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# Criminal Law

# CRIMINAL LAW

## I. EVIDENCE OF VICTIM'S MENTAL TRAUMA RELEVANT TO PROVE CRIMINAL SEXUAL CONDUCT AND RULE AGAINST INCONSISTENT VERDICTS IN CRIMINAL CASES ABOLISHED

In *State v. Alexander*[1] the South Carolina Supreme Court established that evidence of a victim's mental trauma is relevant to prove criminal sexual conduct.[2] The court also abolished the rule that a criminal defendant is entitled to a new trial when the jury reaches inconsistent verdicts.[3]

*Alexander* involved allegations of armed robbery, kidnapping, and criminal sexual conduct in the first degree arising out of an incident between Richard Alexander, the defendant, and Ms. Hendrix, the prosecutrix. The facts were in great dispute. Alexander testified that Ms. Hendrix agreed to have sex with him for money and that he and the prosecutrix parked on a deserted road and began to have sex. Ms. Hendrix stopped the sexual activity and he refused to pay. Upset by the turn of events, Alexander stole cocaine from Ms. Hendrix's purse. Ms. Hendrix then drove Alexander to his sister's house.[4]

Ms. Hendrix told a different story. She alleged that Alexander held a knife to her throat, forced her into a car, and drove to a deserted road. Alexander then forced her to have sexual intercourse with him three times. He demanded money, and then released her. After first stopping off at a bar in Greenville, Ms. Hendrix got something to eat and went to a hospital.[5]

The jury convicted Alexander of kidnapping and criminal sexual conduct in the third degree. Alexander appealed. Alexander asserted that he deserved a new trial for two reasons. First, Alexander argued "that the trial judge erred in allowing Ms. Hendrix to testify, over his objection, about the emotional consequences resulting from the alleged rape."[6] Second, Alexander argued that the jury's verdicts were inconsistent.[7] Addressing Alexander's first argument, the court initially noted the standard that courts apply to determine whether evidence is

1. 401 S.E.2d 146 (S.C. 1991).
2. *Id.* at 149.
3. *Id.* at 150.
4. *Id.* at 147-48.
5. *Id.* at 147.
6. *Id.* at 148.
7. *Id.* at 149.

relevant: "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears."[8] Because Alexander's argument raised an issue of first impression in South Carolina, the court looked to other jurisdictions for guidance.[9] The court relied on authority from Missouri[10] and Arizona[11] and held that evidence of an alleged rape victim's "mental trauma is relevant to prove the elements of criminal sexual conduct, including the lack of consent."[12] The court explained, "Evidence of behavioral and personality changes tends to establish or make more or less probable that the offense occurred."[13]

The court next considered whether the trial judge nonetheless should have excluded the evidence on the ground that it was unduly prejudicial to the defendant. The court noted that the "overwhelming majority rule [is] that relevant evidence may be excluded for undue prejudice even though no specific exclusionary rule requires exclusion."[14] The court adopted the pertinent part of Rule 403 of the Federal Rules of Evidence,[15] which states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."[16] The court applied this test and found that the evidence of Ms. Hendrix's emotional trauma was unduly prejudicial and should not have been admitted.[17] The court reversed the decision and remanded the case for a new trial. The court did not explain why the impact of the evidence was unduly prejudicial to Alexander or why this impact substantially outweighed the probative value of the evidence.[18]

The court also abolished the rule against inconsistent verdicts in criminal cases.[19] The rule decrees that a criminal defendant is entitled to a new trial if the verdicts are inconsistent.[20] Apparently, South Car-

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8. *Id.* at 148 (citing State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)).

9. *Id.*

10. State v. Burke, 719 S.W.2d 887 (Mo. Ct. App. 1986); State v. Philips, 670 S.W.2d 28 (Mo. Ct. App. 1984); State v. Johnson, 637 S.W.2d 157 (Mo. Ct. App. 1982).

11. State v. Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981); State v. Cummings, 148 Ariz. 588, 716 P.2d 45 (Ct. App. 1985).

12. *Alexander*, 401 S.E.2d at 149.

13. *Id.* (citing State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986)).

14. *Id.* (citing 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 10a (Tillers rev. 1983)).

15. FED. R. EVID. 403.

16. FED. R. EVID. 403, *quoted in Alexander*, 401 S.E.2d at 149.

17. *Alexander*, 401 S.E.2d at 149.

18. *Id.*

19. *Id.* at 150.

20. *Id.* at 149.

olina courts have never used the rule to grant a new trial.[21] The *Alexander* court noted that the United States Supreme Court abolished the rule in the federal system in 1932.[22] The United States Supreme Court recently reaffirmed the 1932 decision in *United States v. Powell*.[23]

In *Powell* the Court refused to grant a new trial to a defendant found guilty of compound offenses but innocent of the predicate offenses.[24] The Court explained that juries return inconsistent verdicts for various reasons, including mistake, compromise, or lenity.[25] The Court decided that the defendant was adequately protected "against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts."[26]

The *Powell* Court decided the issue solely in its supervisory capacity over the federal system.[27] Thus, the Court's decision is not binding on state courts. The South Carolina Supreme Court nonetheless found the *Powell* reasoning compelling and abolished the rule against inconsistent verdicts.[28]

The impact of the new rules announced in *Alexander* remains to be seen. The rule against inconsistent verdicts essentially did not exist in South Carolina, and its abolition may be of limited significance. As to the admission of mental trauma evidence in criminal sexual conduct trials, the burden will fall on the state's trial judges to ascertain when the probative value of postevent evidence of mental trauma is substan-

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21. *Id.* at 150. For example, in State v. Hall, 268 S.C. 524, 235 S.E.2d 112 (1977), a Greenville County court convicted the defendant of murder, assault and battery with intent to kill, armed robbery, and carrying a concealed weapon, but found the defendant not guilty of murder while in the commission of armed robbery with a deadly weapon. *Id.* at 526, 235 S.E.2d at 113. Although the verdicts were "obviously inconsistent," the *Hall* court refused to grant the defendant a new trial because the defendant was not prejudiced by the inconsistency. *Id.* at 528, 235 S.E.2d at 114.

22. *See Alexander*, 401 S.E.2d at 149 (citing Dunn v. United States, 284 U.S. 390 (1932)).

23. 469 U.S. 57 (1984).

24. The Government conceded for the purposes of review that the verdicts were inconsistent. *Id.* at 61 n.5.

25. *Id.* at 65.

26. *Id.* at 67.

27. *Id.* at 65.

28. State v. Alexander, 401 S.E.2d 146, 150 (S.C. 1991). Also, the *Alexander* court approvingly referred to Milam v. State, 255 Ga. 560, 341 S.E.2d 216 (1986), a recent decision by the Georgia Supreme Court that abolished the rule against inconsistent verdicts in criminal cases. *Alexander*, 401 S.E.2d at 150.

tially outweighed by the danger of unfair prejudice to the defendant.

*David W. Plowden*

## II. Consecutive Life Sentences Treated as One General Life Sentence for Parole Purposes and Great Deference Given to Trial Judges in Continuing Jury Deliberations in Capital Cases

In *State v. Atkins*[29] the South Carolina Supreme Court upheld a convicted murderer's death sentence. The court held that the trial judge correctly stated the law when he charged the jury that for purposes of parole eligibility, multiple life sentences are treated as one life sentence and that parole eligibility for individuals sentenced to multiple life terms is twenty years.[30] The supreme court also held that the trial judge did not abuse his discretion by requiring the jury to continue deliberation after the jury indicated that it could not reach a decision following three and one-half hours of deliberation.[31]

In 1985 Joseph Earnest Atkins killed his elderly father and a thirteen-year-old neighbor with a shotgun.[32] At Atkins's first trial the jury convicted him of murder and sentenced him to death. The supreme court affirmed the convictions, but reversed the death sentences and remanded the case for resentencing.[33] The resentencing jury sentenced Atkins to death again. Atkins appealed.[34]

Although the supreme court considered numerous issues on appeal, the two most significant involved a pair of supplemental jury instructions. During its deliberations the jury sent a question to the judge that requested whether the jury could recommend consecutive life sentences. The judge, believing the inquiry to be motivated by parole considerations, charged the jury that it could not recommend consecutive life sentences. He added that Atkins would be eligible for parole in twenty years even if given consecutive life sentences.[35]

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29. 399 S.E.2d 760 (S.C. 1990), *cert. denied*, 111 S. Ct. 2913 (1991).

30. *Id.* at 763.

31. *Id.*

32. *Id.* at 761. The circumstances that surround these crimes are set forth in greater detail in State v. Atkins, 293 S.C. 294, 360 S.E.2d 302 (1987), *appeal after remand*, 399 S.E.2d 760 (S.C. 1990), *cert. denied*, 111 S. Ct. 2913 (1991).

33. *Atkins*, 293 S.C. at 301, 360 S.E.2d at 306. The court found that the trial judge erred in denying Atkins his statutory right to have his counsel examine prospective jurors prior to their disqualification on the basis of their opposition to the death penalty. *Id.* at 296-98, 360 S.E.2d at 303-04 (construing S.C. Code Ann. § 16-3-20(D) (Law. Co-op. Supp. 1990)).

34. *Atkins*, 399 S.E.2d at 761.

35. *Id.* at 763.

The supreme court upheld the instruction. The court held that for purposes of parole life sentences cannot be aggregated. A man lives only one life. The majority concluded that consecutive life sentences should be considered one general sentence of life for which parole eligibility is twenty years.[36]

Justice Finney found this holding to be incorrect and illogical. He noted that consecutive sentences "are intended to run one after the other, as would statutory periods of time required to qualify for parole eligibility."[37] From this proposition he reasoned that "[u]nder the majority's holding, the consecutive provision for multiple life sentences would become a nullity."[38]

Justice Finney's criticism is valid. Under the majority's holding a person sentenced to ten consecutive life sentences, like a person sentenced to one life sentence, is eligible for parole in twenty years. Furthermore, a person sentenced to consecutive life sentences is eligible for parole in the same amount of time as a person sentenced to concurrent life sentences. Thus, the majority's holding erases not only any distinction between single and multiple sentences, but also the distinction between concurrent and consecutive life sentences.[39]

Although one may argue the merits of the court's decision, the holding is clear. When multiple life sentences are handed down, whether they are imposed consecutively or concurrently is irrelevant for parole eligibility purposes. They will be considered as one life sentence for which parole eligibility is twenty years.

After the jury had heard four and one-half days of testimony, it deliberated for three and one-half hours. The jury then communicated to the trial court that it could not reach a decision and asked whether to continue deliberation. The judge responded that " 'three and a half hours would not be sufficient for you to have deliberated fully . . . . [Y]our decision must be a unanimous decision of all twelve of you.' "[40] The judge sent the jury home for the night. After deliberating one and one-half hours the next morning the jury recommended that Atkins

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36. *Id.* This issue can no longer arise in the sentencing phase of a capital case. In State v. Torrence, 406 S.E.2d 315 (S.C. 1991), the court overruled State v. Atkins, 293 S.C. 294, 360 S.E.2d 302 (1987), and held that parole considerations may not enter into a capital sentencing decision and that trial judges should not inform sentencing juries about parole. 406 S.E.2d at 321. This issue can still arise, however, in parole hearings before the Board of Probation, Parole, and Pardon Services. *See* S.C. CODE ANN. § 24-21-610 (Law. Co-op. 1989); *id.* § 16-3-20(A) (Law. Co-op. Supp. 1990).

37. *Atkins*, 399 S.E.2d at 766 (Finney, J., dissenting).

38. *Id.*

39. *Id.*

40. *Id.*

receive the death penalty for both murder convictions.[41]

The majority found no error in the supplemental charge. The court cited *State v. Bennett*[42] for the proposition that the length of time that a jury deliberates rests in the sound discretion of the trial judge.[43] The court concluded that the trial judge did not abuse his discretion by requiring the jury to continue deliberating beyond three and one-half hours after a four and one-half day trial.[44]

Justice Finney disagreed. He found that this supplemental charge "tended to coerce the jury into reaching a unanimous verdict."[45] Justice Finney quoted section 16-3-20(C) of the South Carolina Code,[46] which sets forth a clear directive when a jury is unable to decide on a sentence in a capital case:

> In the event that all members of the jury after a *reasonable deliberation* cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment . . . .[47]

The main reason for giving a supplemental charge to a deadlocked jury is to avoid the cost of a retrial.[48] This concern is diffused, however, by section 16-3-20(C), which provides for the imposition of a sentence of life imprisonment when a jury is deadlocked in the sentencing phase of a capital case. This statute appears to restrict judicial discretion in continuing jury deliberations in capital cases if the jurors disagree on a sentence after a reasonable period of deliberation.

It is not clear whether Justice Finney would hold that three and one-half hours is "reasonable deliberation" after a four and one-half day trial because he did not directly criticize the majority's reliance on *State v. Bennett*.[49] He did remark, however, that because of the "unique nature of the death penalty, practices allowed in other non-capital criminal cases may be constitutionally impermissible if utilized in a capital case."[50]

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41. Record at 1211, 1227.

42. 259 S.C. 50, 190 S.E.2d 497 (1972).

43. *Atkins*, 399 S.E.2d at 763.

44. *Id.*

45. *Id.* at 766 (Finney, J., dissenting).

46. S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 1990).

47. *Id.* (emphasis added), *quoted in Atkins*, 399 S.E.2d at 766 (Finney, J. dissenting).

48. *See, e.g.*, Lowenfield v. Phelps, 484 U.S. 231, 238 (1988); State v. Bennett, 259 S.C. 50, 54, 190 S.E.2d 497, 498 (1972).

49. 259 S.C. 50, 190 S.E.2d 497 (1972).

50. *Atkins*, 399 S.E.2d at 766-67 (Finney, J., dissenting) (citing Strickland v. Washington, 466 U.S. 668, 705 (1984) (Brennan, J., concurring in part and dissenting in part)).

The defendant in *Bennett* was charged with kidnapping. After several hours of deliberation, the foreman of the jury announced that the jury was unable to reach a verdict.[51] The trial judge did not declare a mistrial, but instead gave the following supplemental charge: " 'I don't want anybody to give up a conscientious opinion, but very frequently, with the interchange of ideas between members of a jury, the jury can come to a consensus; and if the jury can reach a verdict, it saves a retrial of the case.' "[52] Subsequently, the jury found the defendant guilty of kidnapping. The South Carolina Supreme Court upheld the conviction and noted that "[a]fter a trial of the length of this one, the judge would have been derelict in his duty if he had declared a mistrial at this stage of the proceedings instead of requiring the jurors to continue their deliberations."[53]

The desire to avoid a retrial could not have motivated the *Atkins* court. *Atkins* involved a capital crime. A hung jury would have resulted in a life sentence under the statute. The court's holding nonetheless leaves a question unanswered: What constitutes reasonable deliberation under section 16-3-20(C)?

*Robert F. Daley, Jr.*

## III. A SINGLE TRIAL FOR ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT AND ASSAULT AND BATTERY OF HIGH AND AGGRAVATED NATURE DID NOT CONSTITUTE DOUBLE JEOPARDY

In *State v. Frazier*[54] the South Carolina Supreme Court upheld a defendant's convictions in a single trial for assault with intent to commit criminal sexual conduct and assault and battery of a high and aggravated nature. The court reasoned that the convictions "were for different acts constituting separate offenses and did not violate [the defendant's] constitutional right against double jeopardy."[55]

On June 24, 1987, Sheila Oliphant was walking home when the defendant approached her from behind and grabbed her. After struggling with Oliphant, the defendant dragged her into the woods where he ripped off her shorts and pulled off her underwear. The defendant attempted to loosen his pants but stopped when he saw the headlights of an approaching car. He then told Oliphant that he was going to kill her. The defendant placed his knee on Oliphant's chest and began to

51. *Bennett*, 259 S.C. at 54, 190 S.E.2d at 498.
52. *Id.*
53. *Id.* Unfortunately, the opinion gives no indication of how long the trial lasted.
54. 397 S.E.2d 93 (S.C. 1990).
55. *Id.* at 94-95.

choke her, but fled when the approaching car did not drive away.[56]

The defendant was indicted and tried for criminal sexual conduct in the first degree and assault and battery with intent to kill. The trial court directed a verdict of acquittal on the charge of criminal sexual conduct in the first degree and instructed the jury on the offenses of assault with intent to commit criminal sexual conduct in the first degree, assault and battery with intent to kill, and assault and battery of a high and aggravated nature. The jury found the defendant guilty of both assault with intent to commit criminal sexual conduct in the first degree and assault and battery of a high and aggravated nature.[57]

The defendant argued on appeal that his conviction on both offenses violated the Double Jeopardy Clause of both the United States and South Carolina Constitutions. The Fifth Amendment to the United States Constitution provides in part that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[58] The defendant contended that he was convicted for two offenses based on only one act. The majority in *Frazier* disagreed with the defendant and held that the evidence supported the jury's finding that the defendant committed two separate offenses.[59]

If the majority had concluded that the defendant's actions amounted to only one ongoing act, the Double Jeopardy Clause would not automatically have barred convictions for both offenses. In *Missouri v. Hunter*[60] the United States Supreme Court held "that simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes."[61] The Court continued:

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56. *Id.* at 93-94.

57. *Id.* at 94.

58. U.S. CONST. amend. V. The South Carolina Constitution uses the word "liberty" in place of the word "limb." *See* S.C. CONST. art. I, § 12.

59. *Frazier*, 397 S.E.2d at 94. The majority reasoned:

> The assault with intent to commit criminal sexual conduct occurred when [the defendant] grabbed the victim, forced her into the woods and ripped her clothes in an effort to commit a sexual battery. The [assault and battery of a high and aggravated nature] occurred when [the defendant] put his knee on the victim's chest, one hand around her neck and told her he was going to kill her. . . . Under this view of the evidence, the threat to kill the victim and the ensuing assault were not in furtherance of the attempted criminal sexual conduct.

*Id.* Justice Finney disagreed and stated, "The record reveals that [the defendant] conducted one ongoing varied assault in furtherance of his intent to commit criminal sexual conduct." *Id.* at 95 (Finney, J., dissenting).

60. 459 U.S. 359 (1983).

61. *Id.* at 368. The *Blockburger* test, derived from Blockburger v. United States, 284 U.S. 299 (1932), provides "that where the same act or transaction constitutes a viola-

> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.[62]

Therefore, if the *Frazier* court had found that the evidence indicated that the defendant's actions constituted only one ongoing act instead of two separate acts, then the court would have had to examine the legislative intent behind the offense of assault with intent to commit criminal sexual conduct and the offense of assault and battery of a high and aggravated nature to determine whether the legislature intended to provide multiple punishments. However, because the majority found that the defendant's actions were two separate acts, such an inquiry into the legislative intent was unnecessary.

*Michael K. Kocher*

## IV. CONVICTION FOR OFFENSE AND LESSER-INCLUDED OFFENSE CONSTITUTIONALLY IMPERMISSIBLE ABSENT CONTRARY LEGISLATIVE INTENT

In *Matthews v. State*[63] the South Carolina Supreme Court held that principles of double jeopardy prevented the state from convicting a criminal defendant for both possession of marijuana with intent to distribute[64] and trafficking in marijuana[65] when the possession of an identical amount of marijuana is sufficient to sustain convictions on both counts. The court concluded that possession with intent to distribute was a lesser-included offense[66] of trafficking based upon possession.[67] It is now well settled that absent a contrary legislative intent, a

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tion of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. The *Blockburger* test is a rule of statutory construction and not a constitutional rule. *See Hunter*, 459 U.S. at 368.

62. *Hunter*, 459 U.S. at 368-69.

63. 300 S.C. 238, 387 S.E.2d 258 (1990).

64. S.C. CODE ANN. § 44-53-370(a)(1) (Law. Co-op. Supp. 1990).

65. *Id.* § 44-53-370(e)(1).

66. "The test for determining when a crime is a lesser included offense of the crime charged is whether the greater of the two offenses includes all the elements of the lesser offense." State v. Suttles, 279 S.C. 87, 88, 302 S.E.2d 338, 338 (1983) (citing State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974)).

67. *Matthews*, 300 S.C. at 241, 387 S.E.2d at 259-60.

court cannot constitutionally[68] convict a criminal defendant in the same trial for two offenses when one is a lesser-included offense.[69]

The trial court convicted David Ray Matthews of possession of marijuana with intent to distribute and of trafficking in marijuana. Both convictions rested on his constructive possession of approximately twenty pounds of marijuana.[70] On appeal Matthews contended that possession with intent to distribute was a lesser-included offense of trafficking based upon possession and, therefore, the court could not convict him for both offenses.[71] The trial court judge rejected this argument and sentenced Matthews for each conviction.[72] The sentences were to run consecutively. The South Carolina Supreme Court affirmed the decision in a memorandum opinion.[73] Matthews subsequently applied for post conviction relief. The circuit court judge hearing the application found that Matthews had received ineffective assistance of appellate counsel. The supreme court affirmed this determination and agreed to entertain Matthews's double jeopardy claim.[74]

The supreme court began by stating that for the purposes of double jeopardy analysis the test " 'to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.' "[75] The test, articulated by the United States Supreme Court and known as the *Blockburger* rule, serves as an aid in discerning legislative intent. This determination is crucial because when a criminal defendant challenges the imposition of cumula-

68. The court refers to "principles of double jeopardy" but does not cite the relevant provisions in the United States or South Carolina Constitution. *See* U.S. CONST. amend. V; S.C. CONST. art. I, § 12. From this omission it can be inferred that the South Carolina Supreme Court interprets the double jeopardy provision of the South Carolina Constitution in unison with the United States Supreme Court's interpretation of the federal provision. The South Carolina Supreme Court need not follow this "lock-step" approach, so long as the state does not breach the minimum protection provided by the United States Constitution. State v. Greuling, 257 S.C. 515, 525, 186 S.E.2d 706, 710 (1972) (Bussey, J., dissenting); *see* Michigan v. Long, 463 U.S. 1032, 1037-44 (1983). The federal Double Jeopardy Clause is binding on the states through the Due Process Clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969).

69. *See* Whalen v. United States, 445 U.S. 684 (1980); State v. Harkness, 288 S.C. 136, 341 S.E.2d 631 (1986) (per curiam).

70. Brief of Appellant at 3.

71. Record (Vol. 1) at 292-93.

72. The judge reasoned that because possession with intent to distribute contained an element not required in trafficking, namely an intent to distribute, and because trafficking required possession of at least ten pounds, the offenses were distinct. *Id.* at 297-98.

73. State v. Matthews, No. 86-MO-073 (S.C. Feb. 26, 1986) (per curiam).

74. Matthews v. State, 300 S.C. 238, 239, 387 S.E.2d 258, 258-59 (1990).

75. *Id.* at 240, 387 S.E.2d at 259 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).

tive punishments based on the same conduct in a single trial, " 'the [d]ouble [j]eopardy [c]lause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.' "[76] The court eschewed, however, the *Blockburger* rule by finding its application unnecessary in light of the clear legislative intent evidenced by the structure of the statute.[77]

The court noted the differences between possession of marijuana with intent to distribute and trafficking in marijuana based solely upon possession.[78] The former requires "sufficient indicia of intent to distribute" along with possession;[79] the latter requires only the possession of at least ten pounds.[80] The court reasoned that because one who possesses more than ten pounds of marijuana is prima facie guilty of trafficking as well as possession with intent to distribute, the latter is a lesser-included offense of the former.[81] This statutory interrelationship represents a legislative scheme that imposes penalties based upon the quantity of marijuana possessed. The court concluded that this structure revealed that "the General Assembly did not intend to permit punishment under both statutory provisions" when both charges rested on the same conduct.[82] Rather, the legislature intended a single punishment based upon the amount of marijuana possessed by the wrongdoer.[83] The court vacated the conviction and sentence for possession with intent to distribute and affirmed the conviction and sentence for trafficking.[84]

The Fifth Amendment of the United States Constitution states, "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ."[85] The Double Jeopardy Clause protects "against 'multiple punishments for the same offense' [being] imposed in a single proceeding."[86] The United States Supreme Court developed the *Blockburger* rule in this context as an aid in determining "whether

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76. *Id.* (alteration by court) (quoting Missouri v. Hunter, 459 U.S. 359, 366 (1983)).

77. *Id.*

78. *Id.* at 239-40, 387 S.E.2d at 259.

79. *Id.* at 239, 387 S.E.2d at 259 (citing S.C. CODE ANN. § 44-53-370(a)(1) (Law. Co-op. Supp. 1990)).

80. *Id.* at 239-40, 387 S.E.2d at 259 (citing S.C. CODE ANN. § 44-53-370(e)(1) (Law. Co-op. Supp. 1990)).

81. *Id.* at 240-41, 387 S.E.2d at 259-60.

82. *Id.* at 241, 387 S.E.2d at 259.

83. *Id.*

84. *Id.*, 387 S.E.2d at 260.

85. U.S. CONST. amend. V. The South Carolina Constitution contains an identical provision, except for the substitution of "liberty" for "limb." *See* S.C. CONST. art. I, § 12.

86. Jones v. Thomas, 491 U.S. 376, 381 (1989) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). This is not the only protection provided by the Double Jeopardy Clause. *See id.* at 380-81.

there are two offenses or only one."[87] "The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes."[88] When an application of the *Blockburger* rule leads to the conclusion that "two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent."[89]

Recognizing the import of this final qualification is crucial to understanding the nature of the protection afforded by the Double Jeopardy Clause in the context of the facts in *Matthews*. The United States Supreme Court in recent years has emphasized repeatedly that the *Blockburger* rule is a rule of statutory construction,[90] and it "must of course yield to a plainly expressed contrary view on the part of Congress."[91] To understand why this protection should depend upon the legislature, one must consider "the interest that the Double Jeopardy Clause seeks to protect."[92] When a criminal defendant faces multiple punishments for the same conduct in a single trial, the clause is designed "to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments."[93]

> Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.[94]

The *Matthews* court was faithful to these legal principles. Because the court decided that the legislative intent was clear from the face of the statute, application of the *Blockburger* rule was unnecessary.[95] The court's conclusion that the General Assembly did not intend for a person to be punished for both possession of marijuana with intent to distribute and for trafficking in marijuana prevented the trial court from

87. Blockburger v. United States, 284 U.S. 299, 304 (1932).
88. Whalen v. United States, 445 U.S. 684, 691-92 (1980).
89. *Id.* at 692.
90. *E.g.*, Missouri v. Hunter, 459 U.S. 359, 366-67 (1983).
91. Garrett v. United States, 471 U.S. 773, 779 (1985).
92. Jones v. Thomas, 491 U.S. 376, 381 (1989).
93. *Id.*
94. *Hunter*, 459 U.S. at 368-69. Legislative intent does not play the same determinative role in double jeopardy challenges to successive trials for the "same offense." *See* Grady v. Corbin, 110 S. Ct. 2084 (1990).
95. Matthews v. State, 300 S.C. 238, 240, 387 S.E.2d 258, 259 (1990).

convicting Matthews under both statutory provisions.

The South Carolina Supreme Court's interpretation of a South Carolina statute is definitive. The United States Supreme Court is bound by this determination.[96] The centrality of statutory interpretation in double jeopardy analysis would have fostered the same finality had the *Matthews* court reached a contrary conclusion concerning legislative intent. Thus, if the court had concluded the legislature intended cumulative punishment for both charges based on the same conduct, the court would have affirmed in full the trial court's decision, and the Double Jeopardy Clause would have provided no barrier.[97]

*Stanley C. Rodgers*

## V. ACCIDENTAL SHOOTING IN SELF-DEFENSE RECOGNIZED AS DEFENSE TO HOMICIDE PROSECUTION

In *State v. McCaskill*[98] the South Carolina Supreme Court reversed a defendant's conviction of voluntary manslaughter and possession of a weapon during a violent crime because of the trial judge's erroneous charge to the jury.[99] The court held that the trial judge should have instructed the jury that if the defendant lawfully armed herself in self-defense because of a threat to her safety and the gun accidentally discharged, the jury must find her not guilty.[100]

In 1987 the defendant Joyce McCaskill shot and killed Donna Scott during a domestic quarrel. Following a jury conviction the judge sentenced McCaskill to a twenty-year prison sentence for voluntary manslaughter and a concurrent five-year sentence for possession of a weapon during a violent crime. Throughout the trial the defendant maintained that she armed herself with a gun to protect herself and her unborn child. The defendant claimed that she was lawfully entitled to arm herself in self-defense and that the gun accidentally fired. At the close of the trial the defendant requested jury instructions on her right to possess a gun and arm herself in self-defense. The defendant also requested jury instructions explaining the relationship of this right to an accidental shooting.

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96. *Hunter*, 459 U.S. at 368.

97. *See* State v. Bolden, 398 S.E.2d 494, 495 (S.C. 1990) (Punishment for both armed robbery and possession of a weapon is not barred by the Double Jeopardy Clause because "[i]t is clear . . . the legislature intended to allow cumulative punishment in this instance.").

98. 300 S.C. 256, 387 S.E.2d 268 (1990).

99. *Id.* at 259, 387 S.E.2d at 270.

100. *Id.*

The trial judge rejected McCaskill's request and gave separate instructions on the elements of an accidental killing and a shooting in self-defense. The judge's self-defense charge focused solely on the right to use a weapon in self-defense and not on the right to possess a weapon for protection. The court held that this charge "conveyed to the jury that [the defendant's] willful act of arming herself foreclosed the defense of an accidental shooting" and was therefore inadequate.[101]

South Carolina recognizes the defense of accident in homicide cases. In *State v. Brown*[102] the South Carolina Supreme Court noted that a homicide is excused if the killer was engaged in a lawful enterprise when the killing occurred and the killing was unintentional and not the result of negligence.[103] In *State v. McDaniel*[104] the supreme court held that the defense of accident is not an affirmative defense. In South Carolina self-defense also is not considered an affirmative defense; therefore, the defendant is not required to prove self-defense by a preponderance of the evidence.[105] In *McCaskill* the defendant claimed that she armed herself in self-defense and the shooting was accidental. The jury instructions requested by the defendant incorporated elements of both defenses.

Many courts have addressed the circumstances that entitle a defendant in a prosecution for homicide to jury instructions on both self-defense and unintentional or accidental homicide.[106] Generally courts that have allowed instructions on these defenses have required some evidence to support both claims.[107] Nonetheless, it is difficult to reconcile the inconsistency presented when a defendant claims that he killed in self-defense and that the killing was accidental. Killing in self-defense is an affirmative and intentional act; an accidental killing is an unintentional act. However, when a defendant claims that he armed himself in self-defense and the killing itself was accidental, a court can reconcile the inconsistency with proper jury instructions. The defendant's main theory remains accident but the claim of self-defense becomes relevant in determining whether the defendant acted lawfully.[108]

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101. *Id.* at 258, 387 S.E.2d at 269.

102. 205 S.C. 514, 32 S.E.2d 825 (1945).

103. *Id.* at 521, 32 S.E.2d at 828.

104. 68 S.C. 304, 47 S.E. 384 (1904).

105. *See* State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987); *see also* W. McAninch & W. Fairey, The Criminal Law of South Carolina 493-97 (2d ed. 1989).

106. *See* Annotation, *Accused's Right, in Homicide Case, to Have Jury Instructed as to Both Unintentional Shooting and Self-Defense*, 15 A.L.R.4th 983 (1982).

107. *See id.* at 991-99; State v. Turbeville, 275 S.C. 534, 273 S.E.2d 764 (1981).

108. One authority stated:

> Ordinarily the law of self-defense is not applicable in a case of a killing resulting from an act which was accidental and unintentional, particularly where the facts of the case are not such as would make such law applicable.

In reversing McCaskill's conviction, the supreme court reasoned that McCaskill's claim of self-defense was not inconsistent with her claim that the shooting was accidental. The defense of accident applies only if the defendant was acting lawfully;[109] therefore, the principles of self-defense should have been used at trial to determine the lawfulness of her actions. If McCaskill lawfully armed herself with a gun in self-defense because of a threat to her safety, the defense of accident would apply if the gun accidentally discharged.[110] Therefore, the court required that the jury be given an adequate instruction on the defendant's theory of accidental shooting while acting in self-defense.[111]

As a result of the holding in *McCaskill*, defendants in homicide cases may assert the defense of accidental killing in self-defense. If enough evidence indicates that defendants have lawfully armed themselves in self-defense, but that the killings were accidental, the defendants are entitled to present this theory to the jury.[112] Separate instructions on the law of self-defense and the requirements of an accidental killing may not be sufficient unless they adequately present the defendant's theory. Self-defense instructions should not focus only on the right to use a weapon. The right to possess a weapon also should be included. Instructions on the right to possess a weapon in self-defense will assist the jury in determining whether the defendant was acting lawfully when the accidental killing occurred.

*Michael K. Kocher*

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> However, where the defense of excusable homicide by misadventure is relied on, the principles of self-defense may be involved, not for the purpose of establishing defense of self, but for the purpose of determining whether accused was or was not at the time engaged in a lawful act; and it has been held that in such case the right, but not the law, of self-defense is invoked. Accused is entitled to an acquittal where he was lawfully acting in self-defense and the death of his assailant resulted from accident or misadventure.

40 C.J.S. *Homicide* § 112, at 981-82 (1944) (footnotes omitted).

109. State v. McCaskill, 300 S.C. 256, 259, 387 S.E.2d 268, 270 (1990).

110. " '[A] homicide is excused when caused by the discharge of a gun . . . where the accused is *lawfully* acting in self-defense and the victim meets death by accident, through the unintentional discharge of a gun or the like . . . .' " *Id.* at 259, 387 S.E.2d at 270 (emphasis added by court) (quoting 40 AM. JUR. 2D *Homicide* § 112, at 407 (1968)).

111. *Id.* at 258-59, 387 S.E.2d at 270.

112. The holding in *McCaskill* does not indicate the amount of evidence needed to support this theory or if the defendant's testimony alone is sufficient to require jury instructions on an accidental killing in self-defense. For an analysis of cases in other jurisdictions addressing this issue, see Annotation, *supra* note 106.