

South Carolina Law Review

Volume 40
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA
LAW*

Article 9

Fall 1988

Evidence

William L. Monts III

Mark C. Dukes

Barbara E. Brunson

Luther C. Kissam IV

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

William L. Monts III, Evidence, 40 S. C. L. Rev. 129 (1988).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

EVIDENCE

I. PRIEST-PENITENT PRIVILEGE APPLIED TO STATEMENTS MADE TO MARRIAGE COUNSELOR

In *Rivers v. Rivers*¹ the South Carolina Court of Appeals held the priest-penitent privilege² applicable to communications made to a minister in his capacity as a marriage counselor. A minister cannot be compelled to disclose, in a legal or quasi-legal proceeding, statements made to him during the course of a marriage counseling session unless the speaker waives the privilege.

The case resulted from a dispute between the present and former wives of Malcolm Rivers. Plaintiff Helen Rivers married Malcolm in 1947; they were divorced in 1983. Shortly thereafter, Malcolm married defendant Loretta Rivers. Helen then brought an action against Loretta seeking damages for both alienation of affection and criminal conversation. At trial, Helen admitted that she and Malcolm had seen Dr. Paul Carlson, a marriage counselor, before their divorce. Carlson holds a doctorate degree in psychotherapy, is an ordained Methodist minister, and conducts a marriage counseling program under the auspices of a Columbia church.³ When Loretta called Carlson to testify, he asked to be excused because he believed his conversations with Helen were confidential. Helen also objected to any testimony from Carlson, arguing that her statements to him fell within the priest-penitent privilege.⁴ The trial court excluded the proffered

1. 292 S.C. 21, 354 S.E.2d 784 (Ct. App. 1987).

2. Section 19-11-90 of the South Carolina Code creates the priest-penitent privilege. It reads:

In any legal or quasi-legal trial, hearing, or proceeding before any court, commission or committee no regular or duly ordained minister, priest or rabbi shall be required, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body. This prohibition shall not apply to cases where the party in whose favor it is made waives the rights conferred.

S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1976).

3. 292 S.C. at 25, 354 S.E.2d at 786.

4. *Id.*

testimony, and the court of appeals affirmed.⁵

The priest-penitent privilege exists in South Carolina by virtue of a 1959 statute. As the *Rivers* court noted, no comparable privilege existed at common law.⁶ This case presents the first detailed explanation of the scope of the privilege.⁷

The court identified four conditions that must be met before the priest-penitent privilege may be invoked. There must be: (1) a confidential communication; (2) the communication must be disclosed to a regular or duly ordained minister, priest, or rabbi; (3) the confidential communication must be entrusted to the clergyman in his professional capacity; and (4) the confidential communication must be one that is necessary and proper to enable the clergyman to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body.⁸ The burden of showing facts to establish the four conditions rests with the party seeking to invoke the privilege.⁹

The court found the first two conditions to be readily apparent from the facts. No one challenged Carlson's status as an ordained clergyman, and the court concluded that Helen's communications to Carlson were confidential.¹⁰ From an analytical standpoint, this latter conclusion is interesting. Under the statute, the priest-penitent privilege belongs "to the party in whose favor it is made."¹¹ In the instant case, the privilege holder was Helen. The court concluded, however, that the communications were confidential because Carlson, the minister, so considered

5. The court also addressed two other issues raised by the appeal. It rejected Loretta's argument that Helen's recovery on both her claim for alienation of affections and her claim for criminal conversation constituted double recovery for the same injury. While admitting that both causes of action are "closely related," the court held that each is a "separate [cause] of action, [having] its own peculiar elements." *Id.* at 29, 354 S.E.2d at 788. The court also rejected Loretta's contention that the damage awards were excessive.

6. *See In re Swenson*, 183 Minn. 602, 237 N.W. 589 (1931).

7. Even though the statute creating the privilege passed the General Assembly in 1959, the issue has been the subject of only one other appellate decision. *See State v. Franklin*, 267 S.C. 240, 226 S.E.2d 896 (1976).

8. 292 S.C. at 26, 354 S.E.2d at 787.

9. *Id.*

10. *Id.* at 27, 354 S.E.2d at 787.

11. S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1976). Because the statute allows the penitent to waive the privilege, the only reasonable conclusion is that the privilege belongs to him.

them. Without enumerating the factors establishing confidentiality, the court implied that it has both subjective and objective components: the *clergyman* must subjectively believe the communication to be confidential, and his subjective belief must be reasonable under the circumstances.¹² Because Carlson demonstrated, by his request to be excused, that he believed the statements made by Helen to him during counseling were confidential and because the court found his belief reasonable, Helen's statements met the test of confidentiality.¹³

While the facts established the first two conditions necessary to invoke the priest-penitent privilege, the court found the other conditions problematic. In addition to requiring a confidential communication to a clergyman, the statute requires that the communication be made to a clergyman in his professional capacity. Though marriage counseling might not fall within the popular conception of ministerial duties, the court noted that decisions made by husbands and wives regarding their marriages often involve spiritual considerations.¹⁴ It analogized marriage counseling to other situations, such as draft counseling, in which ministerial advice might be sought outside the realm of doctrinal guidance.¹⁵ Furthermore, while admitting that Dr. Carlson served in a dual capacity as therapist and minister, the court was reluctant to delve into the counselor-counselee relationship to draw lines between the counseling and the spiritual guidance Helen received. The practical difficulty in segregating Carlson's roles as counselor and clergyman, the court concluded, required that all statements Helen made to him be deemed within the scope of his ministerial office.¹⁶

Finally, the court concluded that Helen's statements to Carlson enabled him to "discharge a function of his office ac-

12. The court's language is cryptic, at best. "Dr. Carlson considered Helen's communications to him to be confidential, as do we." 292 S.C. at 27, 354 S.E.2d at 787.

13. *Id.*

14. *Id.*

15. See *In re Verplank*, 329 F. Supp. 433 (C.D. Cal. 1971) (because draft registrants must make decisions that involve spiritual and moral considerations, draft counseling services performed by a minister are performed in the course of his function as a clergyman).

16. At least one other court has reached the same conclusion, albeit in a different setting. See *State v. Jackson*, 77 N.C. App. 832, 336 S.E.2d 437 (1985) (because of impossibility of determining extent to which criminal defendant confided in his aunt as a minister instead of as a relative, court deemed statement was made to a minister).

ording to the usual course of practice of his church.”¹⁷ The court was reluctant, as it was in determining the scope of Carlson’s professional capacity, to draw any boundaries around “the usual course of practice of [the] church.” Since Carlson’s church made marriage counseling available to the public at large, regardless of church affiliation,¹⁸ the counseling services were part of the usual course of church practice. Notably, the court did not examine the tenets of the Methodist faith in delineating the boundaries of church practice. Under *Rivers*, as long as a church maintains a counseling program, it matters not whether such a program is required by the doctrine of a particular faith. The proper inquiry is whether the counseling program normally is offered by the local church. Statements by couples made to a minister while they are participating in one of these programs are within the usual course of church practice for the purposes of the priest-penitent privilege.

Rivers aligns South Carolina with several other jurisdictions that apply the priest-penitent privilege to marriage counseling sessions. Although the cases arising under statutes similar to South Carolina’s are split,¹⁹ the more recent decisions have held marriage counseling sessions to be within the scope of the privilege.²⁰ In addition, a number of state legislatures have amended their relevant statutes to cover statements made to ministers in conjunction with marriage counseling.²¹

17. 292 S.C. at 28, 354 S.E.2d at 788.

18. *Id.*

19. See Annotation, *Communication to Clergyman as Privileged*, 71 A.L.R.3d 794, 817-20 (1976). At least two courts have rejected the contention that the priest-penitent privilege applies to marriage counseling sessions. In *Simrin v. Simrin*, 233 Cal. App. 2d 90, 43 Cal. Rptr. 376 (1965), the court stated in dictum that California’s priest-penitent privilege statute was drawn too narrowly to apply to marriage counseling sessions. In *In re Estate of Schaeffer*, 52 Dauph. Co. Rep. 45 (Pa. County Ct. 1941), the court refused to exclude a minister’s testimony regarding statements made during a marriage counseling session because they were neither penitential in character nor made in the solicitation of spiritual advice. This case was decided before Pennsylvania passed a statute creating the priest-penitent privilege. Since then, at least one Pennsylvania trial court has applied the privilege to marriage counseling sessions. See *LeGore v. LeGore*, 5 Adams L.J. 51, 31 Pa. D. & C.2d (1963).

20. See *Pardie v. Pardie*, 158 N.W.2d 641 (Iowa 1968); *Kruglikov v. Kruglikov*, 29 Misc. 2d 17, 217 N.Y.S.2d 845 (N.Y. Sup. Ct. 1961), *appeal dismissed*, 16 A.D.2d 735, 226 N.Y.S.2d 931 (1962); *Spencer v. Spencer*, 61 N.C. App. 535, 301 S.E.2d 411 (1983); *LeGore v. LeGore*, 5 Adams L.J. 51, 31 Pa. D. & C.2d 107 (1963).

21. ALA. CODE § 12-21-166(b)(3) (1986); D.C. CODE ANN. § 14-309(3) (1981); MO. ANN. STAT. § 491.060(4) (Vernon Supp. 1987); N.J. STAT. ANN. § 2A:84A-23 (West Supp. 1987).

The court's conclusion in *Rivers* is founded on a sound statutory basis. Particularly praiseworthy is the court's refusal to ferret out the advice given by Carlson solely as a counselor. Because of the inextricable link between Carlson's roles as a spiritual and secular advisor, any attempt by the court to define the scope of Carlson's ministry or the "usual course of practice" of his church would have entangled the judiciary in a matter that is generally religious in nature. The court wisely avoided that pitfall.

If, however, *Rivers* conclusively establishes the applicability of the priest-penitent privilege to marriage counseling sessions conducted by a minister, it should not be taken as the final word on the subject. At least two other issues will need resolution in this area, either by the courts or the General Assembly. First, *Rivers* does not address those situations in which the counselee fails to object to the minister's testimony. The question remains whether, in these instances, a waiver will be implied from the counselee's silence. Since in *Rivers* both the minister and the counselee objected, it was clear that the counselee did not intend to waive the privilege.

A related, unanswered question is whether silence will imply a waiver even when the minister objects to the testimony. There has been some discussion in another jurisdiction regarding what constitutes a waiver. In *Kruglikov v. Kruglikov*²² the New York Supreme Court excused a rabbi, after he had raised the privilege issue, from testifying about a counseling session. The counselee had not objected to the testimony, but the court sustained the rabbi's objection in the absence of an *express* waiver by the counselee.²³ The New York court apparently would not imply a waiver, at least when the minister had objected.

The South Carolina statute stipulates that the privilege "shall not apply to cases where the party in whose favor it is made waives the rights conferred."²⁴ This language, coupled with the burden placed on the counselee to show facts establish-

22. 29 Misc. 2d 17, 217 N.Y.S.2d 845 (1961), *appeal dismissed*, 16 A.D.2d 735, 226 N.Y.S.2d 931 (1962).

23. 29 Misc. 2d at 18, 217 N.Y.S.2d at 847.

24. S.C. CODE ANN. § 19-11-90 (Law. Co-op. 1976).

ing the privilege,²⁵ appears to place the burden of raising the objection on the counselee. Whether South Carolina courts will require that the waiver be express, as New York apparently has done, or will imply it from the counselee's failure to raise the objection, is uncertain.

Finally, *Rivers* creates an inconsistency in South Carolina evidence law. While statements made in marriage counseling sessions with ministers now fall under a recognized evidentiary privilege, a similar privilege does not extend to those who seek the services of "secular" marriage counselors. South Carolina does not recognize a physician-patient privilege or general counselor-counselee privilege that would cover statements made to a psychiatrist or psychologist during a marriage counseling session.²⁶ Though there may be some historical basis for distinguishing between statements made to a minister and statements made to a physician or counselor, that distinction is rooted in the substance of the communication and the sanctity of the discussion. While the burdens of one's conscience may be more worthy of confidentiality than the details of one's physical ailments, the distinction breaks down in the context of marriage counseling. The substance of statements made to the minister as marriage counselor and the substance of statements made to the psychiatrist or psychologist as marriage counselor may be identical or have great overlap. Furthermore, the counselee's expectation of privacy is identical in both situations. After *Rivers*, however, a statement made in a marriage counseling session will or will not be privileged solely on the basis of the counselor's professional title. If the counselor is a minister, the statement is excluded; if the counselor is a psychiatrist or psychologist, the statement must be admitted in the absence of some other evidentiary rule that would compel its exclusion. This is, to say the least, an illogical result.

Despite the inconsistency created by the *Rivers* holding, the decision to apply the priest-penitent privilege to statements made to a minister in his capacity as a marriage counselor is a good one. Because the privilege is statutorily created, however, the South Carolina courts may be reluctant to recognize an anal-

25. 292 S.C. at 26, 354 S.E.2d at 787.

26. See *Peagler v. Atlantic Coast Line R.R.*, 232 S.C. 274, 101 S.E.2d 821 (1958); *Aakjer v. Spagnoli*, 291 S.C. 165, 352 S.E.2d 503 (Ct. App. 1987).

ogous common law privilege for other marriage counselors. If the courts, as a matter of judicial restraint, cannot act, then the General Assembly must grapple with the inconsistency. Perhaps *Rivers* will provide the necessary impetus for resolution of these matters.

William L. Monts, III

II. EXPERT TESTIMONY OF COMMON CHARACTERISTICS EXHIBITED BY SEXUALLY ABUSED CHILDREN HELD INADMISSIBLE

In *State v. Hudnall*²⁷ the South Carolina Supreme Court reversed a trial court decision that admitted expert testimony concerning common characteristics exhibited by sexually abused children.²⁸ The court held that this evidence was inadmissible "to bolster the child's testimony that the crime had in fact occurred and was not offered to explain any seemingly inconsistent response to the trauma."²⁹

Michael Lee Hudnall was convicted on two counts of first degree criminal sexual conduct. The victim was his three-year-old daughter.³⁰ Following a domestic dispute that ultimately ended her marriage to Michael Hudnall, Mrs. Hudnall reported the sexual abuse.³¹

The State offered a pediatrician's testimony regarding common characteristics that child sexual abuse victims exhibit, including sexual behavior with others, nightmares, and masturba-

27. 293 S.C. 97, 359 S.E.2d 59 (1987).

28. These common characteristics sometimes are referred to as the "sexually abused child syndrome." For a discussion of the difference between syndrome evidence and testimony of common characteristics of abused children, see McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 53 (1986).

29. 293 S.C. at 100, 359 S.E.2d at 62.

30. Because the victim was three years old at the time of trial, her testimony was taken by videotaped deposition. The supreme court held that the trial court abused its discretion in qualifying her, concluding after reviewing the videotape that the victim could not be held morally accountable for telling a lie. 293 S.C. at 99, 359 S.E.2d at 61. For a discussion of the test to determine a minor's competence to testify, see *State v. Green*, 267 S.C. 599, 230 S.E.2d 618 (1976).

31. Mrs. Hudnall contacted a lawyer regarding the alleged incident but did not take the child for a medical examination until the Department of Social Services became involved in the case. The medical examination did not indicate any physical abnormalities to corroborate the allegations. 293 S.C. at 98-99, 359 S.E.2d at 60-61.

tion.³² Hudnall argued that this evidence had “no probative value to establish an element of the crime.”³³

The court distinguished *State v. Hill*,³⁴ which allowed testimony of the “battered woman’s syndrome” to show that the crime had actually occurred.³⁵ The court also noted that cases from other jurisdictions were consistent in applying this distinction when determining whether to admit or refuse evidence of this type.³⁶ Finally, the court noted that other courts that have admitted this type of evidence have allowed it only to explain a child victim’s post-trauma behavior as a common reaction to sexual abuse when that behavior would otherwise appear impeaching.³⁷

This is an issue of first impression in South Carolina, and its analysis is based on a test similar to that used under the Federal Rules of Evidence.³⁸ In South Carolina, expert testimony may be admissible if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.”³⁹ Courts that have considered the introduction of this type of evidence in child sexual assault cases have almost unanimously recognized its value in assisting the jury to understand the evidence.⁴⁰ Since the unique psychological effects of sexual assault on children place

32. *Id.* at 99, 359 S.E.2d at 61.

33. *Id.*

34. 287 S.C. 398, 339 S.E.2d 121 (1986) (battered woman’s syndrome evidence held admissible to explain the psychological feasibility of the defendant’s claim of self-defense in view of seemingly inconsistent behavior).

35. 293 S.C. at 100, 359 S.E.2d at 61; *see also Evidence, Annual Survey of South Carolina Law*, 39 S.C.L. REV. 89 (1987).

36. The court specifically noted *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984) (expert testimony regarding rape trauma syndrome held inadmissible when used to show that the rape had in fact occurred); *People v. Pullins*, 145 Mich. App. 414, 378 N.W.2d 502 (1985) (rape trauma syndrome not reliable scientific evidence); and *Lantrip v. Commonwealth*, 713 S.W.2d 816 (Ky. 1986) (sexual abuse accommodation syndrome not reliable to prove abuse occurred).

37. 293 S.C. at 100, 359 S.E.2d at 61-62 (1987). *See Smith v. State*, 100 Nev. 570, 688 P.2d 326 (1984); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983); *State v. Dale*, 75 Or. App. 453, 706 P.2d 1009 (1985).

38. *See W. REISER, A COMPARISON OF THE FEDERAL RULES OF EVIDENCE WITH SOUTH CAROLINA EVIDENCE LAW* (1976).

39. FED. R. EVID. 702.

40. *See, e.g., State v. Lindsey*, 149 Ariz. 472, 473-74, 720 P.2d 73, 74-75 (1986); *State v. Kim*, 64 Haw. 598, 607-608, 645 P.2d 1330, 1338 (1982); *State v. Middleton*, 294 Or. at 436-37, 657 P.2d at 1220; *State v. Catsam*, 148 Vt. 366, —, 534 A.2d 184, 187 (1987).

the average juror at a disadvantage in understanding the victim's behavior, the majority of courts have concluded that it is within the trial court's discretion to admit such evidence in appropriate circumstances.⁴¹ It is at this point, however, that the authorities differ. Some courts allow the expert to testify that he believed the child's story and that the child exhibited characteristics common to sexually abused children.⁴² Other courts limit expert testimony of these common characteristics to the explanation of apparently bizarre behavior.⁴³

It appears that the supreme court has joined the majority view by excluding this type evidence when used as proof of the occurrence of the abuse.⁴⁴ As with most opinions on this issue, however, the rationale is not completely clear. The court reasoned that "the evidence was admitted to bolster the child's testimony that the crime had in fact occurred and was not offered to explain any seemingly inconsistent response to the trauma."⁴⁵ This rationale most commonly translates into a belief that the evidence may unduly influence the jury's judgment with regard to the truthfulness of the child.⁴⁶ As noted in *State v. Middleton*,⁴⁷ however, one can argue that the testimony does not invade the province of the jury because the jury is not bound by the expert testimony; the trier of fact alone makes the ultimate decision.⁴⁸

41. *State v. Catsam*, 148 Vt. at _____, 534 A.2d at 187. See also *State v. Geyman*, 729 P.2d 475, 479 (Mont. 1986); *Smith v. State*, 100 Nev. at 572-73, 688 P.2d at 327; *Commonwealth v. Baldwin*, 348 Pa. Super. 368, 374-79, 502 A.2d 253, 257-58 (1985).

42. *State v. Kim*, 64 Haw. 598, 645 P.2d 1330 (1982).

43. *Smith v. State*, 100 Nev. 570, 688 P.2d 326. See also Comment, *The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases*, 34 UCLA L. REV. 175 (1986). Examples of bizarre behavior include retraction of the allegations or extreme delay in reporting the alleged sexual abuse.

44. See generally McCord, *supra* note 28, at 12-17; *State v. Catsam*, 148 Vt. at _____, 534 A.2d at 187-88.

45. 293 S.C. at 100, 188 S.E.2d at 62.

46. See *State v. Catsam*, 148 Vt. at _____, 534 A.2d at 188 (1987); Roe, *Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985); Comment, *The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases*, 34 UCLA L. REV. 175 (1986).

47. 294 Or. 427, 657 P.2d 1215 (1983).

48. *Id.* at 435, 657 P.2d at 1219. See also Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985) (suggests that expert psychological testimony cannot invade the province of the jury unless the jury is instructed that it must agree with the expert's assessment).

While it seems clear from *Hudnall* that expert testimony concerning common characteristics of sexually abused children will not be allowed unless used to explain some seemingly inconsistent actions of the victim,⁴⁹ the extent to which expert testimony will be allowed in those cases in which there is inconsistent victim behavior remains unresolved.⁵⁰ It logically follows from this decision that testimony in those cases would be limited to the issue of the common characteristics of abused children. The expert would not be allowed to testify in any manner that could be construed to bolster the credibility of the victim. Although it is understandable in cases of this type⁵¹ that the court would be reluctant to allow the prosecution to make its case by use of subjective expert testimony, some expert testimony may be useful. The expert could explain behavior inconsistent with behavior that the common juror might expect from an abused child. This would thereby strike a balance between the defendant's interest in having the jury determine the facts and credibility of the witnesses and the prosecutor's interest in having the jury understand the nature of the case.

Mark C. Dukes

III. EVIDENCE OF DEFENDANT'S PRIOR CONVICTION FOR POSSESSION OF COCAINE NOT ADMISSIBLE FOR IMPEACHMENT

In *State v. Ball*⁵² the South Carolina Supreme Court addressed the issue of whether possession of cocaine constitutes a crime involving moral turpitude for purposes of impeachment. In holding that it is not, the court clearly distinguished, for purposes of impeachment, crimes involving simple possession of an illegal narcotic from those involving possession with intent to

49. An exception may be when the victim's credibility is put into issue. See *McCord*, *supra* note 28, at 41-42 n. 217.

50. In *State v. Rogers*, 293 S.C. 505, 362 S.E.2d 7 (1987), the supreme court reaffirmed *Hudnall*, holding that admission of evidence of behavioral traits of a child who has been sexually abused is erroneous if there is no evidence that the child responded in a seemingly inconsistent fashion after the alleged sexual abuse.

51. Proof of the crime can be difficult; there is sometimes no physical evidence of abuse, and reports of sexual abuse are often made during a separation or divorce. See, e.g., *Hudnall*, 293 S.C. at 98-99, 359 S.E.2d at 60-61; *State v. Catsam*, 148 Vt. 366, —, 534 A.2d 184, 186 (1987).

52. 292 S.C. 71, 354 S.E.2d 906 (1987).

sell.

In South Carolina, evidence of a prior conviction is admissible for purposes of impeachment of a witness when the prior conviction is for a crime involving moral turpitude.⁵³ The court has defined moral turpitude as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."⁵⁴ In a long line of cases, the South Carolina courts have addressed the issue of crimes involving moral turpitude.⁵⁵

The supreme court previously has discussed moral turpitude with respect to crimes involving possession of marijuana and possession with intent to sell marijuana. In *State v. Lilly*⁵⁶ the supreme court held that the crime of possession of marijuana with intent to sell or distribute is admissible for purposes of impeachment. The court in *Lilly* distinguished possession with intent to sell marijuana from mere possession.⁵⁷ In an earlier case, *State v. Harvey*,⁵⁸ the court had held that simple possession of marijuana was not a crime concerning moral turpitude. The court reasoned in *Lilly* that an intent to distribute involved the breach of a "duty which a person owes to other people and to society in general" and, therefore, rose to the level of moral turpitude.⁵⁹

In *State v. Ball* the court convicted the appellant of shoplifting. At trial, one eyewitness testified that the appellant had shoplifted three pairs of blue jeans by taking them off the rack, rolling them up, and dropping them in an accomplice's shopping bag. The appellant then testified that she had only handed the

53. See *State v. Morris*, 289 S.C. 294, 345 S.E.2d 477 (1986); *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *vacated*, 474 U.S. 896 (1985); *State v. Millings*, 247 S.C. 52, 145 S.E.2d 422 (1965).

54. *State v. Morris*, 289 S.C. at 296, 345 S.E.2d at 478 (quoting *State v. Yates*, 280 S.C. at 37, 310 S.E.2d at 810).

55. See *State v. McFarlane*, 279 S.C. 327, 306 S.E.2d 611 (1983) (criminal sexual conduct with a minor); *State v. Lilly*, 278 S.C. 499, 299 S.E.2d 329 (1983) (sale of marijuana); *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982) (arson); *State v. Jones* 271 S.C. 287, 247 S.E.2d 43 (1978) (assault with intent to rape); *State v. Horton*, 271 S.C. 413, 248 S.E.2d 263 (1978) ("hit and run" accident); *State v. Vaughn*, 268 S.C. 119, 232 S.E.2d 328 (1977) (housebreaking and grand larceny).

56. 278 S.C. 499, 299 S.E.2d 329 (1983).

57. *Id.* at 500, 299 S.E.2d at 330.

58. 275 S.C. 225, 268 S.E.2d 587 (1981).

59. 278 S.C. at 500, 299 S.E.2d at 330.

jeans over as requested and had no knowledge of what her companion did with the jeans. Because the defendant testified on her own behalf, evidence of prior convictions regarding moral turpitude was admissible for purposes of impeachment.

The trial court allowed the prosecution to question the defendant regarding her prior conviction for possession of cocaine. In overruling the lower court, the supreme court stated that “[p]ossession of cocaine, like possession of marijuana, relates more to self-destructive behavior than to the defendant’s duty to other people or to society in general.”⁶⁰ Thus, the court held that such evidence was not admissible for purposes of impeachment.⁶¹ Because the defendant-witness’s credibility was a critical factor for the jury’s determination, the court held the error in admitting the impeachment evidence was not harmless and remanded the case for a new trial.⁶²

In his dissenting opinion, Justice Gregory reasoned that possession of cocaine fostered illicit manufacturing and trafficking of the drug and that its habitual use resulted in the perpetration of other crimes. Thus, in view of society’s interest in discouraging drug abuse, possession of cocaine should be considered a crime involving moral turpitude.⁶³

The majority’s position, however, is in line with the conclusions of other states concerning drug-related crimes. For example, the California Supreme Court recently addressed this issue in *People v. Castro*.⁶⁴ In *Castro* the state supreme court held that the defendant should not have been impeached with a prior conviction for simple possession of heroin. On the other hand, the court noted that possession for sale would have been admissible since that constituted moral turpitude based on the inherent intent to corrupt others.⁶⁵ Similarly, Georgia deliberated the question of whether the illegal sale of a narcotic constituted moral turpitude, for purposes of impeachment, in *State v. Lewis*.⁶⁶ Relying on “common knowledge” of the harmful effects that the sale of cocaine inflicts on our society, the court held

60. 292 S.C. at 74, 354 S.E.2d at 98.

61. *Id.*

62. *Id.*

63. *Id.* at 75, 354 S.E.2d at 909 (Gregory, J., dissenting).

64. 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985).

65. *Id.* at 317, 696 P.2d at 121, 211 Cal. Rptr. at 729.

66. 243 Ga. 443, 254 S.E.2d 830 (1979).

that the sale of illegal drugs is a breach of man's duty to man and, thus, a crime involving moral turpitude.⁶⁷

In summary, *State v. Ball* reinforces a line of cases concerning impeachment by evidence of a prior conviction for a drug-related offense. Whether such a crime will be considered a crime involving moral turpitude will hinge on whether there is a breach of duty to society in general. Therefore, crimes involving simple possession of an illegal narcotic, harming only the individual, do not constitute moral turpitude, whereas crimes including an intent to sell the narcotic do rise to that level because others' interests are at stake.

Barbara E. Brunson

IV. COURT REFUSES TO CREATE HEARSAY EXCEPTION IN CHILD SEXUAL ABUSE CASES

In *South Carolina Department of Social Services v. Doe*⁶⁸ the South Carolina Court of Appeals faced a problem that is plaguing society — child sexual abuse. An alarming number of child sexual abuse cases are reported each year in this county, and the numbers seem to be growing steadily.⁶⁹ Child molesters fit no particular stereotype,⁷⁰ and a large proportion of child molesters are friends or family members of the victim.⁷¹ Sexual as-

67. *Id.* at 447, 254 S.E.2d at 832.

68. 292 S.C. 211, 355 S.E.2d 543 (Ct. App. 1987).

69. Some statistics show a 200% increase in the number of child abuse cases reported nationally since 1976. Note, *A Comprehensive Approach to Child Hearsay Statements on Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1745 n.7 (1983) (citing Collins, *Studies Find Sexual Abuse of Children is Widespread*, N.Y. Times, May 13, 1982, at C1, col. 1). Some estimates put the total number of annual sexual abuse cases as high as 500,000. Comment, *Television Trials and Fundamental Fairness: The Constitutionality of Louisiana's Child Shield Law*, 61 TUL. L. REV. 141, 141 n.2 (1986) (citing Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspective*, 52 CHILD WELFARE 147, 148 (1973)).

70. "Molesters cut across economic, social, ethnic, and educational lines. They may be rich or poor, well-educated or ignorant, blue-collar or white, married or single." Note, *Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition*, 34 CATH. U.L. REV. 1021, 1021 n.2 (1985) (citing *The Child Molester: No "Profile,"* L.A. Times, Apr. 25, 1984, § 1, col. 1.).

71. "Of 583 cases of child sex abuse examined in one survey, the offender was a family member in 47% of the cases, otherwise an acquaintance of the child in 42%, and a stranger in only 8%." Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 807 n.14 (1985) (citing Conte & Berliner, *Sexual Abuse of Children: Implications for Practice*, J. CONTEMP. SOC. WORK

saults on children usually take place in homes and kindergartens, not on street corners and in dark alleys.⁷² The appalling aspect of this social problem is its grossly low percentage of reported cases.⁷³ Since the offense very often is committed by an authoritarian figure, the child may not report the incident for fear of the defendant or of punishment⁷⁴ or because the child sees the act as an extension of the molester's authority.⁷⁵

Of the small percentage of child abuse cases that are reported, all are very difficult to prosecute, and only a small percentage result in convictions. As a rule, the victim is the only witness to the crime.⁷⁶ Although the South Carolina Supreme Court has held that a child may be competent to testify at trial,⁷⁷ a child may be easily confused on cross-examination by an experienced defense attorney.⁷⁸ It is important to remember

601, 603 (1981)).

72. A Bethesda, Maryland man was charged with sexual offenses against six boys, ages 6 to 11, in his neighborhood. *Man Charged in Sex Cases Had 2 Prior Convictions*, Wash. Post, Feb. 5, 1985, at A1, col. 1. At a military-operated day-care center for 130 children of military and civilian personnel at the United States Military Academy, child sexual abuse charges were investigated. *Scandal Jolts West Point*, Wash. Post, Oct. 16, 1984, at A1, col. 1. Operators of County-wide Babysitting Service in Miami, Florida were charged with 10 counts of sexual battery on children under 11. *Guilt Haunts Molested Kids' Parents*, USA Today, Sept. 17, 1984, at 11A, col. 2. Seven teachers at one California preschool have been charged with 208 counts of sexual abuse. *What Price Day Care?*, Newsweek, Sept. 10, 1984, at 19. All articles are cited in Note, *supra* note 70, at 1022-23 n.5.

73. In two out of three cases, the child never reports the abusive act. Note, *supra* note 71, at 806 n.7 (citing D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 106 (1979) (citing survey results)).

74. *People v. Davison*, 12 Mich. App. 429, 163 N.W.2d 10 (1968). A nine-year-old child, the subject of sex abuse, said nothing to anyone about the incident for two weeks because of her fear of the defendant.

75. Note, *supra* note 70, at 1024 (citing DeJong, Hervada, & Emmett, *Epidemiologic Variations in Childhood Sexual Abuse*, 7 CHILD ABUSE AND NEGLECT 155, 161 (1983)).

76. Stevens & Berliner, *Special Technique for Child Witnesses*, THE SEXUAL VICTIMOLOGY OF YOUTH 246, 248 (L. Schultz ed. 1980).

77. *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987) (three-year-old held to be competent witness).

78. An example of this situation is as follows:

At the trial of Robert and Louis Bentz, accused of participating with 22 other adults and one teenager in two child sex abuse rings in the small town of Jordan, Minnesota, "[t]he defense team relied on traditional courtroom tactics to shake the children's stories and weaken their credibility with the jury. They badgered them in an effort to confuse them about dates and places. They accused them of lying and leaped onto the least inconsistency." The Bentzes were acquitted on all counts.

that ours is an adversarial system of justice. Since the adversarial system extends to child abuse cases, the child is often a victim twice — once during the sexual abuse and again on the witness stand.

Although the South Carolina courts have allowed special arrangements for a child witness in a child sexual abuse case,⁷⁹ the South Carolina Court of Appeals refused to create a child abuse exception to the hearsay evidence rule in *South Carolina Department of Social Services v. Doe*.⁸⁰ In *Doe*, the Department alleged that a father had “sexually abused his three and a half year old daughter by performing oral sex on her and fondling her genital area.”⁸¹ The family court judge ruled *in limine* that statements made by the child to third parties were admissible as evidence, and on the strength of such hearsay evidence, the court entered an order finding that the father had abused the child.⁸² The child allegedly made these statements to third parties while in the midst of a “custody dispute incident to her parents’ divorce.”⁸³ The Department conceded that the child’s statements, made while in her mother’s custody, were influenced by her mother and grandmother.⁸⁴

In reversing the family court, the court of appeals refused to create a child abuse exception to the hearsay evidence rule. In so doing, the court relied heavily on the Pennsylvania case of *Commonwealth v. Haber*⁸⁵ and followed the so-called majority rule.⁸⁶

Note, *supra* note 71, at 807 n.12 (citing N.Y. Times, Sept. 23, 1984, § 4, at 8, col. 1.).

79. See, e.g., *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987) (child’s testimony may be videotaped out of presence of defendant and jury); *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985) (leading questions allowed when child is a witness); *O’Neill v. Cooper*, 282 S.C. 275, 317 S.E.2d 771 (Ct. App. 1984) (trial judge has discretion to exclude the adverse party when the child is testifying).

80. 292 S.C. 211, 355 S.E.2d 543.

81. *Id.* at 212, 355 S.E.2d at 544.

82. *Id.* at 213, 355 S.E.2d at 544.

83. *Id.* at 216, 355 S.E.2d at 546.

84. *Id.* at 217, 355 S.E.2d at 546.

85. 351 Pa. Super. 79, 505 A.2d 273 (1986). Testimony of the victims’ mothers concerning what their children told them was inadmissible hearsay. The court refused to create a child abuse exception to the hearsay evidence rule.

86. The court of appeals, citing *Haber*, pointed out the following:

[T]hirty-three states and the federal courts have codified their rules of evidence in recent years. . . . None of them includes a “child sexual abuse” exception. Among the seventeen remaining states which retain common law rules of evidence, none has created a common law exception for out of court statements of children in sexual abuse cases.

The court also noted that no major treatise on evidence recognizes such an exception.⁸⁷ It does not necessarily follow, however, that because the holding in *Doe* follows the majority rule, it is a good decision. The court, ruling on a very fact-specific case, laid down a blanket rule and refused to create a hearsay exception in any child sexual abuse case.

A better alternative to the total prohibition of the child abuse exception is a “totality of the circumstances balancing test” promoted by dissenting Judge Olszewski in *Haber*.⁸⁸ In such a test of admissibility, the court, in an *in camera* hearing, would determine whether the hearsay evidence was necessary and trustworthy.⁸⁹ In determining the probability of trustworthiness of the testimony, the judge would consider the following:

the totality of the circumstances, including: the time, content, and context of the statement; the language used by the child; the age and maturity of the child; the nature and duration of the abuse; the relationship of the child to the offender; and any other factor relevant to the case.⁹⁰

Using such a balancing test, the court likely would not have admitted the hearsay in *Doe* because of the evidence of “coaching” on the part of the victim’s mother and grandmother. The court correctly held the hearsay inadmissible but, in so doing, used a harsh and ineffective test.

Olszewski’s dissent is of particular importance to South Carolina lawyers because of an act that became effective subsequent to the decision in *Doe*. Governor Campbell signed the act into effect on June 3, 1988.⁹¹ The act, like Olszewski’s dissent,

292 S.C. at 215-16, 355 S.E.2d at 545-46.

87. *Id.* at 216, 355 S.E.2d at 546.

88. 351 Pa. Super. 79, 505 A.2d 273.

89. The two major principles underlying the development of any hearsay exception are the necessity for the evidence and the circumstantial probability of its trustworthiness. See 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1420, at 251 (rev. ed. 1974).

90. 351 Pa. Super. at 94, 505 A.2d at 281-82 (Olszewski, J., dissenting).

91. S.C. CODE ANN. § 19-1-180 (Law. Co-op. Supp. 1988). The act reads:

(A) An out-of-court statement made by a child under twelve years of age at the time of the family court proceeding brought pursuant to Section 20-7-610 or Section 20-7-736 concerning an act of abuse or neglect as defined by Section 20-7-490 that is not otherwise admissible in evidence is admissible in the family court proceeding if the requirements of this section are met.

(B) An out-of-court statement may be admitted as provided in subsection

would not have allowed the hearsay in *Doe* because of the ad-

(A) if:

(1) The child testifies at the proceeding or testifies by means of videotaped deposition or closed-circuit television, and at the time of the testimony the child is subject to cross-examination about the statement; or

(2) (a) The child is found by the court to be unavailable to testify on any of these grounds:

(i) the child's death;

(ii) the child's physical or mental disability;

(iii) the existence of a privilege involving the child;

(iv) the child's incompetency, including the child's inability to communicate about the offense because of fear;

(v) substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television; and

(b) The child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

(C) The proponent of the statement shall inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.

(D) In determining whether a statement possesses particularized guarantees of trustworthiness under subsection (B)(2)(b), the court may consider, but is not limited to, the following factors:

(1) the child's personal knowledge of the event;

(2) the age and maturity of the child;

(3) certainty that the statement was made, including the credibility of the person testifying about the statement;

(4) any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;

(5) whether more than one person heard the statement;

(6) whether the child was suffering pain or distress when making the statement;

(7) the nature and duration of any alleged abuse;

(8) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(9) whether the statement has a ring of verity, has internal consistency or coherence, and uses terminology appropriate to the child's age;

(10) whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;

(E) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.

(F) Any hearsay testimony admissible under this section shall not be admissible in any other proceeding.

(G) If the parents of the child are separated or divorced, the hearsay statement shall be inadmissible if (1) one of the parents is the alleged perpetrator of the alleged abuse or neglect and (2) the allegation was made after the parties separated or divorced.

missions of coaching. The act, however, should prove to be a tremendous asset in the prosecution of child sexual abuse cases while, at the same time, providing the necessary constitutional protections to the defendant. Although the *Doe* court stated that it was not persuaded by the fact that some legislatures have enacted statutes permitting hearsay evidence in child sexual abuse cases,⁹² twenty-two states have enacted such legislation.⁹³ South Carolina now has followed this national trend.

The act provides for the admission of hearsay only when necessary and only when the trial court determines the probable trustworthiness of the hearsay. The hearsay is available only if the child testifies or is unable to testify. The *in camera* hearing conducted with the child in judge's chambers and in the presence of both attorneys would determine the probability of trustworthiness of the child's statements. Evidence would be presented to the judge so that he could balance the "totality of the circumstances" of any particular situation. Unlike the rigid prohibition laid down in *Doe*, which failed to take into account the welfare of the young victim, this act provides a fair and flexible means of prosecuting child sexual abuse cases.

This act surely will face a constitutional challenge under the sixth amendment's⁹⁴ confrontation clause.⁹⁵ Defense attorneys

92. 292 S.C. at 216, 355 S.E.2d at 546.

93. ALASKA STAT. § 12.40.110 (Supp. 1987); ARIZ. REV. STAT. ANN. § 13-1416 (Supp. 1987); CAL. EVID. CODE § 1228 (West Supp. 1987); COLO. REV. STAT. § 13-25-129 (1987); FLA. STAT. § 90.803(23) (1979 & Supp. 1987); ILL. ANN. STAT. ch. 37, para. 805-18 (Smith-Hurd Supp. 1988) (civil); ILL. ANN. STAT. ch. 38, para. 115-10 (Smith-Hurd Supp. 1988) (criminal); IND. CODE ANN. § 35-37-4-6 (Burns 1985 & Supp. 1988); IOWA CODE § 232.96(6) (1985 & Supp. 1986); KAN. STAT. ANN. § 60-460(dd) (1983 & Supp. 1987); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1987); MINN. STAT. ANN. § 260.156 (West Supp. 1988) (civil); MINN. STAT. ANN. § 595.02(3) (West Supp. 1988) (criminal); MO. REV. STAT. § 491.075 (Supp. 1988); N.Y. CRIM. PROC. LAW § 65.00 to 65.30 (McKinney Supp. 1987); OKLA. STAT. ANN. tit. 12, § 2803.1 (West Supp. 1988); R.I. GEN. LAWS § 14-1-68 (Supp. 1987); S.D. CODIFIED LAWS ANN. § 19-16-38 (1987); TEX. CRIM. PROC. CODE ANN. § 38.072 (Vernon Supp. 1988); WASH. REV. CODE ANN. § 9A.44.120 (1988); ARK. R. EVID. 803(25)(A); VT. R. EVID. § 804a.

94. The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

will argue that without cross-examination of the child, there will be no way to test the truth of the victim's statement.⁹⁶

It is possible, however, that the act can withstand such a constitutional challenge. The act calls for the child to testify and to be subject to cross-examination if he or she is available, and if the child is unavailable, the hearsay is admissible only after an *in camera* determination by the judge. The counsel for the defense is present at this *in camera* hearing. If the defense counsel's presence in cross-examining a videotaped child satisfies the requirements of the confrontation clause,⁹⁷ then, arguably, defense counsel's presence at an *in camera* hearing will satisfy such requirements. Additionally, the defense counsel is free to cross-examine the third party as to the truth of the hearsay evidence.

While the South Carolina Court of Appeals refused to create a child abuse exception to the hearsay evidence rule in *Doe*,

95. The United States Supreme Court held in *Coy v. Iowa*, 108 S. Ct. 2798 (1988), that criminal defendants are guaranteed by the confrontation clause of the United States Constitution a "face-to-face meeting with witnesses appearing before the trier of fact." *Id.* at 2800. Arguably, § 19-1-180 of the South Carolina Code may be violative of the confrontation clause in that it may deny a criminal defendant this "face-to-face meeting." On the other hand, the logical extension of such an argument would be that all of the exceptions to the prohibition against hearsay evidence would be unconstitutional. Additionally, under the South Carolina act, the defendant would have face-to-face contact with the "witness testifying before the trier of fact"; however, since the child victim would not be a witness at the trial, there would be no right for the defendant to have a face-to-face confrontation with the victim.

The opinion in *Coy* may cast doubt on cases such as *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987), which permitted a child's testimony to be videotaped out of the presence of the defendant and the jury. Justice O'Connor, however, joined by Justice White, wrote a concurring opinion in which she stated that the confrontation clause issue should be decided by using a balancing test approach on a case-by-case basis:

I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy.

The primary focus therefore likely will be on the necessity prong.

108 S. Ct. at 2805 (O'Connor, J., concurring). Thus, it seems impossible to determine whether the South Carolina act would pass constitutional muster. It does seem certain, however, that such a constitutional challenge soon will be made.

96. Cross-examination has been characterized as the "greatest engine ever invented for the discovery of truth." *State v. Williams*, 285 S.C. 544, 548 n.1, 331 S.E.2d 354, 356 n.1 (Ct. App. 1985) (quoting Younger, *An Irreverent Introduction to Hearsay 2* (ABA Litigation Monograph No. 3, 1977)).

97. See *State v. Cooper*, 291 S.C. 351, 353 S.E.2d 451 (1987).

the South Carolina Legislature may have greatly altered the prosecution of child sexual abuse cases by enacting section 19-1-180 of the South Carolina Code.

Luther C. Kissam, IV