Criminal Law

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CRIMINAL LAW

I. Nature of Peremptory Challenges Altered

In State v. Jones\(^1\) the South Carolina Supreme Court simplified the process of challenging racially discriminatory peremptory challenges.\(^2\) The court shelved the cumbersome analytic framework described in Batson v. Kentucky\(^3\) in favor of a bright-line test. The defendant’s burden of showing evidence of the prosecutor’s purposeful discrimination is removed from the Batson analysis. South Carolina’s rule meets the minimal constitutional requirements set forth in Batson. In addition, the prophylactic approach eliminates strains on judicial resources. The supreme court also established a strict and easily implemented remedy for a Batson violation. Trial courts now will replace improperly challenged jurors on the venire and begin the jury selection process de novo. The risk of seating a hostile juror, one previously challenged on racial grounds, should discourage solicitors from exercising illegal peremptory challenges.

Irving Jones, a black man, was convicted of possession of heroin with intent to distribute and was sentenced to fifteen

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3. 476 U.S. 79 (1986). In Batson v. Kentucky the Court held that a state prosecutor who exercises peremptory challenges based on race does so in violation of the equal protection clause of the United States Constitution. Id. at 86. Batson establishes a framework for analyzing a defendant’s objection to the prosecutor’s peremptory challenge. To establish a prima facie case under Batson, a defendant must show: 1) the defendant is a member of a cognizable racial group; 2) the prosecutor has exercised peremptory challenges to remove venire members of the defendant’s race; and 3) facts and circumstances raise an inference that the prosecutor is acting with racially discriminatory motives. The burden of proof then shifts to the prosecutor, who must give a neutral explanation for a questionable peremptory challenge. Id. at 96-97.

The explanation requirement is contrary to the traditional understanding of the peremptory challenge. Black’s Law Dictionary 1023 (5th ed. 1979) defines peremptory challenge as “[t]he right to challenge a juror without assigning a reason for the challenge.” Accordingly, state supreme courts have scrambled to institute Batson’s analytical framework within their respective jurisdictions.
years in prison. At Jones’ trial, which was prior to Batson, the solicitor used three of his peremptory challenges to strike blacks from the jury. The defendant objected to the peremptory strikes on constitutional grounds. The trial judge neither conducted a hearing nor interrogated the solicitor concerning his reasons for the peremptory challenges. Jones appealed, citing Batson, and demanded a new trial. The constitutional limitations on the prosecutor’s use of peremptory challenges, as described in Batson, represent a significant departure from the traditional treatment of peremptory challenges under South Carolina law. The South Carolina Supreme Court has adopted a unique procedure to govern the limitations on peremptory challenges:

Rather than deciding on a case by case basis whether the defendant is entitled to a hearing based upon a prima facie showing of purposeful discrimination under the vague guidelines set forth by the United States Supreme Court, the better course to follow would be to hold a Batson hearing on the defendant’s request whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant’s race from the venire. This bright line test would ensure consistency by removing any doubt about when a Batson hearing should be conducted. Further, this procedure would ensure a complete record for appellate review.

The prima facie case is established once a minority defendant makes a timely objection to peremptory challenges against members of the defendant’s race. The burden then shifts to the prosecutor to provide neutral explanations.

The court also decided several procedural questions. First, a defendant must object prior to the swearing of the jury in order to raise a Batson issue. Second, if the prosecutor is unable to carry the burden created by the defendant’s objection, the trial judge shall begin the jury selection process anew. The improperly stricken minority veniremen are replaced in a reconstructed

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5. 293 S.C. at 55, 358 S.E.2d at 702.
6. See supra note 3.
7. 293 S.C. at 57, 358 S.E.2d at 703.
8. Id. at 58, 358 S.E.2d at 703.
venire.\textsuperscript{9}

After \textit{Batson} the first issue facing a trial court following an objection to a peremptory challenge is whether the facts constitute a prima facie case of racial discrimination in the use of peremptory challenges. Unlike the majority of jurisdictions in which courts must figure out whether the facts and circumstances infer purposeful discrimination by the prosecutor, South Carolina trial courts need only determine whether the defendant is a member of a cognizable racial group and if other members of that race were peremptorily challenged.\textsuperscript{10} In \textit{Jones}, for instance, the prosecutor exercised peremptory challenges against black veniremen, and Jones, himself, was black man; thus, the prima facie case was shown.

The bright-line approach is an improvement over the \textit{Batson} analysis for two reasons. First, the bright line test is much simpler and will economize judicial resources. The problem caused by the complicated \textit{Batson} approach is best illustrated by similar cases already litigated in other jurisdictions. One recurring issue that has generated an abundance of case law is whether the prima facie showing is made when all members of a minority defendant's race are peremptory challenged and the defendant is then tried before an all white jury. Arizona, North Carolina, and two district courts in Florida hold that these facts alone do not meet the prima facie burden.\textsuperscript{11} The Tenth Circuit Court of Appeals, Pennsylvania, New Mexico, and one Florida district court hold that they do.\textsuperscript{12}

\textsuperscript{9} \textit{Id.} at 58, 358 S.E.2d at 704. The court stated:
In some of the larger counties, it may be possible to call for a new jury panel from the pool. Elsewhere, the members of the tainted jury and all persons who were struck shall be placed back in the jury venire. The jury selection process shall start anew using this "reconstructed" venire.

\textit{Id.} at 58 n.3., 358 S.E.2d at 704 n.3.

\textsuperscript{10} \textit{Id.} at 57, 358 S.E.2d at 703.


\textsuperscript{12} \textit{See} United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987) (prima facie case
Second, under the South Carolina test, solicitors must disclose the reasoning behind their peremptory challenges of minority members of the venire. To the contrary, under the Batson approach, the Fourth Circuit held in United States v. Allen that no inference of racial discrimination was raised when the prosecution left three black jurors on the panel, though the prosecutor had peremptorily challenged five consecutive black veniremen. By allowing selected blacks to pass to the jury, the prosecution may feel confident that future peremptory challenges need not be justified. Therefore, under certain circumstances in the Fourth Circuit, the prosecution need not explain minority strikes and perhaps may engage in racially discriminatory peremptory challenges as long as they do not create an all-white jury. In Batson Justice Marshall predicted,

Evidentiary analysis similar to that set out by the Court has been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the limitations of the approach. First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race.

when all-white jury left after one peremptory challenge); Pearson v. State, 514 So. 2d 374 (Fla. Dist. Ct. App. 1987) (peremptory challenge of one black juror leaving an all-white jury is a prima facie case); State v. Sandoval, 105 N.M. 696, 736 P.2d 501 (1987) (fact that all members of a defendant's race were excluded enough to establish a prima facie showing); Commonwealth v. McCormick, 359 Pa. Super. 461, 519 A.2d 442 (1986) (inference of racial discrimination raised when all black veniremen peremptory challenged leaving an all-white jury).

14. See also United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986), cert. denied, 107 S. Ct. 1973 (1987) (no inference of discrimination when prosecutor used three of six peremptory challenges to strike black men but accepted two black women without challenge); State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986) (no inference of racial discrimination when four black people sat on the petit jury of twelve though the State peremptorily challenged six black people); State v. Smith, 293 S.C. 22, 358 S.E.2d 389 (1987) (in a case prior to Jones, the court held no inference of discrimination when the state used two of five peremptory challenges against black people but four black jurors were seated). But see Fleming v. Kemp, 794 F.2d 1478 (11th Cir. 1986) (inference of discrimination drawn from the fact the prosecutor used eight of ten peremptory challenges against black people notwithstanding the fact black people served on the jury).
15. 476 U.S. at 105 (Marshall, J., concurring) (emphasis added).
Unlike other states, however, South Carolina solicitors cannot engage in routine racial peremptory challenges once they statistically rebut the Batson prima facie case. Whenever the state makes one peremptory challenge against a venireman of the defendant’s race, it must disclose its reasoning.

The second major issue a trial court must confront in a Batson hearing is an evaluation of the solicitor’s motives. Justice Marshall expressed his reservations about this portion of the Batson analysis:

[T]rial courts face the difficult burden of assessing prosecutors’ motives. . . . Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. . . . If . . . easily generated explanations are sufficient to discharge the prosecutor’s obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

These reservations are well founded. At least one jurisdiction permits the prosecutor’s hunch to meet the burden. Other jurisdictions will permit the prosecutor to overcome the defendant’s inference of discrimination by relying on a subjective impression of the jurors’ behavior. In addition, reviewing courts must ordinarily accord the trial court judges “great deference.”

16. The following factors have been considered by courts in Batson hearings: 1) the prosecution’s reasons were not related to the facts of the case; 2) there was a lack of meaningful questioning of the challenged juror; 3) there was disparate treatment in striking jurors; 4) the prosecution used fewer than all of her peremptory challenges; 5) there was a pattern of strikes against minority jurors; 6) the prosecution’s type and manner of questions implied racial intent; 7) none, or few, of the minority members were on the petit jury. See Branch v. Alabama, 526 So. 2d 609 (Ala. 1987).
17. 476 U.S. at 105-06 (Marshall, J., concurring).
18. See Missouri v. Antwine, 743 S.W.2d 51, 67 (Mo. 1987) (“Batson does not prevent ‘hunch’ challenges so long as racial animus is not the motive.”).
20. 476 U.S. at 98 n.21. Most courts have interpreted “great deference” to mean
Those courts that allow the prosecutor to overcome the defendant's prima facie showing on the prosecution's hunch, or subjective opinion, render the *Batson* protections illusory.

Justice Marshall's prediction seems less likely to occur in South Carolina. In *State v. Martinez* a divided supreme court upheld the solicitor's peremptory strikes against four black jurors. The solicitor explained that two of the men were challenged because they were of the same age and sex as the defendant. The solicitor, however, allowed whites of the same age and sex to pass to the jury. In other words, the solicitor exhibited disparate treatment of black and white veniremen. Although the court affirmed the trial court's acceptance of the solicitor's reasoning, the case should, nevertheless, send a warning signal to South Carolina trial judges about accepting trivial motives.

Chief Justice Ness, in his dissent, quoted *State v. Butler* with approval: "'Rubber stamp' approval of all nonracial explanations, no matter how whimsical or fanciful, would cripple *Batson's* commitment to 'ensure that no citizen is disqualified from jury service because of his race.' " It seems unlikely a South Carolina trial court could be comfortable accepting a superficial reason from the solicitor in light of the Chief Justice's strong criticism of the majority opinion. Viewed pragmatically, the benefit to the overall process by sustaining a *Batson* objection, reconstructing the venire, and beginning the jury selection process anew before the trial starts, outweighs the risk of reversal and a new trial.

The remedy imposed by *Jones*, replacing illegally challenged jurors in a reconstructed venire, is likely to inhibit racially discriminatory peremptory challenges as well. This de novo procedure is efficient because the state is not required to call an entirely new venire. The reconstructed venire creates

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that a trial judge's findings will not be overturned unless they are "clearly erroneous." See Wiley v. Mississippi, No. DP-57 (Miss. Nov. 25, 1987) (LEXIS, States library, Miss. file).

22. 731 S.W.2d 265 (Mo. Ct. App. 1987).
23. 294 S.C. at 77, 362 S.E.2d at 644 (Ness, C.J., dissenting) (citing State v. Butler, 731 S.W.2d 265 (Mo. Ct. App. 1987)). See also Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987), *cert denied*, 108 S. Ct. 233 (1987) (prosecutor's reasons were only facially sufficient and were, in reality, a pretext for racial discrimination when he decided not to strike white jurors who differed in no significant way from black jurors who were excused).
some obvious problems for the prosecution, however. Jurors who earlier had been peremptorily challenged may be used against the state’s case. The solicitor would be wise to avoid the risk of alienating ultimate jurors by racially motivated strikes in the initial selection process.

"The [Constitution] nullifies sophisticated as well as simple-minded modes of discrimination."24 In State v. Jones South Carolina has taken a logical and fair approach to the recent constitutional requirements of Batson v. Kentucky. This “bright line test” is efficient and meets constitutional requirements. Racially motivated peremptory challenges by solicitors are discouraged because of the de novo procedure following a successful Batson challenge. Other jurisdictions, struggling to implement Batson’s cumbersome guidelines, would do well to adopt the lead of South Carolina in establishing an approach to the problem which is both fair and economical.

Edwin Lake Turnage

II. RIGHT TO COUNSEL NOT VIOLATED BY JUDGE’S PROHIBITING CRIMINAL DEFENDANT FROM CONFERRING WITH COUNSEL BETWEEN DIRECT AND CROSS-EXAMINATION

In Perry v. Leeke25 the Fourth Circuit Court of Appeals held that a trial judge’s order prohibiting a criminal defendant from conferring with his attorney during a fifteen-minute recess between his direct and cross-examination did not deprive the defendant of his sixth amendment right to counsel. By mandating that all sixth amendment claims be judged by whether the defendant suffered prejudice, the court muddled what was once a clear rule in an already convoluted area of the law.

In August 1981 Donald Ray Perry was indicted for murder, kidnapping, and criminal sexual conduct in the first degree. Perry was called to testify in his jury trial. At the conclusion of defense counsel’s direct examination of Perry, the trial judge ordered a fifteen-minute recess. During this recess, Perry’s counsel attempted to speak with him, evidently to answer a question Perry had and to advise him of his rights on cross-examination.

The trial judge prohibited the consultation, ordering that Perry "was not entitled to be cured or assisted or helped approaching his cross examination."26 Perry's counsel's objection to the order was overruled. Perry, subsequently, was convicted of all three counts.27

On appeal to the supreme court, Perry argued that prohibiting consultation with counsel during the fifteen-minute recess violated his right to counsel under the sixth amendment of the United States Constitution. The court disagreed and affirmed the conviction.28

In November 1985 Perry petitioned for writ of habeas corpus in the United States District Court for the District of South Carolina on the basis that the trial judge's order amounted to a denial of his sixth amendment right to the effective assistance of counsel. The district court ordered that the writ should issue unless Perry was retried within a reasonable period of time. The state appealed the district court's order to the United States Court of Appeals for the Fourth Circuit.

The court of appeals held that Perry's sixth amendment right to the assistance of counsel had not been violated, since he had not been prejudiced by the order. The court noted that in *Geders v. United States*29 the Supreme Court held that a defendant's right to counsel was violated, requiring automatic reversal, when the trial court prevented him from consulting with his counsel during a seventeen-hour overnight recess. The Court in *Geders*, however, refused to delineate precise boundaries for when automatic reversal is required.30

The court of appeals then analyzed its own opinion in *United States v. Allen*,31 which held that "a restriction on a defendant's right to consult with his attorney during a brief routine recess is constitutionally impermissible"32 and that reversal

26. Record at 144.
27. The state sought the death penalty, but the jury recommended life imprisonment. 832 F.2d at 839.
30. See id. at 89 n.2, 91.
32. Id. at 634.
was necessary regardless of whether the restriction resulted in prejudice. Six years later, in *Stubbs v. Bordenkircher*, the court reaffirmed *Allen* but added the requirement that the defendant "show that he desired to consult with his attorney, and would have consulted with him but for the restriction placed upon him by the trial judge." The court then concluded that *Allen* and *Stubbs* were no longer controlling because of the Supreme Court's decisions in *Strickland v. Washington* and *United States v. Cronic*. The court posited that these decisions require an inquiry into whether the alleged sixth amendment violation was prejudicial to the defendant. Labeling as false any distinction between "denial of counsel" cases and "ineffective assistance of counsel" cases, the court stated that in any sixth amendment claim, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." The court reasoned that since fairness is the purpose underlying the sixth amendment right, such right to counsel claims should "always focus . . . on prejudice. Automatic reversal is warranted only where prejudice can be presumed." The *Strickland* test of ineffective assistance of counsel consists of two prongs that a petitioner normally must satisfy in order to sustain his sixth amendment claim. The petitioner must show: 1) that counsel's performance was deficient and 2) that the deficiencies in counsel's performance were prejudicial to the defendant, in the sense that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." The court found that Perry satisfied neither prong. The quality of his counsel's performance was superb; the restrictions on his access to counsel were incredibly brief; and the evidence against him was overwhelming. Moreover, the court contended that there was nothing that Perry's counsel could have accomplished by conferring with Perry that would have improved his

34. 689 F.2d at 1207.
37. 832 F.2d at 841 (quoting Strickland v. Washington, 466 U.S. 668, 696 (1984)).
38. Id.
39. 466 U.S. at 694.
client's performance during cross-examination. Finally, the court expounded several policy arguments (notably judicial economy and victim's rights) to buttress its holding.

In relying on Strickland and Cronic for the proposition that the touchstone of any sixth amendment claim is fairness, the Perry court emphasized that "[t]he proper inquiry is whether this trial was unfair . . . in short, whether justice was done in this case." While this approach has emotional appeal, it is fundamentally at odds with the sixth amendment. The purpose of the right to counsel is to ensure that the criminal defendant receives a fair trial.41 Thus, it is inherently prophylactic. While the court's concern for the fairness of the trial is cosmetically attractive, its effect is to place the right to counsel in intellectual quicksand. If there is no sixth amendment violation when the state denies a defendant assistance of his counsel during a fifteen-minute recess, because the overall trial was "fair," it follows that the assistance of counsel should be constitutionally required only where it is necessary to ensure a fair trial. Both the sixth amendment, by its very terms, and Gideon v. Wainwright42 make it clear, however, that no trial is fair unless the accused has the assistance of counsel. The sixth amendment focuses on the "means" (the process that leads to a verdict), while Strickland, Cronic and Perry focus on the "ends" (the outcome of the trial).43 While a brief restriction of the right to counsel may not result in any actual unfairness to the accused, the restriction itself creates the appearance of unfairness—a specter Gideon specifically sought to suppress.44

40. 832 F.2d at 842 (emphasis in original). Cf. 466 U.S. at 658 ("[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.").
41. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.
42. 372 U.S. 335 (1963) (holding that reversal is automatic when a defendant is deprived of the presence and aid of his attorney, either throughout the prosecution or during a critical stage in a capital offense).
44. See 372 U.S. 335 (1963). Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him . . . . The right . . . to counsel may not be deemed
While the Perry court correctly perceived that claims cannot be classified as either "denial of counsel" cases or "ineffective assistance" cases, it overlooked the classification discussed in Strickland. Strickland recognized that while both types of cases fall under the rubric of "the right to the effective assistance of counsel," there is a distinction between the types of violations of this right: (1) government violations of the right and (2) counsel's violations of the right. Strickland expressly dealt only with the latter. Its two-part test is couched in language that is intelligible only when used to judge the performance of counsel at trial. Thus, even if Strickland and Cronic mean that a "prejudice" analysis should be employed when the government violates the accused's rights to counsel, the Strickland test is not the proper mode of analysis.

Furthermore, Cronic plainly states that there are situations when prejudice is presumed and per se reversal proper:

There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. . . .

Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. . . . The court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.

The majority of circuits have required automatic reversal when counsel is barred from consulting with his client for any amount of time during the trial. There is no real cost to the

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Id. at 344.
45. 466 U.S. at 686.
46. Id.
47. 466 U.S. at 658, 659, 659 n.25.
state, and fear of fraud or other unethical conduct is unwarranted. By requiring the defendant to prove prejudice, the Perry court may be demanding what is both a practical and theoretical impossibility: "First, it would be very difficult for the defendant to show that the trial may have been altered had consultation been allowed. Second, such an inquiry would require that destructive inroads be forged into the attorney-client relationship." In effect, Perry creates a presumption of no prejudice — a reality unwittingly expressed by the majority: "There is no reason to believe that any communication which might have occurred during the brief recess at issue could have altered Perry's performance on cross-examination."

The Perry decision introduces new confusion. By abandoning the Allen-Stubbs bright line rule of per se reversal, yet recognizing the automatic reversal standard of Geders, the court gives no guidance to situations when the trial court denies the accused assistance of counsel for a period longer than fifteen minutes, yet shorter than the seventeen-hour prohibition found unconstitutional in Geders.

David Garrison Hill

III. STANDARD NECESSARY TO JUSTIFY STOP AND FRISK
RELAXED

In United States v. Moore the Fourth Circuit Court of Appeals held that an investigatory stop and frisk is valid when a police officer, responding to a silent burglar alarm, stops and

49. See 832 F.2d at 845 (Winter, C.J., dissenting). See also United States v. Allen, 542 F.2d 630, 633 ("Such a fear rests upon more cynicism than is justified by the performance of the bar."); United States v. Geders 425 U.S. 80, 93 (Marshall, J., concurring) ("If any order barring communication between a defendant and his attorney is to survive constitutional inquiry, it must be for some reason other than a fear of unethical conduct.").

50. Crutchfield v. Wainwright, 803 F.2d 1103, 1114 n.11 (Tjoflat, J., concurring).
51. 832 F.2d at 843. Contra 832 F.2d at 848-49 (Winter, C.J., dissenting):
It is not difficult to conceive of situations in which a ten or fifteen minute recess could be critical to the outcome of a trial. . . . Even an attorney's soothing assurances to a defendant, prior to cross-examination, along with reminders of the rules for such testimony, could have a marked effect on a defendant's performance and demeanor on the stand.

Id.

frisks an individual who is walking thirty to forty yards nearby. This relaxes the objective standard previously necessary to justify a stop and frisk.

On March 31, 1984, at 11:43 p.m., the silent burglar alarm at the Baptist Education Center in Charleston, South Carolina sounded. Officer Smith, patrolling nearby, responded two or three minutes later. As he approached the center, Smith noticed Norman Moore, the defendant, walking thirty to forty yards from its entrance. Smith stopped Moore and, after patting him down, found a handgun in Moore’s pocket. Moore was charged with possession of a weapon by a convicted felon. The Fourth Circuit affirmed the trial court’s denial of Moore’s motion to suppress the handgun, holding that Smith’s stop and frisk was valid.

In reaching its conclusion, the court applied the standards announced by the United States Supreme Court in the seminal case of Terry v. Ohio.53 In Terry the Court first addressed the standards necessary for police to validly conduct an investigative stop and frisk. The Court held that the police may stop an individual without probable cause if the officers can point to “specific and articulable facts”54 that would lead them to conclude that the individual was, or was about to be, engaged in criminal activity. An officer could then frisk that individual if there was reason to believe that he was armed and dangerous. The Terry court applied these standards and upheld the validity of the stop and frisk.55

The Supreme Court continuously has applied the standards set forth in Terry to cases involving stop and frisk situations. For example, the Court in United States v. Cortez56 upheld the stop of the defendant and stated that there must be “some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.”57 The Court held that this as-

54. Id. at 21.
55. In Terry a police officer observed two men repeatedly walk past a store and peer inside. The Court held that the stop and frisk was justified because the officer could reasonably suspect that the men were contemplating a daytime robbery that likely would involve the use of weapons. Id. at 1.
57. Id. at 417 (footnote and citations omitted).
sessment "must be based upon all the circumstances." The Court also applied the *Terry* standards in *Adams v. Williams*. It held that a stop and frisk is justified when a known informant advises a police officer that an individual in a nearby vehicle is armed, and this information is immediately verifiable. The Court stated that the police officer had ample reason to conclude that criminal activity was afoot and to "fear for his safety."

In affirming the trial court's decision in *Moore*, the court of appeals applied the standards announced by the Supreme Court in *Terry* and its progeny. The court focused on Moore's proximity to the center's entrance, the time of night, and the previous history of crime in the area. The court stated that the sounding of the burglar alarm "provided a reasonable basis for believing that a burglary had occurred." In reaching this holding, the court relaxed a stricter objective standard that it had applied previously and, instead, relied on the subjective perception of individual officers in cases involving stop and frisk situations. Previous cases from the Fourth Circuit illustrate the courts' prior adherence to a strict objective standard. For example, in *United States v. Gooding* the court of appeals held that an investigative stop was not based on a reasonable and articulable suspicion that criminal activity was afoot merely because an individual arrived from a source city for drugs, appeared nervous, scanned a concourse after deplaning, and engaged in a game of mutual surveillance with two drug enforcement agents.

If the court had applied the *Terry* test to the totality of the circumstances in *Moore*, it would have held that the stop and subsequent frisk was invalid. Instead, the court focused on Smith's subjective judgment in determining whether the stop and frisk was warranted. In order for Smith properly to conduct

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58. *Id.* at 418.
60. *Id.* at 148.
61. 817 F.2d at 1107.
62. *See* United States v. Porter, 738 F.2d 622 (4th Cir. 1984), *cert. denied*, 469 U.S. 983 (1984) (upheld a stop based on a corroborated anonymous informant's tip that a particular individual would arrive from Miami with drugs); United States v. Perate, 719 F.2d 706 (4th Cir. 1983) (upheld stop and frisk when a chauffeur informed the police that his passengers possessed drugs and that he feared for his safety); United States v. LeFevre, 685 F.2d 897 (4th Cir. 1982) (upheld a stop when an officer observed an individual licking rolling papers, who became nervous upon the officer's approach).
63. 695 F.2d 78 (4th Cir. 1982).
an investigative stop, he must have reasonably suspected that Moore had engaged, or was about to engage, in criminal activity. Moore gave Smith no indication that he had burglarized, or intended to burglarize, the center. He happened to be walking nearby as the alarm sounded. In fact, Moore looked as though he were a resident of the neighborhood, and Smith did not know him to be otherwise.

Additionally, the frisk could be justified only if Smith had reason to believe that Moore was armed and dangerous. The Moore court remarked that a burglary "often involves the use of weapons." Unlike the facts of Terry, however, in which the officer believed that the suspects were about to commit a robbery during daylight, Smith suspected that Moore had burglarized the center in the middle of the night. Moore would not necessarily have carried a gun if he had intended to commit such a crime. Moreover, Moore's actions did not indicate that he was a threat to Smith.

Perhaps the court in the present case was following the relaxed standards of the Supreme Court of Pennsylvania presented in Commonwealth v. Cortez. That court held that a stop and frisk was valid when, during the early morning, an officer saw two individuals emerge from an alley with a number of dogs barking in the background. The court concluded that the officers reasonably could have suspected that the defendants were engaged in criminal activity based on the barking of the dogs. The court stated that "[d]ogs are vigilant of the small parcels of the world they call their own." Like the Moore court, it relied on the officers' subjective assessment in determining that the stop and frisk was justified rather than objectively relying on the circumstances as a whole.

In Terry v. Ohio the Supreme Court created a narrow exception to the requirement of probable cause of the fourth amendment. The Court held that officers could conduct an investigative stop and frisk if those officers reasonably suspected that an individual was engaged in criminal activity and was armed and dangerous. The Fourth Circuit previously had ap-

64. 817 F.2d at 1108.
66. 507 Pa. at 531, 491 A.2d at 112.
plied the *Terry* standard by objectively evaluating the circumstances as a whole. The court's decision in *Moore*, however, illustrates that this circuit will apply a less strict standard to cases involving stop and frisk situations. The court seems willing to rely on the subjective judgment of an individual officer when evaluating the validity of a stop and frisk.

*Stephanie Ann Holmes*

IV. DEFENDANT MAY REQUEST JURY CHARGE DISCLOSING HIS PAROLE ELIGIBILITY

The Omnibus Crime Bill of 1986\(^68\) made several substantive and procedural changes in South Carolina's capital sentencing procedures.\(^69\) *State v. Atkins*\(^70\) reflects one aspect of this change. Until this decision, a jury was not allowed to consider parole eligibility in determining either a defendant's guilt\(^71\) or his sentence.\(^72\) In *Atkins* the South Carolina Supreme Court ruled that the defendant, under limited conditions, may request a new jury charge disclosing the possibility and circumstances of his parole.

Joseph Ernest Atkins was convicted of two counts of murder and sentenced to death.\(^73\) On appeal the defendant cited four errors,\(^74\) one being that the trial judge erred in refusing to

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73. Atkins was convicted for murdering Benjamin Atkins, his father, and Fatha Patterson, a tenant who lived behind his father's duplex. Additionally, Atkins was found guilty of two counts of assault with intent to kill Fatha Patterson's daughter, Karen Patterson, and Karen's common law husband, and unlawful possession of pistol. 293 S.C. 294, 295, 360 S.E.2d 302, 303 (1987).
74. Atkins argued that the judge's refusal to submit involuntary manslaughter, as a possible verdict with respect to the homicide of Karen Patterson, constituted reversible error. *Id.* at 298, 360 S.E.2d at 304. The court, however, ruled that the facts of this case did not support a charge on the lesser included offense.

Atkins' attorney also requested and received a jury charge on assault of a high and aggravated nature. On appeal the defendant asserted that the trial judge's jury charge was inadequate on this issue. *Id.* at 299, 360 S.E.2d at 305. The supreme court agreed
instruct the jury on the law governing parole considerations in capital sentencing. The court held that the trial court properly omitted such instructions but that, henceforth, a defendant could have this information included in the jury charge.\textsuperscript{76} No reason was given for this decision.

Prior South Carolina cases consistently have held that parole eligibility was not to be discussed with a jury. Atkins relied on two such cases, \textit{State v. Norris}\textsuperscript{76} and \textit{State v. Butler}.\textsuperscript{77} Norris held that it was improper to discuss parole eligibility, even if the jury requested this information. In Butler the court held that the defendant was properly denied instructions on the possibility of parole.

Other jurisdictions also have adhered to this principle.\textsuperscript{78} As the South Carolina Supreme Court noted in \textit{State v. Brooks}, "[T]he courts of other states that have considered the question are in near unanimous agreement that ordinarily it is improper to instruct the jury as to an accused's parole eligibility."\textsuperscript{79}

Until the passage of the Omnibus Crime Bill, parole eligibility was relatively liberal. As a result, the general rule prohibiting

that the instructions were inappropriate but that in this case it constituted harmless error.

Further, the defendant argued that the trial court erred by denying 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, 360 S.E.2d at 303. The supreme court agreed and reversed on these grounds.

75. The text of the new jury charge is as follows:

A person who is convicted of murder must be punished by death or by imprisonment for life. When the state seeks the death penalty and a statutory aggravating circumstance is specifically found beyond a reasonable doubt, and a recommendation of death is not made, the trial court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. When a statutory aggravating circumstance is not found beyond a reasonable doubt, the defendant shall be sentenced to life imprisonment and he shall not be eligible for parole until the service of twenty years. No person sentenced under either of the sentencing schemes just explained may receive any work-release credits, good-time credits, or any other credit that would reduce the mandatory imprisonment.

\textit{Id.} at 300, 360 S.E.2d at 305-06.

77. 277 S.C. 543, 290 S.E.2d 420 (1982).
mention of parole eligibility was enforced to protect the defendant.\textsuperscript{60} Now, however, South Carolina law has been amended to provide minimum and mandatory service requirements before granting parole. One who is convicted of or pleads guilty to murder is not eligible for parole before serving twenty years.\textsuperscript{61} Moreover, when the state seeks the death penalty and the jury finds an aggravating circumstance, a defendant is not eligible for parole for at least thirty years.\textsuperscript{62} Consequently, the defendant presumably will want this information released, with the expectation that the jury will more readily impose a sentence of life imprisonment rather than death.

In\textit{ Atkins} the defendant advanced two arguments in favor of including the parole eligibility charge. Conceding that the general rule would not allow the requested instructions, Atkins alleged that the facts in this case merited different treatment and that instructions addressing parole eligibility should be given when the evidence itself creates the inference that the defendant will be eligible for parole if not executed.\textsuperscript{63} Here, the jury may have known that the defendant was out on parole at the time of the crimes.\textsuperscript{64} This, the defense asserted, created exigent circumstances warranting the jury charge.

Second, the defense also argued that under\textit{ Skipper v. South Carolina}\textsuperscript{65} and\textit{ State v. Patterson}\textsuperscript{66} the court was consti-

\textsuperscript{60} State v. Brooks, 271 S.C. 355, 247 S.E.2d 436 (1978), reversed a murder conviction because the judge included information in the jury charge that the defendant would be eligible for parole after serving one-third of any sentence imposed. The supreme court held, "We are of the view appellant was entitled to have his guilt or innocence determined without regard to his eligibility for parole. A jury should be neither invited nor permitted to speculate upon the possible effects of parole upon a conviction." \textit{Id.} at 359, 247 S.E.2d at 438 (citing State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111 (1970), modified, 408 U.S. 936 (1972), and State v. Pulley, 216 S.C. 552, 59 S.E.2d 155 (1950)).


\textsuperscript{62} Id.

\textsuperscript{63} Brief of Appellant at 28 (emphasis in original).

\textsuperscript{64} Id. at 25-28. The prosecution, however, asserted that although this parole information was printed in the newspaper after arrest, the \textit{voir dire} examination revealed that nine of the twelve jurors selected had never heard of the case before and the other three did not remember anything about it. Brief of Respondent at 21.

\textsuperscript{65} 476 U.S. 1 (1986) (United States Supreme Court reversed death penalty because the lower courts' refusal to admit evidence concerning the defendant's future adaptability to prison life was violative of the eighth amendment). See infra note 92 and accompanying text.

\textsuperscript{66} 290 S.C. 523, 351 S.E.2d 853 (1986) (basing its decision on \textit{Skipper}, supreme court reversed a death penalty because of trial court's exclusion of the defendant's evi-
tutionally obligated to provide accurate parole information to the jury. These cases held that in a death penalty situation, the sentencer should have before him all relevant facts. The defendant admitted that Skipper concerned the admission of evidence, rather than the furnishing of accurate legal information, but hypothesized that the Supreme Court would have reached the same result in this case.87

The court did not address these arguments in its opinion. Instead, Justice Harwell cited Norris and Butler in approving the trial court's decision not to include parole eligibility in its jury charge.88 In a clear break from precedent, the decision went on to change the rule for death penalty cases controlled by the Omnibus Crime Bill that proceed to trial "after this opinion is published."89

Atkins is limited strictly to defendants brought to trial under the Omnibus Crime Bill. The defendant retains the option of submitting the jury charge previously used: that the term "life imprisonment" is to be understood in its plain and ordinary meaning without consideration given to possibility of early parole.80

Atkins rightfully follows the judicial trend set by Lockett v. Ohio81 and Skipper v. South Carolina82 allowing broad latitude to the defendant to present all relevant facts to the sentencer in capital cases. Furthermore, the Omnibus Crime Bill's mandatory thirty-year minimum sentence for murder with aggravating circumstances, as found in this case, greatly reduces any specula-

dence regarding future adaptability to prison life). See infra note 92 and accompanying text.

87. Brief of Appellant at 29.
88. 293 S.C. at 300, 360 S.E.2d at 305.
89. Id. The probable reason for excluding Atkins from this decision is that the effective date of the Omnibus Crime Bill was several months after the crime but twenty-four days before the sentencing hearing. Brief of Appellant at 26 n.4. The defendant, however, had agreed to waive any ex post facto objection in return for the requested jury instructions. Record at 850-51. On the other hand, the court was not constitutionally required to make this decision, so it could rightfully exclude Atkins from its holding. See California v. Ramos, 463 U.S. 992, 1001 (1983).
90. 293 S.C. at 300, 360 S.E.2d at 305.
91. 438 U.S. 586 (1978) Lockett held that the eighth and fourteenth amendments require a sentencing judge to consider, as mitigating factors, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604.
92. 476 U.S. at 1. See supra note 85.
tive nature in parole consideration.® State v. Atkins, therefore, gives South Carolina capital defendants a progressive and equitable alternative to the former denial of parole information to juries.

Elizabeth Scott Moïse

V. JURY INSTRUCTIONS MUST BE CAST SO THAT JURIES WILL INTERPRET PRESUMPTIONS AS PERMISSIVE

In State v. Adams® the South Carolina Supreme Court reversed the appellant's convictions of possession of valium and hashish and possession of marijuana and cocaine with intent to distribute because of the trial judge's erroneous charge to the jury.® The court found two defects in the trial court's charge. First, because the amounts of cocaine and marijuana were insufficient to raise the statutory presumption of an intent to distribute,® the trial court erred in refusing to charge the jury on simple possession with intent to distribute.® Second, the trial court incorrectly charged the jury that articles in a dwelling house "must be deemed to be in the constructive possession of the person controlling the house in the absence of evidence to the contrary."® The court held that the jury could have interpreted this language to require the appellant to rebut the state's evidence.®

On the issue of whether the trial court should charge a lesser included offense, the court said, "[a] trial judge must charge a lesser included offense if there is evidence from which it can be inferred that the defendant committed the lesser rather than the greater offense."® The wording of the rule is

93. See Bruck, supra note 69, at 69.
95. Adams' convictions were based on items seized from his home pursuant to a search warrant. Among the items introduced into evidence were a large inventory of drug paraphernalia, weapons, $134,000 in cash, and small amounts of controlled substances.
97. 291 S.C. at 135, 352 S.E.2d at 485-86.
98. Id., 352 S.E.2d at 486 (emphasis added).
99. Id.
100. Id., 352 S.E.2d at 485.
clearer in *Adams* than in *State v. Mickle*, in which the South Carolina Supreme Court said that “[i]t is only necessary to charge a lesser included offense when there is evidence tending to show that only such lesser crime was committed.” The unambiguous phrasing of the rule in *Adams* makes clear that compelling or conclusive evidence on a lesser offense is not a prerequisite to obtaining a charge on a lesser included offense.

The only basis for the supreme court’s requiring a charge on simple possession was the fact that the state narcotics agents had not found statutory amounts of marijuana and cocaine. Evidence that the defendant possessed less than the statutory amount is “evidence from which it can be inferred that the defendant committed the lesser rather than the greater offense.” Thus, any defendant found to possess a controlled substance in an amount less than that which triggers the statutory presumption of intent to distribute should be entitled to a charge on simple possession, regardless of other evidence indicating intent to distribute.

The trial court’s charge on constructive possession was erroneous because the instruction could have been interpreted as shifting the burden of proof to the defendant, requiring him “to disprove possession which is an element of the offense charged.” Such a shift of the burden of proof is unconstitutional.

The trial court’s instruction was phrased in compliance with *State v. Ellis*, which was no longer valid. The proper charge,
according to the supreme court, should have been styled as a permissive inference, which the jury would be free to accept or reject, following its view of the evidence. The trial court should have "instruct[ed] the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control."

The United States Supreme Court dealt with the various types of presumptions in criminal proceedings in Sandstrom v. Montana and County Court of Ulster County v. Allen. The type of presumption in a given case is customarily determined by the trial court's instructions to the jury, and different tests of constitutionality are used for different types of presumptions. Yet the guiding principle in determining whether a pre-


110. 291 S.C. at 135-36, 352 S.E.2d at 486. ("The trial judge should explain to the jury that it is free to accept or reject this permissive inference of knowledge and possession depending upon its view of the evidence."). Id.

111. Id. at 135, 352 S.E.2d at 486 (emphasis added).

112. 442 U.S. 510 (1979). Since the presumption in Sandstrom could have interpreted in either of two ways, see infra note 114, the Court analyzed it as both a conclusive presumption that required the fact finder to find the presumed fact once the basic fact was proved and as a mandatory presumption that shifted the burden of persuasion to the defendant.

113. 442 U.S. 140 (1979). In Allen the Supreme Court divided presumptions into two general categories — permissive inferences or presumptions, and mandatory presumptions. 442 U.S. at 157. Mandatory presumptions were subdivided into two classes—production-shifting presumptions and proof-shifting presumptions. Id. at 157 n.16.

114. Id. at 158 n.16. In Allen the Court found that the presumption involved was a permissive inference because of the trial judge's instruction that the jury could ignore the presumption involved "even if there was no affirmative proof offered by defendants in rebuttal." Id. at 160-61.

In Sandstrom the court examined a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 517. The Court held that the instruction was unconstitutional because a reasonable juror could have viewed such an instruction as either a mandatory burden-shifting presumption or as a conclusive presumption. Id. at 524.

115. See McCormick on Evidence § 347, at 988 (E. Cleary 3d ed. 1984). In analyzing a permissive inference, a court should refer to the facts of the case. See Allen, 442 U.S. at 162-63. If, in the context of the facts of the case, there is no rational connection between the proved and the presumed fact, then the presumption must be found violative of due process. The test of rationality is whether "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact." Id. at 166 n.28. A "rational connection" test for presumptions in criminal cases was developed in Tot v. United States, 319 U.S. 463 (1943). This test was further defined in Leary v. United States, 395 U.S. 6 (1969), to include the "more likely than not" standard. See McCormick § 347, at 991-95.

On the other hand, the constitutionality of either a conclusive presumption or a
sumption is constitutional "remains constant." The Supreme Court stated in Allen: "[T]he device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the state, to find the facts beyond a reasonable doubt." 116

The South Carolina Supreme Court has recognized the distinctions between permissive inferences and mandatory presumptions.117 When faced with an instruction that could be in-

persuasion-shifting presumption is to be judged on its face. See Allen, 442 U.S. at 158; Sandstrom, 442 U.S. 510. If a reasonable juror could conclude that such a presumption either (1) in the case of a conclusive presumption, absolutely requires a finding of the presumed fact once the basic fact is proved or (2) in the case of a persuasion-shifting presumption, requires a finding of the presumed fact unless the defendant disproves the presumed fact, then the presumption violates the defendant's right to due process of law. Sandstrom, 442 U.S. at 523-24. Such a presumption relieves the prosecution of its burden of proving beyond a reasonable doubt every element of a crime. Id. See also supra note 108.

116. Allen, 442 U.S. at 156. The differing tests for permissive inferences and mandatory presumptions, supra note 114, may be explained in terms of this guiding principle. Because a permissive inference may be accepted or rejected by the fact finder, "it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." Id. at 157. Thus, permissive inferences are tested with reference to the facts of the case. On the other hand, "[a] mandatory presumption is a far more troublesome evidentiary device." Id. It affects not only the "proof beyond a reasonable doubt" standard but also the placement of the burden of proof. Therefore, it is appropriate to test a presumption that poses such a threat to due process on its face. Id. at 157-58.

117. W. McAninch & W. Fahey, The Criminal Law of South Carolina 39 (1982). The court, however, seems not to have expressly recognized the distinctions between presumptions that shift the burden of proof and presumptions that shift the burden of production. See supra note 113. The court has stated that the "burden of explanation" should not be placed on the defendant, and without further defining "burden of explanation," has proceeded to analyze the presumption at issue as a burden-shifting presumption. See, e.g., State v. Cooper, 279 S.C. 301, 302, 306 S.E.2d 598, 599 (1983).

Ignoring this distinction, however, is probably prudent. According to one writer, "The status of presumptions that shift the burden of production to the defendent is unclear." Note, After Sandstrom: The Constitutionality of Presumptions That Shift the Burden of Production, 1981 Wis. L. Rev. 519, 522 (1981). A South Carolina writer has stated, "The only acceptable mandatory or rebuttable presumption is one that merely shifts the burden of production, not the burden of persuasion." W. McAninch & W. Fahey, supra note 117, at 38. In Allen the United States Supreme Court suggested that presumptions imposing very slight burdens of production may be analyzed as permissive inferences. 442 U.S. at 158 n.16. In another case, however, the Court expressly noted that it offered no opinion on production-shifting presumptions. Francis v. Franklin, 471 U.S. 307, 314 n.3 (1985). By refusing to recognize production-shifting presumptions, the South Carolina Supreme Court avoids the confusion that seems to surround it.

Furthermore, the court's position may offer greater protection for defendants' due process rights. In Note, supra note 117, the author argued that jurors are likely to misinterpret instructions designed to create production-shifting presumptions, and that even if jurors accurately interpret production shifting presumptions, these devices remain of
interpreted by the jury "as requiring the defendant to personally rebut or explain," the court has reversed convictions, observing that the terms "presumption," "rebuttable," and "reasonable explanation" should be deleted from jury instructions and replaced by terms such as "might infer" or "may be presumed." As the court noted in reversing Adam's convictions, "The trial judge should explain to the jury that it is free to accept or reject this permissive inference . . . depending upon its view of the evidence." Thus, the South Carolina court makes clear that the court should always cast jury instructions regarding presumptions so that juries will interpret presumptions as permissive and so that constitutional problems may therefore be avoided.

Although the South Carolina Supreme Court does not engage in the fine line-drawing that marks cases like Allen and Sandstrom, the court's holdings share with these cases a focus on jurors' possible interpretations of a trial court's instructions. Although the court's approach may be more liberal than is constitutionally required, this approach is faithful to the guiding principle of the tests in Allen and Sandstrom, namely the preservation of the integrity of the fact finder's responsibility.

B. Rush Smith, III

VI. JURY INSTRUCTIONS NOT NEEDED TO EXPLAIN GUILTY BUT MENTALLY ILL VERDICT

In State v. Bell the South Carolina Supreme Court held that the trial court did not err in refusing to instruct the jury on the sentencing procedure for the guilty but mentally ill verdict, despite defense arguments that the solicitor had misled jurors into believing such a verdict might result in a lighter sentence.

dubious constitutionality.
118. Cooper, 279 S.C. at 302, 306 S.E.2d at 599.
120. 291 S.C. at 135-36, 352 S.E.2d at 486.
122. See supra note 117.
The court rejected several other defense arguments as well124 in affirming the murder and kidnapping conviction and capital sentence of Larry Gene Bell.

At trial the defense conceded Bell’s criminal responsibility.125 The primary issue thus became whether Bell was either guilty or guilty but mentally ill.126 In South Carolina, a verdict of guilty but mentally ill results in the same options of punishment as a verdict of guilty.127 The distinction is that before imposition of sentence, the State commits the guilty but mentally ill convict to a mental treatment facility. He remains there until the facility’s staff determines that his condition has improved sufficiently so that his sentence may be carried out, even if that sentence is death.128 To require a state to “cure” a convict before it kills him seems bizarre. For this and other reasons, commentators have sharply criticized the guilty but mentally ill doctrine;129 nevertheless, it has withstood several constitutional challenges.130

Throughout trial, the State sought to dismiss Bell’s history of abnormal behavior as successfully calculated ploys to escape punishment for his criminal acts.131 During closing arguments the solicitor asserted that a verdict of guilty but mentally ill would be a “trophy” and a “reward” for Bell.132 The defense contended that such remarks may have misled jurors into believing that a guilty but mentally ill verdict would result in a lighter

124. Other defense challenges included questions concerning a defendant’s competency to stand trial, the sixth amendment right to public trial, the admissibility of evidence of a victim’s social worth and the impact of a crime on the victim’s family, the right to be present at one’s trial, and the limits of propriety regarding a solicitor’s closing remarks.

125. Record at 3447, 3453.
129. See W. LAFAVE & A. SCOTT, supra note 128, at 359-60.
130. Id. at 359.
131. See Record at 2670, 2672, 2674, 2676, 3215, 3223.
132. Id. at 3440.
sentence than a guilty verdict. The defense urged the trial court to clarify this misperception by instructing the jury that "[t]he finding of either verdict still allows the jury to consider a sentence of life imprisonment or death." The trial judge refused.

In upholding this decision, the supreme court failed to address the essential argument that the trial judge had allowed the State to mislead the jury. Instead, the supreme court relied on general statements that penalty information is "of no aid" and "not relevant" to a jury during the guilt phase of a bifurcated trial. Such a position reasonably might be founded on fears of jury confusion or compromise. In Bell, however, the defense argued, in essence, that the jury was already confused; clarification of the penalty procedure was necessary to dispel an already existing danger of compromise based on a misconception of the guilty but mentally ill verdict as a "reward." Even in the absence of a misleading prosecutorial statement, the doctrine that jurors have no concern with the consequences of a verdict is not without exceptions. In Lyle v. United States, the District of Columbia Court of Appeals ruled that when jurors commonly know the consequences of two verdict options, they have "a right to know" the consequences of a third on which they are unclear. The Supreme Court of Indiana has recognized the inherent confusion facing a jury in cases involving a defendant's mental state:

There will be increased speculation on the part of the jury on the differences in sentencing between verdicts of guilty, guilty but mentally ill and not responsible by reason of in-

133. Brief of Appellant at 31-36.
134. Record at 4204-05.
135. Instead, the trial judge included the following in his charge: "[T]here is another possible verdict in this case and this is not a defense. It is guilty, but mentally ill. . . . [I]t is a form of guilty verdict." Record at 3509.
136. 293 S.C. at 399, 360 S.E.2d at 710.
137. See Brief of Respondent at 42.
138. During closing argument, defense counsel told the jury that the guilty but mentally ill verdict did not relieve a defendant from criminal responsibility. Record at 3451, 3454.
139. 254 F.2d 725 (D.C. Cir. 1957).
140. Id. at 728. See also W. LAFAVE & A. SCOTT, supra note 128, at 359 ("It does not make sense that a jury should be presented with three verdict choices . . . but know the consequences of only the first two.").
sanity. In order to dispel the speculation and to focus the jury on the issue of guilt, rather than possible punishment, an instruction explaining the consequences of each determination in a general way can be appropriate and beneficial to the accused.\textsuperscript{141}

An erroneous belief that a guilty but mentally ill verdict will result in a light sentence could persuade a jury to impose a verdict of guilty, for jurors "abhor setting free a defendant where the evidence establishes guilt of a serious crime."\textsuperscript{142} In \textit{Turner v. Murray}\textsuperscript{143} the Supreme Court found "the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized."\textsuperscript{144} It is equally unacceptable that a risk of jury misperceptions infect a verdict determination in light of the ease with which that risk could be minimized by a clarifying charge from the trial judge.

Of course, the supreme court may have believed that the solicitor's remarks did not mislead the jury; or that the trial judge, in the charge he delivered, reasonably dispelled any confusion; or that, the damage being done, any comment by the judge would only further becloud the issue. Whatever it believed, the court rested this part of its opinion on summary pronouncements of law that avoided the essential question of jury confusion.

\textit{Daniel J. Westbrook}

\textbf{VII. \textit{Pearce} Rule Not Applicable if Harsher Sentence Is Imposed by a Different Judge Than One Who Handed Down the Initial Sentence}

In \textit{State v. Hilton}\textsuperscript{145} the Supreme Court of South Carolina limited the generally recognized\textsuperscript{146} presumption of vindictiveness

\textsuperscript{141. State v. Smith, 502 N.E.2d 485, 488 (Ind. 1987).}
\textsuperscript{143. 106 S. Ct. 1683 (1986).}
\textsuperscript{144. Id. at 1688.}
\textsuperscript{146. See Hewell v. State, 238 Ga. 578, 234 S.E.2d 497 (1977) (an increase in defendant's sentence, absent a finding of conduct occurring after the original sentence, is a denial of due process); State v. Wise, 425 So. 2d 727 (La. 1983) (when there is no new
rule established by the United States Supreme Court in North Carolina v. Pearce. The Pearce rule was designed to prevent judges from imposing harsher sentences on defendants because they had successfully overturned a prior conviction. In Hilton the court held that the presumption does not apply when the subsequent harsher sentence is imposed by a different judge.

Hilton was convicted of assault and battery with intent to kill and was sentenced to fifteen years in prison. The South Carolina Court of Appeals reversed that conviction, holding that the trial judge should have submitted to the jury the lesser offense of assault and battery of a high and aggravated nature. In the second trial, Hilton was again convicted of assault and battery with intent to kill. The second judge sentenced Hilton to twenty years in prison. On appeal the supreme court held that the Pearce presumption of vindictiveness did not apply.

In Pearce the United States Supreme Court held that the due process clause requires that vindictiveness must not play a role in the sentencing of a defendant who has successfully attacked a prior conviction. The Court announced a prophylactic rule: "[W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." The Court placed the burden of proof on the judge who delivered the second sentence. If his reasons for the harsher sentence were not "based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original [sentence]," there was a presumption that vindictiveness played a role in the sentencing process.

In Hilton the record does not reveal any additional information that the second sentencing judge considered when he imposed a harsher sentence. The court considered the victim's disability, which had not changed since the previous sentence was imposed. The judge handed down the maximum sentence of twenty years because he personally felt for the victim who was...

behavior to justify an increased sentence, defendant's right to due process is violated); State v. Eden, 163 W. Va. 370, 256 S.E.2d 868 (1979) (a defendant who receives a heavier penalty than he had originally is denied due process).

147. Id. at 726.
148. Id.
149. Record at 49.
severely injured: "It's more horrible that he lived than if he had died." 150 It is clear that if the Pearce rule had been applied here, the judge's sentence would have been presumed vindictive.

In holding that the Pearce presumption did not apply, the court cited a number of cases to support the propositions that Pearce has been limited many times and that the natural progression would be to hold the rule inapplicable when the second harsher sentence is handed down by a different judge. The United States Supreme Court has held the Pearce presumption inapplicable in certain situations. For example, in Colten v. Kentucky 151 the Court held that the presumption did not apply to Kentucky's two-tiered system in which a defendant may receive a trial de novo. Similarly, the Court has held the Pearce rule inapplicable when a jury, which has not been informed of a prior sentence, imposes a second harsher sentence. 152 It seems, however, that in these two situations, vindictiveness is unlikely to play a role in resentencing. 153

In some of the cases cited in Hilton in which courts have held that the Pearce presumption did not apply, that holding was not intended to limit the Pearce rule. 154 The facts in those cases were such that there could be no presumption of vindictiveness.

 Practically, the decision in Hilton has a chilling effect on

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150. Id. at 57. "The victim suffered severe permanent brain damage as a result of the impact, and was unable to make a statement concerning the incident." 291 S.C. at 277, 353 S.E.2d at 283.
153. In Chaffin the first trial took place in an inferior court, and the second trial occurred in a court of general jurisdiction. The defendant, therefore, received a fresh determination of guilt or innocence. In this situation, the second sentencer has little or no motivation to punish a defendant for a prior successful appeal. Similarly, it seems implausible that a jury that has not been informed about a defendant's prior sentence would vindictively resent sentence that defendant for a successful appeal.
154. In Texas v. McCullough, 475 U.S. 134 (1986), the judge imposed a second sentence that was twenty years greater than the previous jury sentence. The Pearce presumption, however, did not apply in this case because "the second sentencer provid[ed] an on-the-record, wholly logical, nonvindictive reason for the longer sentence." Id. at 140. This is exactly what the Pearce rule prescribes. Also, in Brown v. District Court, Nassau County, 637 F. Supp. 1096 (E.D.N.Y. 1986), the defendant's second sentence was no greater "than originally imposed." Id. at 1099. He was not reconvicted after successfully having his trial put aside; his conviction was unanimously affirmed. These were not situations in which the court limited presumptions of vindictiveness. Therefore, that presumption did not apply to those facts.
those defendants who would appeal their convictions. The Pearce rule was designed to avoid exactly this effect; vindictiveness should not impede the defendant’s right to appeal. The Pearce rule places the burden of proof on the defendant because it would be difficult, if not impossible, for a convicted defendant to prove that a more severe sentence was a product of a judge’s displeasure regarding his successful appeal of a prior conviction. In fact, the Supreme Court of Appeals of West Virginia stated in State v. Eden that “requiring a showing of vindictiveness motivation places too heavy a burden on the defendant.” The South Carolina Supreme Court does not address ways that a defendant might surmount this task. It seems far more equitable to place this burden on the judge who imposes the greater sentence.

Finally, the Hilton court made two other assumptions in concluding that the Pearce rule should not apply in this case. First, the court assumed that vindictiveness cannot occur when a harsher sentence is imposed by a different judge. Second, the court assumed that only sentencing bodies are capable of vindictiveness against a defendant who has successfully appealed a prior conviction. In reality, these assumptions may not be valid and may deter defendants from rightfully appealing their convictions.

Stephanie Ann Holmes

VIII. SELF-DEFENSE NO LONGER MUST BE PROVED FOR AQUITTAL

South Carolina’s new rule regarding proof of self-defense was set out in State v. Bellamy. Self-defense is no longer an affirmative defense that the defendant must prove by a preponderance of the evidence. Now a defendant need only produce evidence sufficient to raise a reasonable doubt of his guilt in or-

156. Id. at 386, 256 S.E.2d at 877 (citing Patton v. North Carolina, 381 F.2d 636, 641 (4th Cir. 1967)), cert. denied, 390 U.S. 905 (1968).
157. It is possible that a second judge might penalize a defendant for successfully appealing a conviction over which a colleague presided. It is also plausible that a solicitor, who has some control over the docket, might want to punish a successful appellant by scheduling the case before a judge who is a notoriously harsh sentencer.
order to be acquitted.\textsuperscript{159}

Bellamy was convicted of criminal conspiracy and the murder of Roland Vereen. Bellamy shot Vereen five times in the head. The state contended that Bellamy's codefendant had hired him to kill Vereen. Bellamy contended that he had refused his codefendant's requests to kill Vereen and had acted in self-defense, firing only after Vereen pulled a gun on him.\textsuperscript{160} The trial court, after defining the four elements of self-defense, instructed the jury that the defendant must show by "the preponderance or the greater weight of the evidence" that he acted in self-defense.\textsuperscript{161} The supreme court held the portion of the charge relating to Bellamy's burden of proof to be error and reversed the conviction.\textsuperscript{162}

In describing the proper charge on proof of self-defense, the court stated, "It is clear that the defendant need not establish self-defense by a preponderance of the evidence but must merely produce evidence which causes the jury to have a reasonable doubt regarding his guilt."\textsuperscript{163} The court quoted the appropriate language from the model charge set out in \textit{State v. Davis}:\textsuperscript{164}

If you have a reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense, then you must find him not guilty. On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all the evidence including the evidence of self-defense then you must find him guilty.\textsuperscript{165}

The court stated that this charge was "made mandatory"\textsuperscript{166} by the South Carolina Supreme Court in \textit{State v. Glover}.\textsuperscript{167} The

\textsuperscript{159} \textit{Id.} at 105, 359 S.E.2d at 64-65.
\textsuperscript{160} \textit{Id.} at 104, 359 S.E.2d at 64.
\textsuperscript{161} \textit{Id.} at 105, 359 S.E.2d at 64.
\textsuperscript{162} \textit{Id.} at 105-06, 359 S.E.2d at 65.
\textsuperscript{163} \textit{Id.} at 105, 359 S.E.2d at 65 (citing W. \textsc{McAninch} \& W. \textsc{Fairley}, \textsc{The Criminal Law of South Carolina} 101 (Supp. 1986) ("[S]elf-defense is no longer to be considered an affirmative defense which must be established by the defendant by a preponderance of the evidence. . . . [I]f any reasonable doubt remains as to self-defense, the jury must acquit.").
\textsuperscript{165} 293 S.C. at 105, 359 S.E.2d at 64 (citing \textit{State v. Davis}, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)).
\textsuperscript{166} 293 S.C. at 105, 359 S.E.2d at 64.
Glover court stated that "the charge approved in Davis shall be applied in all cases tried subsequent to the date of that decision, so long as a contemporaneous objection was made at trial." 168 This rule seems to have been a response to Thomas v. Leeke, 169 in which the Fourth Circuit reversed denial of relief to a habeas corpus petitioner on the ground that the trial court's instructions regarding burden of proof were contradictory to the point of constitutional infirmity. 170 In Glover, although the court adhered to the view that the due process principles articulated in In re Winship 171 were not offended by charging self-defense as an affirmative defense, a view expressed in both the Thomas dissent 172 and a line of South Carolina cases, 173 the court nevertheless noted that the constitutional violation in Thomas had been cured by Davis. 174 The court then mandated the use of the Davis charge prospectively. 175

The constitutionality of charging self-defense as an affirmative defense was confirmed by the recent case of Martin v. Ohio. 176 In Martin the United States Supreme Court rejected

168. Id. at 154, 326 S.E.2d at 150.
170. The problematic contradiction in Thomas lay in charging the jury on the one hand that the State must prove beyond a reasonable doubt that the killing was felonious and, therefore, unlawful, and on the other hand that the defendant must prove by a preponderance of the evidence that the killing was in self-defense and, therefore, lawful. Id. at 250-51.

In Davis, decided more than five months after Thomas, the court did not cite Thomas nor any other case in support of its new charge on self-defense. Indeed, Davis offers no reason at all for its new formulation of the proper charge on self-defense.

In Glover the court did not explore the rationale of Thomas but noted that the old charge on self-defense had "come under a recent attack" in that case. 284 S.C. at 153, 326 S.E.2d at 151. The court then held the Davis charge mandatory. See infra notes 174, 175 and accompanying text.

171. 397 U.S. 358 (1970) (the prosecution must prove beyond a reasonable doubt every element of the offense).
172. 725 F.2d at 252-54. In addition, the majority declined to hold that defining self-defense as an affirmative defense offended due process. See id. at 249-50.
174. 284 S.C. at 154, 236 S.E.2d at 151.
175. Id.
the proposition that requiring a defendant to prove self-defense by a preponderance of the evidence shifted from the state its burden of proving guilt of aggravated murder beyond a reasonable doubt.\textsuperscript{177} Thus, a state may define self-defense as an affirmative defense without violating due process.\textsuperscript{178}

In \textit{Bellamy} the state argued that based on \textit{Martin}, the trial court's charge was within constitutional bounds.\textsuperscript{179} The South Carolina Supreme Court had held accordingly in many cases.\textsuperscript{180} The \textit{Bellamy} court, however, summarily rejected this argument: "While the charge may be constitutionally permissible, it does not comport with South Carolina law."\textsuperscript{181}

This rejection of the proposition that \textit{Martin} should define South Carolina law is significant not only because it indicates that the court may guard the principles of \textit{Winship} more jealously than does the United States Supreme Court, but also because it implicitly renders inoperable a body of South Carolina

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177. \textit{Id. at \ldots} The burden-shifting argument is based on Mullaney v. Wilbur, 421 U.S. 684 (1975). The Court held that requiring the defendant to prove provocation by a preponderance of the evidence in order to reduce the degree of homicide served to relieve the state of its beyond-a-reasonable-doubt burden as defined in \textit{In re Winship}, 397 U.S. 358 (1970).

According to \textit{Winship}, due process requires that the prosecution must prove beyond a reasonable doubt every element of the crime charged. If a defense negates an element of the offense, then requiring the defendant to prove that defense is equivalent to requiring him to disprove an element of the offense. Such a shift of the burden of proof is impermissible. \textit{See Mullaney}, 421 U.S. 684; Martin v. Ohio, 480 U.S. 228 (Powell, J., dissenting).

178. The instructions in \textit{Martin} were similar to those in Thomas v. Leeke, 725 F.2d 246 (4th Cir. 1984), insofar as the jury was charged that the state had the burden of proving all elements of aggravated murder beyond a reasonable doubt, and that the defendant could be acquitted if she proved self-defense by preponderance of the evidence. The Court noted that "[t]he instructions in this case could be clearer in this respect," but found no constitutional infirmity in the apparent contradiction. "[W]hen read as a whole, we think [the instructions] are adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the state's proof of the elements of the crime." 480 U.S. at \ldots. The deference to state law demonstrated in \textit{Martin} was also apparent in Patterson v. New York, 432 U.S. 197 (1977), a case that indicates the narrow limits of the argument on which \textit{Mullaney} is based. \textit{See supra} note 177. In \textit{Patterson} the Court held that due process was not violated by New York's requiring the defendant to prove emotional disturbance by a preponderance of the evidence in order to reduce the crime from murder to manslaughter. New York's definition of murder determined the outcome.

179. 293 S.C. at 105, 359 S.E.2d at 65.

180. \textit{See} cases cited \textit{supra} note 173 and accompanying text.

181. 293 S.C. at 105, 359 S.E.2d at 65.
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law. If Martin does not determine state law, then neither should State v. Bolton, in which the South Carolina Supreme Court held that South Carolina's definition of self-defense as an affirmative defense does not offend due process. The rule that self-defense is not an affirmative defense is thus fortified.

As a result of this new rule, if a defendant produces evidence of self-defense sufficient to raise a reasonable doubt of his guilt, the state must prove beyond a reasonable doubt that the defendant did not act in self-defense. Such a result, though perhaps more onerous for the state, assures that the defendant will not be convicted by a jury that might harbor reasonable doubt of his guilt, specifically in a case in which defendant's proof of self-defense did not rise to the level of the preponderance of the evidence but did raise a reasonable doubt as to guilt. Furthermore, since the South Carolina definitions of murder and manslaughter include elements of unlawfulness and self-defense

183. Later cases have affirmed this holding. See supra note 173 and accompanying text.
184. If the supreme court had not so unequivocally stated that the constitutionally permissible charge did not comport with state law, the Bolton line of cases might have been perceived as a threat to the viability of the Davis charge. In State v. Hardy, 283 S.C. 590, 325 S.E.2d 320 (1985), a decision handed down scarcely more than two weeks prior to Glover, the court upheld the constitutionality of a charge that defined self-defense as an affirmative defense and also held that the charge "substantially embrace[d] all the elements of the Davis charge and that the charge [was] neither contradictory nor confusing." Id. at 593, 325 S.E.2d at 322.

Martin confirmed the validity of the Bolton holding with respect to the constitutionality of defining self-defense as an affirmative defense. At the same time, Martin arguably diminished the force of Thomas v. Leeke, 725 F.2d 358 (4th Cir. 1984). See supra notes 170, 178 and accompanying text.

If Martin weakened Thomas, then there would be little or no remaining basis for the Glover holding that made mandatory the Davis charge. See supra note 170 and accompanying text. Since it is constitutionally permissible to define self-defense as an affirmative defense, there is no reason to define it otherwise. The court's rejection of Martin suggests that such an argument may fail in South Carolina. The conclusion of this argument might be sound, but it would not comport with state law.

There are very good reasons for the present South Carolina rule as expressed in Bellamy. Basically requiring a defendant to prove self-defense by a preponderance of the evidence can be said to cause an unconstitutional shift of the state's burden of proof, because to prove self-defense is to negate the element of unlawfulness, a substantial element of the state's burden. Cf. Martin, 480 U.S. 228 (Powell, J., dissenting); Patterson, 432 U.S. 197 (Powell, J., dissenting); Mullaney, 421 U.S. 684.

185. See Thomas v. Leeke, 725 F.2d at 248 (manslaughter can be defined as "unlawful or felonious killing"). Murder is defined as killing with malice aforethought. "Malice is a word suggesting wickedness, hatred, and a determination to do what one knows to be
renders homicide justifiable, the result in *Bellamy* is consistent with the reasoning of *Winship*.

*B. Rush Smith, III*

IX. Issue of Ineffective Assistance of Counsel Not Waived at Postconviction Stage in Certain Circumstances

In *Carter v. State* the South Carolina Supreme Court held that unless it is shown that an applicant for postconviction relief is expressly informed of the dangers of being represented by trial counsel at the postconviction stage and that the applicant desires to proceed with the same representation, the issue of ineffective assistance of counsel is not waived and may be raised in a subsequent application.

During his 1982 murder trial, Eugene Carter, the defendant, chose not to testify. He was convicted and sentenced to life imprisonment. He did not appeal. In 1984, assisted by the same attorney he had retained at trial, Carter applied for postconviction relief. At the postconviction hearing, Carter argued that amnesia had prevented him from intelligently deciding whether to testify at trial. The court denied postconviction relief.

In 1986 Carter, claiming ineffective assistance of counsel for the first time, again applied for postconviction relief. Carter contended that his trial counsel had not informed him fully of his right to directly appeal his conviction. The state countered that the application should be barred as successive.

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wrong without just cause or excuse or legal provocation." *Id.* at 248. Thus, malice aforethought is a concept that embodies evil and unlawfulness.


187. Although it is uncommon for the same attorney to serve for both proceedings, it is "not unique." Brief of Respondent at 3.

188. 293 S.C. 528, 529, 362 S.E.2d 20, 21.


All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived
In a conditional order, the postconviction court rejected Carter's second application as successive. In his reply to the order, Carter maintained that he could not have raised the issue of ineffective assistance of counsel in the first application since his trial attorney also served as his counsel for the first postconviction relief application. Unpersuaded, the court issued a final order of dismissal, from which Carter appealed to the South Carolina Supreme Court.

The court first noted the well-settled policy against allowing successive applications for postconviction relief. To overcome this policy, "the applicant has the burden of showing that a new ground of relief could not have been raised in a previous application." Once this burden is met, the applicant is entitled to a hearing "despite the successiveness of the application."

in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Applications violative of this statute are "successive" and under Sup. Ct. R. 3, "are not to be entertained" unless the applicant can "establish that any new ground raised in a subsequent application could not have been raised by him in the previous application." The purpose of both the statute and the rule is to maintain the efficiency of postconviction procedure. Land v. State, 274 S.C. 243, 245, 262 S.E.2d 735, 737 (1980).

A conditional order is issued pursuant to S.C. CODE ANN. § 17-27-70(b) (Law. Co-op. 1976). This statutory scheme of court procedure for postconviction applications provides that "[w]hen a court is satisfied, on the basis of the application, the answer . . . and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed . . . or direct that the proceedings otherwise continue." Id.

Actually, this is neither theoretically nor practically impossible as Carter claims.


Again, the court's cited authority, Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982), is peculiar. Case is not illustrative of an applicant who proved that a new ground of relief could not have been previously raised. Indeed, the applicant in Case raised (pro se) the claim of ineffective assistance of counsel in both his first and second applications, both of which the lower court denied. The supreme court held that Case was entitled to a hearing based on "the unique combination of facts in this case," as well as Rogers v. State, 261 S.C. 288, 199 S.E.2d 761 (1973), and Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977) (applicants alleging ineffective
Despite its prefatory analysis, the court did not treat Carter's contention of ineffective assistance of counsel as "a new ground for relief [that] could not be raised in a previous application." Instead, the court isolated the issue to waiver, holding that "[w]hen an applicant is represented on post-conviction relief by his trial counsel, there is no waiver of the issue of ineffective assistance of counsel." The court further held that unless it is shown "that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred." Since the record did not reflect that Carter was cognizant of these hazards, the court decreed that he qualified for a hearing on the ineffectiveness issue.

The court promulgated a simple procedure designed to identify and cure possible ineffective assistance problems at the first postconviction hearing. When the applicant is represented by his trial counsel at the postconviction hearing, "the court shall advise the applicant that the dual representation will result in the waiver of any claim of ineffective assistance of counsel. The applicant shall then state on the record whether he wishes to proceed, thereby waiving the issue."

The result reached in Carter is desirable. A converse rule — that ineffectiveness claims are waived even when the applicant's postconviction counsel served as his trial counsel — would exacerbate ineffective assistance of counsel as a claim for such applicants. Moreover, if failure to advance a claim of ineffectiveness in the first application constituted a waiver when the applicant

assistance of counsel entitled to hearing unless allegations are conclusively refuted by trial record).

195. See supra note 193 and accompanying text.
196. 293 S.C. at 530, 362 S.E.2d at 21. The court relied on Commonwealth v. Via, 455 Pa. 373, 316 A.2d 895 (1974) (failure to raise claim of ineffectiveness of counsel does not constitute waiver where petitioner represented at first postconviction proceeding by trial counsel or one of his associates).
197. 293 S.C. at 530, 362 S.E.2d at 21.
198. Id. Presumably, if the applicant's first postconviction application is denied without a hearing when he was represented by his trial counsel, the Carter rule does not foreclose reapplication on the grounds of ineffectiveness of counsel.
199. Id., 362 S.E.2d at 22.
was represented by his trial counsel, such a rule would require the court to assume that counsel had apprised his client of his own ineffectiveness. The Carter rule is a rational response to these realities.

The court, however, ignored several tangential issues that could have been dispensed with in dicta. Neglected, they may fuel future litigation. First, the court did not provide a satisfactory definition of waiver. Carter simply directs the postconviction court to question the applicant concerning waiver and then to advise him that "the dual representation will result in the waiver of any claim of ineffective assistance of counsel." If, after being advised, the applicant states on the record that he desires to continue, he waives the issue.

This formula for waiver focuses on technical formalities of advise and consent that could quickly deteriorate into an empty convention. The test should center on what the applicant understands, not on when he is routinely and objectively advised. To that end, the court's questions should be "designed to elicit from the defendant a narrative statement of his understanding . . . [rather than] to elicit mere 'yes' or 'no' answers." Unfortunately, the Carter rule seems to employ the latter type of interrogation. Furthermore, the court should examine the defendant only after he has had a reasonable time to appreciate and contemplate the gravity of his situation. Implicit in the Carter rule is an automatic, almost reflexive response by the defendant; a reasonable time for the defendant to reflect would go far to ensure that a valid waiver was secured. Finally, the court should allow and encourage the defendant to discuss the issue

201. 293 S.C. at 530, 362 S.E.2d at 22.
202. Maryland, a jurisdiction that has also adopted the Uniform Post-Conviction Procedure Act, defined waiver in Wyche v. State, 53 Md. App. 403, 454 A.2d 378 (1983):

[T]he requirement of an "intelligent and knowing waiver" may be found to be satisfied when . . . [the] defendant had a basic understanding of the nature of the right which was relinquished or abandoned; and . . . the relinquishment or abandonment of that right was made or agreed to by defendant.

Id. at 408, 454 A.2d at 379.
203. States v. Curcio, 680 F.2d 881, 889 (2nd Cir. 1982). Although discussing waiver of right to conflict-free representation at trial, the principles of Curcio are sufficiently analogous to augment a waiver on Carter-type facts.
204. See id.
with independent counsel.\textsuperscript{205}

The second issue untouched by Carter is whether its rule would apply when the applicant's counsel for postconviction relief is not the same person as his trial attorney but is, for example, from the same law firm or public defender's office.\textsuperscript{206} Since such relative representation is probably common in the indigent-intensive postconviction area, this question must be addressed.

By holding that, absent advice and consent, if an applicant for postconviction relief is represented by the same counsel he retained at trial and if the applicant fails to claim ineffective assistance, he does not waive the issue, the court reached a sound result on an issue of first impression. Still, the court's narrow and restrictive guidelines for waiver may not go far enough to protect postconviction applicants.

\textit{David Garrison Hill}

X. Codefendant's Liability Predicated Upon Determining Identity of Vehicle Driver

In \textit{State v. Leonard}\textsuperscript{207} the South Carolina Supreme Court addressed the issue of codefendant liability for reckless driving that results in the death of another. The court granted Leonard's request that it review the court of appeals\textsuperscript{208} decision to affirm the conviction of petitioner Leonard and his codefendant Harris on charges of reckless homicide. The supreme court reversed and remanded the case. It held that when two persons are charged with reckless homicide arising out of the same accident, and it is unclear which person was driving the car at the time, the jury must be instructed to determine first which person was actually driving before the other can be convicted for aiding and abetting the driver.\textsuperscript{209}

Harris and Leonard had been drinking in various nightspots before they were involved in a head-on collision with another

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\item \textsuperscript{205} Id. at 890.
\item \textsuperscript{206} Commonwealth v. Via, 455 Pa. 373, 316 A.2d 895 (1974), which Carter relied on, held that the waiver rule applied when "during the first [postconviction] proceeding, appellant was assigned counsel who was a member of the same office that represented him at trial." \textit{Id.} at 377, 316 A.2d at 898.
\item \textsuperscript{207} 292 S.C. 133, 355 S.E.2d 270 (1987).
\item \textsuperscript{208} State v. Leonard, 287 S.C. 462, 339 S.E.2d 159 (Ct. App. 1986).
\item \textsuperscript{209} 292 S.C. at 136, 355 S.E.2d at 272.
\end{enumerate}
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automobile whose occupant was killed instantly. At trial there was conflicting evidence concerning who was driving at the time. Both defendants were indicted for reckless homicide. The trial judge read to the jury the reckless homicide statute and instructed the jury that the word “person” should be read to include the plural. He also read the statute codifying the doctrine of accomplice liability in vehicular crimes.

The court of appeals affirmed both convictions, discounting the defendants’ argument that the jury should have been instructed first to determine which defendant was driving before convicting the other. The defendants argued that the jury instructions as given could lead to convictions of both as principals without a finding that either was driving. The court of appeals, however, found ample evidence that whoever was driving was aware of the driver’s intoxicated state and would be liable as an aider and abettor in any event. The supreme court granted certiorari on the question of whether the trial judge erred in instructing the jury that both defendants could be found guilty of reckless homicide and reversed the conviction.

The court first reasoned that a vehicular crime, by its very nature, could have only one principal, as only one person could actually be driving the car at any one time. Any other convictions arising out of an incident would thus have to rest on accomplice liability and not liability as a coprincipal. Liability as an aider and abettor requires a different element of proof from that of a principal; it requires the principal’s criminal conduct. Therefore, the jury instructions should clearly delineate the different standards of proof involved for each defendant. The court stated that the instructions, as read, could have led the

210. S.C. CODE ANN. § 56-5-2910 (Law. Co-op. 1976) (“When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of reckless homicide . . .”).

211. Id. § 56-5-6120 (“It is unlawful for the owner or any other person employing or otherwise directing or the driver of any vehicle to require or knowingly to permit the operation of such vehicle upon a highway in any manner contrary to law.”).

212. 287 S.C. at 465, 339 S.E.2d at 160.

213. Id. at 468, 339 S.E.2d at 163.

214. Only defendant Leonard’s conviction was reversed since defendant Harris did not seek review in the supreme court. 292 S.C. at 135, 365 S.E.2d at 271.

215. Id. at 137, 365 S.E.2d at 272.

jury to believe they could convict both defendants in order to assure the conviction of the driver, an interpretation the court found unacceptable.\textsuperscript{217} The better solution involved instructing the jury first to determine the identity of the driver and then to decide if the passenger met the knowledge requirement necessary for conviction as an aider or abettor. Since the instructions actually given to the jury were confusing on this point, the court determined prejudicial error had occurred and remanded the case for a new trial.\textsuperscript{218}

The court's reasoning presents a new viewpoint on the state's approach to accomplice liability. In South Carolina someone who aids and abets in the commission of a crime is usually treated as a principal.\textsuperscript{219} This rule also has been applied in cases involving vehicular crimes.\textsuperscript{220} The supreme court, however, has now decided to carve out an exception to this principle for cases involving the accomplice liability of passengers when the identity of a driver is contested. Although the court retains the rule that a defendant may be convicted of aiding and abetting after indictment for the principal crime, this opinion sets out a specific method a jury must use in reaching such a result.

Other jurisdictions presented with analogous situations have approached the situation in various ways.\textsuperscript{221} Some have surpassed South Carolina's standards for conviction of a codefendant by requiring not only an identification of the driver but his conviction as well.\textsuperscript{222} Leonard referred to a North Carolina case, \textit{State v. Dutch},\textsuperscript{223} which involved the contested identity of the driver in a hit-and-run accident. Dutch held that aider and abettor liability was predicated upon a finding that the other defendant was the driver.

Since jury instructions in that case did not require this specific finding by the jury, the court held that until the State established beyond a reasonable doubt that the other person was

\textsuperscript{217} 292 S.C. at 137, 355 S.E.2d at 272.
\textsuperscript{218} Id. at 138, 355 S.E.2d at 273.
\textsuperscript{221} See, Annotation, \textit{Criminal Responsibility of One Other Than the Driver at Time of Accident, Under \textquoteleft Hit-and-Run\textquoteleft Statute}, 62 A.L.R.2d 1130 (1958).
\textsuperscript{222} See, e.g., People v. Hoaglin, 262 Mich. 162, 247 N.W. 141 (1933); State v. McFarland, 158 Wash. 652, 291 P. 719 (1930).
\textsuperscript{223} 246 N.C. 438, 98 S.E.2d 475 (1957).
the driver, there existed no basis to instruct the jury to find the defendant liable as an aider or abettor.\textsuperscript{224} South Carolina apparently views this reasoning as sound, suggesting a more thorough analysis of the issues involved than previously had been given in vehicular liability cases.

Although the court's reasoning is more detailed than in previous cases, \textit{Leonard}'s result seems problematic at first glance: it might appear that codefendants could escape liability altogether by each claiming that he was the passenger and the other was the driver. If the jury could not specifically find one to be the driver, and since such a finding must be made in order to impose accomplice liability, both defendants could walk free. This view, however, overlooks the realistic probability that a jury often will have some competent evidence as to whom was driving the car. Moreover, if a jury were aware that the principal and his accomplice both would be treated as a principal in terms of culpability, the jury members might be more willing to go through the formality of identifying the driver to ensure the conviction of the guilty parties. Such cases often involve persons on joint ventures acting in concert, and as long as enough evidence exists that both parties were taking part in the outing, identity of the actual driver may be immaterial.

Other situations, however, may produce no evidence as to the involvement of the alleged passenger, who might, for example, claim to have been asleep at the time of the accident. In this case, the jury's determination of the driver's identity would be crucial. The court's decision in \textit{Leonard} is directed toward these situations, for there would be a risk of convicting an innocent passenger as a coprincipal in order to ensure conviction of the driver. As a protection against abuse of due process, \textit{Leonard} will aid juries in protecting innocent guest passengers not involved in the commission of an offense, without impairing a

\textsuperscript{224} \textit{Id.} at 442, 98 S.E.2d at 478.
jury's ability to convict obviously guilty codefendants.

Andrew E. Thomas

XI. DOUBLE JEOPARDY CLAUSE PROTECTS AGAINST SECOND CONVICTION IF STATE RELIES ON PROOF OF SAME FACTS THAT FORMED BASIS OF A PRIOR CONVICTION

The double jeopardy clause of the fifth amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." The principle on which this provision of the Bill of Rights rests is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Traditionally courts have held the constitutional prohibition of double jeopardy to consist of three separate guarantees: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution after conviction. And it protects against multiple punishments for the same offense." In State v. Carter the South Carolina Supreme Court reaffirmed its recent adoption of a fourth guarantee: it protects against a second conviction if the state relies on proof of the same set of facts that formed the basis for an earlier prosecution.

225. U.S. Const. amend. V. Finding the double jeopardy prohibition to be "a fundamental ideal in our constitutional heritage," the Supreme Court has held the double jeopardy clause applicable to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969). The South Carolina Constitution also contains double jeopardy protection. See S.C. Const. art. I, § 12.


229. This interpretation of the double jeopardy clause was first announced in State v. Grampus, 288 S.C. 395, 397, 343 S.E.2d 26, 27 (1986) (conviction of improper use of lanes barred a subsequent conviction of felony DUI because the state relied on and proved the improper use of lanes as the "act forbidden by law," a necessary element of felony DUI).
On October 3, 1981, Carter was the driver of an automobile involved in a fatal accident. Because of the circumstances surrounding the crash, Carter was charged with driving under the influence (DUI) and reckless homicide. First, the municipal court tried and convicted him of DUI. Before his trial in circuit court on the reckless homicide charge, Carter moved to dismiss on the ground of double jeopardy. The circuit court denied the motion and subsequently convicted him. Carter appealed the second conviction.

To obtain a conviction for reckless homicide, the state must prove two elements: (1) the defendant was operating a vehicle with reckless disregard for the safety of others and (2) the defendant's reckless driving proximately caused the death of another. At Carter's reckless homicide trial, "the state relied on and proved the same facts of the adjudicated DUI offense to establish the reckless act necessary to prove reckless homicide." Thus, Carter contended that the second trial had put him twice in jeopardy.

The supreme court agreed. The court's analysis began by recognizing that the principal test for determining if two offenses are the "same" for double jeopardy purposes, known as the Blockburger test, is whether each offense requires proof of a fact that the other does not. If the offenses are not the "same" under the Blockburger test, then the second prosecution is not barred. Applying the Blockburger test to Carter's case, the court found it "undisputed" that DUI and reckless homicide are not the "same" offense. Relying on the analysis it had

231. Id. § 56-5-2910.
232. Id. The resulting death must have occurred within one year of the accident.
233. 291 S.C. at 389, 363 S.E.2d at 876-77.
234. In Blockburger v. United States, 284 U.S. 299 (1932), the Court stated that "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." 284 U.S. at 304 (citing Gaviere v. United States, 220 U.S. 338, 342 (1911)). Thus, even though the Blockburger Court was not its formulator, this "test" has come to be universally referred to as the Blockburger test. See, e.g., Illinois v. Vitale, 447 U.S. 410, 416 (1980); Brown v. Ohio, 432 U.S. 161, 168 (1977); Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975).
235. 291 S.C. at 387, 363 S.E.2d at 875-76; see also Vitale, 447 U.S. at 416.
237. 291 S.C. at 387, 363 S.E.2d at 876.
adopted in State v. Grampus, the court nevertheless concluded that in establishing the reckless act, a necessary element of reckless homicide, the state had violated Carter's constitutional right to be free from double jeopardy. The court focused on the state's reliance and proof of the fact that Carter was driving under the influence, an act for which he had been previously prosecuted. Accordingly, the court set aside the reckless homicide conviction.

By its decisions in Grampus and Carter, the South Carolina Supreme Court has embraced a suggestion found in dicta in Illinois v. Vitale. In Vitale the United States Supreme Court faced facts almost identical to those that confronted the South Carolina Supreme Court in Grampus and Carter. Vitale was before the Court on appeal from a denial of his motion to dismiss an involuntary manslaughter charge resulting from his involvement in a fatal automobile accident. Vitale previously had been convicted of failure to slow to avoid an accident. Applying the Blockburger test, the Supreme Court rejected Vitale's double jeopardy argument because involuntary manslaughter and failure to slow to avoid an accident were not the "same." Thus, prosecution of the manslaughter charge would not be barred. The court, however, would bar a conviction if the state found it necessary to rely on the facts surrounding the failure to slow conviction to prove its manslaughter case.

The result reached in Grampus and Carter is correct. It reflects the Supreme Court's admonishment that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." Furthermore, it provides a remedy in some cases in which the Blockburger test fails to render full constitutional protection.

239. 447 U.S. at 421 ("[I]f in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident [for which Vitale has already been convicted] as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy . . . ").
240. Id. at 419.
242. The doctrine of double jeopardy protects defendants (1) against multiple punishments for the same offense and (2) against multiple prosecutions for the same offense. See Brown v. Ohio, 432 U.S. 161, 165 (1977); North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Blockburger v. United States, 284 U.S. 299 (1932), involved the first of these two
The remedy provided by the Grampus and Carter reasoning, however, is inadequate. The defendants were prosecuted twice for the same offense. In each case, the conviction rendered in the second trial was set aside; nevertheless, as a consequence of a single accident, both defendants underwent the "embarrassment, expense and ordeal" of standing trial twice.

In order to give the fifth amendment full effect, pretrial motions to dismiss on the ground of double jeopardy, like the ones made by Vitale and Carter, should be granted unless the state can make an adequate showing that it is relying on conduct other than that for which the defendant was previously tried. The Blockburger test should not be rigidly applied in all double jeopardy cases. Courts should recognize the shortcomings of such an approach by limiting its usage to multiple sentencing cases.243 A transactional test is better suited to protect against multiple prosecutions.244

Robert Wilson, III

XII. ADMISSIBILITY OF EVIDENCE IN CRIMINAL CASES OVERTURNEO ONLY IF COURT FINDS ABUSE OF DISCRETION AND PREJUDICE

In State v. Spodnick245 the Supreme Court of South Caro-

 protections. Accordingly, the Blockburger test functions to afford defendants adequate relief from multiple punishments. On the other hand, because it was not designed to protect against multiple prosecutions, the test fails to consistently provide adequate protection against such constitutional encroachments. See, e.g., State v. Norton, 286 S.C. 95, 332 S.E.2d 531 (1985) (Norton, charged with first degree criminal sexual conduct with a minor, was acquitted at his first trial. After the acquittal, Norton was reindicted and convicted for committing a lewd act on a minor. The second indictment was based on the same facts as the first.). It does not necessarily follow that the test for determining whether two offenses are the "same" for multiple punishment purposes should be used to determine whether the offense for which the defendant was previously tried is the "same" as the offense of which he is now accused. This distinction is perhaps best illustrated by examining the different meanings of the word "offense." An "offense" is defined as "a breach of moral or social conduct; ... a crime." WEBSTER'S NEW INT'L DICTIONARY 1690 (2d ed. 1936). A convict should be punished only once for a single crime. An accused should be tried only once for the same breach of social conduct. The Blockburger test is designed to accomplish the former; a transactional test would better ensure the latter.

243. See supra note 242.
olina affirmed a trial court's admission of a human bone fragment as evidence in the murder trial of Anthony Spodnick. Spodnick argued that the bone was unfairly prejudicial in light of his counsel's stipulations. The court, however, rejected this argument and held that admission of the bone was not a prejudicial error.246

The controversy in the case arose when policemen were searching a farm for a dead body. The police found a piece of human bone before locating the rest of the victim's body.247 During the trial, the State introduced the bone fragment in conjunction with the police officer's testimony of the search. The trial judge admitted the evidence over the defendant's objections. The jury convicted Spodnick of murdering the victim, Thomas Boulware. Spodnick asserted that the admission was erroneous because the bone was offered only to show the location of the victim's body, an issue to which Spodnick's counsel stipulated.248 He argued that the bone lacked probative value and any prejudice derived from its admission warranted exclusion.249

The supreme court affirmed the admission. The only discussion offered by the court, however, was its reliance on two well-established principles: a trial judge's decision to admit evidence in a criminal case will not be disturbed absent of discretion, and a conviction will not be overturned absent a prejudicial error.250

In dissent, Justice Finney implied that the majority's decision overrules Harper v. Bolton,251 a civil case. In Harper the

246. Id. at 69, 354 S.E.2d at 905.
247. Record at 41.
248. Spodnick's counsel stated:
   Your Honor, if I might note for the record, I think the prejudicial aspect of
   [the bone] bars what is any probative value. We stipulate that the bone found
   was a human bone; we stipulate that there was some flesh on it. We stipulate
   as to where it was. The only reason to introduce this item is to inflame the
   passion of the jury. It has no evidentiary value. We would stipulate to basically
   anything the Solicitor wants, rather than putting a piece of bone into the evi-
   dence, Your Honor.
   Record at 41-42.

249. Brief of Appellant at 21.
   352, 322 S.E.2d 663 (1984), in support of the proposition that the admission of evidence is
   within the trial judge's discretion and State v. Knight, 258 S.C. 452, 189 S.E.2d 1
   (1972), for the rule that a conviction will not be reversed for nonprejudicial error in the
   admission of evidence.

251. 239 S.C. 541, 124 S.E.2d 54 (1962). South Carolina courts have not addressed
supreme court held that the plaintiff’s eye, which had been removed after an automobile collision, should not have been admitted when the defense stipulated to the loss of the eye.252 Finney agreed with the defense that Harper controlled Spodnick’s case. He felt the bone was not offered to resolve a disputed issue of material fact.253

Despite Finney’s dissent, State v. Spodnick does not stand for the proposition that evidence not offered to resolve a disputed issue of material fact is always admissible. Instead, the decision illustrates the discretion afforded a trial judge in weighing the probative value of evidence against its prejudicial impact.254 The supreme court felt the judge’s determination that the probative value of the bone was not outweighed by its potential prejudice did not constitute an abuse of discretion.

The stipulations made by Spodnick’s counsel undeniably reduced the probative value of the bone.255 Decisions from other the admission of the victim’s body parts in a criminal context. Other jurisdictions, particularly Georgia, however, have discussed the issue. For example, in Hance v. State, 254 Ga. 575, 332 S.E.2d 287 (1985), cert. denied, 474 U.S. 1038 (1985), reh’g denied, 475 U.S. 1040 (1986), the admission of the victim’s bones and teeth was upheld because they illustrated the force of the murder, an aggravating circumstance under the Georgia death penalty statute. Further, in Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978), pieces of human flesh and bones were admitted to connect circumstentially the parts with the rest of the victim’s body. Finally, in Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978), rev’d on other grounds, 442 U.S. 95 (1978), pieces of flesh, bone, and teeth were admitted as relevant to show the causal relation between defendant’s rifle, the bullets, and the victim’s injuries. These decisions suggest body parts can be introduced only to resolve disputed issues of material fact.

252. For a comparison of the stipulations made by Spodnick’s attorney, see supra note 248.

253. A dispute did exist as to whether the bone was, in fact, Boulware’s. The State, however, did not use a pathologist to make this connection. Instead, it chose to connect circumstentially the bone, Boulware’s body, and Spodnick. Brief of Appellant at 22.

254. The balancing test used by the judge is set forth in Rule 403 of the Federal Rules of Evidence. Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403. The federal rules have not been adopted explicitly as a body in South Carolina. The test of Rule 403, however, is a standard touchstone for determining the admissibility of evidence in a criminal case. See, e.g., State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986).

255. See, e.g., Harper v. Bolton, 239 S.C. 541, 124 S.E.2d 54 (1962). See also State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986)(autopsy photographs of a rape and murder victim were erroneously admitted because after defense’s stipulations to any relevant information contained in the pictures, the prejudice clearly outweighed any evidentiary
jurisdictions, however, indicate evidence offered solely to corroborate actual testimony has some probative value notwithstanding stipulations. The trial judge seemed to have adopted this approach in admitting the evidence. The state offered the bone to corroborate the policemen’s testimony of the search. That testimony was designed to connect Spodnick circumstantially to the murder. The trial judge, therefore, apparently determined that the bone had probative value, albeit limited by the defense’s stipulations.

The admission of a piece of human bone was potentially prejudicial. The supreme court previously has held, however, that evidence offered in corroboration of testimony that “portrayed a heinous crime” was no more than “harmless surplusage.” During Spodnick’s trial, the nature and circumstances of the murder were described in detail. The trial judge must have felt that in the context of the entire trial the admission did not trigger a great deal of additional emotional reaction, at least not enough to outweigh its probative value. Further, the supreme court apparently felt this decision did not amount to an

value). The introduction of photographs of a victim’s body in a criminal case provides a useful analogy to the use of body parts. South Carolina case law on this issue indicates that photographs are generally admissible when geared toward disputed issues of material facts. Further, they should not be excluded solely on the ground that they are inflammatory and corroborative. State v. Robinson, 201 S.C. 230, 22 S.E.2d 587 (1942).

256. In Georgia, photographs used to corroborate testimony were held to have probative value when the defendant stipulated everything the photographs would show. Perkins v. State, 152 Ga. App. 101, 262 S.E.2d 158 (1979)(corroboratory testimony that victim had a gun). In North Carolina, the victim’s clothing, which indicated the entry point of the bullets, was admitted despite defendant’s stipulations as to the cause of death. State v. Elkerson, 304 N.C. 658, 285 S.E.2d 784 (1982)(corroborative evidence enhanced force of testimony).

257. Brief of Respondent at 11.


259. The prejudicial impact of the bone seems to be enhanced by the fact that the trial judge remarked that this was “the closest case on circumstantial [evidence] in a major case that I have had.” Record at 106. The majority decision, however, does not address this factor.


261. Testimony indicated Boulware died from stab wounds and blows to his head inflicted by a knife and a baseball bat. Moreover, the murderer severed Boulware’s head and hands from his dead body. Record at 41, 58, 69, 86-94.

262. Brief of Respondent at 12.
abuse of discretion.

*State v. Spodnick* affirms the discretion afforded a trial judge in balancing the probative value and the prejudicial impact of admitting evidence. Practitioners should take note of the supreme court's apparent willingness to review prejudicial impact in the context of the entire trial.

*A. Marvin Quattlebaum, Jr.*

XIII. **Balancing Test Used to Determine the Admissibility of Prior Acts**

In *State v. Johnson* the Supreme Court of South Carolina found that a balancing test approach was proper to determine the admissibility of prior acts as evidence. In doing so, the court reversed a criminal conviction, emphasizing the underlying importance of preventing jury bias. The *Johnson* court also set forth the substance of jury instructions that are to be given in the sentencing phase of a capital case. The court held that any deviance from those instructions could result in the reversal of a criminal conviction.

In September 1985 the appellant, Richard Johnson, had been hitchhiking and was picked up by Dan Swanson. Swanson, who was traveling to Florida, picked up two additional hitchhikers on the following day. It was on that day, while Swanson was resting, that Johnson shot and killed him. Johnson stuffed Swanson's body under a mattress and proceeded on his southbound journey.

Hours later, Trooper Bruce K. Smalls was notified of Johnson's erratic vehicle operation, which was allegedly due to heavy consumption of alcohol. After stopping the vehicle in order to survey that situation, Smalls was killed. A Jasper County jury, finding that Johnson had fatally fired upon Trooper Smalls six times at close range, convicted him of murder. Johnson was sentenced to death.

263. South Carolina's adherence to the rule granting the trial judge such discretion is a majority view. Professor McCormick noted that virtually all jurisdictions follow this approach. *McCormick on Evidence* § 215 (E. Cleary 3d. ed. 1984). Further, it should again be noted that Rule 403 of the Federal Rules of Evidence has not been adopted in South Carolina. See supra note 254.

On appeal Johnson claimed several grounds of error, the first of which concerned the solicitor's comments made during the guilt phase of the trial. Johnson claimed that he was denied due process of law when the solicitor argued to the jury that Johnson had shown no remorse for his actions.265

Similar issues were presented in State v. Sloan266 and State v. Brown.267 In both of these cases the Supreme Court of South Carolina found that the solicitor's comments as to the defendant's failure to show remorse for his conduct constituted gross or flagrant error.

The court's opinion emphasized the underlying concept that a criminal defendant possesses a fundamental right to plead not guilty, putting the burden of proof upon the state.268 Therefore, any argument that favors punishment and is based upon an assertion of that right is prohibited.269

Clearly, if Johnson had offered his apologies and remorse for Trooper Small's death, he would have been defeating his constitutional right to plead not guilty. Simply stated, "[i]t would be highly inconsistent for [Johnson] to present a defense, and, at the same time, say I'm sorry for something I did not do."270 The court relied upon this logic to support its ruling that the solicitor's comments constituted reversible error.271

Johnson alleged as his second ground of error that improper jury instructions amounted to a denial of his due process rights.

265. The solicitor made the following argument to the jury:
After [Johnson] heard his statement and after he told Ms. Burr that he had blown Swanson's head off and he got on the stand, did he ever say he was sorry? Did y'all hear him apologize? Did he tell Swanson, I'm sorry if I killed your husband? I beg your pardon forgive me. I've asked my God to forgive me

266. 278 S.C. 435, 298 S.E.2d 92 (1982).
268. See id. at 590, 347 S.E.2d at 887; Sloan 278 S.C. at 440, 298 S.E.2d at 95. See also Griffin v. California, 380 U.S. 609 (1965).
269. See 289 S.C. at 590, 347 S.E.2d at 887 (citing Doyle v. Ohio, 426 U.S. 610 (1976)).
270. Brief of Appellant at 7.
271. Arguably the error in this case was even more harmful than in Brown or Sloan because the solicitor not only referred to Johnson's lack of remorse as to Small's murder, but he also stated that Johnson should have said that he was sorry for murdering Swanson, an incident for which Johnson was not on trial.
Johnson contended on appeal that the trial judge did not strictly adhere to the instructions regarding capital sentencing, as set forth in *State v. Norris*[^272] and *State v. Plath.*[^273]

In *Plath* the court noted that "[i]n the sentencing phase of a capital case, the jury shall understand the terms 'life imprisonment' and 'death sentence' in their ordinary and plain meaning without elaboration."[^274] The *Norris* court wholeheartedly supported the method of instruction set forth in *Plath.* *Norris* broadened that notion by adding the requirement that the jury should be informed that they are not to consider parole eligibility in reaching its decision. The result is a clear rule of jury instruction to be followed strictly in capital sentencing cases.

The significance of the instant case is that this decision indicates that this "*Norris-Plath*" test is to be rigidly applied.[^275] The *Johnson* court required both parts of the test to be met. Therefore, in a capital sentencing proceeding, the trial judge is to direct the jury (1) not to consider parole eligibility and (2) to understand "life imprisonment" and "death sentence" in their ordinary and plain meaning.[^276] As indicated by the court's response in *Johnson,* deviations from the instructions set forth by this rule simply will not be permitted.

Finally, *Johnson* urged a reversal of his death sentence on the ground that the introduction of detailed evidence[^277] of his past crimes was highly prejudicial and irrelevant. In accordance with the defendant's argument, the court immediately labeled certain items of evidence as irrelevant, holding that they should not have been admitted.[^278] The court, however, was not quick to

[^274]: 281 S.C. at 14, 313 S.E.2d at 627.
[^275]: This proposition is evidenced by the court's unwillingness to hold the instructions in the instant case to be sufficient, even though the judge did fully instruct the jury not to consider parole eligibility in its deliberations.
[^276]: 293 S.C. at 327, 360 S.E.2d at 321.
[^277]: At trial, the State introduced evidence of grand larceny, armed robbery, and Swanson's murder, all allegedly committed by Johnson. Id. at 325, 360 S.E.2d at 319-20.
[^278]: The court immediately dispensed with any argument that evidence of prior acts, such as (1) photographs of Swanson's body or (2) the testimony of a pathologist (as to the etiology of Swanson's wounds) should be admitted. Id. at 325, 360 S.E.2d at 320. The court held, "Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged." 293 S.C. at 324, 360 S.E.2d at 319, (emphasis added) (citing United States v. Johnson, 610 F.2d 194 (4th Cir. 1979); State v. Byers, 277 S.C. 176, 284 S.E.2d 360 (1980); State v. Lyle, 125 S.C. 406, 118 S.E. 803
find evidence of details surrounding the relevant prior-acts evidence to be inadmissible. In its examination of such evidence, the court adhered to the test set forth in *State v. Wilson.*

That is, when the admissibility of prior-acts evidence is at issue, the court must "determine whether the prejudicial effect of the evidence outweighed its probative value, which could result in a jury reaching a 'legally spurious presumption of guilt.'"

The court found the volume of the testimony regarding Johnson's past crimes to be overwhelming, thus resulting in jury bias. Therefore, it ruled that the admission of "extensive evidence in detail of appellant's prior criminal conduct" constituted reversible error. The court used a "totality of the circumstances" approach and looked to "the entire record" in reaching its decision, providing some guidance to trial judges with regard to prior-acts evidence. On the other hand, the "test" used, due to its inherent balancing nature, fails to provide a "bright line" boundary. Thus, much of the admissibility decision is still left to the trial judge's discretion.

For example, the court noted that it did not wish to put "impractical constraints" on the introduction of evidence in the retrial of the case. It did not explicitly set forth which evidence pertaining to the prior acts would be admissible and which would not. Rather, the court intimated that such factors as "probative value, potential prejudice, and the availability of alternate forms of evidence" should guide the trial judge in his determination of admissibility. The value of *Johnson* as an

(1923)).

279. Such evidence included: Johnson's prior statement as to Swanson's murder, Deanna Swanson's identification of items taken in the robbery, and Hess' and Harbert's (the two traveling companions) testimony as to Swanson's murder, the robbery, and the larceny. *Johnson,* 293 S.C. at 325-26, 360 S.E.2d at 320-21.


282. *Id.* at 326, 360 S.E.2d at 320.

283. *Id.*

284. *Id.*

285. The court looked beyond the scope of the evidence itself. In reaching its decision as to the admissibility of the prior-acts evidence, the court also considered factors such as "the solicitor's numerous references to appellant's prior crimes in closing argument." *Id.*

286. *Id.* at 326 n.2, 360 S.E.2d at 320 n.2.

287. *Id.* (citing G. Lilly, *An Introduction to the Law of Evidence* 131 (1978)).
indication of how trial judges are to deal with prior-acts evidence appears minimal at best.

Overall, the prejudice created by these three grounds of error resulted in a denial of Johnson’s due process rights and his right to a fair trial. The case has been remanded to the trial court, where some of the problems raised should be addressed.

Jeanne M. Nystrom

XIV. Scope of the Criminal Process Narrowed in South Carolina

In State v. Drayton288 the South Carolina Supreme Court created new standards of criminal process. Affirming Drayton’s murder conviction and capital sentence,289 the court held: 1) that the trial judge did not err in his opening remarks by cautioning the jury venire not to be prejudiced by the defendant’s failure to testify; 2) that the trial judge properly admitted the defendant’s incriminating statements, although before the statements were given, representatives from the Public Defender’s Office attempted to contact the defendant; and 3) that the trial judge properly refused to charge the jury, as a mitigating circumstance of the crime, that the defendant drank alcohol on the night of the murder.290

The defendant entered the victim’s place of employment, a convenience store, armed with a .347 magnum pistol. He abducted the victim and took her to a secluded area where he fatally shot her in the head. The original trial jury convicted Drayton and sentenced him to death.291 The supreme court found reversible error and ordered a new trial, from which this case resulted.

289. On appeal the defendant raised eight exceptions. This article addresses three of those exceptions. The court also held: 1) the trial judge properly excused two jurors for cause because of their opposition to the death penalty; 2) the trial judge properly qualified two jurors who had prior knowledge of the facts of the case; 3) the trial judge properly ruled that an in-court identification of the defendant was admissible; 4) the trial judge properly refused to charge robbery as a lesser included offense of armed robbery; and 5) the trial judge properly allowed the solicitor to refer the defendant’s parole violations. 293 S.C. at 421-22, 361 S.E.2d at 332.
290. Id. at 422-30, 361 S.E.2d at 333-36.
The court held that the trial judge’s opening remarks292 constituted no reversible error.293 The court distinguished two earlier South Carolina cases294 which held that similar remarks warranted a new trial. The court reasoned that the statement in Drayton was permissible because it “was not addressed to the defendant as to the effect of his failure to testify nor was it a charge as to defendant’s accomplished failure to testify.”295

The United States Supreme Court held in Griffin v. California296 that certain remarks297 by a trial judge on the defendant’s failure to testify constitute reversible error.298 In Drayton the South Carolina Supreme Court declined to extend to a criminal defendant protection from any comment of a trial judge on the defendant’s failure to testify. Oddly, neither party cited Lakeside v. Oregon.299 In Lakeside the trial judge charged the jury, over the defendant’s objection, not to consider the defendant’s failure to testify in determining his guilt or innocence. The

292. The trial judge cautioned the jury venire in the following manner:

[I]t’s not up to you to seek out the reasons why a person doesn’t testify. You are to follow the constitutional mandate, and keep that in mind because it is often difficult to control feelings that, “Well if it was me and I was accused, you couldn’t keep me off the witness stand. I’d be testifying.” A lot of times people say, “Well, where there’s smoke there’s fire.” You hear these things everyday.

Now while you are free to exercise those feelings as a citizen, when you come as a juror and are seated in this jury box, you’ve got a higher duty and a responsibility, and you’ve got to follow these principles of law that I give you. 293 S.C. at 423, 361 S.E.2d at 333.

293. The court, however, noted that “the remarks here were imprudent and we caution that such comments to jurors should be avoided in the future.” Id. at 424, 361 S.E.2d at 333.

294. The court cited State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986) (death penalty case in which trial judge warned defendant that the jury would hold his failure to testify against him) and State v. Gunter, 286 S.C. 556, 558, 335 S.E.2d 542, 543 (1985)(voluntary manslaughter case in which trial judge told the defendant that “[i]f you do not testify, you know that your fellow is going to hold it against you”).

295. 293 S.C. 424, 361 S.E.2d at 333 (emphasis in original).


297. The trial judge charged the jury that if the defendant “fails to deny or explain . . . evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence.” Id. at 610.


United States Supreme Court held that "it does not follow that the cautionary instruction in these circumstances violates the privilege against compulsory self-incrimination."

The Drayton court also held that the trial judge properly admitted the defendant's confession, although the defendant was not informed that representatives from the Public Defender's Office tried to contact him. On the morning Drayton was arrested, an officer advised him of his Miranda rights, and he invoked the right to remain silent. During the morning, the representatives tried to reach Drayton to inquire if he needed their services. After a bond hearing later that day, Drayton signed a written waiver-of-rights form and gave a written statement incriminating himself.

To reach its conclusion, the court followed Moran v. Burbine in which the Supreme Court held that "the refusal of police to inform an accused that an attorney was attempting to reach him did not present a federal constitutional claim." The defendant argued that Moran "merely permits such conduct and urged the court to adopt the "New York rule" as a matter of state law. The court rejected this motion and declined to expand the rights of defendants in the attorney-client area.

This holding places South Carolina in the minority of jurisdictions. Prior to the Supreme Court's ruling in Moran, numerous state courts created a conclusive presumption that a waiver was not valid if an attorney attempted to assist a suspect and the police denied the suspect knowledge of this fact. One

300. Id. at 340.
301. 293 S.C. at 426, 361 S.E.2d at 334.
303. 293 S.C. at 426, 361 S.E.2d at 334.
304. Brief of Appellant at 18.
305. The rule provides:
   [Q]uite apart from the Due Process Clause of the Fourteenth Amendment, this State's constitutional and statutory provisions pertaining to the privilege against self incrimination and the right to counsel, not to mention our own guarantee of due process, require the exclusion of a confession taken from a defendant, during a period of detention, after his attorney had requested and been denied access to him.
307. See Weber v. State, 457 A.2d 674 (Del. Super. Ct. 1983); People v. Smith, 93 Ill.____________
jurisdiction expressly rejected the Moran opinion.308 Moran is also contrary to the American Bar Association’s Standards for Criminal Justice309 and has been sharply criticized.310 Thus, the Drayton court significantly narrowed the scope of a defendant’s rights under South Carolina law.

The court further held that the trial judge properly refused to charge the jury pursuant to section 16-3-20 of the South Carolina Code311 as a mitigating circumstance of the crime that the defendant drank alcohol. According to Drayton’s statement, he consumed liquor and beer for approximately three and a half hours prior to arriving at the convenience store. Drayton also stated that while at the store he drank several sixteen-ounce beers.312

Before reaching its conclusion, the court first acknowledged State v. Pierce,313 a death penalty case in which the South Carolina Supreme Court held that a trial judge’s failure to charge

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308. In People v. Houston, 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986), the California Supreme Court held: “We find ourselves unpersuaded by the majority opinion in Burbine,” and adopted the New York Rule. Id. at 610, 724 P.2d at 1174, 230 Cal. Rptr. at 149.

309. “At the earliest opportunity, a person in custody should be effectively placed in communication with a lawyer.” ABA Standards for Criminal Justice, standard 5-7.1 (2d ed. 1982). The ABA also filed a brief as amicus curiae in Moran urging that if police can prevent communication between a lawyer and a suspect, “an important right to legal representation will be lost.” See Ellis v. Dyson, 421 U.S. 426, 441 n.14 (1976) (Powell, J., dissenting).

310. See, e.g., Note, supra note 306.

311. S.C. CODE ANN. § 16-3-20 (Law. Co-op. Supp. 1987). Section 16-3-20(C) requires a trial judge to include in his instruction any mitigating circumstances which may be supported by evidence. Subsections (C)(b)(2), (6), and (7) provide as mitigating circumstances:

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance; . . .

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age or mentality of the defendant at the time of the crime.

Id.

312. 293 S.C. at 430, 361 S.E.2d at 338.

313. 299 S.C. 450, 346 S.E.2d 707 (1986) (record showed that defendant consumed alcohol and used marijuana and intravenous drugs).
voluntary intoxication as a mitigating circumstance constituted reversible error.\textsuperscript{314} The court distinguished this case by noting that although evidence showed Drayton consumed alcohol, no evidence showed that Drayton was intoxicated when the crime was committed.\textsuperscript{315} The court declined to address the defendant’s argument that once evidence of a mitigating circumstance is proffered, “the trial court is not concerned with the weight of the evidence but rather only with the existence of evidence.”\textsuperscript{316}

The Supreme Court in \textit{Lockett v. Ohio}\textsuperscript{317} established the requirements for state capital punishment statutes. The Court concluded that the Constitution requires “that the sentencer ... not be precluded from considering, as a \textit{mitigating factor}, ... any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”\textsuperscript{318} In \textit{Eddings v. Oklahoma}\textsuperscript{319} the Supreme Court held: “The sentencer ... may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.”\textsuperscript{320}

At least three other state courts\textsuperscript{321} interpreted their capital

\begin{itemize}
\item \textsuperscript{314} Id. at 435, 346 S.E.2d at 710-11.
\item \textsuperscript{315} 293 S.C. at 430, 361 S.E.2d at 336.
\item \textsuperscript{316} Brief of Appellant at 38. \textit{See also} State v. Butler, 277 S.C. 452, 290 S.E.2d 1 (1982), \textit{cert. denied}, 459 U.S. 932 (1982) (court held in death penalty case that trial court is only concerned with the existence of evidence of an aggravating circumstance of rape and not its weight).
\item \textsuperscript{317} 438 U.S. 586 (1978).
\item \textsuperscript{318} Id. at 604 (emphasis in original).
\item \textsuperscript{319} 455 U.S. 104 (1982). In this case, the Supreme Court reversed the holding of the Oklahoma court in \textit{Eddings v. State}, 616 P.2d 1159 (Okla. 1980). The Oklahoma court held a trial judge properly refused to charge the defendant's troubled youth as a mitigating circumstance because “all the evidence tends to show that he knew the difference between right and wrong.” \textit{Id.} at 1170.
\item \textsuperscript{320} 445 U.S. at 114-15.
\item \textsuperscript{321} The Georgia Supreme Court held that “[t]he trial court should exercise a broad discretion in allowing \textit{any} evidence reasonably tending toward mitigation.” \textit{Brooks v. State}, 244 Ga. 574, 584, 261 S.E.2d 379, 387 (1979) (emphasis in original), \textit{vacated in part}, 446 U.S. 961 (1980). In \textit{Alvord v. State}, 322 So. 2d 535 (Fla. 1975), \textit{cert. denied}, 428 U.S. 923 (1976), the Florida Supreme Court held that “[t]here should not be a narrow application or interpretation of the rules of evidence in the \textit{death} penalty hearing, whether in regard to relevance or to any other matter.” \textit{Id.} at 539. Texas courts interpret that state's death penalty statute “as allowing this trial judge broad discretion in admitting evidence but requiring greater restraint in the exclusion of evidence.” \textit{Note, State v. Huffstetler: Denying Mitigating Instructions in Capital Cases on Grounds of Relevancy}, 63 N.C.L. Rev. 1122, 1133 (1985). For cases that have interpreted the Texas state broadly, see \textit{Sanne v. State}, 609 S.W.2d 762 (Tex. Crim. App. 1980), \textit{cert. denied}, 452
\end{itemize}
punishment statutes "as creating a permissive standard of ad-
missibility when considering mitigating evidence." This per-
missive standard is based on the premise that the harm of ex-
cluding mitigating evidence outweighs the harm of the time con-
sumed in the presentation of evidence. The North Carolina
Supreme Court, however, recently has narrowed the interpreta-
tion of that state's capital punishment statute. That court's
approach has been criticized sharply because when a jury weighs
aggravating and mitigating circumstances, any evidence has the
potential to influence the jury "that the death penalty is not ap-
propriate for [a particular] defendant ... when all the evidence
is considered." Thus, the Drayton court also significantly nar-
rowed a defendant's rights in the critical area of capital
punishment.

The Drayton court narrowed the scope of criminal process
in the areas of the right against self-incrimination, police inter-
ference in the attorney-client relationship, and the interpreta-
tion of South Carolina's capital punishment statute. Taken in
the confines of this case, the holding may not seem to have a
broad effect. Taken to its extremes, however, the holding may
significantly change defendants' rights in South Carolina

James F. Rogers

XV. EXPERT OPINION OF A CONVICTED CRIMINAL'S FUTURE
ADAPTABLE TO PRISON LIFE ADMISSIBLE AS EVIDENCE IN
SENTENCING PHASE OF CAPITAL PUNISHMENT TRIAL

In two recent cases the South Carolina Supreme Court ad-
dressed the issue of whether expert opinion of a convicted crim-
nal's future adaptability to prison life must be admitted into ev-
idence in the sentencing phase of a capital punishment trial. In
State v. Patterson and State v. Riddle the court held that

322. Note, supra note 321, at 1131.
323. Id.
judge properly refused to charge the defendant's confession as a mitigating cir-
325. Note, supra note 321, at 1131 (emphasis in original).
this testimony must be admitted as mitigating evidence for the
jury's determination of whether to recommend life imprison-
ment or the death penalty.\textsuperscript{328} In so doing, the court brought
South Carolina into line with the clear majority of states whose
courts have considered this issue.\textsuperscript{329}

In \textit{Patterson} the jury convicted the defendant of murder,
armed robbery, and assault and battery of a high and aggravated
nature.\textsuperscript{330} Raymond Patterson then was sentenced to death for
the murder. During the sentencing phase of the trial, the defense
offered a clinical psychologist's testimony as to the defendant's
future adaptability to prison life. The supreme court held the
trial court's rejection\textsuperscript{331} to be a reversible error under the re-
cently decided \textit{Skipper v. South Carolina}\textsuperscript{332} and overturned the
death sentence.

Until \textit{Patterson}, South Carolina trial courts had discretion
to exclude evidence of future adaptability evidence as irrelevant.
In \textit{Skipper}, however, the United States Supreme Court reversed
an earlier South Carolina death sentence on this identical issue.
In a unanimous decision, the Court held that the exclusion viol-
ated the eighth amendment cruel and unusual punishments
clause.

\begin{enumerate}
\item \textsuperscript{328} The South Carolina Death Penalty Act, S.C. CODE ANN. §§ 16-3-20 to -28 (Law.
Co-op. Supp. 1987), provides for a bifurcated trial in capital cases. The first phase deter-
mines innocence or guilt, and in the event of a conviction, the sentencing phase follows.
\item \textsuperscript{329} See infra note 353 and accompanying text.
\item \textsuperscript{330} Raymond Patterson approached Mrs. Matthew Brooks in a motel parking lot
near Irmo, S.C. and demanded her purse. In the ensuing struggle, Patterson threw her to
the ground. When her husband intervened, Patterson fatally shot him with a stolen pis-
tol. 290 S.C. at 524-25, 351 S.E.2d at 854.
\item \textsuperscript{331} The judge never specifically gave the basis for this exclusion. At the close of the
guilt phase, the defense attorney conceded that the supreme court had ruled previously
that future adaptability evidence was inadmissible. Record at 917. Despite this, the at-
torney gave the judge a copy of the psychologist's evaluation and requested its later admittance “notwithstanding the . . . decision in State v. Koon.” Id. at 920. When coun-
sel attempted to introduce this testimony during the penalty phase, Judge Kinon denied
the motion “on the grounds I previously stated.” Record at 958. Although he never had
actually stated his grounds, it can be inferred from the defense attorney's remarks that
the basis for denial was State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), cert. denied,
471 U.S. 1036 (1985) (court held that future adaptability was irrelevant and
inadmissible).
\item \textsuperscript{332} 476 U.S. 1 (1986). In \textit{Skipper} the trial judge excluded defense testimony by two
jailers and a frequent visitor to show future adaptability to prison life. The prosecution's
evidence showing the defendant's probable future dangerousness, however, was
admitted.
\end{enumerate}
Skipper and Patterson placed significant weight on two United States Supreme Court decisions, Lockett v. Ohio and Eddings v. Oklahoma, in reaching this conclusion. Lockett held that the eighth and fourteenth amendments require a sentencing judge to consider, as mitigating factors, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings broadly construed Lockett to require submission to the sentencer of any relevant evidence the defendant put forth in mitigation of the death sentence.

Patterson relied on two additional cases which further broadened Lockett on the issue of admitting psychiatric testimony bearing on the defendant's future danger to society. Following these recognized principles, Justice Chandler concluded that future adaptability was potentially mitigating and, thus, relevant and admissible.

In State v. Riddle the jury convicted Ernest M. Riddle of murder, burglary, and armed robbery. The defense then offered expert psychological testimony on his future adaptability to prison life. During the sentencing phase, the defense argued that if the prosecution could show the defendant's undesirable past behavior in jail, the defendant's fourteenth amendment right to equal protection should allow him to show probable future behavior as well.

The trial court, however, excluded this evidence based on prior Supreme Court rulings and the jury recommended the death penalty. Relying on the factually similar Patterson, the

335. 438 U.S. at 604.
336. 455 U.S. at 114.
338. 290 S.C. at 531, 351 S.E.2d at 858.
339. In the early morning hours, Riddle and his brother broke into the Gaffney, S.C. home of Abbie Sue Mullinax. After stealing money, they inadvertently awoke Mrs. Mullinax and her daughter. Upon discovering the intruders, Mrs. Mullinax screamed, and Riddle fatally cut her throat with a knife from her kitchen. 291 S.C. at 233, 353 S.E.2d at 139.
340. Record at 987.
341. Id. at 987-88.
supreme court reversed and remanded for failure to admit the psychologist's testimony.\textsuperscript{342}

\textit{Riddle} and \textit{Patterson} correctly overruled earlier cases that courts had decided in direct contradiction to well-settled rules of mitigating evidence.\textsuperscript{343} These opinions cited \textit{Skipper} as the basis for reversal, without expressly articulating the constitutional rights that had been violated by the lower courts' exclusion. The trial courts disregarded these protections and excluded the character evidence on the grounds that it was irrelevant. This determination was constitutionally flawed in two respects.

First, the eighth amendment requires the sentencer to have before him all relevant aspects of the defendant's character or record. Nevertheless, in \textit{Riddle} the trial court used this proposition only as justification for admitting the state's evidence of a defendant's future dangerousness. Although the court offered no explanation for this inconsistency, it disallowed as irrelevant the future adaptability evidence.\textsuperscript{344} The supreme court's reliance on \textit{Lockett} and \textit{Eddings} shows that admitting this evidence was not merely discretionary; rather, it was constitutionally mandated by the eighth amendment's cruel and unusual punishments clause.\textsuperscript{345}

Due process also compels this new evidentiary rule. There are two possible due process grounds upon which to base these decision. First, as the \textit{Patterson} court noted, future dangerousness was properly admissible as a relevant indication that the defendant would pose a danger to the community if not executed.\textsuperscript{346} The court concluded that "[a] defendant has a reciprocal right to present evidence that his probable future conduct

\textsuperscript{342} \textit{Skipper} was decided between the trial court decision and this appeal. Therefore, the prosecution conceded that if the court found the excluded testimony to be evidence regarding the defendant's future adaptability or dangerousness, then it could properly remand the case to reenter the sentencing phase. Brief of Respondent at 17.


\textsuperscript{344} 291 S.C. at 235, 353 S.E.2d at 140.

\textsuperscript{345} Id. at 235-36, 353 S.E.2d at 141; 290 S.C. at 529-30, 351 S.E.2d at 856-57. See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

\textsuperscript{346} 290 S.C. at 530, 351 S.E.2d at 857.
would not pose danger if he were given a life sentence.” To hold differently would sanction an unequal footing at trial, thereby unfairly denying the defendant due process of law.

Since the risk of mistake is so high in a capital case and the penalty so severe, it is fundamentally unfair to exclude any evidence even marginally probative of a defendant’s character. This is imperative although it may not be the most expedient method of conducting the trial. Future adaptability evidence is relative to the defendant’s character, and, therefore, due process prohibits its exclusion in the critical sentencing phase. As further indication that prior South Carolina law was in error, no other jurisdiction in the United States has specifically excluded future adaptability as mitigating evidence. The few state courts considering this issue simply have assumed the relevance and admissibility of a defendant’s prison conduct. Therefore,

347. Id. (emphasis added).
348. See infra note 351.
349. Chief Justice Burger stated in Lockett that there is a “qualitative difference between death and other penalties [that] calls for a greater degree of reliability when the death sentence is imposed.” 438 U.S. at 604.
350. While at first blush this evidence of future adaptability may seem inconsequential, this may not be true. In an interview with David I. Bruck, the defense attorney who successfully argued Skipper before the United States Supreme Court, he noted that this evidence may well tip the scales in favor of a defendant in certain situations. For example, when a sentencing jury entertains serious doubt as to which sentence to impose, the jurors naturally would look at what would likely happen if the defendant lives and returns to society. Mr. Bruck feels this is a recurring concern among jurors who don’t fully understand the state probation system. Interview with David I. Bruck, in Columbia, South Carolina (October 1987).
351. Justice White, in Skipper, noted that “it is . . . the elemental due process requirement that a defendant not be sentenced to death ‘on the basis of information which he had no opportunity to deny or explain.’” 476 U.S. 1, 5 n.1 (1986) (quoting Gardner v. Florida, 430 U.S. 349, 362 (1977)).
352. But see State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982), cert. denied, 459 U.S. 1056 (1982), reh’g. denied, 459 U.S. 1189 (1983). The North Carolina Supreme Court upheld the trial court’s exclusion of a defense psychiatrist’s testimony concerning whether the convicted murderer would be able to adjust to life imprisonment. The court stated that, even assuming this testimony had “some slight relevancy” to the sentencing, the evidence was properly excluded because of an insufficient foundation. Id. at 21-22 n.10, 292 S.E.2d at 220 n.10.
Patterson and Riddle are important steps in bringing South Carolina into line with the rest of the nation on this issue.

These cases will be applied retroactively. In Truesdale v. Aiken, the court interpreted Skipper's retroactive effect as limited to cases pending on direct appeal and did not apply to collateral attack. The United States Supreme Court, however, reversed this judgment. The result is that Skipper will apply to cases that were final at the time it was decided. For these reasons, it is likely that Patterson and Riddle will be retroactive minimally to 1978, the time of the Lockett decision, and probably to 1977 when South Carolina reinstated the death penalty.

There are limits to this rule: although expert opinion of future adaptability is admissible, lay opinion is not. On the other hand, given the courts' broad interpretations of Lockett, it is not improbable that lay testimony also will be allowed in the future. Despite these limits, Patterson and Riddle clearly represent a step forward in defendants' rights in South Carolina.

Elizabeth Scott Moïse

(mitigation evidence about defendant's conduct since incarceration was "clearly admissible").


357. Patterson made the distinction between accepting expert testimony and lay opinion testimony on the issue of future conduct and made it clear that the latter is unacceptable. Justice Chandler, however, also stated, "We have no quarrel with the holding that testimony from lay witnesses is admissible on the issue of past conduct." 290 S.C. at 532, 351 S.E.2d at 858.

358. See also Barefoot v. Estelle, 463 U.S. 880 (1983), which asserted that "it is not impossible for even a lay person [to] sensibly arrive at that conclusion [of future dangerousness]." Id. at 896.