Criminal Law

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CRIMINAL LAW

I. Evidence Offered in Mitigation of a Death Sentence Is Limited by Relevancy

In *State v. Koon*, the defendant was convicted of murder and sentenced to death by an Aiken County jury. During the sentencing phase of his trial, his attorneys offered in evidence the deposition of E. Monsell Pattison, a psychiatrist and chairman of the Department of Psychiatry of the Medical College of Georgia. Dr. Pattison testified that his examination of Koon resulted in a diagnosis of a schizotypal personality disorder. The defense also asked the doctor three questions concerning the defendant's ability to adapt to long-term institutionalization, to behave non-violently in the controlled prison environment, and to function and contribute to society while in prison. The trial court, in response to the solicitor's objection, ruled all three of

1. 278 S.C. 528, 298 S.E.2d 769 (1982).
2. Brief of Appellant at 43.
3. Q: Do you have an opinion as to [the defendant's] ability to adapt to a long-term institutional environment?
   A: Yes. Both from the records and from observing him in the jail and from talking to him, it is, I think, quite clear in my opinion that he adapts very well to an institutional environment. ... I would be willing to risk a professional prediction in that I would predict that he would make an overall excellent institutional adjustment on a long-term basis. ...
   Q: Do you think Paul would be a violent person in an institutionalized environment?
   A: Again, in my professional opinion I feel confident in a reasonable frame to conclude that he would not be violent or dangerous within a custodial institution. The basis for my opinion is his past record within the custodial environment, his ability to conform within that environment, not only to maximum seclusion, but also conforming to the rules and regulations when he was under minimal supervision. Furthermore, his past history and his present state suggests that he performs interpersonally much better with men. That his major provocations of explosive and assaultive behavior is with women rather than men. Therefore, I would conclude that he would be a very good risk for good adjustment in an institution and a very low risk for assaultive or violent behavior in an institutional setting.
   Q: He would be, in your opinion, could be a contributive [sic] member to a prison institution?
   A: Again, for the same reasons, I would say yes, in my professional opinion. Record at 2277-80.
these questions irrelevant.4

The South Carolina Supreme Court held that in capital cases, the sentencing authority is concerned only "with the existence or non-existence of mitigating or aggravating circumstances involved in or arising out of the murder, not the convicted murderer's adaptability to prison life. The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime."5 The court found support in Lockett v. Ohio,6 where the United States Supreme Court stated that trial judges in capital cases retain the discretion to exclude irrelevant evidence.7

A full understanding of the requirements of capital sentencing requires a review of the evolution of modern death penalty decisions. In 1972, the United States Supreme Court, in Furman v. Georgia,8 invalidated existing capital punishment statutes because the excessive discretion possessed by the sentencing authority allowed imposition of sentences in an arbitrary manner, "wantonly and . . . freakishly."9 The states were rendering death sentences with "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."10 Without sentencing guidelines embodied in statutes, such schemes were "pregnant with discrimination,"11 with the ever present danger that racial bias would influence sentencing. Following Furman, the states rushed to draft statutes which were supposedly consistent with the innumerable constructions which could be given that decision. The most common answer to Furman was a list of statutory aggravating and mitigating circumstances, causing the sentencers to focus on the circumstances of each crime and of each defendant while limiting the availability of the death penalty to cases involving at least one aggravating circumstance.12 In 1976, the Court upheld three

4. Record at 1654-55.
5. 278 S.C. at 536, 298 S.E.2d at 774.
7. 438 U.S. at 604 n.12.
9. Id. at 310 (Stevens, J., concurring).
10. Id. at 313 (White, J., concurring).
11. Id. at 257 (Douglas, J., concurring).
12. North Carolina interpreted Furman as requiring that no discretion be vested in
state death penalty statutes as consistent with *Furman*.\(^\text{13}\) The Court interpreted these statutes as creating no substantial risk that the death penalty would be inflicted in an arbitrary or capricious manner.\(^\text{14}\) In striking down the mandatory death penalty statute passed in North Carolina, however, a plurality noted that a necessary component of the sentencing scheme is consideration of the character and record of the individual offender and the circumstances of the particular crime.\(^\text{15}\)

Finally, in *Lockett v. Ohio*,\(^\text{16}\) Chief Justice Burger, writing for a plurality, held that a defendant has the right to require that the sentencing authority be given the opportunity to consider mitigating circumstances in the individual case. The Court invalidated an Ohio statute which limited the sentencer’s discretion to only three mitigating circumstances,\(^\text{17}\) stating:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.\(^\text{18}\)

The Court based its holding on the American tradition of individualized sentencing,\(^\text{19}\) pulling further away from the *Furman* requirement that sentencing discretion be limited.

Under the *Lockett* requirement, states may limit the *types* of circumstances to be considered and comply with the letter

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the sentencers and enacted a *mandatory* death penalty for aggravated murder. This statute was overturned in *Woodson v. North Carolina*, 428 U.S. 280 (1976) (see infra note 15 and accompanying text).


14. Typical of the Court’s interpretation is the language of Justice Stewart’s opinion in *Gregg*, 428 U.S. at 188.


17. Those circumstances were: (1) where the victim induced or facilitated the defense; (2) where duress, coercion or strong provocation existed; and (3) where the offense was the product of psychosis or mental deficiency, though such condition was insufficient to establish the defense of insanity. 438 U.S. at 612-13.

18. *Id.* at 604 (emphasis in original) (footnotes omitted).

19. *Id.* at 602.
but perhaps not the spirit of the opinion. *Lockett* could even be read as imposing no positive duty to consider all mitigating evidence offered, regardless of its connection to the defendant or his crime. Instead, the Court requires only that before imposing sentence, the sentencing authority consider the defendant's character and record along with the circumstances of the crime. This point was made clear when the *Lockett* opinion stated: "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."  

This exclusion of evidence as irrelevant has arisen in many post-*Lockett* decisions. Even in capital cases, the trial judge must have discretion to limit the introduction of evidence by use of some standard. These standards are generally found in rules of evidence. In capital sentencing, however, the full exploration of the mitigating and aggravating circumstances requires that the rules be bent to some extent. In *Lockett*, the Chief Justice wrote that "where sentencing discretion is granted, it generally has been agreed that the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant—if not essential—[to the] selection of an appropriate sentence.'" Whether ordinary evidence rules which would restrict the sentencer's access to this information may stand after the *Lockett* decision was answered in *Green v. Georgia*, where the Supreme Court held that the rationale of *Chambers v. Mississippi* precludes a state court from excluding evidence "highly relevant to a critical issue in the punishment phase" when there is substantial assurance of its reliability. Still, the question of what is relevant to sentencing remains unanswered.

Koon argued that under *Lockett* as well as the State's own

20. Id. at 604 n.12.  
21. See infra notes 30-32.  
22. 438 U.S. at 602-03 (quoting Williams v. New York, 358 U.S. 576, 585 (1959)) (emphasis by the Chief Justice in *Lockett*).  
24. 410 U.S. 284 (1973). *Chambers* held that states could not mechanistically apply rules of evidence to defeat the ends of justice when a state's voucher rule prevented the defendant from cross-examining an adverse witness.  
25. 442 U.S. at 97.
death penalty statute, the sentencing authority must consider all circumstances which would tend to reduce a defendant's sentence. This proof would necessarily include predictions by a qualified expert that the defendant would likely adjust to life imprisonment and would not be a threat to the prison population or to society outside the prison walls. Koon contended that under Jurek v. Texas "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."

In practice, the courts have not followed the Jurek dicta. They consistently hold that evidence not relevant to the matter at issue—the defendant's character, record, or the circumstances of the charged offense—may be excluded from the sentencing phase of a capital trial at the court's discretion. Thus, courts hold that retribution and deterrent evidence is irrelevant; a judge may exclude evidence of the procedures for carrying out a death sentence as well as evidence tending to show the failure

27. Brief of Appellant at 44-45.
29. Id. at 275. In Barefoot v. Estelle, 103 S. Ct. 3383 (1983), the Court held that psychiatric testimony for the prosecution which sought to predict future violent behavior was not improper at a sentencing trial. The Court rejected the defendant's argument that such testimony was unworthy of belief, stating "We are unconvinced . . . that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case." Id. at 3398.
30. Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), rev'd on different grounds, 104 S. Ct. 872 (1984); Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982); People v. Free, 94 Ill. 2d 378, 447 N.E.2d 218 (1983); State v. Cherry, 298 N.C. 36, 257 S.E.2d 551 (1979), cert. denied, 446 U.S. 941 (1980); Rodriguez v. State, 641 S.W.2d 669 (Tex. Crim. App. 1983). Of these cases, Horton and Rodriguez are most significant to the facts here. In Horton, the court cited footnote 12 in Lockett in excluding the defendant's argument at sentencing that he would not be eligible for parole for at least 20 years. 295 S.E.2d at 284. In Rodriguez the defendant's psychologist attempted to testify to the number of "sociopaths" in the prison system. The court held this evidence properly excluded. 641 S.W.2d at 673-74.
31. Cases holding that a trial judge may exclude evidence of the procedures for carrying out the death sentence are Harris v. Pulley, 692 F.2d 1189, 1203 (9th Cir. 1982); Simmons v. State, 278 Ark. 305, 318, 465 S.W.2d 680, 687 (1983); Songer v. State, 365 So. 2d 696 (Fla. 1978); Horton v. State, 249 Ga. 871, 873, 295 S.E.2d 281, 284-85 (1982); State v. Thompson, 278 S.C. 1, 11, 292 S.E.2d 581, 587 (1982). Of these, Simmons is most informative. It held that such proof was simply not mitigating evidence. 278 Ark. at 318, 465 S.W.2d at 687. Only evidence of the defendant's record and character of offense is relevant. See supra note 30.
of capital punishment as a deterrent to serious crime.\textsuperscript{32}

The South Carolina Supreme Court explained its \textit{Koon} decision in \textit{State v. Plath}.\textsuperscript{33} In \textit{Plath}, the defense presented expert testimony which attempted to demonstrate the deprivation caused by a life sentence, and likened such punishment to a form of slavery. The defense also presented evidence indicating the ineffectiveness of capital punishment as a deterrent to crime, concluding that as a matter of social policy, life imprisonment for persons such as the defendant was preferred. In distinguishing between similar testimony held irrelevant in \textit{Koon} and character evidence, the court stated:

The distinction lies in the lack of logical connection between adaptability to confinement and the specific personality or character traits which were instrumental in leading the defendant to commit the particular crime at issue. The dividing line is fine indeed, yet not impossible of discernment. A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure [in prison].\textsuperscript{34}

The court in \textit{Plath} also cautioned the bench not to tolerate excursions by the defense into social policy and penology.\textsuperscript{35} The jury should not be permitted to intrude upon the legislature's role in determining the social utility of capital punishment. "In

\textsuperscript{32} Holding that the judge may exclude offers of proof that capital punishment is not a deterrent to crime are \textit{State v. Cherry}, 298 N.C. 86, 97-99, 257 S.E.2d 551, 559-60 (1979); \textit{State v. Johnson}, 632 S.W.2d 542 (Tenn. 1982). In \textit{Cherry}, the court held that evidence in a sentencing trial was properly excluded when it consisted of the affidavit of a convicted felony murderer that he had been rehabilitated and was serving a responsible role in society, a psychiatrist's affidavit that the death penalty fails as a deterrent, and the affidavit of a minister stating his religious objections to capital punishment. 298 N.C. at 97-99, 257 S.E.2d at 559. In \textit{Johnson} the defense offered "expert" opinion on the validity of the death penalty as a deterrent, the morality of western society, and the relationship between youth and accountability for decisionmaking. It was held that such evidence is irrelevant and inadmissible, even under a statute, TENN. CODE ANN. § 39-2-203(c) (1982), which calls for consideration of any relevant evidence in sentencing trials. 632 S.W.2d at 547-48.

\textsuperscript{33} \textit{Id. at} 15, 313 S.E.2d at 627.

\section*{References}

34. \textit{Id.}
the sentencing phase of a capital case, the jury shall understand the terms 'life imprisonment' and 'death sentence' in their ordinary and plain meaning without elaboration." Thus, sentencing authorities in South Carolina may not consider the general validity of the death sentence as a retributive or determining tool, but must maintain a "strict focus" on the relevant issues.

The court, however, failed to consider that evidence of a prisoner’s adaptability to the institutional environment may be a positive aspect of his character to be considered in mitigation of a sentence. Predictions that a prisoner will desist from violent behavior while incarcerated may indicate a potential for rehabilitation. The jury should be able to assign whatever weight they deem appropriate to this aspect of his character. Instead of construing such evidence simply to demonstrate that Koon would likely "behave himself" while confined in the intolerably bleak conditions of prison, the court could interpret this offer as relating to his character. As such, it is universally held relevant to sentencing. 37

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36. Id. at 14, 313 S.E.2d at 627.

37. The court alternatively held that the psychiatrist’s testimony could be excluded as cumulative to the testimony of another defense psychiatrist. However, the appellant contended that Dr. Pattison’s testimony in the deposition, see supra note 3, explored issues not covered by the other expert, who had failed to offer an opinion on Koon’s future behavior as an inmate or on the likelihood that he would not be violent in a prison environment. Brief of Appellant at 45-46. To the contrary, the other psychiatrist left the jury with the impression that Koon might have violent episodes in the future. Brief of Appellant at 46.

On resentencing, Koon was again sentenced to death. At the resentencing trial, Koon offered the testimony of two prison guards who would testify that Koon had been a model prisoner during the two and one-half years of incarceration since the crime and had adjusted well to the prison environment. Consistent with Koon I, the defense cautioned the guards not to speculate about Koon’s future adaptability or behavior. Nevertheless, the trial judge interpreted Koon I as permitting the exclusion of this testimony because it bore no "logical relationship to the crime itself." Transcript at 9-17.

The supreme court held that past behavior in prison does bear on a defendant's character and is relevant. However, this exclusion was not reversible error since the court found that similar evidence was admitted and that the testimony would have been cumulative. Thus, Koon’s death sentence stands. State v. Koon, No. 22075, slip op. (S.C. April 3, 1984).
II. Improper Arguments by the Solicitor

*State v. Smart*[^38] is the latest among a line of decisions requiring prosecutorial adherence to professional standards while addressing the jury during the sentencing phase of a capital trial. The South Carolina Supreme Court held four specific references by the solicitor during the sentencing phase improper and ordered resentencing. In contrast, the court also concluded that the solicitor’s guilt phase argument that the state’s evidence had been uncontradicted was not an improper comment on the defendant’s failure to testify.[^39]

Ronald Francis Smart was charged with four counts of murder, and the solicitor sought the death penalty. During the guilt phase of the trial, the defense introduced into evidence Smart’s recorded statements which had been taped by Cayce police while he was in custody. These tapes revealed Smart’s motivation for the two admitted killings, and also gave an indication of Smart’s state of mind at the time of arrest.[^40] The defendant,


[^39]: The court also criticized the recent misuse of the *voir dire* examination in capital cases. The court commented on the “extraordinary degree of freedom” given the defense in conducting the *voir dire* and noted that there is no right to use the examination to develop personality profiles of the veniremen. The court pointed to one exchange during the *voir dire* in *Smart* where a defense attorney questioned a female juror on her drinking habits. 278 S.C. at 523, 299 S.E.2d at 690. The special *voir dire* provisions of S.C. Code Ann. § 16-3-20(D) (Supp. 1983) are not a “license to forage at will over the private lives of jurors.” *Id.* The court criticized this practice as a waste of time and an intrusion into the juror’s privacy which diminishes the public’s respect for jury duty. *Id.* The court suggested that the trial court conduct a preliminary *voir dire* examination in advance of counsel to narrow the questioning to relevant matters. *Id.* See also *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984).

[^40]: In the first tape, recorded soon after his arrest, Smart raves about “Red Dog,” who killed all of the victims, and about “demons” inside him. The second, recorded 45 minutes later, presents a more coherent explanation. Smart contended that he killed two of the men in a fight after Smart objected to one of the men sleeping with a thirteen year old girl. He explained that the two male victims killed the two women and that Smart killed the two men. This explanation appears to have carried weight with the jury as Smart was acquitted of murdering the two females.

When the defense proffered the tapes, the jury was excused and the trial judge told defense counsel:
however, did not testify at trial. In his closing argument, the solicitor commented that certain of the state’s evidence was uncontradicted, and asked the jury whether anyone had testified that robbery was not Smart’s motive for the killings. Smart was found guilty of two murders and acquitted of the others.

During the sentencing phase, the solicitor focused on his own decision to seek the death penalty. Referring to Smart’s prior escape, the solicitor stated that law officers who had risked their lives in recapturing Smart would be aggrieved by

I think you gentlemen should know and the defendant should know, and I address myself to the defendant personally, that if these tapes are played after being presented in evidence for the defense, any right against self-incrimination is waived. These tapes being offered by the defense don’t come within the pervue [sic] of Miranda.

Record at 1745.

Defense counsel, after conferring with Smart, responded: “As we understand it we are waiving any rights as to the admissibility of the tapes. We are not waiving any right we have with regard to the defendant remaining silent.”

The court replied: “Except to the extent he is not silent on the tapes. Obviously you can’t waive that.” Record at 1746 (emphasis added).

41. The solicitor stated:

They [the defense] are going to say murder couldn’t have been committed during the course of stealing or robbing with a deadly weapon because they were all dead, and he didn’t intend to rob them. That’s what they are going to tell you. Is that in the record? Has anybody testified to that, that robbery wasn’t his motive, or he didn’t intend to steal anything? I didn’t hear it. If you did, then you give it whatever weight you deem necessary.

Record at 2281-92.

The defense argued on appeal that since the only other witnesses to the killings were the victims themselves, and since a defendant’s motive or intent is inherently something about which only the defendant himself can provide direct evidence, these comments could have no effect other than to focus the jury’s attention on the defendant’s failure to testify. Brief of Appellant at 63.

42. The solicitor argued during the sentencing phase: “I know what you are going through because I went through it. You see, under the law I must notify the defendant if the death penalty is going to be an issue in the case or not.” Record at 2287. He further stated:

I had to go through what you folks are going through a long time ago. I had to look at the facts in the case. I had to look at the law. I had to talk with the police officers. I had to talk with the victim’s families and friends. I had to take into consideration what Lexington County wanted.

Record at 2287.

43. Smart’s escape and hostage-taking episode, which occurred during the trial, was not revealed to the jury. As a security measure, the defendant was not brought into the courtroom during a supplemental instruction to answer the jury’s questions. The court, refusing to presume prejudice to the defendant in such circumstances, distinguished conflicting cases on the facts.
any sentence less than death. 44 After urging that the people of Lexington County would disapprove of a life sentence, 46 the solicitor concluded that the death penalty statute would be ripe for repeal if it was not imposed in this case. 46 The jury recommended the death sentence.

A. Solicitor's Comments on the Evidence

A prosecutor may not comment on the accused's post-arrest silence or his failure to testify at trial. 47 Thus, it has been held that a prosecutor refers to silence when it is either his "manifest intention" to draw attention to the silence or when the jury could infer naturally and necessarily that it was a comment on the defendant's silence. 48 The State may, however, comment on the failure of the defense to rebut the government's case, 49 and statements that certain testimony or evidence is uncontradicted have been held proper. 50 Obviously, it is often difficult to determine when a prosecutor is properly commenting on the totality of the evidence and when he begins to improperly comment on the defendant's failure to testify.

Smart contended that the remarks referring to his lack of zeal in revealing the truth were designed to call attention to his failure to testify. The supreme court rejected this argument and chose a different analysis. The court neglected the "manifest intention" test and held that by using his tape recorded state-

44. "What do we say to those law enforcement officers out on the hunt Wednesday night? What do we say to them in the line of duty putting their lives on the line every day? Well, if they kill you, we are sorry fellows, but keep on doing your job?" Record at 2311.

45. See supra note 5.

46. "If this is not the case for the death penalty, I say let's take the law book on the front lawn of the courthouse and rip the death pages out and throw them away, because it should never apply in Lexington County if it doesn't [apply] here." Record at 2311.


48. United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980); United States v. Edwards, 576 F.2d 1152 (5th Cir. 1978); State v. Rouse, 262 S.C. 581, 206 S.E.2d 873 (1974). In Rouse the solicitor's comment that "[i]t is undisputed what happened in the store that day" was held not improper, although the court admitted that an improper comment on the defendant's silence may sometimes be indirect.


ments, the defendant put his own words in evidence. This opened the door for the solicitor’s comment on the evidence as if it had been live testimony.

Because the court failed to cite any authority for this holding, it is necessary to search for the principles on which such a decision may rest. The court could have supported its decision by reference to either of two principles. First, it is proper for a prosecutor to comment on a defendant’s failure to fully testify when he takes the stand but refuses to submit to cross-examination.51 By equating Smart’s lengthy taped explanations to live testimony, the court could base its holding on this principle, and it appears to have done so in stating:

By the device of his tape recorded statements, the appellant through his own words put before the jury several alternative versions of the killings. . . . With the appellant’s own words in evidence, it was by no means improper for the solicitor to question their veracity and direct the jury’s attention to actual evidence already admitted which appellant in his statement seemed to disregard or implicitly refute.52

Second, the court might have relied on the “invited error doctrine.” This theory holds that a party who by some act or comment induces his opponent to commit error may not com-


In Hearst, Patricia Hearst took the stand to testify to events from the time of her kidnapping in February 1974 through September of that year. Her testimony then jumped a full year to the time of her arrest in September 1975. On Cross-examination, she refused to answer questions regarding that year, invoking the Fifth Amendment forty-two times. The Ninth Circuit upheld the finding that Hearst had waived her privilege against self-incrimination as to all relevant matters by taking the stand. Thus, the prosecutor was allowed to continue asking questions knowing that she would refuse to answer. This was interpreted as a comment on her failure to testify to those matters, which was held proper under Caminetti.

In Woomer, the defendant was allowed to testify, during the guilt phase of his murder trial, to the voluntariness of his confession. The South Carolina Supreme Court stated that it knew of no rule which would allow a defendant to take the stand for a limited purpose. The general rule is that once the defendant takes the stand in his own behalf, he waives any privilege against compulsory self-incrimination and must answer all questions. 278 S.C. at 172, 284 S.E.2d at 358.

52. 278 S.C. at 526, 299 S.E.2d at 692.
plain of that error on appeal. In *Babb v. United States*,\(^5\) defense counsel told the jury that the defendant did not take the stand because of the attorney’s trial tactics, not because he wished to conceal the truth. The Eighth Circuit held that such a comment opened the door for the prosecutor to comment on the defendant’s failure to testify.\(^6\) In *Smart*, the defendant’s act of putting his own words into evidence while not actually taking the witness stand might have invited the prosecutor’s adverse comment. However, the invited error doctrine has never been extended to a capital case. For obvious reasons, its use in such a circumstance must be restricted.

*Smart* should be narrowly interpreted by the bench. Serious self-incrimination problems would be raised by broadening the scope of prosecutorial comment in contexts beyond the unique facts of this case. The judge expressly warned the defendant that the introduction of the taped statements would constitute waiver of the privilege against self-incrimination to the extent of its contents, yet the tapes were played, and the defendant’s words and explanations were placed into evidence. This had the effect of live testimony, with the defendant maintaining the distinct advantage of not being subject to cross-examination.

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53. 351 F.2d 883 (8th Cir. 1965).

54. In *United States ex rel Miller v. Follette*, 397 F.2d 363 (2d Cir. 1968), *cert. denied*, 393 U.S. 1039 (1969), the court held that a pro se defendant who twice called attention to his failure to testify in order to explain his reasons for not doing so invited prosecutorial comment.

In *United States v. Feinberg*, 140 F.2d 592 (2d Cir. 1944), *cert. denied*, 322 U.S. 726 (1944), Judge Learned Hand wrote:

The next complaint is that in his closing address the prosecutor commented upon the fact that none of the accused took the stand. At first blush this appears as a grave error, but on closer examination it turns out to have been quite justified. . . . [C]ounsel had said that the jury had heard all the testimony "and the defendants, if they took the stand, could not add anything to that. . . ." In so assuring the jury, the counsel invited their consideration of what the accused would have said on the stand, and surely he surrendered any privilege they had not to testify.

140 F.2d at 595.

Closer to the point is *Manuel v. State*, 541 P.2d 233 (Okla. Crim. App. 1975). The state was allowed to introduce the defendant’s prior statements. The defense counsel stated that the accused actually did testify through those statements, and equated the statements with live testimony. The prosecutor was allowed to argue that the defendant was not a witness and never took the stand. This was held proper under the invited error doctrine.
B. Solicitor’s Comments During the Sentencing Phase

Regarding the solicitor’s remarks during the sentencing phase of the trial, the court amplified its earlier opinions limiting the scope of prosecutorial comment. Remarks improperly drawing attention to the solicitor’s decision to seek the death penalty and comments on the feelings of other citizens and police officers regarding the sentence in this case were prejudicial and warranted a new sentencing trial. The court admonished both bench and bar to recognize that “[c]apital sentencing is a process specific to the crime and the defendant...” By introducing considerations extraneous to the case, such as popular opinion, the solicitor improperly went beyond the “strict focus upon the particular circumstances of the specific crime and the unique attributes of the defendant.”

In State v. Linder, the court recognized that it is the duty of the solicitor to zealously prosecute the case, but his higher duty is to see that justice is done. Closing arguments should be tailored so as not to appeal to the personal biases of the jurors and they should not be calculated to arouse passion or prejudice. The prohibition against such passionate argument

55. See infra notes 59 & 65 and accompanying text.
56. 278 S.C. at 526-27, 299 S.E.2d at 693.
57. Id.
59. Id. at 312, 278 S.E.2d at 339. In State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982), the solicitor made three improperly passionate arguments to the jury. He urged that if the defendant was found innocent, the crime would remain unsolved. 278 S.C. at 438, 298 S.E.2d at 93. The solicitor also commented on the defendant’s refusal to discuss the case with the state’s psychiatrist, 278 S.C. at 440, 298 S.E.2d at 94, and argued that the defendant’s pleas of not guilty should be considered as evidence of lack of remorse. “Has anyone said to you he’s sorry, sorry for what he did?... What have you been told up until you found him guilty? He has pled not guilty. Is that someone who wants to be rehabilitated?” 278 S.C. at 440, 298 S.E.2d at 95. This was held improper.

In State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1982), the solicitor stated: “[R]est assured... that you would not be sitting in judgment upon this case unless I hadn’t decided that his case deserves to be where it is... This is one of the strongest cases overall that I have prosecuted in my eight and one-half years.” 277 S.C at 546-47, 290 S.E.2d at 422. The court held this prejudicial.

In State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), the solicitor, in cross-examining the defendant, asked the defendant whether he had read his alleged confession, and whether “[t]he content of this statement... is one of the most cruel and brutal things that has ever happened, whoever did it?... [W]hoever did it should die, shouldn’t they? Adams responded that the person who did such things should die. The supreme court held this questioning improper delving into punishment during the guilt
arises from the idea that when the opinion of a judge or solicitor becomes a factor in the jury’s deliberation as though it were itself evidence justifying capital punishment, the death sentence may be tainted by an arbitrary factor and would be improper under the South Carolina Code.60

State v. Durden61 set the parameters for prosecutorial argument. So long as the prosecutor stays within the record and its reasonable inferences, he may:

employ any legitimate means of impressing on [the jury] their true responsibility in this respect as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime . . . to dwell on the evil results of crime and to urge a fearless administration of the criminal law. . . .62

Mr. Justice Bussey, in his concurrence, stated that this passage gave too much discretion to the solicitor. He would have instead adopted the American Bar Association Standard relating to prosecutorial argument: “The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury’s verdict.”63

Implicit in the Smart decision is the solicitor’s invasion of the province of the jury in drawing attention to his own decision to seek the death penalty. This not only injects his personal

phase. 277 S.C. at 119-20, 283 S.E.2d at 584.
In State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981), the solicitor stated to the jury that if the jury failed to recommend the death penalty in this case, he would never seek it again. 277 S.C. at 143, 284 S.E.2d at 230. The solicitor in Smart made an identical argument, and it too was held improper. 278 S.C. at 526, 299 S.E.2d at 692.
62. Id. at 92, 212 S.E.2d at 590 (quoting from 23A C.J.S. Criminal Law § 1107 (1961)).
63. 264 S.C. at 93-94, 212 S.E.2d at 591 (Bussey, J., concurring); ABA STANDARDS FOR CRIMINAL JUSTICE RELATING TO ARGUMENTS OF THE PROSECUTOR TO THE JURY § 5.8 (Approved Draft 1971).
opinion into the deliberation, but also minimizes the jury’s responsibility for the defendant’s fate. *State v. Woomer*,64 decided after the trial in *Smart*, made it clear that a reversal is necessary when a prosecutor attempts to diminish the great responsibility placed solely on the jury for imposing the death sentence, by stressing that he made this decision for them when he decided to seek the death penalty.65

While *Smart* stands as a warning to solicitors to avoid impassioned arguments in sentencing trials, its most significant aspect is the allowance of solicitor’s comments, however oblique, on the defendant’s failure to testify. It bears repeating that this case is special on its facts, as it is rare that a defendant is allowed to introduce his own taped statement and avoid full testimony. To allow adverse comment whenever the defendant places his words into evidence, by prior written statements or otherwise, could interfere with his right to present a defense as well as his privilege against self-incrimination.

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III. INTERFERENCE BY THE TRIAL JUDGE IN JURY DELIBERATIONS

*State v. Elmore*66 made it clear that the South Carolina Supreme Court will not tolerate any interference by the trial judge in jury deliberations such as entering the jury room to answer questions, requesting periodic status reports on deliberations, or issuing supplementary charges which could be interpreted as biased or coercive. Edward Lee Elmore was charged with murder, first-degree criminal sexual conduct, and burglary. The solicitor sought the death penalty. During the guilt phase of the trial, the judge entered the jury room to answer a question. He was ac-

64. 277 S.C. 170, 284 S.E.2d 357 (1981).
companied by counsel from both sides but not by the defendant. Elmore was later found guilty. While the jury was deliberating on the penalty, the judge again entered the jury room, without counsel, and requested that periodic status reports on the jury's progress be sent to him.

These status reports revealed that the jury was deadlocked, with one member voting contrary to the others. The judge then charged, referring to the voir dire examination, that:

[I]n every case, we discussed that with you. We knew what members of the jury panel were opposed to the concept of capital punishment. . . . [I]n every case of my examination of each one of you, you each, without equivocation, without hesitation, told me under oath that you could render a verdict supported by the evidence and the law in the case; a recommendation of either one of the recommended punishments. . . . Now, of course, I do not wish to identify any persons of the jury . . . but I felt it was imperative that I go back over this point of the jury selection process with you.67

The jury later returned a recommendation of death, and Elmore appealed both the conviction and the sentencing procedure.

The supreme court reversed the convictions and criticized the sentencing procedure. The judge's presence in the jury room on both occasions constituted elementary error. Entering the jury room to answer a question was a violation of judicial propriety despite the fact that the judge was accompanied by counsel from both sides.68 The defendant was excluded from the confrontation with the jury, so his right to be present at all stages of the trial was violated.69 This right to be present has been held to extend to supplemental questions of the jury.70 The court firmly cautioned against such behavior in the future and held that the absence of prejudice to the defendant had no bearing on the existence of reversible error created by such conduct.71

67. Id. at 423-24, 308 S.E.2d at 785-86 (emphasis by the court).
68. Id. at 421-22, 308 S.E.2d at 784-85.
69. Id. at 422, 308 S.E.2d at 785 (citing State v. Taylor, 261 S.C. 437, 442, 200 S.E.2d 387, 389 (1973)).
71. But cf. Rogers v. United States, 422 U.S. 35, 40 (1975) (a violation of defendant's right to be present at every stage of trial may in some situations be harmless error); State v. Smart, 278 S.C. 515, 524-25, 299 S.E.2d 686, 691-92 (mere absence of
The most important issue here is judicial coercion of the jury to reach a verdict. In condemning the entrance into the jury room and the requests for status reports, the court cited *State v. Middleton*,72 which dealt with inquiries by the court into the jury's failure to agree.

When a jury is unable to agree, the court may properly recall them for the purpose of ascertaining whether such disagreement arises from the facts or from the law. If the former, the judge may inquire whether there is a reasonable prospect of agreement on the facts or whether the disagreement is irreconcilable. If the latter, it is proper for the trial judge to give further instructions. It is improper, however, to make the jury members reveal their standing in regard to a conviction or acquittal of the accused.73 *Middleton* also allows the judge to give supplemental instructions to a divided jury, but only within the limits of *Allen v. United States*.74

The court in *Elmore* reaffirmed the view in *Middleton* that supplemental instructions to a divided jury must be limited to the factually neutral charge upheld in *Allen*.75 The court found the entire instruction in *Elmore* highly prejudicial and coercive. Without doubt, the charge was directed to the juror or jurors who were voting against the death sentence by calling attention to the process of *voir dire* examination in which the jurors were chosen on the basis of their ability to render a death sentence.76 In effect, the trial court questioned why those jurors, who had stated earlier that under the right facts they would be able to vote for the death penalty, could not do so now. The supreme court also stated that the instruction urged agreement at all costs rather than reminding the jury of its right to retain consci-

defendant does not create a presumption of prejudice justifying reversal of conviction).

72. 218 S.C. 452, 63 S.E.2d 163 (1951).
73. Id. at 457, 63 S.E.2d at 165.
74. 164 U.S. 492 (1896).
75. 279 S.C. at 424, 308 S.E.2d at 786.
76. Id. See Witherspoon v. Illinois, 391 U.S. 510 (1968), which noted that a challenge for cause may be used against a venireman who states an absolute refusal to return a death sentence, while a juror may not be challenged for cause simply because he is opposed to the concept of capital punishment. Compare the South Carolina Code, which states that "a person may not be disqualified, excused or excluded from service as a juror therein by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict of guilty according to law." S.C. CODE ANN. § 16-3-20(E) (Supp. 1983)(emphasis added).
ently held views, as the court must do under Allen.\textsuperscript{77} The court cited United States v. Rogers,\textsuperscript{78} emphasizing the importance of a properly stated Allen charge:

Here what was given was not the Allen charge, but only a paraphrase of that portion of it which directs the attention of the jurors to their duty to agree, without the reminder of their duty of dissent if dissent is founded upon reasoned conclusions reasonably arrived at and reasonably held. Without reference to both sides of the coin, a strong statement of the duty of agreement may readily be construed by those jurors in the minority as requiring a deferential surrender to the views, however unreasoned they may be, of the majority.\textsuperscript{78}

From Elmore, it is clear that any behavior which may have the effect of coercing a jury’s verdict will not be tolerated. The judge, a figure of authority, is at the center of the jury’s attention, and they look to him for guidance. That the judge may intimidate a single dissenting juror to condemn a prisoner to death is a dangerous possibility. The courts must beware of any action which may be interpreted as coercive. This is especially so in a capital case, for otherwise the requirement that the jury unanimously impose sentence would be meaningless.

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\textsuperscript{77} 279 S.C. at 424, 308 S.E.2d at 786. The instruction approved by the Supreme Court stated, \textit{inter alia}, that in many cases absolute certainty could not be expected; that, although the verdict must be the verdict of each juror and not a mere acquiescence in the conclusion of the others, they should each examine the question with proper regard and deference to the views of the others; that it is their duty to decide the case if they can conscientiously do so; that if a much larger number were for conviction a dissenting juror should consider whether his doubt was a reasonable one as it made no impression on the minds of so many men; that if, however, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of their judgment. 164 U.S. at 501-02.

The Ninth Circuit has held that the Allen charge, without more, stands at the brink of impermissible coercion, and held it error in a federal prosecution to repeat an Allen charge after the jury has reported itself deadlocked and has not requested that the instruction be repeated. United States v. Seawell, 550 F.2d 1159, 1162-63 (9th Cir. 1977)(citing Sullivan v. United States, 414 F.2d 714 (9th Cir. 1969)).

\textsuperscript{78} 289 F.2d 433 (4th Cir. 1961).

\textsuperscript{79} Id. at 436.
IV. CRIMINAL SEXUAL CONDUCT IS EQUIVALENT TO RAPE AS AN AGGRAVATING CIRCUMSTANCE WARRANTING CAPITAL PUNISHMENT

In Elmore, the court also considered the defendant’s argument that because the trial judge charged the jury on “criminal sexual conduct” instead of common law rape, a death sentence could not stand. The state death penalty statute refers to “rape” as an aggravating circumstance of murder which would allow consideration of the death penalty.80 “Rape” is, however, no longer a statutory offense since it has been replaced by the term “criminal sexual conduct.” This problem arises because at the time the death penalty statute was passed, the former rape statute was in the South Carolina Code.81 The rape statute essentially embodied common law rape, the elements of which are carnal knowledge82 without consent83 and by force.84

In 1977 the current criminal sexual conduct statutes repealed the rape statutes and replaced them with three degrees of sexual offenses.85 Most significantly, the current statutes define rape in terms of “sexual battery” which includes “any intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body. . . .”86

Elmore contended that the judge, in charging criminal sexual conduct, failed to charge the elements of “rape” as an aggravating circumstance for which the death penalty may be imposed. Rape, he argued, requires the additional element of penetration by the male sexual organ as necessary for “carnal knowledge,”87 and penetration must be proven beyond a reasonable doubt.88 Because the jury was not charged that penetration must be accomplished by the male organ, an essential element of

81. “Whosoever shall ravish a woman . . . when she did not consent, either before or after, or ravisheth a woman with force, although she consent after, shall be deemed guilty of rape.” S.C. Code Ann. § 16-3-630 (1976).
88. Brief of Appellant at 54-55 (citing Jackson v. Virginia, 443 U.S. 307 (1979)).
rape was omitted. The omission was significant because there was a dispute as to whether the victim had been penetrated by a male organ or by a foreign object. The defense contended that if the elements of rape were not properly charged, the aggravating circumstance of rape could not be found. This argument finds some support in a 1979 Attorney General's opinion\(^\text{89}\) which held that a person could not be disqualified from voting on the basis of a criminal sexual conduct conviction absent a determination that the facts on which the person was convicted would have been sufficient to support a rape conviction.\(^\text{80}\) This implies that criminal sexual conduct is not necessarily synonymous with rape.

The court summarily disposed of defendant's argument, stating, "It is evident that it was the intent of the legislature that these terms ['rape' and 'criminal sexual conduct'] be interchangeable and that criminal sexual conduct be an aggravated [sic] circumstance."\(^\text{81}\) The court then stated that "a conviction of criminal sexual conduct in any degree constitutes the offense of rape when the facts on which the conviction was based are sufficient to support a conviction under the previous statutory or common law offense of rape."\(^\text{82}\) The court cited State v. Summers\(^\text{83}\) which stated that the term "rape" is not used in the current statutes, but that the offenses are referred to as "criminal sexual conduct."\(^\text{84}\) There was no discussion in Elmore of the fact that the current statutes changed the requirement of penetration. Thus, to achieve the result in Elmore the court implicitly discarded the requirement of a particular type of penetration required for common law rape when applied as an aggravating circumstance in capital crimes. This holding should finally resolve the confusion caused by references to "rape" in other sections of the South Carolina Code.

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\(^{90}\) S.C. Code Ann. § 7-5-120 (1976) disqualified persons convicted of "rape" from voting.
\(^{91}\) 279 S.C. at 422, 308 S.E.2d at 785.
\(^{92}\) Id.
\(^{94}\) Id. at 13, 274 S.E.2d at 428.
V. THE STATE HAS NO DUTY TO SECURE CUSTODY OVER A PRISONER HELD IN ANOTHER JURISDICTION FOR POST-CONVICTION HEARINGS

The South Carolina Supreme Court, in Clayton v. State, held that a prisoner incarcerated in another jurisdiction for other crimes has no right to be returned, at the state's expense, to South Carolina to assert post-conviction claims based on a conviction in this State. This holding implies that if the prisoner has a right to assert such claims prior to his release from custody in another state, he must secure his temporary release and furnish his own transportation. This effectively denies prisoners the right to bring actions under the state Post-Conviction Procedure Act until they are brought back to South Carolina to serve their sentences.

Robert Clyde Clayton was indicted for murder in Spartanburg, South Carolina in May 1978. Five months later, he was convicted of an unrelated federal bank robbery and was sentenced to serve twenty-five years in a federal prison in Pennsylvania. In July 1979 he pleaded guilty to voluntary manslaughter on the Spartanburg charge and was sentenced to twenty-four years to run concurrently with the federal sentence. While serving his sentence in the federal prison, Clayton sought relief from the state conviction on the basis of ineffective assistance of counsel. Because the state refused to bring Clayton back to South Carolina, he was unable to attend his scheduled evidentiary hearing. Since his public defender could not proceed without him, the action was dismissed without prejudice. The State contended that as moving party to a civil action, Clayton had the responsibility to secure his attendance at the hearing, and that the state was without the funds or the statutory authority...

95. 278 S.C. 655, 301 S.E.2d 133 (1983).
96. The state argued that Clayton could have applied for a Writ of Habeas Corpus ad Testificandum to compel his attendance. Brief of Appellant at 5. Literally, the writ means "you have the body to testify." BLACK'S LAW DICTIONARY 639 (5th ed. 1979). It is often used to bring a prisoner from one jurisdiction to testify in another, 39 AM. JUR. 2D Habeas Corpus § 2 (1968), or for production of witnesses in state confinement. See also Brand v. State, 154 Ga. 781, 270 S.E.2d 206 (1980).
to do so.\footnote{99} On appeal, the supreme court held that the state has no duty to secure custody over prisoners held in other jurisdictions so that they may attend post-conviction hearings.\footnote{100} After citing authority holding that the prisoner is in fact entitled to an evidentiary hearing,\footnote{101} the court summarily stated that:

[Respondent does not contend that appellant is not entitled to an evidentiary hearing. Respondent merely asserts that it does not have the duty or authority to ensure appellant's presence at the scheduled hearing. We agree. When appellant returns to South Carolina, he may reapply for postconviction relief. Then he will be afforded an evidentiary hearing.\footnote{102}]

The court cited no authority on this point and failed to state why no duty is imposed upon the state to return a prisoner to South Carolina when his claims show prima facie constitutional violations.\footnote{103}

On this question, other jurisdictions resurrect the "in custody" requirement of habeas corpus relief in applying modern post-conviction procedure acts. Under this view, the court could have simply stated that custody by this state was required for standing. There would have been no need to discuss duty or authority of state officials. In Missouri, the courts hold that under that state's Uniform Post-Conviction Procedure Act,\footnote{104} prisoners in other states\footnote{105} or in federal penitentiaries within the state\footnote{106} have no standing to attack Missouri convictions. "Missouri has

\begin{footnotesize}
\footnote{99. 278 S.C. at 657, 301 S.E.2d at 133.}
\footnote{100. Id. at 658, 301 S.E.2d at 134.}
\footnote{101. Norman v. State, 278 S.C. 278, 277 S.E.2d 707 (1981) established that a claim for ineffective assistance of counsel, unless conclusively refuted by the record, sets forth a prima facie constitutional violation and entitles the prisoner to an evidentiary hearing. In McDuffie v. State, 276 S.C. 229, 277 S.E.2d 595 (1981), the court held that a prisoner is entitled to an evidentiary hearing if he asserts that the results of his South Carolina conviction persist even after he has served his sentence in this state. For example, a prior conviction may decrease a prisoner's opportunity for parole or status as trusty in a foreign prison.}
\footnote{102. 278 S.C. at 657-58, 301 S.E.2d at 134.}
\footnote{103. The South Carolina Code specifically states: "(a) any person [may institute proceedings] who has been convicted of, or sentenced for, a crime and who claims: (1) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state. . . ." S.C. Code Ann. § 17-27-20 (1976).}
\footnote{105. Wing v. State, 524 S.W.2d 443 (Mo. 1975).}
\footnote{106. Lalla v. State, 463 S.W.2d 797 (Mo. 1971).}
\end{footnotesize}
not denied defendant a post-conviction remedy; it has merely said that, not having him within its custody, a hearing on the matter will be postponed until he is available (and in custody) in Missouri.\footnote{107}

If the basis for the court’s ruling in \textit{Clayton} is indeed a lack of standing, then South Carolina is in the minority. The New Mexico\footnote{108} and Tennessee\footnote{109} courts hold that an applicant for post-conviction relief is sufficiently in custody and has standing to bring a post-conviction action even though incarcerated outside that state’s jurisdiction. In \textit{Desmond v. United States Board of Parole},\footnote{110} the First Circuit held that a prisoner in state custody had standing under the federal habeas corpus statute\footnote{111} to attack a federal conviction.\footnote{112} In these cases, the lack of physical custody over a prisoner did not bar the prisoner’s assertion of claims.

These decisions failed to consider whether the state has an affirmative duty to secure custody over the prisoner and bear the costs of transportation. However, a well-reasoned Florida opinion\footnote{113} held that a prisoner incarcerated in Texas had standing under the Florida Post-Conviction Procedure Act\footnote{114} to attack his Florida conviction. The court considered the costs to the state and the potential for abuse by prisoners in securing a day “on the outside”\footnote{115} at the state’s expense. However, the court noted that safeguards are present in the statute which would allow the courts to dismiss the petition as frivolous, defective on its face, or refuted by the record, prior to conducting a hearing.\footnote{116} Even

\footnote{107. \textit{Id.} at 798.}

Although appellant was incarcerated in a \textit{federal} penitentiary in the State of New Mexico, he was under the legal custody of the state because of his status as a parolee of the state penitentiary. The court held that the lack of physical custody by the state of New Mexico did not bar appellant from seeking post-conviction release. \textit{Id.} at 787, 474 P.2d at 78.}


110. 397 F.2d 386 (1st Cir. 1968), \textit{cert. denied}, 393 U.S. 919 (1968).


112. 397 F.2d at 389.


114. FLA. R. CRIM. P. 3.850.

115. \textit{See Brief of Respondent} at 5, \textit{Reynolds} (citing A.B.A. STANDARDS RELATING TO POST-CONVICTIO N REMEDIES § 4.5).

116. 238 So.2d at 600. This is also possible in South Carolina. \textit{See S.C. CODE ANN.} §}
if a hearing is granted, the Florida court recognized that the prisoner’s presence is not necessary. The state must secure his attendance only when factual questions exist which require the prisoner’s live testimony. The appointed counsel is an adequate substitute for the prisoner in these proceedings.\(^\text{117}\)

*Clayton* is also contrary to the policy set forth by the United States Supreme Court in *Peyton v. Rowe,*\(^\text{118}\) in which the Court held that a federal prisoner seeking relief from the second of two consecutive sentences need not wait until he begins to actually serve it to commence federal collateral attack.\(^\text{119}\) The Court noted the possibility of prejudice both to the prisoner and to the state if a retrial was necessary but was delayed for several years while the prisoner awaits custody, however fictitious, for the second sentence. “Common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time.”\(^\text{120}\)

Eventually, the courts must strike a balance between the policy of assuring a fair retrial at the earliest possible date and the strong state interest in not providing out-of-state prisoners who have frivolous claims a free ride, at the expense of the state, and a little time on the “outside.” The dilemma may not be fully solved by a standing rule such as the one apparently propounded in *Clayton.* Instead, the courts should consider the merits of each case to determine whether custody and transportation is warranted. As the Florida court noted, the prisoner need not always attend these evidentiary hearings, and certainly the courts may create alternatives to the prisoner’s physical presence, such as depositions or written interrogatories.

The court in *Clayton* did not weigh these interests. It also

\(^{17-27-70(b).}\)

\(^{117.}\) 238 So.2d at 600. This is possible because in collateral proceedings, the presence of the prisoner is within the discretion of the trial court, and no constitutional right exists to be present at such hearings. See Villarreal v. United States, 508 F.2d 1132 (9th Cir. 1974).

\(^{118.}\) 391 U.S. 54 (1968).

\(^{119.}\) 391 U.S. at 67. In doing so, the court overturned McNally v. Hill, 293 U.S. 131 (1934), which held that habeas corpus was premature as the prisoner was not technically in custody for the second sentence. 391 U.S. at 67.

\(^{120.}\) 391 U.S. at 64. In Finklea v. State, 273 S.C. 157, 255 S.E.2d 447, 447-48 (1979), the court held that the state Post Conviction Procedure Act was designed to incorporate all rights available under federal habeas corpus relief. Thus, federal habeas corpus precedent is relevant to interpreting the State act.
failed to examine the more principled arguments, consistent with its result, which were offered by the Missouri court. Instead, it summarily rejected the prisoner's position and provided no guidance for solving a similar problem when a closer case arises, as it inevitably must.\footnote{121} As the law stands in South Carolina, no matter how long the wait or how substantial the grounds for relief, a prisoner must either begin serving his sentence in South Carolina or somehow gain temporary release from a foreign jurisdiction and transport himself to this state before his post-conviction action will be heard.

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VI. POST-CONVICTIO N RELIEF IS NOT AVAILABLE FOR DRIVER'S LICENSE REVOCATIONS

In \textit{Lance v. State},\footnote{122} the South Carolina Supreme Court held that the revocation of a driver's license was not a criminal sentence which would allow the licensee to bring an action for post-conviction relief. Within an eighteen month period, Lance accumulated three convictions for driving under the influence of alcohol and two convictions for driving with a suspended license. He was later found an habitual traffic offender under the terms of the South Carolina Code,\footnote{123} and his license was revoked for five years. Lance petitioned the courts for post-conviction relief and received a hearing, at which he contested both the habitual offender determination and the underlying convictions. The trial

\begin{footnotesize}
\footnotetext{121}{For example, a prisoner in another jurisdiction, serving an unrelated sentence, might discover new evidence absolving him of his South Carolina conviction, but would be barred from presenting this evidence until he is returned to South Carolina.}
\footnotetext{122}{279 S.C. 144, 303 S.E.2d 100 (1983).}
\footnotetext{123}{S.C. Code Ann. §§ 56-1-1010 to -1130 (1976).}
\end{footnotesize}
judge denied relief, holding that adjudications under the Habitual Offender Act could not be attacked under the State's Uniform Post-Conviction Procedure Act.\textsuperscript{124}

This ruling was affirmed on appeal. The supreme court held that post-conviction relief may be requested only by one claiming the right to have a sentence for a criminal conviction vacated, set aside, or corrected.\textsuperscript{125} Revocation of a driver's license is not a part of the punishment for the underlying offenses.\textsuperscript{126}

In so holding, the court relied on \textit{Tutt v. State},\textsuperscript{127} which held that a circuit court lacked jurisdiction to hear post-conviction claims by prisoners who asserted violations of their constitutional rights when reassigned to other prison facilities, placed in solitary confinement, or denied medical treatment. These claims did not pertain to the sentence itself and thus could not be heard under the Post-Conviction Procedure Act. Also, in \textit{Parker v. State Highway Department}\textsuperscript{128} and \textit{Finklea v. State},\textsuperscript{129} the court held that the termination of driving privileges was not a sentence and could not be collaterally attacked. In \textit{Finklea}, the court examined the procedural history of the Post-Conviction Procedure Act and found that the drafters' intent was to consolidate in one statute those remedies available to challenge a "sentence of imprisonment."\textsuperscript{130} Thus, the drafters of the Act did not contemplate that the statute would be used for any purpose other than to attack criminal convictions.

In \textit{Linkous v. Jordan},\textsuperscript{131} a federal district court held that an applicant for federal relief from a driver's license revocation had no standing to claim that his underlying convictions were invalid for lack of counsel. The court noted that while no person may be

\begin{footnotes}
\item 124. \textit{Id.} §§ 17-27-10 to -120.
\item 125. 279 S.C. at 145, 303 S.E.2d at 101 (citing Rule 1 of the Uniform Post-Conviction Procedure Act); \textit{Tutt v. State}, 277 S.C. 525, 290 S.E.2d 414 (1982).
\item 127. 277 S.C. 525, 290 S.E.2d 414 (1982).
\item 128. 224 S.C. 263, 78 S.E.2d 382 (1953).
\item 131. 401 F. Supp. 1175 (W.D. Va. 1975).
\end{footnotes}
imprisoned as a result of any conviction obtained without the opportunity to be represented.\textsuperscript{132} This defect invalidates only the sentence, not the conviction.\textsuperscript{133} Lance is consistent with this rationale. If an habitual offender is convicted of driving under revocation and sentenced to jail, the sentence is derived not from the prior convictions which made him an habitual offender, but rather from the fact that the offender violated an injunction against driving.\textsuperscript{134} The civil penalty of revocation, therefore, carries with it no direct criminal sanctions relating to the underlying offenses.

The revocation of driving privileges is a very serious matter which may have greater impact on the life of the driver than a short jail term. In \textit{Bell v. Burson},\textsuperscript{135} the United States Supreme Court recognized the importance of this privilege and held it to be an entitlement triggering due process guarantees. "Suspension of issued licenses . . . involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the fourteenth amendment."\textsuperscript{136} \textit{Bell} does not, however, require a full-dress hearing for all revocations; it requires only that the hearing be "meaningful" and "appropriate to the nature of the case."\textsuperscript{137} In \textit{Bell}, there was absolutely no opportunity for the driver to defend himself and dispute either the revocation or the claims underlying it. When a state revokes a license under the Habitual Offender Act, however, it does so on the basis of actions which have already been adjudicated in proceedings which themselves fulfilled due process guarantees.\textsuperscript{138}

\textsuperscript{134} Cf. Mays v. Harris, 523 F.2d 1258 (4th Cir. 1975), which relied on the rationale of Walker v. Birmingham, 388 U.S. 307 (1967), reh'g denied, 389 U.S. 894 (1967) (while an injunction may have been issued illegally, it must still be respected).
\textsuperscript{135} 402 U.S. 635 (1971).
\textsuperscript{136} Id. at 539. \textit{Bell} concerned an attempt by the state to revoke the license of an uninsured driver automatically upon involvement in an accident. In order to satisfy due process requirements, the hearing required by \textit{Bell} must address the issue of the driver's liability in the accident.
\textsuperscript{137} Id. at 541-42.
\textsuperscript{138} In Dixon v. Love, 431 U.S. 105 (1977), the Court held valid the Illinois Habitual Traffic Offender Statute. This law allowed the Secretary of State to act without a preliminary hearing in revoking licenses upon a showing by records or other evidence that the license had accumulated sufficient "points." The Court held that while \textit{Bell}
Therefore, case law strongly supports the result in Lance. Adjudication as an habitual offender is not part of the sentence for the underlying crimes, but is collateral to those convictions. While the loss of a driver’s license for a long period of time may have a tremendous effect on lifestyle and livelihood, the fact remains that revocation is a separate civil matter governed by its own procedural guarantees under the Habitual Offender Act.

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VII. COURT APPROVES ABA PROCEDURES FOR DEALING WITH DEFENDANTS’ PERJURED TESTIMONY

_In re Goodwin_139 concerned the proper course of conduct for a criminal defense attorney upon learning of his client’s intention to commit perjury during trial. The attorney moved to be relieved of her duties, but the trial court denied her motion to withdraw. Upon the attorney’s refusal to proceed with the defense, she was held in contempt. The South Carolina Supreme Court affirmed both the order and the contempt citation, but because this was a case of first impression and the attorney acted in good faith, no sanctions were imposed.

For such situations, the court approved ABA standards140 whereby the attorney is to counsel the client against perjuring himself. If the client insists upon testifying, the attorney must allow him to make a narrative statement. The attorney may not ask direct questions on the perjured subject matter, and may not refer to the false testimony in closing arguments. The court recognized that there are no ideal solutions for this problem, but determined that this procedure best balances the attorney’s ethical duty to the court and to the client by appearing not to suborn perjury while still offering the defendant his right to counsel.141 For a full discussion of this case, see the Professional

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140. STANDARDS RELATING TO THE DEFENSE FUNCTION § 7.7.
141. 279 S.C. at 277, 305 S.E.2d at 580.
VIII. PROOF OF ACTUAL DELINQUENCY UNNECESSARY IN PROSECUTION FOR CONTRIBUTING TO THE DELINQUENCY OF A MINOR

In *State v. Rodriguez*, the South Carolina Supreme Court held that a person may be found guilty of contributing to the delinquency of a minor even though the minor resists the defendant's advances and does not "wilfully injure her morals." In so doing, the court has inferentially construed South Carolina's "contributing to the delinquency of a minor" statute to require no allegations or proof that the child has actually become "delinquent" in order to establish the crime.

The appellant in *Rodriguez* was convicted of contributing to the delinquency of a fourteen-year-old girl. The charge stemmed from an incident occurring at Beaufort Naval Hospital, where Rodriguez was an employee and where the child was recuperating from an appendectomy. According to the testimony introduced at trial, Rodriguez made an unauthorized visit to the child's room, and grasping the child's arm, forced her to touch his private parts. The child testified that when she realized exactly what the appellant was doing, she immediately pulled her hand away.

After moving unsuccessfully for a directed verdict, Rodriguez offered no testimony on his own behalf and was convicted of the charge of contributing to the delinquency of a minor. He appealed, contending that the trial judge erred in refusing to di-

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142. See infra at pp. 231-43.
144. Id. at 109, 302 S.E.2d at 667.
145. Id. at 107, 302 S.E.2d at 666. The appellant was also convicted of committing a lewd act upon a twelve-year-old girl who shared a room with the fourteen-year-old complainant. With respect to the twelve-year-old, the appellant was charged under the "lewd act" statute, S.C. Code Ann. § 16-15-140 (1976). See Record at 95. The appellant was not charged under this provision with respect to both girls because the "lewd act" statute is expressly applicable only to those committing such acts upon children under the age of fourteen years. 279 S.C. at 108 n.1, 302 S.E.2d at 667 n.1.
146. Record at 56-57.
147. Id.
rect a verdict.\textsuperscript{148} The appellant argued that, as a matter of law, he could not be found guilty under a proper interpretation of South Carolina's "contributing" statute.\textsuperscript{149} The statute provides in pertinent part:

> It shall be unlawful for any person over eighteen years of age to knowingly and willfully encourage, aid or cause to do any act which shall cause or influence a minor:

> \ldots

> (10) To so deport himself or herself as to willfully injure or endanger his or her morals or health or the morals or health of others.\textsuperscript{150}

The appellant argued that since the child had resisted his lewd advances and had never "willfully" injured her morals in any way, he had not contributed to the child's delinquency. The South Carolina Supreme Court rejected this contention and upheld the conviction. Finding that the South Carolina legislature did not intend that the statute "apply only when the minor is a willing participant,"\textsuperscript{151} the court concluded that since the defendant had in fact "encouraged" the child to willfully injure her morals, that is, to become "delinquent," he could be found guilty of contributing to the child's delinquency regardless of whether the child actually cooperated.\textsuperscript{152}

By resolving the question of whether the criminal offense of contributing to the delinquency of a minor requires the allegation or proof of resulting "delinquency" on the part of the minor against the defendant, the supreme court has joined the trend in

\textsuperscript{148} Brief of Appellant at 1. The appellant also contended that the state court lacked jurisdiction over crimes committed at Beaufort Naval Hospital, a federal military installation. Supplemental Brief of Appellant at 1. The supreme court rejected this contention, holding that the state court properly exercised concurrent jurisdiction over the crime. The federal government had never accepted exclusive jurisdiction, as required by 40 U.S.C. § 255 (1970), which deprives the state of jurisdiction over land acquired by the federal government after 1940. The United States acquired the hospital in 1946. 279 S.C. at 107, 302 S.E.2d at 666-67. The appellant further argued that the trial judge committed reversible error in denying the appellant's motion that he be allowed to attend the sounding of the jury venire. Brief of Appellant at 4. The court dismissed this contention as well, holding that the appellant failed to present a record adequate for review of this issue. 279 S.C. at 109, 302 S.E.2d at 667.

\textsuperscript{149} Brief of Appellant at 2-4.

\textsuperscript{150} S.C. CODE ANN. § 16-17-490 (Supp. 1983).

\textsuperscript{151} 279 S.C. at 109, 302 S.E.2d at 667.

\textsuperscript{152} Id.
a growing number of jurisdictions which have construed similar statutes in a liberal fashion. For example, in State v. Worley, the North Carolina Court of Appeals rejected a similar argument that actual "delinquency" must be proven, and instead stated: "It seems clear that the legislative intent was to protect children from wrongful influence by adults, and that in protection of minors the state should not await the result of the wrong perpetrated before punishing the offender."

It is important to note, however, that none of the statutes found in the other jurisdictions contain precisely the same language found in section 16-17-490(10). A number of these statutes prohibit encouraging a child's delinquency or causing or tending to cause such delinquency. None of the statutes, how-

153. See Smithson v. State, 34 Ala. App. 343, 39 So.2d 678 (1949)(guilt of accused did not depend on proof of acquiescence or delinquency of victim); State v. Hunt, 8 Ariz. App. 514, 447 P.2d 896 (1968) (allegations and/or proof of delinquency not necessary under Arizona statute); Williams v. City of Malvern, 222 Ark. 432, 261 S.W.2d 6 (1963) (because legislative intent was to protect the young and innocent from evil influence, no proof of delinquency is necessary); State v. Scallan, 201 La. 1026, 10 So.2d 885 (1942)(under the Louisiana statute, parents may be guilty of a misdemeanor for allowing certain conduct of their children, although no delinquency results); People v. Owens, 13 Mich. App. 469, 164 N.W.2d 712 (1968)(no adjudication of delinquency is necessary to find accused "tend[ed] to cause" a minor to become delinquent); State v. Vachon, 113 N.H. 239, 306 A.2d 781 (1973), rev'd on other grounds, 414 U.S. 478 (1974)(state need only prove that the conduct of the accused could reasonably be found to contribute to causing delinquency; adjudication of delinquency not necessary); State v. Norfleet, 67 N.J. 268, 337 A.2d 609 (1975)(no actual finding of delinquency necessary); State v. Favela, 91 N.M. 476, 576 P.2d 282 (1978)(if the contributing to the delinquency statute applied only when the child committed a "delinquent act," there would be no need for its existence); State v. Worley, 13 N.C. App. 198, 185 S.E.2d 270 (1971)(generally accepted view is that contributing to delinquency statutes are preventative as well as punitive; thus proof of actual delinquency is not necessary); Wallin v. State, 84 Okla. Crim. 194, 182 P.2d 788 (Okla. Crim. App. 1947) (court liberally construes "encourage" in order to bring accused under the statute); State v. Williams, 236 Or. 18, 386 P.2d 461 (1963)(a showing that defendant's conduct tended to cause delinquency held to be sufficient); Commonwealth v. Marlin, 452 Pa. 380, 305 A.2d 14 (1973)(protective nature of statute eliminates need for proof of actual delinquency); Lovvorn v. State, 215 Tenn. 659, 389 S.W.2d 252 (1965)(liberal construction of "encourage" will fulfill preventive purpose of statute); State v. Austin, 234 S.E.2d 657 (W. Va. 1977)(not necessary to show defendant's conduct actually resulted in delinquency); see generally, Annot., 18 A.L.R.3d 824 (1968 & Supp. 1982).


155. Id. at 200, 185 S.E.2d at 271.

156. See, e.g., State v. Norfleet, 67 N.J. 268, 337 A.2d 609 (1975)(interpreting N.J. STAT. ANN. § 2A: 96-4 (West 1969), which was repealed in 1979; in its stead is § 2C: 24-4 (West 1982), which does not mention "delinquency").

ever, forbid only the encouragement of acts "which shall cause 
or influence" a child to "wilfully injure or endanger his or her 
morals." 158

In resolving the issue against the appellant in Rodriguez,
the court raised the problem of fair notice. It is well established 
that a criminal statute which "fails to give a person of ordinary 
intelligence fair notice that his contemplated conduct is forbid-
den" consequently fails to comport with due process, and a con-
viction thereunder cannot be sustained. 159 If a statute is capable 
of more than one reasonable interpretation, conviction for the 
crime therein may violate the defendant's right to be put on no-
tice of what constitutes criminal conduct and what does not, at 
least in the absence of previous judicial interpretation of the 
statute. 160

The prohibition against contributing to the delinquency of 
a minor under section 16-17-490(10) is plainly capable of more 
than one reasonable interpretation. The court in Rodriguez con-
strued the statute to prohibit the "encouragement," that is, "so-
lcitation," of a minor to become delinquent. An equally reason-
able interpretation is that the statute, by employing the ex-
pression "any act which shall cause," contemplates some ac-
tual consequence of the defendant's conduct. 161 It would be ludi-
crous to contend that the appellant believed that his conduct 
was in any manner lawful; however, when a criminal statute does 
not explicitly spell out what activity is prohibited, convicting a 
person on such grounds may be violative of due process. 162 Al-
though recognizing the spirit of the law, the court stretches stat-
utory construction to its limits.

Stat. Ann. § 30-6-3 (1978)).
Harris, 347 U.S. 612, 617 (1954)).
161. At least two other states have construed their "contributing" statutes to re-
quire that the statute actually prove resulting "delinquency." See Spencer v. People, 133 
162. This argument was raised by the appellant in Rodriguez. Nevertheless, it is 
worthy of note that some courts have struck down such statutes altogether as being un-
constitutionally vague. See State v. Vallery, 212 La. 1095, 34 So. 2d 329 (1948); State v. 
Hodges, 254 Or. 21, 457 P.2d 491 (1969); State v. Gallegos, 384 P.2d 967 (Wyo. 
1963)(held unconstitutional under Wyoming statute).
More child protection statutes are certainly needed, and those existing perhaps should be liberally construed. In so doing, however, the court must refrain from implicating the fundamental right of fair notice mandated by the due process clause of the fourteenth amendment.

Robert C. Byrd

IX. ADMISSIBILITY OF INCULPATORY CODEFENDANT CONFESSIONS IN JOINT TRIALS UNDER THE "INTERLOCKING CONFESSIONS" DOCTRINE

The sixth and fourteenth amendments of the United States Constitution guarantee every defendant in a criminal trial the right to confront any person who makes an accusation of criminal conduct against him. This fundamental right of confrontation necessarily includes the right of the criminal defendant to cross-examine his accuser so that he may challenge the veracity of the accusations. This basic constitutional guarantee may be effectively frustrated when, in a joint trial, those accusations are in the form of extrajudicial statements of a non-testifying codefendant. When such statements are admitted into evidence, even with explicit instructions that they be used only against the co-defendant who made them, the sixth amendment rights of the remaining defendant who is implicated by those statements may be contravened if the accusing codefendant refuses to take the stand.

In State v. Thompson, the South Carolina Supreme Court carved out an exception to the general rule that admitting inculpatory statements of a nontestifying codefendant in a joint trial violates the sixth amendment rights of the remaining impli-

163. See Wallin v. State, 84 Okla. Crim. 194, 201, 182 P.2d 788, 792 (1947) ("[a] liberal interpretation of the juvenile delinquency statutes arms the state with a two-edged sword, to protect children not delinquent from the suggestions of delinquency, as well as for the punishment of those who might commit such acts as to a child already delinquent").

164. The sixth amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. This right is protected against state action by the due process clause of the fourteenth amendment. Pointer v. Texas, 380 U.S. 400 (1965).


cated defendant. The court in Thompson held that a defendant's confrontation rights are not violated by the admission of a nontestifying codefendant's inculpatory statements where the defendant alleging the violation has himself made an incriminating statement, the defendant's statement is "interlocking to a substantial degree" with those of his co-defendant, and the trial judge has instructed the jury that it may not consider the codefendant's statements in determining the guilt or innocence of the remaining defendant.

The appellant in Thompson was charged with the crimes of accessory before and after the fact of the murder of her husband. The appellant's codefendant McCurry was charged with first degree murder. Prior to their joint trial, Thompson and McCurry made separate statements to the police recounting the events leading up to and immediately following the fatal shooting of Thompson's husband. The pre-trial statements of both defendants did corroborate each other in some respects. However, neither defendant expressly admitted guilt, and naturally each defendant tended to shift the blame for the death to the other.

The appellant Thompson moved for severance of the joint trial and also for the suppression of her codefendant's pre-trial statement, which implicated her as an accessory to a much greater degree than did her own statement. Denying both motions, the trial judge allowed McCurry's statement to be admitted into evidence; however, it was accompanied by instructions

169. 279 S.C. at 407, 308 S.E.2d at 366.
170. The court noted three salient points of similarity between the two pre-trial statements: "Each admits to having discussed the murder of appellant's husband[,] . . . [each states that McCurry told appellant that he planned to kill appellant's husband immediately prior to the crime[,] . . . [a]ccording to both accounts, McCurry hid in appellant's bedroom after the murder." Id.
171. Record at 106-17. McCurry maintained that the shooting was accidental. Id. at 115.
172. The appellant's pre-trial statement depicts McCurry as the sole perpetrator of the murder and describes her own repeated attempts to dissuade her lover from carrying out his threats to kill her husband. Record at 106-11. She furthermore attributed her own complicity in the crime to fear that McCurry would harm her if she did not cooperate. Id. at 107-08. On the other hand, according to McCurry's statement the plan to murder the appellant's husband was arrived at mutually, and it was the appellant who actually suggested the date upon which the crime was to be executed. Id. at 112-17.
173. See supra note 172.
to the jury that the statement could be considered only in determining the guilt or innocence of McCurry and could not be used against Thompson. Since McCurry refused to take the stand at trial, Thompson never had an opportunity to cross-examine her codefendant concerning the inculpatory remarks in his pre-trial statement.

Convicted of the accessory charge, Thompson contended on appeal that the admission of her codefendant's extrajudicial statement in their joint trial violated her sixth amendment right to confront witnesses against her. The South Carolina Supreme Court rejected this contention, holding instead that since the appellant had also made an incriminating statement which was "interlocking to a substantial degree" with her codefendant's statement, the admission of McCurry's statement along with properly limiting instructions to the jury did not violate the appellant's sixth amendment right of confrontation.

The appellant in Thompson relied primarily upon the landmark decision of Bruton v. United States, in which the United States Supreme Court established the general rule regarding the admissibility of nontestifying codefendant confessions in joint trials. In Bruton, a postal service inspector testified in a joint trial for armed postal robbery that one of two nontestifying codefendants had confessed and had implicated the remaining defendant, Bruton, in the crime as well. The Court held that admitting testimony regarding the codefend-

174. The appellant's challenge was actually on the ground that the trial judge committed reversible error in denying the appellant's motion for severance of the joint trial. Brief of Appellant at 2. The supreme court handily rejected this contention, concluding that the appellant failed to establish abuse of discretion on the part of the trial judge in his refusal to sever. 279 S.C. at 408, 308 S.E.2d at 366.

The appellant also demanded reversal on the ground that the trial judge erred in denying the appellant's motion for a directed verdict on the charge of accessory before the fact since there was insufficient evidence to raise any reasonable inference that the appellant "aided, procured, or encouraged the commission of the felony." Brief of Appellant at 9. The supreme court held that evidence as to the accessory charge was sufficient to send the question to the jury, particularly in light of the amorous relationship between the appellant and her codefendant and the obvious motive to rid the appellant of her husband. 279 S.C. at 408, 308 S.E.2d at 366. Apparently the evidence consisted of a remark made by the appellant to McCurry approximately one week prior to the crime, that, "If you're going to do it [commit the murder] just do it, I don't want to know about it." Id.

175. 279 S.C. at 407, 308 S.E.2d at 366.
ant's inculpatory statement in the joint trial violated Bruton's sixth amendment right of confrontation, despite the trial judge's instructions limiting the jury's use of the confession.\(^\text{177}\)

Instead of applying the *Bruton* rule, however, the court in *State v. Thompson* adopted what has become generally known as the "interlocking confessions" exception.\(^\text{178}\) The court cited as controlling authority the recent decision of the United States Supreme Court in *Parker v. Randolph*,\(^\text{179}\) in which a plurality of the justices similarly recognized this exception to the *Bruton* rule.\(^\text{180}\) In *Parker*, a joint trial, the trial court admitted into evidence the confessions of other nontestifying codefendants, all of which tended to implicate the remaining defendant, Randolph, as well. Unlike the defendant in *Bruton*, however, Randolph had already admitted his own participation in the crime and this confession had already been introduced into evidence. In a plurality opinion authored by Justice Rehnquist, four justices of the Supreme Court held that Randolph's sixth amendment right of confrontation was not violated by the admission of his nontestifying codefendants' confessions since he had confessed, the confessions were interlocking, and the trial judge had issued properly limiting instructions to the jury.\(^\text{181}\)

Although the "interlocking confessions" exception to the *Bruton* rule has been endorsed by only a plurality of the Supreme Court, its adoption by the court in *State v. Thompson* is not surprising. Most jurisdictions which have addressed the issue have similarly recognized such an exception.\(^\text{182}\) However, the

\(^{177}\) Id. at 137.

\(^{178}\) The phrase "interlocking confessions" can be attributed to the decision in United States ex rel. Catanzaro v. Mancusi, 404 F.2d 296 (2d Cir. 1968), where the Court of Appeals for the Second Circuit stated: "In our case Catanzaro himself confessed and his confession interlocks and supports the confession of [his codefendant]. . . ." Id. at 300.


\(^{180}\) Id. at 75 (plurality).

\(^{181}\) Id. at 254. Only four of the eight participating justices recognized the "interlocking confessions" exception. The remaining four applied the *Bruton* rule, as tempered by Harrington v. California, 395 U.S. 250 (1969). In *Harrington*, the Court held that a *Bruton* violation will not require reversal of a conviction if it is "harmless beyond a reasonable doubt." Id. Justice Blackmun, who concurred in the *Parker* judgment, rejected the "interlocking confessions" exception applied by the plurality, although he found that the *Bruton* violation "clearly was harmless." 442 U.S. at 80 (Blackmun, J., concurring).

\(^{182}\) Cases which have applied the "interlocking confessions" exception include:
South Carolina Supreme Court's application of this exception to the particular circumstances in Thompson suggests that the court has a basic misunderstanding of the rationale underlying the exception.

The constitutionality of admitting inculpatory confessions of nontestifying codefendants in a joint trial depends in large part upon the adequacy of limiting instructions in properly safeguarding the remaining defendant's confrontation rights. The Supreme Court has unequivocally stated that, at least where the remaining defendant has not confessed to the criminal activity, such "limiting" instructions do not provide sufficient protection, as "[t]he effect is the same as if there had been no instructions at all." 183 In concluding that the same instructions do constitute an adequate safeguard in those situations in which the defendant has expressly admitted his own guilt, the plurality in Parker reasoned:

[T]he incriminating statements of a codefendant will seldom, if ever, be of the "devastating" character referred to in Bruton when the incriminated defendant has admitted his own guilt. The right protected by Bruton . . . has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence. 184

In applying the "interlocking confessions" exception in Thompson, the court has ignored the rationale set forth above, thus failing to adequately protect the criminal defendant's sixth amendment right of confrontation. The court applied the excep-

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184. 442 U.S. at 73 (plurality).
tion to a situation in which the implicated defendant had not actually confessed to the crime with which she was charged, but had at most made only vaguely incriminating remarks. Unless the "interlocking confessions" doctrine is indeed a misnomer, the South Carolina Supreme Court has extended the exception beyond its contemplated parameters.

Although the plurality in Parker failed to define "confession," it is obvious that the situation in which the application of the exception to the Bruton rule was contemplated was one in which the defendant's "own admission of guilt stands before the jury unchallenged." One of the necessary assumptions of the "interlocking confessions" exception is that a defendant who has confessed has little practical use for cross-examining his codefendant's testimony. Since "one can scarcely imagine evidence more damaging to [the accused's] defense than his own admission of guilt," the prejudicial impact of a codefendant's accusations is negligible. Accordingly, the "interlocking confessions" exception to Bruton appears to be inapplicable unless "the incriminated defendant has corroborated his codefendant's statements by heaping blame onto himself."

The appellant in Thompson never expressly admitted her guilt to the accessory crime charged. Therefore, her pre-trial statement was not a "confession," particularly in light of State v. Cunningham, in which the South Carolina Supreme Court restricted the definition of "confession" to the "'acknowledgement of guilt, and ... not ... mere statement of fact from which guilt may be inferred.'" The "incriminating" statement which Thompson admittedly made was a far cry from "heaping blame" upon herself, as contemplated by the Parker plurality. By broadening the scope of the "interlocking confessions" exception to encompass vaguely incriminating remarks, the court has apparently chosen to disregard the comparatively narrow appli-

185. See supra notes 171-79. The court in Thompson at one point referred to "confessions or incriminating statements." 279 S.C. at 30, 308 S.E.2d at 366.
186. See 442 U.S. at 73 (plurality).
187. Id.
188. Id.
189. See supra note 171 and accompanying text.
191. Id. at 192, 268 S.E.2d at 291 (quoting State v. Miller, 211 S.C. 306, 45 S.E.2d 23 (1947)).
cation of the same exception endorsed in Parker, 192 and to disregard the rationale behind that decision.

Finally, assuming that the court justifiably extended the application of the “interlocking confessions” exception to merely “incriminating statements,” the court in Thompson nevertheless failed to employ any legally recognized standard for determining whether the two pre-trial statements were in fact “interlocking.” 193 Although the plurality in Parker v. Randolph again failed to define an important term, the Court seems to have relied upon the lower court’s finding that the confessions “clearly demonstrated the involvement of each [defendant], as to crucial facts such as time, location, felonious activity, and awareness of the overall plan or scheme.” 194

The plurality opinion in Parker as well as subsequent lower court decisions clearly suggest that in order to be “interlocking” the statements must do more than simply “support each other in several respects.” The Maine Supreme Judicial Court has cogently defined the requisite connection as follows: “[T]he confessions, to ‘interlock’, should be substantially similar and consistent on the major elements of the crime; in particular, the motive, plotting and execution of the crime.” 195 Similarly, the Arizona Supreme Court has stated: “Confessions interlock if they are consistent on the major elements of the crime and there is nothing in the codefendant’s confession that implicates the defendant any more in the commission of the crime than did the defendant’s own confession.” 196

In People v. Smalls, 197 the defendant, who was implicated

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192. See Parker, 442 U.S. at 75-76 n.8, where the plurality attempted to distinguish an earlier decision on the grounds that the defendant’s statement in the prior case, “while inculpatory, was by no stretch of the imagination a ‘confession’.” Id. Contra Tatum v. State, 249 Ga. 422, 291 S.E.2d 701 (1982).

193. The court simply concluded that the statements are “interlocking to a substantial degree,” presumably because they “support each other in several respects.” 279 S.C. at 407, 308 S.E.2d at 366. See supra note 170.

194. 442 U.S. at 67-68 (plurality).


196. State v. Gerlaugh, 134 Ariz. 164, 168, 654 P.2d 800, 804 (1982). See also State v. Gray, 628 S.W.2d 746, 749 (Tenn. Ct. App. 1981). The court stated that unless “the confession of one non-testifying codefendant contradicts, repudiates or adds to material statements in the confession of the other non-testifying codefendant so as to expose the latter to increased risk of conviction or to an increase in the degree of the offense with correspondingly greater punishment,” no Bruton problem occurs.

by his codefendant’s extrajudicial statement as a knowing participant in the commission of a robbery, had also made a pre-trial statement in which he described in detail the events of the crime. The defendant admitted only that he was present at the crime scene and not that he had participated in, or was even aware of, the events as they transpired around him. The New York Court of Appeals held that the statements were not “interlocking,” reasoning: “The only statements made by Smalls even arguably indicating such awareness [of criminal activity] were ambiguous at best. The danger is great that the jury might have resolved these ambiguities by reference to [the codefendant’s] statement. . . .”

In light of the foregoing, the court’s conclusion that the two pre-trial statements in Thompson were “interlocking to a substantial degree” appears to be untenable. The statements simply were not consistent on the major elements of the crime with which the appellant was charged. While it does not appear from the appellant’s pre-trial statement that she wilfully “aided, procured or encouraged” the commission of the murder, the pre-trial statement of her codefendant clearly suggests the contrary. Furthermore, the court’s attempt to rationalize its result by announcing that “[s]light disparities are rarely so prejudicial as to require exclusion” is unpersuasive, particularly since the court fails to adequately explain what constitutes a “slight disparity.”

It is conceded that the inherent suspicion of a codefendant’s accusations becomes attenuated when the remaining defendant who is implicated has confessed to the crime with which he has been charged. The same result, however, is not achieved when the defendant has not “heaped blame onto himself,” but rather has, at most, made vaguely incriminating remarks. Where, as in

198. Id. at __, 434 N.E.2d at 1057, 449 N.Y.S.2d at 700.
199. The elements of the offense of accessory before the fact are: (1) the accused advises and agrees, urges, or aids the principal to commit an offense, (2) the accused is not present when the crime is committed, and (3) the principal commits the crime. State v. Farne, 180 S.C. 75, 1 S.E.2d 912 (1939). The elements of the offense of accessory after the fact are: (1) the crime is complete, (2) the accused has knowledge that the principal committed the crime, and (3) the accused harbors or assists the principal. State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981).
200. See supra note 172.
201. See 279 S.C. at 407, 308 S.E.2d at 366.
State v. Thompson, the defendant's own incriminating statement alone might not be sufficiently compelling to secure the defendant's conviction, the cumulative impact of a nontestifying codefendant's blamesshifting poses a serious danger to the remaining defendant's right of confrontation. Moreover, it cannot naively be assumed that such a prejudicial impact will be neutralized by limiting jury instructions.

Therefore, it is to be hoped that the South Carolina Supreme Court will reevaluate its broad, wholesale application of the "interlocking confessions" exception and accordingly restrict the scope of that exception so that it will comply with the stringent requirements of the sixth amendment. The very narrow exception to the strong rule of Bruton carved out in Parker appears to mandate such a reconsideration.

Robert C. Byrd

X. CONVICTIONS FOR RAPE AND KIDNAPPING, THE LATTER BEING MERELY INCIDENTAL TO THE FORMER, DO NOT CONSTITUTE DOUBLE JEOPARDY

The defendant in State v. Hall was convicted of first degree criminal sexual conduct, assault and battery of a high and aggravated nature, and kidnapping. Although all three charges arose from the same incident, the South Carolina Supreme Court affirmed all the convictions and the consecutive sentences

202. See generally 442 U.S. at 79 (Blackmun, J., concurring). Justice Blackmun stated:

The fact that confessions may interlock to some degree does not ensure, as a per se matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative. . . . Although two interlocking confessions may not be internally inconsistent, one may go far beyond the other in implicating the confessor's codefendant.

Id. at 79.

203. See Bruton, 391 U.S. at 123.

[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-to-side with the defendant, are deliberately spread before the jury in a joint trial.

Id. at 135-36. See also id. at 132 n.8.

imposed therefor. In so holding, the court specifically rejected the contention that the convictions constitute double jeopardy, and further held that in order to establish kidnapping, the state is not obligated to prove that the confining and carrying away of the victim was more than merely incident to the commission of another crime.205

The defendant, Benjamin Allen Hall, approached the victim from behind and knocked her to the ground, threatening to use a knife which he held to the victim’s throat if she screamed. The assailant walked the victim from a phone booth in front of an apartment complex to an adjacent swimming pool area, where he forced her to perform fellatio upon him. He then made her move to the diving board, where he performed cunnilingus upon her. The defendant then moved her to an alleyway in the pool area and twice engaged in sexual intercourse with the victim. Approximately forty-five minutes after initially seizing her, Hall released the victim.206

The defendant was charged with and convicted of four counts of first degree criminal sexual assault,207 of assault and battery of a high and aggravated nature208 and of kidnapping.209

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205. Id. at 76-78, 310 S.E.2d at 431-32.
206. Id. at 75-76, 310 S.E.2d at 430.
207. Criminal sexual conduct in the first degree is defined as follows:
   (1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:
      (a) The actor uses aggravated force to accomplish sexual battery.
      (b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act.
   (2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment for not more than thirty years, according to the discretion of the court.
208. Assault and battery of a high and aggravated nature, a common law offense in South Carolina, is defined as
   an unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation, such as the use of a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, the great disparity between the ages and physical conditions of the parties, a difference in [the] sexes, indecent liberties or familiarities with a female, the purposeful infliction of shame and disgrace, resistance of lawful authority, and others.
On appeal to the South Carolina Supreme Court, Hall contended that his convictions for assault and battery and for kidnapping constituted double jeopardy, since these offenses were circumstances proven in order to elevate the sexual battery to criminal sexual conduct in the first degree. Hall further contended that the trial court erred in failing to instruct the jury that in order to establish kidnapping, the state must prove that the confining and carrying away of the victim was more than merely incident to the commission of the sexual battery.

A. Multiple Punishment and Double Jeopardy

The fifth amendment of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." This double jeopardy clause has been held to provide three separate kinds of constitutional protection: protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense.

The appellant in Hall contended that the consecutive sentences imposed for each conviction amounted to multiple


209. The offense of kidnapping is defined as follows:
Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by a parent thereof, shall be guilty of a felony and, upon conviction, shall suffer the punishment of life imprisonment unless sentenced for murder as provided in § 16-3-20.

S.C. Code Ann. § 16-3-910 (Supp. 1983). In 1976, this statute was amended to eliminate the requirement of proof that the victim was held "for ransom or reward."


211. Id. at 12-13. The appellant also contended that the trial court erred in refusing to allow appellant's counsel to review all notes which the state's witness possessed on cross-examination. Brief of Appellant at 17-18. The court, however, held that since the witness referred to his notes only because the appellant's counsel urged him to do so, the trial judge's decision to allow appellant's counsel to inspect only those portions of the notes actually referred to was proper. 280 S.C. at 78-79, 310 S.E.2d at 432.

212. U.S. Const. amend. V. Recognizing that the double jeopardy prohibition "represents a fundamental ideal in our constitutional heritage," the Supreme Court has accordingly held the double jeopardy clause applicable to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969). The South Carolina Constitution provides essentially the same guarantee. S.C. Const. art. I, § 12.

punishments for the same offense in violation of the double jeopardy clause.\textsuperscript{214} He argued that since assault and battery of a high and aggravated nature and kidnapping were essentially lesser included offenses of first degree criminal sexual conduct, the crimes constituted the "same offense" for double jeopardy purposes under the test defined in \textit{Blockburger v. United States}.\textsuperscript{216} As stated by the Supreme Court in \textit{Blockburger}, "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."\textsuperscript{216}

The appellant relied primarily upon \textit{Whalen v. United States},\textsuperscript{217} in which the United States Supreme Court considered the double jeopardy implications of the defendant's convictions for felony murder and the underlying felony of rape. In \textit{Whalen}, the Court considered the prosecution's argument that the offense of felony murder "does not in all cases require proof of [an actual] rape."\textsuperscript{218} The Court rejected this contention, stating that a case in which proof of rape is a necessary element of proof of felony murder should be treated no differently than another case requiring proof of each element of the offense.\textsuperscript{219}

Thus, even though criminal sexual conduct \textit{may} be elevated to the first degree by proof of other enhancing factors, where the state relies upon aggravated assault and battery or kidnapping to prove such elevation, these lesser-included crimes necessarily constitute the "same offense" as the greater offense since the former do not require proof of a fact which the latter does not require.\textsuperscript{220}

\textsuperscript{214} Brief of Appellant at 6.
\textsuperscript{215} 284 U.S. 299 (1932).
\textsuperscript{216} \textit{Id.} at 304. The \textit{Blockburger} test has been adopted in South Carolina as the test employed to determine whether particular crimes constitute the "same offense." \textit{See State v. Lawrence}, 266 S.C. 423, 223 S.E.2d 856 (1976).
\textsuperscript{217} 445 U.S. 684 (1980).
\textsuperscript{218} \textit{Id.} at 694.
\textsuperscript{219} \textit{Id.} The Court held that "where two statutory provisions proscribe the same offense, they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." \textit{Id.} at 692.
\textsuperscript{220} Presumably, there might have been two convictions under any test. If, for example, the State relied solely upon aggravated assault and battery as the enhancing factor to elevate the sexual battery to first degree criminal sexual conduct, then proof of
The court in *Hall* did not, however, consider whether the crimes of aggravated assault and battery, kidnapping, and first degree criminal sexual conduct constituted the same offense for purposes of double jeopardy. Instead, the court relied upon the recent decision in *Missouri v. Hunter*,\(^2\) in which the United States Supreme Court stated that, “With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”\(^3\)

In *Missouri v. Hunter*, the defendant was convicted of first degree robbery and armed criminal action. The state's armed criminal action statute expressly provided that punishment imposed thereunder “shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon.”\(^4\) The Supreme Court upheld the two convictions, finding the intent of the Missouri Legislature “crystal clear”:

Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the “same” conduct under *Blockburger*, a court’s task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.\(^5\)

Relying upon this language, the South Carolina Supreme Court in *Hall* similarly upheld the convictions, reasoning that the state legislature in fact “has authorized cumulative punishments for kidnapping, assault and battery of a high and aggravated nature and first degree criminal sexual conduct.”\(^6\) Unlike the Court in *Missouri v. Hunter*, however, the South Carolina

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\(^3\) *Id.* at 366.
\(^5\) 459 U.S. at 368-69.
\(^6\) 280 S.C. at 76, 310 S.E.2d at 431.
Supreme Court failed to cite specific statutory language or legislative history that authorizes cumulative punishment.

It is unclear how the court concluded that the South Carolina legislature clearly intended to impose cumulative punishments for first degree criminal sexual conduct, aggravated assault and battery, and kidnapping. It appears that the court relied solely upon the mere existence of more than one statute. However, this seems to be an insufficient basis for inferring legislative intent to impose cumulative punishment when offenses are committed in a single course of conduct.226

In subsequent lower court cases, the holding of Missou... process, the decision in Hall abrogates the judicial doctrine of lenity, and indicates the likelihood that multiple punishments will be readily imposed in similar circumstances in the future.230


229. See supra note 226 and accompanying text.

230. But see State v. Gordon, 111 Wis.2d 133, 137, 330 N.W.2d 564, 566 (1983)("[w]e look for legislative intent in the language of the statutes and, where the statutes can reasonably be understood in more than one sense, in the legislative history or in both the statutory language and the legislative history"). See also Albernaz v. United States, 450 U.S. 333, 340 (1981).
B. Kidnapping as Merely Incidental to Commission of Another Crime

In addition to rejecting the appellant's double jeopardy argument, the court in *Hall* also held that the trial judge did not commit reversible error in refusing to instruct the jury that "in order to establish kidnapping, the state must prove [that] the confining and carrying away of the victim was more than [merely] incident to the commission of" the sexual battery.\(^{231}\) In so holding, the court has provided a substantial basis for the imposition of disproportionately severe punishments for relatively lesser crimes.

It is clear that in South Carolina, neither asportation nor specific intent to kidnap is necessary to establish the crime of kidnapping.\(^{232}\) The only requirement is that the victim be seized, confined, or carried away "by any means whatsoever without authority of law."\(^{233}\) In the absence of some requirement that the restraint of the victim be substantial or at least not merely incidental to the commission of another crime, the consequences are obviously and inescapably harsh. The penalty of life imprisonment is mandatory in cases of kidnapping. "[A] trial judge has no discretion to impose a lesser sentence or suspend a portion of the life sentence and impose probation."\(^{234}\)

Nevertheless, the court in *Hall* failed to require that the restraint involved be substantial to constitute kidnapping, and instead held that the restraint may be sufficient to constitute kidnapping even though merely incidental to another crime. Relying upon the North Carolina decision of *State v. Fulcher*,\(^{235}\) the court stated that there is no constitutional prohibition against convicting a defendant both for restraining his victim and for the crime of which the restraint was in aid. As long as that restraint is a separate, complete and independent act, it need not be substantial in and of itself.\(^{236}\) In addition to re-

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231. 280 S.C. at 77, 310 S.E.2d at 431-32.
232. See supra note 209.
233. Id.
236. 280 S.C. at 77, 310 S.E.2d at 431 (quoting State v. Fulcher, 294 N.C. at 524, 243 S.E.2d at 352)(emphasis added by the S.C Supreme Court). The court, however, did acknowledge the requirement that the restraint at least be a "separate, complete act,
jecting any requirement of substantiality, the court further concluded that "a defendant may not escape conviction for kidnapping by asserting that the kidnapping was merely incidental to a rape." There are two opposing views with regard to whether the crime of kidnapping encompasses restraints that are merely incidental to the commission of another crime. One view, adopted by the court in Hall, maintains that seizure, detention or asportation of the victim which is otherwise sufficient to constitute kidnapping will allow a conviction for kidnapping even if the act is incidental to another crime. The other view holds that a restraint which is merely incidental to the commission of another crime and which does not substantially increase the risk of harm beyond that necessarily present in the other crime does not constitute kidnapping.

There is no evidence that the South Carolina legislature intended that the crime of kidnapping encompass all restraints incidental to the commission of other crimes. If such were the case, then definitions of second and third degree criminal sexual conduct, in which there exists no aggravating circumstances, would be rendered superfluous since every rape essentially involves some detention "without authority of law," and would therefore amount to first degree criminal sexual conduct.

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237. See supra note 209.

Although the full extent of the consequences of the decision in *Hall* is as yet indeterminable, several undesirable results are readily apparent. First, the mandatory punishment of life imprisonment for conviction of kidnapping may in many cases be unduly severe and disproportionate to the crime, such as when the victim is briefly detained during a simple robbery.\(^\text{242}\) Secondly, the risk of prosecutorial abuse is greatly increased since the additional kidnapping charge may now be employed by the state's attorneys as leverage to induce more guilty pleas.\(^\text{243}\)

Finally, this decision constitutes a further emasculation of the double jeopardy clause, which has already undergone increasingly drastic changes in favor of the government it was originally designed to restrain.

Robert C. Byrd

XI. A REAFFIRMANCTION OF A COURT'S SUMMARY CONTEMPT POWER

In *State v. Buchanan*,\(^\text{244}\) the South Carolina Supreme Court held that a motion to disqualify a judge for bias or prejudice does not constitute contempt. Additionally, the court reaffirmed the power of a court to summarily convict and punish for contempt. Finally, the court held that a motions hearing attendant to a habeas corpus petition is not a "critical stage"\(^\text{245}\) invoking defendant's sixth amendment right to counsel.

Appellant Buchanan appealed from two summary adjudications of contempt. The court appearance in which appellant was held in contempt arose out of prior convictions of manslaughter and armed robbery.\(^\text{246}\) Appellant's application for post-conviction relief from these sentences was denied and he appealed to

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244. 279 S.C. 194, 304 S.E.2d 819 (1983).
246. Appellant was convicted of manslaughter and armed robbery on March 10, 1978. He received a sentence of thirty years for the manslaughter conviction and twenty-five years for the armed robbery conviction. The sentences were to run consecutively. The South Carolina Supreme Court affirmed appellant's conviction and sentence in February 1980, State v. Buchanan, Op. No. 80-MO-43.
the South Carolina Supreme Court. While the appeal was pending, appellant filed a writ of habeas corpus with the Darlington County Court of Common Pleas. He later filed several motions concerning the habeas corpus petition, as well as a motion concerning his appeal from the denial of post-conviction relief. The motions, filed without the assistance of an attorney, were "vague and confusing."

The Darlington County General Sessions Court called a meeting to determine in which action the motions had been filed. During the meeting between appellant, the trial court and an attorney from the Attorney General's office, appellant repeatedly asked that his sentence be vacated. The court explained that appellant was not on trial and that the meeting was to clarify the motions.

When the trial court was unable to determine appellant's intentions in making the motions, it adjourned. The judge advised appellant that counsel would be appointed to clarify the motions. Appellant then grabbed documents that the judge had stated were records of the court. The court warned appellant that he would be held in contempt, to which appellant replied by moving that "he be moved out of here." The court found appellant in contempt and sentenced him to six months imprisonment to run consecutively with his current sentence. Seconds later, appellant asked that the judge recuse himself be-


249. In December 1981, appellant filed an Affidavit of Poverty and a Petition to Proceed In Forma Pauperis (without liability for court fees or costs). In January 1982, appellant filed a motion for Appointment of Counsel, apparently in the habeas corpus proceeding. He also filed an affidavit in support of that motion. All motions and affidavits were filed in the Darlington County Court of Common Pleas. Brief of Respondent at 3.

250. In April 1982, appellant filed a Motion to Waive Counsel and Proceed in Person, or Right to the Attorney of his Choice in his appeal from the denial of post-conviction relief. Brief of Respondent at 3.

251. 279 S.C. at 195, 304 S.E.2d at 820.

252. Record at 2, 3, 5, 6 & 8.

253. Id. at 6 & 7.

254. Id. at 8.

255. Id.

256. Id.
cause he was prejudiced and would not give appellant a fair trial. After being warned that the court would "give" him another six month sentence, appellant retorted, "Give it to me! Because that'll be showing that you was prejudiced." The court then sentenced appellant to a second six month term of imprisonment.

The South Carolina Supreme Court found that the trial court properly convicted and sentenced appellant for the first outburst. The court, however, held that appellant's request that the judge recuse himself did not constitute contempt. The court further held that appellant was not entitled to a jury trial on the contempt charge, since the proper sentence was a single six month term of imprisonment.

Courts have traditionally placed contempt in two categories. The first distinguishes between civil and criminal contempt. Criminal contempt is characterized by an unconditional sentence imposed by a court to punish or deter. In contrast, civil contempt is characterized by a conditional sentence designed to coerce the recipient into a certain behavior. The second category distinguishes between direct or indirect contempt. A direct contempt is any misbehavior in the presence of the court, while an indirect contempt is committed out of the view and hearing of the court. Based on these distinctions, appellant Buchanan committed a direct, criminal act of contempt which the court, without a jury, punished in a summary proceeding.

The distinction between indirect and direct contempt is

257. Id. at 9.
258. 279 S.C. at 196, 304 S.E.2d at 820.
259. Id.
262. 277 S.C. at 384-85, 287 S.E.2d at 919.
particularly important since a court may dispose of a direct contempt in a summary proceeding\textsuperscript{265} without the procedural safeguards extended to those charged with indirect contempt.\textsuperscript{266} Courts and commentators have, however, criticized the summary exercise of a court’s contempt power.\textsuperscript{267}

In South Carolina, the court’s power to punish for contempt is well settled.\textsuperscript{268} The supreme court has stated repeatedly that the determination of contempt is within the trial court’s discretion and will not be disturbed in the absence of plain abuse of that discretion.\textsuperscript{269} In Buchanan, then, the supreme court apparently determined that the trial court abused its discretion when it found contemptuous the defendant’s request that the judge recuse himself.

Several courts have held that a motion for disqualification of a judge on the grounds of bias or prejudice does not constitute contempt if presented in respectful language and manner.\textsuperscript{270} Since appellant’s request was arguably disrespectful, the court,

\textsuperscript{265} United States v. Barnett, 376 U.S. 681, 694 n.12 (1964)(citing more than 50 cases supporting summary disposition of contempt). A summary proceeding is one which “dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer . . . and all that goes with a conventional court trial.” Sacher v. U.S., 343 U.S. 1, 9 (1952). For a history and critical analysis of the summary disposition of direct contempts, see Note, Summary Proceedings in Direct Contempt Cases, 15 Vand. L. Rev. 241 (1962).

\textsuperscript{266} A defendant who commits an indirect contempt is entitled to reasonable notice and an opportunity to be heard, Cooke v. U.S., 287 U.S. 517, 537 (1923); to the right to counsel, id.; to the presumption of innocence, United States v. Fleischman, 339 U.S. 349, 363 (1950); and to the right to a jury trial in proceedings involving serious criminal contempts, Bloom v. Ill., 391 U.S. 194, 202 (1968).


\textsuperscript{270} Holt v. Va., 381 U.S. 131, 136-37 (1965).
utilizing its normal standard of review, could have upheld the second determination of contempt. In the only South Carolina decision addressing a similar charge, State v. Barnett, the court upheld a finding of contempt against an attorney representing himself, who made an affidavit for a change of venue alleging the judge's prejudice. The affidavit contained an unsupported charge that the magistrate had, in a prior trial of the same action, attempted to influence a juror against the attorney. The court reasoned that maintenance of the integrity, authority and dignity of all courts is of the utmost importance and that conduct offering "indignity or insult to a Judge" shall not be tolerated.

Case law from other jurisdictions supports a contempt finding for appellant's second outburst. In Illinois v. Baxter, the state supreme court upheld a defendant's conviction for direct criminal contempt when his pro se petition for substitution of the judge charged that the court was acting as a "Ku Klux Klan, Gestapo Setup." The court found that the defendant's charge was intentionally disrespectful, abusive of the court and reflected upon the personal integrity of the judge. In a similar California case, Blodgett v. Superior Court of Santa Barbara County, the court charged petitioner with contempt for his allegation that the judge had acted in the interests of petitioner's adversary party. During the proceeding instituted to hear and determine the contempt charge, petitioner claimed the judge was disqualified from presiding over the proceeding. The court found this claim constituted another and more flagrant contempt.

Several grounds, however, support the inference that the trial court in Buchanan abused its discretion in finding that appellant's request constituted criminal contempt. First, the supreme court has required, as an element of criminal contempt,
the intent to obstruct the administration of justice.\textsuperscript{279} Arguably, appellant lacked the requisite intent when he requested that the judge recuse himself. Furthermore, a court traditionally imposes the sanction of criminal contempt to vindicate its authority.\textsuperscript{260} The court could reasonably have determined that appellant's request was less of an affront to its authority than his act of grabbing court records. Additionally, older decisions from other jurisdictions hold that a motion to disqualify a judge on account of alleged bias and prejudice does not constitute contempt.\textsuperscript{281}

The supreme court, however, may have been influenced by appellant's argument that he was entitled to a jury trial of the contempt charges because the sentence imposed exceeded six months.\textsuperscript{282} The court suggests that appellant would have been entitled to a jury trial if it had affirmed the twelve month sentence.\textsuperscript{283} The authority cited by the court, however, dictates a different conclusion. In Codispoti v. Pennsylvania,\textsuperscript{284} the United States Supreme Court held, in a post-verdict adjudication of contempt, that the sixth amendment requires a jury trial if the sentences, when aggregated, exceed six months.\textsuperscript{286} The Court stated, however, that the judge does not exhaust his power to convict and punish summarily whenever the punishment imposed for separate contemptuous acts during trial exceeds six months.\textsuperscript{268} Therefore, the Codispoti decision did not affect a


\textsuperscript{280} 221 U.S. at 428; Dobbs, supra note 260, at 235.

\textsuperscript{281} See Annot., 70 A.L.R.3d 797 (1976).


\textsuperscript{283} The court's statement, "[b]ecause appellant's sentence for criminal contempt consists of one six-months term of imprisonment, he is not entitled to a jury trial," supports such an inference. 279 S.C. at 196, 304 S.E.2d at 820.

\textsuperscript{284} 418 U.S. 506 (1974). In Codispoti, the trial judge imposed lengthy sentences for contempt at the end of the trial. Petitioners appealed and the Supreme Court remanded for the contempt charges to be heard by another judge. Mayberry v. Pa., 400 U.S. 455 (1971). On remand, the judge without a jury found petitioners guilty of criminal contempt and imposed multiple six month sentences. Petitioners again appealed. The court granted certiorari, limited to the issue of petitioners' right to a jury trial of the contempt charges. 418 U.S. at 507.

\textsuperscript{285} 418 U.S. at 514-17.

\textsuperscript{286} 418 U.S. at 514. Justice Marshall did not concur in the part of the opinion that would allow unlimited consecutive summary punishments. Id. at 518. See Comment,
trial court’s power to summarily convict and punish direct contempt. Thus, under *Codispoti*, appellant would not have been entitled to a jury trial even if the court had affirmed the twelve month sentence.

Certainly, after *Codispoti*, a court must distinguish between summary and post-verdict dispositions of contempt when addressing a contemnor’s right to a jury trial. The South Carolina Supreme Court failed to make this critical distinction in *Buchanan* and in another recent case, *Curlee v. Howle*. The court in *Curlee* stated the *Codispoti* rule as follows: "[D]efendants in state criminal trials who are committed to imprisonment of more than 6 months are entitled to a jury trial." This statement of the rule misleads the reader unless qualified as applicable only to post-verdict adjudications of contempt. Furthermore, in *State v. Blanton*, the court denied appellant’s request for a jury trial in a post-verdict adjudication of an indirect criminal contempt. The court made no reference to *Codispoti* and stated that in South Carolina, “It has long been established that there is no right to a jury trial, when the circuit courts of this state proceed under its [sic] common law contempt power.” Again, this statement is misleading unless qualified as applicable only to charges of indirect contempt.

The court’s misapplication of the *Codispoti* rule may signal its distaste for jury trials of contempt charges. Objections to the right of jury trial for a direct contempt include: (1) the jury has no question of fact to resolve when the contemptuous conduct

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*supra* note 282, at 545 n.65 for conclusion that eight Justices would not permit aggregation of sentences imposed during trial to determine if a jury trial is required.


288. 277 S.C. at 383, 287 S.E.2d at 918 (emphasis in original). The court correctly determined that the *Codispoti* rule was inapplicable since *Curlee* involved a civil contempt proceeding. *Id.* at 384, 287 S.E.2d at 918.


290. *Codispoti* involved contempts committed during trial, not an indirect contempt as in *Blanton*. The court in *Codispoti* did not distinguish between a court’s common law and statutory power to punish for contempt. It appears that petitioners in *Codispoti* were punished by a Pennsylvania court proceeding under its common law power. *See* Mayherry v. Pa., 400 U.S. at 462-66 (1971).

291. 278 S.C. at 599, 300 S.E.2d at 287. Since appellant received only a four month sentence for his criminal contempt, and the conduct was not committed during trial, the court correctly determined that he was not entitled to a jury trial. *Id.* at 599-600, 300 S.E.2d at 287.
occurs in the presence of the court; (2) the judge still imposes the sentence for the contemptuous conduct; and (3) a jury trial is cumbersome if either side desires to call a large number of witnesses.\(^2\)\(^9\)\(^2\) Even though the court in Buchanan, Curlee and Blanton correctly decided that appellants in each case were not entitled to jury trials,\(^2\)\(^9\)\(^3\) a clarification by the court of the jury trial requirement in a contempt case would be welcome.

Additionally, appellant contended that his sixth amendment right to counsel was violated when he appeared without benefit of counsel at the motions hearing and was summarily convicted of criminal contempt. The Supreme Court has held that the right to counsel attaches after adversary judicial proceedings have been initiated against a person,\(^2\)\(^9\)\(^4\) and the right applies to any "critical stage" of the prosecution.\(^2\)\(^9\)\(^6\) Traditionally, the Court has recognized the criminal defendant's right to counsel as more fundamental than his right to a jury trial.\(^2\)\(^9\)\(^6\)

In South Carolina, the test for determining a critical stage, set forth in State v. Williams, is "whether the particular stage [of the proceedings] either requires or offers opportunity to take a procedural step which will have prejudicial effects in later proceedings, or whether events transpire that are likely to prejudice the ensuing trial."\(^2\)\(^9\)\(^7\) When the motions hearing was called, appellant was not charged with a crime, so there was no possibility that the defense of his case would be prejudiced. The more difficult issue is whether the motions hearing constituted a procedural step the result of which might be prejudicial in a later hearing on his habeas corpus petition.\(^2\)\(^9\)\(^8\) Since this was a novel

\(^{292}\) For a discussion and rebuttal of the objections to the right of jury trial for direct contempts, see Note, Criminal Contempt—Right to Jury Trial for Direct Contempt and Aggregated Sentences, 40 Mo. L. Rev. 354, 365-57 (1975).

\(^{293}\) See infra notes 288 and 291.


\(^{296}\) See Argersinger v. Hamlin, 407 U.S. 25, 30-37 (1972) (recognizing historical support for limiting a trial by jury to serious criminal cases but stating "there is no such support for a similar limitation on the right to assistance of counsel," id. at 30). See also 12 Duq. L. Rev. 115, 120-21 (1973).


\(^{298}\) If the application for post conviction relief presents questions of law or issues of fact requiring a hearing, Rule 5 of the Uniform Post-Conviction Procedure Act re-
issue, a more clearly articulated basis for the court’s decision that the motions hearing was not a critical stage would have
been helpful. The facts of Buchanan, however, indicate that the
hearing judge was “just trying to find out” what appellant was
trying to do in order that it might be done properly.299 Therefore,
the test set out in Williams does not warrant a finding that
the motions hearing in Buchanan was a critical stage.

Appellant further objected to being convicted of contempt
without benefit of counsel. The Supreme Court has held that
due process and the sixth amendment require that one charged
with contempt of court have a reasonable opportunity to obtain
counsel to represent him in the contempt proceeding.300 The
Court, however, has recognized an exception to this right for
charges of misconduct committed in open court in the presence
of the judge.301 Thus, the court in Buchanan correctly decided
that appellant was not entitled to benefit of counsel before being
summarily punished for his outbursts.

Appellant contended, however, that Argersinger v. Ham-
lin302 requires representation by counsel before any imprison-
ment can occur.303 Appellant based his assertion on the broad
language in Argersinger that, “[A]bsent a knowing and intelli-
gent waiver, no person may be imprisoned for any offense,
whether classified as petty, misdemeanor, or felony unless he
was represented by counsel at his trial.”304 The court deemed
appellant’s reliance on Argersinger “misplaced.”305

Initially, the impact of the broad holding in Argersinger on
the summary contempt power was unclear.306 One authority con-
cluded that the summary contempt power fell within the

quires appointment of counsel for an indigent person. S.C. CODE ANN. SUP. CT. R. 50(5)
(Supp. 1983).
299. Record at 3.
(1925).
303. 279 S.C. at 196-97, 304 S.E.2d at 820-21. In Argersinger, the Supreme Court
reversed an indigent’s 90 day sentence for conviction of carrying a concealed weapon.
The ground for reversal was that petitioner had not been represented by counsel in his
criminal prosecution. Id. at 40.
304. 407 U.S. at 37.
305. 279 S.C. at 197, 304 S.E.2d at 821.
Argersinger holding.\textsuperscript{307} Such an application of Argersinger would seriously hamper a court’s ability to deal summarily with direct contempts since many exercises of the power involve witnesses who are not represented in court or of attorneys in their representation of clients. Recognizing the possibility of serious interference with the contempt power, courts have not applied Argersinger to summary contempt proceedings. Thus, appellant’s reliance on it in an appeal from a summary adjudication on contempt was misplaced.

Several recent cases demonstrate that a court’s power to proceed summarily in direct contempt cases is intact. In United States v. Wilson,\textsuperscript{309} the Supreme Court addressed a court’s capacity to deal summarily with contempt. Petitioners in that case had pleaded guilty to separate bank robberies.\textsuperscript{309} The district court granted them immunity to testify in the trial of another charged with bank robbery. When each refused on grounds of self-incrimination, he was sentenced to six months imprisonment for contempt of court.\textsuperscript{310} The appellate court reversed the summary convictions and remanded for a hearing on the contempt charges.\textsuperscript{311} The Supreme Court upheld the summary adjudications of contempt. The Court stated that the conduct constituted “an affront to the court, and . . . summary contempt must be available to vindicate the authority of the court as well as provide the recalcitrant witness with some incentive to testify.”\textsuperscript{312}

In Bell v. Wolfish,\textsuperscript{313} the Supreme Court again reaffirmed its position on a court’s summary contempt power. In addressing the rights of pre-trial detainees,\textsuperscript{314} the Court recognized that,
"[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."315 The Court explicitly stated, however, that it did not intend to cast doubt on the historical exceptions to this general principle, "exceptions such as the power summarily to punish for contempt of court."316

Furthermore, Rule 42(a) of the Federal Rules of Criminal Procedure still authorizes summary disposition of instances of criminal contempt committed in the presence of the court.317 Clearly, a court’s power to deal summarily with contempt was not affected by the court’s broad language in *Argersinger*. Thus, the South Carolina Supreme Court correctly determined that *Argersinger* did not bar the imposition of the contempt sentence upon appellant.

In the context of a summary contempt proceeding, the court in *Buchanan* addressed issues of some constitutional significance. The decision may not aid one in predicting what conduct will be considered contemptuous since that determination depends largely upon the facts of the case. One can be certain after this decision, however, that in South Carolina a court has the power to adjudge conduct contemptuous and to deal summarily with instances of direct contempt over the contemnor’s due process objections.

*Jan Schaffer Simmons*

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315. *Id.* at 535.
316. *Id.* at 536 n.17.
317. *FED. R. CRIM. P.* 42(a) provides in relevant part: (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court.