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I. State's Use of Peremptory Strikes made more Difficult to Challenge on Grounds of Racial Discrimination

In *State v. Howard*[1] the South Carolina Supreme Court considered the issue of racial discrimination in the state's use of peremptory challenges. The court concluded the state's reasons for striking jurors sufficiently complied with the requirements of *Batson v. Kentucky*.[2] The court needed only eleven sentences in *Howard* to dispose of the *Batson* issue, upholding the trial court's finding that the state's non-racial reasons had successfully rebutted the defendants' prima facie case of discrimination.[3] Although the court offered little discussion on this issue, analysis of the case exposes some of the problems currently associated with *Batson* claims in South Carolina.

Ronnie Howard and Dana Ricardo Weldon, black males, were jointly tried in a capital case in Greenville County on June 9, 1986, for murder, kidnapping, armed robbery, and conspiracy. After juror qualification, a panel of thirty-five whites and seven blacks remained prospective jurors.[4] The state used its peremptory strikes[5] to excuse six of the seven blacks from the panel.[6] The defendants objected, claiming the state's use of its peremptory challenges was racially motivated and thus violative of *Batson*.[7] The trial court found the defendants had established a prima facie case of discrimination and required the state to divulge its reasons for striking the six blacks.[8]

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1. 295 S.C. 462, 369 S.E.2d 132 (1988), *cert. denied*, 109 S. Ct. 3174 (1989).
2. *Id.* at 466, 369 S.E.2d at 134 (citing Batson v. Kentucky, 476 U.S. 79 (1986)).
3. *Id.*
4. Record at 840.
5. The state is allowed ten peremptory challenges "when there is more than one defendant jointly tried" in felony cases. S.C. Code Ann. § 14-7-1110 (Law. Co-op. 1976 & Supp. 1988).
6. Record at 840.
7. *Id.* at 840-41.
8. *Id.* at 841-42. The state offered the following reasons for striking the six prospective jurors:

Jeffery Dunbar — "[B]ecause he said on two occasions that he could not vote for the death penalty . . . [and] because he had just finished high school and because of his age." *Id.* at 842.

Montain Jones — Because she "said that she was not really for the death penalty. She said there was always a better way around it. I also struck her because of age. She was twenty-three, . . . [and also] because of a very unstable work history. . . . [S]he went approximately one year without a job." *Id.* at 843.

After hearing the state's reasons and allowing the defendants an opportunity to argue that the reasons were not legitimate, the trial court concluded the state had successfully rebutted the prima facie case.[9] Jury selection continued and the state ultimately used two more strikes to remove blacks from slots as alternate jurors.[10] The defendants renewed their *Batson* motion.[11] The state again was required to give its reasons for the strikes,[12] but ultimately the court agreed the state had met its burden of showing nonracial motives and upheld the strikes.[13]

On June 13, 1986, a jury composed of eleven whites and one black found both Howard and Weldon guilty as charged and sentenced both to death for murder, twenty-five years for armed robbery, and five years for conspiracy. The South Carolina Supreme Court affirmed the trial court's conviction and sentencing of Howard. The court affirmed Weldon's conviction, but reversed and remanded his case to the lower court for new sentencing.[14]

The South Carolina Supreme Court, summarily disposing of How-

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Amanda Jean Fuller — Because "she was twenty-two years old. I struck her because of age, because of an unstable work history . . . and because she said she was indifferent about the death penalty and . . . could not commit generally for or generally against the death penalty." *Id.*

Edward Wood — Because he "said he leans toward life every time. He was more pro-life. He said he was not really for the death penalty. He also said as a general rule he was against the death penalty." *Id.* at 843-44.

Charles Copeland — "[B]ecause he said from . . . a religious standpoint he would find it hard to vote for the death penalty. . . . [I]t would have to be [sic] very extreme case for him to vote for the death penalty." *Id.* at 844.

Postell Hunter — Because "in 1982 [the state] had a case on him for assault and battery of a high and aggravated nature . . . . [The Solicitor] was afraid of an adversarial relationship with him." *Id.*

9. *Id.* at 849.

10. *Id.* at 1017-18.

11. *Id.*

12. *Id.* at 1018. The state gave the following reasons for striking the two black alternates:

Gladys McElrath — Because "she absolutely stated that she did not believe in capital punishment . . . and she would vote for life." *Id.* at 1019.

Antonio Golden — "[B]ecause of an erratic work history. She had worked two months at her last job. Her husband was not working." *Id.* The court balked at accepting this reason and asked for another. *Id.* at 1020-22. The solicitor then stated that his "neutral and detached explanation is that [the state] was left with three strikes. The Defense had none . . . . [T]he next two jurors [in the solicitor's opinion] were much more strong [sic] than she was." *Id.* at 1022.

13. *Id.* at 1023.

14. *Howard*, 295 S.C. at 474, 369 S.E.2d at 138, 139. Howard petitioned the United States Supreme Court for a writ of certiorari based on two claims, one of which was the *Batson* issue. The Supreme Court denied Howard's petition. *See* Howard v. South Carolina, 109 S. Ct. 3174 (1989) (mem).

ard and Weldon's claims of racial discrimination, stated that *Batson* requires "a neutral explanation . . . related to the particular case . . . [which] need not rise to the level of justification for a challenge for cause."[15] Acknowledging only the "[s]olicitor's articulated reasons concern[ing] these [challenged] jurors' perceived attitudes to the death penalty,"[16] the court held that on the record before it the trial court had satisfactorily complied with the requirements of *Batson*.[17]

In *Batson* the United States Supreme Court held that the equal protection clause prevented prosecutors from using their peremptory challenges to strike jurors based on race.[18] The Court stated that a defendant could establish a prima facie case of "purposeful discrimination" in the following ways: (1) by showing "that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove [from the group of prospective jurors] members of defendant's race";[19] (2) by relying on the fact "that peremptory challenges constitute a jury selection that permits 'those to discriminate who are of a mind to discriminate' ";[20] and (3) by showing that "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude" potential jurors on the basis of their race.[21]

Upon the defendant's showing of a prima facie case, the state then has the burden of "articulat[ing] a neutral explanation related to the particular case" supporting why the potential juror was struck.[22] The Court compared the required process with that used in employment discrimination claims brought under title VII of the 1964 Civil Rights Act.[23] The *Batson* Court failed, however, to establish any other guide-

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15. *Howard*, 295 S.C. at 466, 369 S.E.2d at 134 (citing Batson v. Kentucky, 476 U.S. 79, 97 (1986)).

16. *Id.*

17. *Id.*

18. *Batson*, 476 U.S. at 89.

19. *Id.* at 96 (citation omitted). Both *Batson* and State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987), use the term "cognizable racial group." Therefore, whites should also be allowed to take advantage of *Batson*.

20. *Batson*, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

21. *Id.*

22. *Id.* at 98.

23. *Id.* at 94, 96, 98 nn.18-19 & 21 (referring to title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1982), which addresses cases of employment discrimination); *see* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The Supreme Court in these two cases established a three-step procedure to be followed in title VII cases. First, the complainant must show a prima facie case of racial discrimination. This burden is not onerous. *Burdine*, 450 U.S. at 253. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to rebut this prima facie case. The burden is one of production and not persuasion. The burden of persuasion is always upon the complainant. *Id.* Finally, if the defendant suc-

lines for state courts to use in applying this decision. Therefore, each state was faced with the task of implementing its own rules for applying *Batson*. This was the task with which the court in *Howard* was faced.

After the defendants objected to the state's use of its peremptory strikes in *Howard*, the trial court ruled that the burden was on the state "to come forward with a neutral explanation for challenging the black jurors," because "when you strike six out of seven . . . blacks, that establishes — that makes a prima facie showing."[24] The state, as required, gave the previously stated reasons for the strikes. The court, in effect, then gave the defendants an opportunity to show pretext when it asked if there was "[a]nything the [d]efendants wish[ed] to put on the record on this issue."[25] The defendants attempted, mostly by "recollection" and "without the benefit of transcripts of the precise testimony,"[26] to point out a few problems with the state's reasons. The defendants concluded that they were sure that there were "other disparities."[27] Nevertheless, the court accepted the state's reasons and denied the defendants' motion to quash the jury.[28]

The United States Supreme Court rendered its decision in *Batson* less than two months before the trial court's decision in *Howard*. Understandably, both the judge and the attorneys in *Howard* were unclear as to what exact procedure should be followed in the situation presented.[29] The South Carolina Supreme Court attempted to rectify this uncertainty in *State v. Jones*.[30] The *Jones* court established the procedure to be followed in South Carolina when *Batson* claims are made and the decision has been praised as a positive step toward proper application of *Batson*.[31]

The trial court in *Howard*, however, readily found a prima facie case of racial discrimination even before *Jones*. *Howard* raises ques-

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ceeds in rebutting the prima facie case, then the complainant "must be afforded a fair opportunity to demonstrate that [the] assigned reason . . . was a pretext or discriminatory in its application." *Green*, 411 U.S. at 807.

24. Record at 841.

25. *Id.* at 844.

26. *Id.* at 845.

27. *Id.* at 846.

28. *Id.* at 849.

29. *See id.* at 840-49, 1017-23.

30. 293 S.C. 54, 358 S.E.2d 701 (1987). The *Jones* court "recommend[ed] that the trial court hold a *Batson* hearing whenever 1) the defendant requests such a hearing; 2) the defendant is a member of cognizable racial group; *and* 3) the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire." *Id.* at 57-58, 358 S.E.2d at 703.

31. *See Nature of Peremptory Challenges Altered, Annual Survey of South Carolina Law*, 40 S.C.L. REV. 41 (1988).

tions about South Carolina courts' substantive examination of the *Batson* claims rather than the procedural process in these situations.

According to the United States Supreme Court, whether a state has exercised its peremptory strikes in a discriminatory manner based on the race of potential jurors is an issue of equal protection.[32] Once the defense succeeds in raising a prima facie case (which after *Jones* should be easy to do in South Carolina), then by definition a presumption exists that the state has discriminated against some veniremen by classifying them, because of their race, as unfit jurors.

Any classification based on race is a suspect classification.[33] The courts must examine such classifications with strict scrutiny and allow such a classification to exist only if the state can show the classification is "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination . . . ."[34] A court should find that the state has rebutted the prima facie case only if there is a "legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."[35]

A court might accomplish this requirement of strict scrutinization by ensuring that the state rebutted the prima facie case only when its reasons for striking jurors are both relevant to the particular case *and* consistently applied to all veniremen. *Batson* stated that the prosecutor's reasons for striking a juror must be "related to the particular case to be tried."[36] A Florida District Court of Appeal in *Slappy v. State*[37] agreed that relevance is important, stating that if "the reason given for the challenge is unrelated to the facts of the case," that factor will "weigh heavily" against the legitimacy of the state's racially neutral explanation.[38]

The state's reasons must not be merely relevant, but also must be applied consistently to similarly situated jurors of all races. Former

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32. *Batson*, 476 U.S. at 98 n.21.

33. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia's miscegenation statute because it was in violation of the equal protection clause).

34. *Id.* at 11.

35. *Id.*

36. *Batson*, 476 U.S. at 98.

37. 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987), *aff'd*, 522 So. 2d 18 (Fla.), *cert. denied*, 108 S. Ct. 2873 (1988). *Slappy* was decided under a state court decision prior to *Batson* which, like *Batson*, required an explanation for apparently discriminatory strikes. *Slappy* also discussed People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), which held that the California Constitution prohibited racial discrimination in the use of peremptory challenges and listed specific bias as an acceptable reason for a strike. Specific bias was defined as "a bias relating to the particular case on trial or the parties, or witnesses thereto." *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

38. *Slappy*, 503 So. 2d at 355.

South Carolina Supreme Court Chief Justice Ness recognized the importance of consistency in his strong dissent in *State v. Martinez*.[39] Justice Finney's dissent in *Howard* also focused on what he believed to be the state's failure to apply consistently its reasons for striking blacks similarly situated to whites.[40] The *Slappy* court also discussed the necessity of consistency, stating that another factor weighing against the state's given reasons in that case was "disparate treatment where there [was] no difference between responses given to the same question by challenged and unchallenged venire persons."[41]

Justice Finney did not agree that the state had rebutted the prima facie case of discrimination in *Howard*. A careful examination of the relevance and consistency of the state's articulated reasons for striking the blacks in *Howard* gives much support to Justice Finney's statement that "the solicitor did not use his peremptory challenges in a nondiscriminatory manner . . . ."[42]

One of the state's articulated reasons for striking black jurors was their age: juror Dunbar was twenty; juror Fuller was twenty-two; and juror Jones was twenty-three. It is difficult to believe that age is a relevant criteria for striking jurors in this case. Nevertheless, even if it were relevant, this reason still is flawed because it was not applied to similarly situated whites. Four white jurors were acceptable to the state, even though they were in their early twenties: Debra Ann Bradley was twenty; Emily Bagwell was twenty-two; Tasha Mathis was twenty-two; and William Miller was twenty-five.[43]

The next reason offered by the state for striking blacks was their erratic employment history. Four blacks were struck because they had been employed at their present job for less than a year: Fuller had been at her place of employment for nine months, Jones for six months, Dunbar for almost four months, and Golden for two months.[44]

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39. 294 S.C. 72, 75, 362 S.E.2d 641, 643 (1987) (Ness, C.J., dissenting).

40. *Howard*, 295 S.C. at 475, 369 S.E.2d at 139 (Finney, J., dissenting).

41. *Slappy*, 503 So. 2d at 355. The Florida court found that the state's reasons were not applied consistently when a black school teacher was struck from a group of prospective jurors for being too liberal, but a white school teacher with comparable views was acceptable. *Id.*

42. *Howard*, 295 S.C. at 475, 369 S.E.2d at 139 (Finney, J., dissenting).

43. *See* Record at 1782-85. The state also struck white jurors Hooper, age twenty-three, and Teague, age twenty. The state was not required to give reasons for these strikes. *See id.*

44. *Id.* at 137. In its brief to the South Carolina Supreme Court, the state asserted that juror Fuller's "response as to how long she had been employed at Burger King was somewhat inconsistent with her answer on *voir dire*." Brief of Respondent at 6. Fuller had previously answered that she had been employed at Burger King for nine months. Record at 1783. She later, on *voir dire* by the solicitor, answered that she had been working at Burger King "[a]bout a year now." Record at 451.

Again, it is difficult to accept the relevancy of this reason. Even accepting its relevance, however, this reason should also fail for lack of consistent application. The state accepted five veniremen who by the state's own standards had erratic work histories: Emily Bagwell was unemployed; Shirley Wooten had been working at her present job only six months; Beryl Bair only four months; Debra Bradley only ten months; and William Miller only six months. Additionally, Bagwell, Bradley, and Miller, were also in their early twenties.[45]

The state's final articulated reason for striking these blacks was based on their views toward capital punishment. While it is unquestionable that a potential juror's view toward the death penalty is relevant in a capital murder case, this reason also must fail because it was not consistently applied to whites with similar views.

Black juror Dunbar was struck because he *twice* stated that he could not vote for the death penalty. It was subsequently revealed during *voir dire*, however, that he had been confused by the question and was not only for the death penalty, but in fact wanted to be a police officer.[46] In contrast, white venireman Floyd Rohm was acceptable to the state even though he had stated *three* times that he was not certain that he could vote for the death penalty.[47] Nevertheless, the state accepted him because he later stated that he could, if necessary and along with the other jurors, sign his name to a "death warrant."[48]

Moreover, Richard Ashmore, a white venireman, stated that he could vote for the death penalty, but only in "extreme" circumstances.[49] White juror Sharon Lunny stated that she was generally against capital punishment and that it should be reserved for the most

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The trial court did not accept the employment reason for striking juror Golden because it had been pointed out during *voir dire* that she had three small children. The court asked for another reason and the solicitor stated that she was struck because later jurors had stronger views on the death penalty. Record at 1020. Juror Golden, however, had stated, "I believe in the death penalty." Record at 951.

45. Record at 1782-85. The state gave age and work history as reasons for striking Dunbar, Jones, and Fuller. *See supra* notes 8 & 44.

46. Record at 135, 147.

47. *See id.* at 156.

48. *Id.* at 161. Of the eight whites whose backgrounds are at least somewhat comparable to the eight blacks struck, the state asked all but one if they could sign a "death warrant." All replied affirmatively. The state, however, asked this question of only one black, Postell Hunter, who was struck because of a feared adversarial relationship. *See supra* note 8. Such questioning suggests consideration should be given to the *Slappy* court's citing of "disparate examination of the challenged juror" as another reason "weigh[ing] heavily against the legitimacy of any race-neutral explanation." Slappy v. State, 503 So. 2d 350 (Fla. Dist. Ct. App. 1987), *aff'd*, 522 So. 2d 18 (Fla.), *cert. denied*, 108 S. Ct. 2873 (1988).

49. Record at 716-17.

"heinous crimes."[50] Nonetheless, both were acceptable to the state, even though Jones, Wood, Copeland, and McElrath, all black, were struck despite their statements that they could vote for the death penalty under certain circumstances.[51]

In light of these facts, the state's reasons should have failed a strict scrutiny examination because of lack of consistency, and arguably, relevance as well. The transcript gives much support to Justice Finney's dissent in *Howard*. Nevertheless, the other four members of the South Carolina Supreme Court considered the state's reasons sufficient to rebut the prima facie case.

This holding will make it even more difficult for defendants to succeed on *Batson* claims in South Carolina. Until the United States Supreme Court clarifies the *Batson* issue, or until the South Carolina Supreme Court voluntarily becomes more receptive to *Batson* claims, prudent defense counsel should raise relevance and consistency arguments at trial. Such a practice will force the state to articulate only relevant reasons consistently applied to any peremptory strikes of jurors.[52]

Kenneth Lawton Frederick

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50. *Id.* at 813-15.

51. *See id.* at 331-32, 556-68, 679-80, 791-92.

52. Defense counsel might also argue that the sixth amendment entitles defendants to an impartial petit jury (not merely a jury venire) drawn from a representative cross-section of the community. This argument was made in *Batson*, but the Court decided *Batson* on equal protection grounds, and thus did not reach the sixth amendment argument.

The Supreme Court recently discussed this issue, however, in Teague v. Lane, 109 S. Ct. 1060 (1989). *Teague* reached the Court by petition for writ of habeas corpus. The petitioner made several claims, including the argument that Taylor v. Louisiana, 419 U.S. 522 (1975) (holding the sixth amendment required that the jury venire be drawn from a fair cross section of the community), should be extended to include the petit jury.

In a plurality opinion, Justice O'Conner (joined by Chief Justice Rehnquist and Justices Scalia and Kennedy) failed to reach the sixth amendment question. The opinion announced a new standard regarding retroactivity of criminal procedure rules: new constitutional rules of criminal procedure should not be applied retroactively on collateral review unless the new rule at issue falls within an exception. *See Teague*, 109 S. Ct. at 1075. Since the *Teague* opinion concluded that the absence of a fair cross-section on a petit jury would not fall within an exception, the sixth amendment question was not reached. *See id.*

Justice Brennan (joined by Justice Marshall) dissented from the plurality's adoption of the new standard for determining whether a decision should be retroactively applied. In so doing, they implied that if the sixth amendment claim was upheld, it could have an even broader application than *Batson's* equal protection argument. *See id.* at 1092 (Brennan, J., dissenting). Justice Brennan thus suggested that a sixth amendment argument could be made by a defendant even if the defendant was not himself a member of the racial group improperly struck from the jury. Accordingly, defense counsel should raise a *Teague* claim on direct appeal and attempt to force the Court to deal squarely with this sixth amendment issue.

II. DISCLOSURE OF INFORMANT'S IDENTITY REQUIRED WHEN INFORMANT ARRANGES SALE OF CONTRABAND

In *State v. Burns*[53] the South Carolina Supreme Court decided two important issues regarding the compelled disclosure of an informant's identity. First, relying solely on the lower court's determination that the informant was material to the defendant's case, the supreme court ruled that the informant's identity had to be disclosed.[54] The informant had neither witnessed nor participated in the offense, which traditionally has been the major criterion in determining an informant's materiality. Thus, the circumstances under which an informant may be found material were expanded. Second, the court held that when disclosure is proper, the state must supply not only the informant's name, but also any additional information in its possession that would aid the defendant in a search for the informant.[55] This increases the amount of disclosure that will satisfy the court.

In *Burns* an unidentified informant revealed to the Charleston police that the defendant, John Henry Burns, had received a large shipment of narcotics. Unable to corroborate this information, the police sought the assistance of a second informant, Jim Woods. Woods telephoned the defendant and arranged a sale of drugs at a specific location. The call was not recorded. The police proceeded to a specified location where they stopped, questioned, and frisked Burns. A police officer saw a film container in Burns' car and found it contained cocaine. The entire car was searched and additional drugs were found. The police charged Burns with two counts of possession of controlled substances with intent to distribute.[56]

On February 6, 1986, the lower court conducted a hearing and ordered the disclosure of the informant's identity after the state conceded the informant was material to Burns' defense.[57] Pursuant to this ruling the state produced only the informant's name, Jim Woods. Immediately before trial, Burns moved for a continuance to locate Woods. The motion was denied. Burns appealed to the South Carolina Supreme Court, which reversed the lower court's decision and remanded the case for a new trial.[58]

Burns relied on *Roviaro v. United States*,[59] the leading case on informant disclosure, to compel disclosure. In *Roviaro* the Court or-

53. 294 S.C. 338, 364 S.E.2d 465 (1988).
54. Id. at 341, 364 S.E.2d at 467.
55. *Id.*
56. *Id.* at 339, 364 S.E.2d at 466.
57. Brief of Appellant at 9.
58. *Burns*, 294 S.C. at 341, 364 S.E.2d at 466.
59. 353 U.S. 53 (1957).

dered disclosure of the identity of an informant who had actively participated in an illegal drug transaction. The Court held that when disclosure "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege [to withhold an informant's identity] must give way."[60] The Court further stated:

> The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.[61]

In *Roviaro*, however, the informant was the only participant who could contradict the agent's testimony, other than the defendant himself.[62] Conversely, the informant in *Burns* was not present during the offense and, therefore, would be unable to contradict the police. The majority of courts that have applied the *Roviaro* balancing test have classified informants into one of three categories: (1) witness; (2) participant; or (3) mere tipster.[63] If the informant is classified as a mere tipster, his identity is privileged.[64] If, however, the informant is classified as a witness or participant (*i.e.* a material witness on the issue of guilt), disclosure may be required.[65] An informant who is neither a witness nor a participant, but merely arranges a sale, as did the informant in *Burns*, is not as neatly classified. Some jurisdictions hold that such an informant is not a mere tipster and his identity is not privileged.[66]

Many courts do not rely as heavily on classification of the inform-

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60. *Id.* at 60-61.

61. *Id.* at 62.

62. *Id.* at 64. A federal agent was hidden in the trunk of the informant's car, but the Court held the agent's testimony "was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction." *Id.*

63. *See*, State v. Diamond, 280 S.C. 296, 312 S.E.2d 550 (1984); People v. Diaz, 174 Cal. App. 2d 799, 345 P.2d 370 (1959); Thornton v. State, 239 Ga. 693, 238 S.E.2d 376 (1977), *cert. denied*, 434 U.S. 1073 (1978); State v. Nelson, 395 N.W.2d 649 (Iowa Ct. App. 1986).

64. State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973); United States v. Freund, 525 F.2d 873 (5th Cir. 1976); United States v. Burrell, 720 F.2d 1488 (10th Cir. 1983); People v. McCoy, 13 Cal. App. 3d 6, 91 Cal. Rptr. 357 (1970); State v. Martin, 156 Ga. App. 554, 275 S.E.2d 129 (1980).

65. *Martin*, 156 Ga. App. 554, 275 S.E.2d 129.

66. *See Diamond*, 280 S.C. 296, 312 S.E.2d 550 (informant is a participant when he sets up the transaction); Taylor v. State, 136 Ga. App. 31, 220 S.E.2d 49 (1975) (informant who arranges a sale of contraband with the defendant becomes a participant); *see also* People v. Garcia, 67 Cal. 2d 830, 434 P.2d 366, 64 Cal. Rptr. 110 (1967) (nonparticipant informant can be a material witness).

ant when, as in *Burns*, the defendant has claimed entrapment.[67] Classification is rendered less important because the informant's testimony becomes material to the defense.[68] Some courts, though, are reluctant to compel disclosure "upon a mere 'speculation' that the informant could produce evidence favorable to the defense."[69] In *Burns* the defendant posed several possibilities suggesting how Woods' testimony may have been material to his defense. "He may have admitted Defendant was 'framed.' He may have admitted he didn't speak with Defendant on the phone or contradicted police testimony as to what was sold or as to various other factors in their determination of probable cause."[70] Furthermore, many jurisdictions hold that simply because an informant is material to a determination of probable cause does not make him material to the defendant's case (*i.e.* essential to a fair determination of the defendant's guilt or innocence).[71]

In *Burns* the court also held that once the materiality of an informant has been established, "[t]he right of an accused to learn the identity of an informant includes more than the state's revelation of the informant's name."[72] This holding is in accord with the majority of jurisdictions.[73] Most courts only require the state to use reasonable efforts in disclosing identifying information.[74] Rarely do courts impose an affirmative duty to locate the informant and ensure his presence at

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67. *See* United States v. Price, 783 F.2d 1132 (4th Cir. 1986); People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958); People v. McCoy, 13 Cal. App. 3d 6, 91 Cal. Rptr. 357 (1970); State v. Nelson, 395 N.W.2d 649 (Iowa Ct. App. 1986); State v. Gill, 22 Or. App. 484, 539 P.2d 1138 (1975).

68. *See Gill*, 22 Or. App. 484, 539 P.2d 1138.

69. *McCoy*, 13 Cal. App. 3d at 12, 91 Cal. Rptr. at 361; *see also Nelson*, 395 N.W.2d at 653 (mere speculation as to the informant's testimony can not overcome the public interest in protecting the informant); *Gill*, 22 Or. App. at 487, 539 P.2d at 1140 ("[I]f the simple assertion by a defendant that he was entrapped . . . is sufficient to require the revelation of the name of the undisclosed informers, then the use of informers as a source of information . . . will quickly come to an end.").

70. Brief of Appellant at 8-9.

71. *See* Keith v. State, 238 Ga. 157, 158, 231 S.E.2d 727, 729 (1977) (Disclosure of an informant's identity is not necessary when "the question is a preliminary one of probable cause and guilt or innocence is not at stake."(quoting McCray v. Illinois, 386 U.S. 300, 311 (1967))); State v. Diamond, 280 S.C. 296, 312 S.E.2d 550 (1984); State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973); Theodor v. Superior Court, 8 Cal. 3d 77, 501 P.2d 234, 104 Cal. Rptr. 226 (1972); State v. Kirksey, 418 So. 2d 1152 (Fla. Dist. Ct. App. 1982).

72. *Burns*, 294 S.C. at 340, 364 S.E.2d at 467.

73. *See, e.g.*, United States v. Williams, 496 F.2d 378 (1st Cir. 1974); United States v. Goss, 237 F. Supp. 26 (S.D.N.Y. 1965); Eleazer v. Superior Court, 1 Cal. 3d 847, 464 P.2d 42, 83 Cal. Rptr. 586 (1970); State v. Logan, 79 N.C. App. 420, 339 S.E.2d 449 (1986).

74. *See, e.g.*, Renzi v. Virginia, 794 F.2d 155 (4th Cir. 1986); *Williams*, 496 F.2d 378.

trial.[75]

By accepting the lower court's determination regarding the informant's materiality, the court in *Burns* expanded the circumstances under which an informant is deemed material. The lower court had established the informant's materiality only after the state conceded to it for purposes of a preliminary hearing. Without a proper judicial determination, which may have found the informant's disclosure unnecessary, the court indirectly expanded the definition of materiality to include a nonparticipant who *might* testify in accord with a defendant's otherwise unsupported claim of entrapment. Without any evidence to support his assertions of entrapment, Burns merely speculated that Woods' testimony would contradict other evidence. Furthermore, after ordering disclosure the court required the state to reveal more identifying information than the informant's name. It held that any additional identifying information in the state's possession is also subject to disclosure. This holding is in accord with a number of other jurisdictions that have considered the issue.

Valerie L. Brumfield

III. NONDISCLOSURE OF CERTAIN NEGOTIATIONS BETWEEN PROSECUTION AND WITNESS HELD NOT VIOLATIVE OF ORDER PURSUANT TO *BRADY* MOTION; COURT DEFINES WHEN OFFENDER HAS MURDERED AS "AGENT OF ANOTHER"

In *State v. Cain*[76] the South Carolina Supreme Court expanded the law controlling criminal prosecutions and the death penalty in two significant ways. First, the court examined potential *Brady* motion[77] violations and held negotiations between the prosecutor and a co-defendant witness are not material and they need not be revealed under a *Brady* motion.[78] Second, the court examined the statutory aggravating circumstances justifying the death penalty and held that when a defendant commits murder after motivation from another, the death penalty is justified.[79] These two holdings clearly expand the cur-

75. *E.g.*, State v. Brockenborough, 45 N.C. App. 121, 262 S.E.2d 330 (1980).

76. 297 S.C. 497, 377 S.E.2d 556 (1988), *petition for cert. filed*, — S.C. —, — S.E.2d — (S.C. May 22, 1989) (No. 22914).

77. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court stated that defense counsel has the right to discover information about a case from the prosecution. The procedure established was for the defense to make a motion before the court for the requested disclosure. These motions became known as *Brady* motions.

78. *Cain*, 297 S.C. at 503, 377 S.E.2d at 559.

79. *Id.* at 508, 377 S.E.2d at 562.

rent law and may violate the United States Constitution.

Of major practical significance is the court's handling of the prosecution's failure to advise defense counsel of "negotiations" which had occurred between the prosecution and co-defendant Kenneth Dale Threatte. Threatte was the prosecution's primary witness in the conviction of James Russell Cain. At trial, Threatte testified that nothing had been promised him in return for his testimony. Threatte's plea hearing for the same counts of murder and armed robbery was held five days after Cain's conviction. Pursuant to certain discussions and negotiations between the solicitor and Threatte's attorney, Threatte plead guilty to one count of murder and the state withdrew its notice of intention to seek the death penalty. The remaining indictments for armed robbery and murder were nol prossed. Threatte was sentenced to life imprisonment.[80]

The court distinguished *State v. Hinson*,[81] a similar case decided one year earlier. In *Hinson* the prosecutor announced "moments after" the testimony of the co-defendant that the co-defendant would not be prosecuted.[82] Hinson was convicted of drug trafficking and appealed. The supreme court affirmed the conviction, but because the timing of the announcement strongly suggested an undisclosed promise, it remanded the case to the lower court with orders to determine whether the prosecution failed to disclose a promise of immunity to the witness.[83]

In *Cain* the court held that no evidence gave rise to an inference that an undisclosed immunity grant or plea bargain existed.[84] The court believed the five day lapse between Threatte's testimony in Cain's trial and his own plea was ample time for negotiations to have taken place.[85] Thus, the court held that the solicitor's decisions were logical, given the testimony and physical evidence presented during Cain's trial.[86] The court went further to state that even if an assurance to Threatte was not disclosed, reversal was not constitutionally mandated.[87]

Citing *United States v. Bagley*,[88] the South Carolina Supreme Court stated that only material disclosures are required. The court defined evidence as material only if it is reasonably probable that disclo-

80. *Id.* at 502, 377 S.E.2d at 559.
81. 293 S.C. 406, 361 S.E.2d 120 (1987).
82. *Id.* at 407, 361 S.E.2d at 120.
83. *Id.* at 408, 361 S.E.2d at 121.
84. *Cain*, 297 S.C. at 503, 377 S.E.2d at 559.
85. *Id.*
86. *Id.*
87. *Id.*
88. 473 U.S. 667 (1985).

sure of the evidence to the defense would have resulted in a different outcome at the proceeding.[89] The court failed to recognize the important ramifications of its definition for this case.

The court used this test only in its examination of the guilt phase of Cain's trial. Since evidence presented at the guilt phase of a trial is also considered during the penalty phase,[90] the court should have considered how the failure to disclose this information would affect the penalty phase. *Bagley* dealt with a narcotics conviction, not a capital crime.[91] This fact is significant since capital crimes receive heightened scrutiny.[92] The court failed to give this capital case the level of scrutiny a capital case warrants.

In addition to the *Brady* motion issue, the court also addressed the issue of when a murder is committed "for another." The state based its request for the death penalty for Cain on alleged statutory aggravating circumstances. It cited in support of its allegation of aggravating circumstances South Carolina Code section 16-3-20(C)(a)(6),[93] which provides, "The offender caused or directed another to commit murder or committed murder as an agent or employee of another."[94]

The trial judge charged that the "agent or employee" aggravating circumstance was broad enough to include those who murder "on behalf of another."[95] Threatte provided testimony that Cain had committed the murders for his mother, apparently on behalf of her narcotics

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89. *Cain*, 297 S.C. at 503, 377 S.E.2d at 559. In so defining "material" the court followed its previous statements in *State v. Hinson*, 293 S.C. 406, 361 S.E.2d 120 (1987), that "[e]vidence is material when there is a reasonable probability that the result of trial would have been different had the evidence been disclosed to the defense." *Id.* at 408, 361 S.E.2d at 120.

90. *See* Zant v. Stephens, 462 U.S. 862, 872 (1983) (Court relying on Georgia Supreme Court's response to certified question in which the Georgia court stated, "In making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial." Zant v. Stephens, 250 Ga. 97, 100, 297 S.E.2d 1, 4 (1982)).

91. *Bagley*, 473 U.S. 667. The differences between *Bagley* and *Cain* do not stop at the level of punishment. The witnesses involved in *Bagley* were state law enforcement officers who received $300.00 from federal agents for their testimony, not co-defendants receiving plea bargains. *See id.* at 671. Moreover, the officers' testimony related almost exclusively to firearms charges of which the defendants were acquitted. *See id.* at 673.

In *State v. Hinson*, 293 S.C. 406, 361 S.E.2d 120 (1987), the South Carolina Supreme Court dealt with a narcotic's charge, more similar to *Bagley* than the instant case. In *Hinson*, however, the court was dealing with the granting of immunity to a co-defendant. Nonetheless, in *Hinson* the court found prejudicial error.

92. *See Zant*, 462 U.S. at 885 ("[T]he severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.").

93. S.C. CODE ANN. § 16-3-20(C)(a)(6) (Law. Co-op. Supp. 1988).

94. *Id.*

95. *Cain*, 297 S.C. at 505, 377 S.E.2d at 560.

drug trade.[96] The South Carolina Supreme Court held that to restrict the definition of agent to one who receives something of value in exchange for services rendered would duplicate section 16-3-20(C)(a)(4),[97] which is South Carolina's murder for hire provision.[98]

The Georgia Supreme Court dealt with an almost identical problem of statutory construction in *Whittington v. State*.[99] Georgia narrowed its definition under a similar statute[100] to prevent the inclusion of defendants who have been motivated by another.[101] The Georgia court believed the statute needed to be defined more narrowly to include only those acting as an employee.[102]

The South Carolina Supreme Court in *Cain* held that such a restriction was not constitutionally required.[103] Again relying on *Zant v. Stephens*, the court stated, "*Zant* describes two constitutionally indispensable features of any aggravating circumstance: first, it 'must genuinely narrow the class of persons eligible for the death penalty'; second, it 'must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' "[104] The court then proceeded to justify the imposition of the more severe sentence by referring to "agents" as having a "total lack of conscience,"[105] by characterizing agent murders as "the product of a bankrupt human conscience,"[106] and by suggesting that the victim of an agent murderer is "rendered even more helpless by his lack of suspicion of the agent."[107]

The court failed to state how the class of murderers was "genuinely narrowed" by including "[o]ne who murders at the request or motivation of another."[108] The court's decision in *Cain* warrants the

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96. *See id.* ("Threatte's testimony unequivocally established that appellant's *mother* motivated the murderers . . . .").

97. S.C. CODE ANN. § 16-3-20(C)(a)(4) (Law. Co-op. Supp. 1988). The statute lists as an aggravating circumstance any instance in which "[t]he offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value." *Id.*

98. *Cain*, 297 S.C. at 506-07, 377 S.E.2d at 561.

99. 252 Ga. 168, 313 S.E.2d 73 (1984).

100. GA. CODE ANN. § 17-10-30(b)(6) (1988). The Georgia statute lists as an aggravating circumstance any instance in which the "offender caused or directed another to commit murder or committed murder as an agent or employee of another person . . . ."

101. *Whittington*, 252 Ga. at 178, 313 S.E.2d at 82.

102. *Id.* at 178, 313 S.E.2d at 81.

103. *Cain*, 297 S.C. at 507, 377 S.E.2d at 561.

104. *Id.* (citing Zant v. Stephens, 462 U.S. 862, 877 (1983)).

105. *Id.*

106. *Id.* at 507-08, 377 S.E.2d at 561.

107. *Id.* at 508, 377 S.E.2d at 561-62.

108. *See id.* at 507, 377 S.E.2d at 561.

same criticism the United States Supreme Court delivered to the Georgia Supreme Court in *Godfrey v. Georgia*.[109] In *Godfrey* the High Court reversed a Georgia death sentence, stating that the Georgia Supreme Court failed to create "any inherent restraint on the arbitrary and capricious infliction of the death sentence" because a person of ordinary sensibility could reasonably find that almost every murder fit the stated criteria established by the Georgia court.[110] The South Carolina Supreme Court, however, apparently did not regard its decision as broadening the class of persons eligible for the death penalty. Instead, the court narrowly focused on the fact that Cain "conceded the 'agency' factor narrows the class of persons eligible for the death penalty."[111] Thus, a possible justification for the court's failure to state how the class is narrowed by its definition of agency could be the result of what the court viewed as a concession from the defendant.

By its holding in *Cain* the South Carolina Supreme Court established potentially dangerous precedent for future use by prosecutors. First, as long as prosecutors do not make any firm commitments to co-defendants, the jury may perceive a testifying co-defendant as contrite, rather than as one testifying out of self interest. Second, if a prosecutor discovers that someone suggested or otherwise motivated a defendant to commit a murder, the defendant then becomes an agent and the death penalty becomes possible.

Richard R. Gleissner

IV. COURT STRICTLY ENFORCES REQUIREMENT THAT TRIAL JUDGE MAKE DETERMINATION AND INDICATE IN RECORD THAT DEFENDANT'S WAIVER OF RIGHT TO COUNSEL WAS KNOWING AND INTELLIGENT

In *State v. Bateman*[112] the South Carolina Supreme Court held that it is the responsibility of the trial judge to determine whether a defendant has intelligently and knowingly waived his right to counsel.[113] Furthermore, the court held that when a defendant has indicated his desire to proceed *pro se*, the record must show the trial judge conducted a hearing to determine whether the defendant's request was accompanied by a competent waiver.[114] Because these requirements were not met in *Bateman*, the supreme court reversed the conviction

109. 446 U.S. 420 (1980).
110. *Id.* at 428-29.
111. *Cain*, 297 S.C. at 507, 377 S.E.2d at 561.
112. 296 S.C. 367, 373 S.E.2d 470 (1988).
113. *Id.* at 369, 373 S.E.2d at 741.
114. *Id.*

and remanded the case for a new trial.[115]

The Supreme Court of South Carolina has required trial judges to make determinations as to whether waivers have been knowingly and intelligently made since the United States Supreme Court indicated in *Faretta v. California*[116] that such determinations were necessary.[117] When trial courts have failed to demonstrate in the record that they have made the determination, the supreme court consistently has reversed trial court decisions and remanded for new trials.[118]

In *Bateman* six defendants were arrested and charged with trafficking in marijuana and conspiracy to traffic in marijuana. At the defendants' bond hearing, T.R. Bateman acted as spokesman for the entire group and informed the court that the group did not want an attorney.[119] At the trial, the judge asked Bateman if he still served as spokesman for the entire group of defendants and Bateman responded affirmatively. Throughout the proceedings the judge recognized Bateman as the group's spokesman. The judge informed each of the defendants that they could participate, but aside from this comment he addressed the remaining defendants only to ascertain their identity.[120] Accordingly, the court reversed the six defendants' convictions and remanded for new trial because the judge failed to make a determination of competent waiver of counsel.[121]

Subsequent to its decision in *Bateman*, the court decided *State v. Coto*.[122] The one paragraph per curiam opinion in *Coto* did not provide the facts of the case, but instead clearly and concisely reiterated the rule that when "the record does not indicate, and no determination was made, that [an] Appellant's waiver of counsel was knowing and intelligent . . . ," the case will be reversed and remanded for a new trial.[123]

In light of the broad rule announced in *Coto*, which apparently was intended not to be limited to any particular fact situation, and the

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115. *Id.*

116. 422 U.S. 806 (1975).

117. *See, e.g.*, State v. Loftin, 276 S.C. 48, 276 S.E.2d 575 (1981); State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977).

118. *See, e.g., Loftin*, 276 S.C. 48, 275 S.E.2d 575; State v. Massey, 277 S.C. 213, 284 S.E.2d 781 (1981).

119. *Bateman*, 296 S.C. at 368, 373 S.E.2d at 470.

120. *Id.* at 368-69, 373 S.E.2d at 471. At the bond hearing the judge spoke briefly with another defendant about his ownership of the land on which the marijuana was found. This same defendant made a closing argument. Other than this one exception, essentially all communication between the trial judge and the defendants was conducted through Bateman. *Id.*

121. *Id.* at 369, 373 S.E.2d at 471.

122. 296 S.C. 480, 374 S.E.2d 181 (1988) (per curiam).

123. *Id.* at 481, 374 S.E.2d at 181-82.

obvious import of that rule as earlier indicated in *Bateman*, the South Carolina Supreme Court clearly is determined to protect the rights of *pro se* defendants and ensure that their waivers of counsel are knowing and intelligent.

James Mauldin Gibson

V. CONDITION OF PROBATION BARRING PROBATIONER FROM ALCOHOL-SELLING ESTABLISHMENTS HELD UNREASONABLE AND DISPROPORTIONATE TO REHABILITATIVE FUNCTION

In *Beckner v. State*[124] the South Carolina Supreme Court struck down a condition of probation that barred a defendant from entering any place of business that sold alcohol. The court's per curiam decision was based on its finding that such a prohibition was not reasonable.

John Hawk Beckner "pled guilty to distribution of marijuana . . . and was sentenced to ten years imprisonment, suspended upon the service of five years with five years probation."[125] A condition of his probation was that he would not "be in a place of business that sells alcohol."[126] Beckner challenged this condition at a post-conviction relief (PCR) hearing, but the PCR judge upheld the condition.[127] Beckner appealed and the supreme court reversed.

The supreme court stated that while a trial judge has great discretion in imposing probation conditions under South Carolina Code section 24-21-430,[128] and although conditions are not limited to those in

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124. 296 S.C. 365, 373 S.E.2d 469 (1988).

125. *Id.* at 366, 373 S.E.2d at 469.

126. *Id.*

127. *See id.*

128. South Carolina Code section 24-21-430 provides a partial list of conditions a court may impose upon a probationer. The statute reads:

> The court shall determine and may impose by order duly entered and may at any time modify the conditions of probation and may include among them any of the following or any other condition not herein prohibited.
>
> The probationer shall:
>
> (1) refrain from the violations of any state or federal penal laws;
> (2) avoid injurious or vicious habits;
> (3) avoid persons or places of disreputable or harmful character;
> (4) permit the probation officer to visit at his home or elsewhere;
> (5) work faithfully at suitable employment as far as possible;
> (6) pay a fine in one or several sums as directed by the court;
> (7) perform public service work as directed by the court;
> (8) submit to urinalysis or a blood test or both upon the request of the probation agent;
> (9) submit to curfew restrictions;

the statute,[129] the conditions must be reasonable.[130] Furthermore, the court recognized that "[t]he practical effect of the challenged condition [was] to prohibit [Beckner] from entering or working in virtually every grocery and convenience store in South Carolina."[131] Also, the court noted the condition would exclude Beckner from many restaurants.[132] The court thus concluded that the prohibition was unreasonable, since the burden on Beckner was "greatly disproportionate to any rehabilitative function it [could] serve."[133]

The court expressly noted, however, that its holding "does not mean that other less restrictive conditions prohibiting entry into places that sell alcohol may not be reasonable."[134] The court cited three cases in which less restrictive conditions geared toward achieving the same result have been upheld.[135] In *People v. Smith*[136] a California court upheld a condition requiring a probationer to stay out of places where alcohol was the chief item on sale. Similarly, a Florida court required the probationer in *Brown v. State*[137] to stay away from bars. Finally, in *State v. Harrington*[138] the North Carolina Court of Appeals upheld a condition that a probationer not frequent places that sell alcohol during certain hours.

Based on these authorities and the court's indication that it regards them as persuasive, it is unlikely that the reversal of the probation condition in *Beckner* will lead to a trend of such reversals. Indeed, the decision might be expected to result in an increased number of probations conditioned upon the probationer not entering certain alcohol-serving establishments. This result might be expected because al-

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(10) submit to house arrest which is confinement in a residence for a period of twenty-four hours a day, with only those exceptions as the court may expressly grant in its discretion;
(11) submit to intensive surveillance which may include surveillance by electronic means;
(12) support his dependents; and
(13) follow the probation officer's instructions and advice regarding recreational and social activities.

S.C. CODE ANN. § 24-21-430 (Law. Co-op. 1989).

129. *Beckner*, 296 S.C. at 366, 373 S.E.2d at 469 (citing State v. Wilson, 274 S.C. 352, 264 S.E.2d 414 (1980)).

130. *Id.* (citing 24 C.J.S. *Criminal Law* § 1571(8) (1961); 21 AM. JUR. 2D *Criminal Law* § 570 (1981)).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 366 n.1, 373 S.E.2d at 469 n.1.

135. *See id.*

136. 145 Cal. App. 3d 1032, 193 Cal. Rptr. 825 (1983).

137. 406 So. 2d 1262 (Fla. Dist. Ct. App. 1981).

138. 78 N.C. App. 39, 336 S.E.2d 852 (1985).

though the court struck down the broad prohibition in *Beckner*, the court for the first time expressly indicated its willingness to uphold a similar, but less restrictive, prohibition against entering places that serve alcohol.

Harold A. Oberman