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CONSTITUTIONAL LAW

I. WARRANT AUTHORIZING SEIZURE OF VIDEOTAPES HELD UNCONSTITUTIONAL

While the General Assembly debated the merits of a new obscenity statute during the 1987 legislative year, the state supreme court addressed the constitutional limitations placed on police seizures of allegedly obscene materials. In *State v. Hall*[1] the court held that a warrant authorizing search of a movie rental company and seizure of "suspect material" was too broad to withstand scrutiny under both the state obscenity statute existing at the time and the fourth amendment.[2]

In 1985 Darlington police officers purchased four adult videotapes from Darlington Home Movie Rentals, a business owned by appellant David Hall. They took the tapes to Judge Sidney Floyd, who viewed the movies and determined them to be obscene. Based on his determination, Floyd issued a warrant authorizing a search of Hall's store as well as seizure of the four videotapes and "additional and like suspect material." Pursuant to the warrant, Darlington police subsequently seized forty-five tapes from Hall's business.

In July 1986 Hall, claiming that the seizure was improper, moved before Judge Ralph Anderson to have the forty-five tapes returned.[3] Judge Anderson denied the motion on the ground that he had no authority to disturb Judge Floyd's order.[4] Hall appealed; the supreme court reversed.

The court relied on both statutory and constitutional

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1. 293 S.C. 331, 360 S.E.2d 323 (1987).

2. *Id.* at 333, 360 S.E.2d at 324.

3. The State never indicted Hall for possessing or disseminating any of the forty-five videotapes seized. He did face charges resulting from the initial purchase of four videotapes by the police. He pleaded guilty to one count of disseminating obscene material; the other three counts were dismissed. Hall did not challenge the constitutionality of the original purchase of the four videotapes by the police because that purchase did not constitute a seizure within the meaning of the fourth amendment. *See* Maryland v. Macon, 472 U.S. 463 (1985) (purchase of allegedly obscene materials by police officers held not a seizure within meaning of fourth amendment).

4. 293 S.C. at 332, 360 S.E.2d at 324.

grounds in reaching its decision. It noted that section 16-15-270(e) of the South Carolina Code required a warrant authorizing seizure of allegedly obscene videotapes to "identify the material to be seized by name, title or fair description."[5] As such, the statute imposed "a limitation upon the search and seizure" of the videotapes.[6] By permitting the seizure of "additional and like suspect material," the court concluded, the warrant failed to comply with the statute and was thus "impermissibly broad and so nondescriptive as to render the resulting warrant a general warrant, in violation of the Fourth Amendment to the United States Constitution."[7] The court ordered the forty-five tapes returned to Hall.

As a matter of statutory interpretation, *Hall* is of minimal precedential value. The General Assembly amended the state's obscenity statute in 1987.[8] The amendment repealed section 16-15-270, which governed the issuance of warrants for seizures of allegedly obscene material.[9] In its place, the legislature enacted a statute containing no similar provisions. The new obscenity law merely requires that warrants be issued only upon the request of

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5. At the time the police seized Hall's videotapes, the state obscenity statute, which was then in effect, outlined procedures for issuance of warrants in great detail. *See* S.C. CODE ANN. § 16-15-270 (Law. Co-op. 1976). The relevant portions of that section read:

> (d) A circuit judge may issue warrants for search and seizure to authorize seizure of single copies of suspect material in order to preserve evidence, but only after he has determined the existence of probable cause based upon a viewing of the allegedly obscene material itself or upon examination of factual allegations contained in any affidavit in support of such warrant.
>
> (e) Any warrant or order of seizure shall describe with particularity the premises to be searched and identify material to be seized by name, title or fair description. Execution and return thereon shall be in accordance with the provisions of § 17-13-140.

This section tracks the constitutional requirements imposed upon police in seizing allegedly obscene material. *See infra* text accompanying notes 12-30.

See also § 16-15-270(b), requiring proceedings prescribed by section 16-15-270 be "examined, heard and disposed of with the maximum promptness and dispatch commensurate with the Constitution of the United States and the Constitution of this State."

6. 293 S.C. at 333, 360 S.E.2d at 324 (citing State v. Barrett, 278 S.C. 92, 292 S.E.2d 590 (1982)).

7. *Id.* at 333, 360 S.E.2d at 324. As an alternative ground for the decision, the court might have noted that § 16-15-270(d) only permitted the circuit judge to issue warrants authorizing seizures of "single copies of suspect material." The seizure in this case clearly went beyond this limitation. The court, however, did not address that issue.

8. 1987 S.C. Acts 168.

9. *Id.* § 2.

a circuit solicitor.[10] It also provides for a prompt adversarial hearing on the question of obscenity following any seizure.[11]

As a matter of constitutional interpretation, however, *Hall* remains of great precedential value. Because the new obscenity statute is silent regarding the issuance of warrants for seizure of allegedly obscene materials, the validity of such warrants will be judged solely by a constitutional standard. Even under this approach, the result in cases such as *Hall* will not change.

The United States Supreme Court has recognized that governments may use "the power of search and seizure as an adjunct to a system for the suppression of objectionable publications."[12] Because books, pamphlets, magazines, motion pictures, videotapes, and other publications are presumed to fall within the protection of the first amendment, the Court has consistently required that warrants identify with particularity the allegedly obscene materials to be seized.

One of the Court's earliest pronouncements in this area came in *Marcus v. Search Warrants*.[13] The *Marcus* Court had before it six warrants issued by a Missouri state court authorizing "any peace officer . . . to search [a magazine distributor's place of business] . . . and seize [obscene materials]."[14] Pursuant to the warrants, police seized some 11,000 magazines, books, and photographs. The Court invalidated the warrants on fourteenth amendment due process grounds rather than fourth amendment particularity grounds. Nevertheless, it rejected the argument that allegedly obscene materials were like any other form of contraband. Justice Brennan, speaking for the Court, noted that "[t]he line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools."[15] In a separate, concurring opinion, Justices Black and Douglas reasoned that the warrants ran afoul of the fourth amendment particularity requirement.[16]

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10. S.C. CODE ANN. § 16-15-435(A) (Law. Co-op. Supp. 1987).
11. *Id.* § 16-15-435(B).
12. Marcus v. Search Warrants, 367 U.S. 717, 724 (1961).
13. *Id.*
14. *Id.* at 722.
15. *Id.* at 731 (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)).
16. *Id.* at 738-39.

Four years later, in *Stanford v. Texas*,[17] a unanimous Court accepted the position espoused by Black and Douglas in *Marcus*. The Court relied on the fourth amendment particularity requirement to invalidate a warrant authorizing seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas."[18] *Stanford* reaffirmed the distinction between allegedly unlawful publications and other forms of contraband and explained the rationale supporting it. Because of the special solicitude given various published materials by the first amendment, "the [fourth amendment] requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain."[19] Although *Stanford* concerned books of a political nature, no principled reason exists for distinguishing the seizure in that case from the seizure at issue in *Hall*. Both were aimed at the content of speech rather than its medium.

Under any objective reading, the *Hall* warrant fails to meet the standard set forth in *Stanford*. Instead, it leaves the scope of the search and seizure "to the whim of the officers charged with executing the warrant."[20] Therefore, even absent the provisions of section 16-15-270(e), the *Hall* warrant runs afoul of the fourth amendment particularity requirement.

Although the *Hall* court made no mention of any other procedural shortcoming in the case, the seizure is also constitutionally infirm in one other respect: it occurred in the absence of probable cause that any of the seized videotapes were obscene.[21]

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17. 379 U.S. 476 (1965).

18. *Id.* at 477-78.

19. *Id.* at 485. This is not to suggest that a magistrate must apply a "higher standard" of probable cause when he issues a warrant to seize materials that he has determined to be obscene. *See* New York v. P.J. Video, Inc. 475 U.S. 868 (1986) (application for warrant authorizing seizure of materials presumptively protected by the first amendment to be evaluated under same standard of probable cause used to review warrant applications generally).

20. *Stanford*, 379 U.S. at 485.

21. *See, e.g.*, Lo-Ji Sales v. New York, 442 U.S. 319 (1979) (warrant particularly describing two films previously purchased by officers insufficient to support search of premises for materials other than those identified). The Court noted in dictum that even assuming the validity of the search for the two specified films, "there was not sufficient probable cause to pursue a search beyond looking for additional copies of [those] films." *Id.* at 325.

Again, because of the special protection afforded various forms of speech by the first amendment, fourth amendment jurisprudence requires that police obtain legally sufficient warrants before they seize any allegedly obscene materials.[22] No warrants are to be issued unless supported by "probable cause upon oath or affirmation."[23] Probable cause, in turn, exists only when a magistrate, considering the totality of the circumstances, determines that criminal activity is probably afoot.[24]

The *Hall* seizure plainly fails to meet these standards. Judge Floyd had viewed none of the forty-five tapes at issue when he issued the warrant.[25] While the police may have had probable cause to seize single copies of the tapes viewed by Floyd,[26] they had no indication that any other tapes in the store might be obscene. The seizure apparently proceeded on the officers' notions that since four purchased tapes were obscene, other tapes in the store might be obscene as well. This sort of inductive reasoning as a basis for the seizure cannot pass constitutional muster.

In *Roaden v. Kentucky*[27] the Supreme Court invalidated the warrantless seizure of an allegedly obscene film even though made incident to an arrest for public exhibition of the film. The rationale supporting the decision is grounded in first amendment concerns. The seizure in *Roaden* proceeded solely on the police officer's conclusion that the film was obscene; prior to the

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22. *See infra* text accompanying notes 25-30.

23. U.S. CONST. amend. IV.

24. Illinois v. Gates, 462 U.S. 213 (1983).

25. The Supreme Court never has held that a warrant for search and seizure of allegedly obscene materials must be issued by a magistrate who actually has viewed the material. *See* New York v. P.J. Video, Inc., 475 U.S. 868, 874 n.5 (1986) (magistrate need not view allegedly obscene material in making probable cause determination if provided with reasonably specific affidavit describing content of material). The problem with the *Hall* warrant, then, is not merely that Judge Floyd did not view the forty-five tapes before the seizure but that apparently no police officer viewed them either. There simply was no factual basis upon which to make a probable cause determination.

26. Heller v. New York, 413 U.S. 483 (1973). The *Heller* Court upheld the seizure of a single copy of an allegedly obscene film pursuant to a warrant issued by a magistrate who had reviewed the film. Heller, a movie exhibitor, argued that first amendment considerations required an adversarial proceeding to determine the obscenity of the film before a warrant for its seizure issued. The Court rejected the argument but did state that if other copies of the film were not available, "the [trial] court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding." *Id.* at 492-93.

27. 413 U.S. 496 (1973).

seizure, no magistrate had any opportunity to "focus searchingly on the question of obscenity."[28] Such a seizure, the Court concluded, "presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards."[29]

The facts in *Hall*, with few exceptions, are the same as those in *Roaden*. The seizure of the forty-five tapes proceeded solely on the police officers' conclusions, unsupported by a magistrate's determination or any evidence other than mere speculation, that they were obscene. Clearly, such conjecture is insufficient to support a finding of probable cause. Thus, any warrant issued in the case could not have authorized seizure of the forty-five tapes. Without a constitutionally sufficient warrant, the seizure is unreasonable under *Roaden*.[30]

In short, the South Carolina Supreme Court could have pointed to any number of constitutional infirmities besetting the seizure in *Hall*. While the repeal of section 16-15-270 of the South Carolina Code has eviscerated the statutory underpinnings of the decision, the opinion remains a viable state interpretation of the federal Constitution. Even under the new state obscenity statute, police seizures of allegedly obscene materials must conform to the procedural requirements of the Constitution. *Hall* gives some indication of the floor of federal rights beneath which state police activity in seizing allegedly obscene

28. *Id.* at 506 (quoting Marcus v. Search Warrants, 367 U.S. 717, 732).

29. *Id.* at 504.

30. The state might have attempted to justify the *Hall* seizure as a "plain view" seizure of contraband. *See, e.g.*, Ker v. California, 374 U.S. 23, 42-43 (1963). This argument, which is clearly at odds with *Roaden* and Lo-Ji Sales v. New York, 442 U.S. 319, 326 n.5 (1979), has been rejected by most state courts that have ruled on the issue. *See* Annotation, *Seizure of Underscribed Papers*, 54 A.L.R.4TH 391, 499-503 (1987). Perhaps because the issue seems so clear from prior opinions, the Court has not had occasion to address the question directly.

materials may not sink.

William L. Monts, III

II. FORCIBLE MEDIATION OF FEDERAL PRETRIAL DETAINEE HELD UNCONSTITUTIONAL

In *United States v. Charters*[31] the Fourth Circuit Court of Appeals addressed the issue of under what, if any, conditions the government may order a patient in a federal treatment facility to be medicated forcibly and unwillingly with antipsychotic drugs. Charters was indicted in late 1983 for making threats against the President of the United States, in violation of federal law.[32] He was found incompetent to stand trial, and the United States District Court for the Eastern District of Virginia ordered him to be confined to the Federal Correctional Institute in Butner, North Carolina. The district court reviewed Charters' commitment five times and returned him to Butner each time.[33]

The district court, upon the government's motion, entered an order to permit medical personnel at Butner to forcibly medicate Charters with antipsychotic drugs, pending appeal to the Fourth Circuit. The district court identified three governmental interests[34] and, based on the testimony of a psychiatrist at Butner, concluded that these governmental interests outweighed the individual's interests. The court based its ruling upon its conclusion that the state's "duty" to treat the medical needs of pretrial detainees justified forcibly medicating Charters. The district court also concluded that Charters was not competent to make decisions concerning his medical care, in essence equating his competence to stand trial (legal competence) with competence to make personal health care decisions (medical competence).[35]

Prior to addressing the issue of the government's authority

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31. 829 F.2d 479 (4th Cir. 1987).

32. Charters was charged with violating 18 U.S.C. § 871 (1982).

33. 829 F.2d at 482 n.1. The dates of review were June 5, 1984; December 11, 1984; March 22, 1985; July 11, 1985; and October 11, 1985.

34. The government claimed that it had interests in preventing violence, maintaining the competence of the individual to stand trial, and a *parens patriae* interest in protecting the health of its citizens. *Id.* at 492.

35. *Id.* at 482.

to medicate a patient forcibly in a federal treatment facility,[36] the court of appeals considered the threshold question of whether the federal government had any justification in detaining Charters.[37] The court found that Charters was improperly in custody because the district court had failed to follow procedures mandated by federal statutes governing the detention of mentally ill persons accused of federal crimes.[38] Based on the district court finding that Charters showed no promise of becoming competent to stand trial, federal custody should have been cut off at four months and transfer made to a state care facility.[39] The court found that Charters' continued detention was "directly contrary to Congress' command."[40]

Despite this holding, the court of appeals remanded this issue to the district court because state facilities might be unavailable and Charters could be found dangerous. If such were the case, he could be maintained in federal custody under Chapter 18, section 4246 of the United States Code.[41]

The almost certain conclusion that Charters would be released from federal custody did not deter the court of appeals from considering the subsequent issue of the legality of forcible medication. Although the decision regarding the detention may appear to have made this issue of forced medication moot, the court acted to prevent the possibility of Charters being medicated prior to the district court decision on remand or afterwards, if he were to remain in federal custody.

The court found that a mentally ill pretrial detainee, if medically (as distinguished from legally) competent, has a constitutionally protected right to decide whether to forego medical

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36. It is important to view any discussion of the individual's rights in the case in light of the court's own pronouncement that the decision here addresses *only* the rights of a pretrial detainee and expresses no views concerning the rights of convicted prisoners facing forcible medication while in confinement. *See id.* at 499 n.30.

37. In his petition for habeas corpus, Charters had not raised the issue of the legality of his detention. The court considered that it was presented by the underlying dispute that if he could not be legally detained, he could not be forcibly medicated. *Id.* at 484.

38. *See* 18 U.S.C. §§ 4241 to -47 (1982).

39. There are limited exceptions to the requirement of transfer to a state institution under § 4246 of chapter 18 of the United States Code, but the court found no such exceptions on the record. 829 F.2d at 486-87.

40. *Id.* at 487.

41. 18 U.S.C. § 4246(a) (1982).

treatment. Furthermore, in the absence of any emergency,[42] this individual interest outweighs any governmental interest in medicating him against his will. In striking this balance, the court considered the facts of this case in light of United States Supreme Court's decision in *Youngberg v. Romeo*.[43] While *Romeo* also involved the forcible medication of a mentally ill patient, the court found that *Romeo* did not dictate the result in *Charters* due to several important distinctions between the two cases.[44] Additionally, the court of appeals stated that even if a patient is found medically incompetent, such a finding does not extinguish a patient's constitutional rights. The court then must examine the available alternatives when it makes treatment decisions on the patient's behalf.[45]

At a glance, the court appears to determine the issue of forced medication by the balancing interests of the individual with those of the government. Yet, apparently unconvinced of the government's claimed interests,[46] the court focuses the majority of its analysis on the question of defining medical competence and addressing how decisions are to be made for those who are not medically competent. In its discussion of this issue, the court first pointed out the difference between medical and legal competence,[47] which the district court had failed to do. Second, the court noted that this issue had seldom arisen in litigation but frequently had been discussed.[48] The court took a commonsense approach in dealing with this question by holding that the correct method for determining whether an individual is medically competent is to evaluate whether that individual's medical

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42. An emergency situation is one "in which violence or the imminent deterioration of a patient will occur in the absence of forcible medication." 829 F.2d at 484.

43. 457 U.S. 307 (1982). In *Romeo* the Supreme Court balanced the right of the individual against the demands of an organized society in determining that a profoundly mentally retarded man was entitled only to an assurance that professional judgment had been exercised in deciding what care he would receive. This is the "professional judgment" process, which defers a mental incompetent's medical decisions to those charged with his care. 829 F.2d at 488, 497. *See infra* note 45.

44. 829 F.2d at 488-90. The primary distinction between the two cases was the possibility of permanent mental incapacitation by the use of antipsychotic drugs in *Charters* versus the use of temporary and nonthreatening physical restraints in *Romeo*.

45. *Id.* at 484. The three methods discussed by the court are the "professional judgment," "substituted judgment," and "best interest of the patient" tests.

46. *Id.* at 492-94.

47. *Id.* at 495.

48. *Id.* at 496 n.26.

decisions have a rational basis.[49] Based upon this and the substantial evidence in the record regarding the possibly severe side effects of antipsychotic drugs,[50] the court concluded that Charters appeared to be medically competent and, therefore, should not be forcibly medicated.

Although the issue of medical competence in this case was established prior to remand to the district court,[51] this test may fail to yield such an obvious conclusion when less dangerous drugs are used or when the more severe side effects of antipsychotic drugs are lessened by advances in medicine. The Fourth Circuit held that when a patient is found to be medically incompetent, either by his being unable to communicate his desires or having no rational basis for them, the court should apply the "best interests of the patient" test only if it is impossible to ascertain what the patient would decide if he were competent.[52] The courts could bypass this two-tiered test to order forcible medication only in the event of an emergency situation.

Simply put, the Fourth Circuit in *Charters* has created a four-step test: (1) Does an emergency situation exist? (2) If not, is the patient medically competent? (3) If not, can the court determine what the patient would do if he were competent? (4) If not, what is in the patient's best interest?

While this test apparently works to achieve the court's stated goal of preserving the individual's right to be free from nonconsensual invasions of his person, a more simplified process would yield the same results.

Because the court states it would only use the "substituted judgment" test where the evidence is clear and convincing, this step is virtually worthless. The court does give one example of a decision which would pass this test—when a patient's strict religious convictions would prevent medical treatment. Such a case, however, would only raise further questions, including the

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49. *Id.* at 496.

50. For example, see *id.* at 483 n.2 (explanation of Tardive Dyskinesia, the most severe side effect caused by the use of antipsychotic drugs).

51. *Compare* 829 F.2d at 483 n.2 *with* 829 F.2d at 496. The only standard the Fourth Circuit requires to find an individual medically competent is that he have a "rational reason" for his actions. In view of the possibly severe side effects of antipsychotic drugs, it is unimaginable that a court could classify a refusal to take such drugs as irrational.

52. This is the "substituted judgment" test. 829 F.2d at 497-98.

strength and sincerity of those convictions and the government's *parens patriae* interest if the patient's decision could result in his death.[53] Most often the "substituted judgment" of an individual would be conjecture based upon possibly inaccurate perceptions of the individual's thoughts and beliefs. It is difficult to imagine a set of circumstances that would yield a different result under these two tests. In fact, the court itself points out that a patient's religious beliefs would be considered in deciding his "best interest."[54] The court, however, gives this as the only example in justifying the "substantial judgment" test. By removing this test, the court could take out at least one step in an already confusing process and still accomplish the same result.

In *Charters*, the Fourth Circuit Court of Appeals properly recognized that the individual's right to avoid unwanted touching, based upon the doctrine of informed consent, is an integral part of his constitutionally protected freedom. Although its analysis is clouded by the discussion of lesser issues, the court recognizes the danger in allowing governmental invasion of the individual's freedom of thought. The court's opinion clearly establishes that, in the Fourth Circuit, federal detainees may not be forcibly medicated simply for the purpose of making them competent to stand trial.

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53. *See In re* Osborne, 294 A.2d 372 (D.C. 1972); *In re* Brooks Estate, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

54. 829 F.2d at 495-96 n.25.