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Criminal Law

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CRIMINAL LAW

I. Rebuttal of General Presumption that All Criminal Defendants Are Sane

In *State v. Milian-Hernandez*[1] the Supreme Court of South Carolina held that once a criminal defendant presents sufficient evidence of insanity to rebut the general presumption that all criminal defendants are sane, the presumption will no longer exist to weigh in the prosecution's favor. Therefore, if the accused proffers valid evidence of insanity, he is entitled to a directed verdict unless the State presents evidence "from which a jury could find the defendant sane."[2] Once rebutted, the presumption alone can no longer create a jury question of defendant's sanity.

Mario Milian-Hernandez was a Cuban refugee who feared for his safety after another Cuban threatened him in California. After the threats, the defendant fled California for Chicago. He left Chicago by bus destined for Texas, via Washington, D.C., and the Carolinas. Several encounters with Spanish-speaking individuals during the trip fueled his suspicions that he was being followed and that his life was in danger. Shortly after the bus entered South Carolina, the defendant shot and seriously wounded two other passengers on the bus. After remaining on the bus for approximately twenty minutes, the defendant ran into nearby woods. The next morning he surrendered to police.[3]

An investigation revealed no motive for the shootings other than the defendant's belief that the two passengers were in league with the man who had threatened him in California. After undergoing six months of psychiatric treatment, the defendant was found competent to stand trial. At trial the jury returned guilty verdicts on two counts of assault and battery with intent to kill. The appeal to the Supreme Court of South Carolina questioned whether the trial judge erred in refusing to grant

1. 287 S.C. 183, 336 S.E.2d 476 (1985).
2. *Id.* at 185, 336 S.E.2d at 477.
3. *Id.* at 184-85, 336 S.E.2d at 477.

a directed verdict of not guilty by reason of insanity.[4]

In reversing the lower court's decision, the supreme court noted the general view that in every criminal case an initial presumption arises that the defendant is sane.[5] The court also reaffirmed the rule expressed in earlier South Carolina decisions that insanity is an affirmative defense that must be pleaded and proved by the defendant.[6] Therefore, in order to assert a successful plea of not guilty by reason of insanity, a defendant must not only put sanity in issue by overcoming the presumption, but must also offer evidence sufficient to prove insanity by a preponderance of the evidence.[7]

In *Milian-Hernandez* several physicians testified at the trial concerning the defendant's mental instability.[8] The supreme court, however, found that the prosecution had failed to introduce sufficient evidence of the defendant's sanity.[9] Conse-

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4. *Id.* at 185, 336 S.E.2d at 477.

5. *See* State v. Livingston, 233 S.C. 400, 105 S.E.2d 73 (1958); State v. Bundy, 24 S.C. 439 (1885).

6. *See* State v. Hinson, 253 S.C. 607, 172 S.E.2d 548 (1970); State v. Bundy, 24 S.C. 439 (1885). There is a split of authority concerning who has the burden of proving sanity or insanity once it has been put in issue at trial. Some jurisdictions place the burden on the accused to prove insanity. *See, e.g.*, 18 U.S.C. § 20(b) (Supp. 1984); Knight v. State, 273 Ala. 480, 142 So. 2d 899 (1962); People v. Monk, 56 Cal. 2d 288, 363 P.2d 865, 14 Cal. Rptr. 633 (1961); State v. Hathorn, 395 So. 2d 783 (La. 1981); State v. Johnson, 298 N.C. 743, 259 S.E.2d 752 (1979); Jones v. Commonwealth, 202 Va. 236, 117 S.E.2d 67 (1960). Other jurisdictions place the burden on the prosecution to prove sanity. *See, e.g.*, State v. Martin, 102 Ariz. 142, 426 P.2d 639 (1967); People v. Ware, 187 Colo. 28, 528 P.2d 224 (1974); People v. Hawkins, 53 Ill. 2d 181, 290 N.E.2d 231 (1972); State v. Bates, 226 Kan. 277, 597 P.2d 646 (1979); Commonwealth v. Soaris, 275 Mass. 291, 175 N.E. 491 (1931); Commonwealth v. Donofrio, 274 Pa. Super. 345, 372 A.2d 859 (1977).

7. *See* State v. Hinson, 253 S.C. 607, 172 S.E.2d 548 (1970).

8. The test used in South Carolina to determine whether an individual has the capacity to form a guilty intention and thus be held responsible for his crimes is the M'Naghten test. State v. Law, 270 S.C. 664, 244 S.E.2d 302 (1978). The test is whether the accused had the mental capacity to distinguish moral and legal right from moral and legal wrong and to recognize the particular act charged as morally or legally wrong. Of the three doctors that testified for the defendant, only one testified that the defendant did not have criminal responsibility. Record at 130, 137. Another doctor testified that the defendant suffered from an acute paranoia disorder, but was unable to testify as to defendant's capacity under M'Naghten because he had not been asked to conduct such a review. *Id.* at 100. The third doctor was unable to formulate an opinion on defendant's capacity under the rule because he had not made a formal determination of defendant's capacity. *Id.* at 5.

9. The prosecution argued that the defendant's flight from the scene of the crime was evidence of sanity and cited as authority State v. Thompson, 278 S.C. 1, 292 S.E.2d 581, *cert. denied*, 456 U.S. 938, *reh'g denied*, 457 U.S. 1112 (1982). *Milian-Hernandez*,

quently, in the absence of an affirmative showing of sanity, the defendant's evidence of insanity, as accepted by the court,[10] was sufficient to overcome the presumption of sanity and meet the defendant's ultimate burden of proof.[11] Nevertheless, the prosecution argued that the initial presumption of sanity alone was sufficient to create a jury question concerning the defendant's sanity and, therefore, the jury verdict should stand.[12] The supreme court, however, stated that the presumption disappears when evidence of sanity is presented. Once rebutted, the presumption no longer retains evidentiary value, and the prosecution must present valid evidence of sanity to create a jury question. Thus, the court held that since the evidence presented by defendant was sufficient to overcome the presumption, and the prosecution had failed to offer acceptable evidence of sanity, the trial judge had erred in not directing a verdict for the defendant.[13]

The majority in *Milian-Hernandez* noted that the presumption issue was one of first impression in South Carolina. The decision is noteworthy because it appears to reject dictum that appeared in the earlier case of *State v. Hinson*.[14] The court in *Hinson* recognized the clear split of authority in other jurisdictions concerning whether the presumption of sanity retains any evidentiary value after evidence of insanity is introduced.[15]

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287 S.C. at 186, 336 S.E.2d at 477. The court noted the validity of *Thompson*, but dismissed this argument by stating "the circumstances of this Appellant's flight are such as to negate that permissible inference." *Id. But see id.*, 336 S.E.2d at 478 (Ness, J., dissenting).

10. It is interesting that the supreme court chose to grant a directed verdict in this case because the defendant's only evidence was testimony from medical experts. *See supra* note 8. As the court recognized, "A jury may properly disregard expert testimony." 287 S.C. at 186, 336 S.E.2d at 478 (citing State v. Johnson, 66 S.C. 23, 44 S.E. 58 (1903)). Other jurisdictions have held that failure to directly controvert expert testimony of insanity will not necessarily entitle a defendant to a directed verdict. *See* Howard v. State, 172 Ala. 402, 55 So. 255 (1911); *see also* Bowker v. State, 373 P.2d 500 (Alaska 1962); State v. Bannister, 339 S.W.2d 281 (Mo. 1960). Even though the court stated that "this opinion should not be read to require the state to produce expert testimony whenever the defendant does so," the outcome in this case appears to suggest that the prosecution's case would be severely weakened without expert testimony. 287 S.C. at 186, 336 S.E.2d at 478.

11. 287 S.C. at 186, 336 S.E.2d at 478.

12. Brief of Respondent at 5-8.

13. 287 S.C. at 186, 336 S.E.2d at 477.

14. 253 S.C. 607, 172 S.E.2d 548 (1970).

15. *See* Annotation, *Modern Status of Rules as to Burden and Sufficiency of Proof*

While refraining from specifically deciding the issue, the *Hinson* court stated that earlier decisions "would seem to indicate that South Carolina is committed to the view that the presumption of sanity does retain evidentiary value even after the offer of evidence tending to prove insanity."[16]

After *Milian-Hernandez*, the practitioner should be aware that in South Carolina, once evidence of insanity is presented, the prosecution cannot rely on the presumption of sanity to create a jury question.

C. Ben Garren, Jr.

II. Rigid Statutory Requirements to Use Breathalyzer Tests or Chemical Analysis of a Defendant's Blood to Prove Driving Under the Influence

In 1985 South Carolina's appellate courts handed down two decisions that construed South Carolina Code section 56-5-2950, entitled "Implied consent to chemical test to determine alcoholic content of blood."[17] The decision by the South Carolina Supreme Court in *Town of Fairfax v. Smith*[18] and the disposition of *State v. Carrigan*[19] by the court of appeals were narrow constructions of the applicability of the statute. In each case, the court rejected the State's argument that it had complied with the statute's intent and found that the State failed to follow the clear statutory requirements necessary to convict a defendant under section 56-5-2950.

In *Smith* the defendant, after submitting to a breathalyzer test, requested an independent test of his blood/alcohol level.

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of Mental Irresponsibility in Criminal Case, 17 A.L.R.3d 146 (1968). One view is that the presumption no longer exists after rebuttal evidence is introduced. *See, e.g.*, People v. Saylor, 319 Ill. 205, 149 N.E. 767 (1925). The other view is that the presumption will still exist to weight the scale in the prosecution's favor. *See, e.g.*, Commonwealth v. Spencer, 212 Mass. 438, 99 N.E. 266 (1912).

16. 253 S.C. at 620, 172 S.E.2d at 554-55.

17. S.C. Code Ann. § 56-5-2950(a)(1976) states in part: "The person tested may have . . . a test or tests in addition to the test administered by the law-enforcement officer . . . . The arresting officer or the person conducting the chemical test of the person apprehended shall promptly assist that person to contact a qualified person to conduct additional tests."

18. 285 S.C. 458, 330 S.E.2d 290 (1985).

19. 284 S.C. 610, 328 S.E.2d 119 (Ct. App. 1985).

The police officer granted this request and transported Mr. Smith to a local hospital where blood was drawn. Before the hospital had a chance to analyze the blood sample, however, the officer seized the sample and sent it to the South Carolina Law Enforcement Division (SLED) for analysis. The defendant was subsequently convicted for driving under the influence of alcohol on the basis of the breathalyzer results and the blood analysis data compiled by SLED.[20]

On appeal the South Carolina Supreme Court reversed the defendant's conviction on the ground that the officer's actions constituted a violation of section 56-5-2950(a). This section grants to a defendant who has submitted to a breathalyzer test the right to receive affirmative assistance from a police officer in procuring an independent blood test.[21] The court found that the officer failed to provide the required assistance when he confiscated the blood sample; therefore, the breathalyzer results and the SLED report were held inadmissible.[22]

In *Carrigan* the defendant was unable to submit to a breathalyzer test because he had to be transported directly to a local emergency room for treatment.[23] Nevertheless, at trial the State was able to introduce into evidence the results of a chemical analysis of Carrigan's blood which had been performed by the hospital. No testimony, however, was offered regarding the correlation between the hospital's blood analysis results and intoxication. Instead, the State relied on section 56-5-2950(b) which provides that an accused is presumed to be under the influence of alcohol when the amount of alcohol in the bloodstream is equal to or greater than ten one-hundredths of one percent (0.10%), as determined by a chemical analysis of the accused person's *breath*.[24] The trial judge assumed section 56-5-

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20. 285 S.C. at 459, 330 S.E.2d at 290.

21. *See* S.C. CODE ANN. § 46-344(a) (1962)(current version at S.C. CODE ANN. § 56-5-2950(a) (1976)), *construed in* State v. Lewis, 266 S.C. 45, 221 S.E.2d 524 (1976).

22. 285 S.C. at 460, 330 S.E.2d at 290.

23. Record at 48; Brief of Respondent at 5.

24. This statutory section states:

> In any criminal prosecution . . . relating to driving under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood at the time of the alleged violation, *as shown by chemical analysis of the defendant's breath*, shall give rise to the following presumptions:
>
> . . . .
>
> (3) If there was at that time ten one-hundredths of one percent or more by

2950(b) was applicable and included it in his charge to the jury. Carrigan was subsequently convicted of driving under the influence.

The court of appeals held that this jury charge was erroneous because the presumption contained in section 56-5-2950(b) arises only when the alcohol level of the blood is determined by an analysis of the accused person's breath.[25] Therefore, the court reversed the defendant's conviction and remanded for a new trial so that proper expert testimony could be admitted with the blood test results.[26]

The supreme court in *Smith* and the court of appeals in *Carrigan* narrowly construed section 56-5-2950 and placed the burden upon the State either to meet the statute's requirements or to forego using the statute to prosecute defendants. The remand by the court of appeals in *Carrigan*, which put the State in the position of prosecuting without the benefit of the presumption contained in 56-5-2950(b), is of particular importance. The court recognized that its decision created an anomalous result: a breathalyzer test could be used to determine an accused's blood/alcohol level and create a presumption of driving under the influence, but the same blood/alcohol level when determined through a chemical analysis of the blood itself could not give rise to the presumption, although the latter test is inherently more accurate.[27] In the court's opinion, however, this result was compelled by the language and the legislative history of the statute,[28] and the court refused to contravene a legitimate use of

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weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor.

S.C. CODE ANN. § 56-5-2950(b)(1976)(emphasis added).

25. 284 S.C. at 616, 328 S.E.2d at 122.

26. *Id.* at 617, 328 S.E.2d at 123. The court of appeals also rejected Carrigan's other two grounds of appeal. First, the court found that the trial court did not err in refusing to grant a mistrial because one of the jurors had a benign conversation with a prosecution witness. *Id.* at 614, 328 S.E.2d at 121. Second, the court of appeals affirmed the defendant's conviction of driving in violation of the Habitual Traffic Offender Act, S.C. CODE ANN. §§ 56-1-1010 to -1130 (1976). The court found that the defendant was not prejudiced by the trial judge's jury charge defining "habitual offender." 284 S.C. at 614, 328 S.E.2d at 121.

27. *Id.* at 616-17, 328 S.E.2d at 122.

28. S.C. CODE ANN. § 56-5-2950(b) (1976) is a recodification of S.C. CODE ANN. § 46-344 (1962) (amended in 1969). The amendment to § 46-344 changed the language from ". . . as shown by chemical analysis of the defendant's blood, urine, breath or other bodily substance . . ." to the present language that includes only breath. Therefore, the

legislative prerogative.

In addition, the holdings of *Smith* and *Carrigan* have constitutional significance. In *State v. Lewis*[29] the South Carolina Supreme Court made clear that an accused person's right to have an opportunity to procure an independent blood test is of constitutional magnitude. The court in *Lewis* recognized that an accused has a due process right to obtain exculpatory evidence which arises independent of legislative enactment.[30] Therefore, in *Smith* the officer's act of seizing the blood sample was a constitutional violation because it interfered with Mr. Smith's right to have his blood independently analyzed for possible exculpatory value.[31] Likewise, the *Carrigan* court noted that a statute that creates a presumption in a criminal case must be construed strictly since the State's burden of proving beyond a reasonable doubt every element of a crime charged is constitutionally compelled by due process of law, and a statutory presumption shifts this burden.[32] Thus, the court refused to expand the applicability of this presumption by implying a legislative intent and, instead, deferred to the plain meaning of the statutory language.[33]

Smith and *Carrigan* indicate that South Carolina courts can be expected to insist that prosecutions relying on section 56-5-2950 must rigidly meet the requirements of the statute. When a police officer's actions deviate from the statutory scheme, statutory and constitutional defenses should be successful.

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court found that the intent of the legislature was to exclude a chemical test of an accused person's blood from the parameters of the statute. 284 S.C. at 616, 328 S.E.2d at 122.

29. 266 S.C. 45, 221 S.E.2d 524 (1976).

30. The defendant in *Lewis* refused to take the breathalyzer test. The supreme court held that the right granted by S.C. CODE ANN. § 46-344 (1962) to receive mandatory assistance from a police officer in procuring an independent test is contingent upon the accused submitting to a breathalyzer test. The court also held, however, that the defendant has a due process right to procure favorable evidence which arises independent of the statute. Consequently, in all cases, the state must afford the defendant a reasonable opportunity to obtain a blood test. 266 S.C. at 48, 221 S.E.2d at 526.

31. The *Smith* court stated that the purpose of the statutory provision which grants the accused the right of mandatory assistance to procure an independent test is "to permit an accused person to gather independent evidence to submit in reply to that of the prosecuting authority." 285 S.C. at 460, 330 S.E.2d at 290. In light of the court's language in *Lewis*, it is clear that this right is one of constitutional proportion.

32. 284 S.C. at 616, 328 S.E.2d at 122; *see In re* Winship, 397 U.S. 358, 365 (1970).

33. 284 S.C. at 616, 328 S.E.2d at 122.

III. Testimony of Convicted Perjurors

In *State v. Merriman*[34] the South Carolina Court of Appeals held that section 16-9-10 of the South Carolina Code,[35] which prohibited the testimony of a convicted perjuror, was repealed by implication upon the enactment of section 19-11-60.[36] Upon rehearing, the court developed a historical analysis of its conclusion. The court also refused to extend *Giglio v. United States*[37] to allow into evidence the results of a polygraph contained within an immunity agreement.

The defendants in *Merriman* were convicted of conspiracy, kidnapping, and murder. The State granted immunity to its principal witness, Danny Hogg. Hogg testified that he and Eddie Merriman had delivered the victim to Paul Mazzell and that Mazzell had killed the victim. The body was buried in Merriman's yard and was not discovered until Hogg turned state's evidence. The appeals of Mazzell and Merriman were consolidated for decision by the court of appeals.

The first significant ruling in this case concerned the testimony of a convicted perjuror.[38] When the State offered a witness who had been convicted of perjury, the appellants objected, cit-

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34. 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985).

35. S.C. Code Ann. § 16-9-10 (1976) provides: "Whoever . . . shall wilfully and corruptly commit any manner of wilful perjury . . . the oath of such person shall not be received in any court of record within this State."

36. South Carolina Code § 19-11-60 provides:

> No person shall be disqualified to testify in the trial of any cause in the courts of this State by reason of his conviction and sentence for any crime. The fact of such conviction and sentence may be established, and the credibility of the testimony of any such witness shall be entirely for the jury or the court determining the facts at issue, as the case may be.

S.C. Code Ann. § 19-11-60 (1976).

37. 405 U.S. 150 (1972). In *Giglio* the Supreme Court held that where the government's case depends almost entirely on a witness' testimony, credibility becomes an important issue, and that any agreement concerning future prosecution was both relevant and admissible.

38. The court also addressed the following grounds for reversal raised by the appellants: (1) the harrassment of witnesses, (2) the prejudicial exchange between the solicitor and a witness, (3) the disqualification of a juror, (4) the prejudicial reply revealing that the witness was under the state's protective custody, (5) the unsuccessful use by the police of an informant to elicit information, and (6) the refusal of the trial judge to make the charge of self-defense and manslaughter. The court of appeals held that no reversible error resulted from the trial judge's decision on these issues. 287 S.C. at 79-88, 337 S.E.2d at 221-27.

ing section 16-9-10, which prohibits the testimony of a convicted perjuror. The trial court allowed the testimony on the basis of section 19-11-60, which provides that no person convicted of any crime should be barred from testifying. The court of appeals upheld the trial judge's decision, stating that the language of section 19-11-60 was unequivocal and unambiguous.[39] Therefore, the court reasoned that because the two statutes were inconsistent, the earlier statute was repealed by implication upon the enactment of section 19-11-60.[40]

On rehearing the appellants argued that section 24-21-990(6),[41] which provides that a pardon restores the right to testify to a convicted perjuror, constituted evidence that the Statute of Elizabeth[42] had not been repealed. The court held, however, that the Statute of Elizabeth was repealed by the express repealer in section 19-11-60.[43] The court also stated that section 24-21-990(6) supported the conclusion that the Statute of Elizabeth had been repealed. Under the Statute of Elizabeth, a pardon did not restore competency to testify.[44] Therefore, the Statute of Elizabeth was inconsistent with sections 24-21-990(6) and 19-11-60.

In a concurring opinion Judge Gardner argued that section 16-9-10 was repealed by section 19-11-60; however, he stated that section 16-9-10 was reenacted upon recodification.[45] In *Nexsen v. Ward*[46] the court stated that "any matter which the Legislature may constitutionally enact as law becomes such when it has been inserted in the Code, and adopted with it."[47] The majority did not address the recodification argument because it was not raised in the petition.

The court in *Merriman* also addressed the issue of the admissibility of a polygraph within the terms of an immunity

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39. *Id.* at 80, 337 S.E.2d at 222.

40. *Id.*

41. S.C. CODE ANN. § 24-21-990 (Supp. 1985) provides: "A pardon shall fully restore all civil rights lost as a result of a conviction, which shall include the right to: . . . (6) not have his testimony excluded in a legal proceeding if convicted of perjury . . . ."

42. Statute of Elizabeth, 1562, 5 Eliz., Ch. 5 (enacted in South Carolina at 2 S.C. Stat. 401, No. 322 (1712)).

43. 287 S.C. at 93-94, 337 S.E.2d at 229-30.

44. *Id.* at 94, 337 S.E.2d at 230.

45. *Id.* at 95, 337 S.E.2d at 230.

46. 96 S.C. 313, 80 S.E. 599 (1914).

47. *Id.* at 319, 80 S.E. at 601.

agreement. Before admitting into evidence Hogg's immunity agreement, the trial judge deleted reference to the requirement that Hogg take a lie detector test. Mazzell, citing *Giglio v. United States*,[48] argued that the entire immunity agreement including the polygraph clause should have been admitted. The court of appeals rejected this argument. The court did not "believe the U. S. Supreme Court intended by *Giglio* that every detail of an immunity agreement should become admissible evidence regardless of its admissibility under generally accepted rules of evidence."[49] The court held that it was within the discretion of the trial judge to delete the polygraph.[50] The court's decision is consistent with its rejection of the accuracy of a polygraph. The decision also reflects a generally uniform position that a lie detector test is not a reliable means of ascertaining truth or deception.[51]

In allowing the testimony of convicted perjurors, the *Merriman* court places South Carolina within the majority of states which have addressed this issue. The disqualification of witnesses has generally been abandoned either by statute or judicial decision.[52] The federal courts do not disqualify convicted perjurors.[53] Judge Gardner's concurring opinion, however, makes clear that there must be legislative action to resolve the two inconsistencies between sections 16-9-10 and 19-11-60.

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48. 405 U.S. 150 (1972).

49. 287 S.C. at 87, 337 S.E.2d at 226.

50. *Id.*

51. McCroskey v. United States, 339 F.2d 895 (8th Cir. 1965); State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); People v. Jones, 52 Cal. 2d 636, 343 P.2d 577 (1959); Johnson v. State, 166 So. 2d 798 (Fla. Dist. Ct. App. 1964); State v. Chang, 46 Hawaii 22, 374 P.2d 5 (1962); People v. Oney, 28 Ill. 2d 505, 192 N.E.2d 920 (1963); State v. Mottram, 158 Me. 325, 184 A.2d 225 (1962); Lusby v. State, 217 Md. 191, 141 A.2d 893 (1958); Commonwealth v. Fatalo, 346 Mass. 266, 191 N.E.2d 479 (1963); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495 (1951); Commonwealth v. Saunders, 386 Pa. 149, 125 A.2d 442 (1956); State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959); Marable v. State, 203 Tenn. 440, 313 S.W.2d 451 (1958); Lee v. Commonwealth, 200 Va. 233, 105 S.E.2d 152 (1958). *See generally* Annotation, *Physiological or Psychological Truth and Deception Tests*, 23 A.L.R.2D 1306 (1952).

52. Stone v. State, 118 Ga. 705, 45 S.E. 630 (1903); State v. Murdock, 172 Ohio St. 221, 15 Ohio Op. 2d 372, 174 N.E.2d 543 (1961); Clemmons v. State, 39 Tex. Crim. 279, 45 S.W. 911 (1898); Koch v. State, 126 Wis. 470, 106 N.W. 531 (1906).

53. Schoppel v. United States, 270 F.2d 413 (4th Cir. 1959).

IV. SAME EVIDENCE TEST USED TO DECIDE DOUBLE JEOPARDY CASE

In *State v. Norton*[54] the South Carolina Supreme Court reaffirmed its use of the same evidence test to decide double jeopardy issues.[55] Applying the test, the court in *Norton* concluded that violations of sections 16-3-655(1)[56] and 16-15-140[57] of the South Carolina Code do not constitute the same offense for double jeopardy purposes.

Norton was first brought to trial for violation of section 16-3-655(1) of the South Carolina Code, which prohibits engaging in sexual battery with a child of less than eleven years of age.[58] Sexual battery, as defined in section 16-3-651(h), requires "an intrusion . . . into the genital or anal openings . . . ."[59] After the victim testified that no penetration occurred, counsel for the defendant moved for a directed verdict. The court granted the motion.

Subsequently, Norton was reindicted under section 16-15-140 of the Code for the same incident. Section 16-15-140 prohib-

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54. 286 S.C. 95, 332 S.E.2d 531 (1985).

55. The doctrine of double jeopardy protects a defendant against prosecution for the same offense after acquittal or conviction and protects against multiple punishments for the same offense at the same trial. *See* Brown v. Ohio, 432 U.S. 161 (1977); North Carolina v. Pearce, 395 U.S. 711 (1969). The double jeopardy safeguards are found in S.C. CONST. art. I, § 12, and U.S. CONST. amend. V (made applicable to the states by U.S. CONST. amend. XIV, § 1). Benton v. Maryland, 395 U.S. 784 (1969). In *Norton* the court refers to "former jeopardy"; there is authority which indicates that former jeopardy is synonymous with double jeopardy. *See* BLACK'S LAW DICTIONARY 587 (5th ed. 1979). The South Carolina Supreme Court, however, appears to limit former jeopardy to double jeopardy situations like *Norton*, which involve multiple prosecutions for the same offense. *See* State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977).

56. S.C. CODE ANN. § 16-3-655(1)(1976) provides: "A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim who is less than eleven years of age."

57. Section 16-15-140 provides in part:

> It shall be unlawful for any person over the age of fourteen years to wilfully and lewdly commit or attempt any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child.

S.C. CODE ANN. § 16-15-140 (1976).

58. S.C. CODE ANN. § 16-3-655(1) (1976).

59. S.C. CODE ANN. § 16-3-651(h) (1976). The only form of sexual battery alleged in Norton's first trial was insertion of defendant's finger into victim's vagina. Therefore, it was unnecessary to consider any of the other forms of sexual battery.

its commission of a lewd act upon a child under fourteen years of age.[60] The defendant was found guilty and sentenced to five years imprisonment. Norton appealed the verdict alleging that reindictment on the basis of the same facts litigated in the first trial constituted double jeopardy.[61]

The supreme court rejected Norton's argument and upheld the conviction, noting that if a single act constitutes two separate offenses, " 'the defendant may be severally indicted and punished for each.' "[62] Therefore, the issue was whether violation of both sections 16-3-655(1) and 16-15-140 was one offense or two separate offenses. The court stated that "[t]he test to be applied to determine whether there are two offenses or one growing out of the same act or transaction is whether each statute requires proof of a fact which the other does not."[63] This approach is often referred to as the *Blockburger* test.[64] It is also known as the same evidence test.[65]

Applying the same evidence test, the court in *Norton* decided that the crimes of first degree criminal sexual conduct with a minor and committing a lewd act upon a minor were separate offenses. The first requires proof of a sexual battery, while the second requires proof of a "lewd or lascivious act . . . [done] with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child."[66] The

60. S.C. CODE ANN. § 16-15-140 (1976).

61. Norton also alleged the following: the retrial violated principles of collateral estoppel; S.C. CODE ANN. § 16-15-140 (1976) is unconstitutional because it is too vague; and insufficient proof was presented at trial of intent to arouse the passions or desires of the defendant for a conviction under S.C. CODE ANN. § 16-15-140 to stand. The court addressed only the collateral estoppel issue in its opinion and rejected Norton's argument without discussion.

62. 286 S.C. at 96, 332 S.E.2d at 532 (quoting State v. Hall, 280 S.C. 74, 77, 310 S.E.2d 429, 431 (1983)).

63. 286 S.C. at 96, 332 S.E.2d at 532.

64. Blockburger v. United States, 284 U.S. 299 (1932).

65. Although the definition of the same evidence test is phrased differently from the *Blockburger* test, as a practical matter, there is no difference between the two formulations, and the South Carolina Supreme Court uses them interchangeably. *See* State v. Lawrence, 266 S.C. 423, 223 S.E.2d 856 (1976).

66. S.C. CODE ANN. § 16-15-140. The court also noted that the crime of first degree criminal sexual conduct with a minor requires that the victim be younger than eleven years of age, whereas the crime of committing a lewd act with a minor requires the victim to be under the age of fourteen. This difference in age requirements was not a sufficient difference to defeat the double jeopardy claim because any victim who met the fourteen year age requirement under § 16-15-140 would also satisfy the eleven year age

court concluded that Norton had not been subjected to double jeopardy since each of the crimes required proof of an element not required by the other.

The South Carolina Supreme Court has consistently used the same evidence test when determining whether a violation of more than one statute constitutes the same offense for double jeopardy purposes.[67] The *Norton* decision, however, represents the court's strictest application of the test. Technically, the court's conclusion that proving a lewd act requires proof of an element not required to prove sexual battery was correct, but appears contrary to a common sense reading of the statutes. It seems unlikely that an act which constitutes a sexual battery would not also constitute a lewd act. The crucial element of a lewd act is the intent of arousing the passions of one of the participants. On the other hand, sexual battery is defined as any intrusion into another's genital or anal openings without regard to intent. It appears, however, that these acts are such that an intent to arouse passions can almost be presumed from the act itself. *Norton* is, therefore, significant because it indicates the court's willingness to apply the same evidence test rigidly and rely upon minor technical differences in statutory criminal elements to defeat a claim of double jeopardy.

Arguably, a strict application of the same evidence test has the advantage of providing predictable results. The results, however, are often strange and harsh. For example, one court using the same evidence test found a defendant who had cheated in a card game guilty of seventy-five separate offenses, one for each hand that was dealt.[68] Such a result illustrates that the greatest shortcoming of the same evidence test is that it lends itself to mechanical, rigid application, which provides inadequate protection of double jeopardy rights. This weakness has been the main target of critics of the same evidence test[69] and has caused many

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requirement under § 16-3-655. Therefore, in order to uphold the conviction, the court had to look for another element required to prove a lewd act that was not required to prove criminal sexual conduct.

67. *See* State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983); State v. Lawrence, 266 S.C. 423, 223 S.E.2d 856 (1976); State v. Greuling, 257 S.C. 477, 186 S.E.2d 706 (1972); State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (1972); State v. Steadman, 216 S.C. 579, 59 S.E.2d 168 (1950).

68. Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 388 (1923).

69. *See* MODEL PENAL CODE AND COMMENTARIES § 1.09 commentary at 162 (Official

jurisdictions to reject the test entirely.[70]

Many courts which continue to utilize the same evidence test warn that it should not be applied too rigidly because of the potentially detrimental effect on double jeopardy rights.[71] In *Faulkner v. State*[72] a Florida court adopted a "flexible" approach to the double jeopardy issue in a case similar to *Norton*. Using the same evidence test,[73] the Florida Supreme Court in *Faulkner* held that a conviction for being "lewd, wanton and lascivious" barred a subsequent prosecution for indecent exposure arising out of the same incident.[74] A strict application of the same evidence test would have allowed a second trial, but the *Faulkner* court reasoned that the two charges were "so closely related" that a second trial would be improper. As one commentator noted, "This type of approach seems more satisfactory than the rigid same evidence test as a means of determining the identity of offenses. The relevant inquiry should not be whether any additional fact is required in the second prosecution, but whether a *materially* different fact, enough to make a truly different offense, must be shown."[75]

This flexible approach to the same evidence test appears to have been endorsed by the United States Supreme Court in *Brown v. Ohio*.[76] In *Brown* the Court stated, "The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense."[77]

Draft & Revised Comments 1985); Cannon, *Double Jeopardy In Oregon*, 14 WILLAMETTE L.J. 21, 29 (1977); Note, *Criminal Law: The Same Offense in Oklahoma - Now You See It, Now You Don't*, 28 OKLA. L. REV. 131, 134-35 (1975).

70. *See, e.g.*, Whitton v. State, 479 P.2d 302 (Alaska 1970); People v. White, 390 Mich. 245, 212 N.W.2d 222 (1973); State v. Brown, 262 Or. 442, 497 P.2d 1191 (1972); Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973). Some jurisdictions have rejected the same evidence through legislative enactments. *See, e.g.*, MINN. STAT. ANN. § 609.035 (1963)(amended 1983).

71. *See* State v. Ahuna, 52 Haw. 321, 474 P.2d 704 (1970); State v. Currie, 41 N.J. 531, 197 A.2d 678 (1964).

72. 146 Fla. 769, 1 So. 2d 857 (1941).

73. *See* King v. State, 145 Fla. 286, 199 So. 38 (1940)(same evidence test applied; court held that acquittal for aiding and abetting arson did not bar prosecution for aiding and abetting arson with intent to defraud an insurer).

74. 146 Fla. at 770, 1 So. 2d at 857.

75. Haddad & Mulock, *Double Jeopardy Problems in the Definition of the Same Offense: State Discretion to Invoke the Criminal Process Twice*, 22 U. FLA. L. REV. 515, 533 (1970)(emphasis in original).

76. 432 U.S. 161 (1977)

77. *Id.* at 166 n.6. The *Brown* court cited *In re* Nielsen, 131 U.S. 176 (1889), with

The South Carolina Supreme Court initially appeared to adopt the view that the same evidence test should not be mechanically applied. In *State v. Switzer*[78] the court stated that the same evidence test "while perhaps not infallible, will generally prove useful and adequate."[79] The court in *Norton*, however, did not question the infallibility of the same evidence test. In failing to do so, the court has established a precedent which may result in a diminution of defendants' double jeopardy rights for the sake of strict adherence to the same evidence test.

Frank A. Schiller

V. JURY CHARGES AND LESSER INCLUDED OFFENSES

The South Carolina Court of Appeals in *State v. Hilton*[80] reaffirmed the longstanding South Carolina rule that, at a defendant's request, a trial judge must instruct the jury as to lesser included offenses if there is any evidence that the defendant is guilty of only a lesser offense.[81] The South Carolina Supreme Court had previously ruled in *State v. Self*[82] that a lower court erred in not charging assault and battery of a high and aggravated nature along with assault and battery with intent to kill where the facts were disputed. Since due process was not directly implicated, *Hilton* could have been decided strictly on the basis of South Carolina law. The decision, however, begins with a due process analysis and, therefore, raises a question of whether a charge on the lesser included offense is a constitutional right.

In *Hilton* evidence existed from which the jury could have concluded that the defendant was guilty of only the lesser offense of assault and battery of a high and aggravated nature.

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approval. In *Nielsen* the Supreme Court held that a conviction for cohabitation for two and one-half years barred a subsequent prosecution of either defendant for adultery, even though the two crimes required completely different elements of proof.

78. 65 S.C. 187, 43 S.E. 513 (1903).

79. *Id.* at 190, 43 S.E. at 514.

80. 284 S.C. 245, 325 S.E.2d 575 (Ct. App. 1985).

81. State v. Jones, 133 S.C. 167, 130 S.E. 747 (1925). In State v. Funchess, 267 S.C. 427, 229 S.E.2d 331 (1976), the court held that the rule is inapplicable when no conflict exists on any element of the higher offense.

82. 225 S.C. 267, 82 S.E.2d 63 (1954).

The defendant and the victim were arguing while standing beside a railroad crossing when the accident occurred. Conflicting evidence was presented to show whether the defendant pushed the victim into an oncoming train, the victim accidently fell into the train's path, or the victim turned and bolted into the oncoming train.[83] The offenses discussed in *Hilton* were assault and battery of a high and aggravated nature and assault and battery with intent to kill. The element of specific intent to kill distinguishes these offenses.[84] If a jury believes the defendant is guilty of some offense and a charge on the lesser offense is not presented, the defendant might be found guilty even though the element of specific intent to kill is not proven beyond a reasonable doubt. Due process requires not only proof beyond a reasonable doubt, but "proof beyond a reasonable doubt of every fact necessary to constitute the crime."[85] The possibility that a jury may convict with insufficient proof of specific intent arguably elevates instruction on the lesser offense to a constitutional right.[86]

In all federal and state proceedings, a court's failure to give a requested charge on lesser included offenses is reversible error.[87] The Supreme Court in *Beck v. Alabama*[88] held that a charge on a lesser offense was a due process requirement in capital cases, expressly reserving the question in noncapital cases.[89] Perhaps because all jurisdictions require the instruction when requested, the urgency of the question in noncapital cases has diminished. There has been no specific ruling on since *Beck*.[90]

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83. 284 S.C. at 247, 325 S.E.2d at 576. Two witnesses testified that they saw Hilton push the victim into the train. A detective testified that on the night of the accident, Hilton told him that the victim slipped and fell. At trial Hilton testified that the victim bolted into the train of his own volition.

84. 284 S.C. at 248, 325 S.E.2d at 576.

85. *In re* Winship, 397 U.S. 358, 364 (1970).

86. If a jury is only given a choice of not guilty or guilty of the greater offense, it might tend to punish what is obviously culpable conduct, even though every element is not proved beyond a reasonable doubt. Keeble v. United States, 412 U.S. 205 (1973) (cited in *Hilton*, 284 S.C. at 249, 325 S.E.2d at 577).

87. 412 U.S. at 205.

88. 447 U.S. 625 (1980).

89. *Id.* at 638 n.14.

90. The Court indicated an unwillingness to expand the holding of *Beck* in Spaziano v. Florida, 468 U.S. 447 (1984). In *Spaziano* the defendant was brought to trial after the statute of limitations had run on the lesser offense. The trial judge offered the instruction on the lesser offense if the defendant would agree to waive the statute of limitations

Resolution of this issue may determine whether there is a federal question basis for federal jurisdiction, either in a habeas corpus proceeding or on writ of certiorari to the Supreme Court. The circuit courts of appeal are currently divided on whether acceptance of jurisdiction, solely for failure to give a charge on a lesser offense, is proper with regard to habeas corpus proceedings.[91] Federal jurisdiction can be asserted in good faith as long as the due process question is left open. Although the Fourth Circuit Court of Appeals has not addressed the jurisdiction question, when it arises, *Hilton* will be persuasive authority for the argument that a defendant's due process rights are implicated by a court's failure to instruct the jury, at a defendant's request, on lesser included offenses.

Albert L. Norton, Jr.

VI. CORPORATE OFFICER'S KNOWLEDGE OF CRIMINAL ACTIVITY IMPUTED TO CORPORATION

In *South Carolina Law Enforcement Division v. The "Michael and Lance"*[92] the Supreme Court of South Carolina held that a corporate officer's knowledge of his plan to use the corporation's shrimp trawler for illegal purposes was imputed to the corporation such to make the trawler subject to forfeiture under section 44-53-530 of the South Carolina Code.[93] In making this ruling, the supreme court quashed a decision of the court of appeals[94] which held that the trawler was exempt from forfeiture under the "innocent owner" provision[95] of the statute. The court

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defense. The defendant refused and was convicted of the greater capital offense. The Supreme Court affirmed.

91. *See* Davis v. Greer, 675 F.2d 141, 143 (7th Cir. 1982), and cases cited therein.

92. 284 S.C. 368, 327 S.E.2d 327 (1985).

93. S.C. CODE ANN. § 44-53-530 (1976)(current version at S.C. CODE ANN. § 44-43-520(A)(5) (1976)) provides in part: "all conveyances including . . . water going vessels which are used or intended for use to unlawfully conceal, contain, or transport or in any manner facilitate the unlawful concealment, containment, or transportation of controlled substances and their compounds shall, except as otherwise provided herein, be forfeited to the states."

94. S.C. Law Enforcement Div. v. The "Michael and Lance," 281 S.C. 339, 315 S.E.2d 171 (Ct. App. 1984).

95. This exception provides that property of an owner will not be forfeited unless such owner was "a consenting party to, or privy to, or had *knowledge* of the concealment,

of appeals had reasoned that the agent was not acting "within the course of his employment and scope of his authority" when he used the trawler to haul marijuana.[96] Thus, his knowledge was not imputed to the corporation, making the corporation an "innocent owner." The supreme court's decision is a peculiar application of the relevant principles of agency law.

The "Michael and Lance" was a shrimp trawler that was entirely owned by C & B Seafood Company (C & B), a South Carolina corporation formed and owned in equal shares by G. S. Crosby, Sr., and James L. Bryant.[97] Crosby and Bryant also served as the corporation's only directors and officers. The trial court found that Crosby provided the entire financial backing for the purchase of the trawler, and Bryant was to provide services involving the day-to-day operation of the boat as a commercial fishing vessel.[98] It was further determined that on or about November 6, 1980, Bryant took the "Michael and Lance" to shrimp off the coast of Florida.[99] On his return trip to Charleston, Bryant agreed to haul marijuana for a friend. Bryant entered into the smuggling enterprise on his own initiative, without the authority, actual knowledge, or consent of C & B or Crosby.[100] On December 19, 1980, Bryant was arrested aboard the "Michael and Lance" and charged with illegally transporting marijuana. South Carolina Law Enforcement Division (SLED) agents seized the trawler and began an action for forfeiture.

In light of the trial court's findings of fact, the supreme court's decision to impute the agent's knowledge of his illegal intentions to the corporation and to bar its claim of innocent owner is an interesting application of South Carolina agency law. In its opinion, the court of appeals correctly stated that "a principal is affected with constructive knowledge of all material facts of which the agent receives notice while acting within the scope

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containment, or transportation of a controlled substance." S.C. CODE ANN. § 44-53-530 (1976)(emphasis added)(current version at S.C. CODE ANN. § 44-53-586(B)(1) (1976)).

96. 281 S.C. at 342, 315 S.E.2d at 173.

97. Record at 31, 41.

98. *Id.* at 14.

99. *Id.* at 22, 23.

100. *Id.* at 13, 21, 28. A corporate resolution stated "no partner shall buy any goods or articles without the prior consent of the other Director and Stockholder," and "no Director or Stockholder shall . . . knowingly condone anything whereby the corporate property may be attached or taken in execution, without the written consent of the other Director and Stockholder." Brief of Respondent at 5-7.

of his authority."[101] This rule is "based on the duty of the agent to communicate all material information to the principal and the presumption that he has done so."[102] Additionally, "an equally well-recognized exception to this general rule exists in situations where the agent is acting fraudulently against his principal or for any other reason has an interest in concealing his acquired knowledge from his principal."[103]

Under these agency principles, it appears that the court of appeals was correct in finding that "[o]bviously it was not necessary for Bryant to smuggle marijuana to accomplish the purpose of his employment as master of the "Michael and Lance" or further the business of C & B Seafood . . . ." Since Bryant was acting outside of the scope of his authority and course of his employment, there could be no imputation of knowledge of the illegal activity.[104] Nevertheless, the supreme court found that even if Bryant was not acting within the scope of his authority when he actually hauled the marijuana, "he was certainly an officer of the corporation when he surrendered it to himself as a drug smuggler."[105] The court imputed his knowledge to the corporation and precluded C & B's claim of innocent owner.

An explanation for the supreme court's decision to disallow C & B's claim of "innocent owner" is that the court was confronted with lawful attempts by the SLED to combat drug smuggling and the use of seagoing vessels for such purposes. The decision in *The "Michael and Lance"* may reflect the court's intent to facilitate the war against drug smuggling in South Carolina by fully penalizing those engaging in it. To apply the "innocent owner" provision in this instance would lessen the statutory penalties for drug smuggling. Indeed, many forfeiture statutes, including the federal statutes, do not have "innocent owner"

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101. 281 S.C. at 341, 315 S.E.2d at 173 (citing Crystal Ice Co. of Columbia v. First Colonial Corp., 273 S.C. 306, 257 S.E.2d 496 (1979)).

102. McSweeney v. Prudential Ins. Co. of Am., 128 F.2d 660, 665 (4th Cir. 1942)(citing Knobelock v. Germania Sav. Bank, 50 S.C. 259, 27 S.E. 962 (1896)).

103. *Crystal Ice*, 273 S.C. at 309, 257 S.E.2d at 498.

104. 281 S.C. at 342, 315 S.E.2d at 173.

105. 284 S.C. at 370, 327 S.E.2d at 328. This reasoning conflicts with the exception stated in *Crystal Ice*. *See* 273 S.C. at 309, 257 S.E.2d at 498. It seems that an agent would certainly have reason to conceal from the principal his intention to allow the principal's conveyance to be used for illegal purposes. Therefore, his knowledge should not be imputed to the principal.

provisions.[106]

This explanation appears more plausible in light of Bryant's position as a fifty percent shareholder and officer of the corporation.[107] Certainly this situation is different from a situation in which a mere employee of a large, publicly held corporation had committed a similar crime without authority or consent from the corporation. The court may have felt that application of the "innocent owner" provisions in this instance would have allowed a criminal to escape full punishment by hiding behind the fictional entity of a corporation.

The "innocent owner" provision, however, does not distinguish between closely held and publicly held corporations. Furthermore, the determinations of whether there should be an "innocent owner" exception or whether its application is to be limited are decisions that should be left for the legislature.[108] Nevertheless, practitioners should be aware that the Supreme Court of South Carolina may impute an officer's knowledge to a

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106. *See, e.g.*, 21 U.S.C.A. § 881 (1981); 49 U.S.C.A. §§ 781, 782 (1963); GA. CODE ANN. § 16-13-49 (1984); N.C. GEN. STAT. § 90-112 (1981).

107. Indeed, the court puts great emphasis on the fact that Bryant was "certainly an *officer* of the corporation when he surrendered [the trawler] to himself as a drug smuggler. 284 S.C. at 370, 327 S.E.2d at 328 (emphasis added). Additionally, the appellant argued that, "[k]nowledge possessed by an officer of a corporation will be imputed to the corporation even if the knowledge was obtained outside the scope of employment where the knowledge is apparently relevant to the interests of the corporation." Brief of Appellant at 12-16. As authority for this premise, respondent cited Young v. Pitts, 155 S.C. 414, 152 S.E. 640 (1930). But the court of appeals sufficiently distinguished this case. *See* 281 S.C. at 342 n.1, 315 S.E.2d at 137 n.1. Furthermore, as stated in the North Carolina case of Cheek v. Squires, 200 N.C. 661, 670-71, 158 S.E. 198, 203 (1931), most courts take the view that, "a corporation is not chargeable with knowledge of its officers with respect to a transaction, in which he is acting in his own behalf . . . . Only that knowledge which its officers acquire while acting in its behalf and which it is his duty to communicate to it, is imputed by the law to a corporation." *See also* Kenineally v. First Nat'l Bank of Anolca, 400 F.2d 838 (8th Cir. 1968).

It could be argued that, because of the closely held nature of the corporation, the supreme court was actually applying partnership law. Yet, the applicable partnership provisions would appear to preclude such a determination. *See* S.C. CODE ANN. § 33-41-340, 350 (1976).

108. *See* 281 S.C. at 343, 315 S.E.2d at 174. Interestingly enough, other states which have "innocent owner" provisions have applied them in a number of situations to exempt an innocent owner from forfeiting a conveyance used to transport contraband without his knowledge. *See, e.g.*, FLA. STAT. ANN. § 932.703 (Harrison 1982) and its application in City of Clearwater v. One 1980 Porsche S.C., V.I.N. 91A0140918, 426 So. 2d 1260 (Fla. Dist. Ct. App. 1983); Garcia v. State, 398 So. 2d 457 (Fla. Dist. Ct. App. 1981); *In re* Forfeiture of 1979 Ford Truck, V.I.N. F14HNEC1331, 389 So. 2d 310 (Fla. Dist. Ct. App. 1980).

closely held corporation, even if he is apparently beyond the scope of his authority, if fairness or crime prevention dictate such a result.

C. Ben Garren, Jr.

VII. LIMITATION OF PRISONER'S FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

While addressing the nineteen exceptions[109] to defendant's murder trial and capital punishment sentencing, the South Carolina Supreme Court in *State v. Gaskins*[110] held that a defendant cannot waive his right to a fair trial as a result of strategic decisions made by defense counsel.[111] Additionally, the court indicated that prisoners in South Carolina do not have fourth amendment rights against unreasonable searches and seizures.[112]

The court found Donald "Pee Wee" Gaskins guilty of assassinating Rudolph Tyner, an inmate on death row at the South Carolina Central Correctional Institution. At the time of his death, Tyner was awaiting execution for his 1979 conviction for the murders of Mr. and Mrs. William B. Moon.[113] Tony Cimo, the Moon's son, contacted Gaskins, who was then serving ten life

109. Several exceptions are not discussed herein. The court granted deference to trial court's discretion regarding exceptions 1, 2, 3, and 5 concerning jury selection. *See* State v. Spann, 279 S.C. 399, 308 S.E.2d 518 (1983). Exception 7 concerning restriction on cross-examination of state's witness was found cumulative and nonprejudicial. *See* State v. Atchison, 268 S.C. 588, 235 S.E.2d 294, *cert. denied*, 434 U.S. 894 (1977). Exception 8 concerning trial judges error in ruling on scope of counsel's direct examination was found cumulative. *Id.* Exception 9 concerning error in not forcing a witness to take the stand to plead fifth amendment privilege not to testify was found cumulative. *Id.* Exception 10, addressing trial judge's 22 interjections of personal opinions and comments at trial, was found nonprejudicial. Exception 11 concerning improper comments by solicitor on Gaskins' failure to testify was found harmless. Exception 12 addressing an unconstitutional charge of malice given to the jury was found harmless. *See* State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1984). Exceptions 13, 14, 16, 17, 18, and 19 concerning aggravating and mitigating material for capital sentencing phase were all found proper. Exception 15, addressing the propriety of admitting evidence of defendant's racial prejudice, was found nonprejudicial. State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132, *cert. denied*, ___ U.S. ___, 105 S. Ct. 2368 (1985).

110. 284 S.C. 105, 326 S.E.2d 132, *cert. denied*, ___ U.S. ___, 105 S. Ct. 2368 (1985).

111. *Id.* at 114, 326 S.E.2d at 138 (exception 4).

112. *Id.* at 115-16, 326 S.E.2d at 138-39 (exception 6).

113. *Id.* at 110, 326 S.E.2d at 136.

sentences for his 1978 guilty plea to eight counts of murder.[114] Gaskins, Cimo, and others conspired to assassinate Tyner. After an unsuccessful attempt, Gaskins used an explosive device that he had prepared to kill Tyner.[115]

At the jury selection over 160 potential jurors were examined before the jury of twelve with four alternates was seated.[116] On appeal defendant asserted various exceptions to this stage of the trial. The most notable exception questioned the limitation on defense counsel's strategic decisions. During their *voir dire* examination, two jurors stated that they believed Gaskins was guilty of murdering Tyner. Both jurors, however, appeared to favor a life sentence rather than capital punishment. Defense counsel attempted to seat these veniremen, thereby waiving the defendant's right to a fair trial in return for the increased chance of an imposition of life imprisonment at the sentencing stage.[117] In support of this effort, defendant cited *State v. Vaughn*[118] which noted, "A party may waive a constitutional as well as a statutory provision for his benefit . . . ."[119]

Nevertheless, the supreme court affirmed the trial court's decision to excuse the veniremen[120] and rejected defense counsel's argument by restating that it is the duty of the trial judge "to assure himself that each and every prospective juror is unbiased, fair, and impartial."[121] The court indicated that although a defendant has the right to reject a number of prospective jurors, he does not have a right to select certain individuals to be seated as jurors.[122] The right to reject is further assurance of defendant's right to a fair jury, a right which cannot be waived for strategic purposes.

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114. *Id.*

115. *Id.* at 111-12, 326 S.E.2d at 136-37.

116. Brief of Appellant at 2.

117. 284 S.C. at 114, 326 S.E.2d at 138; see Brief of Appellant at 18-20.

118. 95 S.C. 455, 79 S.E. 312 (1913).

119. *Id.* at 462, 79 S.E. at 315.

120. The court also stated that the dismissal of the veniremen was justified because neither potential juror could have voted for the death penalty and were, therefore, unable to render a verdict of guilty according to law as required by S.C. CODE ANN. § 16-3-20 (E) (1976). *See* State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31, *cert. denied*, 449 U.S. 1037 (1980).

121. 284 S.C. at 114, 326 S.E.2d at 138. The court cited State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973), where the Supreme Court of South Carolina upheld judge's decision that the jury had not been prejudiced by pretrial publicity.

122. *See* State v. Praeter, 26 S.C. 198, 2 S.E. 108 (1887).

The *Gaskins* court also considered whether the trial court properly admitted evidence that was secured during two warrantless searches and seizures which Gaskins claimed violated his fourth amendment rights.[123] After the explosion in Tyner's cell, Gaskins was transferred to maximum security for "investigation and security purposes." During the transfer, Department of Corrections investigators were authorized to conduct a warrantless seizure of Gaskins' personal effects and were told to look through the prisoner's belongings for evidence relating to the Tyner murder.[124] The investigators discovered various incriminating items, including thirty-eight cassette tapes that contained recorded conversations between Gaskins and his coconspirators.

After confiscating the tapes, a Department of Corrections investigator seized an address book belonging to Gaskins after discovering that it contained the name and telephone number of Tony Cimo, the son of the Tyner murder victims.[125] This seizure occurred while the investigator was interviewing Gaskins, who was then in a prison infirmary. Gaskins had apparently asked the investigator to hand him a letter located in a bedside drawer. In doing so, the investigator noticed that the letter was inside an address book. As he looked through the book, the investigator found Cimo's name and telephone number.[126]

Defendant argued that his fourth amendment protection against unreasonable search and seizure had been violated, and, consequently, the evidence should be suppressed.[127] He relied on *State v. Ellefson*,[128] in which the court stated that "even a convicted prisoner does not shed basic constitutional rights at the prison gate. Rather, he 'retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken away from him by law.' "[129] *Ellefson* held that carrying out a warrantless exploratory search and copying a pretrial detainee's outgoing letters without a legitimate purpose or probable cause or exigent circumstances were violations of detainee's first and

123. 284 S.C. at 115-16, 326 S.E.2d at 138-39.
124. Record at 3066, 3072-73.
125. 284 S.C. at 115-16, 326 S.E.2d at 139.
126. Record at 3533.
127. Brief of Appellant at 23-28.
128. 266 S.C. 494, 500, 224 S.E.2d 666, 669 (1976).
129. *Id.* (quoting Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944)).

fourth amendment rights.[130]

Despite its previous holding in *Ellefson*, the South Carolina Supreme Court held in *Gaskins* that the searches and seizures, including playing the tapes and seizing the address book, were valid and affirmed the trial court's decision not to suppress evidence obtained through those seizures. The court stated that "the search was reasonable; Gaskins had no right of an expectation of privacy and the exigencies of the circumstances warranted the action taken by the prison authorities."[131] The court cited *Hudson v. Palmer*[132] and *Block v. Rutherford*,[133] two recent United States Supreme Court decisions that addressed the issue of prisoners' rights. In both *Hudson* and *Block*, the United States Supreme Court held that random, warrantless searches of the cells of a convicted prisoner and a pretrial detainee were reasonable.[134] While noting that this was the first time that the court had been directly called upon to decide the issue, the majority in *Hudson* held that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."[135]

Although the underpinnings of the decisions in *Hudson* and *Block* were based on the importance of maintaining prison security,[136] other courts have construed the broad language in *Hudson* to apply to all prison searches and seizures, regardless of the reasons given for conducting them. In *Hanrahan v.*

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130. The court in *Ellefson* stressed that the prisoner "was merely in pretrial confinement." *Id.*

131. 284 S.C. at 116, 326 S.E.2d at 139.

132. 468 U.S. 517, 104 S. Ct. 3194 (1984).

133. 468 U.S. 576, 104 S. Ct. 3227 (1984).

134. *Hudson*, 468 U.S. at 527-28, 104 S.Ct. at 3201; *Block*, 468 U.S. at 591, 104 S. Ct. at 3235.

135. 468 U.S. at 526, 104 S. Ct. at 3200. The Court stated in *Hudson*: "A prison shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. . . . A right of privacy is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to insure institutional security and internal order." *Id.* at 527, 104 S. Ct. at 3201. Additionally, the court stated that this ruling applied equally to seizures. *Id.* at 528 n.8, 104 S. Ct. at 3201 n.8.

136. "Determining whether an expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests. . . . [w]e strike the balance in favor of institutional security which we have noted is 'central to all other correctional goals.' " *Hudson*, 468 U.S. at 527, 104 S. Ct. at 3201. In *Block* the Court stated that the "shakedown" searches "were reasonable responses by (the) officials to legitimate security concerns." 468 U.S. at 591, 104 S. Ct. at 3235 (quoting Bell v. Wolfish, 441 U.S. 520, 561 (1979)).

Lane[137] the Seventh Circuit precluded the prisoner from bringing a fourth amendment challenge to a "shakedown" search of his cell. The court held that *Hudson* controlled, even though the prisoner maintained that the search was in retaliation for failure to pay an extortion demand to the prison guards and no prison security implications were involved.[138] In *Cook v. City of New York*[139] the court held that under *Hudson* seizure of a telephone-address book from the cell of a pretrial detainee was not a violation of the detainee's fourth amendment rights. In supporting its decision, the court noted the prison security interests emphasized in *Hudson*,[140] but made no attempt to show that the address book itself was a threat to security. Similarly, in *Gaskins* the Supreme Court of South Carolina supported its decision by stating that "the exigencies of the circumstances warranted the action taken by the prison authorities."[141] The court, however, did not establish why playing the cassette tapes and seizing the address book were necessary for prison security.[142]

The searches and seizures in *Gaskins* were admittedly of a purely investigatory nature[143] and unrelated to any security concerns. Therefore, it appears that the Supreme Court of South Carolina is giving broad application to the *Hudson* decision, as did the courts in *Hanrahan* and *Cook*. Consequently, it is doubtful that a prisoner in South Carolina can bring a fourth amendment claim against any search or seizure regardless of its underlying purposes.

C. Ben Garren, Jr.

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137. 747 F.2d 1137 (7th Cir. 1984).

138. *Id.* at 1139. The court stated that *Hudson* "precludes challenges to prison cell searches taken for any reason, whether or not reasonable."

139. 607 F. Supp. 702 (S.D.N.Y. 1985).

140. *Id.* at 704.

141. 284 S.C. at 116, 326 S.E.2d at 139.

142. The bombing occurrence warranted the initial search of Gaskins personal effects for dangerous contraband. *See* United States v. Chamorro, 687 F.2d 1 (1st Cir. 1982), *cert. denied*, 459 U.S. 1043 (1982) (where defendant was under suspicion for sending a letter bomb, warrantless search of cell found valid). Nevertheless, this does not justify the playing of the cassette and the search through the address book in *Gaskins* because these items in no way threatened prison security. *See* Brief of Appellant at 23-28.

143. Brief of Appellant at 23-28.

VIII. RIGHT TO JURY INSTRUCTION ON SELF-DEFENSE MAY BE WAIVED

The constitutional right to a jury instruction on the defense of self-defense now may be waived by a criminal defendant in South Carolina. The South Carolina Supreme Court, in *State v. Stone*,[144] overruled previous decisions to the contrary, including *State v. Brice*[145] and *State v. Adkinson*.[146]

The defendant was convicted of assault and battery of a high and aggravated nature and assaulting a law enforcement officer while resisting arrest. At trial the defendant did not request a jury instruction on the law of self-defense. Evidence presented at trial would have supported such a defense.[147] On appeal the defendant claimed a violation of his state constitutional right to have the judge "declare the law."[148] The defendant relied on *Brice*, which held that where there is any evidence that would support the defense of self-defense, a judge errs by failing to charge the jury on the defense, whether it is requested by the defendant or not.[149]

The court in *Stone* cited the same language used earlier in *Brice* to state the defendant's constitutional right: "[The constitutional] provision requires a judge to 'explain so much of the criminal law as is applicable to the issues made by the evidence adduced at trial.' "[150] Prior to *Stone*, cases in which there was evidence of self-defense were an exception to the general rule that by failing to request a charge, a defendant in a non-capital case waives his right to have the law declared.[151] In *Brice* the

144. 285 S.C. 386, 330 S.E.2d 286 (1985).

145. 190 S.C. 208, 2 S.E.2d 391 (1939).

146. 280 S.C. 85, 311 S.E.2d 79 (1983).

147. Record at 127.

148. S.C. CONST. art. V, § 21: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." Art. V, § 17, cited in the opinion, was redesignated § 21 by the 1985 amendment to the constitution.

149. *Brice*, 190 S.C. at 210, 2 S.E.2d at 392.

150. 285 S.C. at 387, 330 S.E.2d at 287 (quoting State v. White, 211 S.C. 276, 44 S.E.2d 741 (1947)). This language appears to have originated in State v. DuRant, 87 S.C. 532, 534, 70 S.E. 306, 307 (1910).

151. *See, e.g.*, State v. Humphrey, 276 S.C. 42, 274 S.E.2d 918 (1981)(value of property allegedly stolen in grand larceny prosecution less than $50); State v. Jamison, 221 S.C. 312, 70 S.E.2d 342 (1952)(definition of "reasonable doubt and provocation"); State v. Duck, 210 S.C. 94, 41 S.E.2d 628 (1947)(applicability of circumstantial evidence). *See generally* Annotation, *Duty of Trial Court to Instruct on Self-Defense in Absence of*

court had imposed the duty on the trial judge because self-defense was deemed a "distinct" defense.[152] It is unclear what is meant by "distinct." The rule in *Brice* was particularly compelling because the defendant was unrepresented by counsel. In addition, the rule was upheld as recently as 1984 in *Adkinson*, in which the defendant was represented by counsel.

Stone and prior South Carolina cases do not state the policy grounds for requiring self-defense instructions sua sponte while making other instructions waivable. Perhaps those decisions implicitly recognize that the issue is inextricably bound up in the central elements of the alleged offense. In order to be considered a criminal offense, violent conduct on the part of the defendant must be unjustified.[153] Unlawfulness can be considered an element of the offense.[154] One could argue that a defendant is entitled to an instruction on the lawfulness of his conduct just as he is entitled to instruction on any other element, and that a defendant should not be required to request jury instructions on each element.

A related issue is whether requiring the defendant to prove self-defense improperly shifts the burden of proof, in violation of the mandate of *In re Winship*[155] that "the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[156] The Supreme Court has never resolved this issue, but noted in *Engle v. Isaac*[157] that a "colorable constitutional claim" was made by the argument that "once the defendant raises the possibility of self-defense, . . . the state must disprove that defense as part of its task of estab-

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Request by Accused, 56 A.L.R.2D 1170 (1957).

152. *Brice*, 190 S.C. at 210, 2 S.E.2d at 392. The opinion cites State v. Faulkner, 151 S.C. 379, 149 S.E.108 (1929), which involved a "right to eject" as a defendant homeowner's affirmative defense in homicide prosecution. *Faulkner* does not clarify the meaning of "distinct." Possibly the "distinct" designation is an oblique reference to the distinction in South Carolina law between affirmative defenses, for which the defendant has the burden of proof by a preponderance of the evidence, and other trial issues. If that is the case, one would expect the *Brice* rule to apply to other affirmative defenses as well.

153. *See* W. MCANINCH & W. FAIREY, THE CRIMINAL LAW OF SOUTH CAROLINA 302 (1982 & Supp. 1984) [hereinafter MCANINCH & FAIREY].

154. *See id.*

155. 397 U.S. 358 (1970).

156. *Id.* at 364.

157. 456 U.S. 107 (1982).

lishing guilty *mens rea*, voluntariness, and unlawfulness."[158] Although a strong argument can be made that placing the burden of proof of self-defense on the defendant may implicate the due process clause of the United States Constitution,[159] the South Carolina Supreme Court has consistently held that there is no constitutional infirmity in the practice.[160] Thus, in a slightly different context, due process does not preclude placing on the defendant the procedural burdens of an affirmative defense, "which constitutes . . . a complete refutation of the crime in the first place."[161]

A possible rationale for reversal of *Brice* is the passage in 1953 of what is now section 17-23-100 of the South Carolina Code,[162] giving litigants in a criminal trial the opportunity to object to charges or omitted charges out of the presence of the jury.[163] In *State v. Williams*[164] the supreme court construed section 17-23-100 to nullify the line of cases holding certain objections to jury charges non-waivable.[165] Section 17-23-100, therefore, obviates the necessity of imposing upon trial counsel the "delicate and difficult task of presenting exceptions to the charge before the retirement of the jury . . . ."[166] There are two problems with this rationale. It is not clear that the earlier *Brice* interpretation of a defendant's constitutional rights was premised on the defendant's opportunity to object without prejudicing his case. In addition, the *Adkinson* case was decided in 1984, long after passage of section 17-23-100 and its interpretation in *State v. Williams*.

State v. Stone flatly overrules *State v. Brice* and *State v. Adkinson*. It is likely that other defense arguments traditionally regarded as affirmative defenses, such as acting in defense of

158. *Id.* at 121-22.

159. *See* MCANINCH & FAIREY, *supra* note 153, at 301.

160. *See* State v. Glover, 284 S.C. 152, 326 S.E.2d 150 (1985); State v. Hardy, 283 S.C. 590, 325 S.E.2d 320 (1985).

161. Thomas v. Leeke, 725 F.2d 246, 250 (4th Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 218 (1984).

162. S.C. CODE ANN. § 17-23-100 (1976). This argument was made to the court in Brief of Respondent at 2.

163. *See also* State v. Smith, 279 S.C. 440, 308 S.E.2d 794 (1983).

164. 266 S.C. 325, 223 S.E.2d 38 (1976).

165. *Id.* at 335, 223 S.E.2d at 43.

166. Coleman v. Lurey, 199 S.C. 442, 447, 20 S.E.2d 65, 67 (1942).

others, insanity, defense of property, or entrapment, will also be deemed waivable in South Carolina courts.

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