Criminal Law

Michael V. Hammond
Anthony L. Harbin
William R. Calhoun Jr.
Matthew Hubbell
Lucinda G. Wichmann

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

Part of the Law Commons

Recommended Citation

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 dillarda@mailbox.sc.edu.
CRIMINAL LAW

I. REQUIREMENT THAT MURDER DEFENDANT MUST PROVE SELF-DEFENSE BY A PREPONDERANCE OF THE EVIDENCE DID NOT VIOLATE DUE PROCESS

In *Smart v. Leeke*\(^1\) the Fourth Circuit Court of Appeals held that a South Carolina trial court did not violate the due process clause when it shifted the burden of persuasion and required a defendant charged with murder to prove self-defense by a preponderance of the evidence. No states in the Fourth Circuit currently shift the burden of persuasion to defendants in this way. The South Carolina Supreme Court did not relieve defendants of this burden, however, until after Ronald Smart's conviction.\(^2\) Nevertheless, *Smart* presents an opportunity to analyze the parameters of federal due process when a state shifts the burden of persuasion to the defendant in homicide cases.\(^3\)

In 1981 a jury in the Lexington County General Sessions Court convicted Ronald Smart for the murder of two men. Smart asserted that he killed the men in self-defense. At the close of Smart's trial, the court instructed the jury that the state had the duty to prove every element of the crime beyond a reasonable doubt. The court also charged the jury that Smart had to prove self-defense by a preponderance of the evidence because it is an affirmative defense.\(^4\) The jury convicted Ronald Smart and found that the murders took place during the commission of larceny with a deadly weapon. Consequently, the court sentenced Smart to death on the jury's recommendation.

On appeal to the South Carolina Supreme Court,\(^5\) Smart conceded that the trial court's jury instruction concerning self-defense conformed to existing South Carolina law. Nevertheless, he requested and was denied the opportunity to argue against precedent. The supreme

---

2. South Carolina was the last state within the Fourth Circuit to relieve defendants of this burden. See *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984) (jury charge on self-defense).
3. The discussion of the burden of proof in this survey will distinguish between the burden of persuasion and the burden of production. See *Mullaney v. Wilbur*, 421 U.S. 684, 695 n.20 (1975) (discussion of distinction between the burden of producing some probative evidence on a particular issue and the burden of persuading the fact finder on that issue by a standard of proof such as preponderance of the evidence).
4. 873 F.2d at 1559.
court upheld his conviction, vacated his death sentence on other grounds, and remanded the case for a new trial. At Smart's resentencing, he received two consecutive life terms.

Smart petitioned the United States District Court for a writ of habeas corpus. He claimed that by shifting to him the burden of persuasion on the issue of self-defense, the trial court had unconstitutionally required him to disprove malice, which is an element of the state's case, "thereby relieving the State of its constitutional duty to prove each element of the crime of murder beyond a reasonable doubt." The district court granted habeas relief and the state appealed. The Fourth Circuit, relying primarily on Martin v. Ohio, reversed the district court's order. In Martin the Supreme Court held that Ohio did not violate due process when it shifted the burden of persuasion, as in Smart, and required a defendant to prove self-defense by a preponderance of the evidence. The Fourth Circuit concluded that Smart and Martin were "fundamentally indistinguishable." The court also distinguished between cases in which a defendant must rebut a presumption that is part of the state's case and cases in which a defendant asserts an affirmative defense. The court indicated that requiring a defendant to rebut a presumption violates due process, but shifting the burden of persuasion on an affirmative defense does not violate due process.

A review of Supreme Court decisions that discuss shifting the burden of proof reveals a flaw in the Fourth Circuit's conclusion in Smart. In re Winship, one of the Supreme Court's leading decisions on the requirements of due process, held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

6. Id. at 517, 299 S.E.2d at 687.
10. Smart, 873 F.2d at 1563-65.
11. Id. at 1563.
12. E.g. Mullaney v. Wilbur, 421 U.S. 684 (1975). In Mullaney the Supreme Court addressed the constitutionality of a Maine law that required a defendant charged with murder to rebut a presumption of malice. The Fourth Circuit decided in Smart that Mullaney, as a presumption case, did not support Smart's due process claim. Smart, 873 F.2d at 1562.
14. See id. at 1562-63.
which he is charged.”\(^{16}\) This absolute standard has been considered in several cases with facts similar to Smart.

In *Mullaney v. Wilbur*\(^{17}\) the Supreme Court addressed the constitutionality of a Maine law that required a defendant charged with murder to rebut a presumption of malice. In *Mullaney* the trial court had instructed the jury that “if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation.”\(^{18}\) The court’s instruction shifted to the defendant the burden of persuasion to rebut a presumption of malice in order to reduce his offense from murder to manslaughter.

Although the Supreme Court agreed with the State of Maine that it is permissible for a state to establish different levels of unlawful homicide, the Court held that “[b]y drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship.*”\(^{19}\) The Court then explicitly held that due process required “the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation [in effect, the existence of malice] when the issue is properly presented in a homicide case.”\(^{20}\)

A comparison of *Mullaney* with *Patterson v. New York*\(^{21}\) reveals the importance of malice as an element of murder. In *Patterson* the appellant claimed that his due process rights had been violated when the state required him to prove, by a preponderance of the evidence, the affirmative defense of extreme emotional disturbance. Patterson had been charged with second-degree murder.\(^{22}\) Although a defendant may need to show an absence of malice to establish extreme emotional disturbance, the Supreme Court specifically noted that “[m]alice aforethought is not an element of the crime [under New York law].”\(^{23}\)

---

16. *Id.* at 364.
20. *Id.* at 704.
22. New York defines second-degree murder as “intent to cause the death of another person, [which] causes the death of such person or of a third person.” N.Y. PENAL LAW § 125.25 (McKinney 1975).
23. *Patterson*, 432 U.S. at 198. Justice Powell, the author of the *Mullaney* opinion,
sequently, the court held that the affirmative defense of extreme emotional disturbance does "not serve to negative any facts of the crime which the State is to prove in order to convict of murder."24

An analysis of Martin v. Ohio,25 the decision on which the Fourth Circuit relied in Smart v. Leeke, reveals a fact situation similar to Patterson. In Martin the petitioner plead self-defense to a charge of aggravated murder.26 Although the petitioner conceded that every element of the crime existed,27 she claimed that the trial judge's jury instructions, which shifted to her the burden of persuasion to establish self-defense by a preponderance of the evidence, violated the due process clause.28 As in Patterson, however, malice was not an element of Ohio's statutory definition of murder. Therefore, the Supreme Court said that "Ohio does not shift to the defendant the burden of disproving any element of the state's case."29

A discussion of these Supreme Court cases casts doubt on the Fourth Circuit's conclusion that Martin v. Ohio and Smart v. Leeke are "fundamentally indistinguishable."30 The facts of Smart are distinguishable from Martin and actually more closely resemble the facts of Mullaney v. Wilbur. South Carolina defines murder as "the killing of any person with malice aforethought, either express or implied."31 The South Carolina Supreme Court has held that "Malice is an essential ingredient of murder."32 Furthermore, although the supreme court defines malice as a wrongful act done intentionally without legal justification or excuse, self-defense, by definition, is a legal justification or excuse.33 Therefore, when the Fourth Circuit required Smart to bear the burden of persuasion to establish the existence of self-defense (legal justification or excuse) by a preponderance of the evidence, the court
dissented in Patterson because New York's statutory defense of extreme emotional disturbance originated from the common law defense of "heat of passion." Powell believed that New York's shifting of the burden of persuasion was essentially the same as Maine's requirement in Mullaney, despite the presence of malice as an element of the crime under Maine law. See id. at 216-32.

24. Id. at 206-07.
26. Ohio defines aggravated murder as "purposely, and with prior calculation and design, caus[ing] the death of another." OHIO REV. CODE ANN. § 2903.01 (Anderson 1982).
27. Martin, 480 U.S. at 231.
28. Id. An Ohio statute required the judge to give these instructions. See OHIO REV. CODE ANN. § 2901.05(A) (Anderson 1982).
29. Martin, 480 U.S. at 234.

https://scholarcommons.sc.edu/sclr/vol42/iss1/6
required him to disprove malice (the absence of legal justification or excuse) which is an essential element of murder. The Supreme Court found this exact situation impermissible in *Mullaney v. Wilbur.*

The Fourth Circuit indicated that the jury was free to consider the self-defense evidence "in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime." The court, however, again relied on *Martin v. Ohio.* Unfortunately, allowing the jury to consider self-defense evidence, as in *Martin,* does not reconcile the difference between the definitions of murder in the two cases. Furthermore, the Supreme Court stated in *Engle v. Isaac* that "the prosecution's constitutional duty to negate affirmative defenses may depend, at least in part, on the manner in which the State defines the charged crime." Consequently, *Martin* should not have controlled the Fourth Circuit's decision in *Smart v. Leeke.*

The Fourth Circuit's treatment of the distinction between "presumption" and "affirmative defense" cases is as interesting as the court's determination that *Smart* and *Martin* are indistinguishable cases. The court said that in presumption cases "the state is improperly relieved of the burden of proving an essential element of the crime charged, and the burden is unconstitutionally shifted to the defendant to disprove the element." The court, however, indicated that no constitutional violation occurs when the burden of persuasion is shifted to

---

34. The district court's jury instructions present a corollary question: whether the instructions themselves violated Smart's due process rights because they were so confusing that the jury could not reconcile them. The court instructed the jury that the state must prove every element of its case, which included malice, beyond a reasonable doubt. The court also instructed the jury that the defendant must prove self-defense, which included absence of malice, by a preponderance of evidence. This is precisely the intellectual conflict that the Fourth Circuit held unconstitutional in *Thomas v. Leeke,* 725 F.2d 246 (4th Cir.), *cert. denied,* 469 U.S. 870 (1984). The court stated that, "Confusion in the minds of the jury was inescapable with a charge that was unequivocally contradictory. . . . In the face of such conflicting instructions, the jury's compliance with one part of the instructions necessarily led to its disregard of another part." *Id.* at 251.

In granting habeas relief to Smart the district court ruled that the jury's instructions were as constitutionally deficient as those in *Thomas v. Leeke.* Smart v. Leeke, 677 F. Supp. 414, 423 (D.S.C. 1987), *rev'd,* 873 F.2d 1558 (4th Cir.), *cert. denied,* 110 S. Ct. 189 (1989). The Fourth Circuit disposed of the issue, however, by stating that "under *Martin v. Ohio* the instruction would no longer be considered unclear and misleading." Smart v. Leeke, 873 F.2d 1558, 1556 (4th Cir.) (citation omitted), *cert. denied,* 110 S. Ct. 189 (1989).

35. *Smart,* 873 F.2d at 1564.
37. *Id.* at 120.
38. See *Smart,* 873 F.2d at 1561-62.
39. *Id.* at 1562.
the defendant to establish an affirmative defense.\footnote{40} South Carolina, however, can retain malice as an element of murder, and still not require the prosecutor to disprove, without violating due process, every possible defense as an element of its case. As the dissent in \textit{Smart} suggests, the defendant can be assigned the burden of production to adduce evidence of self-defense. The burden would then shift back to the state to prove malice beyond a reasonable doubt.\footnote{41}

The South Carolina Supreme Court impliedly adopted this approach in \textit{State v. Davis}.\footnote{42} Furthermore, the supreme court clearly adopted this rule in \textit{State v. Bellamy} when it held that, "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."\footnote{43} Accordingly, this due process issue should no longer arise in South Carolina.

\textit{Michael V. Hammond}

\section*{II. PRIOR BAD ACTS THAT SHOW COMMON SCHEME ARE ADMISSIBLE AGAINST CRIMINAL DEFENDANT}

In \textit{State v. Hallman}\footnote{44} the South Carolina Supreme Court held that evidence of prior bad acts is admissible in a criminal trial if the prior acts are "closely similar" to the charged offense. Additionally, in \textit{Hallman} the court held that the defendant's prior bad acts bore such a "close similarity" and show such a common scheme to the charged offense that the probative value of the act clearly outweighed its prejudicial effects.\footnote{45}

Morgan Hallman was charged with criminal sexual assault and attempting to commit a lewd act with a minor foster child in Hallman's home.\footnote{46} At trial the state introduced testimony of other minors who

\footnotesize{\begin{itemize}
\item \textit{40. See id.}
\item \textit{41. See id. at 1568.}
\item \textit{42. 282 S.C. 45, 317 S.E.2d 452 (1984). In Davis the South Carolina Supreme Court established a model jury instruction for a self-defense charge. After summarizing the elements of the defense, the court concluded: "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." \textit{Id.} at 46, 317 S.E.2d at 453.}
\item \textit{43. 293 S.C. 103, 105, 359 S.E.2d 63, 64-65 (1987).}
\item \textit{44. 298 S.C. 172, 379 S.E.2d 115 (1989).}
\item \textit{45. \textit{Id.} at 175, 379 S.E.2d at 117. Hallman had been convicted of first degree criminal sexual conduct with a minor. The court noted that the testimony of other children describing Hallman's prior sexual acts showed that the abuse "commenced . . . in exactly the same manner under similar circumstances." \textit{Id.}}
\item \textit{46. \textit{Id.} at 173, 379 S.E.2d at 116.}
\end{itemize}}

https://scholarcommons.sc.edu/sclr/vol42/iss1/6
alleged that similar assaults occurred in the past when they were foster children in the Hallman home. Although Hallman was not on trial for these alleged previous assaults and had never been charged or convicted for the prior assaults, the trial court allowed the minors to testify about the manner and frequency of Hallman's prior assaults.47

Traditionally, evidence of prior bad acts was not admissible to prove the charged offense or to show the character of the accused, but since 1923 South Carolina has recognized five exceptions to this rule.48 Specifically, in State v. Lyle49 the South Carolina Supreme Court stated:

[E]vidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; [or] (5) the identity of the person charged . . . .50

Since the Lyle opinion, South Carolina courts generally have admitted evidence of prior bad acts if the evidence fits one of the five exceptions.51 The Federal Rules of Evidence include a large number of exceptions which allow the admission of evidence of prior bad acts,52 but South Carolina does not have any statutory authority that pertains to prior bad acts. The common law limits South Carolina to the five exceptions carved out in Lyle.

In Hallman the supreme court allowed the testimony into evidence under the common scheme exception, stating:

Evidence of a common scheme or plan is admissible if it embraces two or more crimes so related to each other that proof of one tends to

47. Id. at 173-75, 379 S.E.2d at 116-17. The victim in this case testified that the abuse started shortly after she arrived in the Hallman home. She was between seven and nine years old. Both witnesses testified that the appellant began to assault them shortly after they arrived in the foster home, and the witnesses claimed that the assaults occurred in the same manner as the victim's assault. See id.


49. 125 S.C. 406, 118 S.E. 803 (1923).

50. Id. at 416, 118 S.E. at 807.

51. See generally State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (court allowed evidence of prior sexual assaults committed on sisters in a nearly identical manner); see also Reiser, supra note 48.

52. Fed. R. Evid. 404(b). Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See also W. REISER, A COMPARISON OF THE FEDERAL RULES OF EVIDENCE WITH SOUTH CAROLINA EVIDENCE LAW 13 (3d ed. 1987).
establish the others. The prior bad acts here occurred while each of the young women was a foster child to appellant and of similar age to the victim. In each instance, appellant took advantage of this relationship for his sexual gratification. . . . [The abuse] commenced . . . in exactly the same manner under similar circumstances. 63

Similarly, in State v. McClellan 64 two sisters testified against their father about prior sexual assaults. The testimony was admitted against the father who was charged with a similar assault on a third sister. The McClellan court applied the common scheme exception because "[t]he experiences of each daughter parallel that of her sisters . . . ." 65

The supreme court, however, has refused to apply the common scheme exception in several cases. In State v. Rivers 66 the court disallowed testimony of the defendant's wife about her husband's sexual practices that were similar to the rape with which he had been charged. The court stated "the overwhelming result of admitting unconnected sexual relationships is to establish an accused's character or propensity to engage in the alleged sexual conduct as a basis for inferring that he committed the charged crime." 67 Furthermore, in State v. Wilson 68 testimony of similar sexual acts was not allowed under the common scheme exception because three months had elapsed between the similar sexual acts and the alleged offenses. Finally, in State v. Rogers 69 a sister's testimony of a prior sexual assault was not admissible under a common scheme exception because "the acts were ten years apart and the only connection between the testimony of the two daughters was appellant touched them both." 70

In Hallman, however, the court noted that the assaults commenced in "exactly the same manner," that each of the victims was a foster child and was approximately the same age when the assaults occurred. 61 Thus, for prior sexual assaults to qualify under the common scheme exception, the separate acts must bear more than a similarity.

Although evidence of prior bad acts is admissible under the Lyle exceptions, the standard for admitting this evidence is not clear. 62 In State v. Drew 63 the court held that in order to be admissible "evidence

53. Hallman, 298 S.C. at 175, 379 S.E.2d at 117 (citation omitted).
55. Id. at 392, 323 S.E.2d at 774.
57. Id. at 78, 254 S.E.2d at 300 (citation omitted).
60. Id. at 507, 362 S.E.2d at 8.
61. See Hallman, 298 S.C. at 175, 379 S.E.2d at 117.
62. See W. Reiser, supra note 52, at 13.
of prior crimes should rest upon actual convictions . . . "64 Moreover, in State v. DuBose65 the court held that "proof of the other crimes must be clear and convincing."66

State v. Hallman reaffirms South Carolina's willingness to allow testimony of prior bad acts despite the potential for prejudice and the opinion is consistent with the court's opinion in State v. Lyle.67 The Hallman court, however, eased the standard for admission of prior bad acts so that a testimony about the prior bad acts of a criminal defendant can be admitted even though the defendant has not been charged or convicted of any previous crime.

Anthony L. Harbin

III. AFFIDAVIT CAN RESCUE WARRANT REGARDING PROPERTY THAT IS SEIZED

In State v. Williams68 the South Carolina Supreme Court held that certain language in an affidavit, which accompanies a search warrant, can satisfy the statutory and constitutional particularity requirements for the search warrant with regard to the property to be seized. Thus, if the court can determine the property to be seized with sufficient particularity from the descriptions on the affidavit and the search warrant, then the warrant is constitutionally and statutorily sufficient, and the evidence subsequently seized pursuant to the warrant will not be suppressed.69

In Williams a county sheriff's department sought a search warrant after an investigator saw many persons briefly visit Freddie Williams' mobile home,70 and after the department received a report from a confidential informant. To secure the warrant, the department submitted an affidavit that described the property it sought to obtain as "'any illegal drugs.'"71 After the magistrate spoke with the chief deputy sheriff on the telephone,72 an investigator provided the affidavit to the magistrate who issued the warrant.73 The warrant, however, erroneously identified the property to be seized as the suspect's residence and

64. Id. at 441-42, 316 S.E.2d at 368.
66. Id. at 230, 341 S.E.2d at 787.
69. Id. at 407-08, 377 S.E.2d at 310.
70. Record at 49-50.
71. 297 S.C. at 406, 377 S.E.2d at 309.
72. Record at 51.
73. Id. at 25.
not the contraband.\textsuperscript{74}

South Carolina Code section 17-30-140, which governs the issuance and execution of search warrants, provides that if a magistrate determines that probable cause exists, "he shall issue a warrant identifying the property and naming or describing the person or place to be searched."\textsuperscript{75} Without the affidavit the warrant in Williams would have been statutorily deficient because it did not identify the property to be seized by the sheriff's department.

In Williams the supreme court relied on State v. Ellis,\textsuperscript{76} another drug search and seizure case, to reach its decision. In Ellis the South Carolina Supreme Court read together the search warrant and the police officer's affidavit in order to meet the particularity requirement with regard to the place to be searched and held that the warrant was sufficient. The court in Williams, therefore, moderately extended existing South Carolina case law.

The court's decision to allow the warrant and affidavit to be read together is reasonable in light of the purposes of the warrant and the practice in South Carolina of simultaneously serving the two documents. The warrant facilitates the process of keeping records and provides notice to the individual whose person or property is to be searched.\textsuperscript{77} Although the limitations on the search are listed on two documents rather than one, the warrant and the affidavit do not provide any less notice to the accused when an officer serves him with both documents. Moreover, the recordkeeping function is not adversely effected because the warrant and affidavit are on the same piece of paper.

Other courts also read the warrant and affidavit together. In a case similar to Williams the Louisiana Third Circuit Court of Appeals held that an affidavit which cites "illegal drugs" as the object of the search is sufficient to rescue a warrant that erroneously lists a description of an automobile as the evidence the searchers expected to find.\textsuperscript{78} Although decisions in other courts are also consistent with Williams,\textsuperscript{79} some courts have expressed strong\textsuperscript{80} or qualified\textsuperscript{81} disagreement with

\textsuperscript{74} Id. at 102.
\textsuperscript{76} 263 S.C. 12, 207 S.E.2d 408 (1974).
\textsuperscript{79} See, e.g., State v. Moorman, 154 Ariz. 578, 583, 744 P.2d 679, 683-84 (1987) (warrant had no description of item to be seized, but was rescued by affidavit because executing officer had it with him and referred to it).
\textsuperscript{80} See, e.g., Namen v. State, 665 P.2d 557, 564-65 (Alaska Ct. App. 1983) (warrant must specify incorporation because allowing extrinsic documents to be incorporated by implication into a warrant would deny a constitutional imperative).
its position. The opinions contrary to Williams, however, appear out of harmony with the flexible totality-of-the-circumstances approach articulated by the United States Supreme Court in Illinois v. Gates.\(^{82}\)

The Williams court also discussed the adequacy of the magistrate's probable cause determination when he issued the warrant. The affidavit's probable cause recitation stated that the information came "from a reliable informant that has given information to the Sheriff's Dept. that has been true and has led to arrest and convictions in the past and has seen drugs at this residence in the past 72 hours."\(^{83}\) The court upheld the magistrate's determination on two bases: (1) the court's substantial deference to magistrates' probable cause determinations, and (2) the totality-of-the-circumstances test articulated in Illinois v. Gates.\(^{84}\)

The probable cause requirement interposes a neutral and detached magistrate between the police and the citizenry.\(^{85}\) The "neutral and detached" intermediary function has not perhaps been fulfilled in Williams to the extent that might be desired. The police certainly could have given the magistrate more information to establish probable cause. The affidavit mentioned only the informant's information, but the record reflects that the police did not include in the affidavit the results of their extended surveillance of Williams' mobile home.\(^{86}\) The police, for example, knew whether the informant was under indictment,\(^{87}\) and that the investigator had known the informant for a long time.\(^{81}\)

---


83. Record at 103.


85. See Moyland, Hear Say and Probable Cause: An Aguilar and Spinelli Primer, 25 Mercer L. Rev. 741, 742 (1974). Moylan, an Associate Judge of the Maryland Court of Special Appeals explained it as follows:

The clear and unremitting command of the Supreme Court throughout this century has been that search and seizure by authority of a warrant is always to be preferred over a warrantless intrusion, and indeed, wherever feasible is to be required. Implicit in that command is the concept that any decision as to whether probable cause exists so that a warrant should issue should always be made where possible, by a 'neutral and detached magistrate' rather than by a policeman. The constitutional protection consists of interposing an impartial judicial figure between the investigator and his quarry.

Id. (footnote omitted).

86. Record at 49-50.

87. Id. at 26.
time. Furthermore, the police knew that several people had telephoned about Williams' activities. Thus, the police could have made a much stronger showing of probable cause to the magistrate if they had been called upon to do so.

Some of the additional information may have been provided in the telephone conversation between the magistrate and the chief deputy sheriff before the warrant issued, but this possibility does not appear to have been pursued at trial.

Even so, supplementing the warrant by additional information is inconsistent with the law. Sworn oral testimony, though insufficient alone, may supplement an affidavit in South Carolina, but, no provision in South Carolina law, however allows a telephone conversation either to supplement or to be the basis for issuing a warrant. The South Carolina Code precludes that possibility in section 17-13-140, which states that: "A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate . . . ." Furthermore, South Carolina courts have forbidden law enforcement officials to supplement a warrant by telephone. By contrast, the Federal Rules of Criminal Procedure allow application for a warrant to be made by telephone rather than in person. If the legislature would adopt a procedure similar to the federal practice, better documentation and control over the telephone contacts between law enforcement officials and magistrates regarding warrants would result. Formalizing these contacts also might make it more likely that magistrates will remain detached and neutral intermediaries. Given the relaxed requirements of Williams, however, the police only infrequently will need to provide supplementary information. In State v. Williams the South Carolina Supreme court justifiably reaffirmed the commonsense, flexible procedural philosophy of Gates. The circumstances of the case, however, raise some doubts about whether magistrates are serving as neutral intermediaries, and the court may need to emphasize this in the future.

William R. Calhoun, Jr.

88. Id.
89. Id. at 27-28.
90. Id. at 21, 51.
93. See McKnight, 291 S.C. at 113, 352 S.E.2d at 472. The court in McKnight stated that, "A search warrant affidavit which itself is insufficient to establish probable cause may be supplemented before the magistrate by sworn oral testimony." Id. (emphasis in original).
IV. *Strickland* Test Ignored in Finding of Ineffective Assistance of Counsel

In *Mitchell v. State* the South Carolina Supreme Court held that an attorney’s failure to object to impermissible character evidence constituted ineffective assistance of counsel and, thus, violated the defendant’s sixth amendment right to counsel. The court based its decision on the circumstantial nature of the state’s evidence, which led the jury to place primary importance on the defendant’s credibility. In ruling that the defendant did not have effective assistance of counsel, the supreme court did not apply the United States Supreme Court’s two-prong test to determine ineffectiveness identified in *Strickland v. Washington*.

The *Strickland* test requires a defendant to show first “that counsel’s performance was deficient . . . . [by] showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.”

A grand jury indicted Addie Mitchell for the murder of her husband, assault and battery with intent to kill her husband’s lover, and burglary. The evidence introduced against Mitchell at trial was entirely circumstantial. The state presented no direct evidence that linked Mitchell to the crimes.

During the trial the state introduced extensive evidence that impugned Mitchell’s character. The evidence consisted of testimony by a police officer and a witness, Thelma Ford, that Mitchell’s home contained an altar surrounded by devil candles and burned snapshots. Other testimony characterized Mitchell as a root doctor, a spiritual advisor, and a spell-caster. Finally, Mitchell’s son testified that his mother was a member of the Mafia. Mitchell’s attorney did not object to the introduction of this character evidence. The jury subsequently found Mitchell guilty on all charges. Mitchell sought post-conviction relief and asserted ineffective assistance of counsel because of

---

96. *See id.* at 188-89, 379 S.E.2d at 124-25.
97. *Id.* at 189, 379 S.E.2d at 125.
99. *Id.* at 657.
102. *Id.* at 23-24.
104. *Id.* at 189, 379 S.E.2d at 125.
her attorney's failure to object to the evidence of prior bad acts. The South Carolina Supreme Court granted certiorari after Mitchell's application was denied for post-conviction relief.105

The supreme court determined that counsel's failure to object to the character evidence constituted ineffectiveness of counsel for two reasons. First, "the State cannot attack the character of the defendant unless the defendant herself first places her character in issue."106 Second, "evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person."107

The court then focused on the effects of counsel's error on the trial itself. Citing Strickland, the court addressed the question whether "there is a reasonable probability that, but for the counsel's . . . errors, the result of the proceeding would have been different."108 The court that determined "[a] reasonable probability is a probability sufficient to undermine the confidence in the outcome."109 Because the state's evidence was purely circumstantial, the supreme court concluded that Mitchell's credibility became the main issue before the jury. Consequently, the improperly admitted character evidence alone may have persuaded the jury of Mitchell's guilt. Thus, the court reasoned that the outcome of the trial might have been different if the evidence had been excluded.110

The United States Supreme Court's decision in Strickland v. Washington111 set the standard for courts to apply in ineffective assistance of counsel cases. Strickland requires the use of a two-prong test to prove ineffective assistance. First, the defendant must show that his counsel's performance was deficient. Second, the defendant must show that these deficiencies were prejudicial to his case.112 The standard used to measure counsel's deficiency is reasonable effectiveness or reasonably competent assistance.113 In making this determination, however, the Supreme Court warned that the scrutiny of counsel's actions must be deferential, and that "every effort [should] be made to eliminate the distorting effects of hindsight . . . ."114

105. Id. at 187, 379 S.E.2d at 124.
107. Id. at 189, 379 S.E.2d at 125 (citing State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987)).
108. Id. (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).
109. Strickland, 466 U.S. at 694.
112. Id. at 687.
113. See id.
114. Id. at 689.
Ineffective assistance of counsel will not be found unless the second prong, prejudice to the defendant, is proven. In addition to the "reasonable probability" test cited by the South Carolina Supreme Court in *Mitchell*, the *Strickland* opinion emphasized the importance of considering the trial's "fundamental fairness" to determine prejudice to the defendant.\(^\text{115}\)

The courts in recent South Carolina decisions have applied *Strickland* consistently. In *Butler v. State*\(^\text{116}\) the defendant claimed ineffective assistance of counsel based on the attorney's failure to research and present mitigating evidence. The supreme court relied on the prejudice requirement of *Strickland* and refused to find ineffective assistance of counsel.\(^\text{117}\) In *Roach v. Martin*\(^\text{118}\) the court declined to evaluate counsel's trial strategies and held that such an inquiry was improper hindsight.\(^\text{119}\) Thus, the courts seem less likely to find a counsel's trial strategy deficient and prejudicial to the defendant than other types of claims, presumably because of the court's deference to counsel's actions in the courtroom.

Ineffective assistance of counsel appears easier to prove when the error alleged is technical. In *Watson v. State*\(^\text{120}\) the court ruled that counsel was ineffective because of his "failure to inform [the defendant] that a jury could be impaneled to determine the propriety of a recommendation of mercy on [his] burglary charge."\(^\text{121}\) The attorney testified that he was not aware that the defendant was entitled to this right.\(^\text{122}\) The attorney's obvious technical error and its effect on the outcome of the trial met both prongs of the *Strickland* test.\(^\text{123}\) In a similar case, *Stone v. State*,\(^\text{124}\) the court ruled that the defense attorney's failure to request a jury instruction on self-defense constituted ineffective assistance of counsel. The *Stone* court based its first-prong analysis on the fact that counsel did not request a charge because "it did not cross his mind."\(^\text{125}\) Because the error was technical, as in *Watson*, the court found it to be objectionable under *Strickland*. Two recent decisions address whether the failure to object constitutes ineffective assistance of counsel. The failure to object arguably

\(^{115}\) See id. at 697.
\(^{117}\) Id. at 443-45, 334 S.E.2d at 815-16.
\(^{118}\) 757 F.2d 1463 (4th Cir.), cert. denied, 474 U.S. 865 (1985).
\(^{119}\) Id. at 1477.
\(^{120}\) 287 S.C. 356, 338 S.E.2d 636 (1985).
\(^{121}\) Id. at 357, 338 S.E.2d at 637.
\(^{122}\) Id.
\(^{123}\) See id. at 357-58, 338 S.E.2d at 637-38.
\(^{125}\) Id. at 287-88, 363 S.E.2d at 904.
falls between an attorney’s discretionary control over his trial strategy and the objective technical errors proscribed by the rules of court. In Jeffers v. Leeko[28] the Fourth Circuit found that the attorney’s failure to object to comments on the defendant’s post-arrest silence was unreasonable.[127] After further consideration, however, the court ruled that the error was not prejudicial to the defendant because the attorney had presented evidence that sufficiently explained the defendant’s silence.[128]

In Sosebee v. Leeko,[129] however, the South Carolina Supreme Court ruled that an attorney’s failure to object to the trial judge’s opinionated comments constituted ineffective assistance of counsel. The court held that the attorney’s error had prejudiced the client because the judge’s comments had undermined a witnesses’ credibility, which was crucial to the client.[130] In both Jeffers and Sosebee the courts intimated that prejudice may depend in part upon the strength and nature of the state’s case. In both instances, however, the courts identified and addressed both prongs of the Strickland test.

Although the outcome in Mitchell is in line with other South Carolina cases on ineffective assistance of counsel, the supreme court’s reasoning in Mitchell is inconsistent with these cases.[131] The Mitchell court did not apply the first prong of the Strickland test to analyze the deficiencies of the attorney at trial. Also, the court did not address the second prong of the test. Instead of applying the two-prong analysis the supreme court ruled that counsel’s failure to object was an error that constituted ineffective assistance of counsel. To support its finding of error, the court cited case law which held that evidence of prior bad acts was inadmissible.[132] The supreme court jumped from one end of the Strickland analysis to the other and disregarded several logical links in between. Thus, the court concluded that because counsel erred, he necessarily was ineffective. The outcome in Mitchell is at odds with the first-prong analysis in Strickland, which relies on a “reasonable competence” standard to determine whether an attorney’s error constitutes ineffectiveness of counsel.[133] The Strickland test does not state that error equals ineffectiveness. Furthermore, the Strickland opinion states that to satisfy the first prong, a defendant must show

127. Id. at 525 (citing Doyle v. Ohio, 426 U.S. 610 (1976)).
128. Id. at 526.
130. Id. at 535, 362 S.E.2d at 24.
133. 466 U.S. at 687.
"that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." The Strickland decision does not suggest that every error results in ineffective counsel. The Mitchell court returned to the Strickland analysis when it applied the "reasonable probability" test to determine the error's prejudicial effects on the defendant. The court focused on the strengths and weaknesses of the state's case as a key factor. The court, therefore, held that counsel's failure to object to the damaging character evidence was particularly prejudicial because the state's purely circumstantial case put the defendant's credibility into issue. Thus, the court clarified a standard of analysis to determine prejudice that never had been enunciated. To determine the prejudicial effect of an error, the Supreme Court in Strickland ruled that courts "must consider the totality of the evidence before the judge or jury . . . [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."

The Mitchell court's decision not to articulate the Strickland test leaves unanswered the question whether the court intends to abandon the first prong of the Strickland test. If so, any error by counsel stands to be labelled as ineffective assistance of counsel if it is based on a near-perfect standard of performance. Furthermore, countless ineffective assistance of counsel cases will flood an already overwhelmed judicial system. The Mitchell opinion in effect has created a demand for perfection in criminal cases that the Supreme Court sought to ameliorate when it designed the prejudice prong of Strickland. In fact, the Strickland court's standard was a requirement for "reasonably competent counsel," not nearly perfect counsel.

Although the Mitchell court did not address the first prong of Strickland, the court's consideration of the relative strength of the state's case to determine the prejudicial effect of counsel's error set forth a practical guideline that will be valuable in reviewing future in-

134. Id. (emphasis added).
135. 298 S.C. at 189, 379 S.E.2d at 125.
136. In several South Carolina cases the courts appear to have based their findings of prejudice in part on the strength or weakness of the state's case, but the courts never clearly stated this as a consideration. See Roach v. Martin, 757 F.2d 1463 (4th Cir.), cert. denied, 474 U.S. 865 (1985) (counsel's failure to develop certain defenses was not prejudicial because of state's strong case); Stone v. State, 294 S.C. 286, 363 S.E.2d 903 (1988) (counsel's failure to request jury instruction prejudicial). For a case in which the court considered the strength of the defendant's case as a factor, see Jeffers v. Leake, 835 F.2d 522 (4th Cir. 1987), cert. denied, 486 U.S. 1008 (1988) (comments of state's counsel not prejudicial because of defendant's strong evidence that rebutted the comments).
137. 466 U.S. at 695-96.
effective assistance of counsel cases.

Kelley M. Braithwaite

V. TRIAL IN ABSENTIA REQUIRES PROPER NOTICE OF ALL CHARGES

In State v. Goode\(^1\) the South Carolina Supreme Court considered whether the state may prosecute a defendant in absentia for two separate crimes when the defendant had notice of only one crime. The court upheld the criminal conviction for which the state gave the defendant notice and reversed the second conviction for which the state did not give the defendant notice.\(^2\)

Law enforcement officials arrested James F. Goode in May 1987 for breaking into a motor vehicle. The court released him on a $5,000 surety bond and ordered him to appear in court on June 15, 1987. Goode failed to appear on June 15 and the court indicted him for grand larceny and breaking into a motor vehicle. On December 9, 1987, the court tried Goode in absentia and found him guilty of both charges. He was not represented by counsel.\(^3\)

The trial judge gave Goode a ten-year sentence for the grand larceny offense and a five-year consecutive sentence for the crime of breaking into a motor vehicle. On appeal the supreme court upheld the conviction for breaking into the motor vehicle, but reversed Goode's conviction for grand larceny. The court noted that the surety bond provided Goode with notice of only the charge of breaking into the motor vehicle and, therefore, Goode did not knowingly and voluntarily waive his right to be present on the grand larceny charge.\(^4\)

The supreme court's opinion in Goode is significant for two reasons. First, when the court upheld one of Goode's convictions, it approved the practice of in absentia criminal convictions in South Carolina. Second, when the court overturned Goode's grand larceny conviction for lack of notice, it confirmed the notice requirement as a limitation on in absentia trials.

The court refused to convict Goode for grand larceny and observed that the state "failed to prove that Goode had any notice, either actual or constructive, as to his indictment for grand larceny or the subsequent trial which commenced several months after Goode was released on the surety bond . . . ."\(^5\) Furthermore, the court stated that

\(^2\)Id. at 483, 385 S.E.2d at 846.
\(^3\)Id.
\(^4\)Id. at 482, 385 S.E.2d at 845.
\(^5\)Id., 385 S.E.2d at 846.
"Goode had no warning that he faced prosecution for [grand larceny] . . . only that he would be prosecuted for breaking into a motor vehicle."\textsuperscript{143} The court's ruling in \textit{Goode} follows South Carolina precedent.\textsuperscript{144} Moreover, the right to reasonable notice of charges is guaranteed by the Sixth Amendment of the United States Constitution,\textsuperscript{145} which applies to state criminal prosecutions under the Fourteenth Amendment.\textsuperscript{146} This right is also guaranteed under the South Carolina Constitution.\textsuperscript{147} The United States Supreme Court has held that the right to reasonable notice of criminal charges is a basic element of the accused's Sixth Amendment rights.\textsuperscript{148}

In \textit{Goode} the state's attorneys relied on \textit{Ellis v. State}\textsuperscript{149} to support their argument that Goode did not have the right to set the time or circumstances of his trial on either charge.\textsuperscript{150} In \textit{Ellis} the South Carolina Supreme Court held that if the defendant has notice of the term of court in which he will be tried and elects to waive his right to appear at trial, that waiver is sufficient.\textsuperscript{151} In \textit{Ellis} the defendant knew of the charges against him and fled the state to avoid the trial.\textsuperscript{152} The supreme court in \textit{Goode} distinguished \textit{Ellis} because the state failed to prove that Goode had any notice of the grand larceny charge when he

\textsuperscript{143} Id.
\textsuperscript{144} See, e.g., State v. Green, 269 S.C. 657, 239 S.E.2d 485 (1977) (state violated the defendant's constitutional right to be informed of the nature and cause of accusations against him when the state did not issue an arrest warrant or indictment and did not arrange him on the charge, and furthermore, no legal official of the state advised him of the charge). The \textit{Goode} court quoted from \textit{Green}: "'[A] valid waiver [of an accused person's right to be present at trial] presupposes notice to the accused. Without notice of the charges, the accused cannot be deemed to have made a "knowing" and "voluntary" election to be absent.'" State v. Goode, 299 S.C. 479, 482, 385 S.E.2d 844, 845 (1989) (quoting \textit{Green}, 269 S.C. at 662, 239 S.E.2d at 487).
\textsuperscript{145} The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him." U.S. Const. amend. VI.
\textsuperscript{147} The South Carolina Constitution provides that "[a]ny person charged with an offense shall enjoy the right . . . to be fully informed of the nature and cause of the accusation . . . ." S.C. Const. art. I, § 14.
\textsuperscript{148} See, e.g., 21A Am. Jur. 2d Criminal Law § 640 (reasonable notice of charges is a basic element of due process); \textit{see also} Farella v. California, 422 U.S. 806, 819-20 (1975) (The accused has the right to make his own defense personally, and this Sixth Amendment right does not belong to his counsel. The accused, therefore, must be informed of the nature and cause of the accusation); \textit{In re Gault}, 387 U.S. 1, 31-34 (1967) (juvenile custody hearing; court held that notice must be given sufficiently in advance of court proceedings and it must set forth the alleged conduct with particularity).
\textsuperscript{149} 267 S.C. 257, 227 S.E.2d 304 (1976).
\textsuperscript{151} 267 S.C. at 260-61, 227 S.E.2d at 305-06.
\textsuperscript{152} Id. at 259, 227 S.E.2d at 305.
waived his right to be present at trial.\textsuperscript{153}

Although Goode was not present at the trial, the supreme court upheld his conviction for breaking into a motor vehicle.\textsuperscript{164} The South Carolina Rules of Criminal Procedure (SCRCP) govern trials in absentia. SCRCP Rule 16 provides that a person "may voluntarily waive his right to be present [at trial] and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present . . . ".\textsuperscript{155} South Carolina courts have held that a trial court must be reversed if no record exists in which the trial judge made a finding of fact that the defendant had been given notice that he would be tried in absentia if he failed to appear.\textsuperscript{166} Appellate courts also will reverse a judgment if the trial judge made the requisite finding of fact as to notice, but the findings were without evidentiary support.\textsuperscript{167} The supreme court upheld the motor vehicle conviction in Goode because they found that the trial judge had made a valid evidentiary finding that Goode was put on notice.\textsuperscript{168} To claim protection of the court's rule that requires notice of trial, either the defendant or the criminal defense attorney must object at the first opportunity and ask that an evidentiary finding of notice be made before the defendant is tried in absentia.\textsuperscript{169}

\begin{itemize}
  \item \textsuperscript{153} Goode, 299 S.C. at 482, 385 S.E.2d at 846.
  \item \textsuperscript{154} Id. at 483, 385 S.E.2d at 846.
  \item \textsuperscript{155} S.C.R. CRIM. P. 16. Rule 16 provides:
  \begin{quote}
    [E]xcept in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon a failure to attend the court.
  \end{quote}
  For a discussion of the capital punishment exception, see Cohen, \textit{Can They Kill Me If I'm Gone: Trial in Absentia in Capital Cases}, 36 U. Fla. L. Rev. 273 (1984) (If capital defendant escapes before trial and remains absent through sentencing, trial in absentia probably barred). \textit{See also} Cohen, \textit{Trial in Absentia Re-Examined}, 40 Tenn. L. Rev. 155 (1973) (in some in absentia trial, defendant's rights may be adequately represented by counsel).
  \item \textsuperscript{156} \textit{See, e.g.}, State v. Jackson, 290 S.C. 435, 351 S.E.2d 167 (1986) (record did not support finding that defendant knowingly and intelligently waived his right to be present); State v. Jackson, 288 S.C. 94, 341 S.E.2d 375 (1986) (error for trial judge not to make finding of fact as to defendant's notice before trial in absentia); State v. Simmons, 279 S.C. 165, 303 S.E.2d 857 (1983) (record failed to show notice of indictment trial); State v. Fleming, 287 S.C. 283, 335 S.E.2d 814 (Ct. App. 1985) (error for trial judge not to make finding of fact as to notice before trial in absentia).
  \item \textsuperscript{157} \textit{See, e.g.}, State v. Simmons, 279 S.C. 165, 303 S.E.2d 857 (1983).
  \item \textsuperscript{158} Goode, 299 S.C. at 483, 385 S.E.2d at 846.
  \item \textsuperscript{159} State v. Williams, 292 S.C. 231, 355 S.E.2d 861 (1987) (defendant appeared a day late for his trial, but neither defendant nor his attorney objected to the court proceeding without defendant being present).
\end{itemize}
The Federal Rules of Criminal Procedure (FRCP) have stricter standards for allowing trials in absentia than the standards set forth in rule 16 of the SCRCP. FRCP rule 43 provides that "[t]he defendant shall be present at . . . every stage of the trial . . . except as otherwise provided . . . and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present . . . is voluntarily absent after the trial has commenced whether or not the defendant has been informed by the court of the obligation to remain during the trial . . . ."160 Accordingly, under the FRCP the defendant must be present at a minimum during the initial stages of trial before he may waive his right to be present.

In United States v. Tortora,161 a case with multiple defendants, the Second Circuit held that it is within the trial judge's discretion to proceed in absentia if the court finds that the defendant had notice of the charge even if the defendant failed to appear as required by the federal rules. The Tortora court also noted that "[i]t is difficult . . . to conceive of any case where the exercise of this discretion would be appropriate other than a multiple-defendant case."162 In Tortora the trial court had proceeded with a trial that was plagued with scheduling difficulties even though one of the defendants knowingly and voluntarily had failed to appear after pleading not guilty and being released on bond. The defendant was convicted in absentia.163 On appeal the Second Circuit upheld the conviction despite the appellant's argument that rule 43 mandated a reversal. The Second Circuit emphasized that defendants may be tried in absentia at the trial judge's discretion when circumstances such as those in Tortora warrant the proceeding.164

The rules governing trials in absentia vary among the states. Some states protect defendants by allowing a trial in absentia if the charge is a misdemeanor and the defendant is represented by counsel.165 One state has upheld an in absentia conviction, however, even though the defendant received no actual notice of his trial date.166

162. Id. at 1210 n.7.
163. Id. at 1204-07.
164. Id. at 1210; note that rule 43(c)(2) of the FRCP allows in absentia trials when defendants are charged with an offense that is "punishable by fine or by imprisonment for not more than one year or both so long as the court proceeds with "the written consent of the defendant . . . ."
165. See, e.g., State v. Turner, 99 Or. App. 176, 781 P.2d 404 (1989) (Oregon statute allowed trial in absentia for misdemeanor and defendant had to be present when represented by counsel for felony).
166. State v. Wagstaff, 772 P.2d 987 (Utah 1989) (notice to attorney sufficient because defendant has duty to keep in touch with attorney).
The substantial authority which requires that reasonable notice be given to a defendant of all charges brought against him compelled the South Carolina Supreme Court's decision on Goode's grand larceny conviction. By upholding Goode's conviction for breaking into a motor vehicle, the court acted within constitutional boundaries and, at the same time, affirmed a sound policy that thwarts defendants who otherwise "could frustrate the speedy satisfaction of justice by absenting themselves from their trials." 167

Matthew Hubbell

VI. THE RAPE SHIELD PROVISION: AN EXCLUSION FOR MOTIVE AND BIAS

In State v. Finley 168 the South Carolina Supreme Court held that the trial court misapplied the Rape Shield Provision 169 when it refused to allow a defendant to testify about the complainant's prior sexual conduct with a third party. 170 The supreme court's opinion in Finley narrows the scope of the Rape Shield Provision to allow a criminal defendant to introduce evidence of the complainant's sexual behavior when it relates to the complainant's possible motives and biases in bringing the charge.

In Finley the complainant's allegations arose from events that followed a dinner date whereupon the defendant and complainant slept separately in the living room of the complainant's apartment. During the night, the defendant awoke and saw the complainant and her neighbor engaged in sexual intercourse. When the neighbor left, the complainant and the defendant went back to sleep without discussing the incident. The complainant alleged that when she told the defendant to leave her apartment the next morning, he physically assaulted her and attempted to rape her. The defendant argued that he did not physically assault the complainant, but admitted that they did quarrel over the complainant's sexual conduct with her neighbor. The defend-

168. 300 S.C. 196, 387 S.E.2d 88 (1989). The supreme court also held that the trial court erred when it refused to admit evidence to tape recorded conversation offered by the defendant to impeach the complainant's testimony. The court noted that "even illegally obtained evidence is generally admissible for impeachment purposes." Id. at 199, 387 S.E.2d at 89 (citing State v. Mercado, 263 S.C. 304, 210 S.E.2d 459 (1974)).
170. Finley, 300 S.C. at 200, 387 S.E.2d at 90.
and also contended that the complainant falsely accused him of rape because she was angry and feared that he would tell others of her sexual conduct with her neighbor.  

At trial the complainant testified that the defendant had offered to pay her $1000 to drop the charges. The defendant's girlfriend testified, however, that the complainant originally made the $1000 offer to drop the charges. The defendant offered evidence of a tape recorded conversation in which the complainant, in fact, offered to drop the charges. The trial court refused to admit the taped conversation because it was "irrelevant and improper." The supreme court ruled that the tape should have been admitted, reversed the trial court, and remanded the case.

The South Carolina Rape Shield Provision states that "[e]vidence of specific instances of the victim's sexual conduct . . . and reputation evidence of the victim's sexual conduct shall not be admitted in prosecutions . . . ." The Provision contains three exceptions to allow the admission of (1) evidence of the victim's prior sexual conduct with the defendant, (2) "evidence of specific instances of sexual activity with persons other than defendant introduced to show source or origin of semen, pregnancy or disease about which evidence has been previously introduced . . . [provided] its inflammatory or prejudicial nature does not outweigh its probative value . . . ." and (3) evidence of adultery that a defendant offers to impeach the credibility of the witness. The Provision does not state expressly any exception for evidence that may relate to a victim's motive or bias in bringing the charges. Because evidence that relates to the motive or bias of the prosecuting witness may be essential to a defendant's constitutional right to confront the witnesses against him and to present his defense, many courts have considered statutes similar to the Rape Shield Provision overinclusive in their scope.

171. Id. at 198, 387 S.E.2d at 89.
172. Id. at 199, 387 S.E.2d at 89.
173. Id., 387 S.E.2d at 89-90.
175. Id.
176. Id.
177. See, e.g., Latzer v. Abrams, 602 F. Supp. 1314, 1319 (E.D.N.Y. 1985) (court ruled that trial court's refusal to permit cross-examination of witnesses because of New York's rape shield statute violated the defendant's constitutional confrontation rights); Commonwealth v. Joyce, 382 Mass. 222, 231, 415 N.E.2d 181, 187 (1981) (court must allow testimony that complainant had been charged twice with prostitution to prove that she was motivated falsely to accuse the defendant of rape by her desire to avoid further prosecution); People v. Slovinski, 166 Mich. App. 158, 182-83, 420 N.W.2d 145, 155 (1988) (evidence of complainant's prostitution admissible to protect rape defendant's due process and confrontation rights).
Rule 412 of the Federal Rules of Evidence generally "bars reputation and opinion evidence of the victim’s past sexual conduct, but permits evidence of specific incidents" if the constitution mandates admission.\(^\text{179}\) Prior to the adoption of rule 412 in 1978, many federal and state courts treated rape victims harshly and unsympathetically.\(^\text{179}\) The victim's reputation and past sexual conduct were proper subjects of inquiry during a rape trial.\(^\text{180}\)

Although almost all states have enacted rape shield statutes\(^\text{181}\) and many courts have addressed the scope of admissible evidence at rape trials in these states, the United States Supreme Court has not addressed directly the issue of admitting evidence of a victim's motive or bias. The Court, however, has suggested the direction it is likely to take. In *Davis v. Alaska*\(^\text{182}\) the Court addressed a criminal defendant's right to confront and cross-examine a crucial prosecution witness about the witness' juvenile court probation. The defendant hoped to prove the possible bias of the witness because of his probationary status. The state argued that the defendant should not reveal the witness' past probation, and the trial court agreed because of the Sixth and Fourteenth Amendments. The Court held that the defendant was entitled to introduce evidence of possible bias on the part of a key prosecuting witness.\(^\text{183}\) The trial court refused to allow the testimony because of state provisions protecting juvenile offenders. The Supreme Court, however, held that without the opportunity to cross-examine and attack a witness' credibility to reveal possible biases or ulterior motives, a defendant cannot be guaranteed a fair and impartial trial in accordance with the Sixth Amendment.\(^\text{184}\) Based on its reasoning in the *Davis* opinion, the Court might extend a similar rationale to protect a defendant that has been accused of rape.

Several courts have relied on the Supreme Court's reasoning in *Davis* to admit a complainant's previous sexual conduct as evidence of motive or bias. In *State v. Jalol*\(^\text{185}\) the Oregon Court of Appeals held that the trial court should have allowed a defendant charged with rape

178. C. McCormick, McCormick on Evidence § 193 (E. Cleary 3d ed. 1984) (discussing rule 412(b)(1)); see, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973) (Sixth Amendment right to confrontation guarantees the defendant's right to cross-examination in criminal proceedings).

179. For an historical overview of the rape victim's treatment in rape cases, see Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1 (1977).


181. C. McCormick, supra note 178, at 573 n.11.


183. Id. at 319-20.

184. Id. at 316-17.

to introduce evidence that the alleged victim brought the charges because she feared that he would tell her parents of her sexual conduct with the defendant's son. Oregon's rape shield law precluded evidence of previous sexual conduct. The court ruled the statute unconstitutional and stated that if a court prohibited the evidence it would infringe upon the defendant's constitutional right to confrontation and found that "the only difference between Davis and this case is that the policy of [the Oregon statute] is to protect a sex-crime complaint." 

In Commonwealth v. Black the Superior Court of Pennsylvania relied on Davis to support its holding that the Pennsylvania Rape Shield Statute could not prevent a defendant from introducing evidence of the victim's bias because of the defendant's Sixth Amendment rights. The Pennsylvania court noted "[w]e can not distinguish the present case from Davis v. Alaska ... and therefore are constrained to reverse . . ." 

In Summit v. Nevada the defendant was charged with assaulting a six-year-old child. The Nevada Supreme Court permitted the defendant to introduce testimony that the child knew about similar sexual acts and, therefore, was able to fabricate the charges. The Nevada court cited the Supreme Court's decision in Davis and allowed the defendant to introduce the evidence because it was not intended solely to impeach or injure the child but to dispel the jury's inference that the child could not otherwise know about sex. Jalo, Black, and Summit are examples of several courts' willingness to allow the admission of motive and bias evidence in rape cases even when rape shield statutes are in force.

In State v. McCoy the defendant challenged the constitutionality of South Carolina's Rape Shield Provision because it limited his right to introduce evidence and his right to confront witnesses. The South Carolina Supreme Court held that the rape shield provision was constitutional because it did not prohibit introduction of all the evidence of a victim's past sexual conduct. In upholding the statute, the court stated that judges should apply the statute's restrictions in such a way that the interests of society and the prosecuting witness are bal-

186. Id. at 850, 557 P.2d at 1362.
187. Id. at 850-51, 557 P.2d at 1362.
189. Id. at 555-57, 487 A.2d at 400.
190. Id. at 556, 487 A.2d at 400.
192. Id. at 162, 697 P.2d at 1376.
194. Id. at 72, 261 S.E.2d at 160.
anced against the interests of the defendants that are charged.195

In Finley the South Carolina Supreme Court used State v. Schmidt196 as an example of a case in which evidence of previous sexual behavior had considerable probative value relating to the motive or bias of the complaining witness.197 In Schmidt the defendant was convicted of criminal sexual conduct with a minor. Two years had elapsed between the alleged assault and the child’s first report of it, and the trial court refused to allow the defendant to introduce evidence of a “vendetta” which stemmed from his extramarital affair with the child’s mother.198 The supreme court held that the evidence relating to motive and bias was relevant and that to refuse such testimony would deny the defendant a fair and impartial trial.199

Although almost all states have enacted rape shield statutes, the statutes vary in their sensitivity to the issue of motive and bias.200 South Carolina’s Rape Shield Provision appears overinclusive because it does not contain language similar to Federal Rule 412(b)(1).201 The court’s decision in Finley refines the holding of McCoy by considering the state’s interest in protecting the victim, while affirming the defendant’s constitutional rights to confront and cross-examine witnesses as part of the defense. In Finley the defendant denied committing an assault and argued that the victim fabricated the charges to extort money from him. The court emphasized the unique facts of the Finley case and ruled that testimony which concerned the complainant’s sexual conduct was relevant to establish evidence of her motive, bias, and prejudice. The court warned, however, that its opinion in Finley should not weaken the rape shield statute’s application to general character or reputation testimony.202

In Finley the supreme court emphasized the distinction between evidence introduced to prove a victim’s motive and bias and evidence of the victim’s past sexual behavior introduced solely to prove general reputation and character.203 In recent years, courts have devoted more attention to trying rape cases in ways that do not degrade and humili-
ate the victim. The state's interest in protecting a victim's past is certainly worthwhile. Nevertheless, courts cannot ignore defendants' constitutional rights. The South Carolina Supreme Court in Finley has established a good balance between the state's interest in protecting the rape victim and the defendant's right to present a defense.

Lucinda Gardner Wichmann
