. *McCORMICK*, supra note 35, at § 190.

39. 275 S.C. at 536, 273 S.E.2d at 764.

40. *Id.*

41. The connection between the offense charged and evidence of the offense sought to be admitted was found significant in *Quarles v. Commonwealth*, 245 S.W.2d 947, 948-49 (Ky. 1951):

[E]vidence of an independent offense is admissible even though it may have some tendency to prove the commission of the crime charged, because the probative value of the evidence is greatly outweighed by its prejudicial effect. This is especially so where the evidence is of an isolated, wholly disconnected offense. But the balance of scales is believed to be the other way where there is a close relationship to the offense charged.

42. Record at 14, 89-90.

43. *Id.* at 15.

44. *Id.* at 4. Other cases have pointed to the availability of other evidence as another factor to be considered in determining admissibility. See, e.g., *Adkins v. Brett*, 184 Cal. 252, 193 P. 251 (1920); *State v. Gilligan*, 92 Conn. 526, 103 A. 649 (1918); *Tucker v.*

tive value. It seems far more likely that the accused, painted for the jury as a law enforcement officer with frivolous disregard for the law, lost his protection against unfair prejudice when the testimony was admitted.⁴⁵

The failure of the court in *Turbeville* to explicitly consider the prejudicial effect of the independent crime testimony was either an oversight or simply deemed unnecessary by the court. The court extensively cited *State v. Lyle*, which clearly holds that the relevancy of evidence of other crimes must be balanced against the potential prejudicial effect.⁴⁶ The court in *Lyle* noted that the inevitable tendency of such evidence is to "raise a legally spurious presumption of guilt in the minds of the jurors."⁴⁷ Thus, the supreme court will probably continue to require a balancing approach to admission of evidence of other crimes.

Practitioners and lower courts should not read *Turbeville* to hold that simply "pigeonholing" evidence of other crimes into one of five exceptions will ensure admissibility. This evidence must definitely fall within an exception. However, its ultimate admissibility will continue to depend upon consideration of other factors, such as prejudicial effect, which defy such a mechanical approach.

Danny H. Mullis

III. HEARSAY STATEMENTS OF COCONSPIRATORS

In *State v. Sullivan*,⁴⁸ the South Carolina Supreme Court made several determinations concerning the admissibility of hearsay statements made by coconspirators in the course of a conspiracy. Following well-established precedents in the law of evidence,⁴⁹ the court reaffirmed as an exception to the hearsay rule the principle that statements made by a coconspirator during and in furtherance of the conspiracy are admissible against

State, 82 Nev. 127, 412, P.2d 970 (1966).

45. This presumption of guilt is precisely what the court in *State v. Lyle* identified as an inherent danger in admitting evidence of other crimes. 125 S.C. at 417, 118 S.E. at 807. See generally Reiser, *Evidence of Other Criminal Acts in South Carolina*, 28 S.C.L. REV. 125 (1976).

46. 125 S.C. at 417, 118 S.E. at 807.

47. *Id.*

48. — S.C. —, 282 S.E.2d 838 (1981).

49. See *infra* note 55.

all of the conspirators. The court held that order of proof is discretionary with the trial judge and declarations made by a conspirator to a third party may be admitted before prima facie proof of conspiracy is shown. The court further held that the indictment need not charge conspiracy for hearsay statements to be admissible against the coconspirators.⁵⁰ This decision reaffirms South Carolina's position in the mainstream of jurisdictions that have decided these issues.⁵¹

The appellants in *Sullivan* were participants in a marijuana smuggling operation. The trial court found six of the eight appellants⁵² guilty of possession of marijuana with intent to distribute and conspiracy to possess marijuana with intent to distribute. The remaining two appellants⁵³ were convicted on one count of conspiracy to possess marijuana with intent to distribute. On appeal, the supreme court reversed the convictions against two of the appellants because there was insufficient evidence to connect them with the conspiracy, and affirmed the convictions of the other six.⁵⁴

All of the appellants raised issues relating to the admissibility of hearsay statements made by coconspirators. Initially they argued that there was insufficient evidence to show participation in the conspiracy. A well-recognized exception to the hearsay rule permits statements of one conspirator made during and in furtherance of the conspiracy to be admissible against each coconspirator.⁵⁵ For this exception to apply, however, the State

50. — S.C. at —, 282 S.E.2d at 843.

51. See C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 53,267 (2D ED. 1972 & SUPP. 1978). See, e.g., FED. R. EVID. 801(d)(2)(E), *United States v. Ciampaglia*, 628 F.2d 632 (1st Cir. 1980), cert. denied, 449 U.S. 956 (1980); *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978); *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977); *United States v. Spanos*, 462 F.2d 1012 (9th Cir. 1972); *United States v. Sapperstein*, 312 F.2d 694 (4th Cir. 1963); *Glover v. United States*, 306 F.2d 594 (10th Cir. 1962).

52. At the trial stage, there were fifteen defendants, but only the following eight appealed: James Charles Dugan, Ralph Dennis Nichols, William Russell Jackson, George Alexander Gedra, Kenneth Warran Davidson, James Thurmond Kincade, Steven Gerald Schone, and Stan White.

53. William Russell Jackson and Stan White.

54. — S.C. at —, 282 S.E.2d at 847.

55. *State v. Ferguson*, 221 S.C. 300, 70 S.E.2d 355 (1952); *State v. Blackwell*, 220 S.C. 342, 67 S.E.2d 684 (1951); accord, FED. R. EVID. 801(d)(2)(E); *United States v. Spanos*, 462 F.2d 1012 (9th Cir. 1972); *Laughlin v. United States*, 385 F.2d 287 (D.C. Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *United States v. Sapperstein*, 312 F.2d 694 (4th Cir. 1963); *Glover v. United States*, 306 F.2d 594 (10th Cir. 1962).

must present substantial and independent evidence of the existence of a conspiracy⁵⁶ and of the declarant's and the defendant's participation therein. Hearsay evidence of coconspirators is not sufficient in itself to establish an individual's participation in the conspiracy.⁵⁷ Further, there must be evidence as to each alleged conspirator of deliberate, knowing intent to join the conspiracy.⁵⁸

The supreme court found that the State had met its burden of proof on these issues as to all appellants except White and

It is important to note, however, that not all statements of coconspirators are admissible against each conspirator. Evidence of acts and declarations of a conspirator prior to the formation of the conspiracy or not in furtherance of the conspiracy is not admissible under the conspiracy exception to the hearsay rule.

Of course, evidence of other crimes may be admitted for other purposes, i.e., to prove the specific crime charged when it tends to establish "(1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the person charged with the commission of the crime on trial." *State v. Blackwell*, 220 S.C. 342, 355, 67 S.E.2d 684, 690 (1951) (quoting *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901)). See also *State v. Richey*, 88 S.C. 239, 70 S.E. 729 (1910); *State v. Davis*, 88 S.C. 204, 70 S.E. 417 (1910); *State v. Kenny*, 77 S.C. 236, 57 S.E. 859 (1907). *Accord*, *FED. R. EVID.* 404(b).

56. The evidence of the existence of a conspiracy must at least be sufficient to take the question to the jury for these hearsay statements to be admitted against the coconspirators. *United States v. Nixon*, 418 U.S. 683 (1974); see also *United States v. James*, 590 F.2d 575 (5th Cir. 1979), *cert. denied*, 442 U.S. 917 (1979).

To prove the existence of a conspiracy, the State must show that the alleged members knowingly agreed to participate toward a common goal or illegal end. *Blumenthal v. United States*, 332 U.S. 539, 558 (1947). The nature of the agreement defines the scope of the conspiracy. *United States v. Varelli*, 407 F.2d 735, 742 (7th Cir. 1969), *cert. denied*, 405 U.S. 1040 (1972); *United States v. Goss*, 329 F.2d 180 (4th Cir. 1964); *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944).

57. *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Bentvena*, 319 F.2d 916 (2d Cir. 1963), *cert. denied*, 375 U.S. 940 (1965); *Glover v. United States*, 306 F.2d 594 (10th Cir. 1962); *Stinson v. State*, 151 Ga. App. 533, 260 S.E.2d 407 (1979).

58. *United States v. Alvarez*, 610 F.2d 1250, 1257 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 2017 (1981). Participation in a substantive criminal act or association with members of a conspiracy will not make an individual a member of the conspiracy in the absence of such knowing intent. *Miller v. United States*, 382 F.2d 583 (9th Cir. 1967), *cert. denied*, 390 U.S. 984 (1968); *Causey v. United States*, 352 F.2d 203 (5th Cir. 1965); *Glover v. United States*, 306 F.2d 594 (10th Cir. 1962).

Once *prima facie* evidence of conspiracy is shown and it is established beyond a reasonable doubt that an individual was a part of the conspiracy, evidence of even slight participation is sufficient to convict him of knowing participation in each act. See, e.g., *United States v. Lopez*, 625 F.2d 889 (9th Cir. 1980); *United States v. Jabara*, 618 F.2d 1319 (9th Cir. 1980), *cert. denied*, 446 U.S. 987 (1979); and *United States v. Dunn*, 564 F.2d 348 (9th Cir. 1977).

Gedra, whose convictions the court reversed.⁵⁹ The appellants further contended that the trial court erred in admitting the hearsay declarations before the State established proof of the conspiracy by independent evidence. The supreme court disagreed, holding that order of proof is discretionary with the trial judge⁶⁰ and that so long as prima facie evidence of conspiracy is established before the close of evidence, the statements of alleged coconspirators may be admitted at any time.⁶¹

The supreme court in *Sullivan* declined to adopt preferred order of proof rule in South Carolina.⁶² This rule requires that, whenever possible, the existence of a conspiracy and the defendant's connection with it be shown before allowing declarations of coconspirators to be admitted.⁶³ The South Carolina Supreme Court focused instead on the discretionary function of the trial court and, finding no abuse of discretion, upheld the admissibility of the hearsay statements.⁶⁴

The court also rejected appellants' argument that they were prejudiced by introduction of hearsay evidence on the conspiracy indictment because such evidence would not have been admissible on the possession charge if this charge had been tried separately. The court held that the indictment need not charge conspiracy for the declarations of one coconspirator to be admissible against another alleged coconspirator.⁶⁵ The well-settled rule in South Carolina is that declarations of a coconspirator are admissible, even though the indictment failed to charge conspiracy, so long as there is a prima facie showing of the existence of

59. — S.C. at —, 282 S.E.2d at 843.

60. *United States v. Vaught*, 485 F.2d 320 (4th Cir. 1973); *State v. Rutledge*, 261 S.C. 44, 198 S.E.2d 250 (1973).

61. — S.C. at —, 282 S.E.2d at 843.

62. — S.C. at —, 282 S.E.2d at 842-43 (citing *Glasser v. United States*, 315 U.S. 60 (1942)).

63. *See, e.g.*, *United States v. James*, 590 F.2d 575, 581-582 (5th Cir. 1979). Jurisdictions advocating the preferred order of proof rule have not rigidly applied it, however, and allow courts discretion in admitting hearsay statements prior to proof of conspiracy, provided the hearsay statements are linked to the proof of conspiracy before the end of trial. *See, e.g.*, *United States v. Calabrese*, 645 F.2d 1379 (10th Cir. 1981), *cert. denied*, 101 S. Ct. 3008 (1981); *United States v. Ocanas*, 628 F.2d 353 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 2316 (1981); *United States v. Continental Group, Inc.* 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1979); *United States v. James*, 590 F.2d 575 (5th Cir. 1979), *cert. denied*, 442 U.S. 917 (1979).

64. — S.C. at —, 282 S.E.2d at 843.

65. *Id.* at —, 282 S.E.2d at 843.

a conspiracy.⁶⁶ This rule applies even though the declarations were not made in the presence of the accused.⁶⁷

The rule permitting statements of coconspirators to be admitted as evidence against each member of the conspiracy is well established in South Carolina, and in *State v. Sullivan*, the court refused to require a preferred order of proof as a refinement of the rule. Practitioners representing members of a conspiracy would thus be well advised to allow flexibility in their trial strategy considering this interpretation of the rule.

Suzanne Hulst Clawson

IV. ATTORNEY-CLIENT PRIVILEGE

*State v. Adams*⁶⁸ is the latest in a short line of South Carolina cases discussing the attorney-client privilege.⁶⁹ In *Adams*, the South Carolina Supreme Court held that the in-court disclosure by the defendant's former attorney of his professional impressions of the voluntariness of the defendant's confession violated the attorney-client privilege.⁷⁰ In so holding, the court joins the majority of jurisdictions in extending the definition of a confidential communication to include those forms of communication which are neither oral nor written.⁷¹

Following the defendant's arrest on charges of housebreaking, kidnapping, and murder, the court appointed Thomas McKinney to represent him. After the appointment of McKinney, Adams confessed in detail to the charges against him. Before trial, however, Adams became dissatisfied with McKinney and

66. *State v. Blackwell*, 220 S.C. 342, 67 S.E.2d 684 (1951); *State v. Rice*, 49 S.C. 418, 27 S.E. 452 (1897); *State v. Green*, 40 S.C. 328, 18 S.E. 933 (1894).

67. *State v. Blackwell*, 220 S.C. 342, 354-55, 67 S.E.2d 684, 690 (quoting *State v. Simon*, 132 W. Va. 322, 342, 52 S.E.2d 725, 735 (1949)).

68. — S.C. —, 283 S.E.2d 582 (1981).

69. See *State v. Doster*, — S.C. —, 284 S.E.2d at 218 (1981); *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980); *South Carolina State Highway Dep't v. Booker*, 260 S.C. 245, 195 S.E.2d 615 (1973). For earlier South Carolina cases briefly discussing the policy behind the attorney-client privilege, see generally *Drayton v. Industrial Health and Life Ins. Co.*, 205 S.C. 98, 31 S.E.2d 148 (1944); *State v. Rook*, 174 S.C. 225, 177 S.E. 143 (1934); *Clary v. Blackwell*, 160 S.C. 142, 158 S.E.2d 223 (1931); *Sandel v. State*, 126 S.C. 1, 119 S.E. 776 (1923).

70. — S.C. at —, 283 S.E.2d at 586.

71. See C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 89 (2d ed. 1972 & Supp. 1978); 8 WIGMORE, *EVIDENCE* § 2306 n.2 (McNaughton rev. 1961 & Supp. 1981).

asserted that his confession had been coerced. McKinney's petition for relief from the case was thereafter granted.⁷²

During trial and before Adams took the stand, McKinney testified for the State that, based on his perception of Adams during an interview prior to the signing of the confession, it was his opinion that Adams' confession was freely and voluntarily given.⁷³ He also testified that he had gone over the written confession "line by line" to assure its accuracy.⁷⁴ Adams was subsequently convicted on all counts.

Appealing his conviction, Adams asserted that McKinney's disclosure on the stand of his opinion of the voluntariness of Adams' confession violated the attorney-client privilege because the opinion was apparently based on observations made during a confidential communication.⁷⁵ The supreme court agreed, and held that Adams' attorney-client privilege had been violated.⁷⁶ The court restated the policy upon which the privilege is based—the promotion of the relationship between attorney and client by the assurance of utmost confidence and secrecy. The majority then premised its decision on a finding that the spirit of the policy demands that the entire setting of the communication be protected.⁷⁷ The court also observed that a policy limiting the scope of the privilege to words spoken but allowing disclosure of impressions conveyed by those words would destroy the substance of the privilege.⁷⁸

72. — S.C. at —, 283 S.E.2d at 585.

73. *Id.* at —, 283 S.E.2d at 585-86.

74. *Id.* at —, 283 S.E.2d at 585.

75. *Id.* at —, 283 S.E.2d at 586. Adams also appealed several other alleged errors in his bifurcated capital trial: (1) the trial court's refusal to permit defense counsel to examine notes to which one of the State's police witnesses referred during his testimony, *Id.* at —, 283 S.E.2d at 583-85; (2) the prosecutor's questions to the defendant on cross-examination during the guilt or innocence phase of the trial, which put at issue defendant's feelings about sentencing, *Id.* at —, 283 S.E.2d at 584-85; and (3) failure of the trial court to correct an error during the guilt or innocence phase in its statement of the law to the jury, *Id.* at —, 283 S.E.2d at 586-88.

76. *Id.* at —, 283 S.E.2d at 586.

77. *Id.* The court relied on its most recent pronouncement on the privilege in *State v. Doster*, — S.C. —, 284 S.E.2d 218 (1981). An informant in *Doster* sought the advice of outside counsel before trial to determine the propriety of his attorney's representation of multiple defendants. When the outside counsel was called on by the defense to testify concerning his conversations with the informant, he successfully asserted the privilege on his client's behalf.

78. — S.C. at —, 283 S.E.2d at 586.

The State argued that the defendant waived the privilege by repudiating the voluntariness of his confession and disputing before trial the propriety of McKinney's representation of him. The State cited MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-104(c)(4), which allows lawyers to reveal confidences in defending themselves against charges of wrongful conduct. The court dismissed this defense on the ground that Adams had not charged McKinney with any wrongful conduct at trial when the State introduced McKinney's testimony, and therefore, McKinney could not have not been acting in self-defense when he disclosed his privileged information.⁷⁹

The rule adopted in *Adams* is in accord with the majority rule regarding nonverbal communications.⁸⁰ In those jurisdictions where the issue has been addressed, the courts have uniformly supported the privileged nature of communications to an attorney which are neither oral nor written.⁸¹ The rationale behind the rule is that the privilege should protect any information gained by an attorney in the ordinary course of his employment as a client's counselor.⁸² Although the South Carolina Supreme Court has only recently begun to explore the rationale behind the attorney-client privilege,⁸³ the court thus far shows no sign of breaking with the majority on any issue of substance.

The court's concern with the protection of the attorney-client privilege is laudable. However, it is hoped that future pro-

79. *Id.* at ___, 283 S.E.2d at 586.

80. See 8 WIGMORE, EVIDENCE § 2306 n.2 (McNaughton rev. 1961 & Supp. 1981).

81. An example of a privileged nonverbal, nonwritten communication from another jurisdiction is found in *State v. Dawson*, 90 Mo. 149, 1 S.W. 827 (1886). In *Dawson*, an attorney defending clients charged with the theft of \$160 in silver coins was not allowed to testify that he was paid in silver coins. The court decided that "[t]he reason of the rule protects a client from a disclosure [of] any information which [the attorney] has derived from his client. . . . [T]o restrict the privilege to oral or written communications would make the rule infinitely narrower than the reason upon which it is based." 90 Mo. at 155, 1 S.W. at 829.

82. See *Ex Parte McDonough*, 170 Cal. 230, 139 P. 566 (1915). The privilege itself does not exist unless the attorney is consulted in his professional capacity as an attorney or counselor. See, e.g., *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass 1950) (business advice held not privileged); *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954) (attorney engaged as accountant held not within privilege).

83. The confidentiality privilege was first expounded upon at length in South Carolina State Highway Dep't v. Booker, 260 S.C. 245, 195 S.E.2d 615 (1973) and was stated again in *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980). Before *Booker*, no South Carolina Supreme Court case had gone into any detail in discussing the theoretical underpinnings of the privilege.

nouncements by the court will identify those situations in which an attorney is allowed to testify as to confidential communications.

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V. INTERSPOUSAL WIRETAPS

In *Baumrind v. Ewing*,⁸⁴ the South Carolina Supreme Court made its first determination of the applicability of the Omnibus Crime Control and Safe Streets Act of 1968⁸⁵ to wiretaps performed in the course of interspousal espionage. The court held that when a husband who lives in the marital home uses a wiretap to record telephone conversations between his wife and a man suspected to be her lover, the recordings cannot be suppressed as evidence under section 2515 of the Act.⁸⁶ This decision places South Carolina in the minority of jurisdictions that have decided this issue.⁸⁷

Suspecting infidelity as the basis for his wife's decision to leave him, plaintiff Baumrind, on his own initiative and without assistance, installed an extension phone and recording device in the closet of the spare bedroom of the home he shared with his wife.⁸⁸ Unknown to his wife, he proceeded to eavesdrop on her conversations.⁸⁹ Armed with recordings of conversation between his wife and the defendant Ewing, Baumrind instituted an action for alienation of affection and criminal conversation against the defendant.⁹⁰ The defendant moved before trial to suppress the recordings on the ground that they violated the Omnibus Crime Control and Safe Streets Act of 1968.⁹¹ The trial judge found that the Act did not apply and denied the motion.⁹² The defendant appealed the denial of this motion; the South Caro-

84. 276 S.C. 350, 279 S.E.2d 359 (1981).

85. 18 U.S.C. §§ 2510, -2520 (1976 & Supp. 1980).

86. 276 S.C. at 353, 279 S.E.2d at 360.

87. *E.g.* *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977); *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974); *Beaber v. Beaber*, 41 Ohio Misc. 95, 322 N.E.2d 910 (1974).

88. Record at 32-34.

89. *Id.* at 34.

90. *Id.* at 3-7.

91. *Id.* at 9.

92. *Id.* at 19.

lina Supreme Court affirmed and remanded the case for trial.⁹³ Although the supreme court acknowledged that the “naked language” of the Act calls for a broad prohibition of wiretapping,⁹⁴ it held the Act inapplicable to the facts of *Baumrind*.⁹⁵ The court reasoned that the Act was primarily aimed at criminal violations and that although Congress may have intended that the Act apply to interspousal wiretaps performed by a third party such as a private detective,⁹⁶ it would be overreaching the purposes of the Act to prohibit one spouse from intercepting the wire communications of another in their mutually shared home.⁹⁷ In explanation of its position, the court noted that Congress typically leaves such matters as marital conflicts to the discretion of the states⁹⁸ and that, in any event, spouses have little or no justifiable expectation of privacy in their home.⁹⁹ Because the court was unable to discern a positive legislative intent that the Act extend to cases like *Baumrind*, it was constrained to find an implied exception in the Act for interspousal wiretapping in the marital home.¹⁰⁰ The court, however, specifically limited its holding to the facts of this case, leaving open the question whether the statute would apply to a married couple living apart.¹⁰¹

The court’s decision in *Baumrind* is questionable in several respects. At the outset, *Baumrind* appears to go against the clear weight of the authority. In reaching its decision, the court summarily rejected an entire line of cases which have held that the Act prohibits intramarital wiretapping,¹⁰² and instead relied

93. 276 S.C. at 353, 279 S.E.2d at 360.

94. *Id.* at 351, 279 S.E.2d at 360.

95. *Id.* at 353, 279 S.E.2d at 360.

96. *Id.* at 352, 279 S.E.2d at 360. For similar reasoning, see, e.g., *United States v. Rizzo*, 583 F.2d 907, 910 (7th Cir. 1978); *White v. Weiss*, 535 F.2d 1067, 1071 (8th Cir. 1976); *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir. 1974) *cert. denied*.

97. 276 S.C. at 353, 279 S.E.2d at 360.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *United States v. Rizzo*, 583 F.2d 907 (7th Cir. 1978), *cert denied*, 440 U.S. 908 (1978); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976); *White v. Weiss*, 535 F.2d 1067 (8th Cir. 1976); *United States v. Schrimsher*, 493 F.2d 848 (5th Cir. 1974); *Gill v. Willer*, 482 F. Supp. 776 (W.D.N.Y. 1980); *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979); *Remington v. Remington*, 393 F. Supp. 898 (E.D. Pa. 1975); *State v. Jock*, 404 A.2d 518 (Del. Super. Ct. 1979); *Stamme v. Stamme*, 589 S.W.2d 50 (Mo. App. 1979);

heavily on *Simpson v. Simpson*,¹⁰³ a factually similar case¹⁰⁴ decided by the United States Court of Appeals for the Fifth Circuit.

Moreover, the court's concern that applying the Act to the facts of *Baumrind* would overreach its purpose appears to be unfounded. The Act, which is organized in three tiers, is all encompassing in scope. The first tier of the Act is aimed at criminal offenses and provides criminal sanctions;¹⁰⁵ its second tier is aimed at both civil and criminal offenses and provides for exclusion of evidence illegally obtained;¹⁰⁶ and its third tier is aimed at civil offenses and provides civil damages.¹⁰⁷ Thus, domestic disputes would appear to be well within the ambit of the Act. The court also appears to have erred in refusing to follow the plain language of the statute and by relying instead upon "inconclusive" legislative history¹⁰⁸ to create an implied exception to the statute's coverage.¹⁰⁹ A well-established principle of statutory interpretation is that when a statute is clear and unambiguous on its face, a court will not refer to legislative history in construing it.¹¹⁰ It is difficult to imagine a statute more comprehensive and unambiguous than the Omnibus Crime and Control Act. The Act clearly states that "except as otherwise specifically provided . . . any person who . . . willfully intercepts, endeavors to intercept, or procures any other person to intercept, or endeavors to intercept any wire or oral communica-

Connin v. Connin, 89 Misc. 2d 548, 392 N.Y.S.2d 531 (1976).

103. 490 F.2d 803 (5th Cir. 1974), *cert. denied*, 419 U.S. 897 (1974).

104. Mrs. Simpson and her husband were living together at the time of the wiretapping. Mr. Simpson performed the tap without outside assistance. 490 F.2d at 804. Compare, *United States v. Rizzo*, 583 F.2d at 907 (spouse hired a private detective to intercept telephone conversations between her husband and third parties); *United States v. Jones*, 542 F.2d at 663 (husband and wife were living apart at the time he intercepted her calls); *United States v. Schrimsher*, 493 F.2d at 849 (defendant and prosecutrix were former lovers who were not married at the time the defendant intercepted and taped her calls); *Kratz v. Kratz*, 477 F. Supp. at 465-66 (husband and wife were separated, but living in the same house at the time the husband hired a private detective to intercept his wife's phone calls); *Remington v. Remington*, 393 F. Supp. at 898-99 (wife hired a private detective to intercept her husband's calls).

105. 18 U.S.C. § 2511 (1976 & Supp. 1980).

106. 18 U.S.C. § 2515 (1976).

107. 18 U.S.C. § 2520 (Supp. 1980).

108. See 276 S.C. at 351, 279 S.E.2d at 359; *Simpson v. Simpson*, 490 F.2d at 806.

109. See *United States v. Jones*, 542 F.2d at 666; *Kratz v. Kratz*, 477 F. Supp. at 468.

110. *United States v. Jones*, 542 F.2d at 667; *Kratz v. Kratz*, 477 F. Supp. at 468.

tion. . ."¹¹¹ is subject to the Act's provisions. Thus, the Act plainly provides that exceptions to the rule will be specifically enumerated, and absent such specific exceptions, the statute covers any person who violates its provisions.¹¹² Interspousal wiretaps are in no way specifically excepted from the statute's coverage.¹¹³ Since Congress apparently was aware of the use of wiretaps in domestic disputes,¹¹⁴ it can only be concluded that Congress intended the Act to cover domestic wiretapping.¹¹⁵

Another of the Act's provisions states that *any* wire or oral communication intercepted by *any* person not specifically authorized to do so shall not be received in evidence in *any* judicial proceeding.¹¹⁶ Significantly, the statutory definition of person includes "any individual."¹¹⁷ The Act's unambiguous language should be interpreted to mean that any individual not otherwise authorized by the plain language of the statute is prohibited from intercepting any oral or wire communications between third parties.¹¹⁸ This construction would reach Mr. Baumrind's actions. Thus, because Baumrind performed a tap that violated the letter of the Act, the information that he acquired should have been deemed illegal and inadmissible as evidence.¹¹⁹

As a final matter, several of the court's observations in *Baumrind* about the privacy interests protected by the Omnibus Crime Control and Safe Streets Act appear to be unsound. The distinction the court draws between interspousal wiretaps performed by a third party and those undertaken without third-

111. 18 U.S.C. § 2511 (1976 & Supp. 1980).

112. *Id.*

113. 18 U.S.C. §§ 2510, -2520 (1976 & Supp. 1980).

114. *See*, *United States v. Jones*, 542 F.2d at 668, n.12. Professor G. Robert Blakey, one of the primary draftors of Title III, stated that "the use of electronic surveillance techniques in this country has . . . widely fallen into the hands of private individuals and [has] been used chiefly in two areas: Domestic relations investigations and commercial espionage." *Hearings on the Right to Privacy Act of 1967 Before the Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. pt. 2, at 413 (1967). *See also* S. REP. NO. 1097, 90th Cong., 2d Sess. 225 (1967); *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2274.

115. *See* *Kratz v. Kratz*, 477 F. Supp. at 470-71; *Rickenbaker v. Rickenbaker*, 290 N.C. 373, 381, 226 S.E.2d 347, 352 (1976).

116. 18 U.S.C. § 2515 (1976).

117. 18 U.S.C. § 2510(6)(1976).

118. *See* *United States v. Jones*, 542 F.2d at 667, 671; *Kratz v. Kratz*, 477 F. Supp. at 469-70.

119. 18 U.S.C. § 2515 (1976).

party participation is largely illusory. This view, which presumes that a third party intrusion into the marital home is a much greater violation of privacy than personal surveillance by the other spouse,¹²⁰ ignores the very purpose of the Act: to protect privacy by prohibiting *all* interceptions except those otherwise provided for.¹²¹

The court's suggestion that one spouse has little or no justifiable right to an expectation of privacy in the marital home vis-a-vis the other spouse is also troublesome.¹²² Notably, the court distinguished from *Baumrind* a case¹²³ in which the spouses were living apart at the time of the interception, indicating that under those circumstances the interception should be prohibited because the expectations of privacy are greater and more justifiable.¹²⁴ Although at first glance this reasoning seems logical,¹²⁵ it

120. See *Simpson v. Simpson*, 490 F.2d at 809; *Baumrind v. Ewing*, 276 S.C. at 352-53, 279 S.E.2d at 360.

121. 18 U.S.C. § 2511 (1970 & Supp. 1980). It makes no difference whether a spouse hires someone else to do the surveillance or does it himself, the end result is the same. The private detective acts only as the agent of the spouse and it is the spouse who will use the product of the tap. *Kratz v. Kratz*, 477 F. Supp. at 471-72.

122. Even if the court's assumption is correct, it is irrelevant for the purposes of Title III since interception of wire communications is proscribed regardless of any expectation of privacy. *Kratz v. Kratz*, 477 F. Supp. at 472-73. The Act distinguishes between "oral" and "wire" interceptions; only the definition of "oral" interception requires an expectation of privacy in order to be prohibited. 18 U.S.C. § 2510(2)(1976). The definition of "wire" interception has no such requirement. 18 U.S.C. § 2510(1)(1976).

123. *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976).

124. 276 S.C. at 352-53, 279 S.E.2d at 360. This distinction drawn between the two cases is somewhat illusory because *Baumrind* had moved to the spare bedroom before the interception took place. He and his wife were thus separated, although they were still living in the same house. Record at 32; See *Kratz v. Kratz*, 477 F. Supp. 463 (husband and wife estranged but living in the same house at the time of the interception).

125. Because the marital relationship has been traditionally viewed as one of intimacy and sharing, courts have been reluctant to examine the issue of interspousal privacy. It is, however, highly questionable whether marital vows should protect surreptitious interceptions by one spouse of the other's private telephone conversations with third parties. After all, Congress intended Title III to be applicable to all individuals who violate its provisions.

Courts have slowly come to recognize the need for legal and personal individuality within a marriage. Increasingly, the notion that husband and wife are one entity is being abandoned. See, e.g., *United States v. Dege*, 364 U.S. 51 (1960); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). See also, *The Equal Opportunity Credit Act of 1976*, 15 U.S.C. § 1691 (1976); Comment, *Interspousal Electronic Surveillance Immunity*, 7 U. Tol. L. Rev. 185, 190 n.27 (1975).

This consideration of individual privacy rights in interspousal wiretapping cases would certainly bring the courts closer to a decision that perpetuates the Congressional

circumvents an important consideration: when one spouse taps the other's calls, it is not only the privacy of the targeted spouse which is violated, but also the privacy of every person who calls the marital home.¹²⁶ Thus, *Baumrind* ignores the well-established principle that the right to privacy is designed to protect people not places.¹²⁷

The cases other than *Baumrind* that have considered inter-spousal expectations of privacy have concerned only the rights of spouse vis-a-vis spouse, not spouse vis-a-vis a third party.¹²⁸ Even if marital privilege somehow transcends certain fundamental rights of a spouse in relation to his mate, surely this privilege cannot extend to abrogate the rights of third parties. Clearly, the court could not have thoroughly examined the ramifications of its decision to have left so vital a point in question.

As a result of *Baumrind*, evidence procured through inter-spousal wiretaps performed by one spouse in the marital home is admissible in South Carolina courts, even against third parties. The holding of *Baumrind* is, however, limited to the fact situation of that case. The supreme court has not yet ruled on the permissibility of third party wiretaps or wiretaps between marriage partners living separately. Consequently, it would be advis-

intent that all individuals should be protected from unauthorized wire surveillance.

126. *United States v. Jones*, 542 F.2d at 670. The inherent offensiveness of this situation was described by Mr. Justice Brandeis:

Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.

Olmstead v. United States, 277 U.S. 438, 475-76 (1928)(Brandeis, J., dissenting). Justice Brandeis' opinion that there is a constitutional right to privacy in wire communications was later accepted by a majority of the Court in *Berger v. New York*, 388 U.S. 41 (1967), and in *Katz v. United States*, 389 U.S. 347 (1967).

127. *Katz v. United States*, 389 U.S. at 351.

128. See, e.g., *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977); *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974). Notably, in *Gill v. Willer*, 482 F. Supp. 776 (W.D.N.Y. 1980), a suit for damages by the third party conversant, the court distinguished *Anonymous* on the grounds that in *Anonymous* no nonfamily member was involved. The court in *Gill* saw this as a controlling factor and denied defendant's motion to dismiss.

able for practitioners to proceed carefully in advising their clients about interspousal wiretapping.¹²⁹

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129. After the *Baumrind* decision the United States Attorney General for the District of South Carolina noted opposition to the court's holding in a letter to the *Transcript*. He asserted that "all wiretapping, interspousal included, still constitutes a criminal act as far as [his] office is concerned." He further stated that every incident of wiretapping reported to his office will be investigated, and where it is in the best interest of the public to do so, wiretapping will be prosecuted. For this reason, he suggested that lawyers advise their clients against wiretapping. Letter from Henry Dargan McMaster, United States Attorney to O. Daniels Black, Editor of the *Transcript* (January 20, 1982).