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Criminal Law

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CRIMINAL LAW

I. STIPULATION REQUIRES CONSENT OF SOLICITOR

In *State v. Anderson*\(^1\) the South Carolina Court of Appeals held that charges of driving under the influence (DUI), driving under suspension (DUS), and violation of the Habitual Traffic Offender Act\(^2\) can be tried together at the discretion of the trial court.\(^3\) Applying the rule of *City of Greenville v. Chapman*,\(^4\) the court affirmed the trial court’s denial of the defendant’s motion to sever the habitual offender charge from the DUI and DUS counts. In holding that “the trial court did not abuse its discretion in denying Anderson’s severance motion,”\(^5\) the court of appeals interpreted the stipulation provision of section 56-5-2980.\(^6\) The court’s decision allows a solicitor to reject a defendant’s offer to stipulate to the jurisdiction of the general sessions court on a second or further offense, thereby abrogating the apparent attempt of the statute to allow a defendant to protect against admission of evidence of a prior conviction.

John Anderson was indicted for DUS, DUI, and violation of the Habitual Traffic Offender Act. He had been declared a habitual traffic offender as a result of three DUI and DUS offenses.\(^7\) The evidence offered at trial to prove the habitual traffic offender violation was a letter from the South Carolina Highway Department to Anderson notifying him that he had been declared a habitual traffic offender.\(^8\) The letter also “showed a record of the traffic violations involving prior DUS and DUI charges that resulted in the habitual traffic offender suspension.”\(^9\)

The trial court denied Anderson’s pretrial motion to sever the habitual traffic offender charge from the DUI and DUS charges. Further, the judge

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3. *Anderson*, __ S.C. at __, 458 S.E.2d at 59. At the time of trial, these offenses were classified as misdemeanors. Effective January 1, 1994, the habitual traffic offender (H.T.O.) offense was reclassified as a felony. S.C. CODE ANN. § 56-1-1100 (Law. Co-op. Supp. 1995). The court “intimate[d] no opinion concerning what impact, if any, the amended version of the Habitual Traffic Offender Act may have upon this decision.” *Anderson*, __ S.C. at __ n.1, 458 S.E.2d at 58 n.1.
6. S.C. CODE ANN. § 56-5-2980 (Law. Co-op. 1991) (prescribing procedures for showing a previous conviction of the defendant for reckless driving or for driving under the influence of intoxicants, drugs, or narcotics).
7. Record at 5.
9. *Id.* at __, 458 S.E.2d at 57.
instructed the jury to "limit any consideration of any alleged prior convictions by [sic] the defendant only . . . to establish that this Court has the jurisdiction or the right to try this case."\(^{10}\) Anderson was convicted on all three counts.\(^{11}\)

The court of appeals applied *Chapman*\(^{12}\) to determine whether the trial court had abused its discretion in denying the motion for severance. The rule in *Chapman* was stated by the *Anderson* court as follows: "Different misdemeanors can be joined in the same indictment and tried together if they (1) arise out of a single chain of circumstances, (2) can be proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant will be jeopardized."\(^{13}\)

The court found that the first three factors were not in dispute and looked solely to the fourth factor to determine the case. Specifically, the court looked to Anderson’s offer to stipulate to jurisdiction to see if any real right had been jeopardized. The court stated that the solicitor rejected the stipulation.\(^{14}\)

\(^{10}\) *Id.* at ___, 458 S.E.2d at 58 (alterations in original).

\(^{11}\) *Id.* at ___, 458 S.E.2d at 57.

\(^{12}\) 210 S.C. 157, 41 S.E.2d 865 (1947).

\(^{13}\) *Anderson*, ___ S.C. at ___, 458 S.E.2d at 58.

\(^{14}\) Herein lies a problem. Examination of the record reveals that not only did the solicitor *not* reject Anderson’s offer to stipulate, but the trial judge might actually have acknowledged and granted the stipulation. After a discussion of the offer to stipulate between the court and defense counsel (in which the solicitor did not object to the stipulation), Record at 1-2, the following exchange took place between the court and Anderson’s attorney:

THE COURT: . . . So you’re submitting to the jurisdiction of the Court for the trial of the D.U.I. and the D.U.S.; right?

MR. FOWLER: Yes, sir, Your Honor.

THE COURT: Understanding that the information [of prior convictions] has still got to come in for the H.T.O.?

MR. FOWLER: Yes, sir.

THE COURT: Okay.

Record at 2. From this exchange, it appears that the trial court granted the stipulation. The discussion continued (after an interruption by the deputy sheriff) with Mr. Fowler reiterating the stipulation and opening the topic of severance. It was only then that the solicitor objected to defendant’s motion to sever. The language of the opinion seems to indicate that the stipulation “refusal” was brought out at oral argument: “Here, Anderson, as the record reflects and *as Anderson’s counsel indicated during argument before this court,* ‘attempted to stipulate [to the] jurisdiction [of the trial court] in this case;’ however, the solicitor did not agree to so stipulate.” *Anderson*, ___ S.C. at ___, 458 S.E.2d at 58 (alterations in original) (emphasis added). Moreover, neither brief mentions the stipulation offer. It appears, then, that there was some confusion at oral argument as to the stipulation. This might be explained by the fact that neither of the attorneys present for trial, and thus represented in the record, actively participated on appeal. The State was represented on appeal by the Attorney General’s office, and the defendant was represented on appeal by the South Carolina Office of Appellate Defense. This is highly unfortunate as it appears that the interpretation of the stipulation provision in the statute was unnecessary under the facts of this case as set out in the record. No appeal was taken from the decision of the court of appeals.
According to the court, "[t]his meant that the state had to prove, so far as the DUS and DUI charges were concerned, that the trial court had subject matter jurisdiction of the DUS and DUI charges for which Anderson was then being tried." The court then determined that, "[a]bsent a stipulation [agreed upon by both parties] as to subject matter jurisdiction, Anderson had no real right to object to the admission into evidence of his prior DUS and DUI convictions."

The court then stated that because the defendant had failed to argue that the solicitor should be required to give assent to such a stipulation, it could not, "as much as [it] might wish to do so, hold the solicitor’s assent was not required." In spite of this disclaimer, the court proceeded to cite cases defining stipulation as “an agreement between the parties to which there must be mutual assent.” In a footnote, the court further stated that "[t]he plain meaning of the statute . . . suggests that the solicitor must assent before a stipulation is effective, otherwise the legislature would not have included the words [‘with the solicitor’]."

The dissent rejected the court’s reasoning regarding the solicitor’s requisite consent. The dissent pointed out that because the prosecution’s interest would rarely be served by agreeing to stipulate to the jurisdictional foundation, the majority’s interpretation of the statute abrogates the intent of the statute to give the option to the defendant. The dissent quoted from Chapman for the proposition that “[c]ircumstances might arise which would render a uniting of several counts unjust to the defendant.” The dissent offered a more appropriate test to determine whether circumstances require severance in order to prevent prejudice: “In more modern terms, the analysis involves a weighing of the State’s interest in judicial economy against the possible prejudice to the defendant.” Finding that the judicial economy served by a denial of severance was minimal and the prejudice resulting from a denial of the severance was obvious, the dissent would have reversed on grounds that the trial court had abused its discretion.

The stipulation provision of section 56-5-2980 had never been put in issue on appeal prior to Anderson. It was, however, mentioned by the South Carolina Supreme Court in Tyler v. State. In Tyler the defendant was

16. Id. at ___, 458 S.E.2d at 58.
17. Id. at ___, 458 S.E.2d at 58.
18. Id. at ___, 458 S.E.2d at 58 (quoting State v. Parra, 859 P.2d 1231, 1238 (Wash. 1993)).
19. Id. at ___, n.2, 458 S.E.2d at 58 n.2. The court’s efforts to define stipulation as requiring the solicitor’s assent are technically dicta.
20. Id. at ___, 458 S.E.2d at 59 (Howard, J., dissenting).
21. Id. at ___, 458 S.E.2d at 59-60 (quoting Chapman, 210 S.C. at 162, 41 S.E.2d at 867).
22. Id. at ___, 458 S.E.2d at 60.
23. Id. at ___, 458 S.E.2d at 61.
24. 247 S.C. 34, 39, 145 S.E.2d 434, 436 (1965). Section 46-349 was recodified as section
indicted for a thirteenth DUI offense. “The indictment set forth the time and place of the previous twelve convictions of the petitioner for driving and operating an automobile while under the influence of intoxicating liquor.”

On appeal Tyler claimed the jurors were prejudiced against him because his previous offenses were detailed in the indictment. The court found that “the allegation of the indictment that the crime charged was a second or subsequent offense was necessary to show the jurisdiction of the court.”

The court explained the general rule that even possible prejudice to a defendant upon an “‘averment of his previous conviction . . . cannot override the necessity of making such allegation on the question of a more severe penalty for a subsequent offense, and such an averment is usually regarded as authorized, and not to violate the constitutional or statutory rights of accused.’” Most importantly, however, the court held that the defendant’s failure to avail “himself of the provisions of the . . . statute and stipulate[] with the Solicitor that the charge against him constituted a second or further offense” made unavailable habeas corpus proceedings to correct the alleged errors of prejudicial evidence. Although the court did not address the issue directly, Tyler might be interpreted to indicate—in line with the Anderson dissent—that the stipulation is entirely in the hands of the defendant.

Because there are no other South Carolina cases on the issue, it is necessary to examine other resources for guidance as to the application of stipulations in criminal proceedings. In agreement with State v. Parra, the Tennessee Court of Criminal Appeals in State v. Ford remarked: “A stipulation is an agreement between counsel with respect to business before a court. . . . However, it is not the duty or function of a trial court to require one of the parties to the litigation to stipulate with his adversary.” Furthermore, “[i]t has been held that, in a criminal proceeding, the state has the right to prove every element of the crime charged and is not obligated to rely on the defendant’s stipulation.”

56-5-2980.

25. Id. at 35, 145 S.E.2d at 434.
26. Id. at 36, 145 S.E.2d at 435.
27. Id. at 37, 145 S.E.2d at 435.
28. Id. at 38, 145 S.E.2d at 436 (quoting 42 C.J.S. Indictments and Informations § 126 (1991)).
29. Id. at 39, 145 S.E.2d at 436.
30. Id.
32. 725 S.W.2d 689 (Tenn. Crim. App. 1986).
33. Id. at 691 (citations omitted).
34. 73 Am. Jur. 2d Stipulations § 17 (1974).
In the absence of statutory guidance similar to section 56-5-2980, cases fall on both sides of the issue—some refusing to require the prosecutor to agree to stipulate to a prior conviction and others placing the decision only with the defendant and the court. Stipulation to prior convictions arises most often in cases of felony possession of a firearm in which the prior conviction is necessary to prove an element of the crime. In State v. Hudson the Supreme Court of Minnesota refused to require the trial court to accept defendant’s offer to stipulate to his prior felony convictions. Likewise, in State v. Wilson the prosecutor refused to agree to stipulate to a prior felony conviction. The Kansas court pointed out that it had repeatedly allowed admission of evidence “otherwise relevant in a criminal prosecution” even if the evidence proved “a crime other than that charged. It is an established rule of law that an admission by a defendant does not prevent the state from presenting separate and independent proof of the fact admitted.” The court then quoted the prevailing rule: “The making of an admission by the defendant does not bar the prosecution from proving the fact independently thereof as though no admission had been made, particularly since facts when voluntarily admitted often lose much of their probative force in the eyes of the jury.”

The key factor in cases like Wilson and Hudson, however, is that the prior convictions prove an element of the offense of felony possession of a firearm—the very existence of a prior felony. In the Anderson scenario the prior convictions for DUS and DUI go only to prove the non-elemental jurisdiction of the court. Therefore, this distinction and the existence of statutory guidance force a conclusion that the general rule that “the government is not required to accept an offer by the defense to stipulate to the facts of a case and may insist on proving all essential elements of its case”


37. 281 N.W.2d 870 (Minn. 1979).

38. Id. at 873.

39. 523 P.2d 337 (Kan. 1974).’

40. Id. at 341 (citations omitted).

41. Id. (quoting 12 WHARTON, CRIMINAL EVIDENCE § 399 (1972)).

should not apply to Anderson or cases like it. The usual purpose behind allowing the prosecution to refuse to stipulate relates to the nature of unfairly prejudicial evidence.

[El]evidence is unfairly prejudicial only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence. Accordingly, a prior conviction is not unfairly prejudicial where the prior conviction is an element of the crime.

. . . .

Every . . . circuit deciding the issue has concurred that the government need not accept the defendant's offer to stipulate to the prior conviction element of the crime charged. . . . Thus, case law recognizes the practical necessity that the jury have before it a context in which to decide a case. In addition, there exists a moral necessity that the jury hear evidence relating to all non-jurisdictional elements of the offense . . . .

This analysis further supports protecting the defendant from juror prejudice by giving the defendant an exclusive option to stipulate.

Some courts, however, have required prosecutors to accept defendants' stipulations even when the prior conviction is an essential element of the offense. In State v. Berkelman the charge was aggravated DWI, and the governing statute increased the crime from misdemeanor to gross misdemeanor if the defendant had a prior conviction for DWI. Thus, the prosecution was required to prove the prior conviction as an element of the gross misdemeanor charge. "[T]he prior conviction is an element which the state must prove at trial and which defendant has a right to have a jury decide. However, it does not follow that the defendant can do nothing to keep the potentially prejudicial evidence of his prior conviction from the jury." The court pointed out that in the majority of such cases the "potential of the evidence for unfair prejudice clearly outweighs its probative value." The balancing test the court applied compared "the potential of the evidence for unfair prejudice with the relevance of the evidence to issues other than the issue to which the stipulation relates." The court held that the trial judge erred in not

(Colo. 1987).


44. 355 N.W.2d 394, 395 (Minn. 1984).
45. Id. at 396.
46. Id. (quoting State v. Davidson, 351 N.W.2d 8, 11 (Minn. 1984)).
47. Id. at 397 (quoting Davidson, 351 N.W.2d at 11-12).
accepting the stipulation of the prior conviction; however, "the error was not so prejudicial as to require a new trial."\textsuperscript{48}

The circumstances in \textit{Berkelman} are strikingly similar to those in \textit{Anderson}. The statute in \textit{Berkelman} required proof of a prior conviction for increased penalty; the evidence was the innocuous testimony of the deputy court clerk\textsuperscript{49} (although in \textit{Anderson}, the evidence was perhaps even more innocuous in the form of a letter from the highway department\textsuperscript{50}); the court gave a limiting instruction to the jury;\textsuperscript{51} and the prosecutor did not "try to use the prior conviction improperly in either his opening or closing statement."\textsuperscript{52} The \textit{Berkelman} court's analysis applies with even greater ease to the facts of \textit{Anderson}. Anderson's prior convictions were unnecessary to prove an \textit{element} of the offense of DUI. Application of the \textit{Berkelman} balancing test to \textit{Anderson} reveals no "relevance of the evidence to issues other than the issue to which the stipulation relates."\textsuperscript{53} Yet, as the court stated in \textit{Berkelman}:

When the jury is told that a defendant charged with the act of driving while under the influence has a prior conviction for driving while under the influence, the risk is considerable that the jury will use the evidence in determining whether the defendant is guilty of the charged act of driving while under the influence. Evidence of a prior act of driving while under the influence is ordinarily not admissible against a defendant in a prosecution for driving while under the influence. . . . If a defendant is willing to concede that he has a prior DWI conviction, we fail to see why the evidence, with its great potential for being improperly used, should be admitted, unless, of course, the evidence is admissible . . . as evidence relevant to some disputed issue.\textsuperscript{54}

Moreover, when, as in South Carolina, the legislature has seen fit to provide by statute a stipulation procedure for just such a case (DUI), it would seem that due process would require the court to use the procedure to protect defendants such as Anderson from undue prejudice.

Only Oregon has had a similar statutory provision for stipulation to prior DUI convictions.\textsuperscript{55} The statute, however, was repealed in 1981 for unreport-
ed reasons. The Oregon statute included a provision to solve a problem like that in Anderson. The statute reads, in pertinent part:

(1) In a prosecution under [the traffic crime statute], the state, municipality or political subdivision shall plead and prove the previous conviction unless the defendant stipulates to that fact prior to trial. If the defendant so stipulates and the trial is by jury:

(a) The court shall accept the stipulation regardless of whether or not the state, municipality or political subdivision agrees to it.

If, as the Anderson dissent suggested, the South Carolina legislature meant to give the stipulation option to the defendant notwithstanding the assent of the solicitor, the remedy now would be an amendment adding the above-quoted and emphasized language of the Oregon statute.

Laying aside the stipulation issue and looking only at the question of severance, a review of other jurisdictions reveals a divided stand on severance of such offenses. The Indiana Court of Appeals in Shuman v. State affirmed a trial court's denial of severance on facts similar to those in Anderson. Shuman was convicted of operating a motor vehicle while intoxicated (DUI) resulting in the death of another person (a felony) and driving with a suspended license (a misdemeanor). He was acquitted of a charge of reckless homicide (a felony). The defendant wanted to sever the DUS charge from the reckless homicide and DWI-resulting-in-death charges to keep evidence of his driving record and license suspension from the jury.

Indiana has a statute that considers virtually the same factors as South Carolina's Chapman decision. The statute provides, in pertinent part:

Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:

(1) are of the same or similar character, even if not part of a single scheme or plan; or

56. Oregon has retained, however, a statute that is identical to the stipulation provision for a previous-conviction element in an aggravated murder case. OR. REV. STAT. § 163.103 (1990). Interestingly, this aggravated murder statute was enacted the same year the traffic statute on stipulations was repealed, 1981.

57. OR. REV. STAT. § 484.380 (1975) (second emphasis added), quoted in Winters, 578 P.2d at 441.


59. Id. at 127.

60. Id.

61. See supra note 13 and accompanying text.
(2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.\(^{62}\)

The Indiana statute that authorizes severance provides, in pertinent part:

"Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:

(1) the number of offenses charged;
(2) the complexity of the evidence to be offered; and
(3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.\(^{63}\)

The *Shuman* court first determined that the offenses charged were based on the same or similar conduct, not character; thus, the court had to apply the statutory factors to determine whether severance was authorized.\(^{64}\) Ultimately affirming the convictions, the court relied in part on the rule of *Douglas v. State*:\(^{65}\) "[I]t [i]s . . . not error to refuse to sever where all the evidence of one crime would have been admissible as to the other crime."\(^{66}\) "Thus, the charges, which arose from the same conduct, required proof of one common element and a number of dissimilar elements."\(^{67}\) Because the evidence was "not complex nor easily confused . . ., the decision not to sever was not clearly erroneous pursuant to the statutory factors."\(^{68}\)

Applying this rule to the facts of *Anderson*, the evidence of prior convictions was necessary to show the jurisdiction of the court as to the DUI and DUS, necessary as an element of the DUS to the extent the letter from the highway department proved the suspension, and necessary as an element of the habitual traffic offender charge. Even though there were also dissimilar elements, the charges arose from the same conduct and required proof of at least one common element—Anderson's previous convictions as evidenced by the letter notifying Anderson of the revocation of driving privileges. Thus, it


\(^{64}\) *Shuman*, 489 N.E.2d at 127-28.

\(^{65}\) 464 N.E.2d 318 (Ind. 1984).

\(^{66}\) *Shuman*, 489 N.E.2d at 128.

\(^{67}\) Id.

\(^{68}\) Id.
would appear the South Carolina Court of Appeal’s decision is consistent with judicial thinking in Indiana.

Also supportive of the Anderson decision is State v. Campbell.69 There the defendant was charged with DUI, operating a motor vehicle while adjudged an habitual offender, and negligent homicide.70 As in Anderson, the defendant moved to sever the habitual offender charge.71 The severance statute in Montana reads, in pertinent part: "If it appears that a defendant or the state is prejudiced by a joinder of related prosecutions . . . the court may order separate trials . . . or provide any other relief as justice may require."72 The Montana court analyzed the case under a test for three basic kinds of prejudice: (1) when accumulation of evidence tends to create the impression the defendant is a bad man; (2) "when proof of guilt on the first count . . . is used to convict the defendant of a second count even though the proof would be inadmissible at a separate trial on the second count";73 and (3) "when the defendant wishes to testify on his own behalf on one charge but not on another."74 The court weighed "the prejudice incurred by the defendant because of a joint trial against the judicial economy resulting from a joint trial."75 Applying that balancing test, the court found that the defendant had not proven he was sufficiently prejudiced by the joint trial.

It has been specifically held that the prejudice incurred by a defendant from being held out to the jury as an “habitual offender” is not alone sufficient to entitle the defendant to separate trials.

We agree that the mere inclusion of an habitual offender count in an information is insufficient to automatically require severance of that charge from other charges. It would be contrary to the considerations of judicial economy set out above to require separate trials whenever one count of an information charges a party with being an habitual offender. That would be especially true in this case where all the charges stemmed from the same incident . . . . To grant severance would require essentially the same evidence about the same occurrence to be introduced at two different trials.76

This argument applies to the facts of Anderson as well. In fact, in Anderson the State argued: “[U]nder Appellant’s theory of the case, the lower courts

69. 615 P.2d 190 (Mont. 1980).
70. Id. at 192.
71. Id. at 193.
73. Campbell, 615 P.2d at 198.
74. Id.
75. Id.
76. Id. at 198-99.
would be required to hold a separate trial every time a person violated the Habitual Traffic Offender statute—one trial for the offense which constituted the violation (DUI or DUS), and a separate trial for the violation of the HTO Act itself."

Other jurisdictions, however, have resolved the issue by requiring bifurcation of the guilt and sentencing phases of habitual offender trials. The applicable statutes, however, govern only felonies. Because the habitual traffic offender offense in South Carolina has been upgraded to felony status, it may be that bifurcation would be prudent here as well.

The dissent in Anderson also raised the question of the constitutionality of the joinder of offenses. The United States Supreme Court, however, in Spencer v. Texas, refused to interfere with the promulgation of state rules of criminal procedure, saying that the "prejudicial effect [of joinder] . . . is justified on the grounds that (1) the jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person . . . is a valid governmental interest." The Court upheld as not violative of due process Texas's habitual criminal offender procedure of including in the indictment allegations of prior offenses and introduction of past convictions when the jury was charged that the prior convictions are not to be considered in assessing defendant's guilt or innocence.

As for any possible violation of the South Carolina Constitution, there is no case law supporting the dissent's contention of a violation of the right to a fair and impartial trial. Though not unconstitutional, it appears the court of appeals has created the opportunity for defendants to be prejudiced when solicitors refuse to accept stipulations to the jurisdiction of the court under the stipulation provision of the statute.

In conclusion, while it may be true that no real right of the defendant was jeopardized as to the DUS charge because the stipulation provision does not apply to a charge of DUS, the same cannot not clearly be said for the DUI charge. It is unclear whether the statute was meant to protect against admission of prior convictions on a DUI charge if the defendant alone stipulated to the jurisdiction of the court. However, because the motion for severance would have kept the DUS and the DUI together, any error would appear to have been harmless even had the solicitor been required to accept the stipulation because the jurisdiction of the court over the DUS would still have been proved with evidence of prior convictions. Also, presumably the

77. Respondent's Final Brief at 8-9.
78. See, e.g., ARK. CODE ANN. § 5-4-502 (Michie 1993); COLO. REV. STAT. § 16-13-103 (Supp. 1995).
80. Id. at 559-69.
prior convictions that resulted in suspension of Anderson’s license would also be admissible as evidence of the suspension on the DUS charge.

The court of appeals’ decision finds support in several jurisdictions, both as to construction of the stipulation provision and as to severance generally. There are, however, many cases in support of the alternate position as to both issues. If the legislature intended the stipulation provision to allow defendants to take from the prosecution the sword of prior convictions, it must now amend the statute to re-establish that intent. Moreover, now that violation of the Habitual Traffic Offender Act constitutes a felony, it is questionable whether Chapman would apply if the Anderson trial were held today.

Suzanne H. Bauknight
II. COURTS STRUGGLE TOWARDS A UNIFORM APPROACH FOR RESOLVING DOUBLE JEOPARDY ISSUES IN CONSPIRACY CASES

In *State v. Barroso*\(^1\) the South Carolina Court of Appeals held, *inter alia*,\(^2\) that appellant Bobby Bell was not subjected to double jeopardy by being prosecuted for trafficking in cocaine after having been acquitted of trafficking in marijuana, a charge that arose out of dealings with some of the same people, during some of the same time periods, and in some of the same geographical areas.\(^3\)

The statewide grand jury returned an indictment against Bell in September of 1990 for trafficking in marijuana.\(^4\) Specifically, the counts alleged that the trafficking occurred in Darlington, Florence, Lee, and Richland Counties and in the State of Texas from February of 1990 until September of 1990. Bell was acquitted of these charges.\(^5\) In November of 1990, another indictment was returned against Bell for trafficking in cocaine.\(^6\) This second indictment alleged that the trafficking occurred in Darlington, Florence, and Lee Counties and in the State of Florida from June 1, 1988 to October 31, 1990.\(^7\) Bell was convicted of trafficking in cocaine, and on appeal he argued that the prosecution was barred by the Double Jeopardy Clause because both prosecutions arose from the same conspiracy and course of conduct.\(^8\)

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2. *Barroso* involved seven appellants who were all convicted of trafficking in excess of 400 grams of cocaine. In addition to double jeopardy, they each appealed various aspects of their trial, including: sufficiency of evidence; admission of evidence of other drug-related bad acts; refusal to grant a mistrial despite the jury's exposure to hearsay evidence; admission of improper impeachment testimony; improper jury charge; refusal to allow presentation of constitutional claims after the verdict; argument that the cocaine trafficking cocaine statute violates the Equal Protection Clause (because it discriminates against those who are predisposed to use drugs); and argument that the cocaine trafficking statute (which denies defendant the opportunity to participate in supervised furlough, extended work release, and parole) violates S.C. CONST. art. XII, § 2. *Id.* All of the convictions were affirmed except that of James Napoleon Smith, which was reversed because the state failed to present sufficient evidence for conviction. *Id.* at ___, 462 S.E.2d at 867-870.

3. *Id.* at ___, 462 S.E.2d at 870-872.


5. *Id.* at ___, 462 S.E.2d at 870.


7. *Id.* at ___, 462 S.E.2d at 870.

8. Brief of Appellant at 3.
The court of appeals approached the double jeopardy question by applying the analysis announced in *Grady v. Corbin*. Even though this test had been overturned by the United States Supreme Court, the court of appeals deferred to the two-step *Grady* test because *Grady* was the applicable law when Bell was tried and convicted. The first element of *Grady* is set forth in *Blockburger v. United States* and is used to determine if "the offenses have identical statutory elements or [if] one is a lesser-included offense of the other." If the court finds that either of these elements is satisfied, "the inquiry must cease and the subsequent prosecution is barred." If the prosecution survives the *Blockburger* analysis, the second step is to determine if "the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."

By analogy to *State v. Wilson*, which was decided on almost identical facts, the court of appeals determined that the *Blockburger* test did not bar Bell's subsequent prosecution. Specifically, the court noted that in *Wilson* the South Carolina Supreme Court held that trafficking in marijuana and trafficking in cocaine were not lesser-included offenses of each other. The court of appeals then applied the second test in *Grady* and found that "[t]he entirety of the conduct sought to be established in the [trafficking-in-marijuana] case . . . does not establish any single element" of the trafficking-in-cocaine case. The court pointed out that the prosecutions involved different controlled substances and that the elements of conspiracy were proved by different conduct. The application of these two tests would complete the analysis in double jeopardy cases not involving conspiracy charges. In *State v. Dasher*, however, the South Carolina Supreme Court adopted an additional totality-of-the-circumstances test for conspiracy cases. The *Dasher*

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11. Barroso, ___ S.C. at ___ n.6, 462 S.E.2d at 871 n.6. The court of appeals applied this analysis to give Bell the extra protection of *Grady*'s "entirety-of-the-conduct" test. It should also be noted that the South Carolina Supreme Court adopted the same-conduct test four years before *Grady* was decided. See infra notes 60-62 and accompanying text.
14. Id.
15. Id. at 521.
17. Barroso, ___ S.C. at ___, 462 S.E.2d at 871.
18. Id. at ___, 462 S.E.2d at 871.
19. Id. at ___, 462 S.E.2d at 871.
20. Id. at ___, 462 S.E.2d at 871.
analysis requires consideration of the following factors to determine whether one or two conspiracies existed:

(1) the time periods covered by the alleged conspiracies; (2) the places where the conspiracies are alleged to have occurred; (3) the persons charged as conspirators; (4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other descriptions of the offenses charged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violat-
ed.22

Applying these factors, the Barroso court determined that "these were two distinct conspiracies with distinct co-conspirators, distinct time periods, distinct places of operation, distinct offenses and distinct overt acts."23

The first step in the Grady analysis, the Blockburger test, has been a pillar in double jeopardy jurisprudence for over six decades, and not surprisingly, the court of appeals had no difficulty in relying upon it in the Barroso case. Perhaps the best attribute of this test is its simplicity. As stated by Justice Sutherland in Blockburger, the question "is whether each [statute] requires proof of a fact which the other does not."24

As noted above, the Barroso court relied on State v. Wilson,25 which held that neither trafficking in cocaine nor trafficking in marijuana was a lesser-included offense of the other,26 implying that each offense requires proof of an element that the other does not. A simple comparison of the plain language of the trafficking statutes supports the Wilson holding. Section 44-53-370(e)(1)(b) requires proof of trafficking 100 or more pounds of marijuana, but section 44-53-370(e)(2)(e) requires proof of trafficking 400 or more grams of cocaine.

The Barroso court's application of the Grady "same-conduct" test is also consistent with precedent. In Grady the United States Supreme Court asked if the state, in order to prove an essential element of the case at bar, would prove conduct that constitutes an offense for which the defendant had already been tried.27 The defendant in Grady had already plead guilty to the traffic offenses of driving while intoxicated and driving left of center.28 The State of New York subsequently attempted to prosecute the defendant for reckless manslaughter, second degree vehicular manslaughter, criminally negligent

22. Barroso, ___ S.C. at __, 462 S.E.2d at 872.
23. Id. at __, 462 S.E.2d at 872.
26. Id. at 385, 429 S.E.2d at 454.
28. Id. at 511-12.
homicide, and third degree reckless assault.\textsuperscript{29} Filing a bill of particulars, the state averred that it would prove the defendant was driving while intoxicated and left of center to establish the elements of recklessness and negligence.\textsuperscript{30} The Court precluded prosecution for the homicide and assault offenses because, in order to establish elements of these offenses, the State would have to prove conduct for which the defendant had already been tried.\textsuperscript{31}

The \textit{Barroso} court relied on \textit{Wilson} and found that the State did not prove the conduct of the trafficking-in-marijuana offense to establish any element of the trafficking-in-cocaine offense.\textsuperscript{32} By following the \textit{Grady} analysis, it is obvious that even if the State wanted to use the conduct\textsuperscript{33} sought to be proved in the trafficking-in-marijuana trial, this conduct would not have proven any of the elements in the trafficking-in-cocaine trial.

Thus, the two-step approach of \textit{Grady} appears rather straightforward. The totality-of-the-circumstances test is not as easy to apply. Although several of the federal circuit courts and state supreme courts have applied the totality-of-the-circumstances test to the double jeopardy analysis of conspiracy cases,\textsuperscript{34} these courts offer very little guidance as to how each of the five factors should be considered. Of course, the determination always rests upon whether the court believes that the same overall agreement (to act in a criminal fashion) among the parties was involved in the multiple prosecutions.\textsuperscript{35} If so, the multiple prosecutions will be considered to involve the same conspiracy "no matter how variegated the criminal purposes contemplated in the agree-

\begin{footnotesize}
\textsuperscript{29} Id. at 513.
\textsuperscript{30} Id. at 523.
\textsuperscript{31} Id. However, the Court noted that this did not bar the State from prosecuting the defendant on these charges if the State did not rely on conduct for which Grady had already been convicted. \textit{Id.} Specifically, if the State attempted to establish recklessness and negligence by showing that the defendant was driving too fast in heavy rain (as was also alleged in the bill of particulars), double jeopardy problems would not exist. \textit{Id.}

\textsuperscript{32} \textit{Barroso}, ___ S.C. at ___, 462 S.E.2d at 871.

\textsuperscript{33} Justice Brennan, speaking for the Court, made clear that the entirety of the conduct did not equate with "same evidence." \textit{Grady v. Corbin}, 495 U.S. 508, 521-22 (1990). The use of specific evidence at one trial does not preclude its use at another. \textit{Id.} Rather, the focus must be placed on "what conduct the State will prove [and] not the evidence [it] will use to prove that conduct." \textit{Id.} at 521.

\textsuperscript{34} See, \textit{e.g.}, United States v. Okolie, 3 F.3d 287 (8th Cir. 1993) (holding that two separate conspiracies existed under the totality-of-the-circumstances test when there was a partial overlap in time, different co-conspirators, indictments under the same statutes, different overt acts, and different geographic locations), \textit{cert. denied}, 114 S. Ct. 1203 (1994); United States v. Bryan, 896 F.2d 68 (5th Cir. 1990) (holding that one conspiracy existed under the totality-of-the-circumstances test when there was a partial overlap in time, some different co-conspirators, indictments under the same statutes, similar overt acts, and some similar geographic locations).

\end{footnotesize}
However, a closer look at the totality-of-the-circumstances test as applied in South Carolina reveals that one factor trumps the others.

Beginning with *Dasher*, in which South Carolina adopted the totality-of-the-circumstances test, consideration of the substantive statutes alleged to have been violated, the fifth factor, seems to take precedence over the other four factors. In *Dasher* the defendants were indicted twice for conspiracy to transport, store, and distribute a controlled substance—once for marijuana and once for cocaine. At the time of the indictment, a single South Carolina statute proscribed these activities. The South Carolina Supreme Court determined that the marijuana and cocaine counts constituted a single conspiracy and that double jeopardy applied even though the other factors pointed towards different conspiracies. The handling of the two drugs involved some but not all of the same people; overlapped in time for only four months; involved the two different overt acts of transporting cocaine and transporting marijuana; and partially occurred in two different places—the cocaine came from Florida while the marijuana came from Texas.

Similarly, in *State v. Amerson* the defendants were indicted twice for conspiring to traffic in marijuana under the same statute. The South Carolina Supreme Court determined that this constituted one conspiracy even though the conspiracies did not overlap in time; involved some but not all of the same people; and the method of transportation and distribution varied somewhat.

However, in *State v. Wilson*, which the court of appeals relied upon in *Barroso*, the South Carolina Supreme Court determined that two separate conspiracies existed when the defendants were indicted under different statutes of conspiracy to traffic in marijuana and conspiracy to traffic in cocaine. The *Wilson* court distinguished the case from *Dasher* by noting that separate substantive statutes were involved.

The court of appeals appeared to use some form of this trumping mechanism in *Barroso* by focusing on the substantive statutes alleged to have

36. Id. (quoting Annotation, *Several Conspiracies as Predicable Upon Single Agreement to Commit Several Offenses*, 87 L. Ed. 29, 47 (1942)).
37. Id.
38. Id. at 455, 298 S.E.2d at 216.
40. Id. at 456, 298 S.E.2d at 217.
41. Id.
43. Id. at 317-18, 428 S.E.2d at 872.
44. Id. at 320, 428 S.E.2d at 873-874.
46. Id. at 386-387, 429 S.E.2d at 455-456.
47. Id.
been violated. The court's only reference to the totality-of-the-circumstances test was in the statement "that these were two distinct conspiracies with distinct co-conspirators, distinct time periods, distinct places of operation, distinct offenses and distinct overt acts." In contrast to this brief mention of Dasher's first four factors, the Barroso court drew upon statutory distinctions throughout its opinion. Furthermore, the conspiracies in question did seem to involve different overt acts, some different co-conspirators, and some different geographical areas. However, the time span of the second conspiracy (trafficking in cocaine) was entirely overlapped by the first (trafficking in marijuana), for which Bell was acquitted.

Barroso possibly changes the double jeopardy analysis by South Carolina courts. This decision implies that the same-conduct test would be abandoned in analysing conduct that occurred after the United States v. Dixon ruling. Essentially, the Dixon decision overturned the same-conduct test of Grady v. Corbin, leaving the Blockburger test to determine what constitutes the same offense. The Court's reasons for overruling Grady included the belief that the test lacked constitutional roots, contradicted an unbroken line of decisions, and produced confusion.

However, it is possible the South Carolina Supreme Court would not reject the same-conduct test. After all, in State v. Grampus, decided a full four years before Grady, the South Carolina Supreme Court adopted its own same-conduct test. On the other hand, perhaps the South Carolina Supreme Court would apply an analysis resembling Barroso's. The likelihood of a Barroso approach becomes more plausible when one considers that the test adopted in Grampus was not based on any provision of the Constitution of South Carolina but on dictum from a United States Supreme Court decision.

48. Barroso, ___ S.C. at ___, 462 S.E.2d at 872.
49. Id. at ___, 462 S.E.2d at 870-872.
50. Id. at ___, 462 S.E.2d at 870.
53. 113 S. Ct. at 2860. This overruling had no effect on the totality-of-the-circumstances test for conspiracies.
54. Id.
55. Id. at 2864.
56. 288 S.C. 395, 343 S.E.2d 26 (1986). The South Carolina test in Grampus was quite similar to the Grady same-conduct test.
57. Illinois v. Vitale, 447 U.S. 410 (1980). When the defendant was convicted of failing to reduce speed to avoid an accident and subsequently faced manslaughter charges, the Court in Vitale suggested that "if in the pending manslaughter prosecution [the state relied] on and prove[d] a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter . . . [the defendant] would have a substantial claim of double jeopardy." Id. at 421.
All that is certain right now is that the South Carolina Court of Appeals has taken a definite position. In Barroso the court of appeals suggested that it would not have had any reluctance in abandoning the same-conduct test if appellant Bell had been tried after Grady had been overturned.\(^5\)

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\textit{Patrick Keith McCarthy}

\footnotesize\textsuperscript{58} See Barroso, ___ S.C. at ___ n.6, 462 S.E.2d at 871 n.6.
III. THE ADMISSIBILITY OF DNA STATISTICAL EVIDENCE UNDER STATE V. DINKIN

The South Carolina Supreme Court upheld the admission of population frequency statistics for deoxyribonucleic acid (DNA) test results in State v. Dinkins. Although this decision is a rational progression in South Carolina law and is consistent with many other jurisdictions, the opinion left many questions unanswered and left the future of DNA evidence in dispute.

Dinkins was convicted of first degree criminal sexual conduct, first degree burglary, and armed robbery. The victim was a seventy-eight-year-old woman, and the attack took place in her bedroom. Although she was unable to identify Dinkins outright, she described a medallion worn by her attacker, which was similar to one owned by Dinkins, and identified her attacker as having "black speech." Dinkins is black.

Police were unable to confirm the attacker's identity from a partial fingerprint lifted from a window screen. However, the South Carolina Law Enforcement Division (SLED) performed DNA analysis on semen samples taken from the victim's bed sheets, and the test resulted in a match with Dinkins' DNA. A SLED DNA expert testified that the probability of finding Dinkins' particular DNA pattern in an unrelated individual selected randomly in South Carolina was one in 2.9 billion in the black population and one in 4.2 billion in the white population. After an in camera hearing, the trial judge ruled that the statistical evidence was admissible.

2. Id. at __, 462 S.E.2d at 59.
3. Id. at __, 462 S.E.2d at 59.
4. Id. at __, 462 S.E.2d at 59. DNA is the long, double-stranded molecule that resembles a twisted ladder and is found in the chromosomes of every nucleated cell. See State v. Ford, 301 S.C. 485, 487, 392 S.E.2d 781, 782 (1990); Thomas M. Fleming, Annotation, Admissibility of DNA Identification Evidence, 84 A.L.R.4TH 313, 319 (1991). Each side of the ladder is composed of a chain of sugars and phosphates, and the approximately three billion "rungs" attached to them consist of pairs of molecules called "bases." Fleming, supra note 6, at 319. These bases (individually known as adenine, cytosine, guanine, and thymine) each bond with only one of the other bases. Id. The order of the four bases along the DNA molecule creates the genetic code, which itself dictates the production of proteins that make up an organism. Id. Although most sections of a chain of bases are largely the same, "certain sections are variable or 'polymorphic,' meaning that they may take different forms in different individuals." Id. Because of these polymorphisms in human genetic structure, "no two individuals (except for identical twins) have identical base sequences throughout their DNA." Id. Thus, DNA analysis arguably makes it possible to identify a specific person to the practical exclusion of all others.

5. Id. at __, 462 S.E.2d at 59.
6. Id. at __, 462 S.E.2d at 60.
The admissibility of evidence derived from DNA identification or "finger-printing" techniques is one of the most controversial issues in the law today. Two kinds of DNA tests are currently in forensic use.\footnote{7} Both methodologies involve the isolation, identification, and comparison of certain highly distinguishing characteristics in the genetic structure of individuals, as revealed by an analysis of DNA extracted from body fluid or tissue samples, and a statistical calculation of the frequency with which such characteristics could be expected to appear in the population.\footnote{8}

DNA testing "has been advanced as a uniquely effective means (1) to link a suspect to a crime, or to exonerate a wrongly accused suspect, where biological evidence has been left; (2) to resolve disputed parentage in paternity, immigration, and other cases; and (3) to identify human remains."\footnote{9} Although DNA identification may offer significant advantages over traditional means of biological identification,\footnote{10} many serious questions have been raised about its reliability and acceptability as evidence in legal proceedings.

RFLP analysis is the most widely used method of DNA matching. The procedure requires the extraction of an adequate amount of DNA from the samples to be compared. For crime scene samples, a quarter-sized blood stain or a dime-sized semen stain is usually required. Following a complex, multi-step procedure,\footnote{11} a process known as autoradiography yields an X-ray showing autorads or bands of DNA. This autoradiograph is "often said to resemble the bar code appearing on grocery store packages, and has become widely known as the 'DNA fingerprint.'"\footnote{12} Once these prints are created, the pattern of bands produced by the suspect's or victim's DNA is compared to the pattern obtained from the unknown sample. A DNA match occurs when the three to five autorads that are examined are determined to be alike.\footnote{13} Once a match is made, data bases developed by forensic DNA laboratories are consulted to statistically calculate the uniqueness of the band pattern based on the frequency with which each band appears in the relevant population, as determined by the race of the DNA contributor. The probability of a random match on multiple bands can be
computed by applying the "product rule," which multiplies the frequencies with which each band appears in the data base. 14 For example, if one autorad is found in fifty percent of the relevant population and another autorad is found in twenty percent of the relevant population, the probability of a coincidental match of the two DNA prints is ten percent. As noted in Dinkins, "most of the controversy surrounding DNA population frequency statistics involves the product rule." 15

South Carolina's standard for the introduction of novel scientific evidence allows admission of DNA analysis. Under the test formulated in State v. Jones 16 "admissibility depends upon "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." 17 Likewise, under federal law, the admissibility of a scientific theory or technique depends on its achievement of general acceptance in the scientific field from which it comes. 18 Accordingly, the court concluded in State v. Ford 19 that DNA identification had gained general acceptance in the scientific community and held that DNA test results declaring matches are admissible, subject to attack for relevancy or prejudice. 20 The court also held that the execution of the test was subject to attack on a case-by-case basis. 21

In Dinkins the court dealt with admissibility of population frequency statistics. The court first addressed the admissibility of such statistics under South Carolina Rule of Criminal Procedure 24(a), 22 which provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise." 23 In holding the DNA popula-

15. ___ S.C. at ___, 462 S.E.2d at 60.
17. Id. at 731, 259 S.E.2d at 124 (quoting People v. Marx, 126 Cal. Rptr. 350, 355-56 (Cal. Ct. App. 1975)).
20. Id. at 490, 392 S.E.2d at 784; see also State v. China, 312 S.C. 335, 340-42, 440 S.E.2d 382, 385 (Ct. App. 1993).
21. See Ford, 301 S.C. at 490, 392 S.E.2d at 784.
23. Dinkins, ___ S.C. at ___, 462 S.E.2d at 60 (quoting S.C. R. CRIM. P. 24(a) (repealed
tion frequency statistics admissible, the court noted that the jury should be allowed to determine, on its own, the reliability of the statistics—effectively recognizing the jury’s freedom to believe or disbelieve the experts. The Dinkins court also held that population frequency statistics are subject to attack on relevancy and prejudice grounds.

Dinkins argued that the statistics were inadmissible because their prejudicial effect outweighed their probative value. He urged that the “probability figure of one in 2.9 billion unfairly prejudiced him because the jury may have perceived this [astronomical] statistic as infallible.” However, Dinkins failed to cross-examine SLED’s DNA expert or present his own experts to demonstrate why the statistics were flawed or unreliable. Therefore, the court upheld the trial judge’s finding that the probative value of the statistical evidence outweighed any unfair prejudicial effect.

The Dinkins opinion fails to address a number of substantive factors identified by other courts as affecting the admissibility of DNA statistical evidence. In other words, Dinkins’s failure to cross-examine SLED’s DNA expert or present his own DNA evidence clearly leaves unanswered the question of whether the probative value of statistical evidence outweighs its potential prejudicial impact. This question is a source of judicial debate nationwide.

A Florida appellate court, following the majority of jurisdictions, explained that although DNA identification “is highly technical, incapable of observation and requires the jury to either accept or reject the scientist’s conclusion[s],” this does not render the evidence unreliable. In another decision, the Florida appellate court upheld the admission of expert testimony that there was only one chance in 234 billion of finding someone other than the defendant with the same DNA band pattern exhibited by the blood and semen samples. Given the current human population of five billion, defense counsel objected that the expert’s probability figures were so overwhelming that if believed by the jury, they would establish the defendant’s identity as the rapist beyond a reasonable

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24. Id. at __, 462 S.E.2d at 60.
25. Id. at __, 462 S.E.2d at 60.
27. Dinkins, ___ S.C. at __, 462 S.E.2d at 60; see also Wedlock, supra note 14, at 13 (arguing that the “statistically untutored are likely to receive [statistical] testimony . . . as conclusive proof that the defendant left the evidence”).
29. Id. at __, 462 S.E.2d at 61.
doubt and thereby invade the jury’s province as the ultimate finder of fact.\textsuperscript{32} Although the court acknowledged the major discrepancies between the victim’s description of her assailant and the defendant’s appearance, it reasoned that the average juror could weigh the credibility of such figures when properly presented and challenged.\textsuperscript{33} The court noted that one of defense counsel’s tasks is to subject expert witnesses to vigorous cross-examination or to attack the scientific foundation upon which statistical proofs are based.\textsuperscript{34}

The Minnesota Supreme Court, however, held that DNA identification test results are generally admissible but ruled that population frequency statistics associated therewith are inadmissible due to their potentially exaggerated impact on the jury.\textsuperscript{35} In \textit{State v. Schwartz} an independent laboratory reported that all bands in the DNA print obtained from the victim’s blood also appeared in the sample taken from the defendant’s clothes and that the frequency of the pattern in the Caucasian population was approximately one in thirty-three billion.\textsuperscript{36} The court explained that cross-examination and limiting instructions may not be sufficient to adequately safeguard against the danger of juries giving undue weight and deference to statistical evidence.\textsuperscript{37} Likewise, the Wyoming Supreme Court held that “the better practice in Wyoming should be to not refer to the statistical probability of duplication when introducing DNA test results.”\textsuperscript{38} In \textit{Rivera v. State} the Wyoming court noted that although the theory underlying DNA testing is generally accepted in the relevant scientific community, a problem arises because “it would be possible for [a] jury to draw [an] inference [of guilt] from statistical probabilities associated with the DNA evidence alone.”\textsuperscript{39}

The National Research Council (NRC) has calculated conservative “ceiling frequencies” for the relevant strands of DNA in an effort to reduce the controversy over the prejudicial effect of statistical evidence.\textsuperscript{40} The use of this ceiling method prompted the Minnesota Supreme Court to create a DNA exception to the rule against admission of statistical probability evidence in criminal prosecutions.\textsuperscript{41}

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32. \textit{Id.} at 694.
33. \textit{Id.} at 696.
34. \textit{Id.} at 697.
36. \textit{Id.} at 424.
37. \textit{Id.} at 428.
39. \textit{Id.} at 942.
Another criticism of DNA identification testing is the "lack of consensus on the proper data base size from which it is acceptable to project statistics for an entire population." In Dinkins the court noted in a footnote that SLED developed its data base using the DNA of only 250 blacks in South Carolina. A Delaware court in State v. Pennell held that statistics regarding band frequency derived from blood samples taken of only 250 people were inadmissible, because even the slightest misidentification "could substantially alter the frequency calculated from that data base."

In Andrews v. State a Florida court upheld the admissibility of statistical evidence derived from a data base of 710 samples. According to expert testimony, the American Association of Blood Banks had concluded that a base of 200 to 500 samples is sufficient to produce reliable statistical results.

The technical specificity of DNA statistical identification raises more questions with regard to its reliability. The extraordinarily exacting procedure requires a high degree of expertise and uniformity in testing conditions before reliable results can be obtained. Many critics have pointed out the lack of uniform standards relating to proper DNA testing procedures. For instance, some critics argue that the laboratory conditions under which DNA identification takes place differ so greatly from true forensic conditions that the reliability of the results is significantly diminished. DNA matching in criminal cases will typically require analysis of blood or semen stains that are small, old, and exposed to adverse environmental conditions. These conditions tend to "break up or 'degrade' DNA into smaller fragments, thereby reducing the number of bands visible after RFLP analysis, and making the interpretation of prints more difficult." Also, samples may be contaminated by chemical agents in the material on which they are deposited, resulting in misleading band sizes or positions.

42. Fleming, supra note 4, at 326.
43. Dinkins; ___ S.C. at ___ n.4, 462 S.E.2d at 61 n.4.
45. Id. at 522.
47. Id. at 850.
48. Id.; see also People v. Miles, 577 N.E.2d 477, 484 (Ill. App. Ct. 1991) (data base of 200 to 300 blood samples sufficient); People v. Shi Fu Huang, 546 N.Y.S.2d 920, 922 (N.Y. Crim. Ct. 1989) (expert testimony that 200 individual samples are usually required for a valid statistical analysis of an ethnic population group).
51. Id. at 670-72; see also State v. Woodall, 385 S.E.2d 253, 260 (W. Va. 1989) (evidence inadmissible because insufficient DNA was recovered from semen stains to yield a band pattern).
52. Fleming, supra note 4, at 325; see also Pearsall, supra note 50, at 668-69.
53. Janet C. Hoeffel, Note, The Dark Side of DNA Profiling: Unreliable Scientific Evidence...
As a result of such criticism, DNA testing procedure guidelines have been issued by agencies such as the Federal Bureau of Investigation’s Technical Working Group on DNA Analysis Methods (TWGDAM) and the California Association of Crime Laboratory Directors (CACLD).54 The testing laboratory’s poor performance on a blind proficiency test given by the CACLD, along with failure to comply with all minimum standards and guidelines developed by the CACLD and TWGDAM, was cited as grounds for the inadmissibility of DNA test results in Schwartz.55

The subjectivity of interpreting band patterns is another major weakness of DNA analysis.56 Again, critics point to the lack of standards or generally accepted objective criteria for determining a match between prints.57 This inconsistency “creates a danger that DNA prints of different individuals will be mistakenly declared to match.”558

There are also non-technical arguments relating to the way in which DNA testing has been developed and marketed. The dominance of private commercial laboratories in the technique’s development and their financial dependence on its judicial acceptance raises significant questions regarding scientific and legal reliability of test results. Accordingly, “parties and the courts may find it difficult to locate experts with relevant experience who can render a truly objective opinion on the matter.”559

Despite these considerable concerns, the South Carolina Supreme Court upheld the admission of DNA statistical evidence in Dinkins. However, because Dinkins failed to cross-examine SLED’s DNA expert or present his

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55. 447 N.W.2d at 426-28; see also State v. Pennell, 584 A.2d 513, 522 (Del. Super. Ct. 1989) (evidence inadmissible due to failure to establish the reliability of the testing laboratory’s methods); People v. Castro, 545 N.Y.S.2d 985 (N.Y. Crim. Ct. 1989) (DNA identification evidence inadmissible because the testing laboratory failed to perform scientifically accepted procedures to resolve test result ambiguities and discrepancies). But see People v. Mehlberg, 618 N.E.2d 1168 (Ill. App. Ct. 1993) (DNA evidence admissible even though testing laboratory had less-than-perfect results on proficiency tests and FBI’s procedure had never been subject to proficiency testing by any outside agency).


57. See Hoeffel, supra note 53, at 486-87.


59. Fleming, supra note 4, at 327; see also Hoeffel, supra note 53, at 499-502; Spencer v. Commonwealth, 384 S.E.2d 775, 783 (Va. 1989) (noting defendant’s inability to find one qualified expert to contradict either the theory of DNA printing or the statistics generated therefrom).
own expert testimony, the decision leaves the issue largely untouched. The court pointed out that counsel for a party opposing the admission of DNA statistical evidence has opportunities to refute the relevance and reliability of such evidence.\(^6^0\) Thus, defendants should vigorously cross-examine the proponent's laboratory experts concerning the testing procedures used, the size of the data base from which the calculations were derived, and the reliability of test results.\(^6^1\) Testimony elicited may be sufficient to show that the statistical evidence is unreliable or that the prejudicial effect outweighs the probative value.

James L. Ward, Jr.

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60. Dinkins, ___ S.C. at ___, 462 S.E.2d at 60; see Thames, supra note 56, at 557 ("any reasonably effective defense can mount a substantial attack on [DNA] evidence").

61. See Fleming, supra note 4, at 331-33; Thames, supra note 56, at 555 (confrontation of DNA evidence “is probably best limited to attacks on the test as conducted”).
IV. THE USE OF DEADLY FORCE IN A CITIZEN’S ARREST

In the recent case of State v. Cooney, the South Carolina Supreme Court addressed the issue of whether deadly force can ever be used in a citizen’s arrest. Specifically, the Cooney court held that the issue of whether reasonable force had been used in a citizen’s arrest is a factual question for the jury. Thus, the court did not foreclose the possibility that a citizen may use deadly force when arresting a felon.

Prior to the events at issue in Cooney, burglars had broken into Cooney and Hale’s plumbing supply business and stolen copper tubing. After the last such burglary Cooney and Hale discovered some copper tubing hidden in garbage bags behind their place of business. They waited near the hiding place for the return of the burglar. When Carlton Williams finally came for the tubing, Hale and Cooney approached him with loaded pistols and informed him that they were going to turn him over to the police. Hale and Cooney allegedly questioned Williams and obtained a confession to the burglary. Williams then attempted to flee, and Hale and Cooney both fired at him. Both claimed that they were aiming at the ground. However, bullets struck Williams in both hips, and he died at the scene. After shooting at Williams as he fled, both defendants left the scene. Cooney returned the next morning, found the body, and reported the homicide to the police. Thomas Cooney and James Clinton Hale were indicted and tried for murder.

At trial the jury convicted Cooney but acquitted Hale. Cooney posited citizen’s arrest as a defense to the charge of murder, but the trial judge ruled as a matter of law that the use of deadly force was not justified in these factual circumstances. Thus, the trial judge did not charge the jury on the law of citizen’s arrest. Basing his ruling on the United States Supreme Court’s decision in Tennessee v. Garner, the trial judge determined that the use of deadly force to apprehend a suspect was not justified when the suspect posed no immediate threat to the person making the arrest or others. The trial judge also concluded that the state statute governing citizen’s arrest does not authorize the use of deadly force.

2. Id. at ___, 463 S.E.2d at 599.
3. Id. at ___, 463 S.E.2d at 598.
4. Id. at ___, 463 S.E.2d at 598.
5. Id. at ___, 463 S.E.2d at 598.
6. Id. at ___, 463 S.E.2d at 598.
7. Id. at ___, 463 S.E.2d at 598.
8. Id. at ___, 463 S.E.2d at 598.
10. Cooney, ___ S.C. at ___, 463 S.E.2d at 598 (citing S.C. CODE ANN. § 17-13-10 (Law.)
Cooney claimed three errors on appeal to the South Carolina Supreme Court: that the trial judge (1) failed to instruct the jury on the law of citizen’s arrest, (2) improperly excluded testimony of William’s involvement in the burglaries of the plumbing store, and (3) refused to instruct the jury on the law of voluntary and involuntary manslaughter.\(^\text{11}\)

The supreme court reversed the trial court, finding error in the trial judge’s decision not to instruct the jury on the law of citizen’s arrest. The court ruled that Garner was distinguishable because Cooney, unlike the police officers in Garner, was acting free of state influence when he attempted to arrest the burglar.\(^\text{12}\)

The Cooney court primarily relied upon State v. Nall.\(^\text{13}\) In Nall the court held: “If after notice of arrest, the suspect attempts to flee or forcibly to resist arrest, the person making the arrest may use reasonable means to effect it.”\(^\text{14}\) Additionally, the court relied on the citizen’s arrest statute, which states that any person may arrest a felon or thief upon “(a) view of a felony committed, (b) certain information that a felony has been committed or (c) view of a larceny committed.”\(^\text{15}\)

The court determined that Cooney had “certain information” that a felony had been committed.\(^\text{16}\) Therefore, the trial judge should have allowed the jury to determine whether Cooney satisfied the Nall standard by using “reasonable means” to effectuate an arrest.\(^\text{17}\) Further, the court pointed that “[t]he determination of reasonableness depends upon the facts of the case and is a question for the jury unless there is no evidence to support a finding of

\(^{11}\) Id. at ___, 463 S.E.2d at 598-600.

\(^{12}\) Id. at ___, 463 S.E.2d at 599. More explicitly, the South Carolina Supreme Court distinguished Garner because it involved a determination of civil rather than criminal liability. See id. at ___, 463 S.E.2d at 599 ("The Fourth Amendment proscription against warrantless searches and seizures does not apply to searches by private individuals not acting as agents of the State." (citing Peters v. State, 302 S.C. 59, 61, 393 S.E.2d 387, 388 (1990))). Garner was a federal, civil rights case that involved state action; Cooney was a criminal murder case that involved a private citizen acting free of state influence. On the other hand, one could also argue that Garner should apply. Cooney was a state actor because he effectuated the arrest under a state statute. Furthermore, the reasonableness interest protected by the Fourth Amendment is no greater in a police arrest than in a citizen's arrest.


\(^{14}\) Id. at 339, 404 S.E.2d at 207. More specifically, in Nall a citizen attempted to arrest the defendants after his daughter informed him that her convertible top had been slashed. Id. at 334-35, 404 S.E.2d at 204. The court held that the citizen’s arrest was unlawful because the citizen had not given the defendant notice of the arrest and because the citizen had no authority to arrest for a misdemeanor committed outside his presence. Id. at 341, 404 S.E.2d at 207-08.


\(^{16}\) Cooney, ___ S.C. at ___, 463 S.E.2d at 599.

\(^{17}\) Id. at ___, 463 S.E.2d at 599 (citing Nall, 304 S.C. at 339, 404 S.E.2d at 207).
reasonableness." The supreme court rejected the appellant’s second claim of error. That is, the court affirmed the trial judge’s decision to exclude testimony implicating Williams in the burglaries. The right to make a citizen’s arrest hinges not on the actual guilt of the suspect, but on whether the arrestor has certain information that a felony has been committed. Under *Nail*, an arrest, if reasonable, would still be lawful even if the arrestee later is found innocent. Thus, evidence, unknown to Cooney at the time of the shooting, that tended to show Williams’s involvement in the burglaries was found irrelevant.

Finally, the court affirmed the trial judge’s refusal to charge the jury on the law of involuntary and voluntary manslaughter. The court reasoned that the evidence simply did not support such a charge. The appellant admitted that he intentionally shot a gun above Williams’s head, so a charge on involuntary manslaughter was inappropriate. A charge on voluntary manslaughter was also inappropriate because no evidence indicated that Cooney acted in a sudden heat of passion.

South Carolina has two statutes that authorize an arrest by a citizen. The *Cooney* court focused on South Carolina Code section 17-13-10(b), which allows citizen’s arrests based on “certain information” pointing to the felony status of the perpetrator. Taking a literalist approach, the court affirmed the exclusion of evidence of guilt not available prior to arrest. Cases like *Cooney* beg the question: “Should citizens have to show something more than just certain information?” Should they have to show that they arrested the correct person? That is, the guilt of the arrestee seems even more relevant in homicide cases.

Section 17-13-20 allows for a citizen’s arrest in unusual circumstances and further dictates the means to be used in such arrests:

A citizen may arrest a person in the nighttime by efficient means as the darkness and the probability of escape render necessary, even if the life of the person should be taken, when the person:

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18. *Id.* at __, 463 S.E.2d at 599.
19. *Id.* at __, 463 S.E.2d at 599.
21. *Id.* at __, 463 S.E.2d at 600.
22. *Id.* at __, 463 S.E.2d at 600.
23. *Id.* at __, 463 S.E.2d at 600 (citing Bozeman v. State, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992)).
24. *Id.* at __, 463 S.E.2d at 600 (citing State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 565-66 (1969)).
(a) has committed a felony;
(b) has entered a dwelling house without express or implied permission;
(c) has broken or is breaking into an outhouse with a view to plunder;
(d) has in his possession stolen property; or
(e) being under circumstances which raise just suspicion of his design
to steal or to commit some felony, flees when he is hailed.\footnote{27}

The language of this statute also could have been applied to Thomas Cooney’s situation. Williams had in his possession stolen copper tubing, and Cooney attempted to make an arrest at night. The court was justified in its reversal based on section 17-13-10, but also could have held that section 17-13-20 presented a question for the jury.

South Carolina is not the first jurisdiction to address the issue of whether deadly force can be used to effectuate a citizen’s arrest. Some state decisions have fallen in line with South Carolina’s. For instance, the Supreme Court of Michigan also held Garner inapplicable to citizen’s arrest cases.\footnote{28} Washington’s Supreme Court reached a decision similar to Cooney in 1962, basing its ruling on a state statute that justified homicide involving a perpetrator fleeing from an arrest.\footnote{29}

Some state courts, however, have held differently. In the recent case of Prayor v. State,\footnote{30} the Court of Appeals of Georgia held that a defendant is not entitled to a jury instruction on the use of reasonable force in effecting a citizen’s arrest. Likewise, the Ohio Court of Appeals held that Garner is applicable to citizen’s arrests and “[t]he rights of a private citizen to use deadly force are no greater than those of a police officer.”\footnote{31}

After Cooney the question of how much force is reasonable when effecting a citizen’s arrest remains unanswered in South Carolina. The Cooney court determined that this was a question for the jury.\footnote{32} However, in leaving the issue open the court has implied that the use of deadly force may be acceptable in certain arrests. Perhaps this issue is better left to the legislature to decide.\footnote{33}

\footnote{28} See People v. Couch, 461 N.W.2d 683, 684 (Mich. 1990), cited in Cooney, ___ S.C. at ___, 463 S.E.2d at 599.
\footnote{32} Cooney, ___ S.C. at ___, 463 S.E.2d at 599.
\footnote{33} The approach taken by the Massachusetts court in Commonwealth v. Klein, 363 N.E.2d 1313, 1319 (Mass. 1977), suggests a legislative solution. In Klein the court adopted Model Penal Code section 3.07, which imposes upon citizens the standards of force applicable to peace officers when making an arrest.
Nevertheless, the court sensed that the reasonableness of the force used in a citizen’s arrest is a question that should be decided on a case-by-case basis.

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