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Brent M. Boyd
M. C. Cauthen
F. S. Pfeiffer
Pamela A. Wilkins
Christie L. Companion

See next page for additional authors

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Authors
Brent M. Boyd, M. C. Cauthen, F. S. Pfeiffer, Pamela A. Wilkins, Christie L. Companion, J. E. Pilgreen IV, James M. Hughes, and Wendy Hallford-Dudley

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CRIMINAL LAW

I. INEFFECTIVE ASSISTANCE OF POST-CONVICTION RELIEF COUNSEL INSUFFICIENT TO SUPPORT SUCCESSIVE PCR APPLICATION

In Aice v. State the South Carolina Supreme Court held that ineffective counsel in a post-conviction relief (PCR) hearing is not per se "sufficient reason" to support a successive PCR application. The Aice court emphasized the need for finality in the judicial process, and the decision reflects the supreme court's reluctance to allow successive PCR applications.

Michael Aice received two consecutive life sentences after he was convicted of two murders that occurred in a drive-by shooting on July 5, 1980. The South Carolina Supreme Court affirmed the convictions on direct appeal in 1982, and the United States Supreme Court denied Aice's petition for certiorari. Subsequently, in 1985 the circuit court denied Aice's first PCR application, so Aice petitioned the South Carolina Supreme Court for certiorari to review the decision of the PCR judge. Aice raised three grounds for relief not raised in the original PCR hearing; however, the court denied his certiorari petition in 1986.

Next, Aice attempted to obtain habeas corpus relief in federal court, but was also unsuccessful. Aice then filed a second application for PCR, raising the same three grounds for relief that he asserted in his certiorari petition to the South Carolina Supreme Court. He argued that, because of ineffective assistance of PCR counsel, those three issues were not presented at the first PCR hearing. The PCR court dismissed Aice's second application as impermissibly successive.

The South Carolina Supreme Court granted Aice's petition for certiorari to review the PCR court's dismissal of Aice's second PCR application. Aice argued before the supreme court that the PCR court should not have dismissed his second PCR application because he had three meritorious arguments that showed his conviction was fundamental-

2. Id. at 451, 409 S.E.2d at 394.
3. Id.
5. Id. at 449, 409 S.E.2d at 393.
6. Id.
7. Id.
ly unfair, and because his first PCR counsel was ineffective in failing to raise these arguments. 8

The court held that Aice's claim of ineffective assistance of counsel did not constitute "sufficient reason" for relief as required under section 17-27-90 of the South Carolina Code. 9 The court noted that the phrase "sufficient reason" has been interpreted very narrowly in South Carolina. 10 Accordingly, the court held that, because Aice's counsel could have raised the three arguments in the first PCR hearing, Aice could not raise those grounds in a successive PCR application. 11 The court specifically refused to examine why Aice did not raise the new grounds; the court stated "it is sufficient that they could have been raised, but were not." 12 An applicant faces a difficult burden in establishing a "sufficient reason" for raising an argument in a second PCR application that was not raised at the original PCR hearing. 13

8. Id. The court initially disagreed that Aice's additional arguments had any merit; however, the court did not reach the merits because the court dismissed Aice's successive PCR application on procedural grounds. Id.

9. Id. at 449-50, 409 S.E.2d at 393-94. Section 17-27-90 provides:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.


10. Aice, 305 S.C. at 450, 409 S.E.2d at 394 ("Under Section 8 of the [Post-Conviction Relief] Act, successive applications for relief are not to be entertained, and the burden shall be on the applicant to establish that any new ground raised in a subsequent application could not have been raised by him in the previous application.") (alteration in original) (quoting S.C. Sup. Ct. R. 50(3)). The South Carolina Supreme Court Rules were replaced by the South Carolina Appellate Court Rules, which became effective on September 1, 1990. S.C. APP. CT. R. 102.

11. Aice, 305 S.C. at 450, 409 S.E.2d at 394.

12. Id.

13. See id. at 450-51, 409 S.E.2d at 394. The Aice court distinguished Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982), in which a successive application for PCR relief was granted on the basis of ineffective assistance of PCR counsel. Aice, 305 S.C. at 451 & n.1, 409 S.E.2d at 394 & n.1. The petitioner in Case was without an attorney in his first PCR application; therefore, it was doubtful whether the petitioner "could have" raised his arguments in a PCR hearing. Id.
The court’s decision in Aice rested ultimately on public policy. The court stated: “Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions . . . .”14 If the court allowed convicted defendants to raise arguments not raised at a prior PCR hearing, successive PCR applications would be limited only by the creativity and ingenuity of a skilled attorney.15

In Pennsylvania v. Finley16 the United States Supreme Court held that an indigent petitioner does not have a constitutional right to court-appointed counsel in a state PCR proceeding.17 Therefore, any rights a convict may assert in PCR proceedings must come from state law.18 In Carter v. State19 the South Carolina Supreme Court set forth the test governing successive PCR applications for claims of ineffective counsel:

Generally, successive applications for post-conviction relief are viewed with disfavor and the applicant has the burden of showing that a new ground for relief could not have been raised in a previous application. If the applicant meets this burden, a hearing must be afforded despite the successiveness of the application.20

Interestingly, the Aice court did not address whether the petitioner’s PCR counsel was in fact ineffective.21 The court focused instead on

15. Id.
17. Id. at 556-57.
18. See, e.g., S.C. CODE ANN. § 17-27-60 (Law. Co-op. 1976) (“If the applicant is unable to pay court costs and expenses of representation . . . these expenses shall be made available to the applicant in the trial court, and on review . . . ”). Furthermore, former South Carolina Supreme Court Rule 50(5) provided: “After return is made by the State, if the application presents questions of law or issues of fact requiring a hearing, the court shall appoint counsel promptly to assist the applicant if he is an indigent person.” S.C. Sup. Ct. R. 50(5), repealed by S.C. APP. CT. R. 102.
20. Id. at 530, 362 S.E.2d at 21 (citations omitted).
21. The briefs of this case indicate that Aice’s trial counsel was not ineffective; therefore, Aice’s PCR counsel would have had reasons not to argue the three additional grounds in the first PCR hearing. For example, petitioner states in his brief that his PCR counsel was ineffective in failing to raise the failure of his trial counsel to cross-examine adequately the state’s major witness. Aice claimed that the witness’s in-court identification of him was tainted by the witness’s inadequate out-of-court lineup identification. The lineup identification was faulty because petitioner was the
whether petitioner’s counsel could have raised the additional claims in the first application. The court concluded that “[c]learly, the arguments Aice seeks to advance in his second PCR could have been raised in his first application.”22 Accordingly, the court did not look beyond the procedural aspects of Aice’s claim.23 Unfortunately, this approach provides little guidance for practitioners or convicted defendants.

The Aice court held that ineffective assistance of counsel is not per se “sufficient reason” to support a successive application for a PCR hearing if the petitioner could have raised the same claims in the first hearing.24 However, it remains unclear whether the court would stand by its rationale in a case in which prior PCR counsel was truly ineffective. The broad language of the opinion suggests that a successive PCR application will be denied even if counsel was ineffective in failing to raise claims that could have been raised.25

_Brent M. Boyd_

II. TRIAL JUDGES MUST RECUSE THEMSELVES IN POST-CONViction RELIEF HEARINGS

In _Floyd v. State_26 the South Carolina Supreme Court adopted a per se rule that, upon motion, a judge must recuse himself in a post-conviction relief (PCR) hearing if he presided over the defendant’s case at trial.27 The court overruled _Henry v. State_,28 which permitted judges only person placed in the lineup whom the witness did not know. _Brief of Appellant_ at 15-16. However, as the State argued, by cross-examining the witness on the lineup identification, Aice’s counsel would have given the jury yet another identification of Aice as the perpetrator of the murders. _Brief of Respondent_ at 18-19. The State argued that this was a proper “tactical” decision because petitioner’s counsel was caught in a “catch-22.” _Id_. at 19. This tactical decision likely is not ineffective assistance of counsel because it arguably meets the test of “reasonableness” under prevailing “professional norms.” _See_ Strickland _v._ Washington, 466 U.S. 668 (1984).

22. _Aice_, 305 S.C. at 450, 409 S.E.2d at 394.

23. _Id_.

24. _Id_. at 451, 409 S.E.2d at 394.

25. If Aice’s counsel were actually ineffective in failing to raise those claims in the first application, it is doubtful whether Aice “could have raised” the claims. The _Aice_ court apparently suggests that as long as petitioner had counsel and the additional arguments were available, a successive application for relief will be denied regardless of whether the decision to assert the claims failed to meet the standard of effective representation.


27. _Id_. at 299, 400 S.E.2d at 146.

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to preside at both proceedings unless the Code of Judicial Conduct required disqualification. 29 Floyd is significant because the trial judge's actions are often the subject of review in a PCR hearing. After Floyd, convicted defendants successfully can move to have a new and impartial judge review their PCR applications.

The petitioner, Darrel Floyd, was convicted of murder and sentenced to life in prison. Thereafter, Floyd unsuccessfully pursued both a direct appeal based on an erroneous jury instruction and an application for post-conviction relief based on ineffective assistance of counsel. Floyd then filed a motion for further PCR hearings. 30 Instead of ruling on the motion, the supreme court instructed the parties to brief the issue of whether Henry v. State 31 should be overruled or modified. 32 The Floyd court based its decision on the briefs submitted, but provided no analytical framework for its holding. 33

The defendant raised two arguments in opposition to Henry. Floyd first argued that allowing the same judge to preside at both his trial and PCR hearing violated his right to an impartial collateral review. 34 Because the trial judge failed to recuse himself in the collateral proceedings, he destroyed Floyd's only chance to show the violation of his right to the effective assistance of counsel. 35 When, as in Floyd, failure to object to a judge's error constitutes counsel's allegedly deficient

30. Brief of Appellant at 3-5. Judge Rodney A. Peeples presided at Floyd's trial. Judge Peeples also reviewed and denied Floyd's motion for further PCR hearings.
32. Floyd, 303 S.C. at 299, 400 S.E.2d at 145.
33. See id. at 299, 400 S.E.2d at 146.
34. Brief of Appellant at 6.
35. Id. The appellant's argument is based in part on general due process rights under the Fourteenth Amendment to the United States Constitution and article I, § 3 of the South Carolina Constitution, and on the right to counsel under the Sixth Amendment to the United States Constitution. Id.

In order to establish ineffective assistance of counsel, an appellant must show that his counsel's performance was deficient, and that the deficient performance resulted in such prejudice that he was deprived of a fair trial. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Strickland v. Washington, 466 U.S. 668 (1984), cert. denied, 474 U.S. 1094 (1986).
performance, it is questionable whether the same judge can objectively
review the prejudice resulting from his or her own mistake.\textsuperscript{36}

In his second argument, Floyd contended that \textit{Henry} was ineffective
in actual practice.\textsuperscript{37} The Code of Judicial Conduct calls for a judge’s
disqualification both when the judge actually is not impartial, and when
one might reasonably doubt the judge’s impartiality.\textsuperscript{38} In \textit{Henry} the
court adopted the provisions of this Code section, but provided no
specific guidelines for the section’s application in a PCR hearing.\textsuperscript{39} In
response to Floyd’s arguments, the supreme court articulated its per se
rule and remanded the case for new PCR proceedings.\textsuperscript{40}

The \textit{Floyd} decision provides increased protection for convicted
defendants seeking post-conviction relief. The supreme court’s failure in
\textit{Henry} to set disqualification guidelines in addition to those in the Code
of Judicial Conduct left lower courts free to interpret and apply the
language of Canon 3(C)(1) of the Code to these situations. Admittedly,
no South Carolina court had ever addressed the issue of disqualification
on facts analogous to those in \textit{Floyd}. However, the Fourth Circuit
provides some guidance through its interpretations of the federal judicial
disqualification statute.\textsuperscript{41} Additionally, several states have enacted
legislation that directs the choice of judge in PCR proceedings.\textsuperscript{42}

\textsuperscript{36} \textit{See} Brief of Appellant at 6.
\textsuperscript{37} \textit{See id.} at 7.
\textsuperscript{38} S.C. APP. CT. R. 501, Canon 3(C)(1); \textit{see also} 28 U.S.C. § 455(a) (1988)
(“Any . . . judge . . . shall disqualify himself in any proceeding in which his
impartiality might reasonably be questioned.”); \textit{Rice v. McKenzie}, 581 F.2d 1114,
1116 (4th Cir. 1978) (analyzing 28 U.S.C. § 455(a)).
\textsuperscript{39} Brief of Appellant at 7 (discussing Henry v. State, 275 S.C. 148, 268
S.E.2d 41 (1980) (per curiam), \textit{overruled by} Floyd v. State, 303 S.C. 298, 400
S.E.2d 145 (1991) (per curiam)).
\textsuperscript{40} \textit{Floyd}, 303 S.C. at 299, 400 S.E.2d at 146.
\textsuperscript{41} 28 U.S.C. § 455(a) (1988). In interpreting this statute, the Fourth Circuit
has adopted an objective partiality standard “to foster not only actual impartiality but
also the appearance of impartiality.” United States v. Carmichael, 726 F.2d 158, 160
(4th Cir. 1984) (holding that, in a proceeding to review an erroneous jury instruction,
a reviewing judge who also gave the jury instruction creates reasonable appearance
of partiality); \textit{see also} \textit{Liljeberg v. Health Servs. Acquisition Corp.}, 486 U.S. 847,
859 (1988) (holding that scintex is not an element of § 455(a), because it does not
“eliminate the risk” that other persons may question a judge’s impartiality).
Additionally, any alleged bias must be personal and must not have developed as a
result of the proceedings in question. \textit{See Shaw v. Martin}, 733 F.2d 304 (4th Cir.),
\textit{cert. denied}, 469 U.S. 873 (1984); \textit{Carmichael}, 726 F.2d at 158.
\textsuperscript{42} \textit{See, e.g.,} \textit{IDAHO CODE} § 19-4907(a) (1987) (requiring that any judge of the
court in which the conviction took place hear the application); \textit{TENN. CODE ANN.} §
40-30-103(b)(1) & (2) (1990) (requiring that the trial judge hear a post-conviction
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Until the *Floyd* decision, South Carolina courts allowed an apparently partial procedure. Floyd's *per se* rule eliminates the likelihood of a partial reviewing judge. Nevertheless, Floyd's *per se* recusal requirement may sometimes result in uncertainty. For example, it is unclear who should hear the PCR application if no other presiding judges are available in a particular circuit. Additionally, it is uncertain whether the trial judge must recuse himself in every case. If the trial court's decision is based on a point of law rather than evidence, or if the defendant does not allege judicial error, disqualifying a trial judge who is familiar with the facts and the record would serve no purpose. Requiring another judge to spend a great deal of time learning about a case would not be practical, especially when the applicant has made a bad-faith motion.

petition if the applicant raises a competency of counsel issue).

Under the Iowa statute, the same judge who presided at trial usually hears the PCR application. See *Freeman v. State*, 757 P.2d 1240, 1243 (Idaho Ct. App. 1988). Judges have discretion to grant or deny the motion based upon whether they feel they actually have become biased. See *Idaho R. Civ. P.* 40(d)(2)(B); *Sivak v. State*, 731 P.2d 192, 201 (Idaho 1986). This requirement of actual bias is contrary to the Code of Judicial Conduct, S.C. APP. CT. R. 501, Canon 3(C)(1), and to *Floyd*, both of which seek to avoid even an appearance of partiality. *Floyd*, 303 S.C. 298, 400 S.E.2d 145.

Under the Tennessee statute, if an applicant does not raise an issue about the competency of counsel, the same judge should not preside at the PCR hearing. TENN. CODE ANN. § 40-30-103(b)(2) (1990). The Tennessee legislature's apparent motivation in not allowing the same judge to preside was to guarantee an impartial judge. See *Brown v. State*, No. 01-C-01-9010-CR00254, 1991 WL 94575, at *2 (Tenn. Crim. App. June 6, 1991); cf. *Wimley v. State*, No. 87-33-III, 1987 WL 17011, at *1, *5 (Tenn. Crim. App. Sept. 17, 1987). *Wimley* presented a factual situation remarkably similar to *Floyd*. In *Wimley* the defendant's counsel did not object to the judge's erroneous malice instruction at trial, and the trial judge denied the application for post-conviction relief. Wimley appealed, attacking the statute requiring the same judge to preside when ineffective assistance of counsel is alleged. Avoiding the question, the court found that no prejudice occurred because the erroneous charge was now before the court in the appeal from PCR proceedings. *Id.* at *5.

43. South Carolina's Uniform Post-Conviction Procedure Act, S.C. CODE ANN. §§ 17-27-10 to -120 (Law. Co-op. 1976), fails to specify whether the trial judge should preside at the post-conviction relief hearings. See *id.* § 17-27-80; *Buchanan v. State*, 276 S.C. 127, 276 S.E.2d 302 (1981). The Act merely requires that the relief application "be heard in, and before any judge of, a court of competent jurisdiction in the county in which the conviction took place." S.C. CODE ANN. § 17-27-80; *Buchanan*, 276 S.C. at 129, 276 S.E.2d at 303 (holding that this language only requires that the post-conviction application be heard before a judge who has jurisdiction to pass upon matters arising in the jurisdiction where the conviction took place).
Although the *Floyd* court concluded that a per se recusal rule would be better than its holding in *Henry*, strict guidelines do not always allow for the many factual differences that may arise. For example, having the trial judge preside at a PCR proceeding may benefit the defendant because the trial judge is familiar with the record and with any alleged ineffectiveness of counsel. However, because only a defendant’s motion activates the per se rule in *Floyd*, defendants may choose whether they want new judges to hear their PCR applications. Defendants should not only have unbiased judges, but also should believe in their judges’ impartiality.

As a result of *Floyd*, judges must recuse themselves upon motion in a PCR hearing if they presided at the proceeding from which the applicant seeks relief. *Floyd* requires that South Carolina courts recognize the constitutional purpose of collateral relief proceedings — the preservation of an individual’s right to due process of law.

*M. Catherin Cauthen*

**III. SOUTH CAROLINA EXTENDS TO PROBATIONERS FULL SIXTH AMENDMENT RIGHT TO COUNSEL**

In *Huckaby v. State* the South Carolina Supreme Court held that a defendant at a probation revocation hearing has a right to counsel co-extensive with that of an accused at trial. The *Huckaby* court applied and extended *Faretta v. California* and *Gagnon v. Scarpelli* and concluded that the petitioner had not made a “knowing and intelligent” waiver of his Sixth Amendment right to counsel.

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46. See Floyd, 303 S.C. at 299, 400 S.E.2d at 146; Adams v. State, 376 N.E.2d 482, 483 (Ind. 1978).
48. Id. at 335, 408 S.E.2d at 244.
49. 422 U.S. 806, 835 (1975) (holding that, although a defendant in a state criminal trial has a constitutional right to self-representation, the defendant must “knowingly and intelligently” waive the Sixth Amendment right to counsel).
50. 411 U.S. 778 (1973), superseded by statute as stated in Baldwin v. Benson, 584 F.2d 953 (10th Cir. 1978).
51. *Huckaby*, 305 S.C. at 336, 408 S.E.2d at 245. The Sixth Amendment to the United States Constitution provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
David Lee Huckaby was convicted of distributing cocaine and sentenced to fifteen years suspended upon the payment of a $2000 fine and the completion of five years of intensive probation. Under the conditions of his probation, Huckaby had to attend drug rehabilitation counseling and report weekly to a probation officer. Huckaby's failure to comply with these requirements led to the probation revocation proceeding at issue.\(^2\)

On July 21, 1988, Huckaby appeared at a probation revocation proceeding. He had been charged with missing four weekly visits to his probation officer in one month, failing to pay his supervision fee, and failing to attend the required drug rehabilitation counseling. On the morning of the hearing, Huckaby met with his probation officer and explained that he had missed the weekly meetings because his previous probation officer told him that he was being reclassified from intensive to regular probation and would only be required to report once a month. Huckaby also explained that he had been unable to afford the drug counseling. The new probation officer arranged for Huckaby to attend counseling and pay on an extended payment plan.\(^3\) Huckaby apparently felt that he had adequately explained his transgressions and that the subsequent hearing would be, as had the previous two, "a rote procedural requirement" at which "the judge would simply hear explanations from Mr. Huckaby and reports from the parole officers, and then continue his probation."\(^4\)

The same judge who initially sentenced Huckaby conducted the probation revocation hearing. The judge recognized Huckaby and asked Huckaby whether he had a lawyer. When Huckaby said that he did not, the judge asked if Huckaby understood that he had the right to have counsel present, and Huckaby responded affirmatively. Finally, the judge asked Huckaby if he wanted to waive his right to counsel and proceed with the hearing, and Huckaby again responded affirmatively. The judge explained the charges against Huckaby and asked if he had anything to say in his defense. Before Huckaby was able to respond, the judge cut

\(^2\) U.S. CONST. amend. VI.

\(^3\) \textit{Huckaby}, 305 S.C. at 332, 408 S.E.2d at 243. Huckaby had appeared at probation revocation hearings on two prior occasions. At the first hearing, Huckaby was represented by counsel, and the judge continued the probation upon testimony from Huckaby's probation officer explaining the alleged failures to comply with the probationary requirements. At the second hearing, Huckaby stated that he could not afford counsel, but the judge determined that Huckaby did not qualify for public representation. Again, the judge simply heard the explanation of the probation officer and continued the probation. \textit{Id.} at 332-33, 408 S.E.2d at 243.

\(^4\) \textit{Id.} at 333, 408 S.E.2d at 243.
him off and revoked his probation. The judge commented that the media
had been critical of his practice of giving suspended sentences in drug
cases.\textsuperscript{55} Huckaby appealed the revocation of his probation on the ground
that he was denied his Sixth Amendment right to counsel. The circuit
court denied relief, and Huckaby petitioned the South Carolina Supreme
Court for certiorari. The supreme court reversed and remanded for a new
hearing.\textsuperscript{56}

In \textit{Barlet v. State}\textsuperscript{57} the South Carolina Supreme Court held that all
persons facing a parole revocation hearing must be advised of their right
to counsel and that some indigent persons may have the right to court-
appointed counsel.\textsuperscript{58} The \textit{Barlet} court based its holding in part on the
United States Supreme Court case of \textit{Gagnon v. Scarpelli}.\textsuperscript{59} In \textit{Scarpelli}
the Court examined whether a probationer had a right to counsel at a
probation revocation hearing. The Court noted that, although such a
hearing was not a criminal proceeding, the possible loss of liberty
warranted due process protection.\textsuperscript{60} However, the Court failed to extend
the full right to counsel to all probationers, but opted to allow a case-by-
case determination.\textsuperscript{61} The \textit{Barlet} court went beyond the confines of
\textit{Scarpelli} by ordering that all persons be advised of their right to counsel
in all revocation hearings.\textsuperscript{62}

In \textit{Huckaby} the court expanded the protection offered in \textit{Barlet}. Now,
courts must not only advise probationers of the right to counsel,
but also determine whether probationers have validly waived that
right.\textsuperscript{63} In fact, the \textit{Huckaby} court stated that a probationer "retains his

\begin{itemize}
\item \textsuperscript{55} \textit{Id.} at 334, 408 S.E.2d at 244.
\item \textsuperscript{56} \textit{Id.} at 336, 408 S.E.2d at 245.
\item \textsuperscript{57} 288 S.C. 481, 343 S.E.2d 620 (1986).
\item \textsuperscript{58} \textit{Id.} at 482-83, 343 S.E.2d at 621 (citing S.C. Sup. Ct. R. 51(B)(2) & (3)).
\item \textsuperscript{59} 411 U.S. 778 (1973), \textit{superseded by statute as stated in} Baldwin v. Benson, 584 F.2d 953 (10th Cir. 1978).
\item \textsuperscript{60} \textit{Id.} at 781.
\item \textsuperscript{61} \textit{See id.} at 790. The Court acknowledged that the case-by-case analysis
originally had been adopted to govern the right to counsel in other areas. In \textit{Betts v. Brady}, 316 U.S. 455 (1942), the Court adopted a case-by-case approach for the right
to counsel in felony prosecutions. The Court later rejected that approach in favor of
a per se approach in the landmark civil rights case of \textit{Gideon v. Wainwright}, 372
U.S. 335 (1963). \textit{See Scarpelli}, 411 U.S. at 788. The Court did not agree, however,
that the rejection of the case-by-case approach for trial purposes was a condemnation
of the approach itself. \textit{Id.}
\item \textsuperscript{62} \textit{Barlet}, 288 S.C. at 482-83, 343 S.E.2d at 621-22 (applying S.C. Sup. Ct.
R. 51(B)(2) (stating that every person charged with a violation of probation must be
advised of his right to counsel)).
\item \textsuperscript{63} Huckaby v. State, 305 S.C. 331, 335, 408 S.E.2d 242, 244 (1992).
\end{itemize}
full Sixth Amendment right to counsel." 64 This is a significant departure from the Scarpelli holding.

The Huckaby court's extension of full Sixth Amendment right to counsel to probationers gives probationers the same waiver standards afforded to criminal defendants at trial. First, the record must demonstrate that the court conducted a hearing to determine whether a party knowingly and intelligently waived his right to counsel. 65 Secondly, the record must demonstrate not only that the defendant understood the risks of self-representation, but also that the defendant was "made aware of the dangers and disadvantages of self-representation so that . . . he knows what he is doing and his choice is made with his eyes open." 66 Applying the newly announced standard to the facts of this case, the Huckaby court found that the State had not given the defendant an adequate Bateman hearing; 67 accordingly, the court remanded for a new hearing. 68

In Huckaby, South Carolina joined other states that have gone beyond the protection mandated by the United States Supreme Court in Scarpelli. 69 As other courts have noted, the additional protection of a

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64. Id. (emphasis added).


67. Mr. Huckaby answered only three questions, each with a short "yes sir" or "no sir" answer, before the court proceeded with the hearing. Huckaby, 305 S.C. 334, 408 S.E.2d at 244. The supreme court noted that "[t]he record certainly does not reflect the level of understanding and awareness of the severity of the risks and dangers of this situation which is required by Wroten." Id. at 336, 408 S.E.2d at 245.

68. Interestingly, in remanding for a new probation hearing, the supreme court failed to follow a case it decided only four months before Huckaby. See State v. Cash, 304 S.C. 223, 403 S.E.2d 632 (1991) (holding that absent extraordinary circumstances, the proper remedy when the record fails to reflect a "knowing and intelligent" waiver is to remand to determine whether the waiver was actually "knowing and intelligent"). Although Huckaby might fall within Cash's extraordinary circumstances exception, it is disturbing that the court failed to address the possible relevance of its recent precedent.

69. See, e.g., State v. Hicks, 478 So. 2d 22, 23 (Fla. 1985) (abandoning the case-by-case analysis of Scarpelli and granting full right to counsel for all probationers because "a uniform rule in all probation revocation hearings is more easily understood and easier to administer"); State v. Coltrane, 299 S.E.2d 199, 201-02 (N.C. 1983) (interpreting N.C. GEN. STAT. § 15A-1345(e) (1978) to reject the rule of Scarpelli and holding that "all defendants are once again entitled to counsel at probation revocation hearings").
uniform rule is easier to administer than a case-by-case analysis. The rule in *Huckaby* will be more convenient for attorneys as well as judges, while affording more protection to probationers.

**F. Scott Pfeiffer**

### IV. SUPREME COURT REMANDS CASE FOR HEARING TO REVIEW WAIVER OF RIGHT TO COUNSEL

In *State v. Cash*\(^{70}\) the South Carolina Supreme Court held that an appellate court should remand a criminal case in which the defendant appeared *pro se* if the record does not reflect a knowing and intelligent waiver of the Sixth Amendment right to counsel.\(^{71}\) On remand, the trial court must determine whether the defendant in fact made such a waiver of the right to counsel.\(^{72}\) The *Cash* decision revives the court’s previous holding in *State v. Dixon*\(^{73}\) and departs from the recent practice of automatically granting a new trial.\(^{74}\)

In *Cash* the defendant, who appeared at trial *pro se*, was convicted of third-degree criminal sexual conduct.\(^{75}\) Before the trial, the judge questioned the defendant about his reasons for wanting to proceed *pro se*.\(^{76}\) The defendant replied that the public defender was too busy to try a case like his.\(^{77}\) The judge informed the defendant of the right to counsel and of the possible sentence of the charge,\(^{78}\) but the judge failed to warn the defendant of the disadvantages and dangers of self-representation.

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71. Id. at 225, 403 S.E.2d at 634. The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.
72. *Cash*, 304 S.C. at 225, 403 S.E.2d at 634.
73. 269 S.C. 107, 236 S.E.2d 419 (1977). In *Dixon*, the court remanded a criminal case to the lower court for a factual determination of whether the defendant, who had proceeded *pro se*, actually made an "intelligent and competent waiver" of his right to counsel. *Id.* at 109, 236 S.E.2d at 420-21.
75. *Cash*, 304 S.C. at 224, 403 S.E.2d at 633.
76. Record at 2-3, 6. The judge also inquired about the defendant’s age and educational background. The defendant was a forty-six year old man with six years of college education obtained while in prison. *Id.* at 2, 7.
77. *Id.* at 6.
78. *Id.* at 3.
At trial, the judge again asked the defendant whether he wished to represent himself, and again the defendant responded affirmatively.\(^79\) During the trial the judge expressed his disapproval of \textit{pro se} litigants,\(^80\) but at one point the judge actually complimented the defendant’s performance.\(^81\) Nevertheless, the defendant was convicted.

On appeal, the supreme court offered little justification for departing from \textit{Bateman}\(^82\) and \textit{Coto}.\(^83\) The court merely noted that a \textit{Dixon} hearing\(^84\) had been standard practice for more than ten years and that its holding in \textit{Cash} was in accordance with this established practice.\(^85\) The court distinguished \textit{Bateman} and \textit{Coto} because of the “unusual facts” of those cases.\(^86\) The \textit{Cash} court explained that, in cases such as

\(^{79}\) Id. at 8.

\(^{80}\) For example, during the defendant’s examination of the complainant, the judge instructed the defendant to ask questions rather than to testify, noting that “you’re testifying again. Another reason why I prefer people to get lawyers.” Id. at 23-25; \textit{see also} id. at 85 (Judge related to defendant: “But I hate to tell you what they taught me in law school about a man representing himself, about what kind of client he’s got.”).

\(^{81}\) Id. at 85. However, during the trial, the defendant failed to make objections that were available to him. \textit{See} id. at 55-56. The defendant could have objected to the judge’s comment about the weight of the evidence. \textit{See}, \textit{e.g.}, State v. Ates, 297 S.C. 316, 377 S.E.2d 98 (1989) (per curiam).


\(^{84}\) A trial court holds a \textit{Dixon} hearing to determine whether a \textit{pro se} defendant knowingly and intelligently waived his right to counsel. State v. Dixon, 269 S.C. 107, 109, 236 S.E.2d 419, 420-21 (1977). At this hearing, both the prosecution and the defense may present evidence and examine witnesses. Id. at 109, 236 S.E.2d at 421.


\(^{86}\) Id. at 225, 403 S.E.2d at 634. In \textit{Coto} the defendant, without representation by counsel, pleaded guilty to murder after killing his wife in an apparent crime of passion. The El Salvadoran defendant had lived in the United States for only three years and had no previous experience with the criminal justice system. Record at 2, 8, \textit{Coto}, 296 S.C. 480, 374 S.E.2d 181 (No. 87-790). The judge did not inform the defendant of the nature of the charge of murder, nor did the judge inform the defendant of the potential sentence of the charge until sentencing. Brief of Appellant at 15. The case’s undisputed facts revealed that the use of counsel probably would have resulted in a much more favorable sentence for the defendant. Id. at 17-18. Under these egregious circumstances, a \textit{Dixon} hearing would be a waste of time.

\textit{Bateman} also presented an exceptional situation. The defendants in \textit{Bateman} were tried for trafficking in marijuana and for conspiring to traffic in marijuana. Two
Bateman and Coto, "it would be almost impossible to find a knowing and intelligent waiver of the right to counsel even if a Dixon hearing were ordered."\textsuperscript{87} Therefore, the interest of judicial economy mandated the different result.\textsuperscript{88}

Cash clears the waters that Bateman and Coto muddied. The Cash court explained that Bateman and Coto were exceptions to the general procedural rule articulated in Dixon.\textsuperscript{89} However, an examination of those cases fails to clarify the justification for these exceptions because the supreme court remanded both cases with little explanation beyond the conclusory statement that the records did not demonstrate "knowing and intelligent" waivers.\textsuperscript{90} The court's minimal analysis in Bateman and Coto may have caused both practitioners and defendants to assume that a new trial was automatically the remedy when the record does not reflect a knowing or intelligent waiver. Cash invalidates this assumption.

The court's underlying motivation behind Cash and Dixon is judicial economy. A defendant who waives the right to counsel "'with [his] eyes open'"\textsuperscript{91} can no longer waste the state's time and money on a new trial simply because the trial judge failed to determine whether the defendant's eyes were indeed open.\textsuperscript{92} The state also saves time and money when the Coto exception applies. If the appellate record clearly reflects an

of the six defendants served as "spokesmen" for the group, in effect representing themselves and the other four defendants throughout the trial. According to the appellate record, the judge questioned only these two of the six defendants. State v. Bateman, 296 S.C. 367, 368-69, 373 S.E.2d 470, 470-71 (1988). The scope of the judge's questions was limited to the defendants' religion and family background, and the ownership interest in the land on which the marijuana was found. The judge addressed the other four defendants only for identification purposes. \textit{Id.} The court held that the record clearly indicated that the judge's inquiry of the pro se defendants fell "far short of the standards for a knowing and intelligent waiver." \textit{Id.} at 369, 373 S.E.2d at 471.

\textsuperscript{87} Cash, 304 S.C. at 225, 403 S.E.2d at 634.
\textsuperscript{88} See id.
\textsuperscript{89} Id. The Dixon hearing is discussed supra notes 73 and 84.
\textsuperscript{90} See Coto, 296 S.C. at 481, 374 S.E.2d at 181-82; Bateman, 296 S.C. at 369, 373 S.E.2d at 471. In neither Coto nor Bateman did the court discuss the necessity of a Dixon hearing. See also Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990) (remanding for new trial because PCR judge erred in finding a valid waiver of right to counsel when defendant pleaded guilty); Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990) (same).
\textsuperscript{91} Faretta v. California, 422 U.S. 806, 835 (1975).
\textsuperscript{92} The trial judge's inquiries are relevant in determining whether a pro se defendant's waiver of counsel is "knowing and intelligent," but the defendant's understanding is dispositive. See, e.g., Wroten, 301 S.C. at 294, 391 S.E.2d at 576 (citing Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986)).
unknowing or unintelligent waiver, automatically granting a new trial is both fair and expedient because a Dixon hearing would not further justice. Unfortunately, it remains unclear exactly when the Coto exception applies.93

Absent exceptional circumstances, the preferred remedy when the appellate record fails to reflect a criminal defendant's knowing and intelligent waiver of counsel is to remand for a Dixon hearing rather than automatically to grant a new trial. The Cash holding clarifies the law, promotes judicial economy, and preserves the rights of the accused.

Pamela A. Wilkins

V. PRIOR UNCOUNSELED MISDEMEANOR NOT RESULTING IN IMPRISONMENT MAY BE USED FOR PENALTY ENHANCEMENT

In State v. Chance94 the South Carolina Supreme Court held that a criminal defendant's prior uncounseled misdemeanor conviction, which did not result in incarceration, may be used to increase the sentence for a second conviction under an enhanced penalty statute.95 Although Chance represents the supreme court's first interpretation of Baldasar v. Illinois,96 the court followed the lead of several other jurisdictions by interpreting Baldasar narrowly.97

Chance was convicted of his second offense for driving under the influence (DUI) and was sentenced to one year in prison.98 The trial court used Chance's uncounseled DUI conviction from 1980 to enhance his punishment under the state's DUI recidivist statute.99 On appeal,

93. One possible application of the exception is the case of a pro se defendant who pleads guilty. The defendants in Coto, Prince, and Wroten pleaded guilty. Because a pro se defendant who pleads guilty receives no trial, the record may be so sparse and the defendant may have had so little contact with the judicial system that a knowing or intelligent waiver would have been impossible.


95. Id. at 408, 405 S.E.2d at 376.

96. 446 U.S. 222 (1980) (per curiam). The Baldasar Court, in a plurality decision, reversed a state court ruling that allowed the use of a prior uncounseled misdemeanor conviction to convert a subsequent misdemeanor conviction into a felony conviction with a prison term. Id. at 223-24. Baldasar is discussed infra notes 106-10 and accompanying text.

97. See infra note 113 and accompanying text.

98. Chance, 304 S.C. at 406, 405 S.E.2d at 375.

99. Id. The South Carolina DUI recidivist statute is codified at S.C. CODE ANN. § 56-5-2940 (Law Co-op. 1991).
Chance argued that Baldasar precludes penalty enhancement unless the state can show that the defendant affirmatively waived his right to counsel in the prior uncounseled conviction. However, the supreme court rejected Chance's argument and affirmed the trial court's use of the prior uncounseled conviction for penalty enhancement purposes.

In Chance the supreme court stated that, although Baldasar "grappled" with the enhanced penalty statute issue, the Court never resolved the matter. The Chance court noted several inconsistent state court interpretations of Baldasar, but without further discussion, the court declared that "an uncounseled conviction constitutionally valid under Scott is valid for all purposes and therefore may be used to increase the term of imprisonment for a subsequent offense under an enhanced penalty statute." The court strengthened its adherence to the Scott rationale by holding that "when a defendant was not actually incarcerated for a prior uncounseled misdemeanor, that offense may be used for enhancement."

In Baldasar the United States Supreme Court reversed a defendant's felony conviction and prison sentence after the trial court allowed evidence of the defendant's prior uncounseled misdemeanor conviction to be used for penalty enhancement. In his concurring opinion, Justice Stewart, joined by Justices Brennan and Stevens, reasoned that an enhanced prison sentence violated the Sixth and Fourteenth Amendments if the defendant was uncounseled in his first conviction. In the second concurrence Justice Marshall agreed but found that the first conviction was invalid for all purposes, including "the purpose of

100. Chance, 304 S.C. at 407, 405 S.E.2d at 375.
101. See id. at 407-08, 405 S.E.2d at 376.
102. Id. at 407, 405 S.E.2d at 375.
103. Id. at 407, 405 S.E.2d at 376 (citing Commonwealth v. Thomas, 507 A.2d 57 (Pa. 1986); State v. Novak, 318 N.W.2d 364 (Wis. 1982); Sargent v. Commonwealth, 360 S.E.2d 895 (Va. Ct. App. 1987); and State v. Orr, 375 N.W.2d 171 (N.D. 1985)).
104. Id. at 407-08, 405 S.E.2d at 376. In Scott v. Illinois, 440 U.S. 367 (1979), the Court held that an uncounseled conviction is constitutional if the offender is not imprisoned. Scott, 440 U.S. at 369. Actual imprisonment is the defining standard. Id. at 373.
105. Chance, 304 S.C. at 408, 405 S.E.2d at 376.
106. Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam). The penalty enhancement statute in Baldasar permitted a second misdemeanor conviction to be treated as a felony conviction with a prison term of one to three years. Id. at 223.
107. See id. at 224 (Stewart, J., concurring) (citing Scott, 440 U.S. 367).
108. Id. at 224-29 (Marshall, J., concurring). Justices Brennan and Stevens also joined in this concurrence. Id. at 224.
depriving [the] petitioner of his liberty." Justice Blackmun wrote the third concurring opinion in which he reiterated his "bright line" approach that the Court declined to adopt in Scott.

The Court's failure to agree on a clear holding has produced conflicting interpretations of Baldasar. Because of this uncertainty,

109. Id. at 226 (citing Scott, 440 U.S. 367, and Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that no imprisonment may be imposed unless the accused is represented by counsel)). Justice Marshall reasoned that Baldasar's subsequent sentence was a direct result of his first conviction because, absent that prior uncounseled conviction, Baldasar's maximum sentence for his second conviction would have been one year. Id. at 226-27. Marshall concluded that the state deprived Baldasar of "the guiding hand of counsel" in the previous conviction. Id. at 227 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)). Therefore, Marshall found that Baldasar was deprived of his Sixth Amendment right to counsel and that the increased prison sentence was constitutionally invalid for all purposes. See id. at 227-29.

110. Id. at 229-30 (Blackmun, J., concurring). In his Scott dissent, Justice Blackmun noted that the state must provide counsel for any indigent defendant who is prosecuted for an offense punishable by more than six months imprisonment or is actually subjected to imprisonment. Scott v. Illinois, 440 U.S. 367, 389-90 (1979) (Blackmun, J., dissenting). Therefore, because Baldasar's uncounseled conviction was punishable by more than six months imprisonment, that conviction was invalid and could not be used to enhance his sentence in a subsequent conviction. See Baldasar, 446 U.S. at 230 (Blackmun, J., concurring).

111. See, e.g., United States v. Eckford, 910 F.2d 216, 218-19 (5th Cir. 1990) (discussing the inconsistencies of the three concurring opinions in Baldasar).


In the federal courts the United States Sentencing Guidelines have added to this confusion by authorizing sentencing courts to count prior uncounseled misdemeanor convictions when determining criminal history points. UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 4A1.2 comment. (backg'd) at 271 (Nov. 1991) ("Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed."). However, some courts have noted the potential constitutional problem of whether the use of uncounseled convictions violates the Sixth Amendment right to counsel. See, e.g., United States v. Castro-Vega, 945 F.2d 496, 499 (2d Cir. 1991);
many courts have construed Baldasar narrowly. Consequently, some courts apparently have applied Justice Blackmun’s “bright line” standard and have held that only “uncounseled misdemeanor conviction[s] punishable by more than six months’ imprisonment cannot . . . be used to increase a prison term under an enhanced penalty provision.”

The South Carolina Supreme Court could have affirmed Chance by distinguishing Justice Blackmun’s pivotal concurring opinion in Baldasar. However, the court decided to affirm Chance by narrowly interpreting Baldasar instead of distinguishing it. Unfortunately, the court gave no interpretive guidance before announcing its holding.

The Chance decision allows South Carolina courts to use a criminal defendant’s prior uncounseled misdemeanor conviction to enhance a subsequent sentence if the prior conviction is constitutionally valid under Scott. However, the court’s interpretation of Baldasar more closely parallels the Scott majority opinion and the Baldasar dissent than


113. See, e.g., Black, 935 F.2d 206; Schindler, 715 F.2d 341; State v. Orr, 375 N.W.2d 171, 176 (N.D. 1985) (claiming to interpret Baldasar on its narrowest grounds); Thomas, 507 A.2d 57.

114. Orr, 375 N.W.2d at 176.

115. In his Baldasar concurrence, Justice Blackmun reasoned that Baldasar’s first misdemeanor conviction violated the “bright line” standard because Baldasar could have been sentenced to up to one year in prison. Baldasar, 446 U.S. at 230 (Blackmun, J., concurring). Justice Blackmun concluded that Baldasar’s first conviction could not be used for penalty enhancement in a subsequent conviction because of this invalidity. Id. However, the uncounseled misdemeanor conviction in Chance carried a maximum sentence of only thirty days. State v. Chance, 304 S.C. 406, 407 n.1, 405 S.E.2d 375, 375 n.1 (1991), cert. denied, 112 S. Ct. 1241 (1992). Unlike Baldasar, the potential sentence in Chance does not violate Blackmun’s “bright line” test. Therefore, Justice Blackmun’s concurrence in Baldasar would not have precluded the use of Chance’s prior uncounseled misdemeanor conviction for penalty enhancement.

116. See Chance, 304 S.C. 406, 405 S.E.2d 376 (holding that an uncounseled conviction is valid for all purposes, including penalty enhancement, provided that the conviction is constitutionally valid under Scott).

117. Id. at 407-08, 405 S.E.2d at 375-76 (citing Scott v. Illinois, 440 U.S. 367 (1979)).

118. The Scott Court determined that actual imprisonment defines the constitutional right to appointment of counsel. Scott, 440 U.S. at 373 (relying on Argersinger v. Hamlin, 407 U.S. 25 (1972)).

119. In his Baldasar dissent, Justice Powell argued that the concurring Justices misunderstood the nature of enhancement statutes. Baldasar, 446 U.S. at 232 (Powell, J., dissenting). Powell reasoned that these statutes do not alter or enhance a prior sentence, but are imposed solely as a penalty for the second crime. Id. Consequently, “an uncounseled misdemeanor conviction is constitutionally valid [for
Baldasar's concurring opinions. This similarity to the Baldasar dissent weakens Chance's persuasiveness, but until the Supreme Court clarifies its position on this issue, courts must interpret and apply Baldasar with only an unclear plurality opinion as a guide.\textsuperscript{120}

Christie L. Companion

VI. DEFINITION OF REASONABLE DOUBT IN JURY CHARGE HELD CONSTITUTIONALLY INSUFFICIENT

In \textit{State v. Manning}\textsuperscript{121} the South Carolina Supreme Court reversed a capital murder conviction by holding that the trial judge's charge on reasonable doubt violated the defendant's due process rights.\textsuperscript{122} The court noted that the jury charge was so confusing that a reasonable juror could have interpreted the charge as allowing a standard of proof of less than reasonable doubt.\textsuperscript{123} The Manning court recognized the difficulty of defining "reasonable doubt" to a jury and suggested that trial judges use the limited definition of reasonable doubt approved by the United States Supreme Court in \textit{Holland v. United States}.\textsuperscript{124}

Warren Douglas Manning was convicted and sentenced to death for the murder of George Radford, a South Carolina State Trooper. On appeal, the supreme court addressed the constitutionality of the judge's jury charge on the reasonable doubt standard.\textsuperscript{125} The court evaluated

purposes of penalty enhancement] if the offender is not jailed." \textit{Id.} at 230.

\textsuperscript{120} The Supreme Court repeatedly has declined opportunities to clarify \textit{Baldasar}. See, e.g., Moore v. Georgia, 484 U.S. 904, \textit{denying cert. to} 352 S.E.2d 821 (Ga. Ct. App. 1987); Schindler v. Clerk of Circuit Court, 465 U.S. 1068 (1984), \textit{denying cert. to} 715 F.2d 341 (7th Cir. 1983).


\textsuperscript{122} \textit{Id.} at 417, 409 S.E.2d at 375.

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} 348 U.S. 121, 140 (1954) (holding that a reasonable doubt is the "kind of doubt that would make a person hesitate to act").

\textsuperscript{125} The trial judge's charge on reasonable doubt provided, in pertinent part: Beyond a reasonable doubt, \ldots\ the degree of proof by which the State must prove, \ldots means exactly what it states in the English language, and \textit{that is a doubt for which you can give a real reason}. That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted to. \textit{A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason}. So it's to that degree of proof that the State is required to establish the elements of a charge.
Manning's appeal in light of the United States Supreme Court's holding in *Cage v. Louisiana*.126

In *Cage* the defendant was convicted of first-degree murder and sentenced to death. The trial judge's charge "equated a reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt,' and stated that . . . 'moral certainty'" was required to find the defendant guilty.127 The Court evaluated the charge as a whole and held that, when reasonable doubt is "considered with the reference to 'moral certainty,' rather than evidentiary certainty," a reasonable jurors could interpret the instruction to allow a finding of guilt based on a standard below that of reasonable doubt.128 Accordingly, the *Cage* Court concluded that the jury charge violated the defendant's right to due process.129

Similarly, the trial judge in *Manning* used the phrase "moral certainty" in his charge.130 The South Carolina Supreme Court held that the use of this phrase violates the Due Process Clause if other terms of the charge suggest a doubt greater than that "required for

... I would instruct you to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant and if such reasonable explanation can be found you would find the Defendant not guilty . . . .

. . .

Sometimes during a charge, and I might have used it, the phrase moral certainty might be used. There is no different degree of proof required. *Moral certainty and beyond a reasonable doubt are the same thing in the eyes of the law.* It might be a different way of stating the same proposition. Either of those two phrases, moral certainty, beyond a reasonable doubt, connote a degree of proof which is distinguished from an absolute certainty.

Record at 1080, 1086-87 (emphasis added). The *Manning* court quoted substantially all of the above instructions, but the order of the instructions quoted in the opinion is not the same as that in the record. See *Manning*, 305 S.C. at 415-16, 409 S.E.2d at 374.


127. *Id.* at 329.

128. *Id.* at 330. The Court also recognized that the federal courts have widely criticized attempts to define reasonable doubt. *Id.* at 330 n.* (citing Taylor v. Kentucky, 436 U.S. 478, 488 (1978); Monk v. Zelez, 901 F.2d 885, 889-90 (10th Cir. 1990); United States v. Moss, 756 F.2d 329, 333 (4th Cir. 1985); United States v. Indorado, 628 F.2d 711, 720-21 (1st Cir.), *cert. denied*, 449 U.S. 1016 (1980); United States v. Byrd, 352 F.2d 570, 575 (2d Cir. 1965)).

129. *Id.* at 330.

130. See *supra* note 125.

131. U.S. CONST. amend. XIV.

https://scholarcommons.sc.edu/sclr/vol44/iss1/7
acquittal under the reasonable doubt standard."132 Although the court noted that "the trial judge twice defined reasonable doubt as 'a doubt for which you can give a real reason,'"133 the court focused primarily on the trial judge's circumstantial evidence charge.134

This charge regarding circumstantial evidence violated the test established in State v. Littlejohn135 that a jury must use to evaluate circumstantial evidence.136 The Manning court stated that the jury charge could have misled "a reasonable juror to focus exclusively on . . . [the defendant's] explanation of the evidence to determine the existence of reasonable doubt" instead of on whether the State proved every material element of the crime charged beyond a reasonable doubt.137 This possibility that a reasonable juror "could have" interpreted the charge as allowing a finding of guilt based on a degree of

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133. Id.
134. Id. at 416-17, 409 S.E.2d at 374-75. The trial judge gave the following charge on reasonable doubt: "When you are giving your attention to circumstantial evidence, I would instruct you to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant and if such reasonable explanation can be found you would find the Defendant not guilty." Record at 1086.
136. See id. at 328, 89 S.E.2d at 926 (holding that the jury must determine "that every circumstance relied upon by the state [is] proven beyond a reasonable doubt; and that all of the circumstances so proven be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis"); accord State v. Edwards, 298 S.C. 272, 275, 379 S.E.2d 888, 889, cert. denied, 493 U.S. 895 (1989).
137. Manning, 305 S.C. at 417, 409 S.E.2d at 375. The Manning court again noted that the trial judge's charge equated a reasonable doubt with "a doubt for which you can 'give a real reason,'" but continued to focus on the trial judge's circumstantial evidence charge. Id. at 416, 409 S.E.2d at 374 (quoting Record at 1080). However, the trial judge's charge also included the following:

To the extent that the State relies on circumstantial evidence to prove any aspect of its case, the State must prove all the circumstances relied on and must prove them beyond a reasonable doubt . . .

Those circumstances must be wholly and in every particular consistent with each other and they must point conclusively to the guilt of the accused to the exclusion of any other reasonable hypothesis.

Record at 1085-86. Although this portion of the charge probably comports with the test enunciated in Littlejohn, see supra note 136, the supreme court reversed Manning's conviction because of the deficiency of the trial judge's charge as a whole. Manning, 305 S.C. at 416-17, 409 S.E.2d at 374-75.
proof below the reasonable doubt standard\textsuperscript{138} violated Manning’s right to due process.\textsuperscript{139}

The Manning court concluded by stating that reasonable doubt is “best understood when the jury is simply instructed to give it its plain and ordinary meaning.”\textsuperscript{140} The supreme court cautiously suggested that trial judges define reasonable doubt as “the kind of doubt that would cause a reasonable person to hesitate to act.”\textsuperscript{141}

\textit{J. Emmette Pilgreen, IV}

\section*{VII. Court Abolishes In Favorem Vitae and Forbids Trial Judges from Instructing Capital Juries About Parole Eligibility}

In \textit{State v. Torrence}\textsuperscript{142} the South Carolina Supreme Court abolished the two-century-old doctrine of \textit{in favorem vitae}\textsuperscript{143} review of capital cases and adopted a contemporaneous objection rule.\textsuperscript{144} The court also overruled \textit{State v. Atkins},\textsuperscript{145} which allowed judges to charge

\begin{itemize}
\item \textsuperscript{138} More recently, the Supreme Court chose to evaluate jury charges under a “reasonable likelihood” test rather than the more liberal “reasonable possibility” test used in \textit{Manning} and \textit{Cage}. \textit{See Estelle v. McGuire}, 112 S. Ct. 475 (1991).
\item \textsuperscript{139} \textit{Manning}, 305 S.C. at 416, 409 S.E.2d at 374 (“The Due Process Clause ‘safeguard[s] against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.’”) (quoting \textit{Taylor v. Kentucky}, 436 U.S. 478, 486 (1978)); \textit{see also Cage v. Louisiana}, 111 S. Ct. 328 (1990). \textit{But see State v. Johnson}, 410 S.E.2d 547, 553-54 (S.C. 1991) (refusing to reverse a capital murder conviction when the jury charge defined reasonable doubt as “substantial doubt” because the judge did not include the term “moral certainty”), \textit{cert. denied}, 112 S. Ct. 1691 (1992).
\item \textsuperscript{140} \textit{Manning}, 305 S.C. at 417, 409 S.E.2d at 375.
\item \textsuperscript{141} \textit{Id.} (quoting \textit{Holland v. United States}, 348 U.S. 121, 140 (1954)).
\item \textsuperscript{142} 305 S.C. 45, 406 S.E.2d 315 (1991).
\item \textsuperscript{143} Literally, “in favor of life.” \textit{Id.} at 60 n.9, 406 S.E.2d at 324 n.1 (Toal, J., concurring).
\item \textsuperscript{144} \textit{Id.} at 69, 406 S.E.2d at 328. In discarding \textit{in favorem vitae}, the \textit{Torrence} court overruled ninety cases, the earliest being \textit{State v. Briggs}, 3 S.C.L. 7, 1 Brev. 8 (1794). \textit{Torrence}, 305 S.C. at 69 n.13, 406 S.E.2d at 328 n.5 (Toal, J., concurring).
\end{itemize}
a capital jury about a defendant's parole eligibility. These two holdings, given in separate concurring opinions, deal a double blow to capital defendants.

A. In Favorum Vitae

A jury convicted Michael R. Torrence of armed robbery, burglary, and two murders and sentenced him to life imprisonment for one murder and to death for the other. On appeal, the supreme court affirmed the convictions and life sentence, but reversed the death sentence. Justice Toal, concurring in the result of Torrence and joined by a majority, pronounced the supreme court's abandonment of in favorum vitae. The common-law doctrine of in favorum vitae provided heightened scrutiny in capital cases by requiring the supreme court to consider lower court errors when reviewing death penalty cases, even if the defendant made no objections, motions, or requests. In all trials beginning after Torrence, the supreme court will consider errors on direct appellate review only if preserved by an objection or a motion.

Although the Torrence court conceded that in favorum vitae was justified at a time when there were few procedural safeguards for numerous capital offenses, the court concluded that the doctrine had outlived its usefulness. The court reasoned that the doctrine is no longer necessary because murder is now the only capital crime and any criminal defendant may file a direct appeal and apply for post-conviction

146. Torrence, 305 S.C. at 60, 406 S.E.2d at 323 (Chandler, J., concurring). The court also held that a jury must determine the voluntariness of a defendant's alleged confession that is initially introduced during the penalty phase. Id. at 52, 406 S.E.2d at 319.

147. Id. at 49, 406 S.E.2d at 317-18.

148. Id. at 54, 406 S.E.2d at 321.

149. Id. at 60, 406 S.E.2d at 324 (Toal, J., concurring). The court addressed the question of whether to abolish in favorum vitae because one of Torrence's arguments could be considered only via the doctrine. Id. at 60 n.10, 406 S.E.2d at 324 n.2. The argument was not addressed in the main opinion.

150. Id. at 60-61, 406 S.E.2d at 324 (Toal, J. concurring). In favorum vitae was especially important in affording protection to convicted capital defendants represented by inadequate counsel.

151. Id. at 69, 406 S.E.2d at 328.

152. Id. at 60-61, 406 S.E.2d at 324-25.
relief (PCR).\textsuperscript{153} Furthermore, federal habeas corpus relief is available to criminal defendants, and South Carolina law mandates review of all death penalty cases.\textsuperscript{154}

The court also stated that the \textit{in favorem vitae} doctrine presented the danger that defense counsel in capital trials would engage in "sandbagging."\textsuperscript{155} Sandbagging is a tactic whereby a defense attorney who feels he is losing a capital case deliberately refrains from objecting to errors at trial, knowing that the appellate court must review them anyway. Defense attorneys might sandbag if they want the prosecution to commit reversible error, or if they do not want to draw the jurors’ attention to erroneous evidence, arguments, or charges.\textsuperscript{156} Additionally, some attorneys may purposely refrain from objecting as a matter of trial strategy, aware that on \textit{in favorem vitae} review the court had no choice but to assume ineffectiveness from the record.\textsuperscript{157}

\textit{Torrence} holds that it is preferable to deal with unpreserved errors in PCR proceedings rather than through \textit{in favorem vitae} review.\textsuperscript{158} The court implied that only in adversarial proceedings such as PCR can a tribunal make a “truly well-informed judgment” about the effectiveness of counsel.\textsuperscript{159} \textit{In favorem vitae} also diluted the adversarial process by forcing trial judges to perform defense counsel’s job. No judge likes to be reversed; yet if the trial judge did not assume a quasi-adversarial role to prevent improprieties by the state to which defense counsel did not object, reversal loomed certain under the doctrine.\textsuperscript{160}

Although the goals of upholding the adversarial system and relying on procedural rules are noble, the furtherance of these goals at the expense of \textit{in favorem vitae} is questionable when the defendant’s life is at stake. Procedural safeguards that rely essentially on the adversarial

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\textsuperscript{154} S.C. CODE ANN. § 16-3-25 (Law. Co-op. 1976).

\textsuperscript{155} \textit{Torrence}, 305 S.C. at 65, 406 S.E.2d at 326 (Toal, J., concurring).

\textsuperscript{156} \textit{Id.}

\textsuperscript{157} \textit{Id.} However, the supreme court had held that \textit{in favorem vitae} applied only to errors of law, not strategy decisions. State v. Riddle, 291 S.C. 232, 355 S.E.2d 138 (1987), overruled by \textit{Torrence}, 305 S.C. 45, 406 S.E.2d 315. The \textit{Torrence} court noted that it was difficult to determine from the record whether the failure to object was due to ineffective counsel or to legitimate strategy. \textit{Torrence}, 305 S.C. at 65 n.11, 406 S.E.2d at 326 n.3 (Toal, J., concurring).

\textsuperscript{158} \textit{Torrence}, 305 S.C. at 66, 406 S.E.2d at 326.

\textsuperscript{159} \textit{Id.} at 66, 406 S.E.2d at 326-27.

\textsuperscript{160} \textit{Id.} at 66, 406 S.E.2d at 327.
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nature of the legal system are, by definition, only as effective as the adversaries themselves. The premise of *in favorem vitæ* is that the just taking of a human life cannot necessarily be guaranteed by the adversarial process. Therefore, increased reliance on the adversarial process cannot extinguish the need for the doctrine. Ineffective counsel provides as little solace to a capital defendant at a PCR proceeding as it does at trial.161

Whether “sandbagging” or ineffectiveness of counsel is the predominant cause of not objecting to errors remains unanswered. As Justice Finney noted in his dissent to the majority’s decision to abolish *in favorem vitæ*, the majority simply assumed bad faith on the part of defense counsel.162 Bad faith or not, “[i]t is incomprehensible that a capital defendant should be penalized for the actions of his counsel when the ultimate result may be prejudicial error for which a defendant pays with his life.”163

A prosecutorial flip-side to “sandbagging” also exists. In the absence of *in favorem vitæ*, a solicitor facing ineffective defense counsel may be tempted to do anything, proper or not, to convict a capital defendant. Furthermore, dealing with errors in PCR proceedings instead of on direct appellate review does not eliminate “sandbagging” because an unscrupulous defense attorney could simply testify to his own “incompetence” at the PCR hearing.

The *Torrence* court left open one possibility of relief for defendants who have been “utterly failed” by the criminal justice system: a state writ of habeas corpus.164 The abolition of *in favorem vitæ* increases the chances that a defendant will employ such a possibility.

### B. Jury’s Information on Parole Eligibility165

At the time of his conviction in this case, Torrence was already serving a life sentence for a previous unrelated murder conviction. Before the penalty-phase closing arguments, Torrence’s attorney

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163. *Id.* at 73, 406 S.E.2d at 331.

164. *Id.* at 69, 406 S.E.2d at 328 (Toal, J., concurring). A prisoner may obtain a writ of habeas corpus from the South Carolina Supreme Court “after exhausting all other sources of relief.” *Id.*

requested a charge that imposition of a life sentence would require service without the possibility of parole, as mandated by section 24-21-640 of the South Carolina Code. The trial court refused to give the charge, but told counsel that it would, upon request, give an Atkins charge as to parole eligibility. Torrence's defense counsel requested the latter charge, which the court then gave.

On appeal, the supreme court considered whether the trial court committed prejudicial error by refusing to charge the jury that Torrence, if sentenced to life imprisonment, would be ineligible for parole. The supreme court held that denying the charge request was prejudicial error. Writing for the court, Justice Finney noted that the Atkins charge was incorrect and stated that "[t]he requested charge was a correct statement of law which would have provided the jury with accurate information regarding appellant's parole eligibility." However, the remaining justices effectively overruled Atkins and "reinstate[d] earlier precedent prohibiting capital sentencing juries from being informed about parole."

The United States Supreme Court has made it clear that states are free, in the interest of providing greater criminal justice system protection, to prohibit juries from considering or being informed about

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167. Torrence, 305 S.C. at 54, 406 S.E.2d at 320. The court in State v. Atkins, 293 S.C. 294, 360 S.E.2d 302 (1987), cert. denied, 111 S. Ct. 2913 (1991) and overruled by Torrence, 305 S.C. 45, 406 S.E.2d 315, authorized a trial court, upon a capital defendant's request, to give one of two charges regarding possible sentences and parole eligibility. The court could charge the sentencing jury that "the term 'life imprisonment' is to be understood in its ordinary and plain meaning." Atkins, 293 S.C. at 300, 360 S.E.2d at 305. Or instead, the defendant could request the charge that imposition of a life sentence would require service of at least twenty or thirty years without the possibility of parole, depending on the absence or presence of aggravating circumstances. Id. at 300, 360 S.E.2d at 305-06. In South Carolina a statute dictates parole possibilities for a murder conviction. S.C. CODE ANN. § 16-3-20(A) (Law. Co-op. 1976 & Supp. 1990).


169. Id. at 49, 406 S.E.2d at 318.

170. Id. at 54, 406 S.E.2d at 320.

171. Id.

172. Id. at 55, 406 S.E.2d at 321 (Chandler, J., concurring).
parole possibilities.\textsuperscript{173} However, the court in \textit{Torrence} cut back the information available to sentencing juries. This conflicts with the Supreme Court's statement in \textit{Gregg v. Georgia}:\textsuperscript{174}

If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information . . . to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.\textsuperscript{175}

The South Carolina Supreme Court's overruling of \textit{Atkins} clearly does not provide greater protection for the defendant. Indeed, it reopens the possibility that death sentences will be imposed in an arbitrary manner.\textsuperscript{176}

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James M. Hughes
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\textbf{VIII. INDICTMENT ALLEGING OFFENSE OCCURRED SOMEWHERE WITHIN A TWO-YEAR PERIOD NOT OVERLY BROAD}

In \textit{State v. Wade}\textsuperscript{177} the South Carolina Supreme Court held that an indictment alleging that a criminal offense occurred at some point within a period of two years was neither overbroad nor unconstitutionally vague.\textsuperscript{178} This holding is consistent with previous South Carolina case

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\item \textsuperscript{173} California \textit{v. Ramos}, 463 U.S. 992 (1983).
\item \textsuperscript{174} 428 U.S. 153 (1976).
\item \textsuperscript{175} \textit{Id.} at 190.
\item \textsuperscript{176} Consider two separate trials in which the defendants are convicted of identical capital crimes. In each case the jury agrees that the defendant deserves thirty years without the possibility of parole, as the statute mandates. However, each jury will give a death sentence if it thinks there is any chance the defendant will serve less than thirty years. Defense counsel requests a charge on parole eligibility, but is denied under \textit{Torrence}. Assume that Jury 1, by chance, knows the law regarding parole eligibility, but Jury 2 labors under the misconception that a "lifer" may be out in seven or eight years. Under this hypothetical, Jury 2 would return a death sentence, even though it believes the defendant deserves only thirty years; Jury 1, under the same facts, would impose life with the possibility of parole.
\item \textsuperscript{177} 306 S.C. 79, 409 S.E.2d 780 (1991).
\item \textsuperscript{178} \textit{Id.} at 80, 409 S.E.2d at 781. The South Carolina Code provides:
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\item Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to \textit{time} and \textit{place}, as required by
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law and with a majority of jurisdictions that have considered similar cases.

The victim accused her uncle, John Wade, of touching her in the vaginal area while they were alone in her grandparents’ bedroom. The indictment charged that the defendant “‘did . . . at divers times during 1984 through 1985, wilfully and unlawfully commit a sexual battery upon [the victim], a minor of less than eleven (11) years of age.’” The jury found Wade guilty, and the court sentenced him to thirty years in prison. Wade appealed.

In affirming the lower court’s decision, the supreme court rejected the defendant’s contention that the two-year time period made it impossible to defend against the accusation. The court first established that an indictment is adequate if it states the offense “‘with sufficient certainty and particularity to enable the court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and acquittal or conviction to be placed in bar to any subsequent prosecution.’” Additionally, the court explained that appellate courts law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.


179. See, e.g., State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 423 (Ct. App. 1991) (holding that an indictment which failed to identify correctly the exact location of the incident and which charged that the offense occurred “on or about December 9, 1988” was “sufficient to satisfy the requirements of the law”).

180. See infra note 193 and accompanying text.


182. Id. at 81, 409 S.E.2d at 781.

183. Id. at 81-82, 409 S.E.2d at 781-82. The court interpreted Wade’s appeal as requesting “a per se rule that a two year indictment period is unconstitutionally overbroad.” Id. at 82 & n.3, 409 S.E.2d at 781-82 & n.3. However, Justice Finney, in his dissent, did not agree that Wade sought a per se rule. Justice Finney believed Wade asserted “that under the circumstances of this case, the two-year period of time is overbroad in that it created a situation which prejudiced his defense and denied him a fair and impartial trial.” Id. at 87, 409 S.E.2d at 784 (Finney, J., dissenting). Justice Finney found the indictment inadequate because it failed “to state the offense with sufficient certainty and particularity to enable him to defend himself against the charges.” Id. at 88, 409 S.E.2d at 785.

184. Id. at 82, 409 S.E.2d at 782 (quoting State v. Adams, 277 S.C. 115, 125, 283 S.E.2d 582, 587 (1981), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), and limited by State v. Davis, No. 23727, 1992 WL 266861 (S.C. Oct. 5, 1992)). In Adams the defendant argued that an indictment for housebreaking which alleged that he “‘did . . . break and enter the house . . . with
must review an indictment using a practical, case-by-case approach instead of a per se rule of invalidity based on an inflexible time limit. The \textit{Wade} court concluded that under the circumstances of this case, the indictment was as specific as possible.

The court declared that it is necessary to include in the indictment the precise time of the offense only when "time enters into the nature of the offense, or is made part of the description of it." Additionally, the court observed that it had previously upheld an indictment that failed intent to commit a crime therein" was fatally defective because it failed to allege the specific crime intended. \textit{Adams}, 277 S.C. at 124-25, 283 S.E.2d at 587 (quoting indictment). The supreme court denied Adam's appeal because the court found "no indication that the appellant was unfairly prejudiced since he obviously knew the crimes for which he was being tried." \textit{Id.} at 125-26, 283 S.E.2d at 588.

The \textit{Wade} court noted that the test for the sufficiency of an indictment is "'not whether it could have been more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.'" \textit{Wade}, 306 S.C. at 83, 409 S.E.2d at 782 (quoting State v. Ham, 259 S.C. 118, 129, 191 S.E.2d 13, 17 (1972)).

185. \textit{Wade}, 306 S.C. at 83, 409 S.E.2d at 782 (citing \textit{Adams}, 277 S.C. at 115, 283 S.E.2d at 582); see also State v. Dell'Orfano, 592 So. 2d 338 (Fla. Dist. Ct. App. 1992) (rejecting a per se rule for an information charging that an offense occurred within a two-and-one-half-year period).

186. \textit{Wade}, 306 S.C. at 84, 409 S.E.2d at 783. The court noted that Wade's defense of denial and his attempt to prove factual impossibility "severely weakened" his claim that the lengthy indictment period prejudiced his defense. \textit{Id.} at 84-85, 409 S.E.2d at 783. Additionally, the court rejected Wade's argument that the vagueness of the indictment made proving an alibi defense impossible. \textit{Id.} at 85, 409 S.E.2d at 783. The court explained that "'[t]he jury could have determined that this young child had little concept of dates and time. Indeed, at trial the victim testified that she did not know her own age.'" \textit{Id.} at 84, 409 S.E.2d at 783.

187. \textit{Id.} at 85, 409 S.E.2d at 783 (citing State v. Peak, 134 S.C. 329, 340, 133 S.E. 31, 34 (1926); accord State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991). The \textit{Thompson} court stated that the absence of a specific date is fatal to an indictment only when the date is a "material element of the offense." \textit{Id.} at 500, 409 S.E.2d at 423. In first-degree criminal sexual conduct cases, the specific date and time are not elements of the offense. \textit{Id.} at 501, 409 S.E.2d at 423 (citing State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 324 (Ct. App. 1991)).

The \textit{Thompson} court also addressed the failure of an indictment to identify correctly the location of an alleged offense. The court concluded that an indictment is adequate if it alleges the location sufficiently enough to establish the jurisdiction of the court and to inform the accused of the county in which the charge against him is pending. \textit{Id.} at 500, 409 S.E.2d at 423 (citing State v. McIntire, 221 S.C. 504, 510, 71 S.E.2d 410, 413 (1952)); see also S.C. CODE ANN. § 17-19-20 (Law. Co-op. 1976) (stating allegations necessary for a valid indictment).
to state the specific date of the alleged offense. In cases such as Wade, when the defendant raises an alibi defense, the court requires "only that the State must 'not be allowed to prove a different date than that set forth in the indictment . . . unless the defendant is held to have had knowledge that the State would attempt to prove a different date upon trial.'"  

The Wade majority also questioned the dissent's application of the Adams case-by-case test. The dissent evaluated the "surrounding circumstances" and "prejudice" regarding the evidence the state presented at trial instead of in the context defined by the Adams court. The Adams test requires that the pre-trial circumstances determine whether the indictment prejudiced the defendant.

Numerous jurisdictions that have examined indictment requirements agree that under limited circumstances, the requirements may be liberally construed. The most prevalent explanation for this view is that, when


189. Wade, 306 S.C. at 85, 409 S.E.2d at 784 (quoting State v. Pierce, 263 S.C. 23, 27, 207 S.E.2d 414, 416 (1974)). The Wade court explained that the Pierce ruling could not be "construed to require a more specific time allegation in an indictment for an alibi defendant, when no such specificity is possible due, e.g., the prosecutrix being a child." Id. at 86, 409 S.E.2d at 784.

190. For a discussion of the Adams test, see supra note 184.

191. Wade, 306 S.C. at 86, 409 S.E.2d at 784. The majority explained that the dissent's approach "looks ahead to the evidence presented at trial" and makes it impossible to evaluate the "surrounding circumstances" and "prejudice" in a pretrial motion. Id.

192. Id.


Decisions that have liberally construed indictments are not limited to child molestation cases. See, e.g., Lightboume v. State, 438 So. 2d 380 (Fla. 1983) (first-degree murder), cert. denied, 465 U.S. 1051 (1984); Chesser v. State, 283 S.E.2d
time is not a material element of the alleged offense, one need not allege the time with particularity. Other courts have found an indictment sufficient if the alleged time falls within the relevant statute of limitations and prior to the issuance of the indictment. A few jurisdictions use a "reasonableness test," consisting of a number of factors for evaluating an indictment.

Despite the sometimes compelling reasons for allowing nonspecific accusatory pleadings, courts must maintain the integrity of the indictment process. The Wade opinion advocates a "case-by-case" approach for judging an indictment's sufficiency, but fails to specify what factors are particularly relevant. The dissent noted this failure by stating:

Other courts, using a case by case analysis, have articulated factors which should be considered in determining whether or not an indictment is overbroad in its time parameters. Without such a case by case analysis . . . the majority is endorsing, carte blanche, a two-

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195. See, e.g., Brown v. State, 588 So. 2d 551, 559 (Ala. Crim. App.), cert. denied, 588 So. 2d 551 (Ala. 1991); State v. Gregory, 191 S.C. 212, 227, 4 S.E.2d 1, 7 (1939); State v. Shaw, 82 S.W. 480, 480 (Tenn. 1904). This reasoning is often used in conjunction with the material-element test. See, e.g., Wingo, 304 S.C. at 175, 403 S.E.2d at 323.

196. See e.g., People v. Morris, 461 N.E.2d 1256, 1259 (N.Y. 1984) ("The standard is that of reasonableness; '[r]easonable certainty, all will agree, is required in criminal pleading.") (quoting United States v. Cruikshank, 92 U.S. 542, 568 (1875)). Although the factors vary by jurisdiction, the most common factors include: the length of the alleged period of time in relation to the number of individual criminal acts alleged; the passage of time between the alleged period for the crime and the defendant's arrest; the duration between the date of the indictment and the alleged offense; and the ability of the victim or complaining witness to particularize the date and time of the alleged transaction or offense.

Id. at 1260; see also In re K.A.W., 515 A.2d 1217 (N.J. 1986). The New Jersey Supreme Court suggested several factors in addition to those listed in Morris: "the age and intelligence of the victim, the extent and thoroughness of the prosecutor's investigative efforts to narrow the time frame of the alleged offense, and whether there was a continuous course of conduct." Id. at 1222; accord State v. Fawcett, 426 N.W.2d 91 (Wis. Ct. App.), cert. denied, 428 N.W.2d 553 (Wis. 1988).

197. See supra notes 184-85 and accompanying text.
year indictment period as being permissible. This sets a dangerous precedent.\textsuperscript{198}

Although the dissent may have overstated the problem, the suggestion that the \textit{Adams} test should be expanded is meritorious.\textsuperscript{199} The supreme court should take the next available opportunity to provide a list of factors for trial courts to consider when determining the sufficiency of an indictment.

In reaching its decision the \textit{Wade} court recognized that requiring all indictments to satisfy strict technical requirements would be impossible and unwise. Although place and time indictments serve a critical purpose, broad indictments, such as that in the instant case, are necessary under certain circumstances. The approach adopted by the supreme court in \textit{Wade} provides a reasonable solution to a difficult problem.

\textit{Wendy Hallford-Dudley}

\section*{IX. Cocaine Residue May Support Conviction for Illegal Possession}

In \textit{State v. Robinson}\textsuperscript{200} the South Carolina Court of Appeals held that possession of a measurable quantity of cocaine is necessary to sustain a conviction for illegal possession, but that possession can be proved circumstantially by seizure of trace amounts.\textsuperscript{201} The court declined to adopt the majority approach that possession of an identifiable residue of contraband is sufficient to support a conviction for possession.\textsuperscript{202} The \textit{Robinson} court interpreted prior decisions of the South Carolina Supreme Court regarding the requirements of possession as inconsistent with the majority view.\textsuperscript{203}

A jury convicted Roland Rod Robinson of possession of cocaine. At trial the State produced testimony that on April 15, 1989, police officers


\textsuperscript{199} \textit{See Fawcett}, 426 N.W.2d at 94 (concluding that factors under the "reasonableness test" can assist in determining the sufficiency of a two-factor test).


\textsuperscript{201} \textit{Id.} at 680.

\textsuperscript{202} For a discussion of the majority approach, \textit{see infra} text accompanying notes 207 and 221.

\textsuperscript{203} \textit{See Robinson}, 411 S.E.2d at 680-81. The court's interpretation is discussed \textit{infra} note 211 and accompanying text.
went to Winyah Grill, a place known for drug activity. When the officers entered the premises, Robinson was standing next to a man named Evans, who was rolling a marijuana cigarette. Upon seeing the officers, Robinson yelled, "the heat is in the house."\textsuperscript{204} The officers searched Evans and found several vials of cocaine. One officer observed Robinson throwing something into a trash can. A search of the trash can revealed a cocaine smoking pipe and a plastic vial that contained a residue amount of cocaine which was neither weighable nor otherwise measurable.\textsuperscript{205}

On appeal, Robinson contended that the trial judge committed reversible error by refusing to grant a directed verdict of acquittal. Robinson argued that the State did not present sufficient proof that he possessed a measurable amount of cocaine, as contemplated by South Carolina statute.\textsuperscript{206}

The court acknowledged that, although the South Carolina Supreme Court has never addressed this particular question, a majority of jurisdictions have held that possession of an identifiable residue of a contraband drug is sufficient to support a conviction for possession.\textsuperscript{207} However, as the Robinson court noted, the supreme court has held that possession of any amount of contraband will support a conviction for the related offense of possession with intent to distribute if sufficient evidence of intent to distribute exists.\textsuperscript{208} The Robinson court also observed that simple possession of contraband requires both the power and the intent to control the disposition or use of the contraband.\textsuperscript{209}

\footnotesize{\textsuperscript{204} Robinson, 411 S.E.2d at 679.}
\footnotesize{\textsuperscript{205} Id.}
\footnotesize{\textsuperscript{206} Id. The controlling South Carolina statute provides:}
\footnotesize{\textsuperscript{209} Id. (citing State v. Kimbrell, 294 S.C. 51, 362 S.E.2d 630 (1987); State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974)).}
The court of appeals initially had no difficulty applying the majority rule to the South Carolina possession statute. Nevertheless, the court agreed with Robinson's argument that, under the supreme court's "power and intent to control distribution or use" requirement for possession, one cannot have power or control over something that one cannot measure or see.

However, the court of appeals affirmed Robinson's conviction. The court held that, although less than a usable amount of a drug will support a conviction for possession, only a measurable amount of a drug is capable of disposition or use. The court further concluded that "illegal possession may be demonstrated if the facts and circumstances of the case can be seen to demonstrate that the quantity of drug actually seized was a remnant of a larger measurable amount the defendant possessed in the past." Essentially, the new rule is that if the court can infer that the accused possessed a measurable quantity of drugs in the past, based on an unmeasurable trace and the facts and circumstances of the case, then the accused is guilty of possession of that measurable amount.

The Robinson court relied on a concurring opinion in the Georgia Court of Appeals case of Partain v. State. The defendant in Partain challenged his cocaine possession conviction, arguing that residue on scale pans was an insufficient amount to convict him. The Partain...
court adopted the majority view on the issue and held that any identifiable amount, however small, together with other evidence of possession, will support a conviction. The concurrence in Partain advocated the adoption of a "compromise between the minority and majority views," whereby illegal possession is established if, when viewing the facts and circumstances of a case, "it can be reasonably inferred that the quantity of narcotic actually discovered is but a remnant of a larger, usable amount."

The Partain concurrence followed the reasoning of a Michigan Court of Appeals decision that had already been overruled when Partain was decided. In People v. Harrington the Michigan Supreme Court rejected the "remnant of a usable amount" test and adopted an "any amount visible to the naked eye" test for possession. The Harrington court discussed the merits and problems of the three different tests used to establish the amount of contraband necessary to support a possession conviction.

THE ANY AMOUNT TEST. The majority rule is that possession of any identifiable amount of a contraband drug will support a conviction for illegal possession. A common criticism of this test is that it may result in convictions of individuals who may have unknowingly possessed trace amounts. But, as the Harrington court pointed out, knowledge of the presence of the contraband drug is generally an essential element of possession.

216. Id. at 294.
219. Id. at 27.
220. Id. at 23-27.
221. Id. at 23.
222. Id. at 24 (citation omitted).
223. Id. In South Carolina a statute makes explicit this element by requiring a person to possess "knowingly or intentionally" a controlled substance in order to be convicted of unlawful possession. S.C. CODE ANN. § 44-53-370(c) (Law. Co-op. 1976).

Nevertheless, a literal application of the "any amount" test, even coupled with a knowledge or intent requirement, could result in the conviction of innocent individuals. Ostensibly, people realize that some paper currency is tainted with unmeasurable yet identifiable traces of cocaine. Establishing that individuals had this knowledge about the currency in their possession and that they intentionally possessed the currency would, under the "any amount" test, make them guilty of possession of cocaine.
THE USABLE AMOUNT TEST. The "usable amount" test, similar to the South Carolina Supreme Court's "power and intent to control" test, requires possession of a usable amount for conviction. Two basic arguments are given for this test. The first argument, similar to the argument given by the appellant in Robinson, is that the knowledge requirement cannot be met if the amount is "so small that its presence can be detected only through chemical or other scientific analysis."224 The second argument is that the test more accurately interprets the legislative intent of reducing illegal drug use because "quantities too small to be used do not pose the sort of societal danger contemplated."225

The major problem with the "usable amount" rule is that it is more difficult to administer than the "any amount" rule.226 No court has precisely defined "usable amount." Perhaps more importantly, determination of a usable amount in any particular case may require testimony concerning a defendant's habit, possibly violating the constitutional prohibition against making drug addiction a criminal offense.227

THE REMNANT OF A USABLE AMOUNT TEST. The "remnant" test was offered "to facilitate efficient law enforcement without undue encroachment on individual rights."228 The problem with this test, as noted by the Harrington court, is that it makes the "possession of the hide . . . possession of the horse"229 inference dependent upon the circumstances, with the attendant risk that illegal possession of drugs may become essentially a status offense.230

The Robinson court offered no rationale for applying the "remnant" test. However, the court invited the supreme court to grant certiorari because the Robinson court's interpretation of supreme court precedent was inconsistent with the majority view.231 The supreme court may agree to decide which test best interprets the legislature's intent in making possession of contraband drugs illegal. If so, the court will have

224. Harrington, 238 N.W.2d at 25 (footnote omitted).
225. Id. (footnote and citations omitted).
226. Id.
227. Id. at 26 (citing Robinson v. California, 370 U.S. 660 (1962) (holding unconstitutional a state law making "status" of narcotic addiction a criminal offense)). However, a similar argument can be made against the knowledge requirement of the "any amount" test. Establishing knowledge or intent may invite consideration of exactly the same sorts of issues.
228. Id.
229. Id. at 28 (Kavanagh, C.J., dissenting).
230. Id. at 26.
to determine whether the test's ease of administration outweighs the consequences of convicting individuals for possession of invisible, unmeasurable, and unusable traces of contraband drugs.

James M. Hughes